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1941

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NLJ	AIR		NLJ	AIR		NLJ	AIR		NLJ	AIR		NLJ	AIR	
201	1941	N 203	277	1941	N 255	361	1941	N 157	435	1941	N 306	514	1941	N 339
205	"	" 236	284	"	" 216	365	"	" 302	438	"	" 316	519	"	" 308
207	"	" 197	287	"	" 251	368	"	" 241	441	"	" 324	523	"	" 355
211	"	" 364	293	"	" 178	371	"	" 273	447	1942	" 12	527	"	" 351
218	"	" 238	296	"	" 199	378	"	" 300	456	1941	" 294	530	1942	" 4
220	1942	" 3	303	"	" 217	382	"	" 258	459	"	" 313	534	1941	" 357
222	1941	" 321	307	"	" 221	388	"	" 271	465	"	" 338	558	1942	" 14
224	"	" 163	309	"	" 224	391	"	" 268	467	"	" 343	568	"	" 1
235	"	" 166	311	"	" 245	396	"	" 317	471	"	" 337	573	"	" 38
242	"	" 162	319	"	" 152	403	"	" 292	473	"	" 330	576	"	" 19
245	"	" 278	324	"	" 261	405	"	" 296	480	1942	" 5	593	"	" 36
250	"	" 249	331	"	" 239	407	"	" 311	485	"	" 8	601	"	" 26
254	"	" 243	333	"	" 263	410	"	" 304	491	1941	" 353	609	"	" 30
258	"	" 220	340	"	" 289	415	"	" 287	494	"	" 322	617	"	" 18
260	"	" 223	345	"	" 145	418	"	" 205	497	"	" 328	620	"	" 32
263	"	" 207	351	"	" 226	421	"	" 297	503	"	" 334	634	"	" 33
266	"	" 209				426	"	" 282	508	"	" 346			

CASES OVERRULED & REVERSED

IN

(28) A. I. R. 1941 NAGPUR

Bapuji Ramji v. Gangaram Madhorao, (1938) 1938 N L J 476=(26) AIR 1939 Nag 47=180 I C 792	Reversed in (28) A I R 1941 Nag 116.
Gobba v. Kanchhedi Lal, (1922) 18 N L R 15=(9) A I R 1922 Nag 62 = 67 I C 225	Overruled in (28) A I R 1941 Nag 313.
Guruprasad v. Emperor, Criminal Revision No. 122 of 1941	Overruled in (28) A I R 1941 Nag 316.
Jhanaklal v. Gulabchand, (1928) 24 N L R 83=11 N L J 87=(15) A I R 1928 Nag 192= 110 I C 76	Overruled in (28) A I R 1941 Nag 100.

THE
ALL INDIA REPORTER
1941
Nagpur High Court

*** A. I. R. 1941 Nagpur 1**

NIYOGI J.

Ganpatdas Kaludas Gosai —
Defendant — Appellant

v.

Harivallabh Onkarji Trivedi —
Plaintiff — Respondent.

Misc. Appeal No. 119 of 1939, Decided on 5th August 1940, from order of 1st Addl. Dist. Judge, Nagpur, D/- 29th April 1939.

* *(a) Stamp Act (1899), S. 35—Document held not promissory note and could, if insufficiently stamped, be validated by levy of penalty.*

It is necessary to look into the terms of the document and the surrounding circumstances to see whether it was intended to be a promissory note in the sense of its being intended to be used as a negotiable instrument. The mere use of the words "I promise to pay" would not necessarily make it a promissory note. [P 1 C 2; P 2 C 2]

A document provided as follows: "On demand I promise to pay to Mr. Harivallabh Onkarji Trivedi of Nagpur the sum of Rs. 950 only which I have taken this day as a loan in cash without mortgaging anything with interest at the rate of Re. 1 per cent. per month; the whole capital as well as interest will be repaid by three years from the date. If I failed to repay within the time I shall pay interest at 1½ rupee per cent. per month.":

Held that the parties did not intend the document to be a negotiable instrument and that in reality it purported to incorporate only the terms of an oral agreement. It could therefore be validated on levy of the penalty if it was insufficiently stamped. [P 1 C 2]

(b) Deed — Construction — Deed must be construed as a whole.

Documents must be construed as a whole, and every part of the documents must receive attention and the intention should be gathered from the whole context of the instrument so as to make one entire and consistent construction of the whole: A I R 1928 P C 35, *Rel. on.* [P 2 C 2]

R. N. Padhye — for Appellant.

M. R. Indurkar and A. B. Jamdar — for Respondent.

Judgment.—This is a defendant's appeal from an order of remand passed under O. 41, R. 23, Civil Procedure Code, by the first Additional District Judge, Nagpur, in civil appeal No. 1-B on 29th April 1939. The respondent sued to recover Rs. 1170 on the strength of a document dated 5th June 1935, which was described as a promissory note. The terms of that document are as follows:

On demand I promise to pay to Mr. Harivallabh Onkarji Trivedi of Nagpur the sum of Rs. 950 only which I have taken this day as a loan in cash without mortgaging anything with interest at the rate of Re. 1 per cent. per month; the whole capital as well as interest will be repaid by three years from the date. If I failed to repay within the time I shall pay interest at 1½ rupee per cent. per month.

It bears an adhesive revenue stamp of four annas. The defendant contended that, it being a promissory note under which the loan was payable otherwise than on demand, was liable to stamp duty under Article 49 (b) of sch. I to the Stamp Act II of 1899 as a bill of exchange and that as it was insufficiently stamped S. 35, Stamp Act, bars its validation by levy of penalty. That contention prevailed in the Court of first instance but was overruled on appeal.

The principal question is whether it was intended to be a promissory note within the meaning of that expression as defined in S. 4, Negotiable Instruments Act. The mere use of the words "I promise to pay" would not necessarily make it a promissory note. As observed by Bowen, L. J., in (1888) 21 Q B D 352[1] at p. 357 most commercial documents contain, either expressly or by implication, a promise to pay a sum of money, but they may contain a great deal besides, and it cannot be contended that all such

1. (1888) 21 Q B D 352: 57 L J Q B 630: 36 W R 833, Mortgage Insurance Corporation v. Commissioners of Inland Revenue.

documents are promissory notes within the meaning of the section." This case was decided on appeal from the decision reported in (1888) 20 Q B D 645[2] in which the observations of Pollock, B., are as significant. They are as follows::

The next question is, can we say that this instrument is necessarily included in the terms of the section? It would be easy to say that every instrument was necessarily included which provides simply and purely for the payment of money, whether it be one single payment, or distributed over a period, or to be paid out of a particular fund, or upon any condition or contingency. But can that construction be applied where, though all the terms of the section are satisfied with respect to the payment of money, the document is not a document which in ordinary parlance is called a promissory note, but contains terms beyond a stipulation for a mere money payment? In that state of things ought it to be treated as one instrument or as two separate instruments? I think it is clear that for the purposes of the Stamp Act it cannot have been intended that a document should be treated as in part a promissory note and in part an agreement. It must be either one or the other. The question is, what is the dominant, the substantial effect of the instrument? In this respect the prior decisions assist me in forming a conclusion. The Courts have said that in order to determine the question two things must be enquired into—what is the intention of the parties, and what is the instrument in the common acceptation of men of business, or persons among whom it is commonly used.

Their Lordships of the Privy Council in 17 LAH 557[3] at p. 569, decided a similar point on the broad ground, namely, whether it was intended to be brought within the definition relating to documents which are to be negotiable instruments. Their Lordships referred to the English case reported in (1888) 20 Q B D 352[1] at p. 357, and pointed out that documents such as receipts and agreements generally were not intended to be negotiable, and serious embarrassment would be caused in commerce if the negotiable net were cast too wide. On the terms of the instrument before them, their Lordships found that it was primarily a receipt and they declared that even if it was coupled with a promise to pay it was not a promissory note. In A I R 1938 P C 121[4] their Lordships of the Privy Council observed that there was a strong current of authority in India to the effect that documents containing a promise to pay came within the ban of S. 35, Stamp Act, and alluding to 63 I A 279,[3] pointed out that the test is not that the instrument contained a promise to pay but whether or not the parties clearly intended the document to serve as a negotiable instrument.

It is consequently necessary to look into the terms of the document and the surrounding circumstances to see whether it was intended to be a promissory note in the sense of its being intended to be used as a negotiable instrument. It is a well-recognized rule of construction of documents that they must be construed as a whole, that every part of the documents must receive attention and that the intention should be gathered from the whole context of the instrument so as to make one entire and consistent construction of the whole : *see* 54 M L J 82[5] at p. 87.

The document under consideration starts with the words "On demand I promise to pay" but subsequently says that the principal sum with interest would be repaid in three years. The words "promise to pay on demand" as explained in 11 N L R 189[6] at p. 192, import that the debt is due and payable immediately. Now, this stipulation is inconsistent with the later one which says that the money was payable within three years. The learned counsel for the appellant contends that the intention was that the money was to be repaid within three years from the date of demand made for its payment. On this argument the making of a demand would be a condition precedent to payment and the date of payment would vary according to the date of the demand. That is manifestly not an unconditional promise to pay. If the promise to pay within the specified time, namely three years, had stood by itself it would not have affected the unconditional nature of the promise as provided in S. 5, Negotiable Instruments Act, for the reason that the obligation to pay, though not immediate, was postponed till a specified date. Whether the parties contemplated payment immediately or after a lapse of a specified period, the date when the promise is liable to be enforced is a well-defined and certain date and the liability is unconditional; but that is not the position with regard to the document under consideration which recites a promise to pay immediately and in the same breath at some future unspecified and

2. (1888) 20 Q B D 645, Mortgage Insurance Corporation v. Commissioners of Inland Revenue.
3. ('36) 23 A I R 1936 P C 171 : 162 I C 454 : 17 Lah 557 : 63 I A 279 (PC), Mohammad Akbar Khan v. Attar Singh.
4. ('38) 25 A I R 1938 P C 121 : 173 I C 736 : 32 S L R 462 (PC), Karam Chand v. Firm Mian Mir Ahmad Aziz Ahmad.
5. ('28) 15 A I R 1928 P C 35 : 107 I C 1 : 54 M L J 82 (PC), Muthuchettiar v. Meenakshi Sundaram Iyer.
6. ('15) 2 A I R 1915 Nag 65 : 31 I C 880 : 11 N L R 189, Meghraj v. Johnson.

shifting date. This glaring inconsistency in the document itself evidences that it was not intended to be used as a negotiable instrument. The recital containing in that instrument, viz., that the executant had received Rs. 950 in cash was a false recital inasmuch as it is clear from the trend of the pleadings that the amount represented a balance found due on previous accounts. The position was that the creditor had been lending money to the debtor from time to time and receiving payments. The relations between the parties were purely those of debtor and creditor and they obviously intended to bring into existence an acknowledgment of the debt coupled with a fresh agreement to discharge the balance found due within the period specified there with a fresh agreement as to payment of interest.

The primary rate of interest settled was Re. 1 per cent. with a stipulation for its enhancement to Re. 1½ per cent. on default being made in payment of the debt within the specified period. The material terms of the document leave no doubt that it was intended to be a memo of an already concluded oral agreement. To escape payment of the full stamp the agreement was made to simulate the form of a promissory note by use of initial words "on demand I promise to pay". I agree with the lower Appellate Court that the parties did not intend the document to be a negotiable instrument and that in reality it purported to incorporate only the terms of an oral agreement. It was therefore rightly validated on levy of the penalty. The appeal is dismissed with costs. Costs in the Courts below will be paid as ordered by the lower Appellate Court.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Nagpur 3

STONE C. J. AND VIVIAN BOSE J.

Munnalal Keshaodas —
Auction-purchaser — Appellant

v.

Singhai Komal Chandra and another
— *Defendants* — Respondents.

Misc. Appeal No. 186 of 1939, Decided on 8th July 1940, from order of Addl. Dist. Judge, Jubbulpore, D/- 30th June 1939.

(a) Mortgage — Mortgagor after mortgaging certain property mortgaging same property along with other property in favour of same mortgagee by way of second mortgage — Property sold in execution of decree on second mortgage subject to decree on first mortgage—Mortgagee is not precluded from selling same property in execution of decree on first mortgage.

Where a mortgagor after mortgaging certain property in favour of certain person mortgages the same property along with other property in favour of the same mortgagee by way of second mortgage and property is sold in execution of second mortgage subject to the decree in first mortgage, what is sold is the equity of redemption and the mortgagee is not precluded from selling the same property in execution of the decree on first mortgage : A I R 1935 Nag 226 (F B), *Disting.* [P 4 C 2 ; P 5 C 1]

(b) Precedent—Obiter dictum of Full Bench of Judicial Commissioner's Court is not binding on Division Bench.

An obiter dictum of a Full Bench of the Judicial Commissioner's Court is not binding upon the Division Bench of that Court. [P 4 C 2]

R. N. Padhye and J. Sen — for Appellant.

M. R. Bobde — for Respondent.

Judgment. — This appeal arises out of an order made on an objection brought by the auction-purchaser in a Court auction following upon a decree in a suit on a second mortgage whereby the auction-purchaser sought to prevent the sale, in execution of a decree on the first mortgage, of the same subject-matter as had been sold to him in the earlier Court auction. To understand the argument it is necessary to state a few facts. This is a case in which the mortgagor and the mortgagee are the same in both the mortgages. The subject-matter of the first mortgage we will call Blackacre. The subject-matter of the second mortgage we will call Blackacre and Whiteacre. The first mortgage was so conditioned that the money did not become due before 13th February 1934 so that it was quite impossible for the mortgagee, even had he been so minded, to sue on that mortgage before that date. On the other hand the second mortgage was so worded as to make the money become due on an earlier date. Accordingly a suit was brought on the second mortgage on 24th April 1933, some ten months before a suit could have been brought on the first mortgage, and it is for that reason that S. 67-A, T. P. Act, does not apply to this case. A preliminary decree for sale in the suit on the second mortgage was passed on 4th February 1934, nine days before a suit could have been brought on the first mortgage, and a final decree was passed on 27th June 1936. It is pursuant to that final decree that the sale took place. As regards the first mortgage the suit was brought on 13th December 1934; preliminary decree was passed on 31st July 1935, and final decree on 1st August 1936. When the sale took place in execution of the decree on the second mortgage the proclamation shows the following incumbrance to which the property is liable :

On account of mortgage incumbrance Rs. 16,165 mortgage decree in C. S. No. 14-A of 1934 of the Court of Additional District Judge, Jubbulpore.

That is the decree which had been passed, by the date of the proclamation, in the second suit so that the sale in execution of the decree in the first suit took place after a decree in the second suit had been obtained, that is to say, the suit on the first mortgage. The list of property sold shows that it was sold subject to the incumbrance of the mortgage decree for Rs. 16,165 of the Court of the Additional District Judge, Jubbulpore, in C. S. No. 14-A of 1934. It is apparent from the evidence of the auction-purchaser that he had purchased it subject to this mortgage decree. He gives the value of the property free of the mortgage decree at Rs. 30,000 and he purchased this property, which he himself says is worth Rs. 30,000 free from incumbrance, for Rs. 16,000 subject to mortgage.

Nevertheless it is urged with his accustomed ingenuity by Mr. Padhye for the appellant in this case that this is a case which is controlled by the principle that though a mortgagee who is a mortgagee in respect of the same property under several mortgages, one subsequent to the other, may sue as many times as he has mortgages, he cannot sell as many times as he has mortgages but that he can sell once only. That proposition is said to be founded on 3 I C 175,[1] 20 ALL 322[2] followed in 25 C W N 129,[3] A I R 1927 ALL 117[4] and 31 N L R SUP 1.[5] 25 C W N 129[3] is an elaborate judgment dealing with the question whether in a case such as this there can be two suits, and Mookerjee C. J., in the course of an examination of many cases on that point came to the conclusion that there could be more than one suit. Then the Court considers very summarily whether granted two suits there can be two sales, 3 I C 175[1] is referred to, and the Court observes at p. 137 as follows:

We have finally to consider what conditions, if any should be annexed to the decree that may be made herein, for it is indisputable that the property cannot be sold twice in execution of the decrees in the two suits. There cannot be a sale on the first mortgage keeping alive a puisne encumbrance, for such a sale conveys the interests of the mortgagor and the mortgagee as they were at the date of the first mortgage and must therefore necessarily sweep away the subsequent encumbrance.

That appears to have been followed in 31 N L R SUP 1,[5] which, at p. 8, it is argued, goes beyond the above for there it is observed:

It is not however open to the holder of two mortgages to have the property sold in execution of the first mortgage subject to the second mortgage, because by having the property sold on the first mortgage he must be deemed to have withdrawn that property from the operation of the later mortgage. If therefore the mortgaged property or part of it is sold in execution of one of the mortgages, it cannot therefore be sold again in execution of the other mortgage.

That is an observation which appears in the decision of a Full Bench of the Judicial Commissioner's Court and would be binding upon us were it necessary for the decision of that case. But in that case the sale was in execution of the decree on the first mortgage. The principle that was applied was that when a first mortgagee sells he sells the property as at the time of the first mortgage, and therefore he sells free from incumbrance, and if he sells free from incumbrance he sells the whole estate, and if he sells the whole estate he cannot sell it again. Nor can he, according to these observations, reserve the second mortgage interest and sell the property subject to the second mortgage.

In this case however what is being sold is the equity of redemption which was outstanding in the mortgagor after the first mortgage was effected. It appears to us to be beyond argument that if *A* is the mortgagor and *B* the mortgagee and *A* takes a mortgage from *B* of Blackacre and then at a later date *B* mortgages to *C* by way of a second mortgage *C* can sue *B* on the second mortgage, obtain a decree for sale and sell the equity of redemption. That having been done, *A* can sue *B* and obtain a decree for sale on the first mortgage, and bring the property to sale. No difference would arise if *C* assigned his rights to *A* so that *A* is the first mortgagee and the assignee of the second mortgage. In such a case he could sue on the second mortgage, get a decree for sale and sell. Then he could sue on his first mortgage and get a decree for sale and sell. We fail to see in principle what possible difference it could make if *A* is a first and a second mortgagee direct as a consequence of taking one mortgage from *B* at one date and another mortgage of the same property from *B* at another date. Different considerations may well arise where the sale

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1. ('09) 3 I C 175, Dwarka Nath v. Mritunjoy Patra.
2. ('98) 20 All 322 : 1898 A W N 58 (F B), Sundar Singh v. Bholu.
3. ('21) 8 A I R 1921 Cal 321 : 60 I C 809 : 33 C L J 232 : 25 C W N 129, Nilu v. Asirbad Mandal.
4. ('27) 14 A I R 1927 Pat 117 : 98 I C 968 : 8 P L T 255, Md. Tabarak Ali v. Dalip Narain.
5. ('35) 22 A I R 1935 Nag 226 : 159 I C 758 : 31 N L R Sup 1 (F B), Mt. Laxmibai v. Kondba.

is of the subject-matter of the first mortgage. If it be correct to say that on such a sale what is sold is the unencumbered property with all its rights including the equity of redemption then doubtless there is nothing left to be sold a second time; but that is not the position here. What is being sold here is the equity of redemption and what is being purchased is the equity of redemption. The purchaser purchases subject to the mortgage. He has full notice of it and he gets for Rs. 16,000 what he regards as worth Rs. 30,000 because he bought subject to the mortgage. The first mortgage does not amount to Rs. 14,000 but amounts to Rs. 11,000 and odd so that even if the auction-purchaser has to pay off the first mortgage he gets, according to his own evidence, a bargain.

It was argued on the authority in I L R (1939) NAG 665[6] that the purchaser at an auction sale in execution of the second mortgage decree could impeach the first mortgage. That was said because it was argued that he had merely bought subject to notice and not subject to the mortgage. In our opinion he bought subject to the mortgage; but even if he bought only with notice and though he could impeach the mortgage he has not impeached it. That has not yet been done. The result is that the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

6. ('39) 26 AIR 1939 Nag 305 : 185 I C 727 : I L R (1939) Nag 665, Mishrilal v. Barik.

A. I. R. 1941 Nagpur 5

STONE C. J. AND VIVIAN BOSE J.

Girdhar Parashram Kirad — *Defendant 5* — Appellant

v.

Firm Motilal Champalal, Owners, Hiralal Champalal and others, Plaintiffs and others — Respondents.

First Appeal No. 26 of 1936, Decided on 26th September 1939, from decree of Sub-Judge, First Class, Ellichpur, D/- 20th October 1935.

(a) Transfer of Property Act (1882), S. 54 — Mortgagee's rights are intangible rights in immovable property and cannot be transferred without written instrument.

There is a wide difference between a transfer made by a mortgagor and a transfer made by a mortgagee. What the mortgagor has is the land which is immovable, tangible property and property of which possession can be delivered. What a mortgagee has depends to some extent on the kind of mortgage but as is broadly stated in S. 58 of the Act: "A mortgage is the transfer of an interest in specific immovable property." That interest (at any rate in mortgages which do not involve the immediate transfer of either legal title or possession) is an intangible right in immovable property and cannot be transferred prima facie without a written instrument : 29 Cal 1 (F B); A I R 1930 All 110; A I R 1933 Lah 210; A I R 1924 All 796 and A I R 1928 All 726 (F B), *Ref.* [P 6 C 1]

(b) Tenants-in-Common—Title cannot be transferred to another except in ways permitted by law.

If the titles are distinct as they are when persons hold as tenants-in-common title cannot be handed on to another except in one of the ways expressly permitted by law. [P 8 C 1]

(c) Mortgage — All parties entitled to share in money due on mortgage not on record — Suit must be dismissed in its entirety.

A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety : A I R 1916 Pat 310; A I R 1938 Nag 42 and A I R 1933 Cal 621, *Rel. on.* [P 8 C 1]

(d) Civil P. C. (1908), O. 1, R. 9 — Joinder of parties—Court's power — Plea of non-joinder raised in pleadings — Parties cannot be joined at appellate stage.

Even though the Court has power to join the Court cannot join a party when the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined. If the point of non-joinder is properly taken in the pleadings the parties cannot be joined at appellate stage. [P 8 C 1]

D. T. Mangalmurti and N. T. Mangalmurti — for Appellant.

M. R. Bobde and P. Y. Deshpande — for Respondents (Plaintiff 1 and Respondent 9, respectively).

Judgment.—This appeal raises a number of points of law all of which could have been avoided by the joinder of the proper parties. This joinder was refused by the plaintiffs' pleader after the difficulties had been disclosed. On 17th April 1935 the pleader for the plaintiffs refused to make Gulabchand and Dhanraj parties. Now the question is: Are they necessary parties? The suit is a mortgage suit. The plaintiffs obtained, through a third party assignee, the mortgagee's rights by purchase. That purchase, however, was in conjunction with two other persons Premraj and Dhanraj. Premraj died and his estate went to Dhanraj and Gulabchand. Dhanraj and Gulabchand purported to transfer or (as it is put in argument) relinquish their rights in favour of plaintiffs for the sum of Rs. 75. That transaction was oral. The Court has held that it was a valid transfer under the provisions of S. 54, T. P. Act, on the ground that there was delivery of possession, that the consideration was under Rs. 100, that the mortgage debt is immovable property and therefore it can be sold, if of the value of under Rs. 100, by

delivery. On appeal it is pointed out that S. 54 is concerned with two kinds of sales (1) where a registered instrument is required (2) where the transfer can be either by registered instrument or by delivery of possession. What is meant by delivery is stated :

> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

What was transferred here were mortgagees' rights. Doubtless those rights are rights in immovable property : 29 CAL 1,[1] A IR 1933 LAH 210,[2] 52 ALL 232,[3] 46 ALL 917.[4] But they are not in our opinion rights of which possession can be taken. There is a wide difference between a transfer made by a mortgagor and a transfer made by a mortgagee: 50 ALL 986,[5] 60 CAL 87.[6] What the mortgagor has is the land which is immovable tangible property and property of which possession can be delivered. What a mortgagee has depends to some extent on the kind of mortgage but is broadly stated in S. 58, T. P. Act ; "A mortgage is the transfer of an interest in specific immovable property." That interest, in our opinion, (at any rate in mortgages which do not involve the immediate transfer of either legal title or possession) is an intangible right in immovable property and cannot be transferred prima facie without a written instrument.

But it is said that this is not a case of transfer but of relinquishment. One starts with the mortgagees composed of the mortgagee-plaintiffs and Dhanraj and Gulabchand. Regard them as partners, or regard them as co-tenants. On either view this, it is said, is a case of relinquishment. Therefore, the rules relating to relinquishment say, by a Hindu widow, apply. There is no transfer of title but merely an obliteration of rights. Consequently the document (there is a receipt) effecting this obliteration does not require registration. Alternatively the obliteration can be orally effected. This question was considered by one of us in A I R 1936 NAG 186.[7] It was pointed out there that we start with this fundamental principle, namely that once a title or an estate has vested in a person he cannot rid himself of it except by death or by one of the modes of transfer recognized by law. Discussing the position of the heir-at-law in England it was said :

> If it had been a statement of the English law as it obtains today, it would, perhaps, be unassailable, but that is because the Land Transfer Act of 1897 has grafted a statutory exception on to the general law, and now vests an intestate's property in his personal representative, that is to say, his administrator and not in his heir-at-law : 14 Halsbury's Laws of England, page 160 (Edn. 2). Thus the heir having no vested interest in the property is free to disclaim the inheritance. But no such disclaimer can be made once the property has vested, for his rights are then different, and the interest once vested is vested irrevocably : (1802) 6 R R 563[8] at pp. 566 and 567. The crux of the matter lies there. The test is the vesting of the estate. It is undoubted that in every other case a man is not bound to take what he does not want, and whether he be given property by a will or a gift or a conveyance, his assent, whether express or implied, is essential to vest the estate in him. Consequently he is free to disclaim it, if he so desires. But the heir-at-law is in a different position. He is the only person in whom the law of England, before the Land Transfer Act of 1897 vested property against his will whether he would or not. No disclaimer that he might make would have any effect, though, of course, he might as soon as he pleased, dispose of the property by an ordinary conveyance: Williams on Real Property, Edn. 24, p. 119, 40 Cal 721[9] at p. 750 and 38 Mad 474[10] at p. 478. The reason is obvious. An estate whether an inheritance or not, cannot remain in abeyance without statutory or other sanction. The seisin to it must reside in somebody during every moment of time and this is the Hindu no less than the English law. Mayne states in his Hindu Law, Edn. 9, page 725, para. 499. The right of succession under Hindu law is a right which vests immediately on the death of the owner of the property. It cannot in any circumstances remain in abeyance.
>
> It follows there can be no disclaimer or relinquishment either generally or in favour of a particular person, unless it is specifically permitted by some special provision of law. In every other case a title once vested can be divested only by a recognized conveyance, or one of the other means allowed by law. It cannot pass by admission or relinquishment or disclaimer when the law requires a deed : 33 Cal 967[11] at p. 983.

There are two apparent exceptions. One is the case of a joint Hindu family. But

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1. ('02) 29 Cal 1 : 5 C W N 821 (F B), Paresh Nath v. Nabogopal.
2. ('33) 20 A I R 1933 Lah 210 : 141 I C 421 : 34 P L R 233, Banarsi Das v. Ram Chander.
3. ('30) 17 A I R 1930 All 110 : 122 I C 409 : 52 All 232 : 1930 A L J 330, Jang Bahadur v. Bhagatram Sheoprasad.
4. ('24) 11 A I R 1924 All 796 : 80 IC 890 : 46 All 917 : 22 A L J 840, Umrao Singh v. Lal Singh.
5. ('28) 15 A I R 1928 All 726 : 118 I C 177 : 50 All 986 : 26 A L J 1084 (F B), Sohan Lal v. Mohan Lal.
6. ('33) 20 A I R 1933 Cal 325 : 143 I C 315 : 60 Cal 87 : 58 C L J 422 : 36 C W N 1138, Umeshchandra Mandal v. Hemangachandra Maiti.
7. ('36) 23 A I R 1936 Nag 186 : 165 I C 217, Dattatraya Govind v. Narayan Gangaram.
8. (1802) 3 East 120 : 4 Esp 154 : 6 R R 563, Doe v. Guy.
9. ('13) 40 Cal 721 : 19 I C 273 : 17 C L J 499 : 17 C W N 701, Debi Prasad v. Golab Bhagat.
10. ('16) 3 AIR 1916 Mad 422 : 21 IC 698 : 38 Mad 474 : 25 M L J 556, Lakshmamma v. Ratnamma.
11. ('06) 33 Cal 967 : 10 C W N 650 : 4 C L J 22, Jadu Nath Poddar v. Rup Lal Poddar.

that is not really an exception to the general rule because as was explained in the earlier decision,[7]
the distinction between a disclaimer of this kind by a member of a joint Hindu family where the seisin of the entire estate resides in each member and one where the seisin resides in the person disclaiming alone, is obvious. When a joint tenant relinquishes his right, there is no transfer or conveyance; only a blotting out of his interest and an enlargement of the inchoate rights of the others to a share on partition. But when a man is seised of the whole fee himself, the title which resides in him has to pass on to another, and that can only be done by one of the recognized modes of conveyance, when no questions of adverse possession or estoppel or part performance arise. This distinction was recognized in 14 N L R 56[12] at page 59 where Drake-Brockman J. C., in dissenting from 11 Mad 406[13] observed : 'I venture to doubt whether the Smritis treated renouncement as equivalent to an alienation.' 16 All 369[14] at page 370 and 25 Mad 149[15] at p. 156 make the same observation. Golapchandra Sarkar Sastri also says in his Hindu law, Edn. 7th, p. 530 : 'Renunciation does not operate as alienation but as extinction of the co-parcener's interest, according to the true intent of the Smritis. If it were alienation, it would be gift ; but it has been held that a member of a joint family cannot make a gift of his undivided share.' This is so even in Madras and Bombay 'where the strict anti-alienation doctrine of the Mitakshara has been departed from in favour of purchasers for value: 27 Mad 162[16] at p. 166 and 19 Bom 803.[17] It is further evident from the fact that the interests of the sons who are then in being are not affected in such cases: 33 Bom 267[18] at pp. 270 and 271. I respectfully agree.

The other exception is that of a limited female owner relinquishing under the Hindu law. But that stands on a special footing and the position is accepted at this date only on the ground of *stare decisis* and for no other reason. This was also explained in the ruling referred to.

The right of a Hindu widow to surrender her life estate and accelerate the succession has long been recognized. But although founded on the Smritis, their Lordships of the Privy Council have twice observed that it has been settled 'by long practice and confirmed by decision' : 42 Mad 523[19] at page 532 and 47 Cal 466[20] at p. 483. But even so whether the act is in reality a conveyance or not was for some time in doubt. The learned Judges in 43 Mad 855[21] at page 858, seem to have placed it on that footing, though they observe that there can be no surrender without the consent of the next reversioner. Beaman J., disagreed with this in 39 Bom 87[23] at p. 100, on the ground that an acceleration is not an alienation at all, but a mere renunciation, the obliterating of a bar in which the life estate is withdrawn in its entirety, and that after that it is not the tenant of the life-estate, but the law which does the rest. On the other hand, their Lordships of the Privy Council called it a 'conveyance' in 19 Cal 236[23] at p. 241 and used that term again in 42 Mad 523[19] at p. 533 although at p. 532 they described the act as 'the effacement of the widow—an effacement which in other circumstances is effected by actual death or by civil death—which opens the estate of the deceased husband to his next heirs at that date.'

The distinction is of importance, for a conveyance requires a registered document when the property involved is over Rs. 100 in value, whereas an 'effacement' not amounting to a conveyance can be effected orally. Sir Lawrence Jenkins C. J. also refers to this in the Full Bench ruling in 40 Cal 721[9] at p. 750, and Mookerjee J., at p. 780. The latter points out that the right is not grounded on any logical principle but on long usage confirmed by judicial precedent which has confused two distinct ideas. He points out that surrenders have been upheld not only when the widow relinquishes without consideration, but also when she sells the estate to the next reversioner for cash and thus converts it into money 'which may be shuffled out of sight as land can never be', a transaction which by no stretch of language can be deemed a relinquishment of her interest in the estate. Some of the precedents quoted by Mookerji J., at pp. 778 and 779 uphold an alienation to a stranger of the entire estate with the consent of the next reversioner, on the ground that it can be 'deemed to operate precisely in the same manner as two conveyances, one by the widow to the reversioner and the other by the reversioner to the transferee', the question being one of form rather than of substance. Their Lordships of the Judicial Committee, when dealing with this in 42 Mad 523[19] at p. 533, observe that, 'the surrender once exercised in favour of the nearest reversioner or reversioners the estate became his or theirs, and it was an obvious extension of the doctrine to hold that, inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent.'

It is obvious this cannot be done without a conveyance, for however much the widow may be affected neither civil death nor natural death can vest the estate in any but the immediate reversioner, and his title cannot be passed on by mere assent. A conveyance at some stage would clearly be necessary. However these doubts have now been set at rest by the decision of their Lordships of the Judicial Committee in 47 Cal 466[20] at p. 483 where their Lordships observe: 'This voluntary self-

12. ('18) 5 A I R 1918 Nag 228 : 44 I C 51 : 14 N L R 56, Vinayakrao v. Laxman.
13. ('88) 11 Mad 406, Peddayya v. Ramalingam.
14. ('94) 16 All 369 : 1894 A W N 117, Chandar Kishore v. Dampat Kishore.
15. ('02) 25 Mad 149 : 11 M L J 353, Sudarsanam Maistri v. Narasimhulu Maistri.
16. ('04) 27 Mad 162, Ranga Natham Chetty v. Ramasami Chetty.
17. ('95) 19 Bom 803, Kalu v. Barsu.
18. ('09) 33 Bom 267 : 2 I C 249 : 10 Bom L R 778, Shivaji Rao v. Vasantrao.
19. ('18) 5 AIR 1918 P C 196 : 50 I C 498 : 42 Mad 523 : 46 I A 72 (PC), Rangaswami Goundan v. Nachiappa Gounden.
20. ('19) 6 A I R 1919 P C 75 : 53 I C 347 : 47 Cal 466 : 46 I A 259 (P C), Mt. Bhagwant Koer v. Dhanukdhari Prasad Singh.
21. ('21) 8 AIR 1921 Mad 246 : 60 I C 135 : 43 Mad 855 : 39 M L J 567, Muthiala Chengappa v. Budiaganta.
22. ('14) 1 A I R 1914 Bom 202 : 27 I C 167 : 39 Bom 87 : 16 Bom L R 699, Basangauda Nagangouda v. Basangauda Dodengouda.
23. ('92) 19 Cal 236 : 19 I A 30 : 6 Sar 88 (PC), Behari Lall v. Madho Lall.

effacement is sometimes referred to as a surrender, sometimes as relinquishment or abandonment of her rights; and it may be effected by any process having that effect.'

But they also observe that the question is not free from difficulty, and as I have already pointed out, it is not founded on any logical principle. The limited estate of a female owner under Hindu law is a peculiar one, and I do not think that considerations which prevail there, and which are now applied simply because of long usage, should be extended beyond it.

But none of these rules would apply to tenants-in-common where there is no unity of title. If the titles are distinct as they are when persons hold as tenants-in-common, then we are left with the fundamental position that title cannot be handed on to another except in one of the ways expressly permitted by law. That there is no unity of title when there is a tenancy-in-common is clear from Williams on Real Property, Edn. 24, p. 295. Is the omission of these defendants fatal? As was pointed out in 1 PAT L J 468[24] a mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety : see also I L R (1938) NAG 370[25] at p. 375 and 60 CAL 777.[26]

A nice point in some cases arises as to whether O. 1, R. 9, is subservient to O. 34, R. 1. In the above case 1 PAT L J 468[24] it was held that it was. Here the point does not arise because even though it be held that the Court has power to join (*see* 52 ALL 134[27] and 60 CAL 87,[6]) a view to which we incline, a Court cannot join a party when the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined, as here. Before us the respondents offered to join but we consider this comes too late. The point of non-joinder was properly taken in the pleadings. The danger was pointed out, and the pleader refused to join these people. If the proper parties have not been joined the plaintiffs cannot succeed to the extent of their share or at all. This being so the suit fails against the appellant for non-joinder and the further question of limitation does not arise. It follows that the appeal succeeds with costs here and below.

D.S./R.K. *Appeal allowed.*

24. ('16) 3 A I R 1916 Pat 310 : 36 I C 542 : 1 Pat L J 468, Girwar Narain v. Mt. Makbunessa.
25. ('38) 25 A I R 1938 Nag 42 : 173 I C 44 : I L R (1938) Nag 370, Gangaram v. Balbhadrasai.
26. ('33) 20 A I R 1933 Cal 621 : 146 I C 259 : 60 Cal 777 : 37 C W N 478, Gobindachandra Ghosh v. Jamaluddin Mandal.
27. ('29) 16 A I R 1929 All 941 : 121 I C 106 : 52 All 134, Baldeo Prasad v. Bhola Nath.

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STONE C. J. AND VIVIAN BOSE J.

Saibanbi w/o Daulatkhan Musalman— Judgment-debtor — Appellant

v.

Kazi Mahamudalli Kazi Mir Basharatalli — Decree-holder — Respondent.

Misc. Appeal No. 223 of 1937, Decided on 7th August 1940, from order of Addl. Dist. Judge, Yeotmal, D/- 7th August 1937.

(a) Mahomedan Law — Dower — Right of retainer—Widow retaining husband's estate under her lien for unpaid dower—Widow's creditor in execution of his decree asking for appointment of receiver and satisfaction of his decree out of profits of property in widow's possession — Receiver held could not be appointed — Proper course to follow is to execute decree by attachment and sale of dower debt — Assignee then should institute administrative suit — Creditors of deceased should sue for administration of deceased's estate — Appointment of receiver in execution proceedings is not proper course.

A Mahomedan widow retaining possession of her husband's property under her lien for unpaid dower is not a secured creditor. She is an unsecured creditor with a special right which exists for a special purpose. That purpose is to compel the payment to her by the heirs of a debt in respect of dower. The debt arising out of unpaid dower is apart from all considerations of lien or right to retain, like any other unsecured debt and can be compulsorily transferred in execution and the assignee thereupon becomes a creditor of the deceased's estate. A dower debt is an actionable claim and not a mere right to sue. Accordingly it does not fall within the exception to assignable property created by S. 6 (e), T. P. Act. It can accordingly be taken in execution like any other debt : 26 All 28 ; 14 M I A 377 (P C); A I R 1920 Mad 666 and A I R 1932 All 345, *Ref.* [P 9 C 1 ; P 10 C 1, 2]

So far as the creditors of the deceased husband are concerned the proper remedy is for them to file an administration suit and not to seek the appointment of a receiver in execution proceedings. [P 9 C 1 ; P 10 C 1, 2]

(b) Succession Act (1925), S. 218 (3)—"Creditor" in S. 218 (3) includes Mahomedan widow in respect of her unpaid dower debt but does not include her creditors.

The word "creditor" in S. 218 (3) includes a Mahomedan widow in respect of her unpaid dower debt but does not include her creditors who cannot, therefore, sue for administration of the assets of the deceased. [P 9 C 2]

M. R. Bobde — for Appellant.

M. Y. Shareef — for Respondent.

Judgment. — This miscellaneous appeal raises a point of interest and importance and in relation to which, we were informed, there is no authority. In point of fact the matter has been considered from a somewhat different angle in 2 LUCK 408,[1] but the

1. ('28) 15 A I R 1928 Oudh 40 : 99 I C 897 : 2 Luck 408 : 4 O W N 98, Sharaf Jehan Begam v. Mohammad Sadiq Ali Khan.

actual point raised in this case seems to be one of first impression. The applicant seeks the appointment of a receiver apparently by way of equitable execution. The application is made on the execution side and its purpose is the realization of a decretal debt obtained against a Mahomedan widow out of the profits of property which the judgment-debtor claims to retain under her so-called lien for unpaid dower. A receiver of the whole of the property, which is very substantial, has been granted for the realization of the decretal debt, which is large. It is said that a receiver cannot be appointed because this right of retention cannot (at least by itself and apart from the dower debt) be assigned and a receiver cannot be appointed for property that cannot be assigned; further, it is urged that it is not just and convenient to appoint a receiver in such a case for two reasons: (1) it would leave the woman without any maintenance, and (2) it would cause her to lose possession and, as a consequence, her lien which is dependent on possession.

We are of opinion that the appeal must be allowed though for reasons other than the above. These proceedings are, in our opinion, misconceived. As the position of a Mahomedan woman claiming the right of retention in respect of dower unpaid does not seem to be properly understood and as there is available an appropriate remedy which will give the decree-holder all he wants we think it right to state broadly what our view of the law is. The matter is considered at length in Mr. Tyabji's work on Mahomedan Law (Edn. 3) p. 185 *et. seq.* *see* paras. 108, 108-A, 108-B and 109, also 572. We are of the opinion that the law is there correctly stated. The fundamental position is that the widow is not a secured creditor. She is an unsecured creditor with a special right which exists for a special purpose. That purpose is to compel the payment to her by the heirs of a debt in respect of dower. But, obviously, if she is allowed to retain possession perpetually until her dower is paid and if the payment of the dower is left to the heirs wide scope is offered to the family to shelter the property of all behind this right of retention and the widow is turned, for all practical purposes, into a preferred creditor. This may operate extremely harshly against her husband's unsecured creditors and against her creditors. The proper course, we think, is for an administrative suit to be brought which will result in the husband's estate being administered. This, however, can only be brought by persons interested in the estate as heirs, legatees and the like, and creditors. "Creditor" of course includes the widow but does not include the widow's creditors.

Suppose she is the only creditor of the husband but that she has many creditors. Can she hide indefinitely behind her right of retention neither claiming nor being paid her dower so that the dower debt is never in fact paid and her right or retention lives on? We think not. Her dower debt is like any other debt. It is assignable. It can be attached and sold, (see O. 21, R. 79.) and when sold the transferee is in the position of the widow except that possibly (we express no opinion on this matter) the right of retention (which is personal), would not pass with the debt. But what does pass is the right to have the debtor's (the husband's) estate administered on the suit of the assignee. The assignee of the dower debt accordingly next proceeds (in a case such as this where the widow is in fact in possession of practically the whole estate) to have the estate administered by the Court which will act as an executor would act. That is to say, the creditors of the deceased will first be paid off and then the rest of the estate, if any, will be distributed amongst those entitled to a share in it. This way of going to work seems largely to have been overlooked in these Mahomedan cases probably because the nature of the right and of the interest which passes when a Mahomedan dies has been, by many lawyers, frequently Hindus, misunderstood. This is not a case of survivorship. The estate is burdened with the debts. Those debts ought to be paid and if not paid a creditor can obtain administration by the Court. As to creditors of those entitled to a share they cannot be kept at bay for ever by the estate remaining unadministered. The right of the heir, the legatee, or the creditor, (e. g. widow having a right of retention) to administer can be obtained by the heir's creditor getting, by execution, into the shoes of the heir, the legatee or the widow creditor. Alternatively such creditor can realize money by way of execution by the sale to another of such person's rights so that such other stands in such person's shoes.

By proceeding in this way the widow's creditor gets at what really belongs to the widow: her share and her dower debt. By proceeding as the applicant here has proceeded the widow's creditor gets at a very

different thing: the income of all the husband's estate that the widow, for a particular purpose, happens to have got possession of in a way that gives her a right to retain. But that right to retain is for a special purpose—a compulsion to obtain speedy payment of an unsecured debt. The substantive right is the debt and the share; the adjective right is retention. The creditor's right is to payment out of the widow's estate; his right is to sell her claim or share or both. There may well be many interests besides the widow and her creditors. There may be other creditors (a) of the husband (b) of the widow. There may be other heirs of the husband and they may be minors. To allow the widow to go on retaining indefinitely is to allow her to abuse her right. To allow a particular creditor of hers to take all the income until he is paid is to damage third persons, creditors of the husband or heirs of the husband or other creditors of the widow. To administer the husband's estate is to clear everything up. That results in the widow getting paid what is due to her both as shareholder and as creditor.

This solution, however, is dependent on the assignability of the dower debt. Whether the right of retention is or is not assignable is a matter of dispute but this question need not be considered in this connexion. The widow's creditor, like the creditor of any heir, is, of course postponed, as such, and in so far as he seeks to obtain payment out of the husband's estate, to the deceased's creditors: 26 ALL 28[2] at p. 35. But the widow's creditor has available to him (regardless of the existence of creditors of the deceased) the widow's assets and these include the widow's debts against the deceased's estate. The debt arising out of unpaid dower is, for the present purpose and apart from all considerations of lien or right to retain, like any other unsecured debt: 14 M I A 377.[3] Being in the category of debts due to the widow it can be compulsorily transferred in execution and the assignee thereupon becomes a creditor of the deceased's estate. (*See* 43 MAD 214[4] at p. 237 where the opinion is also expressed that as a widow can assign her dower debt she can also assign the right of retention). A dower debt is an actionable claim: (54 ALL 499[5]) and not a mere right to sue. Accordingly it does not fall within the exception to assignable property created by S. 6(e), T. P. Act. It can accordingly be taken in execution like any other debt. Once this position is reached the rest follows. The appeal accordingly succeeds but on grounds other than those taken before us. We accordingly leave the parties to bear costs as incurred here and below. As this is a matter in execution it is not necessary to state, as was done in 14 M I A 377,[3] that the dismissal is without prejudice to the bringing of a general administration suit.

G.N./R.K. *Appeal allowed.*

2. ('03) 26 All 28 : 1903 A W N 184, Bhola Nath v. Maqbul-un-nissa.
3. ('72) 14 M I A 377 : 17 W R 113 : 10 Beng L R 45 : 2 Suth 531 : 3 Sar 39 (P C), Mt. Bebee Bachun v. Hamid Hossein.
4. ('20) 7 A I R 1920 Mad 666 : 53 I C 905 : 43 Mad 214 : 37 M L J 627 (F B), Beeju Bee v. Moorthiya Saheb.
5. ('32) 19 A I R 1932 All 345 : 136 I C 833 : 54 All 499 : 1932 A L J 275, Amir Hasan Khan v. Muhammad Nazir Hasan.

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GRILLE J.

Balwant Ambadas and others — Accused
Applicants
v.
Emperor.

Criminal Revision No. 143 of 1940, Decided on 8th June 1940, for revision of order of Magistrate with appellate powers, Yeotmal, D/- 21st February 1940.

Penal Code (1860), Ss. 147 and 323 — Seven people charged under S. 147 — Only three found guilty and convicted under S. 323 — Conviction under S. 323 held justified inasmuch as offence under S. 323 was mentioned in charge framed under S. 147 and no prejudice had been caused to accused.

Charges under S. 147 were framed against seven people and the Magistrate found that only three did commit an assault with sticks, while the rest were innocent and as he could not convict three people under S. 147, he convicted them under S. 323. The accused contended that they could not be convicted under S. 323 since they were charged under S. 147. The charge framed under S. 147 ran as follows: "That you on or about the 8th day of April 1939 at Umerkhed were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, in beating the complainant committed the offence of rioting":

Held that in the particular circumstances, there was nothing illegal in the conviction under S. 323 since the offence in respect of which the accused were convicted was mentioned in the charge and no prejudice had been caused to the accused: AIR 1922 All 114, *Rel. on*; 19 Nag L J 18; A I R 1918 Mad 496 and 30 Cal 288, *Disting.* [P 12 C 1]

N. T. Mangalmurti — for Applicants.

R. S. Dabir — for the Crown.

Order. — A challan under S. 147, Penal Code, against seven people was presented in the Court of the Naib Tahsildar and Magistrate, third class, Yeotmal. Charges under that section were framed against all of

them and the Magistrate on a close survey of the evidence considered that three of the accused who had pleaded alibi were absent and that a fourth did not participate in the assault on Dinanath and his son Tukaram. He found that the other three did commit an assault with sticks, and as he could not convict three people under S. 147, he convicted them under S. 323, Penal Code, and sentenced them to a fine of Rs. 20 each. The appellate Magistrate was asked to set aside the conviction and acquit the accused on the ground that they could not be convicted under S. 323 since they were charged under S. 147. The Appellate Court declined to accept this contention and dismissed the appeal. The three accused have accordingly preferred a revision application in this Court on this point of law.

It is contended on the authority of several rulings which have been cited before me that the offence of rioting does not of itself connote the causing of hurt and that consequently when the charge is for rioting, there cannot be a conviction for causing hurt since the latter is not necessarily an ingredient of the former offence. As a proposition of law, this is undoubtedly correct. But it appears to me that what really matters is the manner in which the charge is framed and whether the accused were aware of the accusation which they had to meet. Some of the cases which have been cited before me relate to charges under S. 325 read with S. 149, Penal Code, and convictions for causing hurt or grievous hurt after an acquittal of the charge of rioting. It is hardly necessary to say that no such conviction could be sustained on a charge relating only to the constructive liability for the assault of the person charged, and where the charge of rioting sets forth a common object of the unlawful assembly, even if the object set forth is one of causing hurt, I agree that there can be no conviction for causing hurt if it is not indicated in the charge that the person convicted did cause hurt. Ordinarily, in cases of this nature, two charges are framed, one of rioting and one of causing hurt, and the charge is framed under Ss. 147 and 323. In the case before me only S. 147 is mentioned, but the charge is framed in a somewhat unusual manner, and in my opinion clearly indicates to the accused that they are charged not merely with rioting in pursuance of the common object of the unlawful assembly but are actually charged with causing hurt. In each case the charge runs as follows:

> That you on or about the 8th day of April 1939 at Umerkhed were a member of an unlawful assembly, and, in prosecution of the common object of such assembly, in beating the complainant and his son, P. W. 1 Tukaram, committed the offence of rioting.

Here it is not merely stated that the common object of the assembly was to beat the complainant and his son, but it is stated that these persons committed the offence of rioting in actually beating the complainant and his son. That they did do so is certainly established by the evidence, and I do not think there is any doubt that the accused were aware that they had to meet a charge actually of beating, and that they have been in any way prejudiced in their defence by the omission of the figure "323" in the charge-sheet. In 30 CAL 288,[1] the leading case cited before me, the petitioners in revision were charged with rioting and were convicted of house-trespass and causing hurt. The learned Judges say in that case:

> The charge does not set out anything amounting to house-trespass; and although hurt is generally committed in the course of rioting, it does not necessarily follow that hurt is so caused, and indeed from the facts set out in the judgment it does not appear that hurt was caused.

As there was no mention of house-trespass in the charge there could of course be no conviction in respect of house-trespass. The circumstances in the case before me are very much akin to those in the case on which the learned appellate Magistrate relied, although in his judgment he has carelessly mutilated the reference by omitting the name of the Court which gave the decision, thus rendering it difficult to trace. The case is A I R 1922 ALL 114.[2] There the learned Judge declined to follow the view of the Calcutta High Court and held that whereas fourteen persons were charged with rioting and a joint assault on the victim, and it was found that only four actually participated, there was no objection to conviction under S. 323, despite the charge under S. 147, and that the applicability of S. 147 depended on the number of persons concerned. With all respect I would not state the case as simply as that and to my mind the crucial point is whether the applicants did have notice by the frame of the charge that they were on trial for an assault. In AIR 1922 ALL 114[2] it is quite clear that they were, and the charge which is quoted in the judgment, ran as follows:

> That you on 15th August 1921, at 4 p. m. all committed a riot upon Daoo at . . . . the common

1. ('03) 30 Cal 288, Yakub Ali v. Lethu Thakur.
2. ('22) 9 AIR 1922 All 114, Hanuman v. Emperor.

intention of your unlawful assembly being to assault Daoo and it was in pursuance of this common object that you all moved in a body and did cause bodily injury to Daoo and thereby committed an offence punishable under S. 147, I. P. C.

In view of the manner in which the charge was framed I concur respectfully in the finding that the number of persons less than the number necessary to constitute an unlawful assembly for causing hurt was permissible and proper. A recent case of this High Court 19 N L J 18,[3] is cited on the applicants' behalf. In that case the actual wording of the charge is not reproduced, and I would respectfully distinguish it on the ground that it must be presumed that the charge stated the common object but did not state that the persons charged had themselves actually and individually committed an assault which caused hurt. An example of a case in which convictions under Ss. 448 and 323 after the charge under S. 147 was set aside—and I am in respectful agreement with the view of the learned Judges who did set it aside—occurs in 41 I C 828.[4] There the charge under S. 147 ran for being

members of an unlawful assembly and having in prosecution of the common object of such assembly, viz., to enforce a right or supposed right to the barber's land in Sorobogodo Pubodo in Pattupur committed the offence of rioting at Pattupur.

Here the charge indicated nothing but rioting and there is no mention of trespass or of causing hurt. In the particular circumstances, then, I consider that there was nothing illegal in the conviction since the offence in respect of which the applicants were convicted was mentioned in the charge and no prejudice has been caused. A further point has been raised that the judgment of the appellate Magistrate is no judgment since it is not in conformity with the requirements of the Criminal Procedure Code. The judgment is certainly one which cannot be commended for its form, and it is urged that it is nothing but a philosophical discussion without any reference to the evidence. The alleged philosophical discussion runs as follows :

In a case like this it is perhaps impossible to expect that the version of each prosecution witness would fit into that of the other in every minute detail. To accept the entire evidence at its face value treating suspicious features lightly was besides the risk of doing injustice to put a premium on fabrication of evidence. To reject the evidence wholesale was equally unwarranted. The safest course was not to believe or disbelieve all that a particular witness said but to accept such of his evidence as had received corroboration all through, and fitted in with the probabilities of the case and to reject the rest.

Here the learned Magistrate is merely enunciating what the lower Court had done which was, on an analysis of the evidence, to accept only such facts as proved which formed the least common denominator of what was said by all the witnesses. The Magistrate then proceeds :

The prosecution story is consistent all through so far as the attack with sticks by the three appellants was concerned. Ample corroboration was furnished to this version by the medical evidence which had traced the injuries on the body of Tukaram as described by the eye-witnesses.

This is all entirely correct. The appellate Magistrate has approved of the method of the trial Court and on perusing the evidence found that the conclusion reached according to this method is correct. A detailed discussion of the evidence would possibly have been a repetition of the judgment in the trial Court, and I do not consider that it can be said that the evidence has not been considered or examined. I have perused the evidence myself in view of the objection that has been raised, and I have no doubt that the decision reached is correct. The judgment in appeal is not artistic, but it does satisfy the requirements of the law. The result is that the application in revision fails and is dismissed.

G.N./R.K. *Application dismissed.*

3. ('35) 19 N L J 18 : 167 I C 748 : 38 Cr L J 442, Gangabishan v. Emperor.
4. ('18) 5 AIR 1918 Mad 496 : 41 I C 828 : 18 Cr L J 860, In re Mongalu Arodhono Hathi.

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NIYOGI J.

Shalagram Trimbaklal Lahariya — Plaintiff — Appellant

v.

Sk. Mannu Hayat — Defendant — Respondent.

Second Appeal No. 155 of 1937, Decided on 5th August 1940, from appellate decree of First Addl. Dist. Judge, Akola, D/- 7th November 1936.

(a) Civil P. C. (1908), Sch. 3, para. 11 — Alienation by judgment-debtor is void ab initio.

An alienation by a judgment-debtor whose property is under the management of the Collector under Sch. 3, is void ab initio and not merely voidable at the instance of the decree-holder or the Collector : A I R 1917 Nag 215 (F B) and A I R 1918 P C 168, *Rel. on.* [P 13 C 2]

(b) Civil P. C. (1908), Sch. 3, para. 11—In execution of decree fields belonging to judgment-debtor attached and decree transferred to Collector for execution — During pendency of proceedings before Collector, judgment-debtor executing sale deed in full satisfaction of judgment-debt—Subsequently parties applying to Collector for recording of adjustment of decree—Sale held void and could not be validated by subsequent ratification.

Some fields were attached in execution and the decree was transferred to the Collector for execution. While the proceedings before the Collector were pending the judgment-debtor sold the fields to his judgment-creditor in full satisfaction of the judgment-debt. Subsequently the parties applied to the Collector for the recording of the adjustment of the decree:

Held that the sale having been made before the extinction of the decree, and termination of the Collector's power, the judgment-debtor was incompetent to transfer. The sale was therefore void: [P 13 C 1]
Case law referred.

Held further that as the transfer was void in its inception, it could not be validated by any subsequent ratification. [P 15 C 2]

D. T. Mangalmurti — for Appellant.

A. Ahmad — for Respondent.

Judgment. — This is an appeal from the concurring judgment of the First Additional District Judge, Akola, in civil appeal No. 57-A of 1935, decided on 7th November 1936. The question involved in this appeal is whether a sale deed executed by a judgment-debtor while the property was under the management of Collector was invalid under Para. 11, Sch. 3, Civil P. C. The question arises in the following circumstances. The appellant obtained a decree against one Ganpat Mahadeo. Ganpat Mahadeo's adoption having been held invalid in a subsequent suit and his adoptive mother Mt. Dwarki having re-married the appellant took out execution of his decree against Ajanbai the mother-in-law of Dwarki. Some fields besides a house were attached in execution and the decree was transferred to the Collector for execution. While the proceedings before the Collector were pending the judgment-debtor Ajanbai sold the fields to her judgment-creditor, namely, the appellant, on 25th March 1933 in full satisfaction of his judgment-debt. Subsequently on 21st April 1933 the parties applied the Collector for the recording of the adjustment of the decree and the Collector passed an order in these terms : "Accepted. The case will be shown as disposed of now."

The respondent Sheikh Mannu who had also a decree against Mt. Dwarki attached the fields purchased by the appellant during the pendency of the Collector's proceedings. The latter objected to the attachment but his objection was dismissed by the executing Court. The appellant therefore filed the suit for a declaration that the respondent had no right to attach the property. The appellant's contention is that the decree had been, in point of law, satisfied before the sale made in his favour came into operation with the consequence that the Collector's powers terminated and the judgment-debtor Mt. Dwarki recovered her competency to transfer. On these premises, it is argued that it was unnecessary to obtain the Collector's permission. Alternatively it is urged that the subsequent action of the Collector in accepting the adjustment of the decree and striking off the execution proceedings amounted to granting permission so as to validate the sale.

At the earlier hearing of this appeal I felt that it was not clear whether the Collector, when he accepted the adjustment of the decree and struck off the execution proceedings, was aware of the fact that the adjustment had been affected by a sale. I framed an issue "whether the applicant produced the sale deed before the Collector and obtained his permission to the sale by the judgment-debtor," and sent it to the Court of first instance for enquiry and report. That Court examined Mr. Seth, E. A. C., who was in charge of the execution proceedings. Mr. Seth explained the word "accepted," used by him in his order as meaning
the lands which were attached in the decree were allowed to be sold in accordance with the compromise and further that such compromise was approved or sanctioned by the Court.

The trial Court has found that the sale deed was actually produced before Mr. Seth and that he passed the order with full knowledge of the sale deed executed by the judgment-debtor in favour of the decree-holder. The crucial point is "when did the Collector's power cease?" In view of the Bench ruling in 13 N L R 130[1] and the decision of their Lordships of the Privy Council in 14 N L R 181[2] it must be recognized that an alienation by a judgment-debtor whose property is under the management of the Collector under Sch. 3, Civil P. C., is void ab initio and not merely voidable at the instance of the decree-holder or the Collector. On the other hand, it has been established by a course of decisions that the Collector's powers cease as soon as the decree is satisfied and become incapable of execution so as to release the judgment-debtor from the disability imposed on him by para. 11 of Sch. 3. In cases of this type it is not always easy to determine the precise point of time when the adjustment operates to extinguish the decree and the Collector's powers ter-

1. ('17) 4 A I R 1917 Nag 215 : 42 I C 200 : 13 N L R 130 (F B), Mt. Salu Bai v. Bajat Khan.
2. ('18) 5 A I R 1918 P C 168 : 48 I C 312 : 46 Cal 183 : 45 I A 219 : 14 N L R 181 (P C), Gaurishankar Balmukund v. Chinnumiya.

minate in relation to the point of time when the transfer becomes effective. If the adjustment and the cessation of the Collector's powers are found to have occurred before the transfer by the judgment-debtor such a transfer has been held to be perfectly valid.

The learned counsel for the appellant relies on the decisions which fall in this category. As the question is virtually one of fact pure and simple, the case law is not calculated to assist in the decision of this case, but an examination of these cases may serve to show how the principle indicated above was applied in the particular facts of the respective cases. 35 BOM 516[3] is the leading case which has guided the decisions of the Judicial Commissioner's Court, Nagpur. In that case the decree-holder intimated to the Collector on 21st May 1904 that the judgment-debtor had satisfied his decree and that the necessity for sale of the judgment-debtor's property in execution had disappeared. The execution case was finally disposed of on 8th June on which day the Collector returned the C Form to the Civil Court with the connected proceedings. On 31st May 1904 the judgment-debtor had sold his property and the question was whether the judgment-debtor was, on that day competent to alienate his property. It was held that when the decree-holder intimated to the Collector that his decree had been satisfied and that the necessity for its execution by the Collector had ceased to exist the Collector's powers of execution of the decree came to an end. Here it is clear that the sale which had been held on 21st May 1904 was effected ten days after the Collector's power had ceased. In A I R 1930 NAG 220[4] the judgment-debtor executed a mortgage on 11th July 1912 for Rs. 15,000 out of which Rs. 12,610-15-0 were paid into the treasury in satisfaction of the decree which was being executed by the Collector. The deposit of the decretal amount and the execution of the mortgage deed and its registration occurred on one and the same day.

In the course of the argument it was argued that where two transactions take place on the same day it must be presumed that they took place in such order as was necessary to make one of them valid. The learned Judges who heard the appeal, Jackson and Mohiuddin, A. J. Cs., declined to draw this presumption and remanded the case to the lower Court for enquiry and report as to whether the deposit into the treasury was made before or after the execution of the mortgage deed. It is clear from the action taken by the learned Judges that if the deposit was proved to have been made after the execution of the mortgage deed they would have held that the mortgage deed was void. As to what was the ultimate result in the case is not known as the matter, it appears, did not come up again in the Judicial Commissioner's Court. The case reported in A I R 1930 NAG 237[5] is not pertinent as the point decided there was that the incompetency of the judgment-debtor did not extend to property in respect of which the Collector did not choose deliberately to exercise his powers under Sch. 3. In A I R 1933 NAG 238[6] the Collector ordered the property under attachment to be sold on 12th December 1914. The judgment-debtor executed a mortgage on that very day and received out of the consideration of the mortgage Rs. 1050 before the Sub-Registrar for payment to the decree-holder. It appears that the payment was actually made to the decree-holder on that very day. He appeared before the Collector on 14th December 1915 and filed a receipt in satisfaction of his full claim. The proceedings in the Collector's Court had been destroyed and there was no evidence to show that the Collector had given his permission to the judgment-debtor to mortgage.

The learned Judge however assumed that the permission must have been granted. He further was of opinion that the payment made to the decree-holder on 12th December brought the Collector's power to an end. The learned Judge did not go into the question whether the payment had been made to the decree-holder before or after the execution of the mortgage deed, but it is clear from the facts recited in the judgment that the money had been received by the judgment-debtor, that is the mortgagor, before the Sub-Registrar for payment to his decree-holder. That event occurred obviously after the execution of the mortgage. There is nothing to show that the learned Judge's attention was specially drawn to this circumstance but it appears to have been assumed that the payment to the decree-holder preceded the execution of the

3. ('11) 35 Bom 516 : 12 I C 572 : 13 Bom L R 977, Khushalchand v. Nandram.

4. ('30) 17 A I R 1930 Nag 220 : 122 I C 371, Mt. Mankarnikabai v. Nandlal.

5. ('30) 17 A I R 1930 Nag 237 : 122 I C 369, Nandlal v. Amboprasad.

6. ('33) 20 A I R 1933 Nag 238 : 147 I C 725, Narsingdas v. Birju Ladhi.

mortgage. In A I R 1934 NAG 33[7] the judgment-debtor sold his crops and satisfied the decree by payment out of the sale-proceeds and on the date on which the decree was so satisfied the judgment-debtor executed a mortgage of the property under the management of the Collector. The payment to the decree-holder was made in the presence of the Collector and it was held that the Collector's power had terminated before the mortgage came to be executed. It must be noticed that the decree was satisfied by the sale of crops and not with the aid of the mortgage though it was executed on the same day. It was therefore naturally held that the decree having ceased to exist after its satisfaction and the Collector's power having come to an end the judgment-debtor was fully competent to dispose of his property by mortgage. In 18 N L J 134[8] the mortgage was executed on 21st June 1912 and on the next day, that is 22nd June the decree-holder appeared before the Collector and produced a receipt of full satisfaction and the case was, therefore, struck off as fully satisfied; but the mortgage deed was registered in October 1912. That mortgage was held to be valid as it became effective by registration long after the decree had been satisfied and the Collector's power had ceased. The learned Judge who decided the case declined to apply the law that the registration dates back to the time of execution of the instrument to a case of a judgment-debtor's transfer of his property under the Collector's management. When the decree was satisfied and the property was released by the Collector the mortgage was not complete. There was, therefore, no transfer by the judgment-debtor. The mortgage became operative as a transfer only after registration. The learned Judge was of opinion that the transfer was subsequent to the termination of the Collector's powers.

In the present case, the facts are these. The fields had been ordered to be sold on 5th April 1933. On 25th March 1933 the judgment-debtor executed a sale deed in favour of the decree-holder in full satisfaction of the decree. It cannot be gainsaid that on that day the Collector could exercise his powers under Sch. 3, Civil P. C. At what point of time his power should be deemed to have come to an end? The cessation of his power, as held in the cases reviewed above, comes about when the adjustment comes into operation and extinguishes the decree. The question, therefore, is: At what moment was the decree under consideration extinguished? The obvious answer is "when the adjustment became effective." When did it become effective? It became effective when, by the sale, the interest of the judgment-debtor passed to the decree-holder. That event was brought about by the registration. Consequently it must be held that, until the registration, the decree was enforceable and the Collector's power remained unimpaired. The execution of the sale deed and the registration of it indisputably preceded in point of time the extinction of the decree. The former was the cause and the latter was the consequence. But for the one, the other event could not happen. The very purpose of the sale was to satisfy the decree. It must, therefore, follow that the sale having been made before the extinction of the decree, and termination of the Collector's power, the judgment-debtor was incompetent to transfer. The two Courts below were, therefore, right in pronouncing the sale to be void.

The next argument is devoid of force. It is based on the assumption that the Collector can ratify the transaction and validate the transfer. If the transfer was void in its inception, it could not be validated by any subsequent ratification. Implicit in this assumption is the admission that the Collector's power to deal with the attached property affected by the transfer remained intact in spite of the transfer. If so, the transfer took place while the Collector could exercise his power and the judgment-debtor was incompetent to transfer. The fact is that the sale being void, the decree remained executable and the Collector could proceed to hold the sale on the specified day. Since the sale was to be held only to pay off the decree-holder, who was the only decree-holder and the decree-holder declared that his decree had been satisfied the Collector had no alternative but to accept his word and terminate the proceedings. His acceptance, in the circumstances, cannot be interpreted as a permission. He has no power to grant permission after the sale. Nor could he validate the void sale by his subsequent permission. The provision of law is no doubt stringent and occasionally results in apparent injustice. But it must be borne in mind that in cases where there are more than one decree-holder, any laxity in the enforcement of the provision is calculated

7. ('34) 21 A I R 1934 Nag 33 : 144 I C 267, Nandusa v. Nana.
8. ('34) 18 N L J 134 : 160 I C 924, Sitaram v. Chainsingh.

to open the door for fraudulent preference of one decree-holder over another and nullify the law regarding rateable distribution. The result is that the appeal stands dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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GRUER J.

Emperor

v.

Govind Prasad and others — Accused

Non-applicants.

Criminal Revn. Nos. 413 and 414 of 1939, Decided on 5th February 1940; reference by Sessions Judge, Nagpur.

(a) C. P. Gambling Act (3 of 1867), Ss. 1 and 4 — Place in front of small pan-stall in which customers usually stand is common gaming house if so used.

Where a pan-stall is small, the area in front of it in which customers usually stand should be included in the definition of "common gaming house" when the place is so used. [P 16 C 2]

(b) C. P. Gambling Act (3 of 1867), S. 5 — Description in warrant adequate to identify place —Non-mentioning of boundaries is immaterial.

If the description in the warrant is otherwise adequate to identify the place without ambiguity it is immaterial that the boundaries are not given: Criminal Revn. No. 455 of 1939, *Rel. on* ; 1939 N L J 357, *Disting.* [P 16 C 2]

Order. — This order will dispose also of Criminal Revision No. 414 of 1939. The Sessions Judge, Nagpur, refers these cases under the C. P. Gambling Act recommending that the conviction of one of the six non-applicants, Govind Prasad, under Ss. 3 and 4, Gambling Act, be set aside, that the conviction of David under each of these two sections be maintained as also the convictions of and the fines imposed on the other non-applicants. It was pointed out that the money found on the persons of the non-applicants should not have been forfeited. I accept the reference about Govind Prasad. As pointed out by the learned Sessions Judge although it is quite possible that he knew all about the betting which was being conducted by David while managing his (Govind Prasad's) pan-stall, still the other possibility is there that David was doing so without his master's knowledge, and the prosecution has not rebutted that possibility. Govind Prasad at the time of the betting was in the house next door and so beyond the range of the pan-stall and its immediate surroundings which could be designated a common gaming house. There is also nothing definite to prove his knowledge which is an essential element of S. 3. He must therefore be given the benefit of the doubt and acquitted. The written argument submitted by the other non-applicants who appear in person tries to make out that none of them was found in the pan-stall at the time when betting was going on and so they were not found present in the common gaming house. As the learned Sessions Judge points out, the pan-stall is a structure only 8 feet long by 4 or 5 feet broad, and customers never actually enter it as there is no room for them, but they stand in front of it: therefore the area in which customers usually stand should be included in the definition of 'common gaming house' when the place is so used. I do not agree that 37 BOM 651[1] is not applicable to the present case. The principle in *Emperor* v. *Ismail Hirji*[2] as stated by the Sessions Judge in para. 7 of his order of reference is also applicable to the present case.

The other point now raised is that the search warrant does not contain a description of the boundaries of the shop to be searched and is therefore ineffective: 1939 N L J 357.[3] This is not one of the reasons given in ground 9 of the revision application why the search was illegal. I have distinguished 1939 N L J 357[3] in a recent case, Criminal Revision No. 455 of 1939 and held that if the description in the warrant is otherwise adequate to identify the place without ambiguity it is immaterial that the boundaries are not given. I see no other reason for setting aside the convictions of the other non-applicants. On the strength of the authorities quoted by the Sessions Judge in para. 3 of his order of reference the monies found on the persons of David (Re. 0-3-0), Laxman Swami (Re. 0-1-0) and Sk. Hussain (Rs. 2-1-9) will be returned. The Sessions Judge has made a mistake in saying that Rs. 4-1-3 were recovered from Narayan Swami. That amount in the seizure memo (Ex. P-6) does not refer to him but is the total of the other amounts. It has already been stated that the convictions of Govind Prasad should be set aside. His fines if paid should be refunded. The convictions and sentences of the others are confirmed.

D.S./R.K. *Order accordingly.*

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1. ('13) 37 Bom 651 : 20 I C 609 : 15 Bom L R 689, Emperor v. Fattoo Mahomed Sher Mahomed.
2. ('30) 17 A I R 1930 Bom 49 : 124 I C 106 : 54 Bom 146 : 31 Bom L R 1349 : 31 Cr L J 633.
3. ('39) 1939 N L J 357, Emperor v. Prahlad.

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GRILLE AND VIVIAN BOSE JJ.

Shamla Hardeo Teli — Appellant*

v.

Emperor.

Criminal Appeal No. 132 of 1940, Decided on 17th June 1940, from the order of Addl. Sessions Judge, Bilaspur, D/- 29th April 1940.

Criminal P. C. (1898), Ss. 164 and 533 — Mere inadvertent omission to obtain signature of accused to statement made under S. 164 would not vitiate confession.

Where not only has the Magistrate given evidence to show that the statement was made as recorded by him, but the accused himself has admitted that he made that particular statement, an inadvertent omission to obtain the signature of the accused to a statement made under Sec. 164 would not vitiate the confession. It is exactly for a case of this nature that the provisions of S. 533, Criminal P. C., are enacted. [P 18 C 2; P 19 C 1]

M. Adhikari—for Appellant.

W. Dutt—for the Crown.

Judgment. — The appellant Shamla, a resident of Mungeli, Bilaspur district, has been convicted of the murder of a small crippled boy of 5 years of age and has been sentenced to death. The child was murdered on 24th November 1939, the accused disappeared from Mungeli the same day and was found working in a rice mill in Raigarh State under the assumed name of Itwari and was arrested on 19th December. The child was a cripple, having deformed feet, and the child's mother Mt. Bija deposes that when she went every day to work in the fields she sometimes took the child with her and sometimes left him at home. On the morning in question she had considered taking the child to the fields, but Shamla, who lives close by and who was fond of the child, picked it up and petted it, and so she left the child with him. On her return at midday the child was not to be found, and Shamla on being questioned said that he had left it playing in the lane. Mt. Dasmat, a vegetable seller, deposes that about 9-30 that morning on her way to the market she saw the accused and the child together and that her attention was attracted by the fact that the accused had picked up the child which was crying and she told him to put the child down. As the child was not found by evening, a report was made to the police, and as this happened in Mungeli itself, the Sub-Inspector arrived very soon. As Shamla was the last person to be seen with the child, it was suggested that he should accompany the police to the police station, which he did, but when the party returned, there is evidence that Shamla ran away and disappeared from the village. Meanwhile enquiries has elicited the fact that Shamla had pawned a bracelet with one Sukaluram (P. W. 8) at 10 or 11 o'clock in the morning. The bracelet was seized that day and also Sukaluram's books (*vide* Ex. P-4 and P-6) which recorded the entry that he had bought the bracelet that day from Shamla. This bracelet has been identified as belonging to the child by its parents and also by Jugul Sonar (P. W. 15) who made it.

The accused admits that the bracelet produced in Court is one which belonged to the deceased and he admits pawning a bracelet with Sukaluram, but he denied that the bracelet in Court is the one which he pawned. Beyond this no explanation is afforded. As it was night time, a watch was kept round the house of Shamla in which his old mother alone lived. The following morning another son of hers who lived in another house was told to question her as to what she knew (she had been away all the previous day), and she admitted that the dead body was in the house. The police then entered and found the body of the child crammed between the grain bin and the wall with minor injuries to the face and head. Death has been established by the medical evidence as being due to asphyxia, and this is not disputed. According to the police the accused when he ran away first went to mauza Baijana, and on being questioned what he was doing there by Hatteram (P. W. 6) and Mahengu (P. W. 7) the latter of whom is a distant relative of his, stated that he had committed a murder and run away and had removed a kara from the deceased child. The learned Additional Sessions Judge has preferred not to accept their evidence as he considered it unlikely that the man would first make his confession to Hatteram who was a stranger and only afterwards to his relation Mahengu, although he does consider it probable that these two persons harboured him for a day and a night and had made no attempt to inform the police when the police came to enquire about him. One would have thought that if the harbouring and the denial to the police is accepted, it would follow that the witnesses did have knowledge that he was a murderer.

The learned counsel for the appellant is unable to offer any explanation as to Shamla's sudden disappearance from the village and his working in a rice mill at Raigarh under

an assumed name, and he selects two points in the prosecution story as accepted in the Sessions Court for attack in order to show that the evidence against him is not convincing. The first point is that the child's mother admitted that she returned home once from the field in the course of the morning and found the child playing in the lane, and we are asked to deduce from this, coupled with the fact of Mt. Dasmat's seeing of the child with the accused which must have been earlier than 9.30 as she was a vegetable seller and the market opened at 7 or 8 and it must be presumed that she would be there at opening time, that when the mother saw the child, the child must already have been abandoned by the accused. We are unable to accept the argument, which is in the nature of a forlorn hope. There is nothing in the mother's evidence to show that her statement in examination-in-chief, that she hesitated whether to take the child to the field or not, refers to her first visit to the field or to the second after she returned. The probability is that it refers to the second visit as the desire to take the child to the field would be prompted by the fact that she had found it playing in the lane and this would not be so likely to happen early in the morning, neither would an accosting by her neighbour be so likely to happen then. Even if this is not so and it were to be held that she saw the child playing in the lane after the time when Mt. Dasmat had seen the child with the accused, there is nothing whatever to show that the parting of company between the two was anything more than temporary, and in face of the overwhelming evidence against the accused, the argument has no force whatever.

The other contention raised on behalf of the accused relates to the kada. He relies on a statement by the purchasing goldsmith Sukluram who says, " When the kada was purchased a plus mark was made on it for its identification later on". This, it is claimed, is inconsistent with the statement of Rahiman (P. W. 10) who was a witness to the seizure and who says that when it was seized, the plus mark was put on it by him. The seizure memorandum (EX. P-4) relates that the witnesses have made a plus sign on the kada with a big borer needle as their identification mark. The contention is that if this is the kada which was pawned by the accused, there should be two plus marks on it, and if the goldsmith had put one on it at the time of the purchase, this would have been noted in the seizure memorandum. The kada is not before us and we cannot say whether it bears one plus mark or two. We do not consider it necessary to send for the kada. There is no doubt that a kada was pawned that morning by the accused, and it would indeed be an extraordinary coincidence if the police when seizing this kada should have taken from the goldsmith a kada which was not pawned by the accused and yet which happened to belong to the child as is admitted. No explanation has been given as to what kind of kada the accused pawned or how he obtained it. Also we would observe that it is most unusual for a goldsmith to mark property which is pawned with him for identification in this manner. This is generally done by tying on a piece of cloth or a piece of paper. We also note that the goldsmith refers to the same type of mark being put on at the time of purchase as was put on by the witnesses at the time of seizure, and in our opinion what has happened is that there has been a mistake either by the goldsmith in making his deposition or by the Judge in recording the evidence and that instead of " when the kada was purchased " what was said by the goldsmith or intended to be said by him was " when the kada was seized ". It is to be noted that the goldsmith does not say that he put on the mark himself which he presumably would have done if the mark had been made at the time of purchase.

The learned Additional Sessions Judge has based his conviction on the fact that the accused was last seen with the child, that he pawned on the morning on which the child disappeared a kada with a goldsmith and that kada has been identified as the child's and admitted to be his, that the accused absconded that night when the police were about to begin investigation and that he was found working in Raigarh State under an assumed name. These facts are, in our opinion, quite sufficient to sustain the conviction. There is also, however, an additional piece of evidence which the learned Judge has discarded and, in our opinion, wrongly discarded. We refer to the confession taken by a first class Magistrate at Raigarh in which there is a full confession of the crime. The learned Judge has stated that the confession was recorded with due regard to the provisions of S. 164 and S. 364, Criminal P. C., except in one detail which the learned Judge describes as "one little slip which had inadvertently

crept in", namely, that the statement was not signed by the accused himself. This, on the authority of the decision of their Lordships of the Privy Council in 17 Lah 629,[1] the learned Judge considers of necessity vitiates the proceedings and renders the confession inadmissible.

The authority of 17 Lah 629[1] does not extend nearly as far as that. In that case the disregard of the provisions of Ss. 164 and 364, Criminal P. C., was so flagrant that their Lordships held that no question of the consideration of the curability of the admission under S. 533, Criminal P. C., arose at all. If an inadvertent omission to obtain the signature of the accused to a statement made under S. 164 were to vitiate the confession, S. 533 of the Code would be rendered entirely otiose. It is exactly for a case of the nature before us that the provisions S. 533, Criminal P. C., are enacted. The signature is not taken as a proof of the accuracy of the statement to which it is appended but in proof of the fact that the statement was actually made. In this particular case not only has the Magistrate given evidence to show that the statement was made as recorded by him, but the accused himself has admitted that he made this particular statement. That being so, there can be no possible prejudice to the accused in giving proof that the statement actually was made. In holding that the confessional statement should have been admitted, we do not wish to derogate from the structures passed in this Court in I L R (1937) Nag 268[2] and on subsequent occasions. We affirm the principle that no other procedure than that which has been detailed in the Code of Criminal Procedure can be followed, but we also desire to emphasize that the omission to take the accused's signature to a statement is not necessarily fatal to the admissibility of the statement in every case as the learned Judge appears to think. The judgment of their Lordships of the Privy Council in 17 Lah 629[1] does not abrogate S. 533, Criminal P. C., and indeed could not do so. The case throughout has disclosed evidence of such an overwhelming nature that the excessive caution of the learned Judge, possibly in respect of the extra-judicial confession and certainly in the case of the admissibility of the confession recorded under S. 164, Criminal P. C., has not affected the result.

On the question of sentence there can, in our judgment, be no doubt whatever. A crippled child was here murdered for the sake of the value of a silver bracelet. There are no extenuating circumstances whatsoever and we dismiss the appeal and confirm the sentence of death.

D.S./R.K. *Appeal dismissed.*

1. ('36) 23 A I R 1936 P C 253 : 163 I C 881 : 63 I A 372: 37 Cr L J 897 : 17 Lah 629 (P C), Nazir Ahmad v. Emperor.
2. ('37) 24 A I R 1937 Nag 220 : 168 I C 962 : I L R (1937) Nag 268 : 38 Cr LJ 642, Neharoo v. Emperor.

A. I. R. 1941 Nagpur 19

NIYOGI J.

Pandurang Kesho Vairagade — *Judgment-debtor* — Appellant

v.

Kunwarlal Singh Indra Rajsingh — *Decree-holder* — Respondent.

Misc. Appeal No. 88 of 1939, Decided on 7th August 1940, from order of Additional District Judge, Chanda, D/- 16th December 1938.

Limitation Act (1908), Art. 182 — In case of appeal time under Art. 182 runs only from date of appellate decree.

The period of limitation under Art. 182 commences to run only from the date of the appellate decree. Whatever the nature of the decree appealed against whether it proceeds upon a ground common to the defendants or not, and whether one defendant appeals from such decree in so far as it affects his own interests or whether all the defendants appeal from only a part of a decree, and whether the parties against whom execution is sought were parties to the appeal or not : A I R 1932 P C 165, *Rel. on;* 13 All 1 (F B) and A I R 1914 Cal 583 *held overruled by* A I R 1932 P C 165 ; 25 Cal 594 (FB) and A I R 1927 Cal 89, *Approved.* [P 21 C 1]

R. N. Padhye — for Appellant.

D. T. Mangalmurti and G. R. Bapat — for Respondent.

Judgment.—This is a judgment-debtor's appeal from an order passed by the Additional District Judge, Chanda, in Civil Appeal No. 30-B/38, on 16th December 1938. The appeal arises out of the execution proceedings in Civil Suit No. 135/31 which was instituted by the respondent against the appellant Pandurang and one Md. Hanif for rendition of the accounts of the village profits for the years 1928-29 and 1929-30. In different parts of the year 1928-29 Pandurang and Md. Hanif acted as lambardars. The respondent's claim for the year 1928-29 was thus against both Pandurang and Md. Hanif. The suit resulted in a decree against the appellant Pandurang for Rs. 77-8-10 and against Md. Hanif for Rs. 259-4-0. That decree was passed on 31st March 1932. Md. Hanif alone preferred an appeal from that decree without impleading Pandurang. The appellate decree was passed on 19th December 1932 and his appeal was

partly allowed. The decree-holder (respondent) applied for execution of his decree on 17th December 1935 which was dismissed on 14th March 1936. He filed a second application for execution on 7th January 1938 and attached the immovable property of both Pandurang and Md. Hanif. The appellant Pandurang contested the application on the ground that his (respondent's) first application made on 17th December 1935 had not been presented within three years from 31st March 1932, the date of the original Court's decree. On the other hand, the contention was that the application having been made within three years from the date of the Appellate Court's decree, namely 19th December 1932 was not barred by time. There is no dispute as regards the second application dated 7th January 1938 being within three years from the date of the disposal of the first execution application.

On the contentions of the parties the only question that arises for determination is whether in the circumstances of the present case three years period of limitation as prescribed in Art. 182, Sch. I to the Limitation Act should be computed from the date of the first Court's decree or that of the Appellate Court's decree. Art. 182 runs as follows :

Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by article 183 or by section 48 of the Civil Procedure Code.	Three years, etc.	1. The date of the decree or order ; 2. (where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal . . . .

The main argument submitted on behalf of the appellant is that the decree under consideration passed in Civil Suit No. 135/31 consisted of two decrees though in form it was only one decree and that Md. Hanif's appeal was not directed against that part of the decree which had been passed against Pandurang and that consequently the period of limitation for execution of the decree as against Pandurang could not be computed from the date of the Appellate Court's decree but from the date of the first Court's decree. Reliance is placed on 13 ALL 1[1] and 19 C W N 287[2] at p. 289 in support of the argument. In the first mentioned case the majority opinion was certainly in favour of the contention that is put forward here but the minority dissented from it. In 19 C W N 287[2] a Bench of the Calcutta High Court followed the majority view in the Allahabad Full Bench case and enunciated the principle that in dealing with the question of limitation in such cases it should be seen whether the original decree was really one decree or an incorporation of several decrees and whether the appeal against it imperilled the whole decree or not. But the majority view in 13 ALL 1[1] did not commend itself to the Judges of the Calcutta High Court in a Full Bench case reported in 25 Cal 594.[3] In 53 Cal 901,[4] 13 ALL 1[1] was again dissented from and 25 Cal 594[3] was approved. In the High Courts of Madras, Bombay and Patna also the majority opinion in 13 ALL 1[1] was not approved. The authority of the Allahabad Full Bench case which was already weakened by the repeated dissents expressed by the other High Courts in India has now been altogether extinguished by the view taken by their Lordships of the Privy Council in 60 Cal 1.[5] In that case it was specifically argued that an appeal, in order to save limitation under cl. (2) of Art. 182, must be one to which the persons affected were parties and that it must also be one in which the whole decree was imperilled. Their Lordships after observing that these contentions were the subject of much difference of opinion in India propounded their view as follows :

> Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the Article : "where there has been an appeal" time is to run from the date of the decree of the Appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions,

1. ('91) 13 All 1 : 1890 AWN 207 (FB), Mashiat-un-nissa v. Rani.
2. ('14) 1 AIR 1914 Cal 583: 22 IC 685 : 19 CWN 287, Christiana v. Benarshi.
3. ('98) 25 Cal 594 : 2 C W N 556 (F B), Gopal Chunder v. Gosain Das.
4. ('27) 14 A I R 1927 Cal 89 : 97 I C 838 : 53 Cal 901 : 44 C L J 544 : 31 C W N 262, Abdul Alim v. Abdul Hofez.
5. ('32) 19 A I R 1932 P C 165 : 137 I C 529 : 59 I A 283 : 60 Cal 1 (P C), Nagendra Nath v. Sureshchandra.

equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage. Nor, in such a case as this, is the judgment-debtor prejudiced.

It is clear from the passage quoted above that their Lordships of the Privy Council have expressly disapproved of the majority opinion in 13 ALL 1[1] which was followed in 19 C W N 287[2] at p. 289. An attempt is made on behalf of the appellant to show that the interpretation put upon Art. 182 by their Lordships of the Privy Council could not have been intended to apply to the case such as the present where there are really two decrees incorporated into one. It was in this form that the contention was put forth before their Lordships and that form had appealed to the learned Judges who decided the case reported in 19 C W N 287[2] at p. 289, but that was explicitly and unequivocally overruled by their Lordships of the Privy Council. On the construction put upon the Article under consideration by the Privy Council it is clear that whatever the nature of a decree, whether a decree proceeds upon a ground common to the defendants or not, and whether one defendant appeals from such decree in so far as it affects his own interests or whether all the defendants appeal from only a part of a decree, and whether the parties against whom execution is sought were parties to the appeal or not, the period of limitation under Art. 182 commences to run only from the date of the appellate decree. The appellant's contention must therefore fail. The appeal stands dismissed with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Nagpur 21

Full Bench

STONE C. J. AND GRILLE, NIYOGI, GRUER AND VIVIAN BOSE JJ.

Gopal — Plaintiff — Appellant

v.

Shamrao — Defendant — Respondent.

Second Appeal No. 306 of 1937, Decided on 6th December 1940, from judgment of First Addl. Dist. Judge, Nagpur, D/- 13th January 1937.

C. P. Land Revenue Act (2 of 1917), S. 188 and C. P. Tenancy Act (1 of 1920), Ss. 2 (7) and 49 — Division of title between cosharers — Transfer of proprietary rights by cosharers — Transferee and not lambardar becomes landlord of transferor ex-proprietary tenant — If however transferring cosharer has not exclusive ownership but only exclusive enjoyment then lambardar is the landlord — Lambardar must however in that case hand over rent collected to transferee cosharer—(Per Full Bench; Stone C. J. and Vivian Bose J. *contra.*)

An ex-proprietary occupancy tenant holds land of the lambardar if the transferring cosharer had not acquired exclusive ownership over his *sir* land of which he became the tenant. The ownership of the land still remaining with the body of the proprietors of the village, the ex-proprietary tenant would be deemed to hold land of the proprietary body, but on the other hand if there was division of title so as to make the cosharer exclusive proprietor of the *sir* land appurtenant to his share he would on the transfer of his proprietary right, become the occupancy tenant of his transferee. The entire proprietary right in the land which before the transfer was *sir* and after it became an occupancy land would vest in the transferee and he alone would become the proprietor and landlord of it. The transferor to whom occupancy right accrues in pursuance of S. 49, C. P. Tenancy Act, must be deemed to be holding his land from the proprietor of the land, namely the transferee, and would be liable to pay rent to him and to no one else. In such a case the lambardar cannot be deemed to be the landlord of either the *sir* land which has passed into the exclusive ownership of one of the cosharers or of the ex-proprietary occupancy land when the exclusive owner of it disposes of his proprietary right in his exclusive *sir*. When however there is no partition involving division of title but only an arrangement for separate enjoyment and appropriation of profits, the lambardar would be bound to hand over the rent collected by him to the particular cosharer entitled to it but since the lambardar does not cease to be a cosharer in respect of land so exclusively held by the other, the tenant of that land will, in point of law, be deemed to be the tenant of the whole proprietary body. Consequently the lambardar as the agent of that body will, by virtue of S. 188 (2), C. P. Land Revenue Act, be entitled to recover the rent: A I R 1928 Nag 39 (F B), *Approved; Case law discussed.* [P 26 C 1, 2; P 28 C 1]

A. R. Kulkarni — for Appellant.

D. B. Najbile — for Respondent.

OPINION

Stone C. J. — I have had the advantage of perusing the opinions of my learned colleagues and I note that Grille, Niyogi and Gruer JJ., consider that 23 N L R 160[1] was rightly decided if by "in severalty" is meant "in exclusive ownership." Bose J., on the other hand, thinks that even so it is wrongly decided; and I am in agreement with the conclusion arrived at by Bose J. I do not propose to reproduce the various arguments that he has used but will state my opinion in a few words.

In my opinion lambardar is an officer appointed, primarily for land revenue purposes, for an area. In respect of that area

1. ('28) 15 A I R 1928 Nag 39 : 106 I C 429 : 23 NLR 160 (F B), Mt. Bari Bahu v. Ganesh Singh.

he is liable to Government for the revenue due to Government from that area. He is, by statute, created a fictional landlord of all tenants within that area. As such he is entitled to collect rents. There may be a difficulty where there are two landlords, (1) the fictional one for purposes of the Land Revenue Act, i. e., the lambardar, and (2) a contractual one for purposes other than the Land Revenue Act. Where, however, as here, we are concerned not only with the fictional landlord but with a fictional tenant of a fictional tenancy, that is to say, an ex-proprietary tenancy that springs not out of contract but out of the statutory provisions of the Tenancy Act, it appears to me to be the better opinion that the only landlord that the Courts should regard in respect of such statutory tenancy is the person that for all purposes of the Tenancy Act the Courts are directed to treat as landlord, that is to say, the lambardar. The lambardar is responsible to Government for the revenue and is empowered, in my opinion, by Government to collect rents. Those rents he will doubtless hold for the person who by assignment of the *sir* is entitled to receive rents from the exproprietary tenant. That is to say, vis-a-vis the tenant the lambardar is the landlord, but when he has collected the rents he must hand over those rents to the assignee after deducting the assignee's share of land revenue. That is not the majority view, and accordingly it seems to me unnecessary to develop any further arguments especially as those have been stated, in my opinion, so clearly by Bose J., to whose judgment I have really nothing to add.

Grille J. — This appeal deals with a question which has been before the Courts on numerous occasions, and the appeal, which was before Niyogi J. and which was decided in the lower Appellate Court on the principles laid down in 23 Nag L R 160[1] to which it affords a parallel, has been referred to a Full Bench of this Court inasmuch as a recent Divisional Bench decision has doubted the correctness of that ruling. I have had the advantage of reading the opinions of Niyogi and Bose JJ., which express at length the two views which were put before us in the course of argument, and also the opinion of Gruer J. In these circumstances it is unnecessary to recapitulate the facts, and the point for determination is whether 23 N L R 160[1] has been correctly decided. The main points for consideration are the interpretation of the term "held in severalty" and whether the provisions of S. 188 (2), Land Revenue Act, by which the lambardar is deemed to be the landlord within the meaning of the C. P. Tenancy Act, entitle the landlord to collect rents from all tenants in the village including such tenants as hold not from the proprietary body but from one member of that body who is in exclusive possession of the *sir* land which the tenant in question formerly held and of which he is now an exproprietary tenant.

I do not think that there is any doubt or divergence of opinion that by virtue of the C. P. Tenancy Act an exproprietary tenant of *sir* land does hold land from his transferee and that the transferee is his actual landlord; the point of divergence is whether despite this the real landlord, the transferee, is debarred from collecting the rent of his tenant and whether that right vests solely in the lambardar as representing the proprietary body. I find myself in full agreement with the opinion expressed by Niyogi J. in so far as the assumption is made that we are dealing with a case where the *sir* land was in the exclusive ownership of the transferor and the transferee and that the facts as established by the pleadings in the particular case before us indicate that the field was one held in exclusive ownership, and that in that case the lambardar has no right to collect the rent, and that in this view 23 N L R 160[1] (in which it appears to me that the exclusive ownership of the *sir* land was also assumed) was correctly decided. I would however point out with great respect that the reinforcement of the argument by a reference to 19 N L R 59[2] is not valid since that decision has been overruled by a Full Bench to which myself as Judicial Commissioner and Gruer A. J. C. were parties, in 31 N L R Sup 132.[3] I am unable to concur in the view which was pressed before us on behalf of the appellant that by virtue of S. 188 (2), Land Revenue Act, the lambardar is entitled to collect the rent of every tenant in the village irrespective of the fact whether he holds from the proprietary body as such or no. To clothe him with that power which is one of the essential appurtenances of landlordship would be to clothe him with the power to exercise the other rights of the landlord as well, that is to say, he would have the right to eject a

2. ('23) 10 AIR 1923 Nag 153 : 71 I C 777 : 19 N L R 59, R. S. Ramkrishnapuri v. Tanba.
3. ('36) 23 AIR 1936 Nag 44 : 161 I C 806 : 31 N L R Sup 132, Keshao Jagannath v. Raoji Gopal.

tenant for non-payment of rent and then appropriate the holding for the use of the proprietary body and would be able to object to an unauthorized transfer, both of which functions must by their very nature belong to the landlord from whom the tenant admittedly holds. I am unable to see how one function of the landlord can be dissociated from another function, and I do not consider that S. 188 (2) (a), Land Revenue Act, was intended to have this effect or that it does in fact have this effect.

Clause (a) of S. 188 (2) does no more than legalize by statute a position which had been accepted by convention but was liable by reason of dissidence among the proprietary body to be the subject of continual challenge. It should not be interpreted so as to clothe the lambardar with rights which he never had and which the proprietary body whom he represents never had in respect of the exproprietary tenants of a shareholder who holds *sir* in exclusive ownership. The result would be that the right of holding *sir* land in exclusive ownership would be entirely illusory, and no palliative in the way of restoring the rent thus collected to such transferee owner would be any aid, since by collecting rent and in my opinion, of necessity exercising the resultant functions of a landlord if the rent were not paid, the very title of the transferee owner as landlord is denied. I concur in the view which has been epitomized in 23 N L R 160[1] (always on the understanding that the reference is to *sir* land exclusively owned) that the Act makes the lambardar the landlord only in respect of such land as the body of proprietors whom he represents is the landlord of.

To hold that it is the transferee who is entitled to collect the rent and not the lambardar in no wise damages the financial position of the lambardar in respect of the collection of village profits and the payment of land revenue. The creation of an exproprietary tenant by the transfer of his *sir* fields to an incoming proprietor does not add an anna to the village profits or increase the liability for the revenue to be paid to Government which has been fixed at settlement. Before the transfer the transferring proprietor had his *sir* land assessed at a certain figure. This assessment is taken into account in determining the profits to be distributed among the proprietors inter se as it has been taken into account in determining the village assets a proportion of which has to be paid to Government. This assessment, the liability and the right to profits are all equally applicable to the incoming transferee share-holder as they were to the outgoing one. The rent which is fixed on the exproprietary occupancy holding may be more or less than the assessment made on it as *sir* land. It is of course generally more, but this is quite immaterial and represents the legitimate profit which the incoming share-holder has in lieu of the right of cultivating the land himself. It is, I think, conceded that even if the lambardar were to collect the rent from the exproprietary tenant, he would have to hand the whole of it and not only a proportionate share of it to the transferee landlord; consequently it would not affect the assets which it is his duty to collect in order to pay the Government revenue and to distribute the surplus among the cosharers in any way, and the rent of the exproprietary occupancy tenant is completely outside the economics of village income and village profits as laid down at settlement. The proprietary body and the lambardar suffer no loss if the rent due by the exproprietary tenant is not collected; the only loss would fall on the transferee landlord. It would be not only illogical but in the highest degree cumbersome to lay down that it is the duty of the lambardar to recover the rent from such tenant and the further duty of the lambardar, having recovered such rent, to pay it to the actual landlord, the transferee. The transferee is the only person affected, he is the only one interested in collecting the rent, and it is he who should collect it. If there is a failure to pay the rent, he may then sue his tenant and in default proceed to the other remedies which the law provides. Were the right of collection to be with the lambardar, the only remedy open to the transferee would be a suit against the lambardar who in his turn would have to sue a tenant who is not his tenant and who is not a tenant of the proprietary body and whose rent he has no financial interest in collecting. To impose this duty on the lambardar would be to place an unwarranted burden on him. In view of the chain of decisions of the Judicial Commissioner's Court of which 23 N L R 160[1] is only one, the tenant need be in no fear of being mulcted in a double demand for rent, his position as an exproprietary tenant is very clear and free from complications, he should pay to his actual landlord and to no one else.

There would be, in my opinion, very little hardship or incongruity in holding the deci-

sion in 23 N L R 160[1] to be correct even if "holding in severalty" as defined therein were to be interpreted in the manner in which Stanyon A. J. C., has interpreted it in 14 N L R 101.[4] It is there laid down that where co-owners of an undivided property have agreed for their common convenience to take exclusive physical possession of certain defined parts of that property for the purpose of better and more intensive management of that property without however any definite severance of interests, the Court will not interfere with such arrangement at the instance of any one co-owner during such period of common tenure, and that when the parties do agree to a division of the property, the arrangement will only be disturbed in so far as it may be necessary to make an equitable division of that property. This also finds expression in the proviso to sub-s. (1) of S. 173, Land Revenue Act, where it is provided that so far as may be compatible with fairness of partition in the creation of pattis, lands held in severalty shall be left in the possession of parties holding the same. This may be termed, if such an expression is permissible, as severalty of possession as opposed to severalty of ownership. Land held in exclusive possession is not brought into the common stock on a partition, and it must therefore follow that land in severalty as defined in S. 173, Land Revenue Act, is land held in the manner described in 14 N L R 101.[4] It is true that the actual ownership is not individual but common and therefore S. 188 (2) of the Act makes the lambardar the landlord of land so held, but subject to that the management of land so held should remain with those so holding it, and equity would demand that a transferee proprietor of such *sir* should receive the rent paid by the exproprietary occupancy tenant from the malguzar in the same way as a transferee of exclusively owned *sir* would be entitled to recover from the tenant, and an incoming transferee co-owner is (*vide* 14 N L R 101[4]) bound by any such existing arrangement; the body of co-owners is equally bound to respect such an arrangement in their relations with the incoming transferee. I am however in no doubt that where there has been no severance of ownership but only a severance of the mode of enjoyment, the proprietary body and therefore the lambardar is the landlord, and that 23 N L R 160[1] is only good law in such cases where there has been a severance of ownership of the *sir* land before the transfer.

4. ('17) 4 AIR 1917 Nag 45 : 46 I C 272 : 14 NLR 101, Jagannath v. Ramprasad.

Niyogi J. — This is a plaintiff's appeal from a reversing judgment of the first Additional District Judge, Nagpur, in Civil Appeal No. 13-C of 1936 decided on 13th January 1937. This appeal comes before the Full Bench for the reason that in a judgment of the Divisional Bench delivered on 7th October 1938 the correctness of the decision of a Bench of the late Judicial Commissioner's Court reported in 23 N L R 160[1] was doubted and that the law enunciated in that decision calls for re-consideration. The suit out of which this appeal arises was instituted by the appellant in his capacity as lambardar of mouza Jatlapur to recover rent of certain ex-proprietary occupancy fields held by the respondent. The respondent denied the plaintiff's right to recover the rent on the ground that the appellant though lambardar of the village was not the proprietor of the occupancy fields and landlord of the defendant. The facts on which the respondent founded his plea were these. One Damu Patel was originally the proprietor of eight annas share of mouza Jatlapur comprising the occupancy fields in suit which were then held by him in *sir* right as appurtenant to his eight annas share. The said Damu Patel died in or about the year 1897 survived by his two widows, Mt. Godubai and Mt. Anandabai and two daughters, Banabai and Kamaljabai, the latter being the respondent's mother. The two widows partitioned the eight annas share which devolved on them from their husband, Damu Patel through Court (Civil Suit No. 15 of 1911, decided on 27th July 1911). Four annas proprietary share including the fields in dispute which were then *sir* fell to the share of Mt. Godubai. She mortgaged her four annas share including the fields with Bajirao and Gangaram who were the managers of a joint Hindu family consisting of themselves and Atmaram. As a result of the partition the mortgage fell to the share of Atmaram who obtained possession of the four annas share including the fields in pursuance of a final decree for foreclosure in his favour. He obtained possession of the four annas share on 3rd June 1930 with the consequence that the fields in suit which were *sir* fields became the ex-proprietary occupancy fields of Mt. Godubai. On her death they devolved on the respondent who was her daughter's son. The appellant has become the owner of four annas share of Mt. Anandabai, the co-widow of Godubai, by purchase. The appellant admitted that the

fields in suit belonged originally to Damu Patel as appurtenant to his eight annas proprietary share in the village. He also admitted the partition between his widows and Godubai's mortgage in favour of Atmaram and the foreclosure of her four annas share in his fields. He raised other pleas which are not material for the decision of this appeal.

The trial Court decreed the plaintiff's suit on the ground that the appellant being the lambardar of the entire village must be deemed to be the landlord within the meaning of C. P. Tenancy Act, 1898, in view of S. 188 (2) (a), C. P. Land Revenue Act, 1917. That decree was reversed by the lower appellate Court on the strength of the case reported in 23 N L R 160.[1] In that case it was held that an ex-proprietor becoming an occupancy tenant of *sir* held by him in severalty became the tenant of his vendee and that the vendee and not the lambardar was entitled to claim the rent. From the trend of the pleadings offered by the parties it is clear that there is no contest as regards the fields in suit having been held by Damu Patel as appurtenant to his eight annas proprietary share and later by Mt. Godubai as appurtenant to her four annas share. In view of the clear admission contained in the plaintiff's written statement dated 25th May 1936 that the fields in suit originally "belonged" to Damu Patel, it can well be inferred that they were held by him in severalty as owner of the eight annas proprietary share. The expression "in severalty" is well known in law and it means individual and exclusive ownership as opposed to property held in joint tenancy or tenancy in common. An estate is said to be held in severalty when it is held by an individual without any other person participating in the estate: *see* Goodeve's Law of Real Property, Edn. 5, p. 227. That expression ordinarily has reference to ownership and not merely to enjoyment. It is however possible that joint owners may, for convenience of management or enjoyment of their joint estate, divide it into parcels and put them in exclusive possession of each of the joint owners without intending disintegration of their joint title.

In such a case although each parcel of land may be enjoyed severally by the joint owners it will not become the exclusive property of the person enjoying it. On the other hand, the joint owners may divide a part of their joint property into parcels and put each parcel into separate possession of each of the joint owners in full ownership. In such a case there is not only division of proprety for enjoyment but also a division of title so as to make each one of the joint owners the sole owner of the property falling to his share. Whether the expression "in severalty" signifies merely individual and exclusive enjoyment or individual and exclusive ownership has to be determined on the facts pleaded and proved in each case. In the absence of any specific pleading to restrict the exclusive possession to mere enjoyment apart from title it must be presumed to mean exclusive ownership. At all events in the present case the admitted facts clearly show that the fields in suit were held in exclusive ownership by Damu Patel and after him his widow Mt. Godubai. As a result of the partition between the two co-widows Godubai became the exclusive owner of the 4 annas share including the fields in suit which were then *sir*. Her share would not on her death pass to Anandabai: *see* 10 N L R 51.[5] The appellant who is her representative by purchase cannot therefore claim any right in Godubai's 4 annas share which passed in its entirety to Atmaram the mortgagee. Atmaram must therefore be deemed to be the sole proprietor of the fields in dispute.

The question is whether Atmaram by virtue of being the proprietor should be regarded as the landlord of the respondent. As pointed out in 8 N L R 123[6] the ex-proprietary cultivating or occupancy right in *sir* land is not something that comes into existence only on the loss of the proprietary right. The cultivating and proprietary rights are co-existing component parts of the full *sir* right. When Mt. Godubai held the lands in suit as *sir* lands appurtenant to her 4 annas share both the cultivating and proprietary rights were vested in her. When she ceased to cultivate the land as a proprietor she became the occupancy tenant of the land under S. 49, C. P. Tenancy Act. Inasmuch as the cultivating rights were appurtenant to her 4 annas proprietary share she, after she became an occupancy tenant, must be deemed to cultivate with the consent of her transferee and be liable to pay rent to him. He would therefore become the landlord entitled to recover rent of the exproprietary occupancy land. This has been the consistent view of the Judicial

5. ('14) 1 AIR 1914 Nag 21 : 24 I C 808 : 10 NLR 51, Balu Bai v. Tanu Bai.

6. ('12) 8 N L R 123 : 17 I C 129, Shiolal v. Nanhelal.

Commissioner's Court as will appear from 15 C P L R 143,[7] A I R 1924 Nag 381,[8] A I R 1927 Nag 325,[9] 23 N L R 160[1] and A I R 1928 Nag 229.[10]

A doubt is cast on the correctness of this view which was confirmed in 23 N L R 160[1] where the rule was enunciated that the proprietor becoming an occupancy tenant of *sir* land held by him in severalty is the tenant of his vendee and that the vendee is entitled to claim the rent and not the lambardar. As I already stated above the expression "land held in severalty" is susceptible of a two-fold meaning according as it signifies division of title or not. If that expression is understood as implying division of title the view taken in that case must be treated as sound but not so if it means only separate and exclusive possession held with no intention of disrupting the joint title.

The C. P. Tenancy Act defines landlord as the person of whom a tenant holds land, and to whom the tenant is, or but for a contract would be, liable to pay rent for such land, and a tenant as a person who holds land of another person, and is, or but for a contract would be, liable to pay rent for such land to such other person. Can it be said that an ex-proprietary occupancy tenant holds land of the lambardar? The answer would be in the affirmative if the transferring cosharer had not acquired exclusive ownership over his *sir* land of which he became the tenant. The ownership of the land still remaining with the body of the proprietors of the village the ex-proprietary tenant would be deemed to hold land of the proprietary body, but on the other hand if there was division of title so as to make the co-sharer exclusive proprietor of the *sir* land appurtenant to his share he would on the transfer of his proprietary right, become the occupancy tenant of his transferee. The entire proprietary right in the land which before the transfer was *sir* and after it became an occupancy land would vest in the transferee and he alone would become the proprietor and landlord of it. The transferor to whom occupancy right accrues in pursuance of S. 49, C. P. Tenancy Act, must be deemed to be holding his land from the proprietor of the land, namely the transferee and would be liable to pay rent to him and to no one else. Section 188 (2) (a), C. P. Land Revenue Act, 1917, indeed places a lambardar in the position of the landlord within the meaning of the C. P. Tenancy Act. The landlord comtemplated there of whom the lambardar is the representative is the body of cosharers who collectively are the landlord of the village. Before the Land Revenue Act of 1917 was promulgated the rule that was consistently recognised was that lambardar was the agent or representative of the proprietary body as a whole and not of each cosharer. He was therefore regarded as representing the collective capacity of the several cosharers and was entitled to exercise the unity of right which vested collectively in the body of cosharers as will be evident from 11 C P L R 1,[11] 13 C P L R 113,[12] 10 N L R 5,[13] 10 N L R 93,[14] 11 N L R 164,[15] 12 N L R 24,[16] 13 N L R 96[17] and 19 N L R 59.[2] The lambardar therefore would have the power under S. 188 (2), C. P. Land Revenue Act, to perform all those acts which the cosharers collectively are entitled to perform in respect of the land jointly owned by them. The lambardar has no greater right than the body of cosharers he represents and he cannot assert any claim in respect of any land in which the cosharers as a body have no interest. It must follow that in respect of the land over which the cosharers have parted with their interest in favour of one of themselves they can have no proprietary claim left in that land any more than if it had been transferred to an outsider. It must therefore be held that the lambardar cannot be deemed to be the landlord of either the *sir* land which has passed into the exclusive ownership of one of the cosharers or of the ex-proprietary occupancy land when the exclusive owner of it disposes of his proprietary right in his exclusive *sir*.

That the lambardar is a representative of the body of proprietors is clear from the expressions "exercise the powers of the pro-

7. ('02) 15 C P L R 143, Dhondba v. Vishwanath.
8. ('24) 11 AIR 1924 Nag 381 : 78 I C 730, Nandkishore v. Lal Singh.
9. ('27) 14 AIR 1927 Nag 325 : 103 I C 818, Murlidhar v. Hussain Khan.
10. ('28) 15 AIR 1928 Nag 229 : 108 I C 790, Bapu v. Santosh Rao.
11. ('98) 11 C P L R 1, Pratap Singh v. Umrao Singh.
12. (1900) 13 C P L R 113, Gopal Ramkrishna v. Govind Pandurang.
13. ('14) 1 A I R 1914 Nag 4 : 23 I C 20 : 10 N L R 5, Murlidhar v. Jagannath.
14. ('14) 1 A I R 1914 Nag 84 : 26 I C 608 : 10 N L R 93, Haijnath v. Raghunath.
15. ('15) 2 A I R 1915 Nag 125 : 31 I C 464 : 11 N L R 164, Dina v. Bishambar Singh.
16. ('15) 2 A I R 1915 Nag 41 : 33 I C 758 : 12 N L R 24, Ganpatsao v. Pandurang.
17. ('20) 7 A I R 1920 Nag 54 : 54 I C 634 : 13 N L R 96, Hariprasad v. Govindrao.

prietors," "to the proprietors" and "on the common property" occurring respectively in cls. (b), (c) and (d) of sub-s. (2) of S. 188, C. P. Land Revenue Act. It is only in respect of the land relating to which he has to render account of the village profits to the proprietors that the lambardar is entitled to exercise the powers conferred upon him by cl. (a) of sub-s. (2) of S. 188, C. P. Land Revenue Act. When the *sir* land is divided among the proprietors in exclusive ownership each of the proprietors is entitled to appropriate the profits of the land falling to his share solely to himself without any reference to other proprietors.

Under the old Land Revenue Act of 1881, a person could be appointed as a lambardar for the whole mahal although he had no proprietary share in a patti of the mahal. Section 187 of the Act of 1917 effected a change in that separate lambardar has to be appointed for each patti. Since 1917, no person who has ceased to be a proprietor in a patti can continue to be a lambardar: *see* S. 189, C. P. Land Revenue Act, 1917, and 19 N L R 59.[2] That proves that proprietary interest is essential for holding the post of a lambardar. It is well-known that a managing partner is entitled to represent his partners only so far as the partnership business is concerned and not the exclusive and separate business or property of any of the partners. The representative capacity of the lambardar cannot similarly extend so far as to entitle him to deal with property which is the exclusive and separate property of one of the cosharers.

The *sir* land exclusively held by a cosharer is no doubt nominally assessed to revenue, but that is never paid. The cosharer is entitled to cultivate the land and appropriate the profits to himself without contributing a single pie to the land revenue of the mahal, which is ordinarily paid out of the rents recovered from the tenants. If the exclusive *sir* owner is entitled to appropriate the profits of the land, it is clear that he can also appropriate the rent recovered from the tenant of that land, if he chooses to lease it instead of cultivating it personally. Now if that cosharer were to sell his proprietary interest and thereby become an occupancy tenant of that land, why should the purchaser of the proprietary interest who becomes the exclusive owner of that land be placed in a worse position than his transferor vis-a-vis the lambardar who in reality is the agent of the proprietary body? I have never known of a lambardar having claimed the right to recover rent from a tenant of *sir* land which is exclusively held by a cosharer. That is obviously because the proprietary body has no interest left in that land and consequently the lambardar cannot deal with it.

If in a case where there is a disruption of the joint title over the *sir* land the ex-proprietary occupancy tenant is treated as the tenant of the proprietary body it would lead to anomalous results. If the lambardar as representing the proprietary body were to sue for rent it is he who would be entitled to eject the tenant if the latter fails to pay the rent decreed and when the lambardar takes possession of the land after ejectment of the tenant he would be holding it on behalf of the proprietary body who ex hypothesi have no interest left in the land. Similarly the lambardar would also claim the right to accept surrender from the ex-proprietary occupancy tenant and that would be contrary to the view taken in A I R 1924 Nag 383.[18] Again, if the ex-proprietary occupancy tenant sells his occupancy holding the lambardar would assert his claim to apply under S. 13, C. P. Tenancy Act, to set aside the transaction and that would be contrary to the view taken in A I R 1927 Nag 325.[9] If the lambardar is held to be the landlord in respect of a land in which he has no proprietary share, he may go so far as to lay action for recovering rent from the sub-tenant of an absolute occupancy or occupancy tenant. Section 188 is not intended to take away the rights of the sole landlord of any land in the mahal to recover the arrears of rent from his tenant. Unless there is a privity of contract between the landlord and the tenant of the exclusive owner of land in the mahal as there is between him and a tenant of the proprietary body, I fail to see how the lambardar who is the representative of the collective interest of the proprietary body can sue to recover it.

In my opinion the law laid down in 23 N L R 160[1] should be affirmed as sound with this explanation that the expression "in severalty" used there should be understood as meaning "in exclusive ownership". The distinction between the expression "land held in severalty" and "land belonging to a cosharer" was pointed out in a ruling of the Chief Commissioner reproduced at p. 247 of C. P. Revenue Manual, Vol II. When 23 N L R 160[1] was decided the expression " in severalty" was understood to apply indiffer-

18. ('24) 11 AIR 1924 Nag 383 : 78 I C 134, Khetsing v. Manmodsingh.

ently to land held in exclusive ownership or enjoyment only, although in that case the expression appears to have been used in the former sense. By an amendment of Ss. 171, 173 and 175, Land Revenue Act, made in 1931, lands held in exclusive ownership are now put in a category different from those held in severalty. In my opinion no useful purpose is likely to be served by departing from the view taken in that case. In the case of a tenant holding land of several cosharers there arose disputes among the cosharers as to the right to recover rent or to accept surrender. Section 188 (2) was enacted to avoid such disputes. That object would be frustrated if the lambardar were allowed to deal with such lands after division. Even if the lambardar were to recover rents from the tenants of such lands he would have to hand over the whole amount recovered by him to the sole owner of that land. Is it not reasonable that the latter should be left to recover rents from his own tenants ?

A question may well arise whether the principle in 23 N L R 160[1] would apply when there is no partition involving division of title but only an arrangement for separate enjoyment and appropriation of profits. In 14 N L R 101[4] it was held that such an arrangement was binding on the purchaser of an undivided share. In such a case also the lambardar would be bound to hand over the rent collected by him to the particular cosharer entitled to it but since (as pointed out in 14 N L R 101[4] itself) the lambardar does not cease to be a cosharer in respect of land so exclusively held by the other, the tenant of that land will, in point of law, be deemed to be the tenant of the whole proprietary body. Consequently the lambardar as the agent of that body will, by virtue of S. 188 (2), C. P. Land Revenue Act, be entitled to recover the rent.

Gruer J. — This reference involves consideration of the question whether 23 N L R 160[1] has been correctly decided. Relying on it the lower appellate Court has dismissed the plaintiff's suit in which he as lambardar claimed to recover rent of some exproprietary occupancy fields held by the respondent. Some argument was addressed to us about the sense in which the phrase "in severalty" is employed in 23 N L R 160.[1] Does it mean "separate ownership" or merely "separate enjoyment" ? Apparently it was being used in both senses in this province, and the resulting ambiguity called for a ruling of the Chief Commissioner and amendments of certain sections of the Revenue Act in 1931 by which lands held in exclusive ownership are distinguished from lands held in severalty. In 23 N L R 160[1] the expression was more probably used in the sense of exclusive ownership although one cannot be certain about it.

Unless S. 188 (2) (a), Land Revenue Act, has altered the position, the arguments for holding that the lambardar is not the landlord in such a case as the present seem to me to be unanswerable. The shareholder was exclusive owner of the *sir* land. His sale of his share including that land was a matter between him and his vendee alone. The vendee obtained the proprietary rights, *i. e.*, the sum total of his vendor's rights less the cultivating rights carved out of them. He therefore became the landlord of the exproprietor. He is the landlord as the term is defined in S. 2 (7), C. P. Tenancy Act.

But it is said S. 188 (2) (a), Land Revenue Act, alters all that and makes the lambardar landlord for all tenancy land in the village irrespective of its origin. That, to my mind, is to apply the section too widely. The section was enacted to give statutory expression to the rights and duties of the landlord as agent of the whole proprietary body, and it should be confined to this. He cannot be deemed to be the agent of a single co-sharer so far as the exclusive ownership of that co-sharer is concerned. He cannot therefore be deemed even by fiction of law to be the landlord of a person who in fact is the tenant of the shareholder. He has, no doubt, to collect the village profits. But so far as these fields are concerned that would be done by taking into account the "rental value" of the *sir* which is part of the malguzari assets: S. 8, C. P. Settlement Act. That is not the same thing as the "rent" of this land after it becomes an occupancy tenancy of the exproprietor. The rent he may pay may be more or less than the rental value, as the fixation of rent is a matter of contract subject to control by the Settlement Officer or Revenue Officer : Ss. 15 and 16, C. P. Tenancy Act.

If the lambardar is landlord of the whole village without restriction he would have the right to collect rents from sub-tenants and to accept surrenders from or eject exproprietary occupancy tenants. This would be an unwarrantable interference with private profits of a shareholder holding exclusive possession of *sir* land. The lambardar's function is to pay revenue to Government and to distribute the profits of the village. For that it is not necessary that he should

collect rent from the exclusive tenant of a shareholder. So far as I am aware, to hold otherwise would be to upset a practice which has worked smoothly and been rarely questioned even after the enactment of S. 188, Land Revenue Act. If the lambardar were entitled to collect rents which were private profits he would have to re-pay them to the true landlord. That would surely be a clumsy and unnecessary procedure.

I have now had the advantage of reading the differing opinions of Niyogi and Bose JJ., and find myself in agreement with the former. Where the land was held in separate enjoyment only I agree that, as it still belongs to the whole proprietary body, the lambardar as their representative would be entitled in law by S. 188 (2) (a) to recover the rent — although even in that case he might in practice allow the shareholders to do so. The distinction between the two cases was recognized in 35 ALL 27.[19] The learned Judges there remarked :

> It is to be noted that this is not a case where the vendor is really the sole owner of the proprietary title in the lands which he holds as *sir*. There are some such cases.

My conclusion then is that 23 N L R 160[1] is correctly decided, if the words "in severalty" in it mean "in exclusive ownership" but not otherwise.

Vivian Bose J. — Niyogi J.'s order of reference asks that the case before him be heard and decided by a Full Bench, but it was agreed at the hearing that the only question with which the Full Bench should concern itself is whether 23 N L R 160[1] was rightly decided. We have therefore to consider the facts of 23 N L R 160.[1] They are as follows : The plaintiff there, (one G), and the defendant B, were cosharers in a village in the Central Provinces. B owned an eight annas share, and G and two others owned the other eight annas. G was the lambardar. B was in possession of certain *sir* fields and according to the facts given in the judgment she held this *sir* in "severalty." In the year 1923, B sold her eight annas share to one M and thus became the exproprietary occupancy tenant of these *sir* fields. G then sued B for the rent of her holding and the question arose whether G was entitled to sue or M. B pleaded that M was her landlord and that he alone could sue. This contention was upheld.

A great part of the argument before us was directed to the meaning of the word "severalty" as used in the judgment and it was argued that much turned upon this. I do not think it does. But before expressing an opinion on that I will deal with this part of the discussion. The learned counsel for the defendant-respondent (the exproprietary occupancy tenant in the case out of which this reference arises) contended that "holding in severalty" meant holding as exclusive owner, and he relied on the definitions given in Wharton's Law Lexicon, page 789 and in Stroud's Judicial Dictionary. But I do not think it is legitimate to refer to these definitions because we are concerned here with the Central Provinces Land Revenue Act where the word "severalty" is used as a term of art in a special and restricted sense. It has come to acquire this special meaning for historical reasons.

When there are two or more co-owners of a village each can hold land in it in one of three ways. In the first place some particular plot of land can be his exclusive property to which the other cosharers have no right or claim and in which they have no interest. If there is a partition of the village, this piece of property would not be brought into hotchpot and the title of the person owning it would be unaffected by the partition. He would continue to hold it as before. The second possibility is when a plot of land is placed in possession of a particular cosharer for convenience of management. In such a case the plot is still common property. The title of the other cosharers is not displaced but they would not ordinarily be allowed to disturb the possession of the cosharer in possession without suing for partition. In such a suit the plot would be thrown into hotchpot and might or might not be assigned to the share of the same person when the partition was made. This is the kind of possession with which their Lordships were dealing in 18 Cal 10[20] and the Court of the Judicial Commissioner at Nagpur in 14 C P L R 76[21] and 14 N L R 101[4] at page 104. The third possibility is when land is held in common without any division by agreement (express or implied) for convenience of management. In that case each cosharer would be entitled to joint and undivided possession until partition and on partition the land would be thrown into hotchpot as before.

These were the three possibilities with which the revenue authorities of the pro-

19. ('13) 35 All 27 : 16 I C 399 : 10 A L J 487 (F B), Debi Prasad v. Bhagwan Din.

20. ('91) 18 Cal 10 : 17 I A 110 : 5 Sar 535 (P C), Watson & Co. v. Ramchund Dutt.

21. ('01) 14 C P L R 76, Padmasingh v. Sahadeo Sao.

vince had to deal when the C. P. Land Revenue Act of 1881 was passed. That Act drew the above distinctions between these several kinds of property but did not draw them very clearly. It used language which was inapt. It used the term "severalty" in a sense in which it is not ordinarily understood in legal terminology. It used the word "belonging" which has no special legal significance to denote a special legal concept. But it did distinguish between them. Section 136-K distinguished between lands held in "severalty" and in "common." Section 136-L dealt with land held in "severalty" and S. 136-N with *sir* land 'belonging' to a cosharer. It was clear that these different terms were intended to denote different legal concepts but exactly what the differences were was not properly understood and so it became necessary for the Chief Commissioner who in those days presided over the highest revenue Court to issue a ruling to clarify the position. This is revenue department ruling No. 5175 dated 7th December 1895. It is reproduced as a note to S. 136-N, C. P. Land Revenue Act of 1881 in the C. P. Revenue Manuals of those days and also as an appendix to Revenue Book Circulars VI-5 dealing with the partition of mahals and pattis. The Chief Commissioner said that the word "belonging" used in S. 136-N must be construed to mean land held in "exclusive ownership," that is to say in the first of the three senses which I have set out above. He gave illustrations of this kind of ownership which I need not reproduce, and then said :

> In all the above cases the lands in question have ceased to belong to the joint estate and may be said to belong to the cosharers in possession of them.

He next dealt with the term 'severalty' and said that it referred to the second of the three positions to which I have referred and the word "common" or "shamlat" to the third. This classification held the field down to the year 1917 and then the Chief Commissioner's terminology received legislative sanction in the new Land Revenue Act of 1917 which replaced the Act of 1881. Section 136-K of the old Act was reproduced as S. 171 in the new with a very slight verbal alteration which did not affect the sense. Before making a partition the Deputy Commissioner was told, as before, to record a proceeding specifying the lands held in "severalty," if any, and the lands held in "common." This section was further amended in the year 1931 and the Deputy Commissioner was then told also to record the lands held in "exclusive ownership." But I will ignore this amendment at the moment because it was not in existence in the year 1927 when 23 N L R 160[1] was decided. I will deal with the law as it stood in 1917 when the new Land Revenue Act of that year was passed. Section 136-L of the old Act was reproduced word for word as S. 173 in the new. This was also amended in 1931 but the amendment does not affect the present position. The point is that both sections, the old and the new, used the word "severalty."

Then followed the counter-part of S. 136-N which had created most of the doubt before the Chief Commissioner's ruling. This was reproduced as S. 175 in the new Act, but this time, instead of using the words "belonging to any cosharer" (the language of the old section), the new section said "which is the exclusive property of any cosharer." This section was also amended in 1931 but not this part of it which in my opinion is crucial for present purposes. It is clear then that the concepts of the terms "exclusive ownership," "severalty" and "common" which the Chief Commissioner had defined in the year 1895 were imported by the Legislature into the New Land Revenue Act of 1917 in the year 1917. All the three terms were used, and each was used in a different sense, and they were so interpreted by the revenue Courts in 13 N L J 45[22] at p. 46 after the passing of the new Act. The amending Act of 1931 made no difference to this. Indeed if anything it underlined the distinctions still further. But we can ignore that. It is enough that in the year 1917 it was placed beyond doubt by the Legislature that the term "severalty" as applied to lands affected by the Land Revenue Act, did not mean "exclusive ownership."

Whether that was the sense in which the term was used in 23 N L R 160[1] I do not know. In the ordinary way I would have had no doubt. I would have been clear that it must have been used in the sense in which, as I see it, the Legislature had intended it to be used. But unfortunately the two learned Judicial Commissioners who decided 23 N L R 160[1] used the term in the sense of exclusive ownership in two previous decisions, namely A I R 1924 Nag 381,[8] A I R 1927 Nag 325[9] and again in A I R 1928 Nag 229,[10] so it is possible that they also used it in that sense in 23 N L R 160.[1] But

22. ('30) 13 N L J 45, Kashi Prasad v. Beharilal Rai.

however that may be it makes no difference in the view I take. Whether the term was meant to indicate exclusive ownership or not, I think with respect, either way, that 23 N L R 160[1] was wrongly decided. The decision turns wholly on the difinitions of "landlord" and "tenant" given in the Tenancy Act. And as regards S. 188 (2), Land Revenue Act, (which in my opinion is crucial) it was set on one side as not applicable because "the Act makes the lambardar the landlord only in respect of such land as the body of proprietors whom he represents is the landlord of." With the utmost respect I do not think that that is so. I think it would have been so under the law as it stood before the Act of 1917 was passed, but in my opinion that Act has effected a radical alteration in the position of the lambardar which alteration has completely changed the old law. In argument the matter was also put somewhat as follows. It is permissible for one of several cosharers in a mahal to own *sir* land as his exclusive property. If it is his exclusive property, then the other cosharers have no rights of any kind in it, and it cannot be made the subject-matter of a partition between them. If that is so, then the lambardar who represents the cosharers as a whole in respect of their common property cannot be the statutory agent of this cosharer in respect of this item in which no other cosharer has any interest.

This sounds logical enough but in my opinion it overlooks the peculiar nature of malguzari tenures under the Central Provinces Land Revenue and Tenancy Acts. The malguzar in this province has not got the ownership of the land : that vests in Government. It has always vested there and is still there. Government has never parted with that fundamental right, and because of that S. 56, Land Revenue Act, states that all land, to whatever purpose applied and wherever situate, is liable to pay revenue to Government, and that neither length of occupation nor any grant made by the proprietor shall release such land from this liability. I have dealt with this at length in the opinion given by me in the Full Bench case reported in I L R 1940 Nag 348[23] at page 371. This fundamental concept results in queer repercussions and has emboldened the Legislature to impose liabilities and make conditions in order to facilitate the collection of Government revenue which it would probably not have imposed upon a true owner of the soil. I will examine first the Land Revenue Act, as it now stands because primarily that is what we are bound by. And here it is necessary to bear two things in mind. The first is that in these matters we are dealing with fictions and not with realities. The law says that for these purposes Courts must "deem" the lambardar to be the landlord whether he is so in fact or not. The second is that though the Land Revenue and Tenancy Acts speak of landlords and tenants the words are used as terms of art to denote special concepts and that the so-called landlord is not really a landlord as ordinarily understood, nor is the so-called tenant a tenant.

I have been at pains to stress this in the opinion recently delivered by me (with which my learned brother Niyogi J. did not wholly agree and with which my Lord the Chief Justice agreed only as to the conclusion without committing himself to the reasons given by me) in the Full Bench case in I L R 1940 Nag 348[23] at pp. 364 and 365 and at 370-377 to which I have already referred ; and I may here also refer to 41 Cal 926[24] at p. 938, where their Lordships of the Privy Council deal with another Indian Act in which the terms "landlord" and "tenant" are used in a special sense. I feel that we are likely to be led astray when dealing with these tenancies unless we place the ordinary law of landlord and tenant on one side and concentrate on the very special and exceptional conditions which the Land Revenue and Tenancy Acts of this province impose on both the "landlord" and on the "tenant." As I said before these Acts create very special tenures which are unknown to the ordinary law and prescribe in detail the rights, remedies and liabilities of the very special type of "landlord" which they create and the very special kind of "tenant." We have therefore to look to those special laws at every step and not to the ordinary law. I have little doubt that the real landlord of the exproprietary tenant is the transferee. I have little doubt that he is the person of whom the tenant holds his land and to whom but for a contract to the contrary he would be liable to pay the rent. I have little doubt that the transferee fulfils the conditions specified in the definition given in the Tenancy Act. I have no doubt that under the ordinary

23. ('40) 27 AIR 1940 Nag 49 : 186 I C 731 : ILR (1940) Nag 348 (F B), Punjaram Jagoba v. Ramu Chintoo.

24. ('14) 1 AIR 1914 P C 111 : 23 I C 632 : 41 Cal 926 : 41 I A 91 (PC), A. H. Forbes v. Maharaj Bahadur Singh.

law the landlord is the person entitled to sue the tenant for rent and not another. That is a commonplace. But we are not dealing here with the ordinary law. The Legislature has abrogated that and for reasons which I consider sound and just, but whether good or bad, has imposed special conditions, and it is to those special conditions that we must look.

The relationship of landlord and tenant is ordinarily founded on contract but in these cases though that is one of the ways in which these special "tenancies" can arise, the moment the contract is made the law tears it up and not a term of it can be given effect to. Thereafter the relationship between the parties is not governed by contract but by the special rules and laws which the Land Revenue and Tenancy Acts have made for those very special and exceptional tenures. One of these laws relates to the very special position assigned to the lambardar. Section 2 (6), C. P. Land Revenue Act, says that:

'Lambardar' means the proprietor of a mahal appointed to discharge the duties imposed on a lambardar by this Act.

The appointment is made by the revenue authorities under S. 187 and once made no civil Court can question it. Its jurisdiction in this respect is expressly barred by S. 220 of the Act. It is true the revenue authorities are directed to select one of the "proprietors" for this purpose but they alone can decide whether a man is a "proprietor" for these purposes or not. Even if they select a man who is not a proprietor according to the view of the civil Courts, the civil Courts cannot interfere or question the appointment. Their right to do so is taken away in express terms. Section 220 (p) says they shall not interfere: *see also* 31 N L R Sup 132[3] at p. 137. It is relevant to point out at this stage that though the lambardar is ordinarily regarded as the agent of the proprietary body he is not so in any strict sense of the term. Agency is a matter of contract. It is a matter of consent and mutual agreement between the principal and the agent. The scope and nature of the agency depends upon what is agreed between the parties. Not so here. The cosharers can protest as vigorously as they please. They can decline to agree to the appointment. It will make no difference if the revenue authorities choose to disregard their wishes and appoint the man against their will. Then again, the cosharers, and indeed the man himself, may desire to delimit the scope of his authority, but that also would make no difference. The Act sets out the exact nature of his duties and the extent of his rights and liabilities. It defines with precision what he may and may not do. Such a man is not an agent in any ordinary sense of the term. It is convenient to refer to him as a statutory agent and it is true that he represents the proprietary body (even though it be against their express wishes and consent) for certain statutory purposes, but in truth and in fact he is not an agent at all. He is a person clothed with authority by statute and empowered to carry out certain statutory duties, and unless we recognize this clearly I fear we may go astray. I stress this because it is here that the law has, in my opinion, been so radically altered by the Land Revenue Act of 1917. My Lord the Chief Justice and I had occasion to deal with this from another aspect in F. A. No. 138 of 1935[25] and I reproduce the following passage from our judgment:

The definition of lambardar given in the Land Revenue Act of 1881 is that he is the person appointed to represent the proprietary body "in its relations with the Government": beyond that no statutory recognition was afforded him and he was merely looked upon as a sort of customary agent of the proprietary body: *see* 11 N L R 164[15] at p. 168. One result of this was that his powers, except in his dealings with Government, could be withdrawn and the proprietors could, when they so chose, appoint another man, not the lambardar, and not even a proprietor, to represent them in all matters unconnected with Government: *see* 10 N L R 93.[14] Also that when there were more lambardars than one the consent of all had to be obtained to invest their action with validity unless the proprietors made some express or implied arrangement to the contrary: 12 N L R 24.[16] Now he is to be deemed the proprietor for certain purposes, the landlord for others, and a statutory agent who cannot be removed except by the revenue authorities and whose powers cannot be abrogated for still others.

I still adhere to that view. The effect of the old view was that the cosharers could put an end to the lambardar's powers by common action amongst themselves. Thus, if they partitioned privately, then each became the sole landlord of his patti and the lambardar was completely excluded. In addition to the rulings cited above, this view was taken in two cases which bear a closer resemblance to the facts of the present case, namely, 12 C P L R 66[26] at p. 69 and A I R 1922 Nag 126.[27] But now the position is quite different. The lambardar has been

25. *Reported in* ('39) 26 AIR 1939 Nag 287 : 189 I C 273, Ganga Prasad v. Itwar Singh.
26. ('99) 12 C P L R 66, Chandrabhan v. Deo Rao Kunbi.
27. ('22) 19 A I R 1922 Nag 126 : 67 I C 121, Chunga Prasad v. Phulwa.

given a statutory status by the new Act which no one can shake, and if the Legislature chooses to say that in respect of these special and peculiar tenures which it has created the lambardar is to be deemed the landlord for certain purposes, even of land in which he has no proprietary interest, no one can do anything about it, especially as even under the old law the cosharers could have appointed such a person to deal with matters which did not directly concern Government by private agreement amongst themselves.

Consider this example. Take the case of a lambardar who sells all his interests in the mahal to another. What happens? He does not cease to be the lambardar, and therefore "the landlord," simply because he no longer has any sort or kind of interest in the mahal and possesses no land in it. He continues until somebody else is appointed in his place. That is the effect of S. 2 (6) and is what was decided in A I R 1928 Nag 123[28] and in A I R 1930 Nag 210.[29]

Take another example. Consider a case in which the mahal is imperfectly partitioned into pattis. The lambardar continues to exercise sway over the entire mahal notwithstanding the partition even though he may have no interest whatever in some of the pattis and may hold no land in them. He continues until he is removed under S. 189. This was decided by a Full Bench of the Nagpur Judicial Commissioner's Court in 31 N L R Sup 132,[3] and if I may say so with respect I think the decision was right. Indeed it was conceded during the arguments that this would be the position but it was contended that that is only a temporary expedient. It may be, but nevertheless the expedient holds good until, as the learned Additional Judicial Commissioners remark, the lambardar is removed under S. 189. After all the remedy is simple. All that a party affected has to do is to apply to the Deputy Commissioner to have any partition or division privately effected, recorded and recognized under S. 47 (2), Land Revenue Act, read with Ss. 66, 77 (1) (a) and 106 (g), have a new patti created and have a new lambardar appointed. The definition of patti has been enlarged in the new Act in order to enable this to be done. Originally it was confined to lands allotted to a cosharer by an imperfect partition made under the Act. Now it is wide enough to include pattis formed by private partition. Even under the old Acts the right of cosharers to effect private partitions among themselves by common agreement was recognized and upheld: *see* 7 C P L R 54,[30] 7 C P L R 137,[31] 12 C P L R 66[26] at p. 69 and A I R 1922 Nag 126.[27] Now the matter is even clearer. If then with these simple remedies to hand a cosharer does not choose to exercise these rights, or if he prefers to have the lambardar do his work for him (and it may well be that he does), why should the tenant of all persons be allowed to object? What does it matter to him who he pays his rent to provided he does not have to pay twice over?

The opinion of a member in charge is irrelevant in construing an Act and I have reached my conclusion on an analysis of the Act itself, but it is gratifying to note that the view I take about the radical alteration in the lambardar's position under the new Act is shared by that very able and experienced administrator Mr. H. A. Crump who piloted the Land Revenue Bill through the local Legislative Council. In his Statement of Objects and Reasons he said:

> The present definition of 'lambardar' is unnecessarily narrow. The lambardar's duty is no doubt primarily to pay the revenue, but it is not necessary to limit his representation of the proprietary body to 'relations with Government'. The tendency of cosharers to insist on their rights of separate management of their pattis is sometimes both inconvenient to Government and bad for the village, and it is necessary to emphasise and strengthen the position of the lambardars.

But to continue the analysis of the Act, S. 188 (2), Land Revenue Act, sets out the powers with which the lambardar is clothed by the Legislature. And the first of these is this. The Act says that he shall "be deemed to be the landlord within the meaning of the Central Provinces Tenancy Act 1898."

Now what is the force of the word "deemed"? I do not think there can be any doubt, but if there is, it is resolved by their Lordships of the Privy Council. They state in 54 Bom 216[32] at p. 223.

> Now when a person is 'deemed to be' something, the only meaning possible is that whereas he is not in reality that something the Act of Parliament requires him to be treated as if he were. It follows that although the High Court was per-

28. ('28) 15 A I R 1928 Nag 123 : 107 I C 527, Raoji v. Mt. Girjabai.
29. ('30) 17 A I R 1930 Nag 210 : 123 I C 897, Raghubar v. Hukumchand.
30. ('94) 7 C P L R 54, Thakur Hazarisingh v. Jagatsingh.
31. ('94) 7 C P L R 137, Babusingh v. Jaitlal.
32. ('30) 17 A I R 1930 P C 54 : 121 I C 532 : 54 Bom 216 : 57 I A 49 (P C), Commissioner of Income-tax, Bombay Presidency v. Bombay Trust Corporation, Ltd.

fectly right in holding that if section 42 (of the Income-tax Act) stood alone 'agent' in that section would mean an agent in actual receipt of the profits or gains which were to be assessed, they failed to appreciate that S. 43 puts the person who comes within its term artificially into the position of the agent and of assessee under S. 42.

So also here. The Act tells us that though the lambardar may not be the real landlord Courts must disregard the reality and resort to a fiction, at any rate for the purposes of S. 188 (2), and put him artificially into a position which he does not really occupy. Even though another man may in truth and in fact be the real landlord the Court is told to ignore that fact and to look upon the lambardar as the real man and treat him accordingly. The meaning given to 'landlord' in the C. P. Tenancy Act of 1898 is

the person of whom a tenant holds land, and to whom the tenant is, or but for a contract would be, liable to pay rent for such land.

(The definition in the new Tenancy Act of 1920 is the same but that is by the way.) Therefore S. 188 (2) (a), Land Revenue Act, tells us that even though the tenant actually holds land of another person and is, or but for a contract would be, liable to pay rent to him, we must ignore these facts and treat the lambardar as the person of whom the tenant holds land and to whom he is, or but for a contract would be, liable to pay the rent. If that is so, and I can see no escape from the clear words of the Act, I find it impossible to hold that Courts can refuse to allow the lambardar to sue, whatever the realities may be. If the Courts must regard him as the person to whom the tenant is bound to pay his rent I find it difficult to see how they can refuse to allow him to sue for the rent when it is not paid.

But to continue. How far does the lambardar's power extend? Section 188 (2) says that he shall be deemed to be the landlord in the mahal or patti for which he is appointed. If he is the landlord, then there cannot be another landlord for these purposes. If he is the person to whom the tenant is bound to pay the rent, then he alone can sue, and all we have to see is whether the land in respect of which the rent is due and in relation to which the tenancy arises is situate within the mahal or patti to which the lambardar in question is appointed.

What then is a mahal and what a patti? Here again we turn to the definitions. Mahal is defined in S. 2 (8) (a) as

any area, not being a malik-makbuza plot or a survey number which has been separately assessed to land revenue . . .

I gather that the plot of land with which 23 N L R 160[1] was dealing was not separately assessed to land revenue, and it is clear that it was not a malik makbuza plot, therefore it must have been a part of the mahal (unless there were pattis, and that does not seem to have been the case) for which G had been appointed lambardar. If that was so, then clearly, as I see it, G was the person entitled to sue for the rent.

Turning next to the definition of patti we find it defined in S. 2 (12) as "the lands in a mahal held by any cosharer or body of cosharers in separate ownership."

At first sight this appears to lend some support to the view taken in 23 N L R 160.[1] It will be remembered that the reason why S. 188 (2) was placed on one side was because according to the view taken there "the Act makes the lambardar the landlord only in respect of such land as the body of proprietors whom he represent is the landlord of." But even so, if A is appointed the lambardar of a mahal, then however wrong that appointment may be, and however many pattis there may be in the mahal he remains, as I see it, the landlord for that mahal. Therefore all that is left is to see whether the land in question falls within that mahal. And that is what the rulings which I have cited above hold.

Now there can, in my opinion, be no doubt that the *sir* land of a mahal forms part of the mahal whether it be held in exclusive ownership or in severalty or in common, and whether the mahal be divided into pattis or not. The test under the definition of a mahal is to see whether the land is separately assessed to land revenue, and we find from S. 81 that only three units are separately assessed, namely, estates, mahals and malik-makbuza holdings. We also find from S. 56 that all land is liable to the payment of land revenue unless it has been expressly exempted, and even in the case of exempted lands a camil jama, that is, the amount which would be payable but for the exemption, has to be recorded: *see* S. 73). It follows that *sir* land is also liable to the payment of land revenue whether it is the separate and exclusive property of one of the cosharers or not. Under S. 82 the assessment is offered (1) in the case of an estate, to the proprietor, (2) in the case of a mahal, also to the proprietor unless there are more than one, and in that event to the lambardar, and (3) in the case of a malik-makbuza holding, to the malik-makbuza. It follows from this, and from S. 81, that *sir* land is

not separately assessed, and that the share of the revenue recoverable from it is included in the lump sum to which the mahal as a whole is assessed; also that no separate assessment is offered to a cosharer having exclusive possession of a plot of *sir* land as it is to the malik-makbuza. Therefore even in respect of *sir* plots which belong exclusively to a cosharer the lambardar represents that cosharer and accepts the assessment on his behalf even though he has no right or interest of any kind in the plot. If then he can represent these persons in their relations with Government there is no reason why he should not also do so in their relations with tenants.

The truth of the matter is that though the status of malguzars as farmers of revenue has been considerably blurred by the passage of time and by the various modifications introduced by the Legislature from time to time, fundamentally it has remained the same, and whatever rights they may have been given and whatever privileges they may have acquired, they have all been subject to their fundamental obligations in respect of the collection of Government revenue. That fundamental conception underlies everything and it explains much which on the face of it appears absurd and incongruous. Viewed in this light, matters which seem obscure in the relations of the so-called landlord with his so-called tenant and of the lambardar with both become easier to understand. Under S. 188 (2) (a) the lambardar is deemed to be the landlord within the mahal or patti for which he is appointed, and under sub-clause (b) it is he who has to collect the village profits and, if necessary, to institute suits to enable him to do so. Now the rent payable by the tenants of the mahal or patti is part of the village profits. Therefore it is the lambardar who has to collect them and it is to him alone that the tenants need and indeed must pay. The reason why he is given these powers is because he is the man who has to pay Government its quota of the land revenue from the profits so collected. That he does so in practice and sues for arrears in all ordinary cases is beyond dispute and his right to do so has never been questioned. Unless therefore this right is inherent in the nature of his office the only other source from which his powers can be derived is S. 188 (2) (b)

An indication of the nature of these village profits is to be obtained from S. 8, Central Provinces Settlement Act, which says that the "malguzari assets" of a mahal include "the rents of holdings fixed by a settlement officer." It is true the term used is "malguzari assets" and that these assets may not cover as wide a field as the village profits, but unless the matters included as the malguzari assets are included in the term "village profits" there will be very little left for the malguzar to recover, so little indeed that it will be impossible for him to pay the land revenue. The rent collections usually form by far the largest item in the lambardar's accounts, and in the very nature of things, village economy being what it is, that must be so. There is also an intimate connexion between the lambardar, the rental collections and the assessment of the land revenue. Section 1, Settlement Act, says that that Act shall be construed together with the C. P. Land Revenue and Tenancy Acts and states that in so far as it relates to land revenue it shall be deemed to be a part of the Land Revenue Act of 1917 and in so far as it relates to tenancy it shall be deemed to be a part of the Tenancy Act of 1920. Section 9 states that the land revenue assessed on a mahal shall be 50 per cent. of the malguzari assets of such mahal. And we know from S. 188 (1) (a), Land Revenue Act, as well as from S. 123 that one of the duties of the lambardar is to pay the land revenue to Government and that if it is not paid it can be recovered from him under S. 125 as well as from the other cosharers. Seeing therefore the intimate connexion which there is between the land revenue and the malguzari assets, and seeing that the bulk of these assets usually consist of rent collections, and seeing that the lambardar has to pay the revenue, I think it is legitimate to infer that he has been given the right under S. 188 (2) (c) to collect that part of the assets which constitutes its main item.

I think that fundamentally the reluctance of the learned Additional Judicial Commissioners in 23 N L R 160[1] to give effect to the plain language of S. 188 (2), Land Revenue Act, is grounded in an unexpressed fear of perpetrating a two-fold injustice, that of exposing the unfortunate tenant to a double liability for rent, and that of depriving the unfortunate transferee who is the real landlord of the fruits of his purchase. I think with respect that both fears are ungrounded. Under the view I take the tenant would not have to pay twice over because if he pays to the person appointed by the law to

collect his rent, his obligation is discharged just as effectively as it would be if he paid to an agent expressly authorized by the landlord in that behalf. And as for the transferee, the fiction imposed by the law is not to be carried further than the Act warrants. The lambardar is not to be deemed the landlord for all purposes but only for the special purposes indicated in the Act. Once we travel beyond that, then we leave the realm of fiction and enter a world of realities. We are at liberty to face facts again. This means that the relations of the cosharers inter se (including of course those of the transferee who by reason of his purchase is now one of them) and their rights and liabilities as between themselves are regulated according to the ordinary law and not according to some statutory fiction.

I will illustrate what I mean by a concrete example. Let it be assumed that there are four cosharers in a mahal and that one of them is the newly acquired transferee of a *sir* plot which was held in exclusive ownership by the transferor. And let it be assumed that the revenue authorities have appointed only one lambardar for the whole mahal and have not appointed a separate lambardar for the separate patti which this *sir* plot held in exclusive ownership may constitute. Let the total village profits of the mahal, after deducting the costs of collection, the land revenue, and other items of expenditure, be X, and let the rent fixed for the *sir* plot in question be Y. Then the matter will work out thus. The lambardar will collect the rent Y from the ex-proprietary tenant and he will pay over to the transferee, not 1/4 of X plus 1/4 of Y (which is what a person holding in "severalty" would get in such circumstances), but 1/4 X plus the whole of Y. This inflicts no hardship or injustice on the transferee. It gives him his entire dues. It preserves to him his rights intact and at the same time protects the tenant and simplifies the task of village administration. The only difference it makes to anybody is that it changes the agency of collection. In my opinion this is the only reasonable way to view these sections. If not, either the unfortunate ex-proprietary tenant is exposed to a double action for rent, or, if he is saved from that, then the unfortunate lambardar is made powerless to make a part of his recoveries without in any way being relieved of his obligation to Government. In my opinion it is no use saying that he can sue the transferee. That is not the quick powerful remedy which the Act gives him. Moreover, if the transferee has no land and is otherwise a pauper, it would be pointless to sue him.

The other view would open up an easy way for a needy proprietor in exclusive possession of *sir* to evade his obligations. All he would have to do would be to transfer his holding to an obliging relation who had no money of his own and then refuse to pay either rent or revenue. The relation would refuse to sue and would refuse to eject him. The lambardar would have to pay Government and would have no remedy left over except the doubtful one of sending the transferee to a civil jail and of having to pay for his upkeep while there. It would create an impossible situation. Apart from this, I can see nothing fantastic in the idea of a man who has no interest in the land being appointed an agent for the collection of another man's rent. It is true that that does not make him a landlord but then he is not the landlord anyway; he is only deemed to be one for certain specified purposes. The whole thing is a fiction. Once it is realized that this is by far the easiest way for Government to get its revenue collected, then there is no reason why the Legislature should not introduce these fictions and impose terms of this nature on persons who at bottom are mere farmers of the Government revenues, however, much their status and dignity may have been enhanced in other ways. In my opinion 23 N L R 160[1] was wrongly decided and should be overruled.

R.K. *Reference answered.*

**** A. I. R. 1941 Nagpur 36**

Full Bench

STONE C. J., GRILLE, NIYOGI, GRUER AND VIVIAN BOSE JJ.

Jagniram Premsukh Firm — *Decree-holder* — Appellant

v.

Ganpati Damaji and others — *Judgment-debtors* — Respondents.

Misc. Appeal No. 262 of 1936, Decided on 21st November 1940, from order of Addl. Dist. Judge, Yeotmal, D/- 18th August 1936.

***(a) Civil P. C. (1908), Ss. 2 (5) and 16 — Courts in Berar are not foreign Courts in British India and vice versa.* (Per *Full Bench; Niyogi J., Contra).*

(Per *Full Bench*)—Courts in Berar which have been established or continued by the authority of the Governor-General in Council are not "foreign Courts" within the meaning of the Code of Civil Procedure in British India and vice versa : *Case law discussed.* [P 44 C 1; P 45 C 1]

(Per *Niyogi J.*)— The Berar Courts are British Courts but not British Indian Courts and as such they are foreign Courts. The British Courts do not possess the inherent authority to adjudicate on a matter relating to property situated in Berar and vice versa. [P 48 C 1 ; P 49 C 2]

*(b) *Jurisdiction—Rule that property must be within territorial jurisdiction can be waived* (Per *Full Bench; Niyogi J., Contra.*)

(Per *Full Bench*) — The rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits can be validly waived by submission. [P 44 C 1 ; P 45 C 1]

(Per *Niyogi J.*) — The parties cannot by their mutual consent nullify S. 16, Civil P. C., so as to confer jurisdiction on a British Court which the law itself refused to do. If the Court has inherent jurisdiction the irregularity in the exercise of it will be cured by submission, but if it has no inherent jurisdiction submission cannot validate its judgment. [P 49 C 2 ; P 50 C 1]

*(c) *Civil P. C. (1908), S. 21 — S. 21 is not limited to appeals and revision in same suit.* (Per *Full Bench ; Niyogi J., dissenting*).

(Per *Full Bench*)—The rule embodied in S. 21, Civil P. C., is not limited to appeals and revisions in the same suit. [P 44 C 1 ; P 45 C 1]

(Per *Niyogi J.*)—An objection on the ground of the absence of the inherent jurisdictlon can be raised for the first time in appeal or in second appeal or in Letters Patent appeal or in revision or in an appeal after remand or even in the course of arguments before the Privy Council and also in execution proceedings of the same suit : *Case law referred.* [P 50 C 1, 2]

**(d) *Civil P. C. (1908), Ss. 2 (5), 16, 17 and 21—British Indian mortgage decree with respect to Berar property and British Indian property can be executed in Berar — No suit on British Indian judgment is necessary.* (Per *Full Bench: Niyogi J., contra.*)

(Per *Full Bench*) — A mortgage decree obtained in British India in respect of property situate in Berar as well as within the local limits of the Courts in which the suit is instituted can be executed in Berar as it stands without the necessity of suing again upon the British Indian judgment. [P 44 C 1 ; P 45 C 1]

(Per *Niyogi J.*)—A mortgage decree obtained in British India in respect of property situate in Berar (out of British India) is incapable of being executed in any Court in Berar, nor can a suit be maintained on the basis of the judgment of a Court in British India, which is null and void. The only course left is to institute a fresh suit in the Court in Berar to enforce that mortgage. [P 52 C 1]

M. R. Bobde and R. N. Padhye—for Appellant.

A. V. Khare, W. B. Pendharkar and S. P. Gole, and T. P. Naik — for Respondents 1 and 5, respectively.

ORDER OF REFERENCE.

Stone C. J., and Vivian Bose J. — A preliminary objection is raised here which must, we think, fail. The appeal arises out of proceedings in execution of a decree obtained in the Court of the Additional District Judge, Wardha, upon a mortgage executed by the judgment-debtor in favour of the decree-holder. The mortgage comprised property situate in Wardha in the Central Provinces and also property situate in Yeotmal in Berar. The suit was brought in the Wardha Court and the decree was against both sets of property. It was for foreclosure. After the decree-holder had obtained possession of the Wardha estate the decree was transferred to the Court of the Additional District Judge at Yeotmal for execution in respect of the Yeotmal property. The judgment-debtor thereupon raised an objection and contended that the decree was a nullity in so far as it affected the Berar property because Berar was foreign territory and so no Court in British India had jurisdiction to entertain a suit in respect of property situate there. The objection was allowed by the Yeotmal Court and execution refused, so the decree-holder has appealed here. At the same time, in order to have two strings to his bow, he has also instituted a separate suit in the Yeotmal Court upon his judgment for foreclosure of the Berar property.

The learned counsel for the judgment-debtor respondent contends that the decree-holder having done this has either accepted the soundness of the lower Court's finding or has elected to pursue the other remedy ; in either case he cannot continue this appeal so long as the separate suit is in being. He must withdraw either the suit or the appeal. We agree that it would be undesirable to have both proceedings going on at the same time as that might lead to conflicting decisions, but we cannot agree that it is either illogical or wrong for the decree-holder to do his utmost to safeguard his own position. If he were to fail here, a separate suit on the British Indian judgment would be the right remedy, but it might well be that by the time the appeal was decided the limitation for that would have gone, consequently the appellant decree-holder was well within his rights in instituting that suit at an early opportunity. Of course that suit ought, as a matter of practical convenience, to be stayed pending the decision of this appeal, and that we gather has been done, but that is no bar to the prosecution of this appeal. The preliminary objection therefore fails.

On the merits we do not think that the lower Court is right. We are prepared to agree, in accordance with the Full Bench decision in 31 N L R Sup 57[1] that in certain special and exceptional circumstances the

1. ('36) 23 A I R 1936 Nag 1 : 161 I C 877 : 31 N L R Sup 57 (F B), Murlidhar v. Gorakhram Sadhuram.

executing Court can question the jurisdiction of the Court which passed the decree under execution on the ground that it is a complete nullity; and we are further prepared to accept the decision of another Full Bench of the Judicial Commissioner's Court (31 N L R Sup 43[2]) that in general, (though not in this particular case), Courts in British India lack territorial jurisdiction in respect of property situate in Berar. But beyond that we are not prepared as at present advised to go. With the utmost respect to the learned Judicial Commissioners who decided the earlier Full Bench (the later of the two just cited) we cannot agree that that concludes the matter. In our opinion want of territorial, as opposed to inherent jurisdiction is not a fatal defect to a suit. It is only an irregularity and it is curable. Section 21, Civil P. C., states that :

> No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice.

This makes it clear that want of territorial jurisdiction is not one of those defects which renders the Court so totally void of power as to make its decree a nullity; and we gather this from S. 18 as well. When there is want of inherent jurisdiction nothing can cure it, neither consent nor waiver nor estoppel. As opposed to this, the wrong place of suing is such a trivial defect that not only must it be ignored unless objection is taken at the earliest possible opportunity but even if it is taken then and overruled (except where the order is set right at once by a higher tribunal) the objection cannot be repeated at a later stage unless there has been a consequent failure of justice. The word connecting these two phrases in S. 21 is "and" and not "or." *See* in this connexion 42 ALL 74[3] at p. 76, 49 Cal 37[4] at p. 41 and 25 N L R 104[5] at page 106 also 11 Lah 15[6] which deals with a corresponding provision in S. 11, Suits Valuation Act, relating to the pecuniary jurisdiction of the Court. The earlier Full Bench, 31 N L R Sup 43[2] considers that S. 21 does not apply for two reasons : (1) because it relates to domestic tribunals and not to "foreign Courts," (p. 53), and (2) because S. 21 is confined to appellate and revisional tribunals having jurisdiction over the Court in which the defect occurred and does not extend to a Court dealing with the question in a separate suit (page 54); and this reasoning would extend to execution proceedings in the same suit as well. With the utmost respect we are unable to agree.

As regards the first objection what the learned Judicial Commissioners have overlooked is that though Berar is foreign territory Berar Courts are not "foreign Courts" within the meaning of the Civil Procedure Code and are therefore on the same footing as other domestic tribunals. So also Courts in British India are domestic tribunals within the meaning of the Berar laws. The term " foreign Court " is defined in S. 2 (5). It means :

> A Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council.

Here again the conjunction is "and" and not "or". Moreover, Berar Courts are established by the Governor-General in Council and they are not wholly devoid of authority in British India for, as will be shown later, their decrees can be executed there.

It is well known that Berar used to be administered (before the Government of India Act, 1935 which does not apply to this case; but more of that later) under the Indian (Foreign Jurisdiction) Order in Council of 1902: *see* 26 N L R 326[7] at pp. 328 and 329. Under that order His Majesty acting under the terms of a treaty with His Exalted Highness the Nizam delegated the right to administer the territories of Berar to the Governor-General in Council, and also the right to set up and continue Courts and other tribunals there. The Court of the Additional District Judge at Yeotmal was one of the Courts so established. Therefore it is not a foreign Court within the meaning of this definition. It is true their Lordships of the Privy Council appear to have decided otherwise in respect of a Secunderabad Cantonment Court in 56 Mad 405[8] at

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2. ('35) 22 A I R 1935 Nag 250 : 159 I C 739 : 31 N L R Sup 43 (F B), Gangaram Tekchand v. Dharamsi Jetha Co.
3. ('19) 6 AIR 1919 All 82:52 IC 801 : 42 All 74:17 ALJ 1034, Nand Kishore v. Abdur Rahman.
4. ('22) 9 AIR 1922 Cal 345 : 65 I C 833 : 49 Cal 37 : 33 CLJ 497, Midnapore Zamindary Co. Ltd. v. Naresh Narayan Roy.
5. ('29) 16 A I R 1929 Nag 73 : 116 I C 645 : 25 N L R 104, Mukundas v. Motiram.
6. ('29) 16 A I R 1929 Lah 509 : 128 I C 122 : 11 Lah 15 : 31 P L R 408, Shankar Nath v. Tirlok Singh.
7. ('30) 17 A I R 1930 P C 267 : 128 I C 664 : 58 Cal 570 : 57 I A 318 : 26 N L R 326 (PC), Dattatraya Kano v. Secy. of state.
8. ('33) 20 AIR 1933 P C 134: 142 I C 552 : 60 I A 167 : 56 Mad 405 (PC), Ananta Padmanabhaswami v. Official Receiver, Secunderabad.

p. 410. But their Lordships did not refer to the definition in S. 2 (5) nor was it cited before them, so we can only conclude that on the facts before their Lordships it did not apply. Their Lordships refer to a Calcutta decision 21 Cal 177[9] at p. 179 and state that

it is not suggested that the position of Secunderabad has altered from that stated by the Foreign Office to the Court.

All that we can gather from that decision is that the Secunderabad Cantonment "is still the property of the Nizam and is not considered to be within British India", also that "the British Government exercises in the Cantonments of Secunderabad powers similar to those which it exercises in British India" but that they are exercised under Ss. 4 and 5, Foreign Jurisdiction and Extradition Act of 1879 which sections regulate the exercise of any power or jurisdiction which the Governor-General in Council has within any country or place beyond the limits of British India.

The Foreign Jurisdiction and Extradition Act of 1879 is "an Act to provide for the trial of offences committed in places beyond British India and for the Extradition of criminals". It has nothing to do with the establishment and constitution of Courts of Justice. The question before the Calcutta High Court was whether security for costs ought to be demanded from the plaintiff under S. 380, Civil P. C., 1882. That turned upon whether the plaintiff resided outside British India and whether he had property within British India independently of the property claimed in the suit. The plaintiff contended that he resided within the British Cantonment of Secunderabad and so was resident in British India. Therefore the question narrowed down to this: was the British Cantonment of Secunderabad a part of British India? It was held that it was not. We cannot gather either from this, or from their Lordships' decision, that the Court in question before their Lordships had been established by the Governor-General in Council, and that of course is the deciding factor here.

Sections 43 and 44, Civil P. C., 1908 draw a distinction between Courts in the territories of any foreign prince or State which have been "established or continued by the authority of the Governor-General in Council" and those which have not. In the former case British Indian decrees are executable as in a domestic tribunal, while in the latter, though they are to be executed in the same way when the necessary notification has been issued, the executing Court remains a "foreign Court" and does not become a domestic one : *see* 15 Bom 216[10] at p. 219. Therefore unless it can be shown that the Court in question before their Lordships was so established or continued (and that has not been done) we are unable to regard their Lordships' decision as relevant to the question at issue here. It follows that, in our opinion, from the point of view of British Indian Courts, the Court of the District Judge at Yeotmal is not a "foreign Court" within the meaning of the Civil Procedure Code and so it must be regarded as a domestic tribunal for all present purposes. This is also evident from the fact that the Berar laws have been framed so as to make these provisions reciprocal.

The Civil Procedure Code, 1908, with certain modifications, was applied to Berar on 3rd November 1913 by Notification No. 3510-I. B. of that date. It may, therefore, for the sake of convenience, be regarded as the Berar Civil Procedure Code though that is not what it is officially called. The modifications are given in item No. 92 of Sch. 1 to the notification. The ones relevant to the present case relate to S. 29 (proviso) and Ss. 43 and 78 (b). The first enables summonses issued in British India to be served in Berar and vice versa. The second enables decrees to be executed in either place (and this is important in the present case) and the third commissions. The result is that Courts in British India and in Berar are not "foreign Courts" vis-a-vis each other but are domestic tribunals for all these purposes. That being so, S. 21 must, in our opinion, apply as between British India and Berar just as much as it does between one part of British India and another.

It also means that we dissent from the view taken in 4 N L R 61[11] because although that decision was under the old Code of Civil Procedure (that of 1882) the definition of "foreign Court" given in S. 2 of that Code was in all essential respects the same as the present one, and the Courts then in existence in Berar were established by the same authority.

Turning now to the second reason given by the Nagpur Full Bench there is a con-

9. ('94) 21 Cal 177, Hossain Ali Mirza v. Abid All Mirza.

10. ('91) 15 Bom 216, Haji Musa Haji Ahmed v. Purmanand Nursey.

11. ('08) 4 N L R 61, Syed Imam v. Mohomed Shikandar.

flict on this point between Calcutta and Allahabad on the one hand and Madras and Lahore on the other. But before dealing with these cases, we will refer to two decisions of the Privy Council which, in our view, enunciate the principle underlying this question. The first is 9 ALL 191[12] at p. 203. It states that

> when the Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent, convert it into a proper judicial process . . . . . But . . . when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

The second is 11 Mad 26[13] at p. 36. Their Lordships quote the above passage and state:

> In the present case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

It is clear that their Lordships draw a sharp distinction betweeen inherent incompetency and a mere irregularity in procedure. The former can never be cured. The latter may be. Which then does the wrong place of suing amount to? When the Legislature itself states that the defect is curable, (and it indicates this not only in S. 21 but also in S. 18), we are unable to see how it can be placed on the same footing as an inherent incompetency which, as their Lordships point out, can never be cured. Support is lent to this from the language of their Lordships in still another case, 42 Mad 813[14] at p. 820:

> This is not an objection to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction.

This also suggests that the two are not the same thing. It will be seen from the decisions of the Privy Council on this point that an objection to a want of inherent jurisdiction can be taken at any stage and at any time, even in the course of the same suit. It must follow that when S. 21 states that an objection to territorial jurisdiction cannot be taken at the appellate or revisional stage unless the conditions mentioned there are fulfilled, that it is not an inherent lack of capacity.

We agree with the decisions in 43 Mad 675[15] and 49 Mad 746[16] at pp. 749 and 750 that to sue in the wrong place is a mere irregularity which is curable for all purposes and not merely for the purposes of appeal and revision in the same suit.

In the former case, which was a decision of a Full Bench, Wallis C. J., pointed out at p. 686 that:

> The ordinary way of questioning a decree passed without jurisdiction is on appeal or in revision, and if this is forbidden, a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing.

The reasoning would apply, in our opinion with even more force to the powers of a Court in a separate suit. But however that may be, it certainly applies, we think, to execution proceedings in the course of the same suit. It was, we think, unnecessary to carry the matter further in the Code, because once the principle is laid down that the defect is a curable irregularity and that it cannot be attacked even in appeal or revision all that is necessary to be said has been said. It shows that the matter is final. It is, we feel, impossible to regard the Legislature as having enacted that while the proceedings in the suit are good so far as that suit is concerned, and can be continued right up to the appellate stage, nevertheless a party who has taken the chance of obtaining a decision in his favour can turn round and challenge it either in a separate suit or in execution proceedings when he loses. There would clearly be no point in saying that a suit is good and can be continued right up to the appellate stage if the decree can be challenged as a nullity for want of jurisdiction at the execution stage. If the proceedings are good throughout all its stages, so far as that suit is concerned, they must, we think, be good for all purposes.

The principle is much wider than S. 21. It is also to be found in S. 531, Criminal P. C., and was so applied in 9 Rang 338.[17] There, a conviction of the Mandalay Courts was upheld even though they had no territorial jurisdiction over offences committed in the Shan States to which the Code of Criminal

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12. ('87) 9 All 191: 13 I A 134 : 4 Sar 741 (PC), Ledgerd v. Bull.

13. ('88) 11 Mad 26 : 14 I A 160 : 5 Sar 54 (PC), Minakshi Naidu v. Subramanya Sastri.

14. ('19) 6 A I R 1919 P C 150 : 51 I C 185 : 42 Mad 813 : 46 I A 151 (PC), Setrucharlu Ramabhadra Raju v. Maharaja of Jeypore.

15. ('20) 7 AIR 1920 Mad 1019 : 58 I C 871 : 43 Mad 675: 39 M L J 203 (FB), Zamindar of Ettiyapuram v. Chidambaram Chetty.

16. ('26) 13 AIR 1926 Mad 421 : 95 I C 12 : 49 Mad 746 : 50 M L J 161, Rajagopala Pandarathar v. Tirupathia Pillai.

17. ('31) 18 AIR 1931 Rang 164 : 134 I C 209 : 32 Cr L J 1120 : 9 Rang 338, All Mohammed Kassim v. Emperor.

Procedure applied. The problem was much the same as here and was solved in the same way.

Even the Allahabad High Court which later took a different view, indicated in 52 ALL 947[18] at p. 949 that the principle underlying S. 21 might be applied to cases where the section itself was not expressly applicable, and we find the Bombay High Court applying it in 2 Bom H C R 374[19] at p. 375 long before it found legislative enactment in a Code. We think the position has been correctly stated by Phillips J., in 47 M L J 448[20] at p. 459 which was quoted with approval in 49 Mad 746[16] at p. 760.

> The principle underlying the section is that waiver of territorial jurisdiction is recognized by law, whereas it has been consistently held that other forms of jurisdiction cannot be waived by consent of parties.

The only modification we would make is that this must be read subject to S. 11, Suits Valuation Act, as well. Phillips J., explains at p. 451 that:

> The jurisdiction of a Court consists in its power to entertain suits. . . . . and when once a suit has been entertained the remaining proceedings taken therein are not taken by reason of any particular territorial jurisdiction but in the exercise of powers vested in the Court to try suits generally and consequently the only time at which the territorial jurisdiction comes into operation is at the time of the filing of the suit.

If then the Legislature says, as it does in S. 21, that the jurisdiction is valid throughout all the subsequent stages of that suit unless objection is taken immediately it must mean that it was valid when the suit was entertained and once that is accepted, then it follows that it is valid for all purposes thereafter. As regards decisions which take the other view, the Calcutta Full Bench in 53 Cal 166[21] did not consider either S. 21, Civil P. C., or S. 11, Suits Valuation Act, and although we do not dissent from the actual decision we consider that the law has been laid down too broadly there. In that case a British Indian Court purported to deal with property situate in the Sonthal Perganas, and the executing Court declined to execute the decree, and we think rightly, for, as their Lordships of the Privy Council point out in 42 Cal 116[22] at p. 143, the jurisdiction of all Courts regarding land in the Perganas was taken away and was conferred exclusively upon particular Courts in the Sonthal Perganas by a special regulation. These Courts were therefore constituted special Courts with exclusive jurisdiction, and of course S. 21 cannot be invoked to confer jurisdiction where the Legislature states in express and explicit terms that there shall be none. To use again the language of their Lordships in a case we have just cited:

> This is not an objection to the place of suing; it is an objection going to the nullity of the order on the ground of want of jurisdiction.

The actual decision of the Calcutta Full Bench was therefore, in our view, right but in giving their decision they have, we think, stated the law too broadly and have not considered either S. 21 or S. 11.

The decision of their Lordships in 42 Mad 813[14] has been considered in 43 Mad 675[15] at p. 686 and in 49 Mad 746[16] at p. 752. We agree with the learned Judges of the Madras High Court that all that their Lordships decided there was that when the Code of Civil Procedure does not apply to any particular territory, then the principles of S. 21 cannot be invoked. Of course the British Indian Code does not apply as such in Berar, nor what we may term the Berar Code in the Central Provinces. But both Codes are identical except for the necessary changes which substitute the word "Berar" for "British India" and which make the provisions for execution and the like reciprocal; except for that the British Indian Code has been applied *mutatis mutandis* in Berar. Therefore since the laws of both places contain identical provisions in this respect and since they consider the Courts of each other domestic tribunals this decision of their Lordships is clearly distinguishable.

As regards the other two decisions upon which the Nagpur Full Bench relied, namely 53 ALL 560[23] and 27 C W N 542,[24] both proceed upon the assumption that territorial considerations are vital to jurisdiction, that is to say, that they affect the inherent jurisdiction of a Court and that S. 21 is an exception to this rule and consequently must be construed strictly. As we have already pointed out we are with respect unable to agree with the initial assumption upon which the subsequent reasoning is founded.

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18. ('30) 17 AIR 1930 All 873: 132 I C 35: 52 All 947: 1930 A L J 997, Dwarka Das v. Pyare Lal.

19. (1864-66) 2 Bom H C R 374, Ex parte Manohar Bhivra.

20. ('25) 12 AIR 1925 Mad 117: 87 I C 152: 47 M L J 448, Chokkalinga Pillai v. Velayudda Mudaliar.

21. ('25) 12 AIR 1925 Cal 907: 89 I C 685: 53 Cal 166: 42 C L J 1: 29 C W N 948 (FB), Gora Chand Halder v. Prafulla Kumar Roy.

22. ('14) 1 AIR 1914 P C 140: 42 Cal 116: 41 I A 197 (PC), Maha Prasad v. Ramani Mohan.

23. ('31) 18 A I R 1931 All 454: 131 I C 248: 53 All 560: 1931 A L J 240, Raghubir Sarau v. Hori Lal.

24. ('28) 10 A I R 1923 Cal 619: 77 I C 253: 27 C W N 542, Kunja Mohan v. Monindra Chandra.

In our view there can be no validation of an inherent lack of jurisdiction in any circumstances and the very fact that the Legislature treats venue either as a matter of procedure, or as something analogous to it, shows that the two are not the same.

There is also another point with which we are unable, again with due deference, to agree with the Nagpur Full Bench. Even if it be assumed that we are wrong, because of their Lordships' decision in 56 Mad 405,[8] in thinking that the Berar and British Indian Courts are not "foreign Courts" vis-a-vis each, even then, in our opinion, the question of submission to jurisdiction remains. The Full Bench considers that there can be no submission, or rather that the question of submission is immaterial the moment it is shown that the foreign tribunal acted without jurisdiction. Up to a point of course this is correct, but, in our opinion, only up to a point. Stated in that broad form the rule is we think misleading.

Here again the general rule is well-known and forms one of the rules of private international law. It has been incorporated into the Civil Procedure Code in Ss. 13 and 14. The usual method of enforcing a foreign decree (and this would apply to Berar as well because of the "Berar Civil Procedure Code") is by suing upon the foreign judgment in the domestic Courts within six years : *see* Mulla's Civil Procedure Code, Edn. 10, p. 92 and Art. 117, Limitation Act. When that is done a decree follows as a matter of course, unless the exceptions specified in S. 13 apply, because under the body of that section the foreign judgment is conclusive, that is to say, it operates as res-judicata though it is not usual to call it by that name. One of the exceptions is when the judgment sued upon "has not been pronounced by a Court of competent jurisdiction," and here the rule about submission to jurisdiction comes into play. The question whether the foreign Court had or had not jurisdiction is of course to be determined in accordance with the law of the country in which the foreign Court pronouncing the judgment is situate, that is to say, it is a matter of foreign law. Now all matters of foreign law are questions of fact in the domestic tribunal and not ones of law. They have to be established just as any other fact by the production of expert witnesses (S. 45, Evidence Act, and its replica in Berar), foreign law books (S. 38) and the like. But when it appears that the defendant had submitted to jurisdiction and invited a verdict the domestic tribunals apply the rule of estoppel and prevent the defendant from pleading that the foreign Court had no jurisdiction. Section 14, Civil P.C., states that:

> The Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

This proof the domestic Courts shut out when they find that there has been a submission to jurisdiction, and so the presumption remains. We observe that 22 Cal 222[25] is distinguishable because, as their Lordships emphasise at p. 237, the defendant in that suit never appeared in the foreign Court and did not otherwise submit himself to its jurisdiction. It is important to bear in mind that the question about the jurisdiction of a foreign Court is a question of fact and not one of law and consequently there is room for applying the rule of estoppel; the usual difficulties about estoppel against a statute or a rule of law do not arise. It is this important distinction between the jurisdiction of a foreign and a domestic tribunal that the Nagpur Full Bench has, we feel, failed to observe.

That, as we have said, is the usual method of enforcing a foreign decree according to private international law. But the Code of Civil Procedure makes two exceptions. One is given in S. 43 which, as we have pointed out above, makes decrees of the British Indian Courts executable in Courts "established or continued by the authority of the Governor-General in Council in territories of any foreign prince or State," in the same way as in the domestic tribunals because, as we have also shown, they are, according to the definition in S. 2 (5), domestic tribunals, and their judgments are, under S. 2 (6), domestic decisions.

The second exception is contained in S. 44 and it applies to foreign Courts situate in the territories of any Native Prince or State in alliance with His Majesty which have not been established or continued by the authority of the Governor-General in Council but which have been notified in the Gazette in India. These Courts remain "foreign Courts", but their decrees are executable in the Courts of British India "as if they had been passed" by those Courts. Here the notification fulfills the functions of S. 2 (5) though in a different manner and

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25. ('95) 22 Cal 222 : 21 I A 171 : 6 Sar 503 : (1894) A C 670 (PC), Gurdyal Singh v. Raja of Faridkot.

with a slightly different effect. The Berar replica of the Civil Procedure Code contains corresponding provisions making these previleges reciprocal. It is clear then that it is not necessary in the case of these Courts to sue again upon the judgment. All that is necessary is to ask for execution in the ordinary way, but it is equally clear that if S. 21 does not apply, and if all the principles applicable to foreign Courts do, then among them must be placed the rules relating to submission to jurisdiction. It is impossible to claim for these Courts all the privileges of a foreign Court and yet not to subject them to what we might term its disabilities.

There is also another point. The incompetency contemplated by S. 13 is an inherent incompetency of a kind which cannot be waived, therefore if lack of territorial jurisdiction is not an incompetency of that kind, and that is our view, then the rule about submission must apply in any event. The rule itself is so well-known that we need not cite authorities in support of it. Even the Nagpur Full Bench, which we feel has come to a wrong conclusion on these points, accepts the rule though it limits its operation. We turn now to another matter. We have so far treated the question on general lines, but cases relating to immovable property, such as mortgage cases, are governed by rules which go even further along the lines we have indicated when part of the property is situate in one jurisdiction and part in another. These rules have not been considered by the Nagpur Full Bench because of course the situation did not arise there. They are to be found in S. 17, Civil P. C.:

> Where a suit is to obtain relief respecting ..... immovable property situated within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate.

Of course we realise that an enactment which turns a Court in Berar into a domestic tribunal does not thereby make Berar British territory, nor does it invest Courts in British India with jurisdiction over property in Berar by reason of that alone. But when the definition of "foreign Court" in S. 2 (5) is read along with S. 17, then we think the same result follows as when the property is situate wholly within British India.

Section 16 (c) states that mortgage suits shall be instituted "in the Court within the local limits of whose jurisdiction the property is situate," and the explanation states that "in this section 'property' means property situate in British India." Section 17 brings in an exception and it is important to note that it does not give the same restricted definition to the word 'property': that is expressly restricted to S. 16 alone. The difference is, in our opinion, deliberate and we think it was made to introduce a well-known principle of private international law. Therefore, under S. 17 the British Indian Courts are, in our opinion, empowered to entertain suits relating to immovable property, including of course mortgage suits, situate in Berar, provided some portion of the property mortgaged is situate within the local limits of the jurisdiction of the Courts in which the suit is instituted.

From that we turn to the fact that British Indian Courts are domestic tribunals in Berar because of the definition in the "Berar Civil Procedure Code" and that therefore their decrees are executable in Berar in the same way as a Berar decree. But here again, even if we are wrong in thinking that the Berar Courts are not "foreign Courts" the result is the same because the rule embodied in S. 17 is, as we have said, only a particular application of a wider principle which extends to foreign territory as well. The rule, in so far as it relates to property wholly situate in British India, is referred to in 49 Mad 716[16] where a long series of decisions of the Calcutta High Court are given from p. 753 onwards. We need not requote them here. It is enough to point out that they regard mortgage suits as an exception to the general rule relating to territorial jurisdiction and hold that special rules apply in such cases. This special rule was applied by a Division Bench of this Court to which one of us (Stone C. J.) was a party in F. A. No. 47-B of 1935[26] in a case where part of the property was situate in British India and part in Berar. It is to be found in Dicey's Conflict of Laws, Edn. 5, p. 207 in the exception to R. 53.

There is one more matter upon which we shall touch. It was argued that in mortgage cases, whatever the form of the mortgage and whether foreclosure or sale was sought, the Court acts *in personam* and so this decree is executable in Berar: 51 Bom 516[27] was relied upon. That decision was not followed in 31 N L R Sup 43.[2] The Bombay decision was one which was very fully considered by seven Judges and covers a wide range. Before disagreeing with the conclusions of such a Bench we should feel it our

26. First Appeal No. 47-B of 1935, Devideen v. Matadeen.

27. ('27) 14 A I R 1927 Bom 278 : 104 I C 8 : 51 Bom 516 : 29 Bom L R 498 (F B), Hatimbhai Hassanally v. Framroz Eduljee.

duty very carefully to consider the law in all its aspects. On the view we take, and bearing in mind that we are at present referring the questions we feel are in doubt, it is not necessary to consider whether the kind of mortgage suit then under consideration is or is not a suit *in personam*: 51 Bom 516[27] depends, on this point, very largely on the fact that the suit was for sale and not foreclosure. This is a suit for foreclosure. 51 Bom 516[27] relies largely on equity cases in England whereas here one is concerned with rights which exist in law and not only in equity. We are content so far as this branch of the case is concerned to follow 31 N L R Sup 43.[2] The result then is that, in our opinion, the decree in the present suit is executable in Yeotmal as it stands. But we cannot give effect to this view if the Full Bench decision in 31 N L R Sup 43[2] is right. But since, with the utmost respect, we consider that it has been wrongly decided so far as the matter raised in the following questions is concerned, we refer those questions to another Full Bench for further and fuller consideration. They are :

"(1) Are Courts in Berar which have been established or continued by the authority of the Governor-General in Council "foreign Courts" within the meaning of the Code of Civil Procedure in British India and vice versa? (2) Can the rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits be validly waived by submission? (3) Is the rule embodied in S. 21, Civil P. C., limited to appeals and revisions in the same suit or does it also apply to separate suits and to execution proceedings in the same suit as well? (4) Can a mortgage decree obtained in British India in respect of property situate in Berar as well as within the local limits of the Court in which the suit is instituted be executed in Berar as it stands without the necessity of suing again upon the British Indian judgment?"

We observe in conclusion that the difficulty about Berar being foreign territory will not arise hereafter because of S. 47, Government of India Act, 1935 but that will not prevent the present impasse from arising again because, according to the decision of the Full Bench, the same result follows when the properties are situate in different jurisdictions in different parts of British India. As this is likely to have serious consequences which will affect a large number of important cases, we feel that the matter should be reconsidered.

OPINION

Stone C. J. — Having already been a party to the order of reference and having perused the judgments of my colleagues it is not necessary for me to quote authorities for the following propositions which, in my opinion, can hardly be doubted :

(1) A defect in jurisdiction may be inherent or procedural. The former cannot be waived, the latter can. (2) If a defect in jurisdiction is procedural and is waived, whether by absence of objection or otherwise, up to judgment an objection cannot be taken in execution. (3) Even where objection to a decree lies on the ground of its being a nullity there is a difference between suing to set the decree aside and seeking to go behind the decree without suing, e. g., in execution. (4) A Court can, by the law of a country, be directed to be deemed, by the Courts of that country to be a Court of that country though not situate in that country. (5) An example of (4) is, and at all times has been, the High Court of Judicature, Nagpur. (6) Berar is foreign territory viewed from the angle of a British Indian Court and the Central Provinces is foreign territory viewed from the angle of a Berar Court. This proposition relates to the period in question and is not concerned with the position that arises under the Government of India Act, 1935.

I now pass to propositions about which I entertain more doubt. Before coming to these I consider it necessary to say that if ever a point called for breadth of treatment it is this. It is in the highest degree desirable, so far as the Central Provinces and Berar are concerned, to make the Courts sitting in both areas as near alike as may be. For a long while now these areas have been administered together. The same Chief Justice has judicial administrative control over both. The District and Subordinate Judges are freely moved from this area to that. The Courts are organized in the same way and are equal in jurisdiction and are controlled by the same appellate authority and are now, by the Government of India Act, put formally on a parity. For a long while so far as execution is concerned, these Courts vis-a-vis each other have not been foreign Courts. The execution of part of the decree we are considering was transferred to a Berar Court and the objection was taken before a Berar Court and was to the effect that a Court situate in the Central Provinces had no jurisdiction to adjudicate in respect of immovable property situate in

Berar. That objection was based on the view that such Court was a foreign Court. I proceed with the propositions: (a) The Civil Procedure Code as applied to Berar makes British Indian Courts not foreign Courts and therefore domestic Courts and therefore in any argument addressed to a Berar Court a Berar Court. (b) The objection taken would fail had the lack of jurisdiction been territorial, i. e., had the Court been a domestic Court dealing with a subject-matter (land) outside its jurisdiction. (c) Granted that the Court situate in the Central Provinces must be regarded by a Berar Court as a Berar Court, there is no difference between the objection taken here and an objection that, say, a Court in Akola District (Berar) had entertained a suit partly in respect of land situate in Amraoti Distrjct (Berar) at the place where the execution Court is situate. Both objections would fail for the same reason *viz.*, that the defect in jurisdiction was territorial merely.

It has been suggested that there is a wide difference between the two cases in that the British Indian Legislature has not and cannot give jurisdiction to British Indian Courts to adjudicate on land situate in foreign countries, *i. e.*, in Berar, and the Governor-General in Council has not given and cannot give jurisdiction to a Berar Court to sit in British India and has not turned and cannot turn a British Indian Court into a Berar Court. In my opinion, however, the Governor-General in Council legislating for Berar can make and has made it necessary for every Berar Court to treat any British Indian Court as a domestic Court, *i. e.*, as a Berar Court. The result, so far as this case is concerned, is that the rules relating to foreign judgments do not apply. My answers to the questions put are accordingly : (1) No. (2) Yes. (3) First part, No. (4) Yes.

Grille J. — I have had the advantage of seeing all the opinions expressed in this appeal and I find myself in respectful and decided agreement with the conclusions reached by the majority. The vital point for determination is whether Courts in Berar are foreign Courts in respect of Courts in the Central Provinces. If the conclusion is in the affirmative, the answers to the other questions fall into line.

In the application of the Code of Civil Procedure to Berar the modification appears inter alia, that in S. 2, sub-s. (5) which contains the definition of a foreign Court, the words "British India" shall be read as referring to British India and Berar. That definition then reads: "'foreign Court' means a Court situate beyond the limits of British India and Berar which has no authority in British India and Berar and is not established or continued by the Governor-General in Council." Now, the object of the amendment was undoubtedly to place civil Courts in Berar in the same relationship to foreign Courts as civil Courts in British India bore to foreign Courts. The particular wording of the alteration of the Code of Civil Procedure in its existing form has, however, had other effects, although possibly not intentional. The effect which is pertinent to the case under consideration is this that for the purposes of Berar a civil Court in British India is not a foreign Court and must therefore be a domestic Court. I do not consider any other interpretation of the definition possible, and consequently an executing Court in Yeotmal refusing to execute the decree of a Court in Wardha is refusing to execute the decree of a domestic tribunal and is wrong in refusing to do so under the terms of the Civil Procedure Code as applied to Berar. The consideration of the unamended Code of Civil Procedure as applied to British India does not in fact arise. Accordingly I would answer the first question in the negative and the second and fourth questions in the affirmative. On the third question which lies somewhat apart from the main question, I agree with the conclusion reached by my Lord the Chief Justice and Bose J.

Niyogi J. — The undermentioned questions have been referred to the Full Bench for consideration :

(1) Are Courts in Berar which have been established or continued by the authority of the Governor-General in Council "foreign Courts" within the meaning of the Code of Civil Procedure in British India and vice versa ? (2) Can the rule limiting the territorial jurisdiction of Courts to property situate within their territorial limits be validly waived by submission ? (3) Is the rule embodied in S. 21, Civil P. C., limited to appeals and revisions in the same suit or does it also apply to separte suits and to execution proceedings in the same suit as well ? (4) Can a mortgage decree obtained in British India in respect of property situate in Berar as well as within the local limits of the Courts in which the suit is instituted be executed in Berar as it stands without the necessity of suing again upon the British Indian judgment ?

The facts of the case out of which these questions arise may be briefly stated. In civil suit No. 51 of 1930 a preliminary decree for foreclosure was passed in the Court of the second Additional District Judge, War-

dha, affecting property situate partly in Wardha and partly in Yeotmal District. The Yeotmal District is in Berar. That decree was made final on 12th October 1933 and on a certificate of non-satisfaction issued by the Wardha Court to the Yeotmal Court the decree-holder on 18th December 1935 applied for execution of the final decree obtained by him. He was countered by the objection that the Wardha Court had no jurisdiction to pass any foreclosure decree affecting property in Berar and that it was null and void. The discussion which follows must be understood as having reference to Berar as it stood before the Government of India Act of 1935 came into force. The first question is whether the Court in Berar is a foreign Court vis-a-vis the Court in British India and vice versa. The first part of the question is answered by the express terms of the definition of 'foreign Court' as contained in S. 2 (5), Civil P. C., as it applies to the Central Provinces. It says: "'Foreign Court' means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor-General in Council." The Indian (Foreign Jurisdiction) Order in Council, 1902 (*vide* Berar Code, Part III, p. 13) defines in para. 2 the limits of the order in these terms: "The limits of this order are the territories of India outside British India etc." Berar is thus declared to be one of the territories of India outside British India, but unless it has authority in British India it cannot be taken out of the ambit of the definition of "Foreign Court." Notification No. 3510-I-B dated 3rd November 1913 (*vide* Berar Code, Part IV, p. 19) applies to Berar certain British Indian enactments including British Indian Codes with certain modifications. Item 2 against entry No. 92 (page 29 Berar Code) in the schedule to that notification modifies S. 2 (5), Civil P. C., by the direction that the words "British India" shall be read as referring to British India and Berar. It must be borne in mind that this modification is valid only within the limits of Berar.

Section 2 (5), Civil P. C., will as a result of this modification be read in Berar (not in Central Provinces) as follows: "'Foreign Court' means a Court situate beyond the limits of British India and Berar which has no authority in British India and Berar and is not established or continued by the Governor-General in Council." This altered definition only means that those Courts which are foreign Courts vis-a-vis the Court in British India are also foreign Courts vis-a-vis the Courts in Berar and if rightly construed so far from abolishing the distinction between the Courts in British India and Courts in Berar goes to emphasise it. It does not purport to make a British Indian Court a Berar Court or vice versa, nor would the Governor-General in Council acting in his executive capacity have the power to amend the definition of the Civil Procedure Code so as to affect the British Indian Courts. The definition of the foreign Court as amended in its application to Berar can no more be regarded as seeking to extend the jurisdiction of the Berar Courts to Central Provinces than it seeks to extend that of the British Indian Court to Berar. Not only are the British Courts in Berar kept distinct from those of Central Provinces, but also the High Court for Berar from the High Court of judicature at Nagpur: *vide* Notification No. 41 dated Nagpur 20th January 1936 amending Part II of the Indian Foreign Jurisdiction Order in Council, 1902, (Berar Code p. 14). Were the Berar Courts British Indian Courts, S. 39, Civil P. C., would automatically apply to them and there would be no necessity to take recourse to S. 45, Civil P. C., in the matter of the decree for execution.

Section 45, Civil P. C., empowers a Court to send a decree for execution to another Court established by the authority of the Governor-General in Council in the territories of any foreign Prince or State to which the Governor-General in Council had declared by notification in the gazette of India this section to apply. The decrees of the Berar Courts would not be executable in British India but for the modification of S. 45, Civil P. C., as applied to Berar (Berar Code p. 29) which inserts the words "situate in British India" or after the words "any Court" in that section. In 26 N L R 326[1] their Lordships of the Privy Council pointed out that the Governor-General in Council administers the Assigned Districts of Berar under a delegated authority from the Crown and is empowered to legislate in respect of the territory of Berar. When he exercises that power and either makes any legislation for Berar or extends the enactments in force in British India, he thereby affects rights of persons within the territory of Berar, but nothing that he does in that capacity can be valid to affect the British Indian territory. The amended definition of S. 2 (5), Civil P. C., as applied to Berar, can in no way enlarge the authority of the

British Indian Courts; nor does it purport to extend the authority of the Berar Court to British India.

It must be observed that the Courts in Berar are not Courts which are "established or continued by the Governor-General in Council (S. 2 (5), Civil P. C.,) but are Courts established or continued by the authority of the Governor-General in Council in the territories of the foreign Prince of State" (Ss. 43 and 45, Civil P. C.). The Court of Political Agent was held to fall into the latter category of Courts: 38 Cal 859.[28] That Berar Courts also fall into the same category is clear from the amended wording of Ss. 43 and 45 as applied to Berar: *vide* p. 29, Berar Code. The Governor-General in Council by virtue of his appointment may have political authority over the Indian States but he does not enjoy any authority over the internal administration of the States. The paramountcy of the Crown does not impair the internal sovereignty enjoyed by the Ruling Prince in his own territory: *see* L R 1912 P 92[29] at p. 95. His Exalted Highness the Nizam of Hyderabad has transferred the right to administer the territory of Berar to the Crown and the Crown has delegated its prerogative authority to the Governor-General by the Indian (Foreign Jurisdiction) Order in Council, 1902. Upto and under the Government of India Act of 1919, the Governor-General in Council was the authority through whom the Crown exercised its authority in the Indian States. Now by the Government of India Act, 1935 his two capacities are separated and clearly defined: *vide* Ss. 2 and 3, Government of India Act, 1935. It makes clear that the Governor-General acts as Crown representative in the Indian States. The expression Crown representative is actually used in the amended S. 43 as applied to Berar: *see* p. 29, Berar Code. The Berar Courts have the status of the Courts in Ceylon which is a Crown colony and they have been held to be foreign Courts: 32 Mad 469.[30] The Berar Courts are situated in foreign territory and are not established or continued by the Governor-General in Council. The question is whether they have authority in British India. They have no authority in British India because the explanation appended to S. 16, Civil P. C., read with proviso 1 to para. 1 of the notification No. 3510-I-B, dated 3rd November 1913 (inserted by Amendment No. 60 dated 7th August 1937, *vide* p. 19 of the Berar Code) makes it clear that all references to British India occurring in the enactment applied to Berar should be read as referring to Berar. Section 1, Civil P. C., which lays down the limits of the operation of that Code and the explanation appended to S. 16, Civil P. C., similarly limits the inherent authority of the British Indian Courts.

It is true that the decrees passed in Berar are executable in British India and vice versa, but that does not imply any authority of one Court in the local limits of the jurisdiction of the other Court. Under S. 44, Civil P. C., decrees passed by Courts situate in the territories of any Native Prince or State are executable in British India. That cannot obviously mean that those Courts have authority in British India. A British Indian Court is not bound to execute a decree of a foreign Court: 39 Mad 24.[31] It can refuse to execute its decree on the ground specified in Ss. 13 and 4, Civil P. C.: 39 Mad 733,[32] A I R 1933 Mad 112[33] and also for other valid grounds: A I R 1925 Mad 788.[34] Sections 43, 44 and 45, Civil P. C., only embody a rule of private international law founded on the comity of States. In 56 Mad 405[8] their Lordships of the Privy Council held that an order passed by the District Court at Secunderabad to which the Provincial Insolvency Act of 1907 was made applicable by the Governor-General in Council adjudicating persons insolvents was an order of a foreign Court for the reason that Secunderabad was a part of the Hyderabad State and the property of His Exalted Highness, the Nizam. Their Lordships observed that the administration of justice according to British enactments by the District Court established in Secunderabad did not render the orders of that Court anything but the orders of a foreign Court in relation to the Courts at British India. On the principle so stated by their Lordships of the Privy Council, it is evident that the Berar Courts cannot acquire the status of the British Indian Courts for the simple

28. ('11) 38 Cal 859 : 11 I C 442 : 15 C W N 992, Zamil Ahmed v. Maharajah of Sikkim.
29. (1912) L R 1912 P 92 : 81 L J P 33 : 105 L T 991 : 28 T L R 180, Statham v. Statham.
30. ('09) 32 Mad 469 : 3 I C 190 : 19 M L J 457, Shaik Atham Sahib v. Davun Sahib.
31. ('15) 2 A I R 1915 Mad 486 : 26 I C 287 : 39 Mad 24 : 27 MLJ 535 (F B), Veeraraghava Ayyar v. Muga Sait.
32. ('17) 4 A I R 1917 Mad 780 : 32 I C 597 : 39 Mad 733 : 30 M L J 148 (F B), Rama Ayyar v. Krishna Patter.
33. ('33) 20 AIR 1933 Mad 112 : 140 I C 588 : 63 M L J 761, Guruswami v. Md. Khan.
34. ('25) 12 A I R 1925 Mad 788 : 86 I C 492, Krishnaswami v. Madhappa.

reason that certain enactments in force in Berar are made applicable to that territory.

The modification of the definition of foreign Court contained in S. 2 (5), Civil P. C., in its application to Berar does not in any way affect the principle laid down by their Lordships of the Privy Council. Dicey in his Conflict of Laws at page 54, Edn. 5, says that the word "foreign" means simply not English and foreign country means any country except England and applies as much to Scotland, Northern Ireland, New Zealand, etc., as to France or Italy. In 26 N L R 326,[7] their Lordships of the Privy Council defined foreign country as a country or place outside His Majesty's dominons. The territory of Berar though administered by the Governor-General in Council on behalf of His Majesty pursuant to a treaty with His Exalted Highness the Nizam does not become a part of British India. It remains a foreign territory. The Berar Courts are indeed British Courts but not British Indian Courts. As such they are foreign Courts.

For the foregoing reasons it is evident that the modification of the terms of S. 2 (5), Civil P. C., does not result in assimilating the Berar Courts to British Indian Courts so as to entitle them to be treated as domestic Courts. Similarly, the British Indian Courts are foreign Courts in Berar as they have no inherent authority in Berar. In this connexion I may refer to the relevant provisions of the Government of India Act, 1935, the agreement concluded between His Majesty and His Exalted Highness the Nizam on 26th October 1936 and the amendments made on 7th August 1937 of the notification dated 3rd November 1913 issued by the Governor-General in Council under the Indian Foreign Jurisdiction Order in Council, 1902, which, in my opinion, tend to confirm the conclusion to which I have reached. Section 47 (1) (a) and (b), Government of India Act, 1935, now incorporates Berar into British India. It runs as follows :

> (a) Berar and the Central Provinces shall, notwithstanding the continuance of the sovereignty of His Exalted Highness be deemed to be one Governor's Province by the name of the Central Provinces and Berar.
>
> (b) Any reference in this Act or in any other Act to British India shall be construed as a reference to British India and Berar . . . . .

It is pertinent to observe that this extended definition of British India is intended to be in force only during the currency of the agreement between His Majesty and His Exalted Highness the Nizam as is clear from the words "while any such agreement is in force" which precede clauses (a) and (b) and sub-s. (2) which follows them. That sub-section is indeed full of significance for the present discussion. It says :

> If no such agreement is concluded . . . references in this Act to the Central Provinces and Berar shall be construed as references to the Central Provinces . . . . .

That shows that before the agreement the Courts in Central Provinces were treated as distinct from the Courts in Berar being under two separate administrations, and further that British India did not include Berar. This is made more explicit by S. 3 (7), General Clauses Act, 1897, as substituted by the Government of India (Adaptation of Indian Laws) Order, 1937. It says :

> British India shall mean as respects the period before the commencement of Part III, Government of India Act, 1935, all territories and places within His Majesty's dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India and as respects any period after that date means all territories for the time being comprised within Governors' Provinces and the Chief Commissioners' Provinces except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act, 1935, shall not include a reference to Berar.

This conclusively shows that before 1st April 1937 on which day Part III, Government of India Act, 1935 came into force, Berar was never regarded as a part of British India. It must further be noticed that even after Part III, Government of India Act, came into force a reference to British India in an Indian law passed before 1936 is not to include a reference to Berar notwithstanding that Berar merged in the Governor's Province known as the Central Provinces and Berar by virtue of S. 47 (1) (a), Government of India Act, 1935, read with Art. 3 of the agreement between His Majesty and His Exalted Highness the Nizam.

I looked round to find some such means of overcoming the difficulty felt by me as would enable me to apply the extended definition of British India contained in S. 47 (1) (b), Government of India Act, 1935, and incorporated as proviso 1 to para. 1 of the Governor-General's notification of 1913 (Berar Code p. 19) to pending proceedings but that course also is barred by para. 2 of that notification which runs as follows :

The notifications of the Government of India specified in Sch. 2 hereto annexed are superseded to the extent noted against each:

Provided that all civil and criminal proceedings pending at the date of this notification shall be carried on as if this notification had not been issued but that save as aforesaid, all proceedings commenced .... things done under any of the enactments specified in the notification hereby suspended in Berar shall be as far as may be, deemed to have been respectively commended.... and done under the corresponding enactment specified in this notification.

The next question is whether the rule limiting the territorial jurisdiction of the Court to property situate within the territorial limits can be validly waived by submission. The question seems to assume that the Courts contemplated there have inherent jurisdiction in respect of property situate outside the territorial limits of their jurisdiction. If the Courts contemplated in this question have no authority to adjudicate on a matter relating to such property the judgment of the Court cannot be validated by submission. Jurisdiction means the legal power or authority of hearing and determining the dispute for the purpose of administering justice and the Court of competent jurisdiction means a Court which has a right to adjudicate upon a given matter: *vide* Dicey p. 391, Edn. 5. The word jurisdiction is ordinarily used in two senses. Jurisdiction over the subject-matter and power to give an effective judgment. If a Court has no jurisdiction respecting the subject-matter of the litigation its judgment however technically correct is not merely voidable but is null and void. It cannot operate as res judicata and is liable to be declared void: *see* 38 Cal 639[35] at pp. 668 and 669.

In the light of these general considerations it has to be seen whether or not the British Court has jurisdiction to adjudicate in regard to any property situate out of British India. The Courts established in British India have under S. 16, Civil P. C., the power to try any suit for the recovery of immovable property situate in British India. The explanation appended to that section restricts the authority of the Courts in British India to property situate within the limits of British India. This restriction is not for convenience of judicial administration as is the case with local jurisdiction of the Courts, but is fundamental. It circumscribes the inherent authority or power of the Court. Similarly, proviso 1 to para. 1 of Notification No. 3510-I-B, dated 3rd November 1913 issued by the Governor-General in Council (p. 19, Berar Code, 1931) limits the authority of the Berar Court to property situate in Berar, since in the enactments applied to Berar it directs that reference to British India shall be read as referring to Berar. It is, therefore, clear that the British Courts do not possess the inherent authority to adjudicate on a matter relating to property situate in Berar and vice versa. As pointed out in 48 Cal 138,[36] there is a distinction between existence of jurisdiction and exercise of jurisdiction. When the Court has no inherent jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although in a cause which the Judge is competent to try, the parties may without objection join issue and go to trial upon the merits: *see* 9 ALL 191[12] at p. 203. In other words, the question is, can the parties by their mutual consent nullify S. 16, Civil P. C., so as to confer jurisdiction on a British Court which the law itself refused to do? The answer must categorically be in the negative.

Under the principles maintained by the British Courts in the province of private international law the word "jurisdiction" means "the right or authority of a Court" and it is not used as meaning "area of territory over which a Court has jurisdiction": *vide* Dicey, p. 191. In India the area of territory over which any particular Court has jurisdiction is fixed by the local Acts. Sections 15 to 25, Civil P. C., regulate the venue within British India and apply only to those places where the Civil Procedure Code *proprio vigore* applies. They deal with matters of domestic concern and prescribe rules in matters within their compass and do not apply to a suit on a cause of action which arose wholly outside British territory: *see* 9 Lah 455.[37] The explanation appended to S. 16, Civil P. C., denies the British Courts jurisdiction in respect of property situate outside British India and to that extent it must be predicated that they have no right or authority to try any suit for the recovery of such property. Even under the rules of private international law submission can give the Court jurisdiction only to the extent of removing objections thereto which are

35. ('11) 38 Cal 639 : 12 I C 464, Rajlakshmi Dassee v. Katyayani Dassee.

36. ('21) 8 AIR 1921 Cal 34 : 58 I C 806 : 48 Cal 138 : 31 C L J 482 : 24 C W N 723 (FB), Hirday Nath Roy v. Ramchandra.

37. ('28) 15 AIR 1928 Lah 297 : 109 I C 28 : 9 Lah 455 : 29 P L R 406, Bhamboo Mal v. Ram Narain.

purely personal to the party submitting as, for example, the objection in the case of a defendant that he has not been duly served with a writ, or that service of a writ outside England has been allowed in a case not within the letter or the spirit of O. 11, R. 1: submission cannot give the Court jurisdiction to entertain an action or other proceeding which in itself lies beyond the competence or authority of the Court: Dicey p. 222. Section 17, Civil P. C., is supplementary to S. 16, Civil P. C., and, it applies to properties situate only in British India and not to those outside it, as pointed out by their Lordships of the Privy Council in 42 Mad 813.[14] Their Lordships of the Privy Council in 54 Bom 495[38] made it clear that the words "situate within the jurisdiction of different Courts" in S. 17, Civil P. C., 1908, referred solely to Courts in British India. A Court devoid of inherent jurisdiction over the subject-matter cannot possibly acquire authority over the parties; their consent cannot therefore confer jurisdiction. My answer is that if the Court has inherent jurisdiction the irregularity in the exercise of it will be cured by submission, but if it has no inherent jurisdiction submission cannot validate its judgment.

The next question is whether the rule embodied in S. 21, Civil P. C., is limited to appeals and revisions in the same suit or does it also apply to separate suits and to execution proceedings in the same suit as well? Section 21, Civil P. C., postulates the existence of inherent jurisdiction and precludes objections in appeal or revision as to the place of suing only. That means that it only leaves open to a party to waive irregularity in the exercise of jurisdiction which a Court has, an enquiry into the existence of facts necessary to give jurisdiction such as residence of the defendant or the occurrence of the cause of action within the limits of the Court's jurisdiction. Objections precluded by S. 21, Civil P. C., cannot be raised in execution proceedings of the same suit because the execution proceedings are the continuation of the same suit. An objection on the ground of the absence of the inherent jurisdiction can however be raised for the first time in appeal: *vide* 20 N L R 33,[39] 42 Mad 813[14] or in second appeal *see* 47 Bom 843,[40] or in Letters Patent Appeal 54 ALL 573,[41] or in revision, 52 ALL 947,[18] 33 Bom 664,[42] or in an appeal after remand 23 Bom 22,[43] 8 Cal 678,[44] or even in the course of argument before the Privy Council 13 All 300,[45] 42 Cal 116[22] and also in execution proceedings of the same suit 58 Cal 1018,[46] 38 Mad 682[47] and 26 N L R 60.[48]

In so far as the objection relates only to the place of suing as opposed to the absence of inherent jurisdiction of the Court, S. 21, Civil P. C., operates directly to preclude objection to jurisdiction of the Court deciding the suit, either in appeal or revision. That section does not mention a fresh suit or execution proceeding arising out of the same suit. Consequently, there has been a divergence of opinion among the various High Courts in India. The Allahabad High Court in 53 ALL 560[23] held that where a decree has been passed by a Court having no territorial jurisdiction over the matter in controversy, the defendant was entitled to maintain an independent suit for its avoidance. The reason given was that S. 21, Civil P. C., does not provide against the question of jurisdiction being agitated by means of an independent suit and that there is no provision in the Civil Procedure Code which either expressly or by necessary implication deprived the plaintiff of his right of suit. A different view was taken in 37 M L J 349,[49] 47 M L J 448[20] and 11 L L J 306.[50] I find it difficult to persuade myself, with due respect, to accept the Allahabad view. It is pertinent to observe that the question of jurisdiction of a Court deciding a suit can be called in question in another suit under the limita-

38. ('30) 17 AIR 1930 P C 188 : 126 I C 417 : 54 Bom 495 : 57 I A 194 (P C), Nilkanth Balwant v. Vidya Narasinh Bharathi.

39. ('24) 11 AIR 1924 P C 95 : 83 I C 531 : 20 N L R 33 : 51 I A 72 : 51 Cal 361 (PC), Ramlal v. Kisanchandra.

40. ('23) 10 AIR 1923 Bom 321 : 77 I C 654 : 47 Bom 843 : 25 Bom L R 945 (FB), Wilkinson v. Wilkinson.

41. ('32) 19 AIR 1932 All 273 : 138 I C 583 : 54 All 573 : 1932 A L J 365 (FB), Gobardhan Das v. Dau Dayal.

42. ('09) 33 Bom 664 : 3 I C 816 : 11 Bom L R 817, Narayan Raoji v. Gangaram Ratanchand.

43. ('99) 23 Bom 22, Keshav v. Vinayak.

44. ('82) 8 Cal 678 : 11 C L R 225, Chundee Churn Dutt v. Edulji Cowasjee.

45. ('91) 13 All 300 : 18 I A 55 : 6 Sar 14 (PC), Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar.

46. ('32) 19 AIR 1932 Cal 9 : 136 I C 466 : 58 Cal 1018 : 35 C W N 537, Rabindranath v. Jnanendarmohan.

47. ('16) 3 AIR 1916 Mad 656 : 31 I C 198 : 38 Mad 682, Subramania Aiyar v. Vaithinatha Aiyar.

48. ('29) 16 AIR 1929 Nag 357 : 120 I C 732 : 26 N L R 60, Kashinath v. Harda Central Bank.

49. ('19) 6 AIR 1919 Mad 242 : 53 I C 463 : 37 M L J 349, Annamali v. Sambasiva Aiyar.

50. ('29) 16 AIR 1929 Lah 449 : 120 I C 279 : 11 L L J 306, Parashottam Das v. Radha Kishan.

tions prescribed by S. 11, Civil P. C., and S. 44, Evidence Act. Both these enactments contemplate "competency to try" a suit. In 9 Cal 439[51] at p. 444 their Lordships of the Privy Council refer to the observations of Sir Barnes Peacock in 8 W R 175[52] which were as follows :

> In order to make the decision of a Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction in the subsequent suit in which the first decision is given as evidence,

and, after discussion, conclude that concurrent jurisdiction should be taken to mean concurrent as regards the pecuniary limits as well as regards the subject-matter: *see* 9 Cal 439.[51] That shows that competency of Court means pecuniary jurisdiction and authority over the subject-matter of the suit but does not imply territorial jurisdiction. In A I R 1925 Mad 1167[53] it was clearly pointed out that competency of Court mentioned in S. 11, Civil P. C., has no reference to territorial jurisdiction. In 37 ALL 1[54] certain claimants of the estate of a deceased person which was situated partly in the Bareilly District (British India) and partly in the State of Rampur sued in the Bareilly Court to recover the portion situated there and obtained a decree. Other claimants filed a similar suit in Rampur State in respect of property situated there. It was held, on a suit by the plaintiffs in the Bareilly Court for a declaration, that the judgment of that Court operated as res judicata in respect of the suit in Rampur and for an injunction restraining further proceedings in the Rampur Court, that neither relief could be granted. Their Lordships observe at p. 4 that if all the property was situated in British India, the decision of the Bareilly Court would operate as res judicata but as the subject-matter of the suit was situate outside British India, the decree of the Bareilly Court could not operate as res judicata. The principle of the decision was that the British Court had no inherent jurisdicton to try a suit affecting rights in property outside British India and consequently the decision of the British Court was not final and conclusive so as to affect that property. In 54 ALL 824[55] it was held that the expression "competent to try and dispose of the same" occurring in S. 24, Civil P. C., has no reference to territorial jurisdiction and it was observed that for purposes of res judicata it is not necessary that the Court which decided the previous suit should have concurrent territorial jurisdiction with the Court in which a fresh suit is filed. It would thus be clear that the competency in S. 11 has no reference to territorial jurisdiction so far as Courts in British India are concerned. The effect of S. 11 is to bar the plea of res judicata if it relates only to the absence of territorial jurisdiction of the previous Court. By necessary implication it must follow that no judgment or decree of any Court is capable of being invalidated on the ground that the Court had no territorial jurisdiction.

The expression "place of suing" simply means venue of trial and has no reference to the competency of the Court in the sense of its general authority to adjudicate on any matter in controversy. Consequently, it must be held that if a defendant fails to raise an objection to the place of suing and suffers a decree to be passed against him he would be precluded from questioning the validity of the decree by an independent suit. It must therefore logically follow that he cannot raise the objection in the execution proceedings arising out the same suit. In 31 N L R Sup 43[2] a different view was expressed. But it was not strictly necessary for the decision of that case in view of the other finding that the Bombay High Court had no inherent jurisdiction and that its decree was a nullity.

As to the fourth and last question, the case reported in 54 Bom 495[38] provides a conclusive answer. The question is whether or not a suit to enforce a mortgage is a suit to recover land. If it is, a Court in British India is, as already shown, incompetent to try the suit and pass a decree affecting land out of British India. In a mortgage for conditional sale, there is no covenant of personal liability as was finally decided in a Full Bench case of the late Court of the Judicial Commissioner in a case reported in 25 N L R 187.[56] As to a simple mortgage, the majority of the Judges in 51 Bom 516[27] took the view that a suit by a mortgagee to enforce his mortgage by sale was not a suit

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51. ('83) 9 Cal 439 : 9 I A 197 : 12 C L R 520 : 4 Sar 395 (P C), Missir Raghobardial v. Sheo Baksh Singh.

52. ('67) 8 W R 175, Mt. Edun v. Mt. Bechun.

53. ('25) 12 A I R 1925 Mad 1167 : 87 I C 705, In re Ayisha Bibi Ammal.

54. ('14) 1 A I R 1914 All 514: 25 I C 193 : 37 All 1 : 12 A L J 1074, Maqbul Fatima v. Amir Hasan Khan.

55. ('32) 19 A I R 1932 All 660 : 143 I C 75 : 54 All 824: 1932 A L J 984, Kishori Lal v. Balkishan.

56. ('29) 16 AIR 1929 Nag 254 : 119 I C 684 : 25 N L R 187 (FB), Mohammad Haji Wali Mohammad v. Ramappa.

for land. That view however cannot prevail against 54 Bom 495[38] where their Lordships of the Privy Council declared the words "a suit to obtain relief respecting immovable property are wide enough to cover the suit in the present case which included prayers for foreclosure and sale of the mortgaged property" (*ibid* pp. 501-502). Then their Lordships pointed out that the words in S. 17, Civil P. C., "within the jurisdiction of different Courts" must mean within the jurisdiction of different Courts in British India. In that view they set aside the decree passed by the Satara (British Indian) Court in so far as it affected property situate in the State of Kolhapur (out of British India). A decree passed by a Court in British India ordering sale of mortgaged property situate outside British India is one passed without "authority". The decree is therefore a nullity. It cannot therefore form a legal basis for a suit in any Court out of British India. The mortgagee will perforce have to file a fresh suit to enforce his mortgage and not the judgment obtained by him in a British Court.

The answer to the question is that mortgage decree obtained in British India in respect of property situate in Berar (out of British India) is incapable of being executed in any Court in Berar; nor can a suit be maintained on the basis of the judgment of a Court in British India, which is null and void. The only course left is to institute a fresh suit in the Court in Berar to enforce that mortgage. There is no doubt an anomaly in the administration of justice in such cases as the present but that is inherent in the situation and it appears to me impossible judicially to remedy it, particularly in view of the trend of the legislation referred to above.

Gruer J. — I agree with the conclusions reached by my Lord the Chief Justice and Bose J. The points involved have been exhaustively discussed by them and by Niyogi J., in his dissenting opinion. I desire to say only that, once it is found on a consideration of the definition of "foreign Court" in S. 2 (5), Civil P. C., and for the other reasons set forth that Courts in Berar are not foreign Courts vis-a-vis those in the Central Provinces but are domestic Courts then the answers to the other questions, especially to the last question, would follow more or less as necessary corollaries. My answer to the first question and to the first part of the third question is "no" and that to the second and fourth questions is "yes".

Vivian Bose J. — I adhere with certain modifications to the view I expressed in the referring order and with respect disagree with Niyogi J. I do not intend to repeat what has been said there nor to re-examine the cases dealt with. This opinion is supplementary. In my opinion the position must be viewed exclusively from the point of view of a Berar Court and the fact that there is a Civil Procedure Code for British India must be placed on one side. Here we have a decree from a Court in British India brought for execution to a Court in Berar. The Berar Court has to deal with the matter from the point of view of its own domestic laws and therefore can only look to what has been termed for convenience the "Berar Code of Civil Procedure" in the referring order. The fact that it is identical in terms with the Civil Procedure Code obtaining in British India except for certain modifications does not matter: in fact it is just that which leads to much confusion of thought. The modifications are vital.

What does that Code (the "Berar Code of Civil Procedure") say? The notification which introduces it into Berar states in proviso 1 that except where the context otherwise requires references to British India or the territories subject to a local Government shall be read as referring to Berar. It also states that in S. 2 (5) of the British Indian Code of Civil Procedure, the words "British India" shall be read as referring to "British India and Berar," that is to say, that the two together are to be looked upon as one unit for these purposes in the same way as the Central Provinces and Berar now form one province under S. 47, Government of India Act, 1935, for all purposes. That means that S. 2 (5), "Berar Civil Procedure Code" which defines foreign Court runs as follows :

> Foreign Court means a Court situate beyond the limits of British India and Berar which has no authority in British India and Berar and is not established or continued by the Governor-General in Council.

Does this include a Court in British India? Clearly not. A Court in British India is situate in this unit known as British India and Berar and therefore is not beyond its limits; and that is the first test which a foreign Court has to fulfil. Then again a British Indian Court has authority in at least a part of this unit, namely the British Indian part of it, therefore having authority in that unit it does not fulfil the second test either, that test being that it should have no authority in any part of this suit

known as British India and Berar. I am assuming for the moment that British Indian Courts have no authority in Berar, though as has been shown in the referring order in point of fact they have because their decrees can be executed there. But even if it be assumed that they have none, they certainly have authority in the combined unit and therefore do not fall within the purview of the definition. That being so, a British Indian Court is not a foreign Court from the point of view of a Berar Court, and if it is not a foreign Court it must be a domestic tribunal.

The fact that it is situate in British India which is foreign territory from the Berar point of view makes no difference. It is open to a State to set up Courts of its own beyond its own boundaries, or to recognize those of other administrations if it so chooses. The co-operation of the other side is of course also necessary. The consent of the other administration to allow its Courts to occupy their time with foreign matters must naturally be obtained, otherwise these Courts would refuse to act and no Berar authority could compel them to do so. But so far as the clothing them with authority is concerned, that is within the competence of all sovereign States. Certain Cantonment Courts in Native States may be quoted as examples, and during the present world crisis we have whole administrations and Government functioning on foreign soil, but for present purposes, the most important illustrations are the Privy Council and the Court of the Judicial Commissioner and later of the Nagpur High Court until the new Government of India Act came into force. Until then there were not two Judicial Commissioners' Courts at Nagpur and later two High Courts, but only one. The jurisdiction of these British Indian tribunals was extended to Berar and thus we had in those days British Indian Courts (and not separate Berar Courts) exercising jurisdiction over foreign territory. The Privy Council is also situate in foreign territory from the point of view of Berar but it is not a foreign Court from the point of view of a Berar Court, because it exercises jurisdiction in Berar. It also exercises jurisdiction in British India but there are not two Privy Councils: there is only one Privy Council.

It is important to recognize that there was only one Court of the Judicial Commissioner in those days and not two, and that the Court which exercised jurisdiction over Berar was a British Indian Court and not a separate Berar Court composed of the same personnel, because that furnishes the key to the rest of the problem. For judicial purposes the Central Provinces and Berar were administered as one compact unit and not as two and each Court was constituted a domestic tribunal, and not a foreign one, vis-a-vis any other civil Court in that area.

Because of its importance it will be necessary to track this down to its sources and deal with the matter at length because it was urged that there were in those days two High Courts at Nagpur. I read the various Acts and Notifications in just the opposite sense and in my opinion the view urged would have the most appealing consequences. The Court of the Judicial Commissioner at Nagpur was first established by the Central Provinces Courts Act of 1865. There was no legislature in those days and the Act was passed by the Governor-General in Council acting in its legislative capacity. The decision to establish such a Court was made by a resolution of the Governor-General in Council dated 2nd November 1861 and the Act which actually brought the Court into existence was passed four years later. Till then there was no Court of the Judicial Commissioner who assisted "the Chief Commissioner and Agent to the Governor-General for the Central Provinces" in his administration of that area. He exercised certain judicial functions but not in his capacity as Judge of a Court. When the Court was first constituted, the Judge, (in the beginning there was only one), and later the Judges, appointed to this Court were appointed in the ordinary way by the Executive Government.

The original Act was repealed and replaced (from time to time) by other Acts. It is not necessary to examine them all. It will be enough to refer to the ones of 1904 and 1917. The important point to notice is the manner in which the Judges of that Court were to be appointed. Section 4 of the Act of 1904 provided that the Judicial Commissioner was to be appointed by the Governor-General in Council and the Additional Judicial Commissioners by the Local Government with the previous sanction of the Governor-General in Council by notification in the local official gazette. Soon after this, in the year 1905, the judicial system of Berar was amalgamated with that of the Central Provinces. This was done by the Berar Courts Law of 1905 which was enacted by the Governor-General in Council on 16th

June 1905 in exercise of the powers conferred upon him by the India (Foreign Jurisdiction) Order in Council of 1902. Section 3 of that Law is as follows :

3. (1) The Court of the Judicial Commissioner of the Central Provinces shall be the highest civil Court of appeal, and, except in reference to proceedings against European British subjects and persons jointly charged with European British subjects, the highest Court of criminal appeal and revision in respect of Berar.

(2) The said Judicial Commissioner may exercise in any part of the Central Provinces any jurisdiction conferred upon him by this law or any other law for the time being in force in Berar.

(3) Where, on the application of any enactment of the Governor-General in Council to Berar, words signifying the Court of the Resident have been substituted for an expression signifying a High Court in British India, those words shall, after the commencement of this law, and subject to the provisions thereof, be construed to mean the Court of the Judicial Commissioner.

Stopping there. These words do not in my opinion constitute a new Court. They merely invest a Court which already exists in British India with an additional extra-territorial jurisdiction. I think the wording of the section indicates that but in my opinion two tests place this beyond doubt. Before however dealing with that I draw attention to S. 5, Government of India Act of 1916 (6 and 7, Geo. 5 Ch. 37) which authorizes the Governor-General in Council to confer extra-territorial jurisdiction upon Courts. Up till the passing of this Act the Governor-General in Council acting, or purporting to act, under the authority conferred upon him by certain orders of His Majesty in Council made under the Foreign Jurisdiction Act of 1890, had been doing this. Doubts arose about the validity of, these actions, so the British Parliament made it clear in S. 5 of this Act that the Governor-General in Council had always had authority to make these orders and that he would continue to have this authority. The section is general and is in these terms :

An order of His Majesty in Council heretofore or hereafter made under the Foreign Jurisdiction Act, 1890, empowering the Governor-General of India in Council to make rules and orders in respect of Courts or administrative authorities acting for any territory shall not be invalid by reason only that it confers or delegates power to confer on Courts or administrative authorities power to sit or act outside the territory in respect of which they have jurisdiction or functions, or that it confers or delegates power to confer appellate jurisdiction or functions on Courts or administrative authorities sitting or acting outside the territory.

When the consolidating Government of India Act of 1915 was amended in 1919 a similar power was conferred upon Local Governments by S. 71 (3) (a), the only limitation being that in their case the approval and assent of the Governor-General in Council was necessary, as also publication in both the Gazette of India and the local official gazette. The Act of 1916 was not repealed and so the power of the Governor-General in Council to act as before was not affected. Even now, although the new Government of India Act of 1935 repeals the Act of 1916, or rather those portions of it, it continues these powers by incorporating S. 5 into S. 294 (5) with certain necessary modifications. It was argued that these actions of the Governor-General in Council amount to acts of legislation in British India and it was contended that so far as the Code of Civil Procedure is concerned, the Governor-General in Council cannot do that and cannot alter or amend the Code. This, in my opinion, confuses the "Berar Code of Civil Procedure" with its British Indian counterpart. It may be that a British Indian Legislature cannot create or set up a Court or other authority in territory which lies beyond the boundaries of the area over which it has jurisdiction and control, nor can the Governor-General in Council, but both can by mutual agreement with the sovereign authority in territory beyond their respective jurisdictions, or with some lesser authority deriving power so to act from such source, confer extra-territorial jurisdiction upon foreign Courts and authorities in certain matters and agree to regard them as domestic tribunals for all these limited purposes.

This is what the British Indian Legislature had done in the British Indian Code of Civil Procedure by its definition of foreign Court in S. 2 (5). It has not thereby set up any Court or authority in foreign territory, it has merely regarded certain foreign tribunals established or continued by the Governor-General in Council as domestic ones. And that it had every power to do. Turning next to the foreign territory, that is to say, in this case, Berar, the Governor-General in Council acting under an order in Council of His Majesty made under the Foreign Jurisdiction Act has power to legislate for Berar. In the exercise of those powers that authority enacted the "Berar Code of Civil Procedure." In that Code it has stated that any Court situate in the unit known as British India and Berar shall be regarded as a domestic tribunal. In doing this it has not legislated for British India, it has not affected British Indian territory, nor has it touched the British Indian Code

of Civil Procedure. The Governor-General in Council has merely conferred a certain extra-territorial jurisdiction upon British Indian Courts. It has not created those Courts, but has only conferred extra-territorial powers upon Courts created by the British Indian Legislatures, and this S. 5 of the Act of 1916 to which I have referred tells us it has power to do and has always had power to do when the requisite order of His Majesty in Council is present, as it is in the present case; and the moment that is done the Berar Code of Civil Procedure constitutes these British Indian Courts domestic tribunals by its definitions. The relevant order of His Majesty in Council is the one dated 11th June 1902. Paragraph 4 (c) empowers the Governor-General in Council to make rules and orders

for determining (not creating) the Courts, authorities, Judges and Magistrates, by whom, and for regulating the manner in which, any jurisdiction, auxiliary or incidental to or consequential on the jurisdiction under this order, is to be exercised in British India.

This, in my opinion, quite clearly, does not empower the Governor-General in Council to create a Berar Court in British India but only enables him to confer extra-territorial jurisdiction upon British Indian Courts created by the British Indian Legislatures and thus enables such Courts, sitting in British India and exercising jurisdiction there, to extend their powers and authority beyond the limits of British India into the foreign territory of Berar. With the utmost respect I am unable to see how this can be looked upon as amendment of the British Indian Code of Civil Procedure.

But turning back to the Berar Courts Law of 1905, I said that I considered two tests as conclusive of the fact that the Governor-General in Council was not creating a separate Judicial Commissioner's Court for Berar at Nagpur but was merely conferring extra-territorial jurisdiction upon a Court which had been created by a British Indian Legislature. If we turn to S. 4, Central Provinces Courts Act of 1904, we find that though the Judicial Commissioner was to be appointed by the Governor-General in Council the Additional Judicial Commissioners were to be appointed by the Local Government subject to the previous sanction of the higher authority. There is no corresponding provision for the appointment of Judges to the Court of the Judicial Commissioner in the Berar Courts Law, nor has the Governor-General in Council ever appointed the Additional Judicial Commissioner for that Court, nor had it up till 1917 authorized the Local Government to do so on its behalf. No part of the Central Provinces Courts Act of 1904 was ever applied to Berar. I give a typical order of appointment below:

GOVERNMENT OF THE CENTRAL PROVINCES,
APPOINTMENTS DEPARTMENT.

Order.

Nagpur, the 16th April 1932.

No. 1267/670/III

Mr. R. E. Pollock, I.C.S., District and Sessions Judge, Legal Remembrancer, Secretary Legislative Council, Central Provinces, and Judicial Secretary to Government, Central Provinces, is appointed to officiate as Additional Judicial Commissioner, Central Provinces, Nagpur.

No similar notification was issued in respect of Berar.

Now it is clear that it is not enough for a Court to be created. It is necessary for the creating authority also to make provision for the appointment of Judges to that Court. That this was not overlooked in the case of Berar is clear from Ss. 17 to 20 of the Berar Courts Law of 1905 which are headed "Appointment of Judges and ministerial officers of subordinate Courts." It is equally clear that not only did the Judicial Commissioner exercise authority over Berar after 1905 but so also did the Additional Judicial Commissioners who had been appointed by the Local Government. What power had they to do so if the law of 1905 had created a separate Judicial Commissioner's Court for Berar? They had never been appointed as Judges to that new Court. But, if the British Indian Court, as a Court, had been invested with extra-territorial jurisdiction, then of course its authority to act through its own Judges is clear.

When the Central Provinces Courts Act of 1917 was passed, the Local Government was given power to appoint both the Judicial Commissioner as well as the Additional Judicial Commissioners without reference to the Governor-General in Council. This Act was applied to Berar by item No. 115, schedule 1, with the direction that the words "the Province" in that Act should be construed as meaning the Central Provinces and Berar. But even that did not authorize the Local Central Provinces Government to appoint Judges to a Berar Court. The authority to create Courts and Judges for Berar was conferred by His Majesty in Council upon the Governor-General in Council and not upon a Local Provincial Government. The extent to which the Governor-General in Council can delegate

his powers is given in para. 3 of His Majesty's Order in Council. It is limited to delegation to "any servant of the British Indian Government." It is difficult to see how a Local Government can be regarded as a servant of the British Indian Government especially when none of its members individually was a Government servant; but in any case where was the delegation?

Section 134 (4), Government of India Act, 1915, defined Local Government as "the Governor in Council or the Governor acting with Ministers as the case may require." Now the Governor and his Executive Councillors were appointed by His Majesty under the Royal Sign Manual (S. 47 (1)), and as such held office during the pleasure of the Crown: *see* 6 Halsbury's Laws of England, Hailsham Edition, para. 782, p. 608. Therefore though they were servants of the Crown they were not servants of the British Indian Government; nor were the Ministers, because being an integral part of the British Indian Government they could not be servants of themselves. But however that may be, even if it be possible to argue that there was the necessary delegation in 1917, that would only affect Judges appointed after that date and would not apply to the Additional Judicial Commissioners who were appointed and functioned under the Act of 1904. It is important to observe that there were no fresh appointments in 1917; the old Court continued as before and so did its Judges. The logical result of the contention under consideration would be that all the thousands of orders passed and decisions made by the Additional Judicial Commissioners in that interval were mere nullities: a staggering conclusion. The position is even clearer when we come down in 1936 when the present High Court was constituted at Nagpur. It was created by His Majesty by Letters Patent and all the present Judges were appointed under that Letters Patent. There has been no fresh appointment of Judges by the Governor-General in Council to a High Court in Berar and consequently if the contention is sound, under what authority do we function in Berar? The order of the Governor-General in Council relied on relates only to a Court and not to Judges. If that creates a new High Court for Berar, then it is necessary to appoint Judges to that Court and none of us has been so appointed.

Other complications will also arise. The High Court functions under its Letters Patent and as such possesses powers which the Judicial Commissioner's Court did not have. If the order of the Governor-General in Council dated 20th January 1936 on which reliance was placed really creates a separate High Court for Berar, then that High Court is not of the same status or kind as the Nagpur High Court. It is not a Court created by His Majesty nor are the Judges, His Majesty's Judges. Consequently it cannot have the powers which His Majesty alone can, in the absence of statutory authority, confer. The Governor-General in Council acting as the legislative authority for Berar has not conferred these wider powers upon any Berar High Court; it has done no more than enact a "Berar Code of Civil Procedure". That means that the powers of the Berar High Court would be strictly limited by the "Berar Code of Civil Procedure" and therefore to mention only one consequence, no letters patent appeals would be possible. In my opinion, the consequences of accepting the contention under consideration would be appalling. I am quite clear that there was only one Judicial Commissioner's Court at Nagpur and not two and thereafter only one High Court. Once that is accepted, then the difficulties of regarding the subordinate Courts in the Central Provinces as domestic tribunals from the point of view of the Berar Courts largely disappears because the underlying principle is exactly the same in their case as well.

I said that to my mind two tests were conclusive of this matter. The first I have just dealt with. The second is this. In applying the various British Indian enactments to Berar why has the Governor-General in Council deemed it necessary to substitute the phrase "Central Provinces and Berar" or "British Indian and Berar" for the words "Central Provinces" and "British India" respectively? One would have thought that the word "Berar" alone would have been enough. The phrases used are necessary only on the view that extra-territorial jurisdiction is being conferred on certain British Indian Courts. Then again turn to notification No. 3510-I. B., dated 3rd November 1913. In applying the enactments referred to above to Berar the Governor-General in Council states that:

> In the enactments so applied references to a 'High Court' (shall be read) as referring to the Court of Judicial Commissioner of the Central Provinces.

What about the Court of the Judicial Commissioner of Berar if there is such a separate Court? What has the British Indian

Court of the Central Provinces got to do with Berar if there are two such Courts and why should this important Berar institution which alone would have any authority in Berar if it existed be ignored in this way? To my mind the answer is plain: there is no such institution. It is the British Indian Court which functions in Berar. Difficulties were raised in argument about ss. 16 and 17, Civil P. C. These difficulties have been dealt with by my learned brother Niyogi J., and he has been impressed with them. In my opinion they can only arise on the assumption that the British Indian Court and the Berar Courts are foreign Courts vis-a-vis each other. I think with respect that the discussion here has omitted to separate the Berar Code of Civil Procedure from its British Indian counter-part. We are dealing in this case with a decree passed by a British Indian Court in respect of property situate in Berar and with a Berar Court which is asked to execute that decree. As I observed before, we have got to look at the matter from the point of view of the Berar Court and to confine our attention to the Berar laws, that is to say, in this case, to the "Berar Code of Civil Procedure". I agree with my learned brother for the reasons given by him that the explanation to S. 16 "Berer Code of Civil Procedure" must be read as follows: "In this section 'property' means property situate in Berar." Therefore what we have to see is whether under this Berar section a British Indian Court can pass a decree in respect of property situate in Berar. That depends upon whether these Courts are to be regarded as foreign Courts or as domestic tribunals. I have already explained at length that they are not foreign Courts from the point of view of a Berar Court. Therefore the position narrows down to this.

Section 16, Berar Code says that suits for the recovery, partition, etc., of immovable property situate in Berar must be brought in the Court within the local limits of whose jurisdiction the property is situate. This of course can only be a Berar Court. But what happens if it is not brought in such a Court? In my opinion the rule which S. 21, "Berar Code of Civil Procedure" illustrates covers the defect as effectively as it does when the suit is instituted in a wrong Court (from the territorial point of view) in Berar. The reason for this has been given in our referring order. A defect of this kind does not affect the inherent jurisdiction of the Court and therefore when the wrong Court is a domestic tribunal, and in certain cases even when it is not, consent, or what is the same thing, absence of objection, can confer the necessary jurisdiction. If this result flows, as it does, in the case of Berar Courts because they are domestic tribunals vis-a-vis each other, and if by special Berar enactments British Indian Courts are also to be regarded as domestic tribunals vis-a-vis Berar Courts, then the same results must, in my opinion, follow in their case as well. It must be remembered that if a British Indian Court has inherent lack of jurisdiction to exercise authority in foreign territory in all cases, then the objection must apply equally to the High Court and probably also to the Privy Council. I agree that ordinarily there is want of inherent jurisdiction but in my opinion not so when the foreign power chooses to clothe British Indian Courts with the necessary authority by recognizing them as domestic tribunals. After that the question of jurisdiction becomes territorial and must be dealt with accordingly. The matter has been dealt with in the referring order but there is a decision of the Privy Council in 12 Cal 225[57] which has not been referred to there and as it supports my view it would perhaps be as well to refer to it now. That decision was given under the Civil Procedure Code of 1859, where there was no section which corresponded to S. 21 of the present Code. At p. 237 their Lordships say:

> It may be observed that the Court of the 24-Pergunnahs dealt with Alumpur, which is in Nuddea, and that the Court of Nuddea dealt with the three mouzahs twice mortgaged which were in the 24-Pergunnahs. The defendant, who succeeded in both suits, raised no question upon this, and each of the District Courts must be taken to have tried the whole suit before it by consent.

When, however, their Lordships dealt with the position in the High Court where there was no consent and the High Court attempted to confer without consent territorial jurisdiction upon a Court which had none, their Lordships said that the High Court had no power to do that. This also indicates that the rule applies even when S. 21 is not available. As regards the Privy Council cases in 42 Mad 813[14] and 54 Bom 495,[38] which were relied on, the former has already been distinguished in the referring order. In that case a British Indian Court passed an order under the Civil Procedure Code for the sale of properties of which a part was situate within the local limits of

57. ('86) 12 Cal 225 : 12 I A 215 : 4 Sar 652 (P C), Kamini Sundari v. Kali Prossunno.

its jurisdiction and part in a tract known as the Agency tracts. The Code of Civil Procedure has been expressly excluded from operation in these tracts by S. 1 (3). Therefore their Lordships held that as the sale was ordered under a provision of law whose operation had been expressly excluded from the tract in question, the order was a nullity.

But that is not the case here. Under the "Berar Code of Civil Procedure" all British Indian Courts have been placed on the same footing as the Berar Courts vis-a-vis each other and all made subordinate to the one British Indian High Court at Nagpur. Therefore as I see it, whenever an order or a decree made by a Berar Court without the necessary territorial jurisdiction would not be a nullity vis-a-vis another Berar Court, then a corresponding order of another domestic tribunal, a British Indian Court, made in like circumstances, would not be a nullity either. To the extent that it is necessary to confer this limited extra-territorial jurisdiction upon British Indian Courts and make them domestic tribunals for the purposes of the Berar Courts, the "Berar Civil Procedure Code" does apply to British Indian Courts, and it has been so applied by an authority recognized by S. 5 of the Act of 1916, namely the Governor-General in Council. Therefore the decision of their Lordships in 42 Mad 813[14] does not, in my opinion, apply to a case of this kind.

As regards the other decision, 54 Bom 495,[38] the position was this. A British Indian Court passed a decree which embraced not only property within its own territorial jurisdiction but also property beyond British India in the Kolhapur State. Now the State of Kolhapur is not administered by the Governor-General in Council and therefore the Courts of British India and the Courts of Kolhapur are foreign tribunals vis-a-vis each other. It was contended before their Lordships that S. 17, Civil P. C., saved the situation but their Lordships held that it did not because they said the different Courts referred to in that section must mean "Court to which the Code applies, that is to say, Courts in British India," and of course after their Lordships pronouncement it must be accepted that that is so. But I do not see that that makes any difference.

I agree with Niyogi J., that S. 17 must now probably be regarded as supplementary to S. 16, though we thought otherwise in the referring order. This point was pressed before their Lordships at p. 501 and though they did not actually say that this was so I think they indicated that in their opinion it would be. But what follows? Section 16 deals with territorial and not with inherent jurisdiction, that is to say, with a kind of jurisdiction which is curable by consent. If S. 17 is supplementary to S. 16, then it follows that S. 17 falls within that class. Therefore, it may well be that S. 17 cannot be applied when the properties are situate partly in British India and partly in Berar any more than S. 16 can be applied when the property is wholly situate beyond the limits of territorial jurisdiction. But that does not touch the point at issue here. The question here is not whether Ss. 16 and 17 can be invoked to confer jurisdiction when the parties object but whether consent can; and that, as I see it, is covered by the principle which S. 21 illustrates. Their Lordships did not refer to S. 21 or to the principle underlying it because clearly in that case it could not have been invoked. The objection to jurisdiction had been taken in the first Court itself, before decree, and an issue had been framed about it. Of course the rule cannot cure an irregularity as to the place of suing under S. 17 when the objection is raised in the first Court any more than it can under S. 16, unless the matter is decided against the objector and is not set right in revision or appeal in which case it would be res judicata. But that is not the case here. Here the objection was taken for the first time in execution. Their Lordships did not consider any such position.

The force of Ss. 16 to 20 was considered by the Judicial Commissioner's Court at Karachi in A I R 1931 Sind 47.[58] The learned Additional Judicial Commissioners pointed out that these sections deal

> with the forum or proper place where a plaintiff is required to institute his suit. These sections contain a direction to the suitor and not to the Court and do not purport to deal with the inherent or general jurisdiction of a particular Court or purport to deprive any such Court of its jurisdiction in the event of their non-compliance.

The learned Additional Judicial Commissioners relied on 23 Mad 367[59] at page 371 where rules of this kind were treated as procedural and then they continued :

> And not only that, but as already observed S. 21 of the Code makes it abundantly clear that a non-compliance with these provisions is in no way fatal to the jurisdiction of the Court and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower

58. ('31) 18 A I R 1931 Sind 47 : 131 I C 182 : 25 S L R 204, Dakumal Ranoomal v. Khajumal Parumal.

59. (1900) 23 Mad 367, Gourachandra Patnaikudu v. Vikrama Deo.

the executing Court to refuse to execute it on that ground.

I entrirely agree. My Lord the Chief Justice and I have dealt with this in our referring order and I will not cover the same ground, but I think that the opinion expressed there requires modification in respect of its treatment of S. 17. In view of the Privy Council decision to which I have just referred I do not think that it can be contended any longer that S. 17 can be applied to cases of this kind though the referring order suggests that it can. This decision of their Lordships was not cited before us then and I had overlooked it. There is also another modification which I think it desirable to make and that is as regards our treatment of the Privy Council decision in 56 Mad 405.[8] On looking into the matter further I find that their Lordships were dealing with an insolvency matter arising under the Provincial Insolvency Act. The District Court at Secunderabad was consequently acting as an insolvency Court and not as an ordinary civil Court. The Preamble to the Civil P. C. shows that the Code is regulating the procedure of "Courts of Civil Judicature" and consequently the Courts referred to in S. 2 (5) are civil Courts and not criminal or insolvency or any other kind of Courts. That being so, there can be no doubt that an insolvency Court situate in foreign territory is a foreign Court from the point of view of a British Indian civil Court. It is also to be observed that S. 5, Provincial Insolvency Act, does not import the definitions given in the Code of Civil Procedure into the Act and adopt them as its own. All it says is that:

> Subject to the provisions of this Act the Court, in regard to proceedings under this Act, shall have the same powers and follow the same procedure as it has and follows in the exercise of original civil jurisdiction.

That being so, the definition of "foreign Court" given in the Code of Civil Procedure does not apply to insolvency matters. It is clear throughout pp. 411 and 413 of their Lordships' judgment that their Lordships were there concerned with bankruptcy matters and adjudication orders, and the House of Lords' decisions on which they rely make that even clearer. That being so, it is clear why the definition in S. 2 (5), Civil P. C., was neither cited nor referred to: it did not apply to that case. But it does apply here. I would also like to add 29 N L R 342[60] at p. 348 to the authorities already cited in the referring order relating to S. 21, Civil P. C., and the rule of law which it illustrates. That leaves outstanding a difficulty which was raised as regards S. 45, Civil P. C. It was contended that this section would be otiose if a Berar Court was a British Indian Court and vice versa and that the Courts could then proceed directly under S. 39. I do not think that is so. The reason why Ss. 43 to 45 are necessary is because a British Indian Legislature cannot extend the operation of its law into foreign territory any more than a foreign authority can legislate for British India.

It is competent for a Legislature either in Berar or in British India to say that it will recognize Courts situate in the territory of the other as its own domestic forums but that in itself will not clothe those Courts with authority to act, nor will it serve to regulate their procedure. It is necessary for the sovereign power of the territory in which those Courts are situate, or some delegate from it clothed with the necessary authority, to allow its Courts to spend their time over these foreign matters and to determine the procedure which they should follow when doing so. The Governor-General in Council, legislating for Berar, has passed the "Berar Code of Civil Procedure" and has told Berar Courts by Ss. 2 (5) and 45 to recognize British Indian Courts as domestic tribunals and to send its decrees to those Courts for execution instead of leaving the successful party to sue on them as he would ordinarily have to do. But its authority stopped there. It could not legistate for British India and therefore could not compel British Indian Courts to recognize Berar Courts as domestic forums and could not compel them to accept their decrees and execute them. It was necessary for a British Indian Legislature to do that, and we find that a British Indian Legislature had done so. British Indian Courts are told in S. 43, British Indian Civil Procedure Code that they are to recognize Berar Courts as domestic forums and to execute their decrees. An exactly similar position is reached in respect of decrees passed by British Indian Courts and sent for execution to the Courts in Berar by reversing this process. I cannot see how this alters the matter. The important point is that these decrees could not be so executed unless the two Courts were domestic forums vis-a-vis each other. If they were foreign Courts, then it would be necessary to sue afresh upon the foreign judgment.

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60. ('33) 20 A I R 1933 Nag 318 : 149 I C 718 : 29 N L R 342, Makhanlal v. Panchamlal.

Some cases which have not been considered in the referring order were cited in the discussion before the Full Bench. I do not think two of them are in point : 15 Pat 567[61] related to the Sonthal Parganas which are a part of British India and the decision turned upon the competency of a settlement officer to send a certain matter for trial to a Court in Gaya (also British India) under S. 5A, Sonthal Parganas Settlement (Amendment) Regulation (3 of 1908). Their Lordships of the Privy Council held that he had this authority and that the Court to which the matter was sent had the necessary jurisdiction when the matter was so transferred: I L R (1938) Bom 529[62] interprets S. 41, Evidence Act, and holds that the Courts referred to there include Courts which are not British Indian Courts. I L R (1937) Bom 895[63] is in point but with respect I am unable to agree with it. The learned Judges considered that the decision of the Judicial Committee in 54 Bom 495[38] relating to S. 17, Civil P. C., settled the question. I have already dealt with this question. I agree with the learned Bombay Judges that after their Lordships' decision, S. 17 ought to be interpreted in the sense in which the Bombay High Court has interpreted it, but the learned Judges do not go on to consider the further question whether the defect is procedural (and so curable) or goes to the root of jurisdiction. In the case before their Lordships the matter was not curable because the Kolhapur Court with which they were dealing was unquestionably a "foreign Court." In our case, and in the case before the learned Bombay Judges, the Court was, in my opinion, and apparently in theirs as well, a domestic tribunal. I adhere to the view taken in the referring order and my replies to the questions put are the same as those given by my Lord the Chief Justice.

R.K. *Reference answered.*

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61. ('36) 23 A I R 1936 P C 189 : 163 I C 49 : 15 Pat 567 : 63 I A 311 (P C), Nrisingha Charan v. Rajniti Prasad.

62. ('38) 25 A I R 1938 Bom 394 : 177 I C 836 : I L R (1938) Bom 529: 40 Bom L R 571, Menahem Mesha Menahem Messa v. Moses Bunin Menahem Messa.

63. ('38) 25 A I R 1938 Bom 121 : 174 I C 116 : I L R (1937) Bom 895 : 39 Bom L R 1287, Karusinga Kushansing v. Narsinha Rangrao.

A. I. R. 1941 Nagpur 60

GRUER J.

Seth Nandlal and another —
Decree-holders — Applicants.

v.

Ramdatta Hiralal and others —
Opposite Party.

Civil Revn. No. 8 of 1939, Decided on 19th July 1940, from order of 2nd Sub-Judge, 1st Class, Khandwa, D/- 5th November 1938.

(a) Provincial Insolvency Act (1920), S. 78 (2)—Applicability—Absolute discharge granted to insolvent — S. 78 (2) cannot be applied even by analogy.

S. 78 (2) excludes time only in the case of annulment of an order of adjudication ; and therefore it cannot be applied even by analogy to a case where an absolute discharge has been granted to the insolvent. [P 60 C 2]

(b) Limitation Act (1908), Art. 182 — Phrase "made in accordance with law to the proper Court" in Art. 182 should be read also with concluding words "to take some step-in-aid of execution"—Insolvency Court is not proper Court within meaning of Art. 182—Steps-in-aid taken in aforesaid Court do not extend period — Time between adjudication and discharge of insolvent judgment-debtor cannot be excluded.

The phrase "made in accordance with law to the proper Court" in Art. 182 is to be read also along with the concluding words "to take some step-in-aid of execution". The insolvency Court is not the proper Court for execution and therefore any so-called steps-in-aid taken in that Court cannot extend the period. Time between the adjudication and discharge of an insolvent judgment-debtor against whom limitation for execution of a decree had already commenced prior to his insolvency cannot be excluded: AIR 1931 Pat 357, *Disting.*: AIR 1919 Mad 656 and AIR 1923 Bom 33, *Ref.* [P 61 C 1]

(c) Limitation Act (1908), S. 15 — Insolvency may act as stay of proceedings only when leave is refused.

An order of adjudication adjudging the defendant as an insolvent is not an order staying suit against the defendant because its effect is not to stay proceedings against the defendant-insolvent but merely to impose on the plaintiff the necessity of obtaining leave from the Court : it is is only when leave is refused that it can be said that there is an injunction and an order staying the institution of the suit. [P 61 C 2]

A. Razak — for Applicant.
V. K. Rajwade — for Opposite Party.

Order. — The question is whether this execution application of the applicants-decree-holders was in time. They first of all rely on S. 78 (2), Insolvency Act, read with Art. 182, Sch. 2, Limitation Act. But S. 78 (2) excludes time only in the case of annulment of an order of adjudication : so it cannot be applied even by analogy to the present case where adjudication was not annulled but an absolute discharge was granted to the insolvent. The decree-holders

then say that under Art.182 itself they are entitled to deduct the time spent in proceedings in the insolvency Court because these proceedings were steps-in-aid of execution of the decree or order. The lower Court has discussed the interrelation of the closing clauses of Art. 182, col. 3 of para. 5—"the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order"—and has in my opinion correctly interpreted it to mean that the phrase "made in accordance with law to the proper Court" is to be read also along with the concluding words "to take some step-in-aid of execution." As the Insolvency Court was not the proper Court for execution, it follows that any so called steps-in-aid taken in that Court do not extend the period. Here the decree was dated 4th October 1929 and was against two brothers Hiralal and Ramlal jointly. It was Hiralal alone who went to the insolvency Court and he was adjudged insolvent on 7th September 1934. He was discharged on 23rd October 1936.

Reliance is now placed on 10 Pat 422,[1] but the facts there were different. The decree against the insolvent was obtained some months after he had been so adjudicated and therefore S. 28 (2), Provincial Insolvency Act, had already come into force, and it was held that limitation did not begin to run until leave to proceed against the person of the judgment-debtor has been granted. In the case before us limitation had already begun to run, and I have not been shown any provision of law by which time between the adjudication and the discharge could be excluded. It is not contended that S. 14, Limitation Act, is applicable. The decree-holders could have applied to the Insolvency Court for permission to proceed in execution, but they did not do so. They could also have proceeded against the other brother Ramlal without permission and executed the decree fully against him, but they did not do so.

Section 15, Limitation Act, seems more promising, but no mention of it was made by either side in argument. Its effect was considered in 42 Mad 319[2] and 47 Bom 244.[3] It was held that an order of adjudication adjudging the defendant as an insolvent is not an order staying suit against the defendant because its effect is not to stay proceedings against the defendant-insolvent but merely to impose on the plaintiff the necessity of obtaining leave from the Court: it is only when leave is refused that it can be said that there is an injunction and an order staying the institution of the suit. For the above reasons I concur with the finding that this execution was barred by time. The present application is dismissed with costs. Counsel fee Rs. 20.

G.N./R.K. *Application dismissed.*

1. ('31) 18 AIR 1931 Pat 357 : 134 I C 633 : 10 Pat 422 : 12 P L T 345, Hit Narayan Singh v. Brij Nandan Singh.
2. ('19) 6 AIR 1919 Mad 656 : 49 I C 625 : 42 Mad 319: 36 M L J 104, Ramaswami Pillai v. Govindasami Naicker.
3. ('23) 10 AIR 1923 Bom 33 : 67 I C 757 : 47 Bom 244 : 24 Bom L R 509, Sidhraj Bhojraj v. Ali Haji.

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VIVIAN BOSE J.

Pannalal Ratanlal Parwar — *Surety* — Applicant

v.

Haji Abdul Karim Ibrahim Kachhi — *Decree-holder* — Opposite Party.

Civil Revn. No. 425 of 1939, Decided on 28th August 1940, for revision of order of 1st Sub-Judge, 2nd Class, Nagpur, D/- 25th April 1939.

(a) Deed — Construction — Surety bond—Rule of construction stated — Plaintiff applying for attachment before judgment—Surety undertaking to produce property or deposit its equivalent value in Court on plaintiff's claim being decreed — Suit dismissed under O. 9, R. 8, Civil P. C., and subsequently restored and decreed — Dismissal of suit under O. 9, R. 8, Civil P. C., held was not decree and did not terminate surety's liability under terms of bond—Surety was liable under bond on suit being restored and decreed.

Surety bonds should be construed primarily upon the terms used in the document and, in respect of any matter on which the bond is silent or ambiguous, by a reference to the various rules and laws and practice which apply in such cases. [P 63 C 1]

On the plaintiff's application for attachment before judgment the surety executed a bond and undertook to produce the property or deposit its equivalent value in Court on the plaintiff's suit being decreed. The suit was dismissed for default under O. 9, R. 8, Civil P. C., but was subsequently restored and decreed. The plaintiff sought to enforce the surety's liability under the bond:

Held that the dismissal of the suit for default was not a decree within the meaning of S. 2 (2) (b), Civil P. C., and therefore did not terminate the liability of the surety and that the surety was liable under the bond on the suit being restored and decreed. The surety could however be absolved if the plaintiff failed to apply for restoration within the prescribed period: *Case law referred.* [P 63 C 1]

(b) Deed — Surety bond—Surety undertaking to produce property or deposit its value in Court — Surety is entitled to his option.

Where the undertaking given by the surety is either to produce the property in Court or deposit

its value in Court, the surety has a right to exercise his option either to produce the property or to pay the money. [P 63 C 2]

Imdadali and S. K. Wankhede—for Applicant.

R. R. Dandige — for Opposite Party.

Order. — This application for revision raises an interesting point. The decree-holder as plaintiff applied for attachment before judgment. On 21st January 1938 it was ordered that the attachment should be effected unless the defendant furnished security for the due production of the property sought to be attached when required. The applicant before me stood surety and executed a bond on 30th January 1938. On 14th February 1938 the case was dismissed for default because the plaintiff did not appear whereas his opponent did. This dismissal was under O. 9, R. 8, Civil P. C. It subsequently appeared that the omission of the plaintiff to appear on the 14th was not due to any fault of his. The case had been fixed in his presence for the 17th and it had been so published in the public cause list. The plaintiff had also signed the order-sheet fixing the next date of hearing as the 17th. But it so turned out that the table clerk behind the back of the plaintiff and without informing him altered the date to the 14th, and of course the plaintiff not knowing anything about it did not turn up on the 14th but turned up on the 17th. The case was naturally restored to file and eventually ended in a decree for the plaintiff. In execution the plaintiff has proceeded against the surety upon his bond and the lower Court has made an order against the surety calling upon him to pay the Rs. 150 mentioned in the bond. The surety applies in revision and claims that the order dismissing the suit in default operated to discharge him. He relies upon three cases. None of them is exactly in point but according to him the principle laid down there will govern a case of this kind.

The first case relied upon is 10 ALL 506.[1] That decides that when a suit is dismissed the attachment before judgment comes to an end and is not revived if the suit is subsequently decreed on appeal. The next ruling relied on is 9 Rang 472.[2] That is more like the present case and decides that when a suit is dismissed for default all interim and ancillary orders in the proceedings, such as attachments before judgment, fall to the ground with it and that consequently an attachment before judgment does not revive if the suit is subsequently restored to file. The third decision upon which reliance is placed is a decision of the Judicial Commissioner's Court at Nagpur and is A I R 1934 NAG 169.[3] There Grille J. (J. C. as he then was) held that when a Court holds that a suit as framed is not maintainable and allows the plaintiff to amend his plaint and the plaintiff does so without objection, then any proceedings, such as attachments before judgment, prior to the amendment automatically fall to the ground and are not revived when the amendment is made. Reliance is also placed upon Mulla's Civil Procedure Code, Edn. 10, p. 1041, where it is stated that no interim order can survive the main litigation. It was argued that the security was furnished to avoid an attachment and that if the attachment, had it been made, would itself have come to an end upon the dismissal in default, then clearly the surety bond which is fundamentally based upon the right to attach must also come to an end.

On the other side reliance is placed upon a decision of a Full Bench of the Madras High Court reported in 58 Mad 721[4] which, in a case relating to a surety, holds that when a suit which has been dismissed for default is restored to file, all ancillary orders are also restored. The learned counsel for the non-applicant also relies upon A I R 1934 Mad 49[5] where it is held that the question turned upon the intention of the officer ordering restoration. If his intention was to revive the proceedings completely in such a way that they must be deemed never to have been terminated, then all ancillary matters prior to the order of restoration do not fall to the ground but continue in the same way as they would have done if no order for dismissal had been made. In my opinion none of these rulings is in point. We are concerned solely with the construction of the surety bond. That bond has not been officially translated but an agreed translation was given to me by the parties. That translation is as follows :

Whereas Haji Abdul Karim plaintiff in this case having applied for attachment before judgment and the Court having granted the same for production of the property worth Rs. 150 or to give secu-

1. ('88) 10 All 506 : 1888 A W N 195, Ramchand v. Pitam Mal.
2. ('31) 18 A I R 1931 Rang 281 : 134 I C 748 : 9 Rang 472, Pindi v. U Thaw Ma.
3. ('34) 21 A I R 1934 Nag 169 : 150 I C 1142, Ramlal Sheolal v. Seth Jamnadas.
4. ('35) 22 A I R 1935 Mad 365 : 157 I C 528 : 58 Mad 721 : 68 M L J 444 (FB), Veeraswami v. Ramanna.
5. ('34) 21 A I R 1934 Mad 49 : 147 I C 1045 : 57 Mad 308 : 65 M L J 844, Saranatha Ayyangar v. Muthia Moopanar.

rity to that extent I, Pannalal, (the applicant here) of my own accord stand surety and state that I shall either cause that property to be produced or its equivalent value to be deposited in Court upon such decree as the Court will pass in this case whenever ordered.

Now it will be seen that the undertaking in the bond is that either the property will be produced when the claim is decreed or its equivalent value will be deposited in Court. The stress is upon the word decree. When a claim is dismissed for default under O. 9, R. 8, that dismissal does not amount to a decree. This is to be gathered from S. 2 (2) (b), Civil P. C. It states that a decree shall not include an order of dismissal for default. Consequently, if a claim is dismissed for default it has not been decreed, and as the liability under the bond is to continue until the claim is decreed it is clear it cannot be brought to an end because something has happened which does not result in the claim being decreed. Of course this does not mean that the liability of a surety in circumstances like these would continue for ever if no application for restoration is made or if made, is dismissed. It would of course be unreasonable to construe a bond in that sense, but it has often been held, not only by this Court but also by their Lordships of the Privy Council, that these surety bonds are to be construed primarily upon the terms used in the document and in respect of any matter on which the bond is silent or ambiguous, by a reference to the various rules and laws and practice which apply in such cases. When a case is dismissed for default, the law is that the plaintiff can apply for restoration within a certain time. If he does not apply, then, of course, as soon as the time passes the surety is absolved. He does not have to keep his money tied up for ever. But the understanding clearly is that the plaintiff has a right to apply in such a case and that if he does apply, the suit will continue and may end in a decree as here. Consequently upon a construction of this bond I am of opinion that the liability did not terminate when the claim was dismissed for default and that as the claim has now been decreed the surety is liable upon his bond.

It was then argued that if this is to be the case, then the bond is not a surety bond in the sense that the surety has undertaken to pay a sum of money. It was argued that the so-called surety is only a supratdar and that his undertaking is either to produce the property in Court, or cause it to be produced, or deposit its value in Court. The learned counsel for the applicant contends that he has not been given an opportunity of producing the property and wants me to remand the case to the lower Court and afford him an opportunity. That, in my opinion, is undoubtedly a true construction of this bond. He has the right either to produce the property or to pay the money and it is clear that he ought to have been given an opportunity of exercising the option given to him under the bond. But I see no point in remanding the case, because I asked the learned counsel whether if remanded he would undertake to produce the property, and he replied that he was not in a position to do so because the defendant had already taken possession of it. In these circumstances a remand to enable him to fulfil an option, which he himself admits he cannot, would be idle. The application is consequently dismissed with costs. Counsel's fee Rupees 10.

G.N./R.K. *Application dismissed.*

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STONE C. J. AND VIVIAN BOSE J.

Panmal Keshrichand Javheri, managing partner of firm Ramkaran Hiralal — Appellant

v.

Dhanalal Laxmichand Karnawat, Decree-holder and another, Judgment-debtor — Respondent.

Misc. Appeal No. 182 of 1937, Decided on 2nd August 1940, from order of 2nd Addl. Dist. Judge, Nagpur, D/- 3rd May 1937.

Partnership — One of partners overdrawing his account with partnership—Judgment-creditor of such partner cannot enforce his decree against overdrawn partner's share of profits before sum due to firm is fully paid up — Firm is entitled to set-off under O. 8, R. 6, Civil P. C.

A judgment-creditor of the overdrawn partner cannot enforce his decree against the overdrawn partner's share of the profits before the sum due to the firm has been fully repaid. The remaining partner or partners are entitled to priority over the overdrawing partner's assignee (or judgment-creditor) in the sense that the other partners are entitled to reimburse the firm out of the overdrawing partner's share of the profits (and in the case of dissolution, of his assets as well) before handing any part of such share over to the overdrawing partner or his judgment-creditor or assignee. The firm would be entitled to a set-off under O. 8, R. 6, Civil P. C. : A I R 1932 Pat 15, *Ref.* [P 66 C 1]

Y. S. Tambe — for Appellant.

G. S. Brahmarakshas and S. R. Mangrulkar— for Respondent 1.

Judgment. — Respondent 1 Dhanalal, obtained a decree for Rs. 11,983 against respondent 2, Mt. Dhanabai. Dhanabai is

interested in the firm of Ramkaran Hiralal on very special terms which mark this out from an ordinary partnership case. She has obtained under a compromise decree an interest not in the partnership assets but in the partnership profits as indicated below. This results in her creditors having no right to the assets of the partnership because she has no such right. The managing partner of the firm is the appellant Panmal. Originally the decree-holder who incidentally is the son-in-law of the judgment-debtor attached a three annas share in all the partnership property. The appellant Panmal objected on two grounds. He said first of all that the decree obtained by the son-in-law against the mother-in-law was a fraudulent and collusive decree obtained in order to obviate the effects of a decision of the Judicial Commissioner's Court in a suit between the judgment-debtor and the appellant. The judgment-debtor who is related to the appellant had sued the appellant's father for partition and separate possession of the family property in the year 1919. This ended in a compromise which formed the subject-matter of further litigation. The Court of the Judicial Commissioner held that under the compromise decree the judgment-debtor was not entitled to partition and that all that she could get was a three annas share in the profits of the business. In order to get round this the son-in-law sued his mother-in-law as above, obtained a consent decree and now wants to partition the property under the guise of executing the decree. That was the appellant's case. The objection succeeded to this extent, namely that the attachment was raised and the lower Court directed the decree-holder to amend his execution application and to proceed under O. 21, R. 49 (2), Civil P. C. This was done and a receiver was appointed and the decree-holder is now attempting to proceed against Dhanabai's share in the profits of the firm. The question is what do these profits come to. The answer depends upon the solution of another problem.

It appears or rather the appellant alleges that the judgment-debtor withdrew sums of money from time to time from the partnership funds and is indebted to the firm. The Commissioner who was appointed to go into the accounts finds this to be the fact. The exact figure is in dispute: the appellant puts the indebtedness, after making allowance for the profits which have accrued to the judgment-debtor at Rs. 20,914-3-3, whereas the Commissioner places it at Rs. 1646-5-3. But the fact that the judgment-debtor has taken money from the firm and now owes it a certain sum has been found. It may be added that the Commissioner has not challenged any of the figures given in the appellant's books. On the contrary he finds that the books are regularly kept and that a profit and loss account has been made every Diwali. The difference arises out of the manner in which items have been appropriated to one account or the other. Thus, items which have been debited to the judgment-debtor's personal account ought in the opinion of the Commissioner to have been debited to the shop account and so on. But for the moment we are not concerned with this difference. It does not form a part of this appeal. The problem we are called upon to solve is a legal one. If one partner overdraws his account with the partnership, are the remaining partners, or rather the firm, entitled to recoup itself from the overdrawn partner's share of the profits before handing over any of the profits to him? And to carry the problem a step further in order to bring it into line with the facts of this case, can a judgment-creditor of the overdrawn partner enforce his decree against the overdrawn partner's share of the profits before the sum due to the firm has been fully repaid? In other words does the judgment-creditor get priority or the firm?

Order 21, R. 49 (2), does not help much. It empowers the Court to do a number of things : (1) to make an order charging the interest of the judgment-debtor partner in the partnership property and profits with the payment of the amount due under the decree, (2) to appoint a receiver of the share of such partner in the profits or other money which may be coming to him in respect of such partnership, (3) to direct the taking of accounts, (4) to make an order for the sale of the said partner's interest in the property, and so on. But none of that solves the present problem. Who is to have priority — the judgment-creditor or the firm? We have no doubt that in all ordinary cases the equitable solution would be to direct sale of the judgment-debtor's interest in the partnership properties, because ordinarily the overdrawn account would not exceed the overdrawing partner's interest in the total assets. But when, (as may be the case here owing to the consent decree and the Judicial Commissioner's judgment, though we decide nothing about that in this appeal), the overdrawing partner has no interest in the assets aside from the profits, or when

the sum owing to the firm exceeds the partner's interest in the total assets, then such a direction does not solve the problem, or the whole of it, as the case may be. Dissolution has not been asked for or ordered here and so we have to proceed on that basis.

Unfortunately the Partnership Act does not deal with this point. In 10 Pat 792[1] the Patna High Court applied the English law. That case was not on all fours with the present but the following principles are deducible from it. (1) That one partner cannot confer all the rights and privileges which he possesses in the partnership upon a stranger by transferring his interest without the knowledge and consent of the other partners. The reason given is that the relationship between partners inter se is a fiduciary one and is one of mutual confidence. (2) That the assignee obtains no right to interfere with the management or administration of the partnership business or affairs during the continuance of the partnership, nor is he entitled to require any accounts of the partnership transactions, or to inspect the partnership books. The only right he obtains is to receive the share of the profits to which the assigning partner would otherwise be entitled and he is bound to accept the account of profits agreed to by the partners. This is the rule in S. 31, English Partnership Act, and according to the Patna decision it is the one which ought to be applied in India. As a matter of fact, it has been subsequently applied in S. 29 (1), Indian Partnership Act. (3) That after dissolution the assignee can claim an account against the remaining partners, and is entitled to receive the share of assets to which the transferring partner is entitled. (now S. 29 (2), Indian Partnership Act.) (4) That partners are not, as regards partnership dealings, considered as debtor and creditor inter se until the concern is wound up or there is a binding settlement of accounts.

But Fazl Ali J. also recognizes at p. 801 that there are exceptions to these rules and that in special circumstances strangers to the partnership have been held entitled to an account. Some of these exceptions are set out in 24, Halsbury, Hailsham Edition p. 480. In our opinion it will be necessary to balance the rights of the other partners against those of the stranger assignee or judgment-creditor. A rule will have to be devised which will do the maximum of justice with the minimum of inconvenience. We think it is clear that the judgment-creditor cannot be placed in a better position than his judgment-debtor. He cannot claim higher rights vis-a-vis the other partners than his own assignor has. The question therefore reduces itself to this. Can a partner demand as against his other partners that his share of the profits (or in the case of a dissolution, of the profits plus the assets) be paid over to him before he has made good moneys which he owes to the firm? In answering this question the most important rule to bear in mind is the last of the four quoted above. The rule as applied in England is to be found in Halsbury's laws of England (Hailsham Edition) Vol. 24, p. 481. After setting out the rule the learned authors continue :

> It follows that one partner has no right of action against another for the balance owing to him until after final settlement of the accounts.

Lindley in his work on Partnership, Edition 10, p. 655, in giving a summary of the law as it stood in England before the Judicature Acts, says that an action would not lie at the suit of one partner against another for money lent to the firm of which the plaintiff was himself a member, for the advance only formed an item in the partnership account.

In our opinion, the converse would also apply. These debits and credits between the partners and the firm are all items in the general account and there can be no true settlement without taking them into consideration. The matter can also be viewed from another angle. Let it be assumed for the moment that a suit would lie at the instance of an overdrawing partner for his share of the profits, and that he could in that suit ignore his indebtedness to the firm because of his overdraft. We think the firm would be entitled to a set off under O. 8, R. 6, Civil P. C. The sums overdrawn are ascertained and the parties would both fill the same character as in the plaintiff's suit, namely that of partners. If then the position is that the assignee has no better rights than his assignor he would also be subject to the same rule. The result would in the end be the same as if this were done in the present proceedings. The plaintiff would not get anything unless the sum due to him exceeded that due by him to the other side. If he could not get more than that, then it follows that his assignee cannot be in a better position. In the result then we think that the remaining partner or partners are entitled

1. ('32) 19 AIR 1932 Pat 15 : 138 I C 40 : 10 Pat 792 : 12 P L T 361, Mistry Gowa Petha v. N. H. Moos.

to priority over the overdrawing partner's assignee (or judgment-creditor) in the sense that the other partners are entitled to reimburse the firm out of the overdrawing partner's share of the profits (and in the case of dissolution of his assets as well) before handing any part of such share over to the overdrawing partner or his judgment-creditor or assignee. It follows then that the receiver cannot claim to receive any portion of the second respondent's share in the profits of the firm until the sums due by her to the firm on account of overdrafts are fully liquidated.

The learned Judge of the lower Court in reaching the opposite conclusion had been impressed by a practical difficulty. He is afraid that if the rule we have enumerated is correct, then it will be possible for partners in a firm to defeat the claim of a judgment-creditor of one of them by colluding together and allowing the partner against whom a decree has been obtained to overdraw his share of the profits during the course of a year and thus leave nothing for the receiver to receive. This impressed us also for a time but we think the answer is that if this is done fraudulently, then the Courts will be astute to circumvent the fraud. Once the receiver is appointed, then it becomes his right and part of his duty to see that frauds of this kind are not committed. He has a right to accounts under O. 21, R. 49, and has the right to demand that enquiries be made. It is true he cannot interfere in the management of the business of the firm but he can insist that nothing be paid over to the judgment-debtor partner for his private and personal purposes as distinct from payments made in the ordinary course of the business for business purposes in order to enable the business to be carried on. In fact the very object of his presence there as receiver is to receive moneys payable to the judgment-debtor partner (except moneys entrusted to him for the carrying on of the business) whether these be paid as advances or otherwise. If the other partner pays to the judgment-debtor direct in such circumstances it would be contempt and would be punishable as such quite apart from other remedies. Therefore we think that the learned Judge's difficulties are more apparent than real.

The appeal is allowed and the order of the lower Court is set aside. The appellant will furnish to receiver with accounts from time to time and will assist him in all enquiries relevant and proper to this matter, and further he will not pay to respondent 2 any money or moneys except such as are payable strictly for the purposes of the partnership business in order to enable such business to be carried on. The receiver will be informed of all such payments and will be entitled to challenge them before the Court and in the event of his challenge being upheld, the appellant will be personally responsible for the payments and will have to make them good and hand them over to the receiver personally on application being made therefor in these proceedings. But apart from this the appellant will be entitled to set off respondent 2's profits against the sums legally and properly due by her to the firm until these sums are fully satisfied. The accounts will be made periodically and the profits for each year settled annually as hitherto. Any balance due to respondent 2, and indeed any sum payable to her apart from those payable for strictly business purposes as aforesaid, will be paid to the receiver and not to respondent 2. The costs of this appeal will be paid by the respondents.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Nagpur 66

NIYOGI J.

Nathu Singh Laxman Singh and others — *Accused* — Applicants

v.

Emperor.

Criminal Revn. No. 304 of 1939, Decided on 7th November 1939, from order of Sess. Judge, Akola D/- 31st July 1939.

(a) Penal Code (1860), S. 361 — Expression 'lawfully entrusted' — Meaning.

The expression "lawfully entrusted" signifies that the care and custody of a minor should have arisen in some lawful manner so as to show as if the person having the custody of the minor had been entrusted with the care and custody of the minor. The entrustment may be by a legal guardian; it may be written, oral, express or implied. In the absence of a legal guardian the entrustment may be presumed from the course of conduct of the person actually taking upon himself the duties of the care or custody of a minor. Guardianship connotes maintenance, protection and control of a minor. The word used in the explanation is "lawful" and that must be distinguished from the term "legal". A guardian may be lawful without being a legal guardian : 8 Cal 971, *Rel. on.*

[P 68 C 2; P 69 C 1]

(b) Penal Code (1860), S. 361—Lawful guardian — Illegitimate daughter marrying when three years old but living with her parents on account of her not having attained puberty — Her husband dying and girl continuing to live with her parents — Father-in-law not bringing her to his house — Guardianship held remained with parents.

An illegitimate daughter had been married when she was 3 years old and she had been always living with her parents except at intervals when she used to go to her father-in-law's place on festive occasions. She had not attained puberty when her husband died, and she was living with her parents at the time of her husband's death and she continued to live there subsequent to it. The father-in-law never brought her to his place after her husband died:

Held, that the parents never lost their guardianship as the girl did not attain puberty and even if they had lost it by her marriage, that was revived in consequence of the failure of the father-in-law to take up the responsibility of a guardian. At all events the father-in-law must be deemed to have "entrusted" the guardianship to the parents. [P 69 C 2]

(c) Penal Code (1860), S. 361—Lawful guardian — Custom — Married girl does not leave parents' house before attaining puberty.

According to a well-recognised custom among Hindus a married girl does not leave her parents' house before she attains puberty. [P 69 C 1]

(d) Criminal P. C. (1898), Ss. 342 and 428 — S. 342 does not operate when additional evidence is taken under S. 428.

S. 342 does not come into operation when additional evidence is taken under S. 428: A I R 1928 Bom 200, Rel. on. [P 69 C 2]

T. J. Kedar — for Applicants.

W. R. Puranik, Advocate-General — for the Crown.

Order.—The applicants Nathusing, Dama and Bhulabai were tried on the charge of kidnapping a minor girl from lawful guarnianship, Nathusing for the substantive offence and the other two for abetment thereof. All of them were found guilty and Nathusingh was sentenced to undergo rigorous imprisonment for nine months, Dama to undergo rigorous imprisonment for four months and Bhulabai was released on probation of good conduct under S. 562 (1), Criminal P. C. Their appeals failed and they have moved this Court in revision. The girl Jaiwanti was 14 years and 4 months of age when she was enticed away by the applicants. She was the daughter of Baina and Sadu who lived together as a man and wife without their relation being hallowed by marriage. The girl was therefore the illegitimate daughter whose legal guardian would be her mother if not her father. She had been married to one Pundia when she was an infant of three years and had the misfortune of losing her husband before she attained puberty. Except that she was occasionally going to stay in her husband's family she continued to stay as before her marriage with her mother and her putative father Sadu. This man was an agricultural servant of the applicant Nathusingh. The girl Jaiwanti and her mother also worked as agricultural labourers on his farm. Nathusingh seduced the girl and was cohabiting with her without the knowledge of her parents. As she was on the verge of puberty the parents thought of getting the girl remarried. There was apparently some difference of opinion between the parents as to the prospective son-in-law. It was while the negotiations for marriage were in progress that Nathusingh enticed the girl away from her parents' house on the evening of 10th February 1939, and moved her from place to place with the help of the other applicants and once sent her away as far as Seoni in C. P. Nathusingh was shrewd enough to write out a report, Ex. P-7, to say that the girl had attained majority and sent it to the police when she was made to leave the village in a tonga. On enquiry by the head constable who turned up to verify the report Nathusingh confirmed it by saying that the girl was a major.

An attempt was made here to demolish the convictions. The plea of the defence that the girl had been removed from her house with the express or tacit consent of her mother was overruled in view of the testimony of the mother Baina (P. W. 4). On the strength of 61 Cal 168[1] it is argued that the explanation given by the accused should have been accepted in view of the circumstances that there was a disagreement between the parents as to the selection of the bridegroom, and that the mother was inclined to break off the match arranged by the father of the girl. This explanation cannot stand in the face of the clear and unequivocal statement made by the mother that she never consented to the girl being taken away from her house and that it was all done without her knowledge. That statement of the mother has been believed by the two Courts below in view of the other evidence on record.

The question of law which has been argued here goes to the root of the case. If the applicants succeed on this point the convictions must be set aside and their acquittal ordered. The point is: whether the girl was under lawful guardianship of either Sadu her putative father, or Baina her mother, when she was enticed away from her house. It is argued that as she was a widow her lawful guardian was her father-in-law, and that in the absence of specific evidence that he had entrusted her

1. ('33) 20 A I R 1933 Cal 800 : 146 I C 767 : 35 Cr L J 156 : 61 Cal 168 : 58 C L J 405 : 38 C W N 187, Robert Stuart Wauchope v. Emperor.

guardianship to her parents, they would not be her lawful guardians. Reliance is mainly placed on a case reported in 4 Pat L J 74[2] for the proposition that the word "entrusted" occurring in the explanation appended to S. 361, I. P. C., means giving, handing over or confiding of something by one person to another so as to involve necessarily three persons; the person imposing the confidence or trust, the person in whom the trust is imposed and the person constituting the subject-matter of the trust. It is contended that a declaration of trust by the girl's father-in-law handing her over or confiding her to the care and custody of Sadu or her mother was essential on the true construction of the explanation to S. 361.

The support which this case gives to the applicants is more apparent than real. In the first instance the facts of this case are quite different from those in the present case. In the cited case the kidnapped girl Masudia was in no way related to Chhote Begum. Masudia's mother was a servant in the employ of Chhote Begum. When she died in her service Masudia was an infant 1½ year old. Masudia, when she grew in years, began to work as a servant with Chhote Begum. Atkinson J., who was disposed to put a very restricted construction on the word "entrusted" himself conceded at p. 89 that neither the declaration of trust itself nor its acceptance need be necessarily in writing. In his opinion it was sufficient if the declaration was verbally made and given, or if it arises from a course of conduct consistent only with the existence of such an antecedent declaration and accepted verbally or by necessary implication from the conduct of the party so entrusted with the duty imposed. Thus it is clear that although the expression "lawfully entrusted" presupposes a declaration of trust, that declaration may be oral or such as is inferrable from a course of conduct. Manuk J., who was a party to the Bench was of opinion that "entrustment" contemplated by the explanation to S. 361 could be inferred in the absence of proof of an express declaration written or oral from well defined and consistent course of conduct governing relations of a person alleged to be the lawful guardian of the minor. It is pertinent to observe that the narrow interpretation put upon the word "entrusted" by Atkinson J., did not commend itself to a later Bench of the same Court as is evident from 15 Pat 817.[3] The explanation appended to S. 361 runs as follows: The words "lawful guardian" in this section include any person lawfully entrusted with care or custody of such minor person. The wording no doubt differs from the wording of S. 55, English statute 24 and 25 Vic., clause 100, which runs as follows:

> Whoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of 16 years, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her shall be guilty of a misdemeanour.

The terms of the English statute appear to be wider than those of the explanation to S. 361, but the intent and scope of signification of either do not appear to materially differ. The use of the adjective "lawful" in the English statute is significant to show that the care or charge must have a lawful origin. That is precisely what appears to me to be the meaning of "lawfully entrusted with care or custody." The care or custody may arise by an express act or declaration of a person who is the natural or legal guardian and in their absence may arise from a person voluntarily assuming the duty and obligation of taking care and custody of any minor. Any narrower interpretation of the explanation to S. 361 would lead to somewhat strange and capricious results. No superintendent or director of an orphanage would have any remedy left against persons enticing away the minor orphans in their charge and an orphanage would become a kidnappers' paradise. The reasonable and proper construction should be to regard the expression "lawfully entrusted" as signifying that the care and custody of a minor should have arisen in some lawful manner so as to show as if the person having the custody of the minor had been entrusted with the care and custody of the minor. The entrustment may be by a legal guardian; it may be written, oral, express or implied. In the absence of a legal guardian the entrustment may be presumed from the course of conduct of the person actually taking upon himself the duties of the care or custody of a minor. Guardianship connotes maintenance, protection and control of a minor. The word used in the explanation is "lawful" and that must be distinguished from the term "legal". A guardian may be lawful without being a

2. ('19) 6 A I R 1919 Pat 27 : 49 I C 481 : 4 Pat L J 74 : 20 Cr L J 161 (F B), Mt. Kesar v. Emperor.

3. ('37) 24 AIR 1937 Pat 263 : 169 I C 48 : 15 Pat 817 : 38 Cr L J 673 : 18 P L T 535, Samarendra Kumar v. Emperor.

legal guardian. As was held in 8 Cal 971[4] the expression "lawful guardian" must be liberally construed.

But all this discussion is somewhat academic on the view I take of the personal law applying to the case in the special circumstances of this case. The girl was no doubt married but the marriage was only technical. Her father-in-law Kesheo who was examined as witness No. 1 for the Court says that she had been married when she was three years old and that she had been always living with her parents except at intervals when she used to go to his place on festive occasions. She had not attained puberty when her husband died, and she was living with her parents at the time of her husband's death and she continued to live there subsequent to it. The father-in-law never brought her to his place after her husband died. That is also the testimony of Sadu her putative father. It also emerges from Sadu's evidence that according to custom a married girl does not leave her parents' house before she attains puberty. That is undoubtedly a well recognized custom among the Hindus. In 24 Mad 255[5] it was recognized that the husband was not entitled to the actual custody of his wife until she attained maturity: In that case it was held that the parents had the preferential right to the custody of their minor married daughter. In the present case there being no tie of wedlock between her parents she would be deemed to be under the guardianship of her mother : *see* 12 Mad 67.[6] It has also been held that when father is known he has the preferential right : *see* 15 Lah 630.[7] It is therefore incontestable that, as parents, Sadu and Baina were the guardians of the minor. But it is urged that they lost their guardianship on the minor's marriage and that the guardianship once lost cannot be revived. This is a proposition which does not appear to have commended itself to the ancient Hindu jurist Narada, whose text runs thus :

> When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as in her maintenance they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of Sapinda.

This text is quoted in 16 Cal 584[8] at page 586. In the present case the father-in-law of the minor is alive but admittedly he never cared to exercise his right, presumably because the girl had not attained puberty and his son died before that event. As he was not willing to undertake responsibility of a guardian he would be deemed to be "helpless" within the meaning of that word in Narada's text cited above. It must therefore be held that the parents never lost their guardianship as the girl did not attain puberty and even if they had lost it by her marriage, that was revived in consequence of the failure of the father-in-law to take up the responsibility of a guardian. At all events the father-in-law must be deemed to have "entrusted" the guardianship to the parents as is clear from his course of conduct. On this view the parents would be the guardians even on the narrow interpretation of the word "entrustment" which commended itself to Atkinson J., in 4 Pat L J 74.[2]

There is now left outstanding a minor point for consideration. The appellate Court had felt a difficulty in deciding the appeal in the absence of a finding that the girl was entrusted to the care of her parents by the girl's father-in-law. It therefore directed the trial Magistrate to examine the father and the father-in-law of the girl under S. 428, Criminal P. C. It is urged that the accused persons should have been given the opportunity of adducing further evidence in rebuttal and that they should have been examined under S. 342, Criminal P. C. It was open to the accused to adduce additional evidence but he did not choose to do so. Section 342, Criminal P. C., does not come into operation when additional evidence is taken under S. 428, Criminal P. C. : *see* 52 Bom 699.[9] I affirm the conviction and I see no reason to interfere with the sentences. The application is dismissed. The applicants Nathusing and Dama will surrender to the District Magistrate and serve their respective sentences.

D.S./R.K. *Application dismissed.*

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4. ('82) 8 Cal 971, Empress v. Pemantle.
5. ('01) 24 Mad 255: 11 M L J 69, Arumuga Mudali v. Viraraghava Mudali.
6. ('89) 12 Mad 67, Venkamma v. Savitramma.
7. ('34) 21 A I R 1934 Lah 1003 : 156 I C 87 : 15 Lah 630 : 35 P L R 677, Mt. Parem Kuar v. Banarsi Das.
8. ('89) 16 Cal 584, Khudiram Mookerjee v. Bonwari Lal Roy.
9. ('28) 15 A I R 1928 Bom 200 : 112 I C 60 : 29 Cr L J 972 : 52 Bom 699 : 30 Bom L R 651, Narayan Keshav v. Emperor.

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NIYOGI J.

Madhaorao Narayanrao Ghatate — *Plaintiff* — Appellant

v.

Hanmant Dhaduji and others — *Defendants* — Respondents.

Second Appeal No. 112 of 1938, Decided on 9th September 1940, from appellate decree of Third Addl. Dist. Judge, Nagpur, D/- 25th November 1937.

(a) Limitation Act (1908), Art. 90 — Dates of knowledge of defalcations not stated — Article 90 does not apply.

Where the master alleges that certain defalcations by his servant have been discovered after the servant left the service but the precise date or dates on which they came to his knowledge is not stated, the article applicable would not be Art. 90.

[P 70 C 2; P 71 C 1]

(b) Practice — Plea — Appellant cannot shift ground in second appeal.

It is not open to the appellant to shift his ground in second appeal particularly on face of various facts on record placed by him in the pleadings.

[P 71 C 1]

(c) Stamp Act (1899), Sch. 1, Art. 1—Admission of correctness of account is not acknowledgment to supply evidence of debt within Art. 1.

An admission of the correctness of accounts is not the same as acknowledgment of liability. The debtor's admission taken on a memo so that he might not subsequently dispute its correctness cannot be regarded as an acknowledgment under Sch. 1, Art. 1 of the Stamp Act executed to supply evidence of the debt : A I R 1925 Mad 1215; A I R 1936 Mad 936 and A I R 1938 Pat 139, *Rel. on.*

[P 71 C 1]

(d) Stamp Act (1899), S. 35 — Document not basis of suit not being instrument of obligation — It can be used as piece of evidence in support of plaintiff's allegations.

Where an unstamped document has not been made the basis of the suit it neither being used by the plaintiff as an instrument of obligation nor as an acknowledgment to extend limitation but the suit is to enforce an oral promise to pay the amount which the defendant had failed to account for, the document produced can be used as a piece of evidence in support of the plaintiff's allegation : A I R 1931 Nag 113, *Rel. on.* [P 71 C 2]

G. J. Chati — for Appellant.

R. N. Padhye — for Respondents.

Judgment. — This is a plaintiff's appeal from the concurring judgment of the third Additional District Judge, Nagpur, in Civil Appeal No. 41-A of 1937 delivered on 25th November 1937. Respondent 1, Hanmant was in the service of the appellant as Kamdar, that is agent, up to 18th May 1930 if not 18th July 1930. During the period of his service he failed to account for certain sums for which he was accountable. Some time after he left the service it was discovered that he had not accounted for several sums aggregating Rs. 577-1-9. When he was confronted he admitted the correctness of the total amount found due by him, and he signed the memo of accounts, Ex. P-26 dated 2nd August 1931 expressly admitting its correctness and agreed to pay on the next day, that is 3rd August 1931. The suit was contested on various grounds of which the ground of limitation alone is material for this appeal, as the other contentions of the defendant were negatived by both the Courts below. On the issue of limitation the trial Court held that the cause of action for the suit had arisen on 19th May 1930 when the respondent left his service and that the memo of accounts, Ex. P-26, which bore his signature was inadmissible on account of its being unstamped so that it could not be used for the purpose of extending limitation. In the lower appellate Court it was argued that the memo of accounts, Ex. P-26, was an account stated within the meaning of that expression used in Art. 64, Limitation Act, and that the suit which was filed on the last day of three years period of limitation prescribed in that article should have been held to be within time. The lower appellate Court overruled the contention that the case fell within the Art. 64 and also that the memo of accounts was admissible although unstamped. The lower appellate Court disbelieved the evidence produced by the plaintiff to prove that the sureties were present when respondent 1 signed the memo of accounts on 2nd August 1931 and that they joined with him in the promise to pay the amount on the next day.

In this Court the plaintiff's claim is sought to be put on a much wider basis so as to bring the case within Arts. 90, 64 and 57, Limitation Act. The contents of the plaint no doubt countenance the argument to some extent. The plaint states that defendant 1 Hanmant was in the plaintiff's service till 18th July 1930 and that he had not accounted for certain sums aggregating Rs. 577-1-9. Then it alleges that these sums were discovered afterwards and states :

He being called upon to account admitted these items and admitted his liability for the total amount of Rs. 577-1-9 on 2nd August 1931. He had promised to return the amount on 3rd August 1931, but he did not turn up as promised.

There is indeed the allegation that certain defalcations have been discovered after respondent 1 left the service, but the precise date or dates on which they came to his knowledge is not stated as would have been done had the plaintiff intended to bring his case under Art. 90, Limitation Act. The

argument as to the application of Art. 90 must therefore fall to the ground. As to the application of Art. 64 there has been a good deal of argument whether the memo of accounts, Ex. P-26, could be treated as an account stated, but it appears to me totally irrelevant in view of the claim as laid in the plaint. The plaintiff did not allege that he was suing on the basis of the memo as an account stated but he alleged that he was suing to enforce a promise to pay certain amount on 3rd August 1931. The plaintiff described his cause of action as having arisen not on 2nd August 1931 but on 3rd August 1931 : *see* para. 1 (b). In his rejoinder filed on 6th July 1935 he reiterated that the respondent had agreed to pay the money on 3rd August 1931. In para. 5 of the rejoinder, he again makes it clear that the suit was not time-barred owing to the agreement to pay on 3rd August 1931. The evidence of P. W. 1 and P. W. 2 is directed to prove the respondent's promise to pay on 3rd August 1931. In view of these facts on the record it is not open to the appellant to shift his ground in second appeal.

Although the case does not fall under Art. 90 or Art. 64, Limitation Act, for the reasons stated above, I am unable to agree with the Courts below that the suit was liable to be dismissed on the ground of limitation. Exhibit P-26 contains the various items which respondent 1 had failed to account for and the respondent signed that document admitting the various sums. There is nothing to show that it was meant to be an acknowledgment to serve as evidence of liability. An admission of the correctness of accounts is not the same as acknowledgment of liability. The respondent's admission was taken on that memo so that he might not subsequently dispute its correctness. That document therefore could not be regarded as an acknowledgment under Sch. 1, Art. 1, Stamp Act, executed to supply evidence of the debt. In 49 M L J 306[1] it was held that a letter admitting that a certain account sent to the writer of it was correct did not require any stamp : *see also* A I R 1936 Mad 936[2] and A I R 1938 Pat 139.[3] That document was therefore admissible only to the extent of proving the admission by the respondent of the correctness of the memo of accounts. Even assuming that it was inadmissible the Courts below failed to see that the document was not the basis of the suit. It was neither being used by the plaintiff as an instrument of obligation nor as an acknowledgment to extend limitation. The suit was to enforce an oral promise to pay the amount which the respondent had failed to account for and the document was produced only as a piece of evidence in support of the plaintiff's allegation. In 27 N L R 56[4] it was pointed out that even when a promissory note fails for want of necessary stamp a suit would lie on the basis of an oral agreement to pay the debt. There is very clear evidence consisting of the testimony of Ganpat (P. W. 1) and Sakharam (P. W. 2) to prove the plaintiff's allegation as to the defendant's admission of his liability and promise to pay the sum due by him on the next day. That evidence is confirmed by the memo of accounts which bears the respondent's signature. There can be no question that the promise was made before the claim had become barred by time, whether the defendant left service on 18th May 1930 as he alleged or on 18th July 1930 as the plaintiff alleged; the plaintiff was entitled to ask for rendition of accounts within three years from either date. Respondent 1 admitted the liability within one year, that is on 2nd August 1931 and his promise to pay that amount was to pay a lawful debt. The suit must be held to be within time as against respondent 1.

As to respondents 2 to 4 the suit has rightly been thrown out. The plaintiff alleged a fresh agreement with the principal debtor and in order to impose its obligation on the sureties pleaded that they had also joined in the promise to pay. The lower appellate Court has disbelieved the plaintiff's witnesses as being interested in the plaintiff. The absence of their signature on the memo of accounts goes to a great extent to discredit the statement of the plaintiff's witnesses who are his servants. The result is that the appeal succeeds as against respondent 1 Hanmant only and fails as against respondents 2 to 4. Respondent 1 Hanmant will pay the costs of the plaintiff in all Courts and the appellant will pay the costs of respondents 2 to 4 in all Courts.

R.K. *Appeal partly allowed.*

1. ('25) 12 A I R 1925 Mad 1215 : 91 I C 494 : 49 M L J 306, Nagappa Chetty v. V. A. A. R. Firm.
2. ('36) 23 A I R 1936 Mad 936 : 168 I C 413, Swaminatha v. Narayanaswami.
3. ('38) 25 A I R 1938 Pat 139 : 174 I C 585, Ramprabha Ojha v. Bishunath Ojha.
4. ('31) 18 A I R 1931 Nag 113 : 134 I C 283 : 27 N L R 56, Mohan v. Ramji.

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STONE C. J. AND VIVIAN BOSE J.

Umar Haji Karim Shop, Akola No. 15 Defendant — Appellant

v.

Badridas Ramrai Shop, Akola and others — Plaintiffs — Respondents.

First Appeals Nos. 99-B of 1935 and 8 of 1936, Decided on 16th July 1940 from decree of Court of Sub-Judge, First Class, Akola, D/- 9th November 1935.

(a) Registration Act (1908), S. 49 — Unregistered sale deed may be used to explain nature of possession taken under it.

Though an unregistered deed of sale is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It may operate as starting point for adverse possession of vendee if he has set up independent title in himself : A I R 1919 P C 44, *Rel. on.* [P 74 C 1]

(b) Adverse possession — Mortgage — Stranger entering into adverse possession of property burdened with simple mortgage—His adverse possession as against mortgagee does not commence until mortgagee has obtained decree for foreclosure.

If a stranger enters into adverse possession of property burdened with a simple mortgage, then he only prescribes for the interest of the person entitled to immediate possession, that is to say, of the mortgagor. All that the mortgagor has is the right to redeem. Therefore all that the stranger gets is the right to redeem. He does not get a full title to the property and as for the mortgagee, his right to possession does not accrue until he has obtained his decree for foreclosure, or in the case of a sale, until he has purchased, (if he happens to be the purchaser); therefore, adverse possession as against him does not commence until that date : A I R 1916 Mad 990 (F B); A I R 1914 All 95 (F B); A I R 1918 Cal 933 and (1882) 7 A C 235, *Rel. on.* [P 74 C 1]

(c) Mortgage — Stranger entering into adverse possession subsequent to mortgage—Suit by mortgagee for foreclosure without joining trespasser as party—Rights of mortgagee and trespasser and procedure to be followed stated.

A mortgagee is not affected by anything done behind his back after his mortgage; therefore he is entitled to foreclose his mortgagor, (or bring the property to sale), without joining subsequent purchasers of the right to redeem, (or those in a lesser position such as trespassers whose title had not yet ripened). And by so doing he acquires substantial rights. On the other hand the purchaser of the mortgagor's rights, or the trespasser who has, or is on the way to ousting him and acquiring his rights, is also not without rights : and he is clearly not affected by a litigation to which he was not a party. The only way to do justice between these two conflicting rights is to adjust the equities. They are best adjusted by affording the purchaser, or the trespasser, (as the case may be), an opportunity to redeem that portion of the property in which he is interested on paying a proportionate part of the mortgage money : A I R 1936 Mad 70, *Rel. on.* [P 75 C 2]

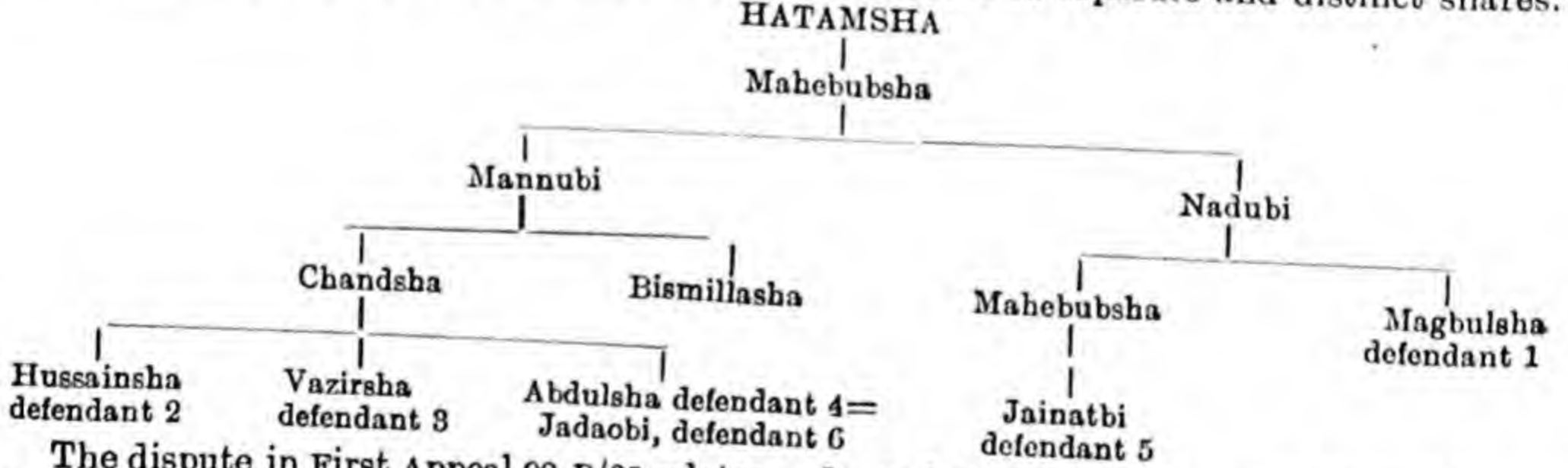
(d) Mortgage—Suit on mortgage — Lessee and trespasser are not necessary parties.

Though the lessee, and the trespasser, (or even the transferee) may be proper parties if their interests accrue subsequent to the mortgage, they are not necessary parties to a suit on mortgage. [P 76 C 1]

A. V. Khare and W. B. Pendharkar — for Appellant.

V. K. Rajwade, and A. Ahmad — for Respondents Nos. 1, and 3, 5 and 7, respectively.

Judgment.—This judgment will govern First Appeal 99-B/35 as well as First Appeal 8/36. They both arise out of the same judgment. We will deal with F. A. 99-B/35 first. The facts were placed before us in a somewhat confused state but once they are disentangled the questions which remain are not difficult. The property in dispute consists of a number of different plots which have been shown in a map prepared by the commissioner appointed for that purpose in the lower Court. It originally belonged to one Hatamsha and from him descended to the defendants, (except the fifth and sixth), as shown in the following tree. Defendant 1 got an undivided 8 annas and defendants 2, 3 and 6 an undivided 2 annas 8 pies each. There has been no partition by metes and bounds but the parties being Mahomedans succeeded to separate and distinct shares.



The dispute in First Appeal 99-B/35 relates to plots Nos. 2 and 3. We take the numbers from the commissioner's map. We will recite the facts relating to plot No. 3 first. On 2nd July 1913 defendant 1 leased his undivided interest in plot No. 3 to defendant 15 (who is the appellant in this appeal) by a document Ex. 15., D-1. Exhibit P-10 is

a copy of the same document. It will be convenient however to refer throughout to EX. 15., D-1. But though an undivided half interest was leased defendant 15 was placed in possession of the whole plot and it appears that he had been allowed to construct a substantial structure on this plot at some time anterior to the lease. Who had allowed him to do this has not been disclosed, but the lease deed refers to this fact and acknowledges that the superstructure on the plot belongs to defendant 15, and further states that even after the termination of the lease the lessee is not to be deprived of possession, unless the superstructure is paid for by the lessor. The recitals so far as they are relevant are as follows:

> . . . Hussainsha Fakir and, myself own a land measuring 30 X 30 feet' (this is plot No. 3) 'I am entitled to half of the aforesaid land as owner. I have given to you on rent my own half share in the aforesaid land for a period of six years . . . The land is bounded as under . . . Half the land of the land within the aforesaid boundary limits has as stated above, been given to you on rent for six years.
> . . . *P. S.* The superstructure constructed on the aforesaid land does not belong to us. It is constructed by you. It is owned by you. If after the expiry of the aforesaid period of six years I want to take back my land, I will pay you the price that the Panchas may fix of your superstructure on the land and then will take possession of the land. I will recover from you Rs. 16 by way of the rent of the land per year until I pay you the amount fixed by the Panchas on account of the superstructure.

It is to be observed that though the deed speaks of "half the land within the aforesaid boundaries" it means an undivided half and not a demarcated half. As a matter of fact, we understand that the superstructure covers the whole of this plot. It is also to be observed that though the deed speaks of the lessor having a half share in this plot that is not strictly accurate. What he had was an undivided half share in the whole of the property which consists of a number of plots and only an expectation of having this plot, or a half of it, assigned to his share at a partition. It will be necessary to take this into consideration when the property is divided at the partition. Two years after this lease, namely on 3rd November 1915, defendant 1 mortgaged his undivided 8 annas interest in the whole estate to the plaintiff. Then after this, on 30th May 1917, he sold his undivided half interest in plot No. 3 to defendant 15 by an unregistered deed of sale, Ex, 15D-2(A). Several years later defendant 3 mortgaged his undivided 2 annas 8 pies share in the whole estate to the plaintiff by two mortgage deeds, EX. P. 31 dated 2nd October 1923 and EX. P. 32 dated 11th March 1926.

In the year 1927 the plaintiff sued on his mortgages, obtained final decrees for foreclosure and eventually obtained joint possession, (the property was still undivided), on 21st December 1930 in the one case, and on 1st September 1930 in the other. Defendants 1 and 3 thus lost their respective interests in the estate and the plaintiff stepped into their shoes and became a co-owner to the extent of an undivided 10 annas 8 pies along with defendants 2 and 6. Defendant 15 was not joined in the mortgage suits and consequently is not bound by them. His interests are not affected by the decrees in any way. After this, on 1st May 1931, defendant 6 sold her undivided 2 annas 8 pies interest in plot No. 3 to defendant 15 by a registered sale deed, EX. 15D-2. The recitals state :

> 'I have this day sold to you the undermentioned immovable property' (plot No. 3) 'acquired by me under a deed of Mehar executed and registered in my favour by my husband on 20th September 1928 . . . . The entire land of the half joint share in the land within the aforesaid boundary limits . . . is sold . . . . The entire land within the aforesaid boundary limits is in your possession as a tenant for the last many years. On that entire land there is a pucca superstructure of tin roofing belonging to you. . . I having no concern with the said superstructure only owned the land of the half share. My husband had, as owner, given you on rent the aforesaid land and had delivered possession thereof to you. In the meanwhile the ownership of the said land was transferred to me under the deed of Meher . . .

It is necessary at this stage to explain the positions of defendants 4 and 5. Defendant 5 is a daughter of Mahebubsha, the brother of defendant 1. Mahebubsha died before the succession opened out and so defendant 1 obtained the entire 8 annas which fell to the share of that branch of the family. Defendant 5 got nothing. So far as defendant 4 is concerned, he inherited a 2 as. 8 ps. share, but out of this he transferred an undivided 2 as. 8 ps. interest in plot No. 3 to his wife, defendant 6, in lieu of Meher on 20th September 1928 as EX. 15D-2 recites. Thus she became the owner of that share in plot No. 3 to the exclusion of her husband. The present suit is a sequel to the plaintiff's mortgage suits. Having obtained an undivided 10 as. 8 ps. interest in the whole estate, and having been placed in joint possession thereof, the plaintiff now sues for partition and asks to be placed in undivided possession of such property as may be assigned to his share. But before this can be done it is necessary to decide the dispute which arises in connection with this plot (No. 3), because

it will be necessary to direct the partitioning officer to assign this plot, so far as that is possible and convenient, to the shares of defendants 1 and 4. It will also be necessary to decide, as between the plaintiff and defendant 15, what the plaintiff is entitled to receive.

The first problem in the case arises out of the unregistered sale deed dated 30th May 1917. As a deed of sale it was ineffective to pass title. But defendant 15 pleaded that it was good enough to operate as a starting point for adverse possession. Their Lordships of the Privy Council decided in 43 Mad 244[1] that though an unregistered deed of this kind is ineffective to pass title, it can be used to explain the nature of the possession taken under it. It is quite clear from the document that from the date of its execution defendant 15 set up an independent title in himself and thus held adversely to defendant 1 from that day. He has continued to hold in that character down to the present day which is more than 12 years from that date. Therefore, as against defendant 15 defendant 1 forfeited his title on 30th May 1929. But this does not affect the plaintiff mortgagee. It is well settled that if a stranger enters into adverse possession of property burdened with a simple mortgage, then he only prescribes for the interest of the person entitled to immediate possession, that is to say, of the mortgagor. All that the mortgagor has is the right to redeem. Therefore all that the stranger gets is the right to redeem. He does not get a full title to the property, and as for the mortgagee, his right to possession does not accrue until he has obtained his decree for foreclosure, or in the case of a sale, until he has purchased, (if he happens to be the purchaser), therefore, adverse possession as against him does not commence until that date. This was decided in 39 Mad 811,[2] 36 ALL 567[3] at p. 571 and 44 Cal 425[4] at p. 433. It is also the English law: *see* (1882) 7 A C 235.[5]

But this does not solve the whole problem. All the cases cited above, except the Madras Full Bench, (including the House of Lords case from England) were cases in which the trespasser was joined as a party to the suit on the mortgage, and the question of his adverse possession was considered from that angle. In that class of case there is not much real difficulty. The principle that the possession of a trespasser who enters into possession after the date of the mortgage is not adverse to the mortgagee, and that therefore the mortgagee's rights are not affected can readily be accepted. Therefore so long as the mortgagee sues upon his mortgage to enforce his rights as mortgagee within limitation, it is clear that he can enforce these rights. But if he does not join the trespasser to his mortgage suit and sues later for possession upon his title, the position is not as clear. When there is a mortgage the original rights to the property are split up between the mortgagor and the mortgagee, some residing in one and the rest in the other. When the mortgagee eventually forecloses, (or buys in a case of sale), the two rights coalesce. But if the mortgagor no longer has that portion of the rights which reside in him at the date of the mortgagee's suit it is by no means clear that the mortgagee can obtain them by foreclosing the mortgagor, (or bringing the mortgaged property to sale), and omitting from the action the person in whom these rights really reside. It is immaterial for this purpose whether the stranger has acquired the mortgagor's rights by purchase or by adverse possession.

We can quite see that the mortgagee could sue again upon his mortgage and foreclose (or sell) as against the stranger, but if he does not do this, or if at the date of his suit for possession such an action would be barred, then the position is by no means clear. It is even more difficult when, as here, the trespasser's title to the mortgagor's rights happens to have been perfected during the pendency of the mortgagee's suit upon the mortgage against the mortgagor. The division between the interests which the mortgagor and mortgagee respectively have in the property mortgaged is not the same in India and in England, but bearing those differences in mind, the observations of Lord Selbourne in (1881) 6 Q B D 345[6] (which was later confirmed by the House of Lords in (1882) 7 A C 235[5]) bring out the point we are now considering :

> This being the position of the title, as long as the mortgage is redeemable, the effect of an order for foreclosure absolute is to vest the ownership of,

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1. ('19) 6 AIR 1919 PC 44 : 53 I C 901 : 46 I A 285 : 43 Mad 244 (PC), Varada Pillai v. Jeevarathnammal.
2. ('16) 3 AIR 1916 Mad 990 : 31 I C 412 : 39 Mad 811 : 29 M L J 645 (F B), Vyapuri v. Sonamma Boi Ammani.
3. ('14) 1 AIR 1914 All 95 : 24 I C 997 : 12 A L J 982 : 36 All 567 (F B), Raj Nath v. Narain Das.
4. ('18) 5 AIR 1918 Cal 933 : 37 I C 277 : 44 Cal 425 : 27 C L J 212 : 21 C W N 177, Priya Sakhi Debi v. Manbodh Bibi.
5. (1882) 7 A C 235 : 51 L J Q B 367 : 46 L T 321 : 30 W R 553, Pugh v. Heath.
6. (1881) 6 Q B D 345, Heath v. Pugh.

and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forefeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or released . . . There can be no two things said Lord Manners in . . . more distinct or opposite than the possession as mortgagor and the possession as owner of the estate.

If these observations reflect the true position then it is difficult to see how the position of the mortgagee after foreclosure of the mortgagor, (or purchase), is better or worse than that of a person who buys property outright from another. If the vendor has lost all right, title and interest at the date of the sale, the vendee gets nothing. If there is a trespasser on the land at the time the vendee gets the vendor's rights to eject him. But he must bring his action within twelve years of the dispossession, because the adverse possession which had commenced against the vendor will run against the vendee as well. That is one point of view. The other way of looking at the matter is this. The trespasser only prescribes for the limited estate of the mortgagor when the property is burdened with a simple mortgage. Therefore, even though a suit on the mortgage may be barred as a suit on the mortgage against the stranger, all that the trespasser has acquired is a right to redeem. It is therefore inequitable to allow him to set up a higher right, namely the right to retain the property unconditionally, against the person in whom the larger title resides.

This difficulty was not considered by the Madras Full Bench in 39 Mad 811.[2] The sequence of events given in the report of that case is as follows: 1878, mortgage; 1890, trespasser enters upon the land; 1900, suit on the mortgage; trespasser not joined. November 1900, decree for sale. October 1906, mortgagee's successor (his widow) purchases. 1910, suit for possession against the trespasser. It will be seen that the position there was exactly the same as here. When the mortgagee sued on his mortgage the trespasser had not perfected his title, but he had had more than 12 years adverse possession before the mortgagee obtained his decree for sale. Unfortunately the only question referred for the consideration of the Full Bench was this:

Whether the possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple, is adverse to the simple mortgagee.

The question was answered in the negative, and with that answer we fully agree. But what then? Was the mortgagee allowed to eject the trespasser? Or were the equities adjusted by giving the defendant an opportunity to redeem? And if so, to redeem what? The whole of the mortgaged property which might comprise, as here, many properties, or just the one item of property of which he had been in adverse possession by paying a proportionate part of the mortgage debt? None of these problems was discussed in that ruling nor does the report furnish us with the sequel. We think the true position has been explained by Ramesam J., in 59 Mad 312[7] at p. 334, namely that it is the kind of case in which the equities have to be worked out. The mortgagee is not affected by anything done behind his back after his mortgage, therefore he is entitled to foreclose his mortgagor, (or bring the property to sale), without joining subsequent purchasers of the right to redeem, (or those in a lesser position such as trespassers whose title had not yet ripened). And by so doing he acquires substantial rights. This is also the view of Lord Selbourne, (whose judgment was later upheld by the House of Lords), in the English case which we have cited above, though there the subsequent purchaser was as a matter of fact joined to the action on the mortgage. But the learned Lord Chancellor enunciates the principle that the mortgagee is not affected by his mortgagor's actions, (or absence of action), subsequent to the mortgage.

On the other hand the purchaser of the mortgagor's rights, or the trespasser who has, or is on the way to ousting him and acquiring his rights, is also not without rights: and he is clearly not affected by a litigation to which he was not a party. The only way to do justice between these two conflicting rights is to adjust the equities. We think that they are best adjusted by affording the purchaser, or the trespasser, (as the case may be), an opportunity to redeem that portion of the property in which he is interested on paying a proportionate part of the mortgage money. Another question was also raised and was more fully argued in the other appeal (F. A. 8/36), but it will be convenient to deal with it here. It was contended that a mortgage is one and indivisible and consequently if a person interested in the equity of redemption is omitted from a suit on the mortgage the mortgagee obtains no title as against him and loses his cause of action on the mortgage for ever. It was argued that every person interested in the equity of redemption must be joined and that this includes subsequent

7. ('36) 23 AIR 1936 Mad 70 : 170 I C 856 : 59 Mad 312, Sambasiva Ayyar v. Subramania Pillai.

purchasers of the mortgagor's rights, lessees, tenants, trespassers, and so forth. The following rulings were relied on: 25 N L R 19,[8] at p. 26, 19 N L R 18,[9] 62 Cal 75,[10] at p. 77, 18 Cal 164[11] at p. 179, and 60 Cal 948.[12]

We need not go into this question here because it is possible to decide this matter on another ground. All we say now is that if that is really the law, then it will raise many practical difficulties and will seriously disturb the existing practice in this province. It will mean that whenever a mortgagee sues a malguzar, or other landlord of a village with tenants in it, then he will be obliged to join every tenant of the village, and every holder of every trumpery interest in it; and in large villages that may well run the defendants up to several hundreds. We also observe that it is possible that there is a difference between the words "interest in .... the property mortgaged or the right to redeem" used in S. 91, T. P. Act, and the words "right to enjoy" which occur in S.105. If the "right to enjoy" specified in S. 105 is different from the "interest" mentioned in S. 91, then the lessee who has only "a right to enjoy", and not an "interest", would not appear to be entitled to redeem. But the matter is debatable and we say no more about it.

The ground on which we proceed is this, namely that though the lessee, or the trespasser, (or even the transferee), may be proper parties if their interests accrue subsequent to the mortgage, they are not necessary parties. If the principle which we have enumerated above that the mortgagee cannot be affected by anything which is done behind his back and after his mortgage is correct, then he is entitled, if he so desires, to ignore these interests and proceed against his mortgagor on his contract. Having foreclosed his mortgagor, or purchased his interests at the auction in accordance with his contract, then he obtains all the interests which his mortgagor has in the estate at the date of the mortgage, subject, however, to subsequent equities. Those equities entitle him either to sue again upon his mortgage, if such a suit is still within time, or to sue upon his title, provided he affords the holder of the subsequent interest an opportunity to redeem such interest upon payment of a proportionate part of the mortgage amount. We have now to determine the extent of the mortgaged property in which defendant 15 is interested. In our opinion, it includes only the site of plot No. 3 and does not include the superstructure which stands on it. In this particular case we do not think that the superstructure can be said to form an accretion to the mortgaged estate.

The plot, or rather, defendant 1's half share in it, was leased to defendant 15 before the mortgage. The superstructure was then standing on it, and a condition of the lease was that the lessee was not to be evicted without the lessor paying for the building. The mortgagee was bound by these conditions when he later took his mortgage. Of course the lease has now merged in the higher rights which defendant 15 has acquired by his adverse possession. But we are not here dealing solely with legal rights. We are endeavouring to adjust the equities and in doing that we think that the fact that the superstructure was constructed by defendant 15 under the conditions mentioned above is a relevant consideration. As regards the other 2 as. 8 ps. share in plot No. 3 which defendant 15 claims, he obtained it by a registered sale deed from defendant 6. This defendant is not the plaintiff's mortgagor, and the plaintiff had not stepped into her shoes, or those of her husband defendant 4. Defendant 15 has consequently a clear title to an undivided 2 as. 8 ps. share in this plot.

This leaves us with a complicated situation. We think that the fairest method of working out the equities will be to assign an undivided half share in the plot to the share of the plaintiff's mortgagor defendant 1 (into whose shoes the plaintiff has now stepped), and an undivided 2 as. 8 ps. share to the share of defendant 6 (who stands in the shoes of her husband defendant 4). As regards the remaining 5 as. 4 ps. share that will be turned into cash and the money will be thrown into hotchpot. Defendant 15 will be allowed to redeem within six months an undivided 8 as. share in the plot (site only) on paying to the plaintiff a proportionate share of the mortgage amount, the proportion to be calculated on the basis of the site without its superstructure. Defendant 15 will also buy out the

8. ('29) 16 AIR 1929 Nag 246 : 123 I C 462 : 25 N L R 19, Ramnath v. Hazarilal.
9. ('23) 10 AIR 1923 Nag 273 : 65 I C 503 : 19 N L R 18, Sheoram v. Jamnabai.
10. ('35) 22 AIR 1935 Cal 139 : 154 I C 868 : 62 Cal 75 : 38 C W N 1178, Jagatchandra Dev. Abdul Rashid.
11. ('91) 18 Cal 164 : 17 I A 201 : 5 Sar 507 (PC), Umes Chunder Sircar v. Zahur Fatima.
12. ('33) 20 AIR 1933 Cal 728 : 148 I C 42 : 60 Cal 948 : 37 C W N 897, Niharmala Debee v. Sarojebandhu Bhattacharjya.

remaining undivided 5 as. 4 ps. share (site only) by paying into Court, within six months, its market value at the date of the suit. This money will be thrown into hotchpot and will be treated as a cash asset available for distribution at the partition. On failure of defendant 15 to redeem as above and to pay for the 5 as. 4 ps. share, or either, the property, including the superstructure, will be put to auction, and the proceeds will be distributed over the site and the superstructure by the lower Court. Such sum as the lower Court apportions to the superstructure will be handed over to defendant 15, and such sum as represents the site will be thrown into hotchpot.

We now turn to plot No. 2. There is no real dispute about this. Defendant 15 pleaded that he was a lessee of this plot under an oral lease granted before the mortgage by the first four defendants. His original statement dated 26th July 1933 is a little confused and the plaintiff appears to have read an assertion of adverse possession into it, and the issue has been framed accordingly. But we do not think that that was meant. The allegation of adverse possession related to plot No. 3 and not to plot No. 2. In any case the matter was cleared up in 15th defendant's statement of 10th August 1933 where he stated that he was prepared to pay the rent to the plaintiff if this field was allotted to the share of his mortgagors. The only contention the plaintiff raised in respect of this plot was that defendant 15 was a lessee and not an owner. The parties are therefore not really at issue on this point. It is accepted that an oral lease would be good. It is possible that disputes will arise hereafter when and if the plaintiff endeavours to determine the lease. But all that is premature now. Both sides agreed before us that these matters may be left open, that is to say, they accept the position that defendant 15 is a lessee and that he will attorn to whoever gets this plot at the partition, and that he will be bound by the terms of the lease (whatever they were), as also will his new landlord. It is however necessary to state that defendant 15 claims the superstructure on this plot as his own. The lower Court finds that this is so and there has been no appeal by the plaintiff against that finding. It will therefore have to be accepted that the superstructure is 15th defendant's but the other questions relating to this are left open. That is to say, we do not decide whether defendant 15 will have to remove the superstructure on the determination of the lease, or whether the plaintiff will have to pay him its price as a condition precedent to eviction.

The decree will accordingly contain a declaration to the effect that defendant 15 is a lessee of plot No. 2 and that he will continue to hold on the old conditions, (conditions which are not determined in this suit), after partition, and that he will have to attorn to whichever person receives this plot at the partition. This concludes F. A. 99-B/35. The success and failure in it are about equal. As regards plot No. 2, there was never any real dispute. As regards plot No. 3 each side claimed the plot as his own. In the result neither gets it without being compelled to recognize the rights of the other. We consider therefore that each side should bear his own costs vis-a-vis each other both here and in the lower Court. We turn now to F. A. 8/36. Defendant 16 is the appellant and he is interested in plot No. 1. The position here is a curious one. The plaintiff impleaded this defendant on the ground that he was in possession of plot No. 1 as a lessee from defendants 1 and 2, (para. 17 of the plaint), and that he (the plaintiff) did not want to be obstructed in his enjoyment of whatever property might be assigned to his share. Defendant 16 thereupon set up a title in himself adverse to that of the plaintiff. He said that he had been sold this plot by defendant 1 about 40 years before the suit, that is to say, long before the mortgages under which the plaintiff claims title. The sale is said to have been an oral one. It is admitted that in those days an oral sale was effective to pass title in Berar because the Transfer of Property Act had not then been introduced there.

The plaintiff denied this sale, and the lower Court upheld his contention and found that the sale was not proved. That leaves us with the position that this defendant was, on the plaintiff's allegation, a lessee. As such he was not a necessary party to the suit and should have been discharged; in fact that is what he asked for at one stage. But since then he has taken up the attitude, and has maintained it before us, that the plaintiff could get no title whatever to the property as against him because he was not joined as a party to the plaintiff's mortgage suits. We have already dealt with this argument in the other appeal and do not think it is well founded. We have no doubt that the plaintiff obtained a good title. All that has happened, or rather that

will happen if this plot is assigned to the share of the plaintiff, is that there will be a change of landlords. In view of the fact that the matter has been fought out up to this stage, we think that instead of discharging this defendant and thus allowing him to raise all these pleas over again it will be more satisfactory all round to embody a declaration about this plot in the decree as in the other case. The declaration will state that defendant 16 is a lessee of plot No. 1 holding from defendants 1 and 2 on the old terms, (terms which are not decided in this suit), and that he will have to attorn to whichever party obtains plot No. 1 when the property is divided. This is virtually what the lower Court has done. This appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeals dismissed.*

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* A. I. R. 1941 Nagpur 78

STONE C. J. AND NIYOGI J.

Manaklal Beharilal — Plaintiff — Appellant

v.

Mt. Kisni w/o Narayanprasad and others — Defendants — Respondents.

Letters Patent Appeal No. 18 of 1938, Decided on 21st August 1940, from appellate decree of Vivian Bose J., in S. A. No. 78 of 1934, D/- 5th September 1938.

* *Hindu Law—Alienation—Widow—Alienation for litigation for recovering estate is for necessity.*

A limited owner such as a Hindu widow or a daughter under the Benares law, is entitled to enter into any agreement involving alienation of part of the property to meet the cost of litigation for recovering the property claimed by her because preservation of the estate for the benefit of the rightful heirs of the last male owner is itself a benefit to the family, provided the particular alienation or transaction made by the limited owner in the circumstances in which she is situated is prudent, fair and reasonable having regard to the conflicting rights of the limited owner and reversioner: *Case law discussed.* [P 78 C 2 ; P 79 C 1]

D. T. Mangalmurti — for Appellant.

M. N. Gadgil and V. R. Gharpure, and B. L. Gupta — for Respondents, 1 to 8 and 11, and 9, respectively.

Judgment. — This appeal is allied to First Appeal No. 26 of 1933 and Second Appeal No. 143 of 1936.[1] The facts are stated at length in our judgment in First Appeal No. 26 of 1933. The facts that are material for the disposal of this appeal are that Mt. Bulki filed Civil Suit No. 381 of 1883 to recover possession of 5 as. 4 ps. share of mouza Wathoda which she claimed on her mother's death, as the separate property of her father. As she had no resources she, on 8th October 1883, entered into an agreement with Maniram, Chhotelal and Umediprasad whereby they undertook to defray the expenses of litigation and she promised to give each of them a quarter share of the property that she would recover on her success. She succeeded in the suit in recovering possession of 2 as. 8 ps. share and transferred 8 pies share including some fields to each of the three financiers. The suit out of which this appeal arises was filed by the appellant to recover possession of this 2 annas share from the representatives of the original transferees. The question which arose in this suit was whether the agreement dated 8th October 1883 was justified by legal necessity. The original Court accepted the plaintiff's contention and decreed the suit. The first appellate Court took the contrary view and dismissed the suit. That decree was upheld by Bose J. in second appeal.

The only question material for consideration in this appeal is whether a limited owner such as a Hindu widow or a daughter under the Benares law, is entitled to enter into any agreement involving alienation of part of the property to meet the cost of litigation for recovering the property claimed by her. In 12 Cal 52,[2] 4 Luck 26,[3] 31 Cal 433[4] and 31 ALL 497[5] it was held that it was competent to a limited owner to incur a debt and alienate sufficient part of property to discharge it for defending her title to the estate claimed by her. We do not see any reason why the same rule should not apply when having been excluded from the estate she is driven to institute a suit for recovering it. If a litigation attacking her title affords justification for charging the costs of litigation on the estate, *a fortiori* would a suit by her to recover the estate from which she is wrongfully excluded. In either case she would be under the necessity to defend the title of the last male owner under whom she claims. In fact in such a case the necessity will be the greater as her inaction would mean the loss of the estate with the deprivation of the

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1. *Reported in* ('41) 28 A I R 1941 Nag 79, Babulal Nandaram v. Maniklal Beharilal.

2. ('86) 12 Cal 52, Amjad Ali v. Moniram Kalita.

3. ('29) 16 A I R 1929 Oudh 364 : 112 I C 238 : 4 Luck 26 : 5 O W N 715, Jagdat Singh v. Kanhaiya Bakhsh.

4. ('04) 31 Cal 433 : 8 C W N 408, Debi Dayal Sahoo v. Bhan Pertap Singh.

5. ('09) 31 All 497 : 3 I C 795 : 36 I A 133 : 6 A L J 807 (P C), Karimuddin v. Gobind Krishna Narain.

maintenance of those who are dependent on the estate. Preservation of the estate for the benefit of the rightful heirs of the last male owner is itself a benefit to the family. In 31 ALL 497[5] their Lordships of the Privy Council held that the preservation of the estate and the cost of litigation for that purpose were objects which justified a widow in incurring debt and alienating a sufficient amount of the property to discharge it. In 29 N L R 41[6] it was held that the test to determine whether the transaction was legally necessary or beneficial, is not whether it was of defensive nature or otherwise, but to see whether the transaction was fair and proper; that was the test which their Lordships had applied in 1 Pat 741.[7] In that case they pointed out that the word necessity does not mean actual compulsion but the kind of pressure which the law recognizes as serious and sufficient. In 40 Mad 709[8] their Lordships of the Privy Council while considering the question as to the meaning of the expression "benefit to the estate" observed as follows:

> No indication is to be found in any of them as to what is, in this connexion, the precise nature of the things to be included under the description "benefit to the estate." It is impossible, their Lordships think, to give a precise definition of it applicable to all cases, and they do not attempt to do so. The preservation, however, of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connexion, to be taken as benefits and what not.

Is it possible to draw the line between a suit filed against a widow to deprive her of her husband's or father's estate and one filed by her to recover such estate from a trespasser? It cannot logically be said that in one case there is necessity or benefit to the estate and in the other case there is not. The safer course is not to attempt the impossible task of framing an exhaustive definition of the term 'necessity' but to decide on the particular facts of each case whether or not the particular alienation or transaction made by a limited owner in the circumstances in which she is situated is prudent, fair and reasonable. The words occurring in the original text of the Mitakshara, Chap. I, section 1, pp. 28 and 29 are 'apatkale' *i. e.*, in times of distress and 'kutumbarthe' *i. e.*, benefit to the family. The benefit to the family as pointed out in 46 Bom 312[9] may, under certain circumstances mean a necessity for the transaction. It is clear that the terms benefit and necessity are convertible terms. Necessity or benefit is only one of the phases of the test of propriety: *see* 43 Cal 574.[10] So one comes back again to the test "Is the transaction fair and proper?"

The two tests which have been formulated in the present case by Bose J. are: (1) whether the agreement is reasonable and prudent and having regard to conflicting rights of the limited owner and reversioner, was it just and fair to both? and (2) could she reasonably have made a better bargain? These tests are, in our opinion, perfectly sound and in accordance with the principles enunciated by their Lordships of the Privy Council as being applicable to the case of alienations by a limited owner. As we concur with Bose J. in the tests applied by him for judging the binding character of the agreement under consideration, there is nothing left in the appeal to call for our interference in view of the concurrent finding on the point of necessity. The appeal is dismissed with costs.

R.K. *Appeal dismissed.*

6. ('33) 20 A I R 1933 Nag 109 : 141 I C 494 : 29 N L R 41, Narayan Rao v. Mulchand.
7. ('22) 9 A I R 1922 P C 356 : 69 I C 71 : 1 Pat 741 : 40 I A 342 (P C), Ramsumran Prasad v. Mt. Shyam Kumari.
8. ('17) 4 A I R 1917 P C 33 : 39 I C 722 : 40 Mad 709 : 44 I A 147 (P C), Palaniappa Chetty v. Devasikamony Pandara Sannadhi.
9. ('22) 9 A I R 1922 Bom 122 : 64 I C 923 : 46 Bom 312 : 23 Bom L R 1094, Nagindas Maneklal v. Mohomed Yusuf.
10. ('16) 3 A I R 1916 Cal 792 : 31 I C 433 : 43 Cal 574 : 22 C L J 345, Khub Lal Singh v. Ajodhya Misser.

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* A. I. R. 1941 Nagpur 79

STONE C. J. AND NIYOGI J.

Babulal Nandram and others — *Defendants* — Appellants

v.

Maniklal Beharilal — *Plaintiff* — Respondent.

First Appeal No. 26 of 1933 and Second Appeal No. 143 of 1936, Decided on 21st August 1940, from decree of Sub-Judge, First Class, Wardha, D/- 27th October 1932.

**(a) Hindu Law — Alienation — Legal necessity — Transaction ancient — Witnesses and parties dead — Presumption of legal necessity is justified and onus would be on reversioner to prove absence of legal necessity — Thirty years' rule suggested should be applied.*

In the case of an ancient transaction, it must be presumed that the alienation was lawful i. e., justified by legal necessity. The difficulty no doubt lies in fixing the length of time (intervening between the transaction and its challenge in a suit)

that would be necessary to justify the application of that presumption. It is impossible to lay down any hard and fast rule. But on the principle underlying S. 89, Evidence Act, relating to documents 30 years old, the presumption in favour of the existence of necessity may well be applied to transfers more than 30 years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded. The presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the life time of the alienor. In such a case it would not be unreasonable to assume that the failure to sue for declaration was due to the existence of evidence proving necessity and the Courts would be justified in placing the onus on the reversioner of proving absence of legal necessity. *A I R 1920 P C 64; A I R 1922 P C 163 and 19 Mad 485, Rel. on.* [P 82 C 1, 2]

(b) Hindu Law — Partition — Shares defined in revenue papers is alone not sufficient to displace presumption of jointness.

A definition of shares in revenue and village papers affords but a very slight indication of an actual separation in a Hindu family. Such a definition of shares, standing alone, is not sufficient evidence to displace the presumption in law which is peculiarly strong in the case of sons of one father. *A I R 1925 P C 132 and A I R 1925 P C 49, Rel. on.* [P 82 C 2]

(c) Hindu Law — Alienation — Widow — Compromise fair and prudent — Alienation involved in compromise binds reversioner.

If the compromise is fair, reasonable and prudent in the circumstances in which a widow is placed, the alienation which is involved in the compromise must bind the reversioner. The alienation cannot be considered apart from the compromise. [P 84 C 1]

(d) C. P. Tenancy Act (1 of 1920), Ss. 49 and 37 — Both proprietary and cultivating rights given up — Person acquiring such rights can transfer cultivating rights to another.

Where the cultivating rights also have been given up along with the proprietary rights, a person acquiring both the rights in respect of a field can transfer the cultivating rights to any one he pleases or confirm the transfer of them if they had already been transferred. [P 84 C 2]

A. V. Khare, W. B. Pendharkar and M. B. Deshpande — for Appellants.

D. T. Mangalmurti — for Respondent.

Judgment.—This appeal and Second Appeal No. 143 of 1936 and Letters Patent Appeal No. 18 of 1938[1] arise out of three suits filed by the respondent in his capacity as reversioner, to set aside certain alienations made by his mother in favour of the predecessors of the three sets of defendants. The principal question involved in all these suits was one of legal necessity. This appeal and Second Appeal No. 143 of 1936 involve common questions of fact and law. This judgment will therefore govern the disposal of both. To elucidate the form in which the question of legal necessity arises it is necessary to narrate the facts at some length. The dispute in the suits relates to 5 as. 4 ps. share of mouza Wathoda. The field which was originally numbered 6 and is now included in fields Nos. 27, 28 and 29 of the current settlement, is alleged to be *sir* land appurtenant to 2 as. 8 ps. share which, at a revenue partition, had been carved out of the original 5 as. 4 ps. share. The entire village of Wathoda, it appears, had been acquired by Chintaman, the father of Uderam, Mohan and Balgovind, long before the first proprietary settlement of 1860. At this settlement the village was recorded in shares as follows:

Uderam	...	0-5-4 share
Ramdin son of Mohan	...	0-5-4 share
Tulsiram and Bodhiprasad sons of Balgovind	...	0-2-8 share each.

On the death of Uderam in 1868, the 5 as. 4 ps. share recorded in his name was mutated in the name of his widow Mt. Gangabai and on Ramdin's death in 1872, the share of 5 as. 4 ps. standing against his name was mutated in the name of his father Mohan. On Gangabai's death in 1870, the 5 as. 4 ps. share standing in her name was mutated in the names of Mohan and Bodhiprasad, with the result that the share of each of them augmented to 8 annas. In 1874, they got an imperfect partition of the village effected, as a consequence of which the 8 as. shares in the village were partitioned into two khels described as khel A and khel B. Khel A was allotted to Mohan and khel B to Bodhiprasad. Mohan sold his 8 as. share including field No. 6 which was then recorded as his malik wahit to Venkatrao Gharpure on 23rd May 1881. That field was then in the possession and enjoyment of his mistress by name Gaji through whom it passed to her son-in-law Nandram and other defendants. Nandram is now represented by his adopted son Babulal, appellant 1.

Uderam had a daughter by name Bulki. At the time of the death of Gangabai, her mother, in 1870, she was a minor. One would expect that her father's 5 as. 4 ps. share would be mutated in her name. But it appears that as Mohan, her uncle and Sunder, her aunt agreed to maintain her and meet the expenses of her marriage, her father's 5 as. 4 ps. share came to be mutated in the name of Mohan and Bodhiprasad the son of her deceased uncle Balgovind. They however failed to carry out the obligation which they had taken upon themselves. Consequently, Bulki represented by her grandmother Kasturibai, filed Civil Suit No. 511

1. *Reported in* ('41) 28 A I R 1941 Nag 78, Manaklal v. Mt. Kisni.

of 1871 against Mohan's son Ramdin and Bodhiprasad to recover some moveable property. But that suit was dismissed. Subsequently Mt. Bulki filed Civil Suit No. 381 of 1883 against Mohan, Mt. Gaji, Venkatrao Gharpure and Bodhiprasad to recover the 5 as. 4 ps. share which had been recorded in the name of her mother. As apparently she had no resources to enable her to carry on the litigation, she entered into an agreement with certain persons named Maniram, Umediprasad and Chhotelal on 8th October 1883, whereby they agreed to finance the litigation in consideration of which she in her turn agreed to part with three quarters of the property in case she succeeded in the suit.

At any stage of Suit No. 381 of 1883, Bulki compromised her claim against Mohan, Mt. Gaji and Venkatrao on 3rd November 1883. In pursuance of that compromise she transferred 2 as. 8 ps. share out of what she claimed to Venkatrao for Rs. 800. She thereafter withdrew her claim against Venkatrao, Mohan and Gaji who was then in possession of the *sir* field No.6, the subject-matter of this appeal. The question which arises upon this appeal is whether this sale deed dated 3rd November 1883 in favour of Venkatrao which was followed by the withdrawal of the claim against Venkatrao and Gaji, was justified by legal necessity or not. That issue arises directly in Second Appeal No. 143 of 1936. On that issue both the Courts below have agreed in finding that the alienation was made in the circumstances which would justify the inference of the existence of legal necessity for it. The suit out of which this first appeal arises, was decided by another Court. It came to a different conclusion as it was of opinion that Mt. Bulki fell a victim to fraud on the part of Mohan and his transferee Venkatrao. It is this conception which has largely influenced the decision of that Court.

The transaction which is impeached took place as far back as 1883, 45 years before the suits out of which these appeals arise, were filed. The plaintiff came into the world nine years after the transaction and had attained majority 18 years before he instituted the suits. Mt. Bulki, his mother, survived the transaction for 43 years. It was open to the plaintiff-respondent to file a suit any time during his minority and within three years on his attaining majority, for a declaration that the transaction was devoid of legal necessity. He omitted to take action along that line. He thus suffered 21 years to lapse during the life-time of his mother, the alienor, and he instituted these suits two years after her death and 45 years after the transaction, seeking to upset what in practice must be regarded as established titles. During this long period of nearly half a century, the original purchaser Venkatrao and his son died, with the result that his grand-son who, like the plaintiff, was not even born at the time when the transaction sought to be impeached took place, and others who were not parties to the transaction are now confronted with the superhuman task of proving the necessity to justify this ancient alienation. The best proof of the circumstances in which the transaction occurred, could naturally have come from the parties to it or those who witnessed it. They have all disappeared from this world and the defendants are deprived of their best evidence. In these circumstances it is not humanly possible to produce direct evidence to discharge the burden which lies on them. Cases are not a few where a reversioner standing in the position of the plaintiff, is tempted to exploit this inherent helplessness of a party who derives his title from an ancient transaction. The rule that the onus of proving legal necessity lies on the alienee, was long ago found by the Courts to be inequitable in its application to cases of ancient transactions. As far back as 1896 their Lordships of the Madras High Court, in 19 Mad 485[2] thought that it was unreasonable and inequitable to throw on the defendants the onus of showing that the original alienation was for a necessity binding on the reversioner. The judgment in which these observations were made was no doubt reversed in the Privy Council on a different point, but the view taken there as to the onus of proof was approved by their Lordships of the Privy Council in 46 Bom 481[3] in these words :

> In 19 Mad 485[2] it was pointed out that although the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. Their Lordships have no hesitation in applying the doctrine in the present case.

Their Lordships proceed :

> At the lapse of 100 years, when every party to the original transaction has passed away, and it

2. ('96) 19 Mad 485 : 6 M L J 247, Chockalingam Pillai v. Mayandi Chetiar.
3. ('22) 9 AIR 1922 P C 163 : 66 I C 162 : 46 Bom 481 : 49 I A 54 (PC), Magniram Sitaram v. Kasturbhai Manibhai.

becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made.

In 43 Mad 541[4] the suit was one by a reversioner to set aside an alienation by a widow made in 1830, on the ground that it was made without legal necessity. The widow died in 1900 and the suit was instituted in 1903 involving an enquiry into the circumstances of the transaction more than 82 years after it took place. The District Court found that there was no legal necessity for the same and decreed the suit. But the High Court held that the legal necessity had been proved and reversed the judgment of the trial Judge. The High Court was mainly influenced by the fact that the reversioner had failed to file a declaratory suit during the life-time of the widow and it construed the reversioner's silence and inaction for a long time as raising a presumption in favour of legal necessity. The learned Judges of the High Court in their judgment had propounded the law as follows:

It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time.

Their Lordships of the Privy Council adopted that statement of law as a sound one. It is clear that in the case of an ancient transaction, it must be presumed that the alienation was lawful i. e., justified by legal necessity. The difficulty no doubt lies in fixing the length of time (intervening between the transaction and its challenge in a suit) that would be necessary to justify the application of that presumption. It is impossible to lay down any hard and fast rule. But it appears to us that on the principle underlying S. 89, Evidence Act, relating to documents 30 years old, the presumption in favour of the existence of necessity may well be applied to transfers more than 30 years old provided that the original parties and witnesses to it are not available at the trial for bearing testimony to the circumstances in which the transaction was concluded. The presumption will operate with greater force in a case where the reversioner fails to bring a declaratory suit during the life time of the alienor. It would not be unreasonable to assume that the failure to sue for declaration was due to the existence of evidence proving necessity. In any case, application of the rule as to presumption would depend on the particular facts of each case and we are decidedly of opinion that the facts and circumstances of this case are such as to justify the placing of onus on the reversioner of proving absence of legal necessity. On behalf of the reversioner it is contended that the evidence as it stands on record is sufficient to disprove the necessity for the transaction. That contention is founded on the facts that the village had been recorded in the names of the three brothers or their sons according to their respective shares; that Uderam's 0-5-4 share was mutated in the name of his widow, Mt. Gangabai, and that the transferee Venkatrao admitted the title of Bulki and paid her the price of the 0-2-8 share which he purchased during the pendency of Civil Suit No. 381 of 1883. In addition to these circumstances, stress is laid on Bulki's success in the suit against Bodhiprasad. These are no doubt ostensibly in favour of the reversioner, but on careful scrutiny they would be found to be inconclusive. The record of the separate shares is by itself not sufficient to prove a partition among the brothers. In 29 C W N 1037[5] at p. 1046 their Lordships of the Privy Council point out that a definition of shares in revenue and village papers affords but a very slight indication of an actual separation in a Hindu family, and that in no case could they have regarded such a definition of shares, standing alone, as sufficient evidence to displace the presumption in law which is peculiarly strong in the case of sons of one father. In 48 MAD 254[6] at p. 257 their Lordships of the Privy Council observed as follows:

But the mere fact that the shares of the coparceners have been ascertained does not by itself necessarily lead to an inference that the family had separated. There may be reasons other than a contemplated immediate separation for ascertaining what the shares of the coparceners on a separation would be.

Their Lordships' observations made in this case indicate the inconclusive character

4. ('20) 7 AIR 1920 P C 64 : 55 I C 538 : 43 Mad 541 : 47 I A 6 (PC), Venkata Reddi v. Rani Saheba of Wadhwan.

5. ('25) 12 AIR 1925 P C 132 : 88 I C 385 : 29 C W N 1037 (PC), Mt. Bhagwani Kunwar v. Mohan Singh.

6. ('25) 12 AIR 1925 P C 49 : 87 I C 333 : 48 Mad 254 : 52 I A 83 (PC), Palani Ammal v. Muthuvenkatachala Moniagar.

of the definition of shares as evidence to justify the inference of partition. In the present case, the statements of the parties in whose names the shares were recorded are significant. In Ex. P-3 Ramdin, Tulsiram and Uderam stated in 1860 that they were each owners of 1/3rd share of mouza Wathoda, but they did not say when the partition had taken place. In Exs. P-6 and P-7 filed in Civil Suit No. 11 of 1933 = old No. 164 of 1928, there are to be found very significant statements to show that there was no formal partition. Both these documents are copies of wajib-ul-arz of the year 1860. In Ex. P-6 it is noted as follows:

> In the beginning this village was *rith* (uninhabited). Then in the year 1233 faslee our father populated the same. Particulars regarding the hissadari (copartners) will be clear from the *fard* (schedule or statement) included in this wajib-ul-arz. And there are no cosharers.

In Ex. P-7 (*vide* cl. 3 regarding the partition of land), it is noted:

> The land of this village had not been divided. All are responsible for the profit and loss according to their respective shares .... We three are equal cosharers, are of the same caste and belong to the same family ..... We three will jointly recover nikasi, get the kabuliyat and give pattas ..... At present there is no dispute regarding anything whatsoever. If any dispute arises we will make an application to Government and will get khel partition effected so that there shall be no occasion for dispute and everyone will be responsible for his respective share.

That goes to show that in 1860 the village was joint and that the three brothers were managing it jointly and that they intended to effect a partition when disputes arose in their common enjoyment. That they were joint in estate and enjoyment is made very clear from the statement of Sundar Patlin in Ex. D-24. She was the guardian mother of Bodhiprasad. It was she who wished to separate and asked for a revenue partition. She unequivocally stated:

> Up to this day the defendant's and my wahiwat of the village have continued joint. But as I am not on good terms with the defendant at present, I desire the separation of my share.

This statement throws a clear light on the meaning of what was stated in 1860. The parties had got their respective shares entered separately, not as evidence of partition that had taken place, but a partition they intended to make in case of dispute. Against this there is no doubt the mutation in favour of Mt. Gangi after Uderam's death. But on Gangi's death it is remarkable that the 0.5.4 share was recorded in the name of Mohan and Bodhiprasad in pursuance of their agreement with Mt. Kasturibai that they would maintain her grand-daughter Bulki and perform her marriage at their expense. The fact that Bulki's grand-mother Kasturibai agreed to have the shares recorded in their names on that condition, militates against the theory of partition. It would thus appear that Mt. Bulki's claim made in Civil Suit No. 381 of 1883 was by no means unanswerable. The case against her could have been strongly presented by Venkatrao who was a leading pleader at Wardha, had he not gone out of the suit in consequence of the compromise.

It is not suggested that she had no case, but what is suggested is that Venkatrao also had a good case on his side in view of the evidence indicated above. Their dispute was therefore a bona fide one. The question is whether the settlement of the dispute was fair and prudent or not. Mt. Bulki was then representing the estate which the reversioner now claims. It appears to us that in entering into the compromise as she did, she acted exactly as any sensible person in her position would do. The result of the contest as it then must have appeared to them was highly uncertain. It was therefore natural and prudent for both parties to avoid the contest and hit upon a *via media* that would satisfy either party. That course could be no other than the one that they should acknowledge each other's claims and arrive at a compromise on that basis. Venkatrao consequently admitted her title and Bulki admitted his right to continue in possession provided he paid her Rs. 800. There is no suggestion that the consideration was inadequate. It must therefore be held that both parties dealt with each other at arm's length and concluded in amicable settlement in a way fair and beneficial to both. There was neither fraud nor any unfair advantage gained by one party over the other. That it was a fair settlement is attested by the fact that Mohan, the then next reversioner, and Bulki's husband accepted it. Even her financiers, whose interest was substantially affected by the compromise, acquiesced in the same. That compromise greatly strengthened her case against Bodhiprasad and she ultimately succeeded in her suit against him.

That being the nature of the compromise it must bind the reversioner. In 1 Pat 741[7] their Lordships of the Privy Council held that an alienation which is the result of a

7. ('22) 9 A I R 1922 P C 356 : 69 I C 71 : 1 Pat 741 : 49 I A 342 (PC), Ramsumran Prasad v. Mt. Shyam Kumari.

compromise that is reasonable and prudent, and for the interest of the estate, binds the reversioners. In A I R 1930 P C 163[8] their Lordships of the Privy Council referred to the Patna case with approval and expressed their opinion that to determine the reasonableness and prudence of the compromise, it must be judged merely as a business transaction. It is clear that if it stands that test, it is a reasonable and prudent transaction from the point of view of the estate. The words 'benefit to the estate' cannot be defined in precise terms. As pointed out by Shah J. in 46 Bom 312[9] at p. 315 the benefit to the family may under certain circumstances mean a necessity for the transaction. He refers to the original text in the Mitakshara, Chap. I, S. 1, Paras. 28 and 29, where the words '*Apatkale*' i. e., in times of distress and '*kutumbarthe*' i. e., for the purposes of the family, occur and observes that these expressions must be interpreted with due regard to the conditions of modern life. If the compromise was fair, reasonable and prudent in the circumstances in which Mt. Bulki was placed, the alienation which was involved in the compromise must bind the reversioner. The contention raised here that the alienation should be considered apart from the compromise cannot be accepted as sound. The next question is whether, notwithstanding that the compromise with Venkatrao was fair and reasonable, the reversioner is entitled to dispute the title of the appellants who are the representatives of Mt. Gaji.

From the pleadings no doubt it appears that Bulki wished to prosecute her suit against Gaji in spite of the compromise (Ex. D-4 in Civil Suit No. 11 of 1933). But on 17th June 1884 she withdrew her claim against Gaji also. She had to do so for the obvious reason that field No. 6 was appurtenant to the 2 as. 8 ps. share which passed under the compromise to Venkatrao and she had under that compromise agreed to withdraw her claim against Gaji also. By her sale deed dated 3rd November 1883 she transferred to Venkatrao all such rights as her father Uderam had in 2 as. 8ps. share recorded in his name. That would include the cultivating rights in field No. 6 also. In Ex. P-2 that field is shown as being in his cultivation. The question whether it was *sir* or khudkasht is immaterial as in any case the cultivating rights also had been given up along with the proprietary rights. If Venkatrao acquired both the rights in respect of that field, he could transfer the cultivating rights to any one he pleased or confirm the transfer of them if they had already been transferred by Mohan to Gaji. Consequently the plaintiff's claim must fail against Gaji's representatives. The result is that this appeal succeeds and the plaintiff's suit fails. The plaintiff-respondent will pay the appellants' costs in both the Courts. Second Appeal No. 143 of 1936 fails and the appellant will pay the respondents' costs in all the Courts.

R.K. *Order accordingly.*

8. ('30) 17 A I R 1930 P C 163 : 123 I C 709 : 54 Bom 455 : 57 I A 177 (PC), Raoji v. Kunjalal.
9. ('22) 9 AIR 1922 Bom 122 : 64 I C 923 : 46 Bom 312 : 23 Bom L R 1094, Nagindas Maneklal v. Mahomed Yusuf.

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STONE C. J. AND CLARKE J.

Shrideo Ram Janki Mandir through Sarbarakars Tulsiram and others — *Plaintiffs* — Appellants

v.

Nathuram Nanhebhai Lohar and another—*Defendants*—Respondents.

Misc. Appeal No. 212 of 1938, Decided on 9th September 1940, from order of Sub-Judge, First Class, Narsinghpur, D/- 8th July 1938.

**(a) Civil P. C. (1908), S. 2 (2)—Decree—Matters determined must be of substance granting or denying remedy on part of plaintiff — Two alternative modes of seeking remedy — Court holding that one is not available — Decision is appealable.*

What are being referred to in S. 2 are matters of substance which the suit is concerned to have determined in order to lead to a remedy on the part of the plaintiff or to a denial of a remedy on the part of plaintiff: AIR 1914 Bom 149, *Ref.*, and AIR 1921 Bom 220 *Rel. on.* [P 85 C 2]

Where there are two alternative modes of seeking a remedy and a Court finally decides that one of those modes is not available that branch of the case is finally decided ; that branch of the case relates to substantive rights and raises a matter of controversy in the suit. It does not raise all the matters of controversy, but S. 2 clearly distinguishes between "all" and "any" and hence an appeal lies from such decision. [P 85 C 2; P 86 C 1]

(b) Civil P. C. (1908), S. 66—Revenue sale — S. 66 does not apply.

A person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code but under a revenue sale would not be protected under S. 66 : 14 W R 372 ; 2 I A 154 (P C) ; 28 Mad 526 ; 29 Mad 473 (F B) ; 19 M L J 270 ; 14 Cal 583 and A I R 1937 All 176, *Rel. on.* [P 86 C 1]

M. B. Kinkhede and A. R. Kulkarni — for Appellants.

D. N. Choudhuri — for Respondents.

Judgment.—Before we come to deal with this appeal it is necessary to deal with the

preliminary objection that has been raised as to the maintainability of the appeal. Before that can be understood it is necessary to state certain facts. The plaintiffs are the appellants and the suit claims the reliefs based on two different causes of action. Apparently property was sold at a revenue sale by public auction and defendant 1, according to the plaintiffs' case, purchased the property benami on behalf of the plaintiffs. Alternatively, the plaintiffs claim the suit property on the ground that after that sale had been completed the defendant executed a deed of transfer in favour of the plaintiffs. The plaintiffs are endeavouring to obtain a declaration that they are owners and entitled to possession of the suit property. A preliminary issue was struck to the following effect: "Does S. 66, Civil P. C., apply to this claim and is the suit not maintainable?" In the result the learned Judge who considered that preliminary issue came to the conclusion that the principle underlying S. 66, Civil P, C., did apply to the claim and that the suit was not maintainable so far as that part of it was concerned which claimed on the basis that the defendant was a benamidar. Accordingly the learned Judge ordered the plaintiffs to put in a new plaint striking out all those allegations and claims in their plaint which related to this branch of the case. In that state of fact the counsel for the respondent relying chiefly on 19 CWN 755,[1] also upon 17 N L R 66[2] at p. 68, 26 N L R 24[3] and 39 Bom 339,[4] urges that no appeal lies. Whether appeal lies or not depends, in our opinion, upon whether this adjudication, whether it be called an order or whether it be called a judgment of the learned Judge, is an adjudication that falls within the definition of "decree" in the Civil Procedure Code which provides inter alia as follows:

> Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

We think that a certain amount of difficulty has been felt by confusing "matters in controversy in the course of litigation" with "matters in controversy in the suit." For example in 39 Bom 339[4] Beaman J. puts the case that if every final decision on a matter of dispute were treated as a decree

> it would be virtually impossible to deny that any ruling as to whether a document tendered were admissible or not, or a question objected to, relevant, would also be a preliminary decree.

But with great respect, in our opinion such questions as those are matters of controversy that arise in a litigation. One can give endless instances. For instance counsel rises and asks that the case be adjourned owing to private ill-health. The other side is constrained to oppose the adjournment. That is a matter in controversy in the litigation. No one would suggest that it is a matter of controversy in the suit. What are being referred to in S. 2 in our opinion, are matters of substance which the suit is concerned to have determined in order to lead to a remedy on the part of the plaintiff or to a denial of a remedy on the part of the plaintiff, and that is what the Bombay High Court indicated in 45 Bom 627[5] at p. 632 where it was observed:

> Where issues both of law and of fact arise in the same suit and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined: O. 14, R. 2. Nothing is said regarding the procedure at the trial of such issues but following the analogy of O. 15, R. 3 judgment should only be pronounced when the finding disposes of the case or a part of the case which would then be final pro tanto.

In our opinion, this is directly within that observation as it is within the remarks passed in 17 N L R 66[2] at p. 68. The result of the order that has been passed in this matter is to conclude one branch of this case. That is as absolutely at an end as though the claim has been dismissed. It is only because the plaintiff happens to have put in an alternative ground of claim based on a different cause of action that there is anything left of this case. Counsel has urged in support of this preliminary objection that that makes all the difference because it results in this adjudication not being final and conclusive, for, if the plaintiff wins on his second line of attack he wins just as satisfactorily as if he had won on his first line of attack. But, in our opinion, that is not the right way to look at the matter. Here there are two alternative modes of seeking a remedy. If a Court finally decides that one

1. ('15) 2 A I R 1915 Cal 272 : 27 I C 317 : 20 C L J 476 : 19 C W N 755, Kamini Debi v. Promotha Nath.
2. ('21) 8 A I R 1921 Nag 108 : 62 I C 467 : 17 N L R 66, Pandurang v. Gayabai.
3. ('30) 17 A I R 1930 Nag 122 : 127 I C 887 : 26 N L R 24, Punaji v. Jairam.
4. ('14) 1 A I R 1914 Bom 149 : 26 I C 885 : 39 Bom 339 : 16 Bom L R 954 (F B), Chanmalswami v. Gangadharappa.
5. ('21) 8 AIR 1921 Bom 220 : 60 I C 885 : 45 Bom 627 : 23 Bom L R 92, Dattatraya Purshottam v. Radhabai.

of those modes is not available that branch of the case is finally decided ; that branch of the case relates to substantive rights and raises a matter of controversy in the suit. It does not raise all the matters of controversy, but S. 2 clearly distinguishes between "all" and " any". Out of two this decides one and for that reason we are of the opinion that the preliminary objection fails.

That leads up to the main question. When we get to that we realize why counsel pressed so strongly his preliminary objection because it is quite clear that this order cannot be supported. It is conceded by Mr. Choudhari, as indeed it must be conceded, that S. 66, Civil P. C., does not apply to this claim, and the answer to the first half of the preliminary issue as framed should have been, no ! If the answer be no, it is a little difficult to see why the suit was not maintainable. Indeed the suit is maintainable on any view on the alternative branch, so strictly regarded this issue should have been answered "no" as regards both the questions posed by it.

But apart from formal points such as the above if we look at the principle underlying the questions raised, it appears to us clear that only one answer is possible. It is said that as S. 66 strikes against purchases benami where those purchases are effected at a court auction it is enunciating a matter of general policy and is in terms laying down a principle that should be applied to all public sales always assuming that those sales are in some way conducted in a manner similar to the mode of conducting sales adopted in the rules by civil Courts in execution. Needless to say there is no case in support of that proposition. On the other hand there are cases going back to 1870 to the contrary. The case law commences with 14 W R 372[6] where the Bombay High Court refused to apply the provisions of the then Civil Procedure to revenue sales. Five years later, in 1875, the Privy Council in 2 I A 154[7] expressed the view that this section, cutting athwart ordinary principles of law as it does, must be construed strictly and literally and as it strikes at suits against a certified purchaser it does not affect the position of a defendant sued by a certified purchaser. Later, in 28 Mad 526,[8] 28 Mad 473[9] and 19 M L J 270[10] it was indicated that the mere fact that the sale is under the Revenue Act does not preclude any one from contending that the purchaser is only a benamidar. The same view is expressed in 14 Cal 583[11] where it was regarded as obvious that the analogous section of the old Civil Procedure Code has no application to any other kind of sale than sales in execution of decrees of civil Courts. Lastly in I L R (1937) ALL 113[12] at pp. 120, 121 the learned Chief Justice of the Allahabad High Court observes as follows :

> Section 66 is confined to a purchase certified by the Court in such manner as may be prescribed ; and the word " prescribed " is defined in S. 2 (16) as meaning " prescribed by rules "; and " rules " under sub-s. (18) mean "rules and forms contained in Sch. 1 or made under S. 122 or S. 125, Civil P. C." It is therefore patent that a person who is not claiming title under a purchase certified by the Court under any of the rules framed under the Code would not be protected under S. 66, Civil P. C.

With those observations we entirely agree and we think it follows directly that the answer to both branches of the preliminary issue should have been in the negative. Accordingly the appeal succeeds with costs which the defendants will pay in any event both as regards the costs in this Court and the costs on this preliminary issue in the Court below.

R.K. *Appeal allowed.*

6. ('70) 14 W R 372, Brijo Beharee Singh v. Shah Wajed Hossein.
7. ('75) 2 I A 154: 23 W R 358: 3 Sar 472 : 3 Suther 122 (PC), Lokhee Narain Roy v. Kalyapuddo Bandopadhya.
8. ('01) 28 Mad 526 : 15 M L J 419, Muthunaiyan v. Sinna Samavanjan.
9. ('02) 29 Mad 473: 16 M L J 505 : 1 M L T 234 (FB), Narayanasami Padayachi v. Govindasami Padayachi.
10. ('09) 19 M L J 270 : 3 I C 124 : 6 M L T 168, Venkatachalam Pillai v. Purushotama Naicker.
11. ('87) 14 Cal 583, Fazal Rahman v. Imam Ali.
12. ('37) 24 A I R 1937 All 176: 167 I C 683: I L R (1937) All 113 : 1937 A L J 52, Bishan Dayal v. Kesho Prasad.

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GRILLE AND GRUER JJ.

Bharosa Ramdayal — Appellant

v.

Emperor.

Criminal Appeal No. 201 of 1940, Decided on 21st August 1940, from order of Sess. Judge, Wardha, D/- 16th July 1940.

* *(a) Evidence Act (1872), S. 27 — S. 27 is valid even after amendment of S. 162, Criminal P. C.*

Section 27, Evidence Act, has not become a dead letter even after the amendment of S. 162, Criminal P. C., in 1923 : A I R 1940 All 263 (F B) and A I R 1940 Lah 129 (F B), *Not foll.*; A I R 1939 P C 47, *Expl.*; A I R 1939 Pat 577; A I R 1940 Nag 66 and A I R 1929 Nag 17 (F B), *Rel. on.* [P 89 C 1]

(b) Evidence Act (1872), S. 25 — First information report — Not whole but only confessional part is excluded.

The whole of the first information report by an accused need not be excluded from admission,

merely the confessional part is excluded : A I R 1935 Bom 26, *Dissent.*; A I R 1922 Cal 342, *Rel. on.* [P 89 C 2]

* *(c) Evidence Act (1872), Ss. 25 and 27 — Accused voluntarily confessing offence to police is submitting to police custody — Confession is not admissible under S. 25—Statements made are not however excluded for purposes of S. 27 as same are made by person in custody.*

Until S. 25 is amended, a confession made in a first information report must be excluded from its operation. Statements made in the course of such an inadmissible confession are not however excluded for the purposes of S. 27, Evidence Act because a person who makes a statement to a responsible police officer, voluntarily confessing that he has committed an act which the Penal Code regards as an offence, is submitting himself to custody within the meaning of S. 46 (1), Criminal P. C., and the statement made by him is one made by a person in the custody of a police officer within S. 27 : 1 Cal 207, *Ref.*; A I R 1935 Bom 26, *Doubted*; A I R 1922 Cal 342 and A I R 1933 Pat 149 (F B), *Approved*; A I R 1932 Cal 297, *Expl.*, and *Dist.* [P 90 C 1,2]

(d) Criminal trial — Police receiving information from accused — Accused made to repeat it in presence of witnesses — Conduct is objectionable.

In principle it is objectionable for a Sub-Inspector who has received information from the accused and is proceeding to act on that information to get him to repeat that information in the presence of witnesses. In the peculiar circumstances, the Sub-Inspector was held justified in taking statements again in presence of witnesses : A I R 1939 Mad 15, *Ref.* [P 91 C 1]

(e) Evidence Act (1872), S. 27 — Statement resulting in discovery of dead body and blood-stained lathi — It cannot be argued that the statement cannot be used under S. 27 on ground that things discovered must have been known to numerous other people.

It is wrong to contend that the statement made to the police officer resulting in the discoveries (finding out the body of the deceased and of the blood-stained lathi) made could not be used under S. 27 as the discovery of the body must already have been known to numerous people when it has not been proved that anybody else had seen the body or was aware where the stick had been placed until the spot was pointed out by the accused. [P 91 C 1]

(f) Evidence Act (1872), S. 24 — Extra-judicial confession is admissible.

An extra-judicial confession is undoubtedly admissible though retracted in the Sessions Court if the fact that it was made appears to the Court to be natural and undisputable being corroborated by subsequent discoveries. [P 92 C 1]

(g) Penal Code (1860), S. 302 — Sentence — Provocation though not grave and sudden held sufficient for passing lesser sentence.

A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion that he should instal her as a permanent mistress, which would undoubtedly result in heavy caste penalties and if this suggestion amounts to importunity, the provocation though not grave or sudden as to take the offence outside the provisions of S. 302 can be urged for the passing of the lesser sentence which the law permits. [P 92 C 1, 2]

M. Adhikari and M. G. Ghate — for Appellant.

W. R. Puranik, Advocate General — for the Crown.

Judgment.—The appellant Bharosa has been convicted of the murder of one Mst. Gaji and has been sentenced to death. The facts, though unusual, are simple. The prosecution story is that Bharosa, who was a gardner in the employment of one Dagaji, malguzar of mauza Waldur, lived in a hut in his master's garden and had formed an illicit connection with Mt. Gaji, a widow of a lower caste than his own, she being a Pardhan and he, a Pardeshi of the United Provinces. On the night of 3rd April the woman visited his hut and suggested that she should enter permanently into his keeping and live with him. He demurred as this would result in his being outcasted and he in a rage at her importunity struck her over the head with a lathi, killing her practically instantaneously. The medical evidence is to the effect that several blows with a lathi must have been delivered. The murder was committed not in the hut but at a nalla some 150 yards away, and the accused turned her out of the hut and accompanied her part of the way, when, presumably, the importunities being renewed, he lost his temper and killed her. Early on the following morning he left Waldur for Hinganghat, where his master lives, with the intention of telling his master exactly what had happened. The master was not present at his shop, but his agent Devidas (P. W. 1) was, and to him the accused confessed that a woman had come to his hut at night and refused to leave and that he had struck her and killed her. Devidas then suggested that the accused ought to go to the police station and report, and this, with the concurrence of his master Dagaji who had then arrived, was done and a first information report was recorded by the Sub-Inspector Sheomangal, in the course of which a full story was detailed. As the result of statements made in the course of this narrative, namely, where the instrument with which the crime had been committed lay and where the body was to be found, the Sub-Inspector went to the village. He reached there before the accused, who had been placed in the custody of a constable, arrived, and village elders were called at the bada. When the accused arrived he was asked to show the weapon and the corpse and he did so, accompanied by the Sub-Inspector and by witnesses. A blood-stained lathi was produced from under his bed in the hut, and the body was found in

the nalla where he said it would be found. In the committing Magistrate's Court the accused in his examination admitted all these facts, but he retracted them in the Court of Session, denied that he had struck the woman or killed her, denied that he had made a confession to Devidas and even denied that he had been to the police station at all or made a report to the Sub-Inspector in charge. Finally, and equally incredibly, he denied that he had made the statement which was recorded in his examination in the committal Court. He called no evidence in defence, but it was contended on his behalf that he had been implicated by one Kalkaprasad, a fellow servant of his. We may here note that Kalkaprasad was called as a witness for the prosecution and although in examination-in-chief he admitted that he knew Mt. Gaji who was a day-labourer under his control, he stated that he was unaware if she had any connection with the accused Bharosa, and he was not asked a single question in cross-examination which would tend to show that he himself had any immoral relations with Mt. Gaji although such immoral connection was hinted at in counsel's argument both in this Court and in the Sessions Court. Neither was any question put to him indicating any ill-feeling between himself and the accused. It is quite obvious that any imputation against Kalkaprasad was a despairing afterthought.

The grounds taken in appeal all relate to technical points of law. The Sessions Judge, following the law as laid down in 49 Cal 167,[1] did not allow the whole of the first information report to be proved excluding from the proof by the Sub-Inspector who recorded it any such part as would include a confession. The earlier part of the report was allowed to be proved down to the words "used to come to do my master's work and I therefore knew her." We reproduce the first information report as taken down in full :

I am a resident of Santara Mohalla, Allahabad. I do not know whether any of my relations in Desh (native country) are alive or not. I came to Pardesh (another country) 25 years back. I served as a guard at the shop of Seth Narsinghdas for 20 years. From over 12 months from now I have been working as a gardener on Rs. 5 per month in the garden of Dagaji at Waldhur. I live in the tin hut in his garden at Waldhur. Mt. Gaji a widow by caste Pardhanin who as the people said had two sons used to come to do my master's work and I therefore knew her. That Mt. Gaji Pardhanin came to me in the master's garden last night at 12 or 12-30 o'clock and said that she had no husband and so I should take her into my keeping. I told her that I was a Pardeshi and she a Pardhanin by caste and because of a caste diversity I could not take her as a keep and advised her to go to her own caste. Then, your honour, I explained things to her at length. She did not agree and said, 'I have no husband and I shall live here only.' Then I got angry and raising my bamboo stick overhead with both hands I struck with force. The lathi fell on the head of Mt. Gaji in front and she fell to the ground along with the stick. Fleshy material protruded out of her broken scalp and there has been bleeding. Immediately on falling down she died; it did not take half a minute (even). I then remained lying in my master's garden. I got up before 6 A. M. in the morning and took my way to the master's shop from the village. The master, Dagaji, had gone to the station and I related the fact of Mt. Gaji's murder to the senior dewanji who was in the shop and who has accompanied me to the police station house. Then the master arrived and dewanji told this incident to him. When I struck Mt. Gaji with the lathi she was standing close to me. The lathi is a bamboo stick of my desh and up to my ear in height. Only one lathi blow killed her. When Mt. Gaji approached my cot once I asked her to go away quietly. Accordingly she went a little distance outside the garden. I lay on my bed. In the meantime she came back again. Then again I said to her 'I advised you to go away and you have come again' and asked her to get out of the garden gate. She did not go. I took her out of the garden up to the nullah and told her to take her way across the nullah. She said she would not go. I then struck her. Mt. Gaji is lying dead in the nullah at the rear of my master's garden and the lathi is kept near the cot inside the hut in my master's garden. The hut is open. The report was read over to me; it has been taken down correctly.

It is contended before us that not merely the confessional part of the first information report should have been excluded but the whole of it. It is also contended that as the first information report itself could not be admitted in evidence, no statement contained in it could be used under the provisions of S. 27, Evidence Act, for the purpose of leading to the discovery of the blood-stained lathi or of the body. It is further urged that the whole of the accused's examination in the committing Magistrate's Court is inadmissible as the questions asked are based on the inadmissible first information report, and the examination itself is attacked intrinsically on the ground that multiple and improper questions were asked to which the accused could not give proper answers. In respect of statements made by the accused in the bada in mauza Waldur after he had been taken there and met the Sub-Inspector, it is contended that the conduct of the Sub-Inspector was improper in asking him questions which he had asked him previously so as to obtain his statements in the presence of witnesses for the application of S. 27, Evidence Act. Finally it

1. ('22) 9 A I R 1922 Cal 342 : 62 I C 578 : 49 Cal 167 : 22 Cr L J 562 : 25 C W N 788, Legal Remembrancer v. Lalit Mohan.

is urged that no statement under S. 27, Evidence Act, is admissible since that section has been superseded by the amendment in 1923 of S. 162, Criminal P. C. In short, the contention on behalf of the appellant is that there is no admissible evidence whatever to connect the accused with the crime.

Taking the last point of law first, namely, that S. 27, Evidence Act, is now a dead letter since the amendment of S. 162, Criminal P. C. in 1923, reliance is placed on two recent decisions of the Allahabad High Court and the Lahore High Court in AIR 1940 ALL 263[2] and AIR 1940 Lah 129[3] to the effect that this is the correct interpretation of the ruling of their Lordships of the Privy Council in 18 Pat 234.[4] The Patna High Court, however, does not follow the interpretation which is given to this ruling by the Allahabad and Lahore High Courts: *vide* 18 Pat 450.[5] The opinion of this Court has been expressed on similar lines to that of the Patna High Court: *vide* the Divisional Bench decision of Niyogi and Gruer JJ. in AIR 1940 Nag 66.[6] The view follows a decision of the Nagpur Judicial Commissioner's Court in 24 N L R 158[7] which is anterior to the decision of their Lordships of the Privy Council, and the Divisional Bench has pointed out that their Lordships did not specifically decide the question but left it open. A similar decision was reached even more recently by a Divisional Bench of this Court in Cri. App. No. 121 of 1940,[8] where the question has been discussed. One of us was a party to the decision in AIR 1940 Nag 66[6] and the other to the decision in Cri. App. No. 121 of 1940.[8] We are therefore satisfied that the provisions of S. 27, Evidence Act, are still valid and are not affected by their Lordships' judgment in 18 Pat 234.[4]

For the proposition that the whole of the first information report should have been excluded from admission, reliance is placed on 59 Bom 120[9] where the partial exclusion in 49 Cal 167[1] was doubted. With the greatest respect we do not consider that the doubt there expressed was justified. The relevant words of Beaumont C. J. are as follows:

> But I doubt myself whether the principle on which the Calcutta High Court proceeded in that case can be justified. Section 25, Evidence Act, seems to be founded on the view of the Legislature that confessions made to a police officer are suspect, since they may have been induced by improper pressure. If that be the true underlying principle of S. 25, it is, to my mind, very difficult to see how any part of the confessional statement can be admitted in evidence.

The confessions in those cases and in the one which we are considering were made in circumstances which preclude any possibility of improper pressure, as in each case the accused person went of his own accord to the police station before any suspicion had been aroused and stated that he had killed some one, and in 49 Cal 167[1] that part of the confessional statement which was admitted had no connection with the actual narrative relating to the crime. Neither in the case before us can the part which has been admitted have any direct bearing on the fact of the fatal assault. So little bearing has it that it is really immaterial whether it is admitted or not, and the case against the accused would not lose any of its force by disallowing the whole of the first information report.

Of more serious consideration, however, is the contention that if the first information report is not admissible in evidence—and the argument of course applies to that part of it which comes within the confessional statement—then the statement cannot be used for the purpose of the discovery of the body or of the weapon under S. 27, Evidence Act. If this proposition is correct law, we arrive at the astonishing position that a man may kill another person in circumstances which he considers entirely justifiable and, moved either by remorse or honesty, makes a report to the nearest police station stating the exact truth and the full circumstances of what he has done, the police, however, would not be able to prove that such a statement was made or, if on investigation they found that the circumstances detailed were entirely true and made their discoveries as the result of what they had been told, and no other evidence was available, to use it. This might result in glaring miscarriages of justice. Rankin C. J.

2. ('40) 27 AIR 1940 All 263 : 188 I C 562 : 41 Cr L J 627 : 1940 A L J 241 : I L R (1940) All 396 (F B), Baldeo v. Emperor.
3. ('40) 27 AIR 1940 Lah 129 : 188 I C 498 : I L R (1940) Lah 242 : 41 Cr L J 591 (F B), Hakam Khuda Yar v. Emperor.
4. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : 18 Pat 234 : 66 I A 66 : I L R (1939) Kar 123 (P C), Pakala Narayan Swami v. Emperor.
5. ('39) 26 AIR 1939 Pat 577 : 181 I C 1001 : 40 Cr L J 625 : 18 Pat 450 : 20 P L T 420, Emperor v. Mayadhar Pothal.
6. ('40) 27 AIR 1940 Nag 66 : 185 I C 310 : 41 Cr L J 158, Motilal Puransao v. Emperor.
7. ('29) 16 AIR 1929 Nag 17 : 114 I C 273 : 30 Cr L J 258 : 24 N L R 158 (F B), Gola v. Emperor.
8. Cri. App. No. 121 of 1940, decided on 23rd May 1940, Sheoram v. Emperor.
9. ('35) 22 A I R 1935 Bom 26 : 154 I C 621 : 36 Cr L J 589 : 59 Bom 120 : 36 Bom L R 1117 Emperor v. Harnam Kisha.

has pointed out the absurdity of the situation in AIR 1932 Cal 297[10] and considers that the situation is the result of bad drafting of the Evidence Act and that the Act should be re-drafted. The material criticism is as follows:

> What was said in this case was said to the police. It was therefore not allowed to go in evidence by S. 25 and the consequence of holding that S. 27 is not a mere exception to S. 26 is this: that in a case like the present where the confession was made to the police, if the man was at liberty at the time he was speaking, what he said should not be admitted in evidence even though something was discovered as a result of it. That is the present case. It cannot be admitted in evidence because the man was not in custody, which of course is thoroughly absurd. There might be reason in saying that if a man is in custody, what he may have said cannot be admitted; but there can be none at all in saying that it is inadmissible in evidence against him because he is not in custody. Yet this is the consequence of saying that S. 27 is more than a proviso to S. 26.

It was suggested to Beaumont C. J. in 59 Bom 120[9] that "confession" in S. 25, Evidence Act, refers only to a confession made to a police officer in the course of an inquiry into an offence and does not cover the first information which starts the inquiry. That would be, in our opinion, an obviously desirable interpretation were it possible, since it is evident, and we consider undisputed, that the purpose of S. 25, Evidence Act, in the words of Garth C. J. in 1 Cal 207[11] at p. 215, is "to prevent confessions obtained from accused persons through any undue influence being received as evidence against them", and in confessions made in the course of a first information report it is patent that there could have been no pressure by the police. Unfortunately, S. 25 is worded in such plain and simple language, namely, "no confession made to a police officer shall be proved as against a person accused of any offence", as to make the salutary proviso propounded in 59 Bom 120[9] impossible, and until this particular section is amended, as in our opinion it should be, such confession made in a first information report must be excluded from its operation. We are not however satisfied that statements made in the course of such an inadmissible confession are excluded for the purposes of S. 27, Evidence Act. The matter has been adumbrated in 49 Cal 167[1] to which no reference was made in A I R 1932 Cal 297,[10] and the proposition that a person who makes a statement to a responsible police officer, voluntarily confessing that he has committed an act which the Penal Code regards as an offence, is submitting himself to custody within the meaning of S. 46 (1), Criminal P. C., is, in our opinion, sound. In 12 Pat 241[12] a Full Bench of the Patna High Court stated:

> When a person states that he had done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of S. 46 (1), Criminal P. C., and is then in the custody of a police officer within the meaning of S. 27, Evidence Act. This was also the opinion of Teunon and Ghosh JJ. in 49 Cal 167.[1]

In both those cases and in the case before us the person making the statement had no intention of not submitting himself to the police. There is a voluntary statement without any pressure by the police and indeed without any previous knowledge by them of what had been done; the arrest took place immediately after the statement, but we feel no doubt that at the time the statement was made there was a submission to custody which would bring the statement made within the ambit of S. 27, Evidence Act, as a statement made by a person in the custody of a police officer. The facts in A I R 1932 Cal 297[10] were entirely different and the statements made were in the course of a police investigation shortly before the arrest of the accused and in circumstances which certainly could not connote any submission to police custody; and this we presume to be the reason why no reference was made in this case to 49 Cal 167[1] since the facts in one case could have had no application to the facts in the other. We are, then, satisfied that the statements as the result of which the police discovered the blood-stained lathi and the body are admissible.

Arising out of this is the conduct of the Sub-Inspector at the bada where the accused was asked to repeat his statements which he had already made to the Sub-Inspector at the police-station. In re-examination the Sub-Inspector stated that the accused had told him in the first information report that the stick was lying in the hut, and that he repeated the question as he wanted the accused to make the statement before the panches. This question was objected to by the defence counsel as being inadmissible; nevertheless use is sought to

10. ('32) 19 A I R 1932 Cal 297 : 138 I C 116 : 33 Cr L J 546 : 59 Cal 1040 : 36 C W N 373, Durlav Namasudra v. Emperor.

11. ('76) 1 Cal 207 : 25 W R 36 Cr, Queen v. Hurribole Chunder Ghose.

12. ('33) 20 AIR 1933 Pat 149 : 142 I C 474 : 34 Cr L J 349 : 12 Pat 241 : 14 P L T 82 (F B), Santoki Beldar v. Emperor.

be made of it here. In principle it is of course objectionable for a Sub-Inspector who has received information from the accused and is proceeding to act on that information to get him to repeat that information in the presence of witnesses. As stated by Burn and Lakshmana Rao JJ. in A I R 1939 Mad 15[13] at p. 17, a police officer ought to expect to be believed when he gives evidence on oath. But in the case before us the stricture is certainly not so well-deserved as it was in that case where the accused person was brought out of the lock-up and examined in the presence of witnesses and where the statement was embodied in a panchnama, and he was then apparently returned to the lock-up again, since it was quite clear that the Circle Inspector knew exactly what the accused was going to say. In the present case, it may be safely presumed that the Sub-Inspector had no doubt that the accused was going to take him to the place indicated and that the people had been called so as to depose to the recovery of whatever there was to be recovered, a perfectly legitimate proceeding since a seizure memorandum has to be signed by witnesses. It may of course also be possible that the Sub-Inspector was aware that there might be some doubt as to the admissibility of what the accused had stated at the police station as it was embodied in a confession made to a police officer, in which case, if he considered that the statement might be entirely inadmissible, he was justified in taking the statement again in circumstances where it certainly was admissible.

It was also urged that the statement made to the police-officer resulting in the discoveries made could not be used under S. 27, Evidence Act, as the discovery of the body must already have been known to numerous people. It has not been proved that anybody else had seen the body or was aware where the stick had been placed until the spot was pointed out by the accused. No evidence was led on the point, neither was this elicited in cross-examination from the prosecution witnesses. Even if other people had discovered the body or the blood-stained stick after the accused had left his village to make a report at Hinganghat, that would be entirely immaterial, and the argument could only have force if it were shown that by the time the second statement was made the police were aware from other sources that the stick and the body were actually to be found in such places. There is no evidence whatever that anyone else informed the police where these things were or that the Sub-Inspector who had certainly arrived at Waldur a short time before the accused, had been shown any object connected with the crime. Turning now to the examination of the accused the learned Sessions Judge, although he does not say so in so many words, appears to indicate that there might be some doubt as to the propriety of question 3 put to the accused in the committing Magistrate's Court. We reproduce the questions and answers seriatim and number them:

Q. 1—From the statement of witnesses it appears that there was illicit intimacy between Mt. Gaji Pardhanin and you and that she had been trying to live with you. What have you to say ?

A. — She used to work in my garden and at cultivation. I had no illicit connection with her.

Q. 2 — Then from the statement of witnesses it appears that she came to your hut on the night of the 3rd April 1940 and made an attempt for living with you, that you then turned her out and taking her to the nullah you struck her on the head with this lathi (Art. A) as a result of which she died. What have you to say ?

A.—Yes sir, I gave her a blow with lathi (Art. A) on her head. She fell down in the nullah and died.

Q. 3 — On the following day in the morning you came to Hinganghat and related all this to your master's dewanji Devidas and he brought you to the station-house where you made this report (Ex. P-1 read over to the accused) to the station-house Officer. What have you to say ?

A.—I had told this fact to my master's dewanji and exactly the same thing to the station-house officer. My report which had been read over to me is true.

Q.—Then you took the station-house officer and the panches to your hut and produced this stick (Art. A) from under the cot. To whom does this lathi belong ?

A.—This lathi is mine. I produced it to the station-house officer.

Q. 5—After this you pointed out the spot where the corpse lay to the station-house officer and the panches. What have you to say ?

A.—Yes, sir.

Q. 6—Have you to state anything else?

A.—Your honour is ma-bap.

We do not consider that there is any impropriety in any of the questions. The inadmissibility of the confessional part of the first information has not the complete bearing on the question which the learned counsel would ask us to hold that it has, since there is the admission of Devidas, and on his statements the questions could be properly put. Question No. 2 gives the circumstances leading up to the fact that he had confessed that he had struck the woman a fatal blow and he admits that he did and that she fell down in a nullah and died. Nor can we see any objection to

13. ('39) 26 A I R 1939 Mad 15 : 180 I C 590 : 40 Cr L J 433, Public Prosecutor v. Subba Reddi.

question No. 3 on which the learned Judge has come to no definite conclusion. It cannot be disputed that the accused did go to Hinganghat that morning, and there was evidence that he had related the circumstances to Devidas. It is also obvious that he did go to the police station, and the question is well within the proper limits of S. 342, Criminal P. C., in that it is put to give him an opportunity to explain salient points in the evidence against him, points which are likely to prove fatal unless explained, and the answer of the accused is in fact an answer to every part of the question, namely that he says that he told the fact to his master's dewanji and told exactly the same thing to the station-house officer. We do not consider that anything in this examination can be said to be improper.

The learned counsel in attacking the conviction on all the points of law to which we have referred omitted to consider, even if the propositions of law advanced were sound, the effect of the extra-judicial confession made to Devidas. That extra judicial confession is undoubtedly admissible. It was of course retracted in the Sessions Court, but the fact that it was made appears to us indisputable. It was a natural thing for an honest man to do, and his conduct in going to the police station accompanied by Devidas (and his conduct is of course relevant) is inexplicable on any other ground than that he had come to Hinganghat with the intention of telling his master what he had done and in his master's absence he told his representative Devidas. The subsequent discoveries fully corroborate this extra judicial confession, and on that alone the conviction could be sustained. There is also the full confession made in the committing Magistrate's Court.

The accused has been sentenced to death. There is no doubt from the medical evidence that he did strike more than one blow and that all the blows were delivered on the woman's head. We see no reason to disbelieve the circumstances as given by the accused, and indeed there is no evidence on the record to contradict them. Although we agree that the provocation was not sufficiently grave or sudden to take the offence outside the provisions of S. 302, I. P. C., there was nevertheless some provocation which can be urged for the passing of the lesser sentence which the law permits. A man who is willing to have casual intercourse with a woman, treating her as a prostitute, may nevertheless justifiably resent any suggestion—and in this case the suggestion amounted to importunity—that he should instal her as a permanent mistress, which would undoubtedly result in heavy caste penalties. That there had been importunity and argument is deducible from the fact that he undoubtedly escorted the woman from his hut to the place where the body was found, a distance of some 150 yards, and it is evident that he was trying to get rid of the woman who was doing her best to persuade him to instal her permanently. We do not consider that she was taken to the nalla with the express purpose of being killed in a secluded spot; the subsequent conduct of the accused negatives this. Taking these circumstances into consideration we consider that the punishment of transportation for life is more suitable. The appeal is accordingly dismissed, but the sentence of death is not confirmed and that of transportation for life is substituted for it.

R.K. *Sentence reduced.*

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GRILLE J.

Kamaljabai w/o Tukaramji Mali and others — Appellants

v.

Dasru Kewji Khatik and others — Respondents.

Second Appeal No. 399 of 1939, Decided on 26th September 1939, from appellate decree of 3rd Addl. Dist. Judge, Amraoti, D/- 23rd December 1939.

Hindu Law — Succession — Brother's widow takes before paternal uncle's son's son.

In the absence of any of the compact series of heirs a brother's widow will take before a paternal uncle's son's son. [P 94 C 1]

J. R. Mudholkar — for Appellants.

Judgment. — One Shivaji, who owned certain fields, died in the year 1906-07. He was succeeded in possession of them by the widow of his deceased younger brother, Mt. Baija. She died in 1934, and the suit out of which this second appeal arises was brought by her daughter, Mt. Kamaljabai, claiming as the reversioner of her uncle in respect of fields of which her mother, Mt. Baija had disposed during her lifetime; the claim was that these dispositions were made without necessity and were not valid beyond the lifetime of Mt. Baija. The defence raised by Mt. Baija's transferee and subsequent transferees also was that Mt. Kamaljabai was not entitled to bring the suit as she was not the next reversioner of Shivaji after

the death of Mt. Baija, that position being occupied by Sakharam who was the grandson of Shivaji's paternal uncle. It was also contended that the transfers which were made by Mt. Baija had been made with the full consent of Sakharam who was the next reversioner. The plaintiff (we may disregard the other plaintiffs in addition to Mt. Kamaljabai who appear to be champertous transferees of her alleged interest) denied that Sakharam was any relation to her or to the propositus, and the claim that she alone was the nearest reversioner of Shivaji was reasserted. It was found in both the Courts below that Sakharam was related to the propositus as asserted by the defence, namely, that he was the grandson of his paternal uncle and that he was therefore the next reversioner and as such closer in the line of reversioners than Mt. Kamaljabai, who was a brother's daughter. Incidentally, the evidence also established that the transfers by Mt. Baija had been made throughout with the consent and indeed with the active participation of Sakharam. The plaintiff's suit was dismissed and her appeal failed.

The finding that Sakharam was the grandson of male descent of the paternal uncle of Shivaji is a finding of fact, and despite the confident assertions in the first two paragraphs of the memorandum of appeal is unassailable. It is also unassailable that Sakharam is a nearer heir than the plaintiff, and Sakharam is still alive. An ingenious plea is, however, now taken by the learned counsel for the appellant for the first time. It is this, that the Courts below should have held that even on the defendant's own case, namely, the establishment of the relationship between Sakharam and the propositus, Sakharam should have succeeded to the estate of Shivaji on the latter's death to the exclusion of Mt. Baija, Shivaji's widowed sister-in-law, and that any claim that Sakharam might have had was extinguished when he failed to assert his right against Mt. Baija within 12 years of Shivaji's death. In the first place, I do not see how it can be claimed that the lower Courts should have acceded to this argument when admittedly the argument was never placed before them. Again, the whole of the plaintiff's case is dependent on the fact that Baija succeeded to the estate as a limited owner, and in purporting to divest herself of the fields in question for ever she exceeded her rights as a limited owner. Her limited ownership was accepted on both sides and the suit proceeded on that basis, and it cannot now be turned into a suit based on the alleged misdemeanour of Mt. Baija as a trespasser; for that is what the result would be even though the object of the argument now adduced would appear to be to show that Sakharam can no longer claim to be a reversioner since he failed to establish his position as owner on the death of Shivaji. It cannot, however, be contended that he has lost his position as a reversioner since the contention is that he never was a reversioner of Mt. Baijas at all.

In any case the ingenious contention advanced must fail. The parties reside in Amraoti and admittedly are governed by Bombay school of law; otherwise Mt. Baija as the widow of a gotraja sapinda could not have been considered as coming within the inheritance at all. The point of law which the ingenuity of the counsel has raised is this, that in the order of succession a female gotraja sapinda is postponed to all male gotraja sapindas in the same line as her husband although she has precedence over a male in a remoter line, and reliance is placed on 14 N L R 6[1] and 6 N L R 39,[2] and it is urged that on the death of Shivaji in 1906 Sakharam should have succeeded rather than Mt. Baija. The contest would have been between the widow of a pre-deceased brother and the paternal grandson of a paternal uncle. Neither of the cases on which reliance has been placed deals with this actual relationship, but I would point out that Baija's husband and the propositus had a closer common ancestor than did Sakharam and the propositus, Sakharam having to go back to a great-grandfather to establish common relationship whereas Baija's husband had to go back to a common link of fatherhood with the propositus alone; and in 9 Bom L R 1149[3] quoted by Bose A. J. C. at the conclusion in 6 N L R 39[2] it is pointed out that a step-mother was preferred to a paternal uncle's son on the ground that she was the widow of a gotraja in the ascending line of a nearer branch, that of the father, whereas her adversary was a male gotraja in a more remote line, namely, a descendant of the paternal grandfather. That case is a near parallel to the one now under consideration. In Mulla's Principles of Hindu law the position in the order of succession of the widows of gotraja sapindas has been compiled and set out with refer-

1. ('17) 4 A I R 1917 Nag 83 : 43 I C 475 : 14 N L R 6, Sadasheo v. Jaikrishna.
2. ('10) 6 N L R 39 : 5 I C 748, Bayana v. Dinkar.
3. ('85) 9 Bom L R 1149, Ranchod v. Ajoobai.

ence to authorities where necessary. The widows of gotraja sapindas can only succeed in the absence of any of the compact series of heirs. Here, admittedly, there were none as the brother had already died and had left no son. In the case which I have already quoted, a step-mother has been held to take before a paternal uncle's son. Next to a step-mother in succession would come a brother's widow as in the case before me, and in 39 Bom 87[4] it was held that a brother's widow took before a paternal uncle's son; a fortiori, in the case before me, a brother's widow will take before a paternal uncle's son's son, and that, on the assumption that the argument is one which is open to the appellant, concludes the matter. The appeal fails and is dismissed without notice to the opposite party.

D.S./R.K. *Appeal dismissed.*

4. ('14) 1 A I R 1914 Bom 202 : 27 I C 167 : 39 Bom 87 : 16 Bom L R 699, Basangauda v. Basangauda.

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GRILLE AND VIVIAN BOSE JJ.

Moujilal Hiralal Sonar — Appellant

v.

Emperor.

Criminal Appeal No. 129 of 1940, Decided on 3rd July 1940, from order of Addl. Sess. Judge, Akola, D/- 26th April 1940.

Criminal P. C. (1898), S. 418—Convictions of accused under Ss. 366 and 302, Penal Code—Former by jury, latter by assessors — Appeals against both convictions — Though conviction under S. 366, Penal Code, can be challenged only on ground of law, accused can in appeal against conviction for murder challenge facts on which conviction under S. 366, Penal Code, rests.

No doubt a conviction by the Sessions Judge under S. 366, Penal Code, on the kidnapping charge can only be challenged on grounds of law but where a person has been convicted by the Sessions Judge with a jury under S. 366, Penal Code, and also under S. 302, Penal Code, with the aid of assessors, the accused can in his appeal against the conviction for murder challenge the facts on which the charge of kidnapping is founded. The intention of the law is that a man should not be condemned to death unless at least two High Court Judges have had the opportunity of scrutinising the case on facts as well as on law and unless they are satisfied that he is guilty. The law quite definitely does not intend that the final result in such cases should depend upon the opinion of the jury. [P 95 C 1]

A. Ahmad — for Appellant.

W. Dutt — for the Crown.

Judgment. — Three persons, Nago, Mahabir and Moujilal were prosecuted for (1) kidnapping one Lachiya for the purpose of forcing her to illicit intercourse, and (2) for murdering her in furtherance of the common intention of all. The charge under the former head was tried by a jury and under the latter by the Additional Sessions Judge, the jury acting as assessors. The jury returned an unanimous verdict of guilty against all three accused under S. 366, Penal Code. The learned Additional Sessions Judge has acquitted Nago of the charge of murder and has convicted the other two and sentenced each to death. All three have appealed. We will consider Nago's appeal separately. This judgment is confined to the appeals of Mahabir and Moujilal. Their appeals were filed from jail and it is not clear whether they are directed against both convictions or only against the one on the charge of murder. Mahabir's grounds of appeal mention the convictions against both sections and then states: "I have not committed the offence." Then after setting out the fact that they were taxed by the police with having kidnapped the girl the grounds state that he replied, after denying all knowledge of the woman and her ornaments, "a false charge is being unnecessarily levelled against me." Towards the end of the memorandum Mahabir says, after setting out that he has been sentenced to seven years on the one charge and to death on the other :

> This sentence has been passed against me for no offence. I do not know anything concerning it. I have been arrested on account of suspicion and I have been sentenced for no offence.

The other accused Moujilal states in his grounds of appeal :

> The Court levelled against me a charge under Ss. 366 and 302. I have not kidnapped Lachhiya at all and have not committed the murder also. This is a false charge that has been levelled against me. On account of this I am sentenced to seven years' imprisonment under S. 366 and to suffer death under S. 302. This sentence has been passed against me for no offence.

It is our opinion that though the grounds have been clumsily drafted the intention was to appeal against both convictions. That leads to a curious and anomalous position. The conviction on the kidnapping charge can only be challenged on grounds of law. The only ground of law possible in this case would be that there was misdirection in the charge to the jury. But no misdirection is alleged, nor have we been able to find any, nor in fact did the learned counsel for the accused pretend that there was any. In the circumstances we have no power to interfere on this point and the convictions for kidnapping must stand. That raises this difficult position. The case is so circumstanced that if the facts relating to the charge of

kidnapping cannot be challenged, then it becomes difficult to resist the conclusion that the convictions on the charge of murder were properly made. If these persons were responsible for the kidnapping of the girl for the purposes of forcing her to illicit intercourse then it becomes very probable that they were concerned with her murder. But if there is nothing in the charge of kidnapping then the motive for the murder disappears and the remaining points implicating the accused are so slender that in the absence of motive they are not sufficient to bring home guilt on the capital charge. That raises the following legal question. Can the appellants when dealing with the appeals against their convictions for murder challenge the facts on which their convictions on the charge of kidnapping rest? We think they can.

We are clear that the convictions for kidnapping cannot be challenged except on grounds available in an appeal from a conviction in a jury trial. But as the Code allows an appeal on facts against a conviction for murder, it seems to us that the appellant must be allowed to challenge every fact on which that conviction rests or which is likely to affect the result. The position is anomalous, but then so is this hybrid kind of trial. The Code is not clear on this point and it seems to us that in a case where a man is on trial for his life every ambiguity in the law of procedure should be resolved in his favour. The intention of the law is that a man should not be condemned to death unless at least two High Court Judges have had the opportunity of scrutinising the case on facts as well as on law and unless they are satisfied that he is guilty. The law quite definitely does not intend that the final result in such cases should depend upon the opinion of the jury. But if the verdict cannot be challenged in the High Court, (as distinct from the conviction) and if the case is such (as it is here) that once a kidnapping is established a conviction for murder ought logically to follow, then the graver issue is made to depend upon the opinion of the jury and not on that of two High Court Judges. We do not think this is the real intention of the Code; therefore, since the matter is not expressly dealt with, and as a doubt as to the meaning of the relevant sections arises, we consider it proper to resolve that doubt in favour of the accused and so have allowed him to challenge every fact material for conviction on the capital charge.

[The rest of the judgment is not material for reporting.—ED.]

G.N./R.K. *Order accordingly.*

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STONE C. J. AND VIVIAN BOSE J.

Udhao Nanaji Gadewar — *Defendant* — Appellant

v.

Narayan Vithoba Mangilwar — *Plaintiff* — Respondent.

First Appeal No. 110 of 1936, Decided on 16th October 1939, from decree of Addl. Sub-Judge, First Class, Yeotmal, D/- 26th August 1936.

(a) Civil P. C. (1908), O. 8, R. 5—Defendant admitting to have executed bond for certain amount on certain date and admitting to have agreed to pay it on certain date — Case does not fall under O. 8, R. 5.

Where in a suit the defendant has admitted that he executed a bond for certain sum on certain date on taking accounts and has admitted that he agreed to pay the amount on certain date, this is not a case, which falls under O. 8, R. 5, of an implied admission. This is an example of an express admission. [P 96 C 2]

(b) Evidence Act (1872), S. 65—Debtor's application to Debt Conciliation Board cannot be regarded as admission of liability within S. 65 (b).

The statement contained in the debtor's application to the Debt Conciliation Board cannot be regarded as an admission within S. 65 (b), Evidence Act. It is a statement. Under S. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The debtor is in no sense promising to pay this amount: on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot be inferred that there is any promise to pay anything or any admission of liability for anything. [P 96 C 2; P 97 C 1]

(c) C. P. Debt Conciliation Act (2 of 1933), S. 9 — Admission by debtor of agreement to pag sum due on bond—S. 9 does not operate.

Where there is an admission by the debtor of an agreement to pay the sum due on a bond it is not necessary to prove the bond. Therefore S. 9 does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. [P 97 C 1]

R. N. Padhye — for Appellant.

V. V. Kelkar — for Respondent.

Judgment.—This appeal is from a judgment decreeing the claim founded upon a loss for Rs. 4000 effected on 30th March 1929. On the same date the defendant executed a bond in respect of the same transaction. Re-payments were made from time to time. On 26th February 1928 a payment of Rs. 5 was endorsed on the back of the bond. On 25th March 1933 there was a renewal. Rupees 4400 was then found due and a bond was given for that amount. The bond, we are informed, contained interest clauses. The

date of the suit is 25th February 1936. On 21st January 1935 the debtor applied to a Debt Conciliation Board and included his debt on the bond of 1933, that item of his indebtedness being shown in his application in the following words :

Executed a bond for Rs. 4400 in the year 1933. Interest at the rate of eight annas per cent. per month. The amount of Rs. 4870-6-0 is found due on the said bond.

The matter came before the Debt Conciliation Board, and the Board ordered the creditors to file statements and to produce various documents. The plaintiff failed to produce the bond of 1933. The Board accordingly treated his failure as coming within S. 9, Debt Conciliation Act, 1933, and intimated that the document would thereafter not be admissible in evidence against the debtor in any suit brought by the creditor or by any person claiming under him. A review application was made in which the creditor pointed out that his failure was due to floods. That review application failed and the Debt Conciliation Board maintained the position it had taken up. The matter came before the civil Court in this case, and the civil Court considered itself not bound by the findings of the Debt Conciliation Board. It said, however, that the civil Court was bound by S. 9(3) and held that the document could not be looked at : neither could the earlier bond be looked at for a like reason. But the Court decreed the claim on the ground that the plaintiff could resort to the original contract of loan and ignore the bond altogether. Before us, it has been pointed out that this is not a case of a loan with collateral security, but is a case of a loan transaction reduced to writing; and it is therefore argued that so far as the original contract of loan is concerned that is reduced to writing the terms of which are to be found in the bond executed in 1929, and therefore one cannot go outside that bond to find out what the terms were of that bond and the contract that it evidenced which came to an end when the new bond was brought into existence, because not only was the new bond brought into existence but a letter of even date signed by the plaintiff was given. That letter is proved in this case and contains the following statement : . . . after receiving credit for remission and payment, the previous stamp dated 30th March 1929 in cancelled.

In other words the first bond ended and the contract it evidenced was brought to an end and was substituted by a new contract evidenced by the terms of the bond of 1933. Therefore it is said that as the contract has been reduced to the form of a document within the meaning of S. 91, Evidence Act, and as that document, the bond of 1933, in the circumstances here present, cannot be looked at by any Court, and as it follows from that and from S. 91 that no evidence at all can be given of the terms of the contract, the plaintiff's claim should have been dismissed with costs. In this case, however, the defendant has admitted that he executed a bond for Rs. 4400 on 25th March 1933 on taking accounts and has admitted that he agreed to pay the amount on 15th April 1935. That is, in our opinion, an admission that on 25th March 1933 he agreed to pay Rupees 4400 on 15th April 1935, and in the light of that admission it was quite unnecessary for the plaintiff to prove anything in order to succeed to the extend of Rs. 4400.

This is not a case, which falls under O. 8, R. 5, of an implied admission. This is an example of an express admission. It is said by the plaintiff that not only should Rupees 4400 be awarded but that interest thereon should also be awarded because there is an implied admission as to interest derived through the other admissions contained in the written statement. But, in our opinion, bearing in mind the fact that this point has been taken for the first time in this Court, that there is no issue turning round the question of admission, and that we have a discretion in the case of an implied admission, under the proviso to Order 8, R. 5, to require the fact to be proved otherwise than by such admission, we should require the fact of the interest reserved to be proved otherwise than by admission. Were the plaintiff driven to prove it he would find himself unable to do so because he would then have to put in the bond, and that bond the Court cannot look at. It is said, however, that the amount of interest can be derived from the entry abovementioned in the application, and S. 65, Evidence Act, is relied on. It is necessary for the plaintiff to rely on S. 65 because obviously the primary evidence is the evidence of the bond; and the bond is in existence, is not destroyed or lost; but the plaintiff's difficulty is due to the fact that he is shut out by S. 9, Debt Conciliation Act, from proving it.

Section 65, Evidence Act, only helps the plaintiff, however, if the statement contained in the defendant's application to the Debt Conciliation Board can be regarded as an admission. We are not prepared to treat it as an admission. It is a statement. Under

S. 6, Debt Conciliation Act, the statement is not to be deemed a statement of the amount admittedly due but of the amount claimed. The defendant is in no sense promising to pay this amount: on the contrary he is applying to a Debt Conciliation Board with a view to having his liability cut down, and it cannot, we think, be inferred that there is any promise to pay anything or any admission of liability for anything. However that may be, here there is in the pleadings an admission of an agreement to pay Rupees 4400 due on a bond. It is therefore not necessary to prove the bond. Therefore, S. 9, Debt Conciliation Act, does not operate. That section does not declare that no suit could be brought on the debt. It merely states that some documents cannot be proved. Here it is not necessary to prove the bond in order to establish liability to the extent of Rs. 4400 due on 15th April 1935. The admission, however, does not go beyond that; and beyond that the plaintiff is unable to prove his claim.

The result is that the decree is varied, and the plaintiff's claim is allowed to the extent of Rs. 4400 only together with proportionate costs in the lower Court. The defendant will have half his costs of this appeal.

D.S./R.K. *Decree varied.*

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VIVIAN BOSE J.

Vishnu Ghanshyam Deshpande
Accused — Applicant

v.

Emperor.

Criminal Revn. No. 86 of 1940, Decided on 11th June 1940, for revision of the order by Addl. Dist. Magistrate, Nagpur, D/- 18th January 1940.

* *(a) Press (Emergency Powers) Act (1931), Ss. 7 (1) and 30 — Order under S. 7 (1) — High Court has no jurisdiction to interfere in revision.*

An application for revision against an order under S. 7 (1) cannot be brought within S. 23 and hence the High Court's jurisdiction to entertain such an application is barred by S. 30: A I R 1934 Pat 344 (FB), *Rel. on.* [P 98 C 1]

(b) Criminal P. C. (1898), S. 561A — S. 561A cannot be invoked to confer jurisdiction on High Court to interfere with order under S. 7 (1), Press (Emergency Powers) Act.

Inherent powers cannot be invoked where the Legislature expressly deals with the matter. S. 30, Press (Emergency Powers) Act, expressly deals with the powers of High Court. Hence, S. 561A cannot be invoked to confer jurisdiction on High Court to interfere with order passed under S. 7 (1) of Press (Emergency Powers) Act. [P 98 C 2]

(c) Press (Emergency Powers) Act (1931), Ss. 23 and 30—Ss. 23 and 30 are not ultra vires.

Sections 23 and 30 cannot be regarded as ultra vires on the ground that they contravene S. 561A, Criminal P. C. [P 98 C 2]

(d) Government of India Act (1915), S. 107—Ss. 23 and 30, Press (Emergency Powers) Act are not ultra vires because of S. 107, Government of India Act.

The High Court has not been conferred with revisional jurisdiction by S. 107 in respect of orders judicially passed. But apart from that, it is impossible to ask High Court to exercise powers of superintendence in order to prevent a Magistrate from doing that which the Act under which he is acting gives him power to do. If his order is intended to be final in the sense that no revision or appeal lies from it, then clearly the Court cannot assume revisional or appellate powers under S. 107. Hence Ss. 23 and 30, Press (Emergency Powers) Act, are not ultra vires because of S. 107, Government of India Act of 1909 as amended in 1915. [P 99 C 1]

(e) Government of India Act (1915), S. 65 — Press (Emergency Powers) Act is not ultra vires.

The Press (Emergency Powers) Act is not ultra vires on the ground that it offends against S. 22, Councils Act, which has now been embodied in S. 65, Government of India Act, 1915 : *Case law referred.* [P 99 C 1]

B. R. Mandlekar — for Applicant.

W. C. Dutt, Advocate-General — for the Crown.

Order. — This is an application for revision against an order passed by the Additional District Magistrate of Nagpur under S. 7 (1), Press (Emergency Powers) Act of 1931 under which the applicant has been ordered to furnish a security of Rs. 1000. The application covers a very wide field, but it is not necessary for me to enter into the questions raised by it because, in my opinion, I have no power to exercise jurisdiction in this matter. The Act expressly deals with the powers of the High Court in respect of orders passed and action taken under the provisions of the Act. These powers are of a very limited character. Section 23 provides that if an order of forfeiture has been made under Ss. 4, 6, 8, 10 or 19 of the Act in respect of security which has been deposited under S. 3 (3) or S. 7 (3), then, provided an application is made to the High Court under S. 23 (1) within two months, the High Court shall have jurisdiction to determine whether the publication in respect of which the order was made did or did not contain the words, signs, etc., described in S. 4 (1). Sections 24, 25, 26 and 27 relate to the procedure to be followed by the High Court in the entertainment of and the hearing of such an application. For example it has to be considered by a Special Bench consisting of not less than three

Judges and so on. Then follows S. 30 which states :

> No proceeding purporting to be taken under this Act shall be called in question by any Court, except the High Court on application under S. 23.

The proceeding, which is being questioned here does purport to be taken under S. 7 (1) of this Act. Therefore, under S. 30 the jurisdiction of the High Court is expressly barred unless the application can be brought within S. 23. It is clear that it cannot. Consequently, I have no jurisdiction in this matter. This is also the decision of a Full Bench of three Judges of the Patna High Court in 13 Pat 547.[1] The learned counsel for the applicant seeks to distinguish this ruling on the ground that in that case the Local Government had already passed an order demanding security and the District Magistrate was, therefore, according to the argument, acting in an executive capacity as a ministerial agent of the Local Government : he was not acting in an independent capacity as a Court. That however is only one part of the ruling. The latter half of the ruling deals expressly with the point just discussed by me. In any case whether the ruling is precisely in point or not that is my view. A part of the argument before me was directed to the question whether the District Magistrate in such a case acts as a Court or not. It is argued that in fact he is a Court and if he is a Court then the High Court has jurisdiction because of powers to which I shall refer presently. I need not however decide in this case whether the District Magistrate acts as a Court or in an executive capacity, though a Full Bench of the Lahore High Court in 18 Lah 438[2] appears to consider that the functions which either he or the Local Government (their powers being independent) exercise under the Act are executive, because, whether they are executive or judicial, the Act deals with the exact scope of the powers of superintendence which the High Court is to have in these matters and consequently the High Court cannot travel beyond the powers so conferred and so delimited.

It is urged that the High Court has powers under S. 561A, Criminal P. C. But I am clear that that section can have no application to a matter of this kind. That section confers no fresh or new or additional powers on the High Court. It merely states that the existing powers are not circumscribed by anything in the Code of Criminal Procedure except in so far as the sections expressly dealing with them do so. It is well known that inherent powers cannot be invoked where the Legislature expressly deals with the matter. It has dealt with the matter in this case. It has stated that no proceeding purporting to be taken under the Act shall be called in question except in one particular matter and in one particular way. That is express and absolute. No general section conferring inherent power can be invoked in the face of that. But it is argued that these sections in the Act are ultra vires because they contravene S. 561A. Section 561A cannot possibly have been intended to relate to powers which were not in existence at all at the date when it was passed. It does not give a power of superintendence or of revision in respect of matters which have been specially created by the Legislature at a later date. If the Legislature chooses to confer those powers upon any Court or body and state that there shall neither be appeal nor revision it has every right and power to do so. We are familiar with the exercise of these powers on the civil side. Many special Acts are passed conferring special and extraordinary powers upon Courts, persons or bodies and stating that there shall be no appeal from orders made under those Acts, or stating that an appeal shall not lie in the civil Courts. It would be impossible to argue that these Acts are ultra vires because inherent powers are conferred upon the High Court on its civil side by S. 115, Civil P. C. The same reasoning applies here.

It is next argued that Ss. 23 and 30 are ultra vires because of S. 107, Government of India Act of 1909 as amended in 1915. That Act confers powers of superintendence over all Courts for the time being subject to its appellate jurisdiction. It is a moot point whether this confers powers of revision which have not been conferred either by the Code of Civil Procedure or that of Criminal Procedure or some other Act. The High Courts have differed on this point, and the new Government of India Act makes it clear that the High Court has no revisional jurisdiction in respect of orders judicially passed. The jurisdiction is executive and ministerial. In my opinion the cases which held that that was the correct interpretation of the old Act are right. But apart from

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1. ('34) 21 A I R 1934 Pat 344 : 149 I C 841 : 35 Cr L J 1022 : 13 Pat 547 : 15 P L T 291 (FB), Murli Manohar v. Emperor.
2. ('37) 24 A I R 1937 Lah 844: 172 I C 200: I L R (1937) 18 Lah 438: 39 Cr L J 86:39 P L R 842 (FB), In the matter of the Indian Press (Emergency Powers) Act, 1931, and of the Daily Riyasat Lahore.

that, it is impossible to ask this Court to exercise powers of superintendence in order to prevent a Magistrate from doing that which the Act under which he is acting gives him power to do. If his order is intended to be final in the sense that no revision or appeal lies from it, then clearly the Court cannot assume revisional or appellate powers under S. 107. If it cannot, then it is clear that S. 30 does not contravene S. 107. The two matters are distinct. It is then argued that the whole Act, that is to say the Press (Emergency Powers) Act, is ultra vires because it offends against S. 22, Councils Act, which has now been embodied in S. 65, Government of India Act, 1915. That section is not before me, but the proviso embodied in S. 65 which is relied on states that the Legislature shall have no power unless expressly so authorized by Act of Parliament to make any law affecting

any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom.

It is argued that this Act affects the liberty of the subject: it prevents him from saying what he likes in a publication and that affects his allegiance to the Crown. 40 Cal 391[3] is relied on. The question there was whether the Government of India could make any law the effect of which was to debar a civil Court from entertaining a claim against the Government to any right or demand. Their Lordships referred to the well-known judgment of Sir Barnes Peacock C. J., in which he held that Government possesses a dual capacity : (1) that in which it reigns and (2) that in which it has taken over the commercial rights, privileges and obligations which were vested in the East India Company. Their Lordships held that the right in respect of the lands in question related to the commercial capacity of Government. Therefore the Government of India could not pass an Act which ousted the jurisdiction of the civil Courts in respect of its commercial capacity. Their Lordships pointed out that the East India Company could have been sued. They stated that the Government of India in its commercial capacity inherited the rights and obligations of that Company and that when it took over from the East India Company the right of the subject was to proceed against the Secretary of State, and they pointed out that under S. 65, Government of India Act, the Government of India has no power to pass an Act which would prevent the subject from suing the Secretary of State. That has no possible application to this case. The present Act does not relate to any commercial aspect of Government. It relates to its sovereign attributes. Government has power and authority to make laws for the good Government of the country and for the preservation of peace, law and order.

It was also referred to 8 N L R 107[4] and 26 N L R 217[5] for the proposition that an Act which ousts the jurisdiction of the Courts or says that the authority of any person or body is to be final is ultra vires. The former case refers to bye-laws. It is quite clear that if an Act does not state that the order of a body created by it shall have finality neither that body nor anybody else can give itself powers embodying finality by making rules in the guise of bye-laws. Of course the bye-laws cannot travel beyond the authority conferred by the Act. As regards 26 N L R 217[5] that merely decides that the civil Courts have jurisdiction to determine whether a tax imposed by a municipal committee is intra vires or not. Again, it has no application to this case.

A large number of other cases were cited dealing with other Acts, but, as they do not refer to the Act in question, which, as I have said, expressly limits the jurisdiction of the High Court in respect of orders passed under the Act, I need not deal with them in detail. It is enough to state that they are not relevant to this case. The rulings cited are, 39 Cal 953,[6] 54 Mad 422,[7] 57 ALL 778,[8] 41 Cal 400,[9] 53 Bom 149,[10] 42 Cal 793,[11]

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3. ('13) 40 Cal 391 : 18 I C 22 : 40 I A 48 : 7 L B R 10 : 17 C W N 169 : 17 C L J 194 (PC), Secretary of State v. Moment.

4. ('12) 8 N L R 107 : 16 I C 449, G. I. P. Ry. Co. v. Amraoti Municipality.

5. ('30) 17 A I R 1930 Nag 153 : 122 I C 691 : 26 N L R 217, Bagmal Kisandayal Ginning Factory, Akot v. Municipal Committee, Akot.

6. ('12) 39 Cal 953 : 16 I C 501 : 39 I A 163 : 16 C L J 231 : 16 C W N 865 : 13 Cr L J 693 (PC), Clarke v. Brojendra Kishore.

7. ('30) 17 AIR 1930 Mad 975 : 129 I C 70 : 32 Cr L J 217 : 54 Mad 422 : 59 M L J 914, In re Anantapadmanabhiah.

8. ('35) 22 A I R 1935 All 341 : 158 I C 1118 : 57 All 778 : 1935 A L J 228 : 36 Cr L J 1505, Emperor v. Har Narain.

9. ('14) 1 A I R 1914 Cal 22 : 21 I C 993 : 41 Cal 400 : 14 Cr L J 673 : 18 C W N 869, Gulli Sahu v. Emperor.

10. ('29) 16 A I R 1929 Bom 81 : 117 I C 321 : 30 Cr L J 772 : 53 Bom 149 : 31 Bom L R 62, Mabel Ferris v. Emperor.

11. ('15) 2 A I R 1915 Cal 426 : 26 I C 355 : 42 Cal 793 : 21 C L J 112 : 19 C W N 221 : 16 Cr L J 31, Gulli Sahu v. Emperor.

42 Mad 96,[12] 37 Cal 287,[13] 28 Mad 42,[14] 4 C W N 36[15] and 61 Cal 450.[16] The revision fails and is dismissed.

D.S./R.K. *Revision dismissed.*

12. ('19) 6 A I R 1919 Mad 620 : 48 I C 890 : 20 Cr L J 90 : 42 Mad 96 : 35 M L J 686, In re Penchalu Reddi.
13. ('10) 37 Cal 287 : 5 I C 323 : 11 Cr L J 112 : 14 C W N 404 : 11 C L J 297, Rajani Khemtawali v. Emperor.
14. ('05) 28 Mad 42 : 32 I A 45 : 8 Sar 763 (PC), Maharaja of Jeypore v. Gunupuram Deenabandhu Patnaick.
15. (1900) 4 C W N 36, In re Siddeshwar Boral.
16. ('34) 21 A I R 1934 Cal 725 : 152 I C 914 : 61 Cal 450 : 38 C W N 729, In re National Carbon Co.

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STONE C. J. AND CLARKE J.

Shivjiram Dhannalal Marwari and another — Defendants — Appellants

v.

Gulabchand Kalooram Marwari — Plaintiff — Respondent.

Second Appeal No. 253 of 1936, Decided on 8th October 1940, from appellate decree of Addl. Dist. Judge, Bhandara, D/- 29th February 1936.

(a) Practice—New plea—Limitation—Plea of minority cannot be raised for first time in second appeal.

The plea of minority for the purpose of calling in aid the provisions of S. 6, Limitation Act, cannot be raised for the first time in second appeal : 17 C W N 667, *Rel. on.* [P 101 C 1]

* *(b) Limitation Act (1908), Ss. 4 and 19—S. 4 is not concerned with computing period prescribed under S. 19* : 24 N L R 83=A I R 1928 Nag 192= 110 I C 76, OVERRULED.

Section 4 has nothing to do with computing the period prescribed under S. 19. Consequently, an acknowledgment signed after the expiration of the period prescribed by S. 19 cannot be brought within time by the application of S. 4 : 24 N L R 83 = A I R 1928 Nag 192=110 I C 76, *OVERRULED*; A I R 1935 P C 85 ; A I R 1938 Lah 234 (F B) ; A I R 1937 Mad 367; A I R 1939 All 252 and A I R 1938 All 606, *Rel. on.* [P 101 C 2]

* *(c) Contract Act (1872), S. 25 (3)—Promise to pay under S. 25 (3) must be in writing — Implied promise in acknowledgment cannot be said to be in writing and hence does not fall under S. 25 (3)—Acknowledgment held did not amount to promise to pay within meaning of Section 25 (3).*

Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3). The implied promise to pay which is contained in all acknowledgments does not attract the provisions of S. 25 (3) because the promise to pay is not in writing. Consequently, the words "after taking old accounts into consideration there remains to be paid a balance of Rs. 3200" in an acknowledgment do not amount to a promise to pay within the meaning of S. 25 (3): A I R 1938 Nag 180 and A I R 1938 Bom 460, *Rel. on; Case law referred.* [P 101 C 2; P 102 C 1]

(d) Practice—New plea—Novation — Plea of novation under S. 63, Contract Act, cannot be raised for first time in second appeal.

A plea that a contract amounts to novation within the meaning of S. 63, Contract Act, cannot be raised for the first time in second appeal. [P 102 C 2]

Y. V. Jakatdar and R. R. Dandige — for Appellants.

R. N. Padhye, K. B. Dwiwedi and J. M. Thaker — for Respondent.

Judgment.—This is a defendants' appeal against the decree granting the full claim of the plaintiff-respondent. The claim is stated in the plaint to be based on a sarkhat or an acknowledgment, which was admittedly executed by the appellants on 15th June 1932 in renewal of an earlier acknowledgment dated 3rd June 1929. The appellants took various pleas, those with which we are concerned in this appeal being that the suit was based on a mere acknowledgment executed after the period of limitation had expired in respect of the previous sarkhat, and that as it did not fall within the requirements of S. 25 (3), Contract Act, the suit was barred by limitation. Other contentions were that part of the consideration for the sarkhat amounting to Rs. 500 was illegal being of a wagering nature, and they also claimed to have the transactions re-opened under the Usurious Loans Act. All these points were decided against the appellants in the lower Courts.

Before us the learned counsel for the respondent has endeavoured to side track the point of limitation, which the appellants have taken, by arguing that even if the point be conceded as to the sarkhat being beyond limitation when regarded according to the provisions of S. 19 read with S. 4, Limitation Act, limitation is saved by S. 6 since the respondent-plaintiff is a minor. Whether this plea would have succeeded if it had been taken in the trial Court is extremely doubtful, but we need not consider it here because in that Court not a word was said about the minority of the plaintiff, nor even in the lower appellate Court was any such plea taken as far as we can ascertain, since nothing has been said about it in the judgment of that Court. It is before us for the first time that the point appears to have been made. It was held in 17 C W N 667[1] by a Bench of the Calcutta High Court before whom the point of minority was similarly taken for the first time that the law expressly imposes upon a Court the duty of throwing out a suit or application filed after the

1. ('13) 17 C W N 667 : 18 I C 391, Panchu Mondal v. Sheikh Isaf.

period of limitation fixed therefor, and it may well be that, if a Court were to decree a suit or allow an application which was, in fact, time-barred without considering whether it was so or not, it could be said to have failed to exercise a jurisdiction vested in it by law so as to bring the matter within the scope of S. 115, Civil P.C., 1908. But we think that the same thing cannot be said of a Court merely because it has omitted to consider *ex proprio motu* the question whether a litigant was entitled to proceed out of time by reason of some special provision of law, such a question not having been raised by or on his behalf. If a litigant claims the benefit of an exceptional rule of the kind indicated it is clearly his duty both to do so expressly and to establish his claim. This is in accordance with general principles, and is recognized by O. 7, R. 1 of the Code, which provides for the contents of a plaint, and lays down a rule applicable, by virtue of S. 141, to applications *mutatis mutandis*. It is true that the petitioner was described in the headings to certain applications made in this case as a minor represented by a guardian, but that alone was clearly not sufficient to entitle him to the benefit of S. 7, Limitation Act; nor was it, in our opinion, sufficient to throw upon the Court the duty of protecting his interest by raising a point of this kind on his behalf.

Although this decision is more than a quarter of a century old, it has, so far we are aware, never been dissented from. It is therefore too late in this Court to raise the point of the minority of the plaintiff for the purpose of calling in aid the provisions of S. 6, Limitation Act. As regards the questions of limitation which were agitated in the lower Courts, the acknowledgment in suit was executed more than three years after the previous acknowledgment, but the Courts below have held, relying on 24 N L R 83,[2] that limitation is saved by reading the provisions of S. 4 along with S. 19, since on the date when the previous acknowledgment was due to expire the Courts were closed for the summer vacation. Therefore, it is said that the plaintiff could have instituted his suit on the old acknowledgment when the Courts re-opened. Instead of doing so, however, he accepted a fresh acknowledgment while he still had a right to sue and therefore it is said that the new acknowledgment was executed within limitation. It is certainly correct that that was the view expressed in 24 N L R 83[2] and if that were the last word on the subject, then the Courts below would have been perfectly correct to act upon that ruling. In 1935, however, the Judicial Committee of the Privy Council in 57 ALL 242,[3] while considering the applicability of S. 14, Limitation Act, to the facts of the case before them, pronounced that S. 4, Limitation Act, had nothing to do with computing the period prescribed under S. 14. The reasoning of their Lordships applies equally to a case where S. 19 is in issue as to a case where S. 14 applies. That case was followed by a Full Bench of the Lahore High Court in I L R (1938) Lah 193,[4] which was a case under S. 19, Limitation Act. The same view was also expressed in A I R 1937 Mad 367.[5] There are also rulings of the other High Courts which have applied the observations of their Lordships in 57 ALL 242[3] to cases under S. 20, Limitation Act : *vide* AIR 1939 ALL 252[6] and I L R (1938) ALL 861.[7] We entirely concur with those observations and hold therefore that the view expressed in 24 N L R 83[2] is not good law.

If then the appellants are correct in saying that the suit is founded on a mere acknowledgment, then it is barred by limitation. This therefore brings us to the question whether the suit is so founded and whether there was any consideration for the acknowledgment. Under S. 25 (3), Contract Act, an agreement made without consideration is void unless it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits. The nature of an acknowledgment, such as that we are now considering, came before Bose J., in I L R (1940) Nag 441[8] and his reasoning in that case appears to us to be unanswerable :

> Unless a promise to pay is in writing it cannot fall within the purview of S. 25 (3), Contract Act. The implied promise to pay which is contained in all acknowledgments does not attract the provisions of S. 25 (3) of the Act, because the promise to pay is not in writing.

Here the words used in EX. P-1 are: "*juna hisab raju karna baki dena raha* Rs. 3200" which may be translated : "after taking old accounts into consideration there remains to be paid a balance of Rs. 3200." This is not quite the same as the wording of the docu-

2. ('28) 15 A I R 1928 Nag 192 : 110 I C 76 : 24 N L R 83, Jhanklal v. Gulabchand.
3. ('35) 22 A I R 1935 P C 85 : 155 I C 205 : 57 All 242 : 62 IA 80 (PC), Maqbul Ahmad v. Onkar Pratap Narain Singh.
4. ('38) 25 A I R 1938 Lah 234 : 174 IC 277 : ILR (1938) Lah 193 : 40 P L R 533 (F B), Shanti Parkash v. Harnam Das.
5. ('37) 24 AIR 1937 Mad 367 : 169 IC 653 : (1937) 1 M L J 262, Chindambaram v. Venkatasubba.
6. ('39) 26 AIR 1939 All 252 : 181 IC 899, Shyam Peare v. Ram Autar.
7. ('38) 25 A I R 1938 All 606 : 178 IC 668 : ILR (1938) All 861 : 1938 A L J 1183, Puran Chand v. Abdullah.
8. ('38) 25 A I R 1938 Nag 180 : 174 IC 374 : ILR (1940) Nag 441, Ramprasad v. Anandi.

ment which Bose J., was considering in the above mentioned case but it is near enough for his reasoning to apply with equal force. Somewhat similar words to those used in Ex. P-1 but in the Gujarati language were used in a document which came under consideration in 40 Bom L R 1010[9] and the Bombay High Court took the same view as Bose J.: *see also* 31 N L R 105,[10] 52 Bom 521,[11] A I R 1939 Lah 466,[12] 8 Pat 706,[13] A I R 1940 Mad 678[14] and 23 ALL 502.[15] It follows therefore that, if there is no consideration for the implied promise to pay, S. 25 (3), Contract Act, will not come to the aid of the respondent. This is not an "account stated" of the kind which includes items on both sides which the parties have agreed to set off so that only the balance should be paid.

It has been strenuously argued before us by Mr. Padhye on behalf of the respondent that here there was a novation of the contract which novation is evidenced by this entry and by a post-card (Ex. P-4) written on 20th June 1931 by the appellants. As far as the post-card is concerned, it is by no means clear that it is addressed to the respondent; it purports to emanate from Heeralal Sheojiram whereas the appellants are Shivjiram and Chotelal, sons of Dhannalal, and it is addressed to Nirbhe Ramji Kanayalalji which is not the name of the plaintiff or of his father. Even if it is a communication from one of the parties to the other, it does not, in our view, evidence any novation. The idea of a novation first appears to have occurred in the lower appellate Court since it held that as the parties had agreed to pay the amount in ten instalments there was a novation of contract and a fresh cause of action at the time of execution of the sarkhat. It is this aspect of the case which Mr. Padhye has elaborated in his argument before us. We consider that the lower appellate Court, in coming to the conclusion that there was a novation, has lost sight of the exact nature of the appellants pleading. They did not admit that there was an unconditional agreement to pay the amount in ten yearly instalments. Their plea was that the acknowledgment and the oral undertaking to pay in instalments were given on the understanding that the accounts would subsequently be shown to them to satisfy them that the amount really was due and that in point of fact no accounts ever were shown to them. The same applies to the oral statement of Mr. Bapat on behalf of the defendants on 18th February 1935 at p. 12 of the paper book. It is clear to us that the plaintiff founded his case on this acknowledgment. He has stated so over and over again. If he wanted to make out a case of novation he should have pleaded the necessary facts to found novation and stated what was the original contract and in what way it had been replaced by a new contract. Mr. Padhye has argued that a letter, which is alleged to have been given by the plaintiff to the defendants at the time when the acknowledgment was executed and which is not forthcoming, falls within the provisions of S. 63, Contract Act, and therefore time does not begin to run until there was a failure on the part of the defendants to carry out the terms allowed to them by the letter. This argument would, in our opinion, have been a good one if it had been taken at the proper time, but we do not consider that it is a plea that can be advanced for the first time in second appeal.

It follows from the above that the appeal must succeed. It is not therefore necessary to consider the further points which were raised in the case about the wagering nature of the transaction in respect of Rs. 500 of the consideration or as to whether the transactions should have been reopened under the Usurious Loans Act. Accordingly the lower appellate Court's decree is set aside and the plaintiff's suit is dismissed with costs throughout.

G.N./R.K. *Appeal allowed.*

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STONE C. J. AND VIVIAN BOSE J.

Dau Bhairoprasad Duryodhansao and others — Plaintiffs — Appellants

v.

Jugalprasad Toksingh Kurmi and others — Defendants — Respondents.

Second Appeal No. 508 of 1938, Decided on 24th July 1940, from appellate decree of Addl. Dist. Judge, Raipur, D/- 22nd April 1938.

9. ('38) 25 A I R 1938 Bom 460 : 178 I C 174 : 40 Bom L R 1010, Balkrishna v. Jayshankar.
10. ('34) 21 A I R 1934 Nag 273 : 153 I C 255 : 31 N L R 105, Ramchandra v. Muka.
11. ('28) 15 A I R 1928 Bom 319 : 112 I C 24 : 52 Bom 521 : 30 Bom L R 733, Maganlal Harjibhai v. Amichand Gulabji.
12. ('39) 26 A I R 1939 Lah 466 : 186 I C 718 : 41 P L R 878, Joti Parshad v. Raham Ali.
13. ('29) 16 A I R 1929 Pat 258 : 120 I C 478 : 8 Pat 706 : 10 P L T 169, Deoraj Tewari v. Indrasan Tewari.
14. ('40) 27 A I R 1940 Mad 678 : (1940) 1 M L J 682, Govinda Nair v. Achutan Nair.
15. ('01) 23 All 502 : 1901 A W N 150, Ganga Prasad v. Ram Dayal.

(a) Deed—Construction—Case law is not very helpful for that purpose.

In a matter turning on the construction of a document cases are not very helpful except to clear one's mind as to the essence of the transaction which the agreement is said to effect. [P 103 C 2]

(b) Transfer of Property Act (1882), S. 100—Charge in India cannot be compared with charge in England — No interest in property need be created but property must be made security for money—Charge held created.

A charge in India cannot usefully be compared with a charge, legal or equitable, in England because in India such a charge is defined by statute. A charge is something other than a transfer of an interest in specific immovable property. It is not a question whether there is an expression of an intention to create an interest but whether on its true construction, the document makes immovable property security for the payment of money : *Case law discussed.* [P 103 C 2]

By a document one *J* admitted liability. In respect of that liability he undertook to execute a charge bond over a specified share and rights in a village together with the *sir* land. *J* further had undertaken to get sanction for the transfer of *sir* and not to assign certain property until the above were carried out :

Held that the last undertaking was to segregate the property so that it would be answerable in the hands of *J* should he fail to give the charge bond, and that made the property a security for the payment of money. A charge was thus created by the deed. [P 105 C 1; 2]

M. R. Bobde and R. G. Rao — for Appellants.

M. B. Kinkhede, and D. N. Choudhari — for Respondents 1 and 2, and 3, respectively.

Judgment. — This appeal raises a question under S. 100, Transfer of Property Act. It is concerned with the construction of EX. P-1. Does that document, which was duly registered, create a charge? Essentially by that document one J admits liability. In respect of that liability he undertakes to execute a charge bond over a specified share and rights in a village called Nawagaon together with the *sir* land. *Sir* land being involved there can, under the law applicable in the Central Provinces, be no effective transfer without the sanction of a certain administrative officer. Accordingly the next undertaking is that J will obtain the necessary sanction. That is followed by a promise to execute the above-mentioned charge bond within a month of obtaining sanction. The charge bond is to be registered. Then the agreement in question provides :

Unless (until) the writing and the registration have been effected with respect to mouza Nawagaon, sir land and houses according to the terms laid down above, I will not assign in any way to anybody, my decree obtained from the Court of the Judicial Commissioner (Nagpur) in cases Nos. 16 and 34 of 1929 nor will I transfer any property whatsoever, which I have acquired from the said Court by virtue of the decree. And I will fully abide myself with the terms of the agreement. If I act in contravention of any term whatsoever, the said creditors will be at liberty to file a suit immediately against me in respect of their claim and recover their amount due, by attachment and sale of my entire property which I have described above. I will further stipulate in the charge bond that in case the entire claim of the creditors is not satisfied by attachment and also of the property that will be laid down in the charge bond, they will be entitled to recover their remaining claim from my any other property, moveable or immovable, which they may desire.

The sanction was never sought ; the charge bond was never given. Does the above create a charge separate from the charge that was going to be created by the charge bond? A large number of cases have been cited before us by each side but in a matter such as the present turning on the construction of a document cases are not very helpful except to clear one's mind as to the essence of the transaction which the agreement is said to effect. There is little doubt what a charge (when within S. 100, Transfer of Property Act) is in India. It cannot usefully be compared with a charge legal or equitable, in England because in India such a charge is defined by statute. Section 100, Transfer of Property Act, provides that :

Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

What is essential is that immovable property must be made a security for the payment of money in such a way that the transaction does not amount to a mortgage in the Indian law sense. Now in that sense a mortgage is a transfer of an interest in specific immovable property for the purpose of securing various things which include the payment of money : *see* S. 58, Transfer of Property Act. Of course if the transaction falls within S. 58, it is outside S. 100. So a charge is something other than a transfer of an interest in specific immovable property. 49 Cal 820[1] at pp. 835 and 836, gives an example of a charge. Settlement of Blackacre to certain uses with direction to pay out of income certain periodic and ascertained sums to X. No interest in Blackacre is so

1. ('22) 9 AIR 1922 P C 107 : 69 I C 138 : 49 Cal 820 : 49 I A 153 (P C), Khajeh Solehman Quadir v. Salimulla Bahadur.

to speak, segregated, so as to make it security for the payment to X of the indicated sums. Anybody buying blackacre or an interest in blackacre with knowledge of the charge would be bound by it. It will be seen that there the charge arises out of a transaction that belongs to the law of trusts rather than to conveyance or contract. In 5 Luck 365[2] the Privy Council applying the provisions of the Transfer of Property Act, as expressing the principle of equity, justice and good conscience to a transaction of 1881 expressed the following opinion at p. 368:

> It appears to them clear . . . . . that the parties intended that the original village should remain in the possession of the mortgagees until the second debt was paid off, and intended therefore that the property should be security for the debt.

Cases relating to debentures, at any rate where, as in 59 Cal 377,[3] they turn on circumstances quite outside the present case, are not helpful. So cases like 24 C W N 929[4] do not assist. The facts there are complicated but narrow down to this: If A has two villages X and Y and he keeps one (X) and hands one (Y) to B to enjoy on terms that B has the revenue and A pays the Government revenue, has B a charge over X in order to secure the payment of Government revenue to A on Y? The answer was, of course, no. It was pointed out that A's obligations to B were purely contractual:

> . . . . . there is not a word (in the award under consideration which resulted in the above arrangement) to suggest that *(A)* agreed to the creation of a 'charge' on his estate *(X)* or to hypothecate it for the revenue of *(Y)* granted to *(B)*.

40 Cal 514[5] which was relied on by the respondent for the proposition that no charge can be created by implication (the observations in 11 M L J 186,[6] being relied on) is not a very clear case and is concerned with quite different facts from the present. It does not purport to decide that before one can hold that a document on its proper construction creates a charge it must be expressly stated that a charge is created. No one doubts that before there can be a charge so created the document must operate to make immovable property security for the payment of money. What we are concerned with in this case is whether this document on its true construction has that effect. In 24 M L J 474[7] the clause that was being construed was "until the said amount is paid Blackacre should not be dealt with by defendants 1 and 2 in any manner." That clause appeared in a compromise decree. The Court observed:

> The promise contained in the compromise not to alienate the property to third persons without the payment of the plaintiffs' debt is only a covenant not to create any interest in it in favour of others. There is no expression of an intention to create an interest in the plaintiffs' favour.

It will be noted that if the transaction amounted to a transfer of an interest it would not be a charge but a mortgage. We, with respect, consider therefore that it is not a question whether there is an expression of an intention to create an interest but whether, on its true construction, the document makes immovable property security for the payment of money. The learned Judges in 24 M L J 474[7] rely on 3 Cal 336[8] as deciding that a covenant not to alienate "was regarded as insufficient to create a charge." Their Lordships could hardly have referred to 3 Cal 336[8] which decides that such a covenant does not amount to a mortgage. Nevertheless in A I R 1934 Mad 713,[9] a decision to which one of us (Stone C. J.) was a party, 24 M L J 474[7] was cited with approval. A I R 1934 Mad 713[9] is distinguishable from the present case. It was concerned with registration. There were also questions about admitting further evidence. The evidence sought to be introduced was a letter addressed to a bank by the defendant's father undertaking not to alienate certain properties. At the date of the letter there was no money payable to the bank which commenced its advances some time later. It was held that the letter did not amount to a charge, and following 58 Cal 136,[10] on appeal to Privy Council 59 Cal 377,[3] that effectively to create a charge it would have to be registered. It was also observed: "We agree with the decision in 24 M L J 474.[7]"

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2. ('30) 17 A I R 1930 P C 176 : 123 I C 191 : 5 Luck 365 : 57 I A 173 (P C), Aditya Prasad v. Ram Ratan Lal.

3. ('31) 18 A I R 1931 P C 245 : 134 I C 651 : 59 Cal 377 : 58 I A 323 (P C), Imperial Bank of India v. Bengal National Bank.

4. ('20) 7 A I R 1920 P C 16 : 76 I C 680 : 47 Cal 932 : 47 I A 149 : 16 N L R 114 : 24 C W N 929 (P C), Sunderlal v. Ramjilal.

5. ('13) 40 Cal 514 : 18 I C 80, Makbul Ali v. Ali Ahmad.

6. ('01) 11 M L J 186, Kuttiumma v. Madhava Menon.

7. ('13) 24 M L J 474 : 19 I C 478 : 1913 M W N 337, Sivanna v. Venkatakrishna.

8. ('78) 3 Cal 336 : 1 C L R 91, Gunoo Singh v. Letafut Hussain.

9. ('34) 21 A I R 1934 Mad 713 : 152 I C 772, Rangampudi v. Venkateswarlu.

10. ('31) 18 A I R 1931 Cal 223 : 131 I C 689 : 58 Cal 136 : 34 C W N 605 : 53 C L J 269, Imperial Bank of India v. Bengal National Bank.

24 M L J 474[7] was dissented from in A I R 1929 Oudh 539[11] which follows 36 ALL 201.[12]

As in 58 Cal 136[10] so in A I R 1929 Oudh 539[11] it was stressed that the law does not prescribe any particular form of words as necessary to create a charge. The determination of the question in all such cases rests upon the intention to make the particular property a security for the payment of money. We do not find that the other cases cited before us are very helpful. The learned Judge has referred to 14 Cal 687[13] (and the appellants have cited 7 Pat 584[14] as being a case dissenting from 14 Cal 687[13]). What 14 Cal 687[13] decides is that the document to effect a charge must effect it at once and not in futuro. Assuming for the sake of argument that that is so (it is not very obvious why) no one doubts that if the part of this document under consideration creates a charge at all it creates it at once. The argument before the lower Court doubtless was that as J had agreed to give a charge bond and do this and that the charge did not operate at once. In our opinion the undertaking, which either does or does not amount to a charge, was an undertaking binding from the moment the document was executed.

Without going so far as to say that a mere bare undertaking not to alienate property necessarily creates a charge we are clearly of the opinion that this document creates a charge. It has been urged that this might be so had the passage above quoted at "with the terms of the agreement". But it goes on to describe what is to happen if J fails to carry out his promises. That, it is urged, imposes the sanction and that is the only sanction. We do not think so. Anybody reading this document would know, (1) that J had undertaken to give a charge bond, (2) that J had undertaken to get sanction for the transfer of *sir*, (3) that J had undertaken not to assign certain property until the above were carried out.

In our opinion the only possible purpose of the last undertaking was to segregate this property so that it would be answerable in the hands of J should he fail to give the charge bond, and that we think makes this property a security for the payment of money. The appeal is accordingly allowed with costs. The decree will incorporate the clauses of the trial Judge's decree together with a provision relating to the costs in the lower Appellate Court and here which will be the plaintiffs'. It should be added that the Court raised a question of the appropriate stamp. By the Stamp Act, S. 2 (17), mortgage deed is so defined as probably to include a document creating a charge. This document is not so stamped. The document has, however, been admitted and no party has raised this point probably for that reason.

R.K. *Appeal allowed.*

11. ('29) 16 A I R 1929 Oudh 539 : 121 I C 81 : 6 O W N 903, Narain Dass v. Murli Dhar.
12. ('14) 1 A I R 1914 All 187 : 22 I C 973 : 36 All 201 : 12 A L J 290, Jawahir Mal v. Indomati.
13. ('87) 14 Cal 687, Madho Misser v. Sidh Binaik Upadhya.
14. ('28) 15 A I R 1928 Pat 587 : 110 I C 526 : 7 Pat 584 : 9 P L T 743, Murat Singh v. Pheku Singh.

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STONE C. J. AND VIVIAN BOSE J.

Messrs. Suganchand and Co. — *Plaintiff* — Appellant

v.

Laduram Balkisandas, Firm — *Defendant* — Respondent.

Second Appeal No. 177 of 1937, Decided on 19th July 1940, from appellate decree of Dist. Judge, Akola, D/- 10th November 1936.

(a) Minor — Contract by minor is void and not merely voidable.

In India a contract entered into by a minor is void from its inception and not merely voidable, and consequently is no contract at all in law and therefore cannot be sued upon : 30 Cal 539 (P C), *Rel. on.* [P 106 C 2]

(b) Hindu law — Guardianship — Minor member of undivided family with adult members—No guardian can exist.

There neither is nor can be a guardian of minor's property in an undivided Hindu family which has adult members. The manager is not the guardian and cannot be appointed as such under the law : 25 All 407 (P C) and A I R 1915 Nag 52, *Rel. on.* [P 107 C 2]

(c) Partnership — Position of partner explained.

In a partnership each partner is part owner of the business in the same way as each member of a joint family is a co-owner of the family estate. He is not a mere servant or agent employed for a special purpose; and being an owner he has as much right to enjoy and use the joint property for his own benefit as any other co-owner. His powers are consequently wider than those of a guardian or of a manager who holds entirely for another and has no right to make any personal use of the property. [P 108 C 2]

(d) Hindu law — Guardianship — De facto guardian — Minor being sole owner of ancestral business —Goods supplied to his de facto guardian in usual course of business for carrying on business— Minor is bound to make good price of goods out of his estate.

Where minor is the sole owner of ancestral business and goods are supplied to his de facto guardian in usual course of business and which are necessary for carrying on that business, the minor is bound to make good the price of the goods out of his estate. The questions about the benefit to the estate and about the enquiries by the creditor are not relevant: *Case law discussed.* [P 110 C 2; P 111 C 1]

M. R. Bobde — for Appellant.

W. B. Pendharkar and R. N. Padhye — for Respondent.

Vivian Bose J. — The suit is for the price of goods supplied to the defendant by the plaintiff for the running of a ginning factory at Akot during the year 1933-34. The defendant was then a minor and the only question is whether, in the circumstances, the plaintiff can recover. The factory belonged to the defendant's father Balkisandas and the plaintiff used to supply him with gin stores and coal for running it. These were all paid for. The father died in 1932 according to the plaintiff and the plaintiff says that he continued to supply goods as before. Those supplied in the year 1932-33, after the father's death, were duly paid for but trouble arose in connexion with those supplied during the year 1933-34. The defendant's case is this. He admits that the factory has come down to him from his father, but he states that his step-mother, who is his guardian, did not want to run the factory during the year 1932-33 but wanted to keep it idle in combination with other ginning factories. But his guardian's muktyar Laxminarayan, instead of carrying out his mistress' instructions, started it in competition with other factories against the guardian's wishes and ran the factory at a loss. The defendant states that the goods were supplied to the order of this muktyar who had no authority to order them and consequently he is not liable. Both the lower Courts hold that Laxminarayan was the manager of the factory and that he had authority from the defendant's guardian to run it. They also hold that the defendant's step-mother must have known that it was being run. These are questions of fact which are binding here. The lower Courts also find that the business was an ancestral one and it is admitted on all hands that the defendant is a Hindu.

As regards the position of the defendant's step-mother, the finding of the lower appellate Court is that though she was not the natural guardian she was the de facto guardian of the defendant and was the manager of her estate under the Hindu law. The learned Judge also finds that the goods were supplied, that they were supplied in the ordinary course of business and that they were necessary for the running of the factory. The first Court decreed the claim being of opinion that questions of benefit to the estate and of legal necessity did not arise because it considered that the carrying on of a family business was in itself a family necessity. The learned Judge of the lower appellate Court differed from this and held that as no benefit to the estate was established the suit must be dismissed. Questions of difficulty arise if the matter is viewed from the point of view of "necessaries" within the meaning of S. 68, Contract Act. Under the English law the rule would appear to be confined to contracts entered into by the infant personally, and he would appear to be bound only if the contracts relate to his person, such as contracts for necessaries, food, clothing, lodging, contracts of marriage and contracts of apprenticeship and service. Because of these limitations it was held in (1912) 2 K B 419[1] at p. 422, that a trading contract would not come within that category: *see also* Bullen and Leake's Precedents of Pleading, Edn. 7, p. 598. This decision has been criticised by the learned authors of Salmond and Winfield's Law of Contracts, p. 453. They state that:

> No adequate reason is suggested for this rule, and it is not easy to reconcile it with the fact that many contracts of employment (which are admittedly valid) look like trading contracts. Nevertheless the law has been stated in terms which would exclude a trading contract not only from the head of 'benefit', but also from that of 'necessaries'.

The English authorities are not binding here and it may well be that the Indian law is different. In any event, the Privy Council has held that an agreement which is not enforceable at law, and which is consequently void under the Contract Act, is not a contract: *see* 45 ALL 179[2] at p. 184. Therefore the English rule which appears to limit a claim for necessaries to cases in which it is possible to sue a minor on his contract is probably inapplicable in India because here a contract entered into by a minor is void from its inception and not merely voidable, and consequently is no contract at all in law and therefore cannot be sued upon: *see* 30 Cal 539.[3] Also in any case no such words of limitation are to be found in S. 68. Some of the Indian decisions seem to have carried the meaning of the

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1. (1912) 2 K B 419 : 81 L J K B 865 : 106 L T 984 : 56 S J 552 : 28 T L R 423, Cowern v. Nield.
2. ('22) 9 AIR 1922 P C 403 : 71 I C 629 : 50 I A 69 : 45 All 179 : 26 O C 223 (P C), Harnath Kuar v. Inder Bahadur Singh.
3. ('03) 30 Cal 539 : 30 I A 114 : 7 C W N 441 : 8 Sar 374 (P C), Mohori Bibee v. Dharmodas Ghose.

word "necessaries" farther than the English authorities would appear to warrant: *see* for instance, the cases collected in T. S. Venkatesa Iyer's Law of Contract, Edn. 3, p. 778; and at least two decisions of this Court, A I R 1938 Nag 65[4] and A I R 1938 Nag 68.[5] But I need not enter into that here, because we are dealing here with the ancestral business of a Hindu and so the rules of Hindu law special to that class of case apply. It was stated in 13 N L R 109[6] at p. 111 that :

> Where a Hindu family maintains itself by trade, and a minor becomes by inheritance the sole owner of such business, if the trade is thereafter carried on by the guardian, the assets of such business will be liable for debts contracted by the guardian necessarily incidental to and flowing out of the carrying on of the trade along its normal course;

and at p. 113 that

> the mere fact that the money and goods were supplied to carry on a shop for the defendant is not enough. If the shop was the ordinary business of the family and the guardian confined himself to carrying it on in the usual course without undue speculation, as a means of maintaining and advancing the minor, those facts should have been alleged and a decree claimed against the assets of the shop.

This rule was also applied in 20 Bom 767.[7] But apart from these two cases, and a Calcutta decision to which I shall refer later, I have not been able to find any decision in which the minor was the sole owner of the business at the date of the transaction. When the family owning the business consists of adult coparceners as well as minors, there is not much difficulty. It was held at a very early date in Taylor's Rep 279[8] that an ancestral trade descends upon the members of a joint Hindu family like any other property. From this followed the corollary that the manager could bind the other members by all acts necessarily incidental to and flowing out of the carrying on of that trade, because, as the learned author of Mayne's Hindu Law, Edn. 10, points out at p. 399,

> credit is the very essence of trade and the existence of a business creates the necessity for borrowing and purchasing on credit.

The reason for this has been put in various ways, but none of them necessarily applies when a minor is the sole owner. Thus in 1 Bom H C R App 51[9] at p. 72 it was said that :

> The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade, as inheritable property, renders it necessary for the general benefit of the family that the protection, which the Hindu law generally extends to the interests of a minor, should be so far trenched upon as to bind him by acts of the family manager necessary for the carrying on and consequent preservation of that family property ; but that infringement is not to be carried beyond the actual necessity of the case.

This decision was given in the year 1863, and it will be seen that so far from endorsing the view that the position is the same when the minor is the sole owner it is diametrically opposed to it. The ruling shows that the Hindu law disregards the special interests of the minor in this class of case because it considers that the general benefit of the undivided family is paramount to any individual interest. The rule which that case laid down was that :

> In carrying on such a trade, infant members of the undivided family will be bound by all acts of the manager, or the adult members acting as managers, which are necessarily incident to and flowing out of the carrying on of that trade whether it be singly or with a copartner (p. 71).

It will be observed that the word "manager" has been used, and that seems to have caused some confusion in later cases. In my opinion, the word used there means the manager of an undivided Hindu family as ordinarily understood, that is to say, one of the adult members who has been invested with rights of management by the others. It does not mean the guardian of a minor. In fact there neither is nor can be a guardian of minor's property in an undivided Hindu family which has adult members. The manager is not the guardian and cannot be appointed as such under the law. This was decided by their Lordships of the Privy Council in 25 ALL 407[10] and was followed by the Nagpur Judicial Commissioner's Court in 12 N L R 12[11] at p. 15. In a Calcutta Full Bench of the year 1878, 3 Cal 738[12] at p. 741, the matter was put a little differently by Garth C. J. He said :

> On principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business

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4. ('38) 25 AIR 1938 Nag 65 : 175 I C 149, Sadasheo Balaji v. Firm Hiralal Ramgopal.
5. ('38) 25 AIR 1938 Nag 68 : 175 I C 494, Sadasheo Balaji v. Shankar Govind.
6. ('16) 3 AIR 1916 Nag 11 : 41 I C 35 : 13 N L R 109, Jhitibai v. Tejmal.
7. ('96) 20 Bom 767, Rampartab Samrathrai v. Foolibai.
8. Taylor's Rep 279, Petumdoss v. Ramdhone Doss.
9. (1862) 1 Bom H C R App 51, Ramlal v. Lakhmichand.
10. ('03) 25 All 407 : 30 I A 165 : 8 Sar 483 (P C), Gharibullah v. Khalak Singh.
11. ('15) 2 A I R 1915 Nag 52 : 32 I C 242 : 12 N L R 12, Asaram v. Ratansingh.
12. ('78) 3 Cal 738 : 2 C L R 440 (F B), Joykisto Gowar v. Nittyanund Nundy.

and that of one on whose behalf an ancestral trade is carried on by a manager.

This was quoted with approval in a Bombay Full Bench by Jenkins C. J., 26 Bom 206[13] at p. 213, and again by Batchelor J. in 34 Bom 72[14] at p. 86 who said :

If this reasoning is right, we have taken what appears to me to be the really important step in the case, that is, the step from the ordinary Hindu law as to a manager's power of alienation to the law of partnership.

Of course the learned Judge realized that there was no true partnership and said so, but he thought that

the analogy between such a joint firm in its relations with the outer world and an ordinary partnership is in many respects very close.

But in Mayne's Hindu Law, Edn. 10, pp. 391 and 392, the learned author states that after the passing of the Partnership Act

it would seem no longer correct to say that a joint family business has many of the incidents of a partnership.

But however that may be, the reasoning in these decisions would appear to be based on the assumption that there are adult coparceners as well as minors in the joint family. In the Calcutta Full Bench the facts were these. One A. C. carried on business as a trader and had dealings with the plaintiff's firm. He died leaving widows and two minor sons. After his death the ancestral business was carried on under the management of the widows. But as they were pardanashin they employed their son-in-law, H, to manage on their behalf. H continued the dealings with the plaintiff's firm until one of the two brothers attained majority. After that, the major brother and H jointly managed the business and still continued the dealings with the plaintiff's firm. In the course of those transactions the defendants became indebted to the plaintiffs in the sum of Rs. 4605-11-3. This debt related entirely to the transactions entered into after the father's death. The learned Judges who decided the case drew no distinction between the period when H (who acted on behalf of the minor's guardians, as here) was in sole management, and that when one of the brothers, after attaining majority, was also a manager. They grounded their decision entirely on this :

On principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager.

If there is no difference, then it is difficult to see where the Hindu law comes in, and why the rule should be limited to an ancestral trade. It ought logically to apply to all minors, whether Hindu or not, and to all trades. The reasoning would appear to be relevant only if there are adult members in management, and the reference to partnerships confirms this; also the fact that the only three rulings relied on were cases in which the minor was not the sole owner. In a partnership each partner is part owner of the business in the same way as each member of a joint family is a co-owner of the family estate. He is not a mere servant or agent employed for a special purpose: and being an owner he has as much right to enjoy and use the joint property for his own benefit as any other co-owner. His powers are consequently wider than those of a guardian, or of a manager who holds entirely for another and has no right to make any personal use of the property. Therefore when there are adult coparceners in management the analogy becomes close. But it wears thin when there are none. But even if this analogy breaks down, as the learned author of Mayne's Hindu Law suggests, then there would appear to be even less justification for assuming that rules which obtain in the one case must also apply in the other. The only other cases which deal with minors who were the sole owners of the business are 13 N L R 109[6] at p. 111 and 20 Bom 767.[7] Unfortunately, neither case furnishes any reason for extending rules which deal with families where adults are in management to the case of a minor who is the sole owner of the business. They both assume that because the Hindu law has laid down one rule in the one case it follows that the same rule must also apply in the other; a consequence which I do not think necessarily follows. Jenkins C. J. extended this rule to the case of a Hindu widow who had succeeded to an ancestral business in 26 Bom 206.[13] But I think that that can be distinguished, because a Hindu widow, though a limited owner, fully represents the estate for the time being, and it is her duty to preserve it and hand it on to the reversioners after her death.

Of course this is also the duty of a guardian, or a manager of a minor's property. But that is a duty which every guardian owes to his ward whether the latter is a Hindu or not. There is nothing special to the Hindu law in it. What I am doing here is to try and discover some rule special to

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13. ('02) 26 Bom 206 : 3 Bom L R 738 (F B), Sakrabhai v. Maganlal.

14. ('10) 34 Bom 72 : 2 I C 173 : 11 Bom L R 255, Raghunathji Tarachand v. Bank of Bombay.

Hindus and special only to ancestral businesses. The only ground, as I see it, on which the earlier rulings can be extended to a case like the present is to say that the guardian of the minor is the manager of the estate in the same sense as an adult member of a family who is entrusted with powers of management; and indeed this was the view of a Full Bench of the Judicial Commissioner's Court in 22 N L R 5[15] at p. 10. The learned Judicial Commissioners were of opinion that their Lordships of the Privy Council had decided this in 6 M I A 393.[16] With the utmost respect I do not think that that was so. It is true their Lordships called the guardian of the minor in that case (she was his mother) a manager at p. 412, but at p. 414 they made clear what they meant. They said :

> The plaint itself says she had possession as guardian, that is, as managing in that character; and on a review of the whole pleadings and documentary evidence, and of the probabilities of the case, their Lordships think it a strained and untrue construction to assign any other character to her acts than that which the plaint ascribes to them.

Of course a guardian of property is also a manager, but not the special kind of manager which the Hindu law envisages in the case of a joint Hindu family. Trevelyan in his Law relating to Minors, Edition 4, p. 139, describes the rights of a guardian of the property as follows :

> Subject to the restriction on the powers of testamentary guardian and of guardians of property appointed or declared by the Court, a guardian of property may do all acts which are reasonable and proper for the realization, protection and benefit of the property.
>
> The powers of a guardian are not co-extensive with those of a full owner. He is a trustee with powers of management and occasionally enlarged by necessity.

But this is general to all guardians. It is not special to Hindus. In my opinion this is all that their Lordships of the Privy Council meant by saying that the guardian was a manager. Of course there are special rules by which a Hindu minor is bound because of his personal law. He is subject to obligations and liabilities which do not necessarily apply to other minors. He is, for example, under a pious obligation to pay his father's antecedent debts out of the joint family property of which he was the part owner as a member of the coparcenary in the father's lifetime, and of which he becomes (in the case put) the sole owner by survivorship after the father's death. He is also obliged to maintain certain females, and is under an obligation to marry off his sisters and so on. His guardian is entitled in these cases, and indeed bound, to discharge these obligations for him. The guardian is entitled to borrow money for these purposes and to bind the estate; and when there is no document binding the estate the creditors are, according to certain Indian decisions, entitled to recover on the ground that these purposes are necessaries within the meaning of S. 68, Contract Act, whether that is a right view I do not stop to enquire in this case, but if it is, it is general to all minors, and amounts to no more than saying that the guardian of a minor's estate is justified in making all reasonable and proper arrangements for meeting the minor's obligations; and more especially those which can be enforced against him in a Court of law. It is not easy to see why a Hindu minor should be treated differently in the class of case we are now considering, from any other minor similarly situated. The fundamental position is that an ancestral business is regarded as property under the Hindu law, which of course it is. The goods belonging to the business, its capital, its goodwill, and so forth, are looked upon as assets under any system of law. Why then should special rules which do not obtain in the case of other minors be necessary in the case of Hindus?

I realize that business is a special kind of property and that credit is usually necessary for running it, but that obtains in the case of everybody, and it is not obvious why the guardian of a Hindu minor should be under any greater obligation to preserve this kind of property for his ward, or to run greater risks in connexion with it, than any other guardian. Whatever rules obtain here ought logically to apply to all guardians and to all wards. If the Hindu texts had enjoined these special rules that would be another matter, but here we are dealing with judge-made law; and that law springs out of rules which are clearly necessary when there are adult coparceners who are as much entitled to use and enjoy the property as owners for their own benefit as are the minors. In their case a balance has to be struck between the rights of the adult members (who own the property), and of the adult manager (whose powers are much wider than those of a guardian), on the one hand, and the special measures which the law enjoins for the protection of minors, on the other. A similar conflict was already in evidence in the case

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15. ('26) 13 AIR 1926 Nag 81 : 92 I C 121 : 22 N L R 5 (F B), Kesheo Bharati v. Jagannath.

16. (1854-57) 6 M I A 393 : 18 W R 81 P N : 2 Suther 29 : 1 Sar 552 (P C), Hunoomanpersaud Pandey v. Mt. Babooee Mundraj Koonweree.

of partnerships, and the Courts very naturally applied the rules obtaining there to what they described as the peculiar kind of partnership which obtains in the case of a Hindu trading family. For example in 1 Bom H C R App 51[9] at p. 72 Sauses, C. J. said:

> ...taking into account the intimate and fiduciary position of one partner towards a copartner, and the anxious protection afforded by Hindu law to the interests of a minor, I think it safer, etc.

But this conflict disappears the moment the minor becomes the sole owner of the business. In that event, it is no longer necessary to weigh the rights and privileges of the adult member against the protection afforded to the minor. All that has to be considered then is the interests of the minor in the ordinary way. But that, as I see it, is not peculiar to Hindus, but obtains in the case of all minors. However, the distinction has been drawn in the cases cited. It does not appear to have been questioned and it is of long standing. Therefore on grounds of stare decisis alone, I would have been disposed to follow those decisions. But that apart, the Nagpur Full Bench binds us; and once it is accepted that the guardian of a Hindu minor is the manager of his estate within the special meaning of that expression under the Hindu law, then the rest follows. The matter is debatable. But in view of 13 N L R 109,[6] 22 N L R 5[15] and the very early Calcutta and Bombay decisions which have never been questioned, I am not disposed to take a different view, as that might affect transactions entered into on the faith of these rulings. This is especially so as a recent Division Bench of this Court referred to some of these rulings without criticizm, 1938 N L J 375[17] at p. 377.

I have been at pains to examine the position at length because on a previous occasion when, sitting alone, and again as a member of another Division Bench in another case, I applied S. 68. Neither of those cases related to a trading family, but a case of this kind would be covered by the wider rule enunciated there if those decisions lay down the law aright. I am anxious to make it clear that in this case I neither approve nor disapprove of those rulings; nor do I say that the result would not be the same in a similar case relating to a non-Hindu minor along the lines of S. 68. All I decide here is that whether the case of a Hindu minor surviving to an ancestral business could or could not fall under S. 68, it certainly falls under the other rule which is special to Hindus. The next question is whether the acts of Laxminarayan fall within the purview of the rules I have been discussing. The learned Judge of the lower appellate Court holds that benefit to the estate has not been proved, and that the creditor made no enquiries. I do not think that those questions are relevant. It was held in 1 Bom H C R App 51[9] at p. 71 that:

> The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties, in the ordinary course of bona fide dealings, should not be held bound to investigate the status of the family represented by the manager whilst dealing with him on the credit of the family property. Were such a power not implied, property in a family trade, which is recognized by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family whereever an infant was concerned, for no one would deal with a manager if the minor were to be at liberty on coming of age to challenge as against third parties the trade transactions which took place during his minority.

This was endorsed by the Bombay Full Bench in 26 Bom 206[13] at p. 211 and by the Calcutta High Court in 5 Cal 792[18] at p. 805. In Mayne's Hindu Law, Edn. 10, p. 396, it is said that

> an inherited business may involve quite as much risk as a new business and apparently there is no duty on the part of a manager to close down an ancestral business notwithstanding its evident risk. The element of risk, incident in varying degree to all kinds of trade or business, is necessarily assumed by trading families. But a speculative business, or one attended with unusual risk will be beyond the powers of a managing member to start or continue.

In 20 Bom 767[7] at p. 779, the enquiry was limited to seeing whether the acts were "necessarily incidental to or flowing out of the carrying on of that trade." The same test was applied in 13 N L R 109[6] at p. 111, with the added restriction quoted by Mayne, namely that the guardian must not travel beyond the carrying on of the business "in the usual course without undue speculation." In my opinion, these authorities make it clear that so long as the business is carried on in the usual course, third parties are protected and are not put on enquiry. In the present case both Courts are agreed that the goods (gin stores and coal) were supplied in the usual course of business and were necessary for the running of the factory. There is no suggestion that the goods supplied in the year in question were supplied on an extravagant scale or that there

17. ('39) 26 A I R 1939 Nag 33: 180 I C 741 : 1938 N L J 375, Garamlal v. Tularam.

18. ('80) 5 Cal 792 : 6 C L R 34, Bemola Dossee v. Mohun Dossee.

was any substantial difference between the quantities supplied in this and the previous years. In the circumstances I consider that the matter falls within the purview of the authorities quoted and that the minor is bound to make good the price out of his estate. The appeal succeeds. The decree of the lower appellate Court is reversed and that of the first Court restored. Costs here and in the lower appellate Court will be paid by the defendant-respondent.

Stone C. J. — I have had the advantage of perusing the judgment of Bose J., and I agree with his conclusion. I prefer, however, to say that the liability is created because the guardian's act was necessary for the proper conduct of an ancestral business.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1941 Nagpur 111

STONE C. J. AND VIVIAN BOSE J.

Rajaram Koduram Nikhera —
Defendant No. 1 — Appellant

v.

Madhaorao Gangadharrao Chitnavis and another—Respondents Nos. 1 & 2.

First Appeal No. 13 of 1938, Decided on 8th December 1939, from decree of 3rd Addl. Dist. Judge, Nagpur, D/- 30th October 1937.

* *(a) Contract — Building contract — Contractor contracting to put up building of particular kind in particular way and according to plans — Building owner appointing supervising engineer — Collusion between contractor and supervising engineer — Building when completed proving to be so grossly defective as to necessitate demolition — Joint decree for damages held could be passed against contractor and engineer — Measure of damages stated.*

A building contractor contracted to put up a building of particular kind in a particular way and according to plans. The building owner appointed a supervising engineer. There was collusion between the contractor and the supervising engineer. When the building was nearly complete it proved to be so defective and out of level as to make it necessary to pull it down :

Held that the owner was entitled when there was either such gross incompetence or gross negligence or gross dishonesty to put an end to the whole contract; and this apart from any special clause in it. [P 113 C 2; P 114 C 1]

Held further that a joint decree against the contractor and the engineer could be passed even when the liability of one was in contract and that of the other in tort and even though the connexion between the owner and the one was a direct one while that between the owner and the other was indirect. [P 113 C 1]

Held also that the measure of compensation was the loss which the owner would suffer in erecting a structure of the kind for which he had contracted. [P 116 C 1]

(b) Contract — Building contract — Passing of running bills — Effect.

Passing of running bills by supervising engineer does not preclude the building owner from challenging the work done. [P 112 C 2]

J. Sen — for Appellant.

M. R. Bobde and N. T. Mangalmurti — for Respondents 1 and 2, respectively.

* * * * *

Judgment

We are thus here concerned on any view with a bad building and the question is: What is the proper remedy? The building owner says that he does not want it at all. It is of no use to him; it cannot be put right; it has to be removed. The contractor says that he is agreeable to pull it down and to rebuild it. Alternatively he says if it is not pulled down it can be put right by lifting it in various ways so as to rectify the errors. The lower Court has in fact found that the right way to treat this matter is to consider how much the building owner has paid. Certain of those payments are referable to another piece of work and to a part of the present work that can be dissociated from the bad building. Therefore one deducts the sums referable to the work that has been properly done from the total payments made : the balance shows how much has been paid on account of this bad building. That is treated as money that is paid for nothing because this building has got to be removed; and accordingly the lower Court has given a decree for Rupees 10,115-12-0 and the contractor has been permitted to take this material away. As the lower Court has found collusion between defendant 1 and defendant 2 it has given a joint decree against them. What we have now to consider is : (1) whether this is the proper measure of damage ; (2) whether there should be a joint decree.

To consider the second question first : This is a case where, so far as the contractor is concerned, he is responsible to the building owner in contract. His contract was to put up a building of a particular kind in a particular way. He contracted to build according to plans. Those plans show a square and level building. If he delivers a building that is out of level so grossly as to make it useless or so unsightly as to make it necessary to pull it down then of course he has broken his contract. If the building owner chooses to throw up the contract — and that we consider is the position he takes up here — then this is a case where it is argued nothing has been done under the contract of any value so that the contractor is not entitled to sue on a *quantum meruit*,

and the building owner has paid so many thousands of rupees for nothing. If this suit were laid in contract—or it may be in quasi contract—for money paid for no consideration the building owner it is urged would be entitled to get back his money. The contractor is liable for negligence also. As against the supervising engineer the building owner can sue him in contract or in tort for negligence, and the measure of damage would be again what the building owner suffered. In a recent case which came up to the Privy Council from Australia, (1936) A C 85,[1] their Lordships had to consider a much more difficult case where A sues B and C as a consequence of an injury that A sustained following upon the purchase from B of a defective article manufactured by C. Between A and B there was privity of contract and no negligence on the part of B because B was not aware of the defect which was latent. Between A and C there was no privity of contract but there was negligence in the manufacture of the article. The main question was : Was C liable, that is to say for negligence in manufacture, and could a decree be given against both B and C for the damage suffered ? It was decided that it could, the decree being against B in contract and against C for negligence ; and the decree was in the same form as the present decree is and would result in each being liable : if one was proceeded against wholly he would have his remedy for contribution against the other. These latter points were not decided in that case but they would follow directly from the granting of a joint decree against both.

We have now to consider the damages. What is the measure of damage in this somewhat unusual case where a building has been put up and nearly completed and yet proves so defective that there is a mass of evidence to the effect that it should be pulled down ? The contractor has pressed us with the view that this is a case where the building owner should recover only nominal damages, alternatively only 10 per cent. the retention money. The latter point is founded on the contract. We do not propose to examine it because we do not think that there is much weight in that branch of the argument. The retention money was not intended to cover defects going to the whole root of the contract but only to guard against the possibility of the building owner having to complete the work even though he had paid the running bills relying on the supervising engineer's signature. The point has also been made that this is a case where a supervising engineer has given progress certificates which are final. There is nothing, we think, in this point. Progress certificates have not been given. Running bills have been passed but such passing does not preclude the building owner from challenging the work done.

The other point is a little more difficult. Here one has a building owner appointing a supervising engineer. The supervising engineer so acts that the builder spends thousands of rupees in part payment for a building which will, as the supervising engineer should well know, have to be pulled down. It is said that an engineer is employed as agent : agent's knowledge is principal's knowledge ; the engineer knew the defects, therefore the principal knew : the principal stood by, and now he cannot recover. A somewhat more complicated case was considered in (1892) 2 Q B D 494.[2] That was more complicated because in that particular case it was not a building owner who was suing a contractor but a building owner suing a surety who had assured the true performance of the building contract. It was a case where the building contract provided that the engineer's certificate should be final and the engineer had given his certificate. The jury in an action between the building owner and the builder had held that it was fraudulently obtained and consequently not effective. Then the building owner, having been unable to get satisfaction from the contractor, sued the surety and the surety said :

> I am not liable because you (building owner) had a supervising engineer who allowed things to be done for which you are now holding me responsible.

It came before the Court of appeal, and Bowen L. J. (at p. 508) observed as follows :

> The doctrine of law on this subject established in (1819-21) 3 Cl & F 525,[3] and probably before the case, and expounded by subsequent authorities, particularly in (1854) 1 Kay 280,[4] and other cases referred to in (1890) 22 Q B D 394,[5] is this: mere omission on the part of the employer, mere passive acquiescence in acts which are improper on the part of the employer will not release the surety.

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1. (1936) 1936 A C 85: 105 L J P C 6: 154 L T 18: 79 S J 815 : 52 T L R 38, Grant v. Australian Knitting Mills Ltd.
2. (1892) 2 Q B D 494 : 62 L J Q B 55 : 4 R 7: 67 L T 539 : 41 W R 19 : 57 J P 85, Mayor & Co. of Kingston-upon-Hull v. Harding.
3. (1819-21) 3 Cl & F 525 : 10 Bligh 618, M'Taggart v. Waston.
4. (1854) 1 Kay 280 : 2 Eq 230 : 23 L J Ch 434 : 2 W R 213, Dawson v. Lawes.
5. (1890) 22 Q B D 394 : 58 L J Q B 246 : 60 L T 456 : 53 J P 374, Mayor of Durham v. Fowler.

It is apparent from Lord Esher's judgment in the same case that the fact that the surety was there being sued caused the Court the only trouble that they had. Had the builder been sued, it would have been a clear case. In any event, it is clear from these decisions that a joint decree against two persons is possible even when the liability of one is in contract, and that of the other in tort and even though the connexion between the plaintiff and the one is a direct one while that between the plaintiff and the other is indirect. We have therefore no difficulty in holding that a joint decree against the two defendants is possible and that it should be passed in this case. The defence which might otherwise have been available to the contractor, namely that as the building was passed by the plaintiff's expert and agent up to the stage it has now reached it must be accepted as far as it goes, cannot be raised once it is found that the supervising engineer and the contractor were in collusion. We do not say that this defence would have been legally sound had the facts been otherwise. But as the point was argued, all we say is that the question does not arise in this case.

We now have to assess the damages and we think that the principle on which this should be done is to be found in the American Law Institute's Restatement of the Law, Contracts p. 574 to 577. Dealing with the question of damages in the case of construction contracts, the learned authors state:

> The purpose of money damages is to put the injured party in as good a position as that in which full performance would have put him; but this does not mean that he is to be put in the same physical position. Satisfaction for his harm is made either by giving him a sum of money sufficient to produce the physical product contracted for or by giving him the exchange value that that produce would have had if it had been constructed .... Sometimes defects in a completed structure cannot be physically remedied without tearing down and rebuilding at a cost that would be imprudent and unreasonable. The law does not require damages to be measured by a method requiring such economic waste.

We think that that accurately states the law which obtains, or which should obtain, here. The example given to illustrate the rule is this:

> *A* contracts to construct a school house for *B* for $50,000. When completed the foundations sink and the building is dangerous. *B* has paid *A* $30,000. At a cost of $40,000 more, *B* tears down the walls, strengthens the foundations, and rebuilds the superstructure, this being necessary to make the building safe. *B* can get judgment for $20,000 this amount being the cost of tearing down and rebuilding, less the part of the contract price not yet paid.

The first question therefore is to see whether the building must be pulled down and started afresh or whether rectification is possible. On this the defendant's experts state that rectification is possible and that it can be done at comparatively small cost. The plaintiff's expert thinks that rectification is not possible if what is required is a reasonably satisfying building for the price paid. We think that Ditchburn, P. W. 6, has better qualifications and much wider experience than the defendants' experts. It does not appear from the evidence of the latter that they have ever seen rectifications of this nature carried out or that they have ever done it themselves. As we have to choose between these two sets of opinions we prefer that of Ditchburn. This is particularly so as, though extraordinary feats of engineering are possible given the requisite knowledge, skill and machinery, we do not think they would be available in a place like Nagpur where constructional ability is not of a high order and where anything out of the ordinary is not often attempted. One has only to look to the results produced in this case by persons who are said to have qualifications which, judging from their own and their counsel's statements, as well as from the high prices charged and paid for their work, are regarded as extremely high in this locality. If this is the sort of state these local experts can get a building into, one trembles to think what would happen to any difficult and complicated engineering feat entrusted to their care. It is true the contractor has offered to do the rectification himself but seeing the work he has already done it is not surprising that the plaintiff is not prepared to entrust anything more to his hands.

The contractor has, as a matter of fact, offered to pull the whole thing down to the plinth level and start afresh from there without extra charge, and has undertaken to rebuild, using the old materials, to the satisfaction of any engineer the plaintiff chooses to name: a fair offer enough but not one which we can force the plaintiff to accept. In the first place, Ditchburn says this would not be satisfactory: the materials would be second-hand and the result in a measure patch-work. We agree with the lower Court that the plaintiff who has agreed to pay high rates for a really first class building should not have one which, at the best, would not be in that class, foisted upon him. But also as a matter of law the plaintiff is entitled, when there is either such

gross incompetence, or gross negligence or gross dishonesty, it does not matter which, as here, to put an end to the whole contract: and this apart from any special clause in it. If we were to compel the plaintiff to accept the contractor's offer it would mean that we are depriving him of a right to which he is legally entitled. Moreover, as the lower Court remarks, the plaintiff has already afforded the defendants this opportunity by his letters, Ex. 1 (D-7) and Ex. (P-7). They did nothing about it, so he was fully justified in putting an end to the contract altogether. We are consequently of opinion that rectification is not the right remedy in this case.

As regards damages, the plaintiff wanted a first class building at a certain price. He is entitled therefore to be put as nearly as may be in the same position as he would have been in if things had been rightly and properly done. The lower Court holds in para. 22 of its judgment that the plaintiff has paid the contractor Rs. 17,036-15-0 and has supplied him with materials worth Rs. 424-11-0. That is to say the plaintiff has up to date, according to the lower Court, invested a sum of Rs. 17,461-10-0 in this building. For this money he has obtained what he has described as blocks *A*, *B* and *C* in his plaint. Of these, there is no complaint about blocks *A* and *C* except in a small matter which according to the lower Court can be set right at a cost of Rupees 10. We have therefore to deduct the sum spent on blocks *A* and *C* before we can arrive at any conclusion respecting block *B*. The lower Court's figures are based on the statement in the plaint and its schedule. But they are not accepted by the contractor. He states in para. 9 of his written statement that the payment towards the works in dispute totals only Rs. 16,780-15-0 and not the Rs. 17,461-10-0 mentioned in the plaint. The contractor's figures appear to be based on the plaintiff's measurement book, Ex. (P-6). This shows that the following sums were passed for payment on the dates shown against them below:

21-3-32	Rs. 1830-2-0
23-5-32	Rs. 3957-13-9
9-7-32	Rs. 4009-6-0
26-7-32	Rs. 2487-9-3
	Rs. 12,284-15-0
Add as per Schedule to the plaint.	Rs. 4,500-0-0
Total	Rs. 16,784-15-0

There is a small difference of Rs. 4, which we can ignore; it is probably a misprint. But though these seem to have been the sums passed for payment we find that the sums actually paid were those given in the plaint. The plaintiff's cashier, P. W. 4, speaking from the plaintiff's account books, states that he himself made the payments and that they were as follows:

23-3-32	Rs. 1830-2-0
25-5-32	Rs. 4209-13-9
11-7-32	Rs. 4009-6-0
26-7-32	Rs. 2487-9-3
19-8-32	Rs. 500-0-0
27-8-32	Rs. 4000-0-0.

These add up to the plaintiff's figure. The defendants have not shown us any accounts on their side, nor have they called for any receipts; consequently, we see no reason to disbelieve P. W. 4 and the plaintiff's books, especially as the lower Court has accepted the plaintiff's figure. We therefore hold that the sums actually paid to the contractor totalled Rs. 17,037-3-6.

The next dispute is about Rs. 424-11-0, the cost of materials supplied. The defendant's case is that only Rupees 85-8-0 is properly chargeable to this head and he complains that the plaintiff has included an item of Rs. 339-3-0 twice over in the schedule to his plaint. The schedule shows that on 23rd March 1932 Rs. 2122-5-0 was actually due to the contractor but he was only paid Rupees 1830-2-0 because a sum of Rupees 80-3-0 was deducted on account of materials supplied. A similar deduction was made on 25th May 1932 in respect of a sum of Rs. 259. The two together total Rs. 339-3-0. We do not think there is anything in this connexion. Had we been considering the sum properly payable to the contracter on the basis of sound work of course he would have been right. The plaintiff would not have been entitled to charge this over again. But we are not now considering what the contractor ought to get but what damages the two defendants should pay to the plaintiff. We cannot arrive at that figure without knowing how much the plaintiff has actually put into this building; not what he would have had to pay if it had been properly constructed, but how much he had actually spent. This sum totals up to Rs. 17,461-10-0 which the lower Court has accepted.

We have next to see how much of this went into blocks A and C. The figure given by the plaintiff in his plaint is Rs. 4149-10-9. The contractor's figure is Rs. 7345-14-0. We have to choose between the two. The lower Court has accepted the contractor's figure and the cross-objection and the revision which we have dismissed relate to Rs. 1000

out of this. The balance was apparently not questioned in either of these two proceedings. But however that may be, the lower Court points out that when the contractor questioned the plaintiff's figure and gave one of his own the plaintiff chose to reply, and though he questioned other portions of the paragraph in the written statement (namely para. 9) he did not question the accuracy of the contractor's figures on this point. Had he not replied the question would have been in issue but as he chose to file long and elaborate replies to practically every statement made, the matter assumes a different aspect. In these circumstances, and bearing in mind that the cross-objection and the revision have already been dismissed, we think it right, as the lower Court did, to adhere to the contractor's figure of Rupees 7345-14-0. When we deduct this from the total of Rs. 17,461-10-0 we find that Rupees 10,115-12-0 is the sum expended over block B. The question now is how much of this should be returned to the plaintiff.

We have already decided that rectification would not be the right remedy in this case. We agree with the plaintiff's expert Ditchburn that the building will have to be pulled down, but we are of opinion that the foundations will still be serviceable—in fact they will be all the better for having an opportunity to settle. Nobody has made any complaint about them, either as regards the quality of the materials used or the manner in which they have been laid. The reinforced concrete coping with which these foundations are finished off will of course have to be removed in order to enable the underneath to be properly levelled but up to that point we think the building must be regarded as sound and serviceable. Ex. P-6, which contains particulars of the first running bill, shows that it was paid for work up to the plinth stage. The total of the work done up to that stage was Rs. 2122-5-0 and deducting Rs. 80-3-0, the value of the materials supplied by the plaintiff, we get a figure of Rs. 2042-2-0 chargeable to that head. But out of this will have to be deducted the value of the materials which were used for the reinforced coping on top of the foundations. We have not been shown any evidence about this by either side and the matter is not of much importance any way, but as far as we can make out from the first running bill, items 6 and 7 relate to this head, and the amount referable to these items is the difference between Rs. 1852-5-0 which seems to be a running total at the end of item 7 and the Rs. 1675-8-0 which heads Col. 6. That is to say the total is Rs. 176-13-0. That makes the total properly debitable to the foundations as Rs. 1865-5-0 (that is to say, Rs. 2042-2-0 less Rs. 176-13-0). This figure must be deducted from the Rs. 10,115-12-3 awarded by the lower Court. That leaves a sum of Rs. 8250-7-3.

The next question is whether any of the materials used in other parts of the building will still be serviceable to the plaintiff for a new building. Ditchburn says that it will not be fair to saddle him with these used materials. We agree that so far as the bulk of them is concerned, that would not be right, but no complaint has been made about either the quality or the workmanship of the woodwork and it seems to us that most of it will still be serviceable. We think therefore that the door frames and shutters and the window frames and the skylight frames as also the wooden beams and trusses which support the roof of the upper storey should be reused and their cost as charged in these bills, less 20 per cent. for deterioration and the rough state in which they will now necessarily be, should be deducted. We also think that the iron girders can be used again and that in their case also their cost as charged to the plaintiff less 20 per cent. should be deducted. That means that the decree of the lower Court will be modified by substituting for the figure of Rs. 10,378-10-0 the figure which will now be obtained by deducting from Rs. 8250-7-3 the value as charged in the running bills of the door frames and shutters, the window frames and skylight frames and the iron girders, as also the wooden beams and trusses which support the roof of the upper storey, less 20 per cent. There will also be added to the decree a clause directing defendant 1 to restore to the plaintiff within the two months allowed the door frames, shutters, girders etc., which we have mentioned above, and of which a list will be given later, in good and serviceable condition for re-use, with a right to the plaintiff to apply to this Court to amend the decree in respect of any such material as is returned in an unserviceable condition. This latter part of the case was not argued before us as we cut counsel short on the extent of the damages to be allowed until we had decided the principle along which they should be awarded. The parties will therefore now file an agreed list, if that is possible, of the materials we have specified above and the cost debitable to them in accordance with the running bills. If they

are unable to agree each will file his own list and we will determine the point. The 20 per cent. will be deducted by us and this list or these lists should not show the deduction.

The costs of this appeal and those in the Court below will be according to success and failure. A fresh period of two months from the date of the decree will now be fixed. The following clause in the lower Court's decree will also be modified: "and restore the ground to the same position in which it was before the construction of the building" will now read as "and restore the ground to the same position in which it was before the construction of the building with the exception of the foundations after removal of the reinforced cement coping. That will remain." We add that we have not overlooked the fact that ordinarily the plaintiff would also be entitled, after all these matters have been taken into account, to the difference between the price which he would have had to pay if the building had been properly constructed and that which he will be obliged to pay for the re-construction if the latter exceeds the former. But here the plaintiff's own case is that the prices agreed were high and that the market rates were much lower. It follows the plaintiff will not, on his own showing, now have to pay as much for the re-construction as he would have had to pay under the original agreement. Consequently, he is not entitled to anything along these lines and so we need not consider exactly what it will cost him to re-build. We also add that we have not overlooked the fact that the 20 per cent. rebate which we have allowed to the plaintiff on the price of such of the materials as in our opinion will still be serviceable, hits the contractor; also that he gets the benefit of whatever materials he removes; and that at the first blush this would appear to overlook the supervising engineer. But really it does not.

The liability, as we have pointed out, is joint and several and the measure of compensation is the loss which the plaintiff will suffer in erecting a structure of the kind for which he had contracted. This is a matter which is independent of personalities and so whoever is responsible in law for this loss must suffer a decree to be passed against him for the full amount. If there is inequality as between the defendants inter se that is a matter which they will have to settle between themselves. So far as the plaintiff is concerned there is only one standard. We may add that at first we had thought of directing that the decree be executed in the first instance against the contractor and then against the supervising engineer only for such balance as was irrecoverable from his co-defendant. But in view of the unfounded attacks made on the plaintiff by defendant 2, which were persisted in in this Court in spite of warning, we see no reason why we should, in the exercise of our discretion, discriminate between the two. In the eye of the law they are both jointly and severally liable and we think that the law should be allowed to follow its normal course.

D.S./R.K. *Decree modified.*

✻ A. I. R. 1941 Nagpur 116

STONE C. J. AND CLARKE J.

Bapuji Ramji Patel — Defendant 2 — Appellant

v.

Gangaram Madhaorao Deshpande and others — Respondents.

Letters Patent Appeal No. 33 of 1938, Decided on 6th November 1940, from appellate decree of Vivian Bose J., *Reported in A I R 1939 Nag 47.*

• *Hindu law — Adoption—A dying leaving his widow C and son B—B dying leaving his widow D—D remarrying—C's power to adopt revives;* 1938 N L J 476=A I R 1939 Nag 47=180 I C 792, REVERSED.

Where *A* dies leaving behind him his widow *C* and son *B* and B dies leaving behind him his widow *D* who remarries, the power of *C* to adopt is revived and she can validly adopt a son to her deceased husband *A*: 1938 N L J 476=A I R 1939 Nag 47=180 I C 792, *REVERSED: Case law discussed.* [P 118 C 1; P 122 C 1]

R. N. Padhye, R. W. Fulay and N. K. Banerji — for Appellant.

B. R. Mandlekar — for Respondent 2.

Judgment. — This appeal raises a point of difficulty in the Hindu law of adoption. Nearly the whole of this difficulty arises out in 12 Pat 642,[1] a decision of the Judicial Committee that marked a reorientation, if not a definite departure, relating to the factors which have to be considered in determining whether an adoption can be made by a widow. The logical difficulty mainly flows from the consideration that the principle laid down seems to point in one direction whereas certain excerpts from earlier decisions extracted and cited with what appear to be approval seem to point in an-

1. ('33) 20 A I R 1933 P C 155 : 143 I C 441 : 12 Pat 642 : 60 I A 242 (P C), Amarendra Mansingh v. Sanatan Singh.

other direction. For the sake of lucidity, we have invented a word and we shall throughout, so far as possible, use the same letters to describe the following persons :

A = C
| |
| E''
B = D
| |
E E'

A is the deceased grandfather. B is the deceased father. C is the widow of the grandfather termed throughout this judgment the "grandwidow." D is the father's widow, termed the "widow." E, E', E'' are the sons natural-born, adopted by widow, adopted by grandwidow respectively. The facts which it is necessary to state before the point can be formulated are as follows: A certain Hindu undivided family included the following members :

GRINAJI
|
Girjabai=Bhiwaji (d. 1912)=Gopibai (d.1927)

Pisabai	Laxmi=Kondba (d. 1918) (remarried 4 months after husband's death)	Dattu (deft. adopted 1921 by Gopibai.)
Vithal (P. 3)	Kesheo (P. 4)	

The appellant is defendant 2, a purchaser of property, parcel of the ancestral property, from Dattu (or Dattoo) defendant 1 and respondent 5. Plaintiffs 1 and 2 are purchasers of the suit property from plaintiffs 3 and 4. In essence therefore this is a contest between stranger purchasers of items of joint family property. One says that Dattu is entitled, the others say that Vithal and Kesheo are entitled. That dispute in turn depends on whether Dattu was effectively adopted by Gopibai and that depends on whether A's grandwidow C can adopt a son to A when A had a son B who died leaving widow D who remarried. It is to be assumed that at the date of adoption B was dead and that at that date D had passed out of the family by remarriage so that it was, for all purposes of adoption in that family, as if she were dead. Thus, admittedly, the question can be narrowed down to this: Can the grandwidow adopt to A after A has had a son B who has married, granted B and his wife are dead? It may be said at once that there is a mass of authority supporting a negative answer. A negative answer has been given by the learned Judge from whose decision this Letters Patent appeal has been brought. The lower appellate Court took the same view and the trial Court arrived at the same result but by a line of thought, no longer valid, which may be called the old view.

It is as well to observe, however, that the spiritual aspect had been referred to in cases long before 12 Pat 642.[1] It is only necessary to refer to the observations of the Judicial Committee in 3 I A 154[2] made as long ago as 1876. The old view was this: The power to adopt was a power relating to property and is lost once the power over property is lost and that power, in so far as it consists in the widow's power by adoption to vest property in an adopted son, is lost once it is acquired by another. The principle established by 12 Pat 642[1] is that adoption in essence is not an economic but a religious act having for its primary purpose the artificial creation of a son who can, as a real son, offer those oblations necessary for the future well being of the fictional father. One would think that as a logical consequence the question whether C could or could not adopt to A would depend solely on whether there was or could be anyone other than C who could adopt to A. If there is no one else and if A has no son one would have thought that the religious duty or right or power (whichever way one cares to express it) would fall upon or be possessed by C and it would not make the slightest difference that sometime before D (now dead) had the power to adopt to B. The religious need is a son. It is a need divorced from property. Paupers have souls and souls need prayers. That is the fundamental conception. Prayers must be by the living. The living are the more efficacious the nearer they are, and the nearest is the son, natural-born or adopted makes no difference. But, aping nature, the power to give a son, actual or fictional, is restricted to a class. There is no need for a grandwidow to adopt to her dead husband if there is a widow to adopt to her dead husband. Obviously there is no need for a grandwidow to adopt at all, if her dead husband has left a son, while the son is living. The purpose of adoption has not arisen.

All this follows directly from the reasoning in and the thoughts underlying 12 Pat 642.[1] But what happens if in fact there is neither son nor grandson, the son being dead and his widow not being enceinte, and the grandwidow C wants to adopt to her husband and the widow D does not want to adopt to her husband? The conflict between

2. ('75) 1 Mad 69 : 3 I A 154 : 25 W R 291 : 3 Sar 583 (P C), Sri Virada Pratapa Deo v. Sri Brozo Kishoro Datta Deo.

religious and property considerations is at once brought out. From a religious point of view, C ought to be able to protect her deceased husband from the irreligious D but it is admitted (as it must be on the cases as they stand) that C cannot adopt while D is alive and able, though not willing, to adopt. But it has been very strenuously argued that different considerations apply if D is dead either actually or, for this purpose, in the eye of the law, e. g., by remarrying into another family. We say at once that all the logic seems to be with Mr. Padhye who so argues. The difficulty is that so much authority seems to be the other way. The case mainly relied on by Mr. Padhye was the Privy Council decision in 59 Bom 360[3] at p. 364. Using the letters already employed the relationships there were :

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A  =  C
|     |
|     E''
B  =  D
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E'' was adopted after B and D had gone into another family by the adoption of B (who was at the time married : *see* 59 Bom 360[3]). The Judicial Committee, following 12 Pat 642,[1] held that C could adopt E'' after B's adoption into another family because

> the power of a widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of an adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her.

In 31 N L R Sup 180[4] at p. 189 it is pointed out that 12 Pat 642[1] refers to the doctrine of Hindu law that the husband and wife are one and that in the widow half of the husband survives. Therefore so long as she survives the son is not wholly dead and she alone can adopt and the grandwidow cannot be regarded as sonless and cannot adopt. But when the widow dies actually or notionally the grandwidow's right revives. As the learned Judges there say :

> It is on the death of the son's widow without adoption that the mother (the grandwidow of our argument) would have the right to exercise her power to adopt.

On the other hand Pollock J., in 17 N L J 57[5] followed the dictum in 26 Bom 526[6] at p. 532 which was quoted without apparent disapproval (Pollock J. says with approval) in 12 Pat 642[1]:

> Where a Hindu dies leaving a widow and a son and that son dies leaving natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived.

That dictum is expressly based on the reasoning of Lord Kingsdown in 10 M I A 279.[7] If page 531 of 26 Bom 526[6] is read (and it is the page examining what was decided in 10 M I A 279[7]) it will be seen that the whole problem is being considered in the light of what we have called the old view—power depending on property. Thus the learned Judge explains Lord Kingsdown's second illustration:

> According to it, again, where a Hindu dies leaving a widow and a son, and that son dies leaving his widow and a son, the power of adoption of the former widow is "at an end" the moment the estate passes to the grandson.

Illustration 3 also relied on entirely turned on the conception of a vested estate. 39 Bom L R 599[8] is exactly the present case. Purporting to follow 12 Pat 642[1] a Bench of the Bombay High Court held that the adoption was invalid. The passage relied on at page 603 (from 60 I A 242[1] at p. 256) will be seen on examination to lay down that the grandwidow's power is gone. It leaves open whether it can ever revive. It does however clearly and in express terms differentiate between the case where there is a son (power of grandwidow suspended reviving on son's death) and where there is a grandson or son's widow (power of grandwidow gone). In ILR (1939) Nag 88[9] at p. 98, a Bench decision of this High Court to which one of us was a party, it was observed :

> Any limit to the widow's power of adoption that may be laid down to avoid practical difficulties would in its nature be arbitrary. It is therefore advisable to leave it to the Legislature to amend the law. In the meantime the limit indicated in 12 Pat 642[1] may be regarded as the only limit.

In 41 Mad 855,[10] a case we shall have to return to when examining 12 Pat 642,[1] the relationships were :

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A  =  C
|
B  =  D
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3. ('35) 22 A I R 1935 P C 95: 155 I C 498: 59 Bom 360: 62 I A 161 (P C), Vijaysingji v. Shivsangji.
4. ('36) 23 A I R 1936 Nag 65: 162 I C 571: 31 N L R Sup 180 (F B), Ramchandra v. Mt. Yamuni Bai.
5. ('34) 21 A I R 1934 Nag 183: 150 I C 1032: 17 N L J 57, Vithoba v. Amrita.
6. ('02) 26 Bom 526: 4 Bom L R 315, Ramkrishna v. Shamrao.
7. (1863-66) 10 M I A 279: 3 W R 15 (P C), Bhoobun Moyee Debia v. Ram Kishore.
8. ('38) 25 A I R 1938 Bom 20: 173 I C 36: 39 Bom L R 599, Ramchandra v. Murlidhar.
9. ('38) 25 AIR 1938 Nag 423 : 179 I C 82 : I L R (1939) Nag 88, Mt. Draupadi v. Vikram.
10. ('18) 5 AIR 1918 P C 74 : 46 I C 481 : 41 Mad 855 : 45 I A 156 (P C), Madana Mohana Ananga Bheema Deo v. Purushotthama Ranga Bheema Deo.

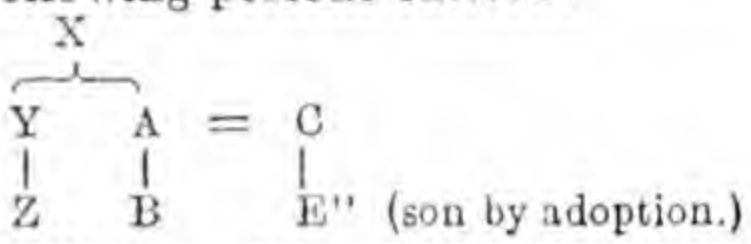
B died "after attaining full legal capacity to continue the line of descent either by a natural born son, or by the adoption to him of a son by his widow who was not proved to have no power to adopt." It was held by the Judicial Committee that C's power to adopt was gone. In 55 Mad 581,[11] the limit of the widow's power was regarded as correctly summarized in the passage from 26 Bom 526[6] already quoted. So far as we can see, this case, 55 Mad 581,[11] is not in agreement with the majority decision in I L R (1937) Bom 508.[12] This important case was referred to in ILR (1939) Nag 88[9] at p. 92. It takes up an intermediate position where the coparcenary has terminated. It was there held that the adoption is valid for ceremonial purposes but does not divest the property which devolved on the heir of the last surviving coparcener (other than the widow) or those claiming through him or her. We do not feel ourselves bound by 25 N L R 144.[13] It proceeded on the old view and it was regarded as overruled in 31 N L R Sup 180.[4] Bose J., in the present case has taken the view he has because, to use his own words:

> whatever else their Lordships in 12 Pat 642[1] at p. 650 may have meant they clearly decided that the mother cannot adopt when the son dies leaving a widow who can.

We are inclined to agree with that observation. The real difficulty lies in the question: Does the power revive if the son's widow dies, or otherwise becomes incapable of adopting, before she (i. e. the son's widow) adopts? We fully bear in mind the warning given by the Judicial Committee in 3 I A 154[2] that it is the duty of the Court "to keep the power (to adopt) strictly within the limits which the law has assigned to it." We contrast this with the warning given in 12 Pat 642[1] at page 650:

> Great caution should be observed in shutting the door upon any authorized adoption by the widow of a sonless man.

The difficulty is to find the boundary line. We think the best way to approach that is to take 12 Pat 642[1] as our guide. It should be made plain that as was pointed out in I L R (1939) Nag 88[9] at p. 93, the widow who adopted there, (i. e., in the case reported in 12 Pat 642,[1]) had no estate vested in her. The estate in question was an impartible zamindari passing by inheritance from which females were excluded. The main argument against the adoption was that the adopting widow had no estate. The estate had vested in the plaintiff before the adoption was made, i. e., on the death of the son. This argument was negatived. The suit was apparently (*see* 10 Pat 1[14] at pp. 5 and 45 and 12 Pat 642[1]) one instituted by a person claiming to succeed as heir to the zamindari on the death of the son and claiming as a separated sapinda. The result was that the suit was dismissed. It should further be made clear what their Lordships decided. There the following persons existed:



The rules of succession were such that on the death of A the whole estate passed to B and on the death of B, the whole estate passed through Y to Z, unless C could adopt to A. If she could, the whole estate passed to such adopted son, as from the death of the son. When B died he was 20, unmarried, and a ward. C adopted E''. The suit was by Z claiming to succeed and it was dismissed. It was dismissed because the Judicial Committee held that C could adopt E''. Her power to adopt was suspended while B was alive and revived on his death. In the above table Y and A are not brothers but both descend from X. We will first examine 12 Pat 642[1] and then see how the matter is affected by 59 Bom 360.[3] In 12 Pat 642[1] at pp. 650-651 their Lordships state that the power is not limitless, that a limit must be fixed consonant to the spirit of Hindu law and equities. The exact words are:

> The Hindu law itself sets no limit to the exercise of the power during the lifetime of the (donee), and the validity of successive adoptions in continuance of the line is now well recognized. Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property. But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognized both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has mainly turned.

They then examine the first line of argument addressed to them. That proceeded on the old view, once an estate is vested in X,

11. ('32) 19 A I R 1932 Mad 227 : 138 I C 170 : 55 Mad 581 : 62 M L J 187, Panyam v. Ramalakshmamma.
12. ('37) 24 A I R 1937 Bom 279 : 170 I C 393 : I L R (1937) Bom 508 : 39 Bom L R 382 (F B), Balu Sakharam v. Lahoo Sambhaji.
13. ('29) 16 A I R 1929 Nag 98 : 116 I C 499 : 25 N L R 144 (F B), Uttamrao v. Daulat.
14. ('30) 17 AIR 1930 Pat 417 : 123 I C 770 : 10 Pat 1 : 11 P L T 268, Amrendra Mansingh v. Banamali Singh.

the widow, not being X, cannot adopt. 10 M I A 279[7] was regarded as the leading case. They quote the following from Lord Kingsdown's judgment :

> The question is whether the estate of his son being unlimited and that son having married and left a widow his heir, *and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate.*

The italics are their Lordships'. The case in 10 M I A 279[7] was this :

A = C
| |
| E''
B = D

A died leaving B. B married and died leaving D, his widow and heir. C adopted E''. It was held that E'' was not validly adopted. It is a Dayabhaga case. That case was, however, used to show that it was "upon the vesting of the property that the determination of the power of adoption depended." The validity of the same adoption was again considered on the death of D, in a contest between E'' and a distant reversioner, in 8 I A 229.[15] It was held that immediately the property vested in D, C's power was "at an end": *see* 12 Pat 642[1] at p. 652. It will be remembered that E'' was adopted while D was alive and there was no suggestion that he was again adopted after D died. The same point exactly arose in 14 I A 67.[16] There C adopted while D, in whom B's estate had vested, was alive. There was no second adoption after D had died. 14 I A 67[16] was followed in 16 I A 166[17] where the property passed to the son's widow under a will. Their Lordships in 12 Pat 642[1] at p. 652 after referring to the argument based on the above cases say :

> . . . . . it was well established that power of adoption in a mother was extinguished when her son had died leaving a widow *to whom the son's estate passed by inheritance.*

The italics are ours. Then their Lordships, having observed that some passages in the cases relied on stressed property consideration, go on to say :

> It is at least material that in each of the other cases it was the existence of the son's widow that stood in the way of the adoption, and that in none of them was there any suggestion that the same rule would apply if the heir in whom the property had vested were someone other than her.

Then they observe, citing a number of cases, that vesting in a coparcener does not defeat the right to adopt. Then they point out that the mother's right is not lost merely because a son is born because if the son dies in infancy she may adopt. So the vesting of the estate in a son does not kill the power. Then they decline to go through the mass of case law which had sprung up in India because they treat it as covered by two cases they proceed to consider. These are 26 Bom 526[6] and 45 I A 156.[10] Stating what these cases decided without expressing approval or disapproval at p. 655 their Lordships at p. 664 return to 45 I A 156[10] and limit what had been regarded as its effect. It is the fact that their Lordships have been considered to have approved Chandavarkar J.'s judgment in 26 Bom 526,[6] at least as regards the passage cited, that is the main obstacle in the appellant's way. The passage quoted is as follows :

> Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived.

The fatal words are, of course, "and can never. . . . be revived." In 26 Bom 526[6] the following are the material persons :

A = C
| |
| E''
B = D
| |
E E'

The above citation lays down that if when B dies there survives D, or E, or E', C cannot adopt E'' at any time whatever. Her power is gone and never revives. In 41 Mad 855[10] the following are the material persons:

X
|
R | A = C
| |
V (took on | adopts Brojo = D
Brojo's death | in 1870
in 1906) |
| C adopts Madana
P | in 1907
Madana sues P.

In 41 Mad 855,[10] 26 Bom 526[6] was approved. In that case, 41 Mad 855,[10] the Judicial Committee at p. 860 observed :

> He (Chandavarkar J.) interprets earlier decisions of the Judicial Committee as having established conclusively that. . . . . there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and that when that limit is reached the power is at an end . . . . . on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on (A's) widow (C) to an end when (Brojo), the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of

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15. ('82) 8 Cal 302 : 8 I A 229 : 4 Sar 285 (P C), Pudma Coomari Debi v. Court of Wards.
16. ('87) 10 Mad 205 : 14 I A 67 : 5 Sar 10 (P C), Thayammal v. Venkatarama Aiyan.
17. ('90) 17 Cal 122 : 16 I A 166 : 5 Sar 379 (P C), Tarachurn Chatterji v. Sureshchander Mookerji.

a natural-born son or by the adoption to him of a son by his own widow. That widow was not a party to the suit, and, whether or not she had power to adopt (Brojo), it has not been established against her that she had no such power. Their Lordships think it right to draw attention to this circumstance, but they do not desire to be understood as saying that even in its absence the succession of (Brojo) and his dying after attaining full legal capacity to continue the line would not in themselves have been sufficient to bring the limiting principle into operation, and so to have so determined the authority of (A's) widow, who was not the widow of the last owner, and could not adopt a son to him.

In other words: if there is a son Brojo who attains legal capacity and dies, his mother's power is gone because of the application of the principle in 26 Bom 526.[6] This would be so even if Brojo's widow had no power to adopt. The factor that divests the grandwidow of her power is not the presence of a widow but the existence of a son who attains "full legal capacity." This seems to be the plain meaning of what Lord Haldane, on behalf of the Judicial Committee, wrote. In 12 Pat 642,[1] however, it was held that while there was a (natural-born) son the widow's power was not ended but suspended and on his death revived and this is so even though the son arrives at the age of "full legal capacity" or "ceremonial competence" before dying. Their Lordships in 12 Pat 642[1] at p. 664 observe:

They think that there is no foundation for the contention that a mother's authority to adopt is extinguished by the mere fact that her son has attained ceremonial competence, and they are satisfied that Lord Haldane had no question of this in mind.

In 43 Bom 778,[18] strongly relied on in 12 Pat 642,[1] 'it was,' to quote from 12 Patna at p. 657,

laid down in clear terms that 'the right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate'.

An adoption resulting in a divesting was there, 43 Bom 778,[18] upheld. Their Lordships in 12 Pat 642[1] at p. 657 add:

It necessarily follows, their Lordships think, from this decision, that the vesting of the property on the death of the last holder in someone other than the adopting widow, be it either another coparcener of the joint family, or an outsider claiming by reverter, or, their Lordships would add, by inheritance, cannot be in itself the test of the continuance or extinction of the power of adoption.

What may be called the first line of thought concerned with property ends there with the conclusion that the fact that property has vested in X does not present an obstacle to C adopting. It ends with a renunciation of the view that the vesting in B, a person who dies after attaining full legal capacity, and whether he leaves a widow with power to adopt or not ends finally the power of C to adopt. It re-states the view that the presence of E or D "ends" the power of C. It leaves in a state of great uncertainty the question whether when E and D die the power of C revives. 41 Mad 855[10] approving 26 Bom 526[6] seems to indicate: (1) the existence of B and his survival to an age of full legal competence "ended" the power of C; (2) once ended, it could never revive. 12 Pat 642[1] explaining 41 Mad 855[10] said that C's power in the case put was not ended but suspended and when B died C's power revived. Next, their Lordships deal with the second line of thought, concerned with religious ideas. Now appears the observation at p. 658:

It being clear upon the decisions above referred to that the interposition of a grandson, or the son's widow, brings the mother's power of adoption to an end . . . .

Then is considered the question whether the birth or adoption of a son has that effect. The conclusion is that it has not. If the observation quoted from 12 Pat 642[1] at p. 658 supra be understood as limited to the case where the widow (D) or the grandson (E) stands between (is interposed) the grandwidow C and her power, everything is clear except for the words "and can never be revived" quoted from 26 Bom 526.[6] Strictly the above is the true meaning of their Lordships' words. That amounts to nothing more than this: that while D or E is alive and competent to adopt his or her existence prevents any adoption being made by C. That leaves at large what happens when the "interposition" is ended. Logic says that as the death of the son removes his "interposition" whereupon C's power revives, so the death of D removes her interposition and so C's power revives. Turning now to 59 Bom 360[3] at p. 364 their Lordships note the departure made by 12 Pat 642.[1] They are concerned with a case where B was in existence, became of age, married D and then with D passed, by adoption, into another family. The Judicial Committee observe at p. 364:

In the present case the natural son *B* with his wife *D* having ceased to exist for the purpose of continuing the line in the Ahmima family, his mother *C* was entitled to make an adoption to secure that object.

It is, of course, true that D there never became a widow and so never attracted the idea that once a widow the grand-widow's

18. ('18) 5 A I R 1918 P C 192 : 50 I C 457 : 43 Bom 778 : 46 I A 97 (P C), Pratapsing Shivsingh v. Agarsinghji Rai Singhji.

power is forever gone. Can we however have a rule which says that if B and D die together C's power, which was suspended while either of them lived (was interposed), revives, but if B dies on Monday and D on Tuesday (a thing which frequently happens in time of plague) C's power, which was ended by D's becoming a widow for a day, does not revive? The Hindu law has anomalies but this anomaly would be founded entirely on Judge-made difficulties. If this is so then the true rule is that the grand-widow's power is suspended by the interposition of various persons: son, son's widow, son's son, and revives with the removal of the obstacle. Balancing as best we can the opposing views and noting that the above is in conformity with the view expressed in 31 N L R Sup 180,[4] a Full Bench decision of the Judicial Commissioner's Court, we are of the opinion that the appeal succeeds and must be allowed with costs throughout. This being our conclusion the question of ceremonial competence does not arise.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1941 Nagpur 122

STONE C. J. AND VIVIAN BOSE J.

Kashinath Vishwanath Jot and another — Appellants

v.

Bapurao Lalji Patil and others — Respondents.

First Appeal No. 33 of 1936, Decided on 18th November 1940, from decree of Addl. Dist. Judge, Akola, D/- 19th December 1935.

(a) Hindu law — Alienation — Alienation not binding on family as a whole—Mother is no more bound than sons.

The mother is no more bound by an alienation which does not bind the family as a whole than are the sons. [P 122 C 2]

(b) Hindu law — Partition — Mother's share does not accrue until family partitions.

Under the Hindu law the mother's share does not accrue until the family partitions. [P 123 C 1]

**(c) Hindu law — Alienation — Mortgage — After born son has no cause of action to bring declaratory suit—He cannot create cause of action by waiting until he is dispossessed — Nor can he set up rights which he could not urge in suit of his own by way of defence in suit by mortgagee—Cause of action to challenge mortgage arises on date of its execution—Son born or conceived after execution of mortgage cannot challenge it though he can redeem it.*

An after-born son has no cause of action to sue for a declaration that a mortgage is not binding on him nor can he create a cause of action for himself by waiting until he is dispossessed and then suing for possession; nor can he set up rights which he could not urge in a suit of his own by way of defence when the mortgagee sues. The cause of action to challenge a mortgage arises at the date of its execution and consequently a son born and conceived after that date cannot challenge the mortgage though he still has a right to redeem : A I R 1940 Nag 305 (FB), *Expl., and Applied.* [P 123 C 2; P 124 C 1; P 125 C 1]

(d) Hindu law — Alienation — Joint family— Real alienor is family and not individual signing deed.

The real alienor according to orthodox Hindu ideas is the joint family and not the individual who puts his signature to the deed. [P 124 C 1]

(e) Hindu law — Joint family — Individual member can own part of family estate as his separate property.

An individual member of a joint Hindu family can own separate property. The family can by agreement break off a piece of its property (whether tangible or a share) and hand it over to one of its members for him to have and to hold as his separate estate. They can do this just as effectually and completely as they could to a complete outsider, and yet remain joint. It is thus possible for an individual member to acquire for himself as his own separate property a part of the family estate. [P 124 C 1, 2]

A. V. Khare and W. B. Pendharkar — for Appellants.

S. A. Sohoni, V. K. Rajwade, A. Ahmad and B. L. Gupta —for Respondents 1, 2 and 3, 4, 6 and 7, respectively.

Judgment.—After the decision of the Full Bench* only two points remain. The first relates to the fields Survey Nos. 17, 5/2, 6/2, 63/2 and 88. Both sides are agreed that the shares which defendants 6 and 7, Janrao and Dnyandeo, have in these fields should be released from the mortgage. But they are not agreed about the extent of their shares. According to the learned counsel for the plaintiffs, the family consists of Govinda (defendant 4), and his two sons, Janrao and Dnyandeo, (defendants 6 and 7), and the mother of the sons, defendant 5, Saraswatibai. The learned counsel contends that each would have a share on partition and therefore the extent of defendants 6 and 7's interests is only one-half and so that is all that can be released. The contention of the other side is that if the mother is taken into account then her share would also have to be excluded and that would leave the plaintiffs with only one-fourth. But, they say, no question about her share has been raised hitherto and so all they claim is two-third. We think this is sound. If the mother's rights are to be taken into account, then the plaintiffs can only get one-fourth because the mother is no more bound by an alienation which does not bind the family as a whole than are the sons. But, as counsel for the defendants admits, no question about her share has been raised, and in any event

* See AIR 1940 Nag 305 (FB).

her share does not accrue until the family partitions (which it has not done hitherto), therefore all that the defendants can claim is two-thirds. We accordingly direct that a two-third share in the fields mentioned be released from the mortgage and be excluded from the decree.

The next question is more difficult and pivots around the decision of the Full Bench. Lalji's son Bapurao (now defendant 1) was born on 9th December 1926. The cause of action on the mortgage which this suit seeks to enforce did not accrue till 21st March 1927. Therefore, Bapurao was born after the mortgage (which is dated 21st March 1922) was executed and before the cause of action on it accrued. Bapurao's learned counsel relies on the following passages in the Full Bench decision I L R (1940) Nag 573[1] :

> The cause of action arises at the moment the alienee enters into possession where the suit is for possession. It may be there are other causes of action arising at different dates.
>
> Whichever cause of action is in question it belongs to those in existence when the cause of action arises.
>
> . . . .
>
> If a coparcener is not in existence when such a cause of action arises he cannot sue.
>
> When the coparceners are defendants different considerations arise.

It is argued by him that Bapurao was in existence when the cause of action in this suit arose and consequently had he been a plaintiff he could have sued for a declaration that the mortgage did not bind him, and if he could have done that, then he can set up the same right by way of defence. It is also argued in the alternative that even if he could not have sued, the Full Bench decides that different considerations apply in the case of defendants and therefore, as he is in possession, he can challenge the mortgage. This is not a proper interpretation of our decision. The question referred was whether an after-born coparcener can challenge an alienation made before the date of his conception. It was assumed all the way through the arguments, and that assumption underlies much of our opinions, that if he could challenge the alienation by way of suit he would also be able to do so by way of defence. The test was whether he could sue and as that answered the other question attention was concentrated on the first point. As regards the other point, namely that "when the coparceners are defendants different considerations arise," it was not developed because the case was not argued from that angle. It was never doubted or contested that the after-born son has a right of redemption—indeed that is why he was joined as a defendant to this suit—but as advantage has been taken of this sentence in the Full Bench decision by the learned counsel who appeared before us but who had not appeared either at the earlier stage of the case or before the Full Bench, it will be necessary to explain what was meant. A mortgage splits the bundle of rights which constitute ownership into two parts. One part passes out of the mortgagor and goes to the mortgagee. This is the transfer of the interest spoken of in S. 58 (a), T. P. Act. The other part remains in the mortgagor and constitutes the right to redeem. As we say it has never been doubted that the right to redeem resides in the family even after the mortgage and that therefore the after-born son obtains an interest in that right by birth the moment he is conceived. The dispute in this case, and before the Full Bench, did not touch that right at all. The arguments there were confined, so far as mortgages are concerned, (and this is a mortgage case), to the other part of the bundle of rights which pass to the mortgagee. Those rights pass under the mortgage. Therefore unless the mortgage can be challenged the mortgagee is entitled to have those rights enforced. The Full Bench decides that if the challenging coparcener is born (or to be more accurate conceived) after the cause of action arises, then he cannot challenge the alienation.

But the cause of action spoken of there is the cause of action which accrues to the after-born son to challenge the alienation and not to the cause of action which accrues to the alienee to enforce his transfer. The cause of action to challenge a mortgage accrues at the date of the mortgage. A suit for a declaration can be filed the moment the mortgage is executed. In other cases, the cause of action would accrue at other times, for example, in the case of dispossession by a trespasser, it would accrue at the date of the dispossession when the right to sue for possession first accrued; so also in the case of an unregistered sale or mortgage which requires registration. We did not mean that in the case of a mortgage, though the after-born son has no cause of action to bring a declaratory suit he can create a cause of action for himself by waiting until he is dispossessed and then suing for possession; nor did we mean that though he could not have sued for a declaration he can set

1. ('40) 27 AIR 1940 Nag 305 : 191 I C 241 : ILR (1940) Nag 573 (F B), Kashinath v. Bapurao.

up rights which he could not urge in a suit of his own by way of defence when the mortgagee sues. In the view we take, the after-born son has no cause of action at all if the transfer is good, at the time, or if it must be deemed to have been good by reason of the coparceners in being at the date of the alienation not choosing to challenge it within the time allowed by law. In the Full Bench case we were both agreed as to the conclusion and Bose J. fully concurred with the view taken by the Chief Justice but he also felt that the matter could be traced back even further than the Chief Justice had gone and that the root of the rule is to be found in the doctrine of notional partition. According to his view, there is no escape from the logic of the ancient and rigid Hindu law position which is still followed in Allahabad unless the doctrine of notional partition is introduced. As he pointed out, according to orthodox Hindu notions all family property is owned by the fluctuating entity known as the joint family. No individual coparcener owns any part of that property as an individual. Until partition he has no separate rights and no separate share. He has no separate existence for those purposes. His identity is merged in the family as completely as an ounce of water or sand is merged in the gallon or pound of which it forms a part, and until partition his separate identity cannot be distinguished for these purposes any more than can that of the ounce of water or sand. If there is an alienation it must be the family as a complete whole which alienates. If not, there is no alienation. There is nobody to alienate. There is nothing which this nobody can own to alienate. It is true that the family either acts as a whole, each member joining in the alienation, or that it acts through the manager or whoever else is invested with authority to act on its behalf. But the real alienor according to orthodox Hindu ideas is the family and not the individual who puts his signature to the deed.

But the moment there is a partition, however partial it may be, the moment a piece of property, whether a plot of land or an ascertained share, is broken off from the whole and given to an individual member as his separate estate, of course he can do what he likes with it. An individual member of a joint Hindu family can own separate property and a joint Hindu family can separate and yet not divide its estate by metes and bounds. In between these extremes lies another possibility. The family can by agreement break off a piece of its property (whether tangible or a share) and hand it over to one of its members for him to have and to hold as his separate estate. They can do this just as effectually and completely as they could to a complete outsider, and yet remain joint. In any one of these ways, it is possible for an individual member to acquire for himself as his own separate property a part of the family estate. If they partition they can assign to any given member any part of the property they please. It does not matter whether it is equal to his share or not. It does not matter that it comprises the entire family estate. That is their affair. If they are satisfied nobody else can question their action except that the after-born son may in certain limited circumstances claim to reopen such a partition. Those circumstances are set out at p. 613 of the Full Bench decision by Bose J. in his opinion. So also, if the family chooses to gift its entire estate to a stranger. If the family agrees, there is an end of the matter. The property transferred goes and is lost to the family from that moment and there is nothing to which the after-born son can succeed. The position is the same if the transfer is made to a coparcener. In his case it may be made in anticipation of partition as the whole or part of the share which he is to receive when and if the family divides, or it may be a pure gift, or it may be for any other consideration. But it is clear that such transfer can be made provided the whole family agrees. Of course the members of the family then in being (or the after-born son in the circumstances mentioned) could get such an agreement set aside if suitable grounds existed, or they could show that they had never agreed, but if the agreement and transfer were really made, they would be binding and valid until avoided. All this is, we think, commonplace. The next step is not as easy.

The inconvenience of the orthodox position was early recognized though its logic is inescapable and attempts were made to break away from it. This caused a split in which one side adhered and still adheres, as in Allahabad, to the extreme orthodox and logical position, while the other took a more liberal attitude which has resulted in the view we take of alienations in this province. But the difficulty all through has been to trace this down to some logical and legal principle. Bose J. has endeavoured to do this in his opinion in the Full Bench case

and according to his view the more liberal among the early commentators developed what we might term the principle of notional partition, that is to say, they regarded a transfer first as a partition, partial or otherwise, which was immediately followed by the alienation. Looked at from this point of view, the family is deemed to separate off the alienated property from the rest of the family property and hand it over to the alienating member. As we have shown, this can be done in several ways and it does not matter for these purposes which is selected because they all come to the same thing in the end, namely that the property passes completely out of the family and is lost to it from the moment of the alienation. Nor does the fact that any coparcener then in being has the privilege of avoiding this notional partition make it any the less binding till avoided. If they choose not to avoid it or to challenge it, it stands, and if they die before doing so, their right to avoid lapses and no one else not claiming through or under them can exercise it on their behalf.

But whether this ratio decidendi, which is that of Bose J. is right or not (and we can see difficulties, as for instance where there are minors at the date of the alienation) we are both of opinion that the Full Bench decides that the son who is born or conceived after the cause of action to challenge the alienation arises cannot do so. The cause of action to challenge the mortgage here arose on 21st March 1922. Bapurao was born and conceived after this and so he cannot challenge the mortgage though he still has a right to redeem. As, in our view, the Full Bench has decided the point, it will be idle to examine the cases cited at the last hearing because we cannot now reopen the question. The result is that the appeal succeeds except as regards the two-third share in the fields we have specified above belonging to defendants 6 and 7. The decree of the lower Court will therefore be set aside and a foreclosure decree will now be passed in the plaintiffs' favour in respect of all the mortgaged property except the two-thirds share mentioned above. The costs of the suit and of the appeal will be paid by the defendants. A further six months will be allowed for redemption.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Nagpur 125

VIVIAN BOSE J.

District Council, Amraoti through Secretary — Defendant — Applicant

v.

Vithal Vinayak Bapat — Plaintiff — Opposite Party.

Civil Revn. Appln. No. 525 of 1939, Decided on 24th September 1940.

(a) Master and servant — Master when can justify refusal to pay wages during period of suspension of servant, stated.

A local body has no more authority and power over its servants and employees than any other person or body unless such powers are expressly conferred by statute. An ordinary master not given special powers by statute or by some rule or law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case, the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. A master can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that instead of exercising the right he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forgo his salary during a certain period and agreed to continue to serve on fresh terms under a fresh contract. But it would be necessary for the master to prove in such a case first that there is this fresh agreement and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement : *Case law referred.* [P 126 C 2; P 127 C 1]

(b) Master and servant—Misconduct on part of servant justifying his dismissal condoned by master — Master cannot subsequently claim right to dismiss him or impose any other punishment in respect of offence which has been condoned.

Once a master has condoned any misconduct on part of servant which would have justified dismissal or a fine, he cannot, after such condonation, go back upon his election to condone and claim a right to dismiss him or impose a fine or any other punishment in respect of the offence which has been condoned : A I R 1925 Cal 87, *Rel. on.* [P 127 C 2]

N. B. Chandurkar — for Applicant.

J. R. Mudholkar — for Opposite Party.

Order. — The defendant is a District Council. The plaintiff is one of its teachers on a salary of Rs. 44 a month. On 28th April 1937 the plaintiff was suspended and was subsequently reinstated on 12th June 1937. The claim is in respect of the plaintiff's salary during the period of suspension which salary the defendant refuses to pay. The facts are as follows: A report was made against the plaintiff by a member of the District Council. It is not clear when the report was made nor is it clear when the offence to which that report relates was committed. All that we can gather is that the report and the offence were made and occurred some time before 24th April 1937.

The offence complained of in that report was that the plaintiff had abused the office bearers of the Local Board and the District Council. The nature of the abuse was not set forth. The Vice-Chairman of the District Council acting on this report passed orders suspending the plaintiff on 28th April 1937. The plaintiff was thereupon asked to submit an explanation. He did so and an inquiry appears to have been made because the next thing that we know is that on 10th June 1937 the School Board of the District Council confirmed the action of the Vice-Chairman suspending the plaintiff and at the same time ordered the plaintiff to rejoin his duty on 12th June 1937.

The plaintiff rejoined. He had originally been attached to the Takarkhed school but on re-appointment he was posted to Khartalegaon. While there another complaint was made against him in respect of another matter and the District Council thereupon passed a resolution on 5th August 1938 to the effect that the plaintiff should be degraded down to a salary of Rs. 15 a month and that if he did not accept the same his services should be dispensed with. On 16th August 1938 the School Board of the District Council passed a resolution which sets out the resolution of the District Council itself and resolved that the plaintiff be degraded in accordance with the resolution of the District Council and also added that "the period of suspension be treated as a suspension period without allowance." It is not clear what period this refers to but it appears to have been assumed throughout that the period referred to is the period of suspension which I have mentioned above. This matter then went to the Deputy Commissioner and he passed an order on 3rd April 1939 setting aside the orders of the District Council. It is contended on behalf of the District Council that it does not know anything about this order of the Deputy Commissioner as it was not referred to in the lower Court. I find, however, that it is a portion of Ex. D-1 which has been placed on record wholesale. No trouble has been taken to separate out any portion of this voluminous document and it is clear that the whole of it has been tendered in evidence. In any case, reference has been made indiscriminately to portions of this document. In the circumstances, seeing that it is the defendant's own evidence and seeing that it is a copy of an official document sent by the Deputy Commissioner himself to the Chairman of the District Council, I see no reason why I should not take judicial notice of it. It is agreed by both sides that there is no written agreement of service in this case. The learned counsel for the applicant has not been able to refer me to any laws or rules relating to the engagement of teachers and the conditions of their service by the District Council. He asks for an adjournment but, in my opinion, the case has no merits and I see no reason why the matter should be kept pending any longer. It is argued in the first place on behalf of the District Council that the civil Court has no jurisdiction because a servant of the District Council is on the same footing as a servant of His Majesty and holds office at pleasure, consequently the District Council being on a par with His Majesty in this respect the jurisdiction of the civil Court is barred. For these wide and sweeping claims, reliance is placed on A I R 1940 Lah 71,[1] ILR (1938) ALL 252[2] and I L R (1937) Mad 532.[3]

It is not necessary for me to decide in this case whether the wide and sweeping propositions which are contained in the argument addressed apply in all cases where there are rules or regulations framed by Government. That was the position in the Allahabad case, and so far as the Privy Council case is concerned, it is a case in which a servant of the Crown was concerned. It may be that if there is a special statute, or if rules are framed under an Act by Government which set out that a servant of a local body shall hold office at pleasure, then the rule enunciated by their Lordships of the Privy Council in the case of servants of the Crown will apply. But in the present case no such rules have been brought to my notice, no such rules were pleaded and no such rules were produced in the lower Court. So far as the Lahore case is concerned, I am not clear whether there are such rules in the Punjab or not. If there are then as I say the matter is distinguishable. If however the learned Judge who decided the Lahore case quoted above meant to state that every employee of a local body was on the same footing as a servant of His Majesty, I am with respect unable to agree. A local body has no more authority and power over its servants and employees than any other

1. ('40) 27 A I R 1940 Lah 71 : 187 I C 540, Narain Das v. District Board, Jhang.
2. ('38) 25 A I R 1938 All 276 : 175 I C 875 : ILR (1938) All 252 : 1938 A L J 351, Prabhulal v. District Board, Agra.
3. ('37) 24 A I R 1937 P C 31 : 166 I C 516 : 64 I A 55 : I L R (1937) Mad 532 (P C), Venkatrao v. Secretary of State.

person or body unless such powers are expressly conferred by statute. The matter therefore must be governed along the ordinary lines of master and servant.

It is to my mind clear that an ordinary master not given special powers by statute or by some rule or law flowing from a statute has no power to suspend a servant. He can either dismiss him or continue him in service on fresh terms. In either case the servant is entitled to be paid up to the date of dismissal in the one case or of continuance in service in the other. This rule is enunciated in A I R 1938 Cal 759[4] and A I R 1921 Cal 346.[5] Reliance was also placed on 30 N L R 173.[6] The Nagpur case is not quite in point, but it is of assistance in this way. It decides that a servant is entitled to be paid his wages up to the date of dismissal even if he has not worked in the interval. A servant who is suspended is clearly not working in the interval. If therefore a servant who is dismissed is entitled to be paid his wages up to the date of dismissal, it is clear that a servant who has not been dismissed but continued in service has a right to similar treatment.

In an ordinary case of master and servant, a master who dismisses his servant has to justify his action in a Court of law if the servant brings an action for wrongful dismissal. If the servant succeeds in showing that the dismissal was without justification, he is entitled either to his wages or to damages. If a master has no power of suspension, then he can only justify a refusal to pay the wages during the period of suspension on the ground that he had a right to dismiss the servant because of some wrongful action justifying dismissal or that, instead of exercising the right he came to a fresh agreement with the servant under which the servant rather than be dismissed agreed to forgo his salary during a certain period and agreed to continue to serve on fresh terms under a fresh contract. But it would be necessary for the master to prove in such a case first, that there is this fresh agreement, and secondly that he was justified in dismissing the servant and thus forcing him into a fresh engagement. Not only have these matters not been proved but the order of the Deputy Commissioner shows that there was never at any time any justification for the order of suspension because no proper enquiry was made. That in turn means that there is no proof of any misconduct on the servant's part and as I have said there is no vestige of proof of such misconduct in this case.

Apart from that it is clear from the order of 10th June 1937 that the plaintiff was reinstated in service on 12th June 1937. No conditions were imposed, and the plaintiff rejoined service on the strength of that order. There was therefore no fresh contract when the plaintiff rejoined. There was no undertaking by him or agreement that he would forgo his salary during the period of suspension. There was no agreement that he would continue to serve on a lower salary. The orders in respect of these were not passed till much later, namely on 5th August 1938, but then it was too late, quite apart from the fact that they were passed in respect of another matter. Once a master has condoned any misconduct which would have justified dismissal or a fine, he cannot after such condonation go back upon his election to condone and claim a right to dismiss him (servant) or impose a fine or any other punishment in respect of the offence which has been condoned. This rule is to be found in AIR 1925 Cal 87[7] and in many other cases. The reason is obvious. A servant even though he misconducts himself has a right to seek other employment, and it is proper and just that he should be given the earliest opportunity of seeking such fresh employment. As time goes by and he grows older, his chances of obtaining employment grow less and less. Therefore the rule is that a servant must be dismissed at once or given the chance of serving upon a fresh contract. If no such terms are imposed then clearly new terms cannot be imposed at some later date after the election to condone has been made, for the simple reason that had these conditions been put forward at the time, the servant might have preferred dismissal and the opportunity of obtaining other service. That is the reason underlying the rule which, in my opinion, is a fair, just and proper one. For all these reasons, it is clear that the order of the lower Court is right. The application is therefore dismissed with costs. Counsel's fee Rs. 15.

D.S./R.K. *Application dismissed.*

4. ('38) 25 AIR 1938 Cal 759 : 180 I C 918 : I L R (1939) 1 Cal 46 : 42 C W N 1186 : 68 C L J 320, Secretary of State v. Surendra Nath.

5. ('21) 8 AIR 1921 Cal 346: 60 I C 756: 33 C L J 336, Kamini Kumar v. Rebati Raman Das.

6. ('33) 20 AIR 1933 Nag 247 : 147 I C 571 : 30 N L R 173, Tikaram v. Gendalal.

7. ('25) 12 A I R 1925 Cal 87 : 86 I C 310, Middleton v. Harry Playfair.

A. I. R. 1941 Nagpur 128

NIYOGI J.

Seth Champalal Kundanlal Jain — *Plaintiff* — Appellant

v.

Village Panchayat, Semri-Harchand — *Defendant* — Respondent.

Second Appeal No. 335 of 1938, Decided on 8th July 1940, from appellate decree of Addl. District Judge, Narsingpur, D/- 28th March 1938.

(a) C. P. Local Self-Government Act (4 of 1920), S. 23 — S. 23 does not apply to village panchayat.

Section 23 of the Act has no application to the village panchayat. [P 128 C 2]

(b) C. P. Village Panchayat Act (5 of 1920), S. 12 (1) (d) — Holding of market is measure of public utility — Village Panchayat can undertake control of it without reference to District Council.

The holding of a market is a measure of public utility and as such the village panchayat can undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. The control of a market can be undertaken without reference to the District Council as there is no mention of the District Council in S. 12 and a Court of law cannot insert that expression when it is not there. [P 128 C 2]

K. C. Jain — for Appellant.

R. S. Dabir and K. B. Tare — for Respondent.

Judgment. — This is a plaintiff's appeal from a differing judgment of the Additional District Judge, Narsingpore, in Civil Regular Appeal No. 43-A of 1937, decided on 28th March 1938. The appellant filed the suit out of which this appeal arises against the village panchayat of Semri Harchand for a decree of permanent injunction restraining the village panchayat from recovering the market fees from him and for refund of Rs. 16-7-6 already recovered from him under coercive process. It is common ground that up to 1930 Semri market used to be held on the Hoshangabad-Sohagpur road and that it was removed to its present site which is malguzari plot No. 272 at the instance of the Deputy Commissioner Mr. D. J. N. Lee. The plaintiff admittedly keeps his shop in that market on every Monday when a market is held. His contention is that the village panchayat, viz., the defendant, has no power to impose any tax or levy fees from any person having a shop in the market as the market was held on a site which is the private property of the malguzar. This contention was overruled in the lower appellate Court.

It is urged here that the village panchayat would have the power to levy fees from the shopkeepers in the market only if the control of the market had been vested in the panchayat by any notification of the Provincial Government as contemplated in S. 23, Local Self-Government Act. It is further contended that the panchayat could not under S. 12 (1), Village Panchayat Act, 1920, undertake the control and administration of a private market without the permission of either the District Council or the Provincial Government. I see no force in these contentions. Section 23, Local Self-Government Act, is altogether irrelevant as it has no application to the village panchayat. It is because the Central Provinces Local Self-Government Act, 1920, does not directly confer on the District Councils the right of levying fees and tolls and of control in any market that it vests the Provincial Government with power to confer such rights by means of a notification, but S. 12, Village Panchayat Act, confers a discretionary power on panchayats to undertake the control and administration of certain matters specified in that section. That section does not expressly mention markets but there can be no doubt that holding of a market being a measure of public utility would be a matter falling under the head (d) of S. 12 (1). The contention that the village panchayat cannot undertake control of a market without reference to the District Council must fail for the reason that there is no mention of the District Council in that section, and a Court of law cannot insert that expression when it is not there. In fact there was a provision like what is contended for here in the section as enacted originally but the reference to the District Council was deleted by the C. P. Act 9 of 1935. I have no doubt that the holding of a market is a measure of public utility and as such the village panchayat could undertake control and administration of it and be responsible for the arrangement of conservancy and cleanliness and general maintenance of order in the market. The panchayat assumed control of the market by a formal resolution, Ex. D-1. It had therefore power to levy fees on persons exposing goods for sale in that market under S. 15 (1) (c) with the approval of the District Council. The procedure as laid down in that section relating to imposition of any tax, toll or fees was followed in this case and no contention is raised in that behalf. There is no substance in this appeal which is therefore dismissed with costs in all Courts.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Nagpur 129

VIVIAN BOSE J.

Misc. Appeal No. 218 of 1940, Decided on 10th September 1940, against order of Dist. Judge, Nagpur, D/- 15th March 1940.

Moreshwar Parashram Damle and others — Appellants

v.

Commissioner, Chhattisgarh Division, Raipur — Respondent.

(a) C. P. Local Fund Audit Act (9 of 1933), S. 14—Appeal to High Court arising out of application under S. 14—No ad valorem court-fee can be demanded.

The District Judge acting under S. 14 is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. The appeal from his decision to High Court is not from a Court but from a special tribunal. Moreover, the jurisdiction which S. 14, C. P. Local Fund Audit Act, confers is not revisional nor can the "appeal" to the High Court be called a "reference." Section 4, Court-fees Act, therefore does not apply nor Art. 1 of Sch. 1. No ad valorem court-fee can therefore be demanded on the memorandum of appeal to High Court arising out of application under S. 14, C. P. Local Fund Audit Act. [P 129 C 2 ; P 130 C 1]

(b) Court-fees Act (1870), Schedules — Schedules do not confer right to impose court-fee.

The schedules to the Court-fees Act only determine the method of assessment and do not confer a right to impose and collect court-fees. [P 130 C 1]

C. B. Parakh — for Appellants.

W. R. Puranik, Advocate-General — for Respondent.

Judgment.—This appeal arises out of an application made under S. 14, C. P. Local Fund Audit Act (9 of 1933) and the question is whether court-fees on appeal should be paid ad valorem on the amount by which the appeal seeks to reduce the decree of the District Judge. The scheme of the Act is that the Examiner of Local Fund Accounts is empowered to charge such sums as he considers fit under S. 10 of the Act against the persons mentioned there and to certify such charge. What happens thereafter is not clear. This is another of the local Acts which the Courts find so difficult to understand and construe. Section 14 provides that any person aggrieved by any charge made under S. 10 may either apply to the District Judge or to the Local Government to have such charge modified, altered or set aside. If he applies to the Local Government that body can, after hearing the applicant, pass such orders thereon as it thinks fit. The word used for the decision of the Local Government is "orders." If, however, the application is made to the District Judge, then the District Judge is empowered to confirm, modify or remit the charge, and to pass such decree as he thinks fit. The word used there is "decree." Then follows the proviso to S. 14. That provides that

> the aggrieved person shall have a right to file one appeal in accordance with the provisions of the Code of Civil Procedure.

The term used here is "appeal" and it evidently refers to an "appeal" from the "decree" of the District Judge. Section 13 deals with the matter of recovery and divides all possible cases under the Act into two categories. The first relates to cases in which "no appeal has been preferred under S. 14," and the second to cases in which an appeal has been preferred. In the former case the sum stated in the certificate of the examiner has to be recovered by the Deputy Commissioner as if it were an arrear of land revenue, and, in the latter case, "the sum stated in the order of the appellate authority." What is the position of the District Judge in all this? It will be seen that he has been empowered to pass a decree and not to make an order. It will also be seen that the person aggrieved has been empowered to apply (not appeal) to the District Judge and that the only appeal contemplated by S. 14 is the appeal from the "decree" of the District Judge. What the decision of the appellate authority is intended to be I do not know. As the appeal is to be in accordance with the provisions of the Civil Procedure Code from a "decree" of the District Judge, I would have thought that the decision of the appellate authority would have ended in a "decree" in accordance with the provisions of the Code. But S. 13 speaks of the decision of the appellate authority as an "order".

However, reading all these provisions together, I think it is clear that the District Judge is not intended to act as a Court but as a special tribunal, in much the same way as it does under the Workmen's Compensation Act. Many considerations lead me to this view. In the first place, the appeal or the application, whichever it is, is to the District Judge and not the District Court. In the next place we have the two alternative tribunals of appeal, the High Court and the Local Government; and in the third place, we have an astonishingly loose use of the expressions "apply", "appeal", "decree" and "order", terms which have well-known technical meanings when one is dealing with Courts. The charging section in the Court-fees Act, so far as the High Court is concerned, is S. 4. It authorises the levy of

court-fees when the Court is exercising the following jurisdictions, (1) its extraordinary original civil jurisdiction, (2) its extraordinary original criminal jurisdiction, (3) its appellate jurisdiction under the Letters Patent and (4) its jurisdiction as regards appeals from the Courts subject to its superintendence; or in the exercise of its jurisdiction as a Court of reference or revision.

The memorandum in question clearly does not relate to the first three jurisdictions, and as regards the fourth, the appeal is not, on the view taken above, from a Court but from a special tribunal. As to the difference between the two, see a recent decision of the Division Bench in I L R (1939) Nag 124[1] where it was held that an award by a District Judge acting as a Commissioner under the Workmen's Compensation Act is not a "judgment" within the meaning of the Letters Patent because the District Judge is not a Court when acting in that capacity. That this is also the position in respect of orders of the District Judge acting under the Land Acquisition Act is implicit in the Court-fees Act itself. Section 8 deals specially with these cases. In my opinion, this section would be unnecessary if the District Judge's awards were "judgments" in the ordinary sense because then exactly the same result in respect of the fee payable would be reached by the application of Art. 1, Sch. 1. It is only on the assumption that this article does not apply that S. 8 becomes necessary. There is no similar special provision in respect of the kind of appeal contemplated by S. 14, Local Fund Audit Act. The next type of jurisdiction which S. 4, Court-fees Act, legislates for is when the High Court acts as a Court of reference or revision. The jurisdiction which S. 14, Local Fund Audit Act, confers is not revisional, nor in my opinion can the "appeal" to the High Court be called a "reference". A reference can only be made by a Court or some person in authority. Here what is contemplated is an appeal by an aggrieved party. In the circumstances I do not see how any court-fee at all can be demanded. Article 1 to Sch. 1 though general cannot apply unless the right to collect is conferred in the body of the Act. The schedules only determine the method of assessment and do not confer a right to impose and collect court-fees.

D.S./R.K. *Order accordingly.*

1. ('39) 26 AIR 1939 Nag 122 : 182 I C 970 : ILR (1939) Nag 124, Secy. of State v. Mt. Geeta.

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* A. I. R. 1941 Nagpur 130

VIVIAN BOSE J.

Civil Revn. No. 501 of 1939, Decided on 18th September 1940, from decree of Third Sub-Judge, Second Class, Nagpur, D/- 31st July 1939.

Abdul Aziz Sk. Imam Musalman and others — Defendants — Applicants

v.

Sk. Amir Sk. Burham Musalman and another—Plaintiffs—Opposite Party.

(a) Limitation—Suit against certain person described as major — Person found to be minor and guardian appointed—Suit must be taken to have been instituted for purpose of limitation on date when plaint is presented and not on date when guardian is appointed — Suit cannot be said to be not instituted until guardian is appointed under O. 32, R. 3, Civil P. C.

The Limitation Act contemplates a suit brought against a particular person; it does not matter whether that person is a major or a minor, so long as the suit is brought it is brought against that person. Consequently the suit against a minor so far as the Limitation Act is concerned, is against the proper person, whether he is described as a major or a minor, and therefore is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the person who in point of fact is a minor. Order 32, R. 3, Civil P. C., does not mean that the suit is a nullity until a guardian is appointed or that no suit can be taken to have been instituted until a guardian has been appointed. [P 131 C 1, 2]

(b) Specific Relief Act (1877), S. 9 — One co-owner ousting other co-owners and taking exclusive possession — Suit under S. 9 more than six months after ouster — Ouster holds good even if title of plaintiff may not be extinguished.

It may well be that a joint owner of property is still at the date of suit under S. 9 entitled to the property and would be given possession in a suit properly instituted for that purpose. But, nevertheless, it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under S. 9, then for the purposes of S. 9 that ouster would hold good even though the title of the plaintiff may not be extinguished. [P 131 C 2]

Fida Hussain and N. B. Chandurkar — for Applicants.

A. D. Mande and G. S. Padhye — for Opposite Party.

Order.—The suit was under S. 9, Specific Relief Act. The lower Court holds that the plaintiff was in possession within six months of the suit, that is to say on 7th January 1938, and that the defendants ousted him and therefore has passed an order in the plaintiff's favour. Two questions are raised in revision. The first is whether the suit is

within limitation and the second is whether the Court could pass an order placing the plaintiff in exclusive possession without determining whether the parties had been in joint possession and therefore entitled to joint possession. As regards the first point, the matter arises in this way. The cause of action is stated in the application to have arisen on 8th January 1938. The suit was filed on 24th February 1938. In the entitling defendant 3 was shown as a major. In the course of the proceedings it was objected that he was in point of fact a minor. The plaintiff accepted this without contest and a guardian was appointed on 5th September 1938. It is argued on behalf of the defendants that the suit as against the minor defendant must be taken to have been instituted on 5th September 1938 and that as this makes it more than six months beyond the date of dispossession the suit under S. 9 did not lie. Reliance is placed for this on 38 Mad 1076.[1] I am not able to agree. Order 32, R. 3, Civil P. C., as amended locally, states that :

> Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

This appears to me to contemplate distinctly a suit brought against a certain defendant in which a dispute about minority is raised and in which the Court has to be satisfied about the fact of minority and then on being satisfied it has to appoint a proper person to be guardian. It does not mean that the suit is a nullity until that is done or that no suit can be taken to have been instituted until a guardian has been appointed. It seems to me clear that the Limitation Act contemplates a suit brought against a particular person: it does not matter whether that person is a major or a minor : so long as the suit is brought it is brought against that person. The suit is not instituted against the guardian but against the minor himself and the minor does not become another person simply because he is described as a major. He still is the same person. Consequently, the suit, so far as the Limitation Act is concerned, is against the proper person, whether he is described as a major or a minor, and therefore is within time if it is within time on the date on which the suit is instituted by the presentation of the plaint. The question of guardianship is a separate matter and relates not to the institution of the suit but to the right of the plaintiff to carry it on against the person who in point of fact is a minor. If no proper guardian is appointed, the suit of course in the result becomes a nullity and that is the decision in 38 Mad 1076.[1] But it is a nullity not because it is not instituted in time but because the procedure for continuing the suit against the minor and for obtaining a decree or order against him has not been carried into effect.

The next question is whether the lower Court is right in ordering the property to be placed in the exclusive possession of the plaintiff. The plaint claims that the plaintiff was in exclusive possession and that he was dispossessed. The written statements of the defendants state on the other hand that they and not the plaintiff have been in possession. Therefore neither side contended that within the six months preceding the suit either had been in joint possession. Each claimed to be in exclusive possession. Consequently the lower Court was right in not going into the question of joint possession and in placing that party in exclusive possession which, on the facts before it, it considered to have been in possession at the date of the dispossession.

Reliance is however placed by the learned counsel for the applicant on certain statements in the written statements where the defendants admit that the property is the joint property of the plaintiff and the defendants and on a statement of defendant 5 where she admits that they have a joint title. That however has nothing to do with the question of possession under S. 9. It may well be that a joint owner of property is still at the date of suit under S. 9 entitled to the property and would be given possession in a suit properly instituted for that purpose. But, nevertheless, it is open to one co-owner of property to oust the others and to obtain exclusive possession for himself. The title of the others may not be extinguished when this is done, but if that ouster took place more than six months before the institution of the suit under S. 9, then for the purposes of S. 9 that ouster would hold good even though the title of the plaintiff may not be extinguished. Consequently, the admissions of the defendants which go to the question of title do not oust the jurisdiction of the Court, and as neither side contended that they were in joint possession within six months before the suit was filed, the lower Court was right in placing the plaintiff in exclusive and not in joint posses-

1. ('16) 3 AIR 1916 Mad 33 : 29 I C 314 : 38 Mad 1076 : 28 M L J 525, Payidanna v. Lakshminarasamma.

sion. The application is dismissed with costs. Counsel's fee Rs. 15.

D.S./R.K. *Application dismissed.*

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* A. I. R. 1941 Nagpur 132

VIVIAN BOSE J.

Civil Revn. Appln. No. 226 of 1938, Decided on 28th March 1939.

Tulsiram Dewaji Kunbi — *Defendant* — Applicant

v.

Paikan Bapu — *Plaintiff* — Opposite Party.

* **Limitation Act (1908), Art. 7 — Village barber is not artisan—Suit by village barber for remuneration for services rendered to his customer is not governed by Art. 7.**

Village barbers are not household servants, or labourers in the sense in which the term 'labourer' is used in Art. 7. They are also not artisans. Hence a suit by a village barber for remuneration for services rendered to his customer is not governed by Art. 7 : A I R 1918 Nag 156 and A I R 1927 Rang 279, *Disting.* [P 132 C 1, 2]

M. R. Rajkarne — for Applicant.

N. B. Chandurkar — for Opposite Party.

Order. — The plaintiff is a village barber and the defendant is a resident of that village and is one of the plaintiff's customers. The plaintiff sues for remuneration for services rendered to the defendant, and the question at issue is one of limitation. If the suit falls within Art. 7, Limitation Act, then it is beyond time; on the other hand if it falls under the general Article 102 it is within time. The lower Court finds that Art. 102 applies and has consequently decreed the claim which is for a small sum of Rs. 9. The learned counsel for the applicant contends that Art. 7 applies and so asks me to dismiss the plaintiff's claim. Article 7 is confined to suits for the wages of a household servant, artisan or labourer. It is clear that village barbers are not household servants. It is also, I think, clear that they are not labourers in the sense in which the term 'labourer' is used in that Article. It is used there with reference to a man who does work chiefly requiring bodily strength. That leaves the word 'artisan' to be considered.

Artisan is defined in the Oxford English Dictionary as "one who practises or cultivates an art : an artist" and also as "one who is employed in any of the industrial arts; a mechanic, handicraftsman, artificer." I think it is clear that a barber cannot be said to be employed in any industrial art; he is not a mechanic or craftsman or artisan in that sense. The only question is whether he can be said to cultivate an art. The word 'art' is defined in the Oxford English Dictionary and also in Webster's Dictionary and a large number of illustrations are collected under the definition to indicate the sense in which the term is ordinarily used in the English language. Nowhere is cutting of hair or shaving or trimming of beards included as one of the arts. Whether a modern barber who works on the heads of fashionable ladies can be considered an artist may perhaps be open to question. It is possible that the skill required by him places him in a higher category than was formerly the case, but in any case such persons no longer call themselves barbers. They describe themselves as hairdressers and use other names of that kind. But however that may be, it is not possible to include barbers of a remote village of the Central Provinces in the class to which a modern barber may perhaps aspire.

I am referred to a passage in 14 N L R 152[1] at p. 155 which places the village barber among village servants such as carpenters and blacksmiths. It is argued that blacksmiths and carpenters are undoubtedly artisans and there is no reason why the village barber should be placed in a higher category and be given a longer period of limitation. It is also pointed out that the learned Judges in the Rangoon High Court in 5 Rang 477[2] considered this a relevant argument in the matter of a motor driver. I do not think that either of the rulings is in point here. One may or may not consider the village barber a village servant, but that would not bring the case under the purview of Art. 7, for the servant described there is a household servant and not a village servant. As regards the Rangoon case, there can be little doubt that a motor driver is an artisan in the sense that he is employed in an industrial art, namely that of a motor mechanic. Apart from that, I do not think that the mere fact that a village barber who may not be as highly skilled a person as a village carpenter or a village blacksmith gets a longer period of limitation would justify me in straining the meaning of the words employed in Art. 7. I am of opinion therefore that the lower Court was right in holding that the case did not fall within Art. 7. The application is therefore dismissed with costs. Counsel's fee Rs. 10.

D.S./R.K. *Application dismissed.*

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1. ('18) 5 AIR 1918 Nag 156 : 46 I C 779 : 14 N L R 152, Bala v. Ballabhdas.
2. ('27) 14 AIR 1927 Rang 279 : 104 I C 520 : 5 Rang 477, Sewaram v. Lachminarayan.

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VIVIAN BOSE J.

Civil Revn. No. 562 of 1939, Decided on 10th September 1940, from order of Third Sub-Judge, Second Class, Nagpur, D/- 6th July 1939.

Mt. Shakuntalabai w/o Govindrao Mudliyar—Defendant 2 — Applicant

v.

Roshanlal Mallooram Agarwal and others, (Plaintiffs 1 to 4) and another, Defendant 1 — Non-applicants.

(a) Mortgage—Parties to suit—Person claiming paramount title to mortgaged property is not necessary party to mortgage suit—His title cannot be tried out unless all parties desire that or he claims some interest in equity of redemption—He is bound to be discharged when he claims paramount title and does not wish to be joined.

All that the Court is concerned with in a mortgage suit is the question of redemption. The mortgagee sues for the money which he has lent and for the enforcement of his security if the money is not paid. Only the persons who are interested in paying in order to save the property are necessary parties to the suit. All other matters are irrelevant. Consequently, in a mortgage suit a person claiming a paramount title to the mortgaged property is not a necessary party. His title to the mortgaged property cannot be tried out in the mortgage suit unless all parties desire that or unless he claims some interest in the equity of redemption either by way of an alternative case or in spite of his paramount title. He is bound to be discharged when he claims a paramount title and does not wish to be joined : A I R 1937 Nag 121, *Expl., and Rel. on*; A I R 1935 Nag 68, *Ref.*; A I R 1931 Nag 20, *Disting.*

[P 133 C 2; P 134 C 1, 2]

(b) Mortgage—Mortgage suit—Decision when person claiming paramount title is necessary party can be interfered with in revision.

The question of parties and persons is fundamental and goes to the very root of jurisdiction. Consequently, the High Court can interfere in revision with a decision as to when a person who claims a paramount title is a necessary party to the mortgage suit : A I R 1936 Nag 157, *Foll.*; A I R 1935 Nag 68, *Expl.* [P 134 C 2]

Dr. W. S. Barlingay — for Applicant.

A. L. Halve — for Non-applicants 1 to 4.

Order. — The question here is whether a person who claims a paramount title in a mortgage suit should be discharged. The mortgage was executed by defendant 1. The plaintiff has joined defendant 2 to the suit alleging that defendant 1 and the husband of defendant 2 (the husband is now dead) formed a joint Hindu family and that the mortgage was executed by defendant 1 on behalf of the family. Defendant 2 contests this and states that her husband was separate from defendant 1 at all relevant times and that the property in suit was his exclusive property which defendant 1 had no right or authority to mortgage. The lower Court holds that defendant 2 is a necessary party as it is necessary to have her here in order to give complete relief to the plaintiff.

I am not able to see how this case differs from one in which a person has mortgaged property which another claims as his exclusive property. It is to my mind evident that the title of that other to that property cannot be tried out in a mortgage suit unless all parties desire that or unless that other claims some interest in the equity of redemption either by way of an alternative case or in spite of his paramount title. It is, I think, elementary that in a mortgage suit no question of title arises. The mortgagee clearly has no interest and in fact cannot, if he wishes to succeed, challenge the title of his mortgagor. All we are concerned with in a mortgage suit is the question of redemption. The mortgagee sues for the money which he has lent and for the enforcement of his security if the money is not paid. Only the persons who are interested in paying in order to save the property are necessary parties to the suit. All other matters are irrelevant. Unless that were so, it would be possible for complicated questions of title in relation to some vast estate to be decided in a trumpery mortgage suit concerned with a comparatively small sum of money. It would be possible for a person who wants to get property from another and have the question of title tried out to take a mortgage from a man of straw who has no possible interest in that property for some small amount and then to sue him on the mortgage and to join the real owner of the property on the ground that he claims a right to the property. The court-fees payable would be negligible on the mortgage and the complicated question of title would be tried out on payment of a small court-fee as a side issue in some trumpery mortgage matter. Clearly that is neither the object nor the intention of the law.

The learned counsel for the non-applicant however relies on 26 N L R 359,[1] A I R 1935 Nag 68[2] and A I R 1937 Nag 121.[3] So far as the first of these three cases is concerned, it was a case in which all the defendants pleaded to the mortgage and desired to fight

1. ('31) 18 AIR 1931 Nag 20 : 130 I C 105 : 26 NLR 359, Ishwardas v. Hiralal.
2. ('35) 22 AIR 1935 Nag 68, Mt. Iqbal Begam v. Misrilal.
3. ('37) 24 AIR 1937 Nag 121 : 170 I C 192 : I L R (1937) Nag 366, Motiram Motharam Patel v. Lalchand Gullabchand Marwadi.

out the question of the mortgage. Of course if that is so, they are all necessary parties. It does not matter whether some one of them claims in addition a paramount title. If he wants to fight out the mortgage matter because he says he is interested in the equity of redemption and the plaintiff agrees that he is so interested, clearly he is a necessary party. The learned counsel however relies on a somewhat wider pronouncement made by the learned Judge in that case which is to the effect that there is no inflexible rule either in law or in practice excluding questions of title from a mortgage suit and that such titles may be investigated in such a suit if it is necessary to give complete relief to the plaintiff or to secure to him, as a result of the decree in the mortgage suit, a quiet and unobstructed possession. Those observations, read in conjunction with the facts of the case in which they were made, are of course unexceptionable. But what does one mean by stating that all matters necessary to give complete relief to the plaintiff may be investigated? It is only matters in suit which can be investigated and not matters which are beyond the suit. The only relief claimed in a mortgage suit is the relief to enforce the security against persons interested in the equity of redemption. If a person is not interested in the equity of redemption whatever else he may be interested in forms no part of the relief claimed in the mortgage suit and it is not necessary to go into those other matters in order to give the plaintiff the relief which he claims, namely a right to enforce his security against those interested in the equity of redemption.

As regards A I R 1935 Nag 68,[2] that is a very short judgment in which no facts are given. Staples, A. J. C. merely states, after referring to a Patna ruling which has not been referred to here, that it would be just and convenient to join the applicant as a party to the suit before him and to adjudicate upon her claim. Unless one knows the facts on which the learned Judge proceeded it is quite impossible to comment on that decision. There are undoubtedly cases in which it would be proper to inquire into these matters. I have already mentioned some of them, namely when all parties desire this to be done, or when the person claiming a paramount title also pleads to the mortgage and claims a right to contest the mortgage on the ground that he is also interested in some way in the equity of redemption.

As regards A I R 1937 Nag 121,[3] that is a case which is not in favour of the non-applicant. The decision there is that a son is not a necessary party to a suit against his father on a mortgage of joint family property because the son can bring a suit for a declaration that the mortgage decree does not bind his share. The learned Judge, however, goes on to state that if the son should himself come in and ask to be joined on the ground that he is interested in the equity of redemption and wants to be given a chance to challenge the mortgage or redeem it in the alternative, then he ought to be joined. With that of course I agree, but that is not the case here. Defendant 2 does not wish to be joined. She claims a paramount title and claims the right to be discharged. According to the ruling just cited, she is bound to be discharged in those circumstances.

It is next urged that whatever be the rights or wrongs of the matter, the lower Court, even if it has decided wrongly, had jurisdiction to do so and that the High Court cannot interfere in revision with a decision when a party who claims a paramount title is necessary to the case. Again reliance is placed upon A I R 1935 Nag 68.[2] As I have already said, so far as that decision is concerned, it is not possible for me to comment on it because I do not know what the facts there were. If a more general proposition was intended, then with respect I dissent from that view and have so dissented in a ruling published in the authorized reports, I L R (1936) Nag 73.[4] When I say "dissent from that view" I do not mean that I have referred to the ruling of Staples, A. J. C. or indeed to the question of paramount title; but I have referred to and followed a number of decisions which state that the question of parties and persons is fundamental and goes to the very root of jurisdiction. This will be found at pp. 76 and 77 of my decision. As my decision is the later of the two, and as it is published in the authorized reports, and as no facts are given in the ruling of Staples, A. J. C., so that I cannot determine whether what he has said is obiter or not, I prefer, with respect, to follow my own view. In my opinion defendant 2 must be discharged from this suit on the ground that she claims a paramount title and disclaims all interest in the equity of redemption. The application is allowed, the order of the lower Court is set aside and an order

4. ('36) 23 A I R 1936 Nag 157 : 164 I C 848 : I L R (1936) Nag 73, Devidas v. Nilkanthrao.

will now be passed discharging defendant 2 from the suit. Costs of the revision will be paid by the plaintiff. Counsel's fee Rs. 25. Costs in the lower Court will also be paid by the plaintiff.

G.N./R.K. *Application allowed.*

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STONE C. J. AND VIVIAN BOSE J.

First Appeal No. 70 of 1937, Decided on 22nd August 1940.

Mt. Radhabai w/o Pandharinath Bapu Kalar — Plaintiff — Appellant

v.

Pandharinath Bapu Narayan Bapu Kalar and others — Defendants — Respondents.

(a) Hindu law—Partition—Wife can sue for her share provided she has not assented, waived her right or acquiesced — Wife held did not acquiesce in partition but merely stood by and hence entitled to share.

A wife can sue for her share where there has been a partition and she has not been assigned any share and has not assented or waived her rights or acquiesced. [P 135 C 2]

None of the parties to the partition knew that the wife had any right to a share. No provision was made for her. She was never asked to waive her right to her share. She was allowed to retain, and in fact retained, certain ornaments. Though the wife used to remain present off and on at the time of discussion between the parties during the partition she merely stood by and did nothing except claim certain ornaments not as a share-holder but because she wanted them :

***Held* that the wife did not acquiesce in the partition and therefore was entitled to a share. The fact that she suggested a division of the ornaments and actually got them weighed for the purpose did not involve any agreement or consent with regard to partition : 31 Cal 262 (P C) and A I R 1936 P C 20, *Rel. on*; A I R 1930 All 537, *Ref.* [P 136 C 2]**

(b) Hindu law — Partition — Suit by wife for her share — Partition re-opened — wife's share should be adjusted so as to interfere with past transactions as little as possible.

Where in a suit by the wife for her share in the family property a partition is reopened, the proper course in allocating the wife's share is to so re-arrange the property as to interfere with past transactions as little as may be. [P 136 C 2 ; P 137 C 1]

(c) Hindu law—Partition—Wife taking ornaments because she wanted them — Subsequent suit for share by wife—Gold and silver must be taken into account in settling her share.

Where at a partition the wife takes certain ornaments not as a share-holder but because she wanted them the value of those ornaments must be taken into account in settling the wife's share in a subsequent suit by her for her share. [P 137 C 1]

Y. V. Jakatdar — for Appellant.

A. R. Kulkarni, J. V. Jakatdar and M. R. Bobde and B. V. Pradhan — for Respondents 1 ; 1 and 4 ; and 2, 3 and 5, respectively.

Judgment. — This is an appeal by the wife of the father of three sons who at one time were the members of a joint Hindu family and who in 1931 or thereabouts separated. The resulting partitioning of the property was effected amicably and resulted in the family property being divided into four shares, the plaintiff, wife of the father, being, as we think, allowed to retain certain ornaments. The question in this suit is whether the plaintiff is entitled to claim a share. The learned editor of Mayne on Hindu Law and Usage (Edn. 10) at p. 544 observes as follows :

> According to the Mitakshara law, a wife is entitled on a partition between her husband and his sons to a share equal to that of a son ; but she cannot enforce a partition. She may either be the mother or the step-mother of the sons.

That proposition as late as 1930 in 52 ALL 596[1] was regarded as a proposition about which two opinions could be rationally expressed and it was there observed that it had been strongly argued by an eminent lawyer that she had no such right. All doubt on the matter is however set at rest by the decision of the Privy Council in 63 I A 33,[2] where their Lordships point out that under the Mitakshara law when the family estate is divided a wife or mother is entitled to a share but is not recognized as the owner of such share until the division of the property is actually made. In this case however it is said that granted that a wife has a right to a share, this particular wife has lost her right to re-open this partition because she consented to it, she took part in it, she acquiesced in it, and therefore she is prevented by the doctrine of acquiescence from now challenging it and she must be regarded by her conduct as having waived her right to a share. It has already been held on a preliminary issue as follows in this very case :

> **The weight of authority thus lies in favour of the view that a wife is entitled to sue for repartition and to get her share in it which share was not allotted to her in the partition when she did not acquiesce in the partition or did not waive her share.**

We would express the matter somewhat differently, though doubtless it comes to very much the same thing. A wife can sue for her share where there has been a partition and she has not been assigned any share and has not assented or waived her rights

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1. ('30) 17 AIR 1930 All 537 : 125 I C 762 : 52 All 596: 1930 A L J 793, Partap Singh v. Dalipsingh.
2. ('36) 23 A I R 1936 P C 20 : 159 I C 1080 : 63 I A 33 : 63 Cal 691 (P C), Pratapmull Agarwalla v. Dhanbati Bibi.

or acquiesced. As their Lordships of the Privy Council state in 31 Cal 262[3] at p. 272 the mother (the same applies to the wife) is not bound by a partition to which it is not shown she ever assented.

At page 271 they observe as follows :

The Judges of the High Court apparently considered that acquiescence on the part of the mother was established ..... But their Lordships have not been referred to, nor have they been able to discover any evidence of acquiescence except a vague statement by the plaintiff that no share was assigned to the mother 'because she did not make any objection.'

We have no reason to think that in this branch of law acquiescence is anything other than it is in other branches of law and acquiescence is, we think, a branch of the law of estoppel and before it begins to operate it has to have all the factors present that are indicated as necessary by the Lord Chancellor in (1865) 1 H L C 129,[4] referred to in 2 N L R 34[5] at page 40 and together with the case law on this branch of law by this Bench in A I R 1939 Nag 163.[6] In this present case the plaintiff has greatly weakened her position by alleging that she did not know of the partition at all. The learned Judge has found that she knew about the partition and there is abundant evidence to justify that conclusion of fact and we accept it. But it is equally plain, in our opinion, that nobody in this family was aware that the wife was entitled to a share. Of the contesting defendants, the two elder sons, only one has gone into the box and he said:

We never asked her that she had a share in the partition of the property. We never knew that she had any share.

It is apparent from other evidence that the only part she took in this partitioning was in connection with the household ornaments. On this plea a witness who strikes us as giving the most truthful evidence is again a witness for the contesting sons, 2 and 3, D. W. 4. He says :

I never told the plaintiff that she had a share in the property and whether she required it or not. I simply asked her if she wanted anything and she simply said that she would be satisfied if she were given the gold which was with her. I told Laxman then and there not to demand the gold which was with her. Laxman agreed to it.

There is other evidence to the effect that that attitude was taken up because these sons were not merely claiming their share in the immovables and houses and money-lending but were claiming to take away from her her ornaments and she objected to that and the matter was amicably settled by the neighbours saying that she ought to be left with her ornaments. Another witness (2 and 3 D. W. 2) says :

On all these four occasions plaintiff was present. She did not raise any objection to any of the said divisions effected. On all these occasions she did not claim any share for herself in any of the properties except that she demanded the gold which she had with her.

Taking the evidence as a whole it seems to us to be reasonably plain that this is a case in which nobody knew that the wife had any right to a share. No provision was made for her. She was never asked to waive her right to her share. She was allowed to retain and in fact she retained certain ornaments and according to the evidence of the defendants she kept a substantial amount of gold ornaments. That sort of evidence seems to bring this case directly within the Privy Council decision in 31 Cal 262,[3] that is to say a case where a woman stands by and does nothing at all except claim certain ornaments, and she claimed not as a shareholder but because she wanted them. They were being claimed in point of fact by the sons, and the sons were claiming them as of right and the neighbours came along and persuaded the sons to give up their rights and they gave up their rights for the sake of enmity. The defendants pleaded acquiescence based on her conduct and active part in the partition. They subsequently added further particulars : (1) that she suggested a division of the ornaments and had actually got her ornaments weighed for the purpose and (2) she used to remain present off and on at the time of discussion between the parties during the partition. As to (2) that comes directly within their Lordships' observations. As to (1) we think that as above indicated that did not involve any agreement or consent with regard to partition but has resulted in an amicable settlement of the claim made by the sons to certain ornaments as theirs but which right they waived and allowed their stepmother to keep them.

Mr. Bobde for the respondents has strongly urged that to allow a partition to be reopened many years after the event, after all sorts of payments have been made, suits filed by third parties or against third parties, involves immense dislocation. It is of course regrettable that dislocation is involved, but this woman filed this suit in 1933 a very short time after this partition was effected. But we think that the pro-

3. ('04) 31 Cal 262 : 31 I A 10:8 C W N 146 (P C), Ganesh Dutt v. Jewach Thakoorain.
4. (1865) 1 H L C 129 : 12 Jur (N S) 506 : 14 W R 926 : 149 R R 543, Ramsden v. Dyson.
5. ('06) 2 N L R 34, Collier v. Baron.
6. ('39) 26 A I R 1939 Nag 163 : 182 I C 527, Kuwarji Madhao v. Bhurelal Ajitmal.

per course to pursue in allocating her share would be so to rearrange the property that it interferes with past transactions as little as may be. What she is asking for is a declaration that she is entitled to a fifth. That declaration, we think, she is entitled to. She is further asking for division either through the Collector or through Court according as the nature of the property. As to the working out of the partition, we cannot of course say anything at this stage except this that it is hardly disputed on the evidence already on record that the plaintiff has received gold and silver and that whatever she has so received will be taken into account in settling her share, and that as to what she has received will be determined by evidence after an issue has been framed. Costs out of the estate.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Nagpur 137

NIYOGI J.

Misc. Civil Case No. 122 of 1939, Decided on 4th September 1940.

Nagpur Electrical Light & Power Co., Ltd. — Applicant.

v.

Nagpur Municipal Committee — Opposite Party.

(a) C. P. Municipalities Act (2 of 1922), S. 83 (2) — Commissioner is competent to make a reference.

As the Commissioner has jurisdiction to hear the appeal from an order of the Deputy Commissioner he must be deemed to have the same powers as are conferred on the Deputy Commissioner under S. 83, as an appeal is only a continuation of the original proceedings. The Commissioner is therefore entitled to make a reference under S. 83 (2). [P 137 C 2; P 138 C 1]

(b) C. P. Municipalities Act (2 of 1922) — Terminal tax — Terminal tax rules of Nagpur Municipality, R. 3 — Hard drawn bare copper wire imported by rail is liable to be assessed under serial No. 5 and not under serial No. 7 of Terminal Tax Schedule.

If an article is imported by rail it must fall under the first part of R. 3 which refers specifically to railway consignments. Hence hard drawn bare copper wire imported by rail is liable to be assessed under serial No. 5 and not under serial No. 7 of the Terminal Tax Schedule in accordance with the first part of R. 3 of the Terminal Tax Rules. [P 138 C 1]

M. R. Bobde — for Applicant.

Dr. W. S. Barlingey — for Opposite Party.

Order. — This case arises on a reference made by the Commissioner, Nagpur Division, Nagpur, under sub-s. (2) of S. 83, Municipalities Act, II of 1922. The question is whether hard drawn bare copper wire is assessable to terminal tax under serial No. 5 or serial No. 7 of the Terminal Tax Schedule of the Nagpur Municipal Committee. Up to August 1937, the Nagpur Municipal Committee had been levying terminal tax on hard drawn bare copper wire imported by rail to Nagpur classifying that article under electric goods specified in serial No. 5 of the Terminal Tax Schedule. But, on an objection raised by the auditor the standing sub-committee of the Municipal Committee sanctioned the levy of a higher rate of Re. 1-8-0 instead of 2 annas per maund under serial No. 7 of that Schedule. The action of the sub-committee was upheld by the committee by its resolution No. 104 dated 30th July 1938. The Nagpur Electric Light and Power Company Limited which was aggrieved by that resolution filed an appeal in the Court of the Deputy Commissioner under S. 83, C. P. Municipalities Act of 1922. The Deputy Commissioner upheld the Municipal Committee's resolution whereon the Nagpur Electric Light and Power Company Limited preferred an appeal to the Commissioner. It is as a second appellate Court that the Commissioner has referred the question to this Court for its opinion.

On behalf of the Municipal Committee an objection was raised in limine that the Commissioner was incompetent to make a reference and that the proper course for the Commissioner was to have remanded the case to the Court of the Deputy Commissioner with a direction to that officer to make a reference to this Court under S. 83 (2), C. P. Municipalities Act. I am unable to see any substance in this objection. The Commissioner under S. 58, Municipalities Act, is vested with the same authority and control over the Deputy Commissioner as he could exercise in the revenue administration. Under S. 33 (2), C. P. Land Revenue Act, a second appeal lies to the Commissioner from any order of the Deputy Commissioner on any of the grounds mentioned in cl. (c) of sub-s. (2) of that section. That the Commissioner is competent to hear the appeal appears to be beyond doubt. If the Commissioner had jurisdiction to hear the appeal he must be deemed to have the same powers as are conferred on the Deputy Commissioner under S. 83, C. P. Municipalities Act, as an appeal is only a continuation of the original proceedings : *see* 15 Cal 94[1] at p. 98. The appellate Court is, as indicated in S. 107, Civil P. C., empowered to pass any order which the law authorises the original Court to pass. Under S. 83, C. P. Municipalities Act, the Deputy Commissioner could determine the appeal finally or under sub-s. (2) of

1. ('88) 15 Cal 94, Gobind Chunder v. Guru Churn.

that section refer the case for the decision of this Court. The Commissioner would therefore be entitled to exercise the same powers as the Deputy Commissioner could. I hold that the reference has been properly made. Coming to the merits of the case, I have no doubt that so far as the hard drawn bare copper wire was imported to Nagpur by rail it was liable to be assessed under serial No. 5 and not under serial No. 7 of the Terminal Tax Schedule in accordance with the first part of R. 3 of the Terminal Tax Rules. The rule as a whole runs as follows :

If any question arises as to the heading in the schedule of articles under which any particular consignment falls, the classification adopted by the railway authorities for the levy of the railway freight upon that consignment shall be accepted for the purpose of the terminal tax. When an article is mentioned in the Schedule specifically and is also included in a general category, the tax shall be levied at the rate mentioned for the specific item. When any article is not specifically mentioned and may come under two or more headings in the Schedule, the tax shall be levied at the highest rate fixed for any such headings.

Analysing that section it would appear that the articles which are assessable to terminal tax are broadly divided into two classes; those which are imported by rail and those which are imported otherwise than by rail. The latter class of articles are sub-divided into two classes, (1) where an article is mentioned in the schedule specifically, and (2) when an article is not specifically mentioned. If an article is imported by rail it must fall under the first part of R. 3 which refers specifically to railway consignments. In that case the Municipal Committee is bound to accept the classification adopted by the railway authorities for the levy of the railway freight upon a consignment. That rule leaves no scope for discretion. It is not denied in this case that the goods which were imported by the Electric Company were all imported by rail. The Municipal Committee could not therefore apply the third part of R. 3 and levy the terminal tax at the higher rate. I find from G. I. P. R. Goods Tariff, Part. 1-A, page 194 that the bare hard drawn copper wire is classed under the head 'electrical appliances and fittings.' The Municipal Committee is under Part 1 of R. 3 of the Terminal Tax Schedule bound to accept that classification.

It is true that if the same article were imported into Nagpur otherwise than by rail, the contention of the Municial Committee would have some force. In view of the admitted fact that the article was a rail borne import, any discussion of this question would be academic. I may only point out that part 2 (i. e. the second sentence in R. 3 of the Terminal Tax Rules) only applies to an article which is mentioned specifically, that is by the specific description that article is itself known in the market and that when an article falls under two headings, one more specific as a class than another, the last part of that rule would authorise the Committee to levy tax at the higher rate. It must however be conceded that in a case of an article such as the present, it would be manifestly absurd to levy taxes at different rates because the means of transport are different. This absurdity is the more glaring as this particular article would have to pay the tax at Re. 1-8-0 per maund while the other kinds of electric goods would be paying only at 2 annas per maund. It is not permissible to presume that the authority which framed this rule intended such a startling and capricious result. Consequently, it must be held that were the Municipal Committee to levy the higher rate in the hypothetical case put forward on its behalf, it would be acting in contravention of the spirit of the rule. To avoid an anomaly, the appropriate course would be to amend the wording of R. 3. On the particular facts of this case, I have no doubt that it falls under the first part of R. 3 so as to leave no alternative to the committee but to accept the classification adopted by the railway authorities. The resolution No. 104 dated 30th July 1938 cannot be sustained. The Municipal Committee will pay the costs of this reference to the Company. Counsel fees Rs. 100.

D.S./R.K. *Order accordingly.*

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* **A. I. R. 1941 Nagpur 138**

POLLOCK AND GRUER JJ.

Civil Revn. No. 463 of 1938, Decided on 27th November 1939, from order of Fourth Sub-Judge, 2nd Class, Nagpur, D/- 5th July 1938.

Ganpatrao Raghobaji Koshti and another—*Defendants 3 & 4*—Applicants

v.

Shamrao Damodhar Dalal and another, Plaintiffs 1 & 2 and another, Defendant 1 and others — Non-applicants.

• **Civil P. C. (1908), S. 6 — Mortgage suit — Subsequent mortgagee added as defendant claiming his rights to be investigated and decided — Suit for purposes of jurisdiction has to be valued ad valorem on amount due on plaintiff's prior mortgage — Jurisdiction is not lost if amounts claimed on prior and subsequent mortgages together exceed Court's pecuniary jurisdiction—No court-fee is payable on claim under subsequent mortgage.**

When in a mortgage suit a subsequent mortgagee is added who wants his rights to be investigated and decided the suit for purposes of jurisdiction has to be valued ad valorem on the amount due on the plaintiff's prior mortgage and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court: A I R 1931 Cal 159, *Ref.* [P 140 C 2]

No court-fee is payable on the claim under the subsequent mortgages inasmuch as the claim is neither a set-off nor a counter-claim and is asked for in the written statement which does not require to be stamped at all. [P 140 C 2; P 141 C 1]

P. P. Deo — for Applicants.

G. R. Pradhan and S. C. Dutt Choudhary — for Non-applicants 1 and 2, and 4, respectively.

ORDER OF REFERENCE

Gruer J. — In this mortgage suit the applicants (defendants 3 and 4) were subsequent mortgagees. Defendant 1 was the original mortgagor and the plaintiffs (non-applicants 1 and 2) were the prior mortgagees. These applicants, subsequent mortgagees, claimed to be allowed to pay off the prior mortgage and to have a decree in their favour for the combined amounts of the two mortgages in Form No. 9 of Appendix D read with O. 34, R. 4, Civil P. C. The lower Court, Fourth Sub-Judge, second class, Nagpur, points out that the total claim on the subsequent mortgages is Rs. 2557 plus Rs. 4502 = Rs. 7059 which is beyond the inherent jurisdiction of a second class Sub-Judge. It therefore holds that these mortgages of defendants 3 and 4 cannot be enquired into in the present suit. The present application against that finding is not opposed by the plaintiffs who say that they have nothing to urge. It is opposed by defendant 2 who points out that O. 34, R. 4, Civil P. C., provides for the case of subsequent mortgagees and

for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may be, of Appendix D with such variations as the circumstances of the case may require,

Now Form No. 9 provides for a statement of the amount due on the subsequent mortgage so that evidently that amount would have to be determined in the suit and all objections to the mortgage would have to be decided. It is said however that though this no doubt would have to be done if the Court had jurisdiction to entertain the total claim it cannot be done where the pecuniary jurisdiction of the Court has been exceeded as is the case here. Section 6, Civil P. C., says:

Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

The valuation of a suit for purposes of jurisdiction is determined by the valuation in the plaint. That is the general rule, but here by reason of O. 34, R. 1, Civil P. C., the subsequent mortgagees having a right of redemption had to be joined as parties, and by reason of R. 4, sub-r. 4, their rights and liabilities had to be determined in the manner and form set forth in form No. 9 seeing that they themselves wished to redeem. The Court therefore apparently has no option but to investigate the validity of the mortgages and the amount due not only on the mortgage primarily in suit dated 22nd December 1925 but the two subsequent mortgages of 1931 and 1933 of which the principal sums are Rs. 4000 and Rs. 3000 respectively. I doubt therefore whether the lower Court's order refusing to consider these mortgages can stand. It seems to me that if it had jurisdiction it was bound to go on with the suit as a whole, otherwise to return the plaint to be presented to the Court having jurisdiction.

The question whether jurisdiction has been exceeded in such a case is somewhat puzzling, and I have not been able to find any authority bearing directly on the point. There are of course cases in which it has been held that the Court has power to pass a decree in excess of its pecuniary jurisdiction: for instance where mesne profits accruing pendente lite are concerned, I L R (1937) 2 Cal 176,[1] and where the amount finally due on accounts exceeds jurisdiction, 9 N L R 112;[2] 8 C P L R 86.[3] I doubt, however, whether the analogy of these cases is a good one. In 51 Cal 737[4] the suit brought was one for redemption, and it was held that jurisdiction depended on the amount ultimately found to be due. That case turned on S. 8, Suits Valuation Act, and is of course distinguishable from one like the present where the suit as brought is for sale on the mortgage. At p. 743 of that ruling it is said:

Prima facie it is the plaintiff's claim which determines jurisdiction, and the jurisdiction continues whatever the event unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive.

1. ('37) 24 A I R 1937 Cal 761 : 172 I C 591 : I L R (1937) 2 Cal 176, Hemanga Bhooshan Roy v. Bheem Gharami.
2. ('13) 9 N L R 112 : 20 I C 928, Olpherts v. Arjundass.
3. ('94) 8 C P L R 86, Kalooram v. Ramkishen.
4. ('24) 11 A I R 1924 Cal 783 : 78 I C 747 : 51 Cal 737 : 28 C W N 710, Sarada Sundari Basu v. Akramannessa Khatun.

It may well be argued that here the investigation of the subsequent mortgages is implicit in the case from the beginning, and will really be part of the subject-matter of the suit unless the defendants decline to redeem. It is also contended that the subsequent mortgagees' demand for investigation of their mortgages is in the nature of a counter-claim and that court-fees should be paid. That question does not arise directly in this revision application, but it is important that the proper procedure in such cases should be clearly laid down. The question in my opinion is one of some difficulty and should be decided by a Bench. I should refer it as follows:

"(1) When in a mortgage suit a subsequent mortgagee is added who wants his rights to be investigated and decided how is the suit to be valued for purposes of jurisdiction, and is jurisdiction lost if the amounts claimed on the prior and subsequent mortgages taken together exceed the pecuniary jurisdiction of the Court?

(2) If the Court cannot deal with the whole claim should it dispose of the suit without enquiring into the subsequent mortgages or should it return the plaint for presentation to the proper Court?

(3) Should court-fees be payable also on the claim under the subsequent mortgages and if so, by whom?"

This reference be submitted to my Lord the Chief Justice for passing orders about a Bench.

Opinion. — The facts leading up to this reference and the points to be decided are set out in the order of reference itself. The position is briefly that in a mortgage suit in which a decree for sale is sought defendants 3 and 4 have been joined as subsequent mortgagees. Plaintiffs' mortgage involved a sum of Rs. 1330-8-11 only and so was within the pecuniary jurisdiction of the Court of the Sub-Judge, second class, in which it was brought, but the claim on the two subsequent mortgages comes to Rs. 7059, which is beyond the pecuniary jurisdiction (Rs. 5000) of a second class Sub-Judge. These subsequent mortgagees want to pay off the prior mortgage and have a decree on the foot of their mortgages in Form No. 9, Appendix D, Civil P. C., read with O. 34, R. 4, of the Code. On objection raised by defendant 2, who is the legal representative of the purchaser of the mortgaged property from defendant 1 the lower Court framed a preliminary issue whether the subsequent mortgages of defendants 3 and 4 could be enquired into in this suit and has held that it cannot as it would thereby be acting beyond its jurisdiction.

The suit was rightly valued for purposes of court-fee on the amount due on plaintiffs' mortgage. Under S. 7 (ix-A), Court-fees Act, that is also now the valuation for court-fees in the Central Provinces in suits to foreclose a mortgage or, where the mortgage is made by conditional sale, to have the sale declared absolute. The plaintiffs' mortgage is a simple one not falling under S. 7 (ix-A), but it has to be valued on the amount claimed, and according to S. 8, Suits Valuation Act, the value for purposes of jurisdiction would be the same: 58 Cal 829.[5] Learned counsel for defendant 2 relies on S. 6, Civil P. C., and says that the amount or value of the subject-matter of the suit includes the amounts due on the subsequent mortgages and therefore the pecuniary limits are exceeded. In our opinion, the subject-matter of the suit is plaintiffs' mortgage as stated by them, and this is not altered by the obligation to join subsequent mortgagees or by the possibility that such subsequent mortgagees may in their defence claim to redeem and to have their own mortgages investigated. Our answer to the first question is that the suit for purposes of jurisdiction has to be valued ad valorem on the amount due on the plaintiffs' prior mortgage, and jurisdiction is not lost if the amounts claimed on the prior and subsequent mortgages taken together exceed Rs. 5000, the pecuniary jurisdiction of the Court.

On this finding, the second point does not arise. So we refrain from answering it. The third point is: "Should court-fees be payable also on the claim under the subsequent mortgage, and if so, by whom?" This is neither a set-off nor a counter-claim on which court-fees would have to be paid. These puisne mortgagees ask for this relief in their written statement, which does not require to be stamped at all. It is no doubt advantageous to puisne mortgagees to obtain a decree on their mortgages without paying any court-fees and it would be especially so where the later mortgages happen to be for very large sums. The legislature no doubt could have provided for payment of court-fees by the puisne mortgagees when they claimed a determination, or recourse perhaps might have been had to S. 9, Suits Valuation Act. But in the absence of any such provision or rule we find that no court-fees

5. ('31) 18 A I R 1931 Cal 159 : 130 I C 876 : 58 Cal 829 : 52 C L J 589, Shailendrakumar v. Haricharan.

are payable on the claim under the subsequent mortgages. We answer the reference accordingly.

G.N./R.K. *Answer accordingly.*

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NIYOGI J.

Second Appeal No. 111 of 1938, Decided on 19th November 1940, from appellate decree of Addl. Dist. Judge, Chhindwara, D/- 30th October 1937.

Gulabchandsao and others — *Plaintiffs* — Appellants

v.

Bashiruddin Nasiruddin and others — *Defendants* — Respondents.

(a) Adverse possession—Cosharers—Name of some not entered in mutation register—Possession of other cosharers does not become adverse to them.

Where some of the cosharers enter into possession under lawful title, *viz.*, that of co-owners, their possession cannot be treated as being adverse to other cosharers. The fact that names of such other cosharers have not been entered in the register of proprietary mutation does not necessarily show that the possession of the co-heirs was adverse to them : A I R 1915 Nag 125, *Rel. on.* [P 142 C 2]

(b) Adverse possession — Mortgagor and mortgagee — Mortgagee's possession secured under foreclosure decree is not adverse against mortgagor who is not party to the decree.

Whether mortgagee's possession becomes adverse or not depends upon the nature of the right which the mortgagee asserts while entering into possession of the mortgaged property. If he enters into possession pursuant to the rights acquired by him under the mortgage his possession will not be adverse. It is only when he takes possession in assertion of a right independently of the mortgage that his possession will become adverse. [P 143 C 1]

A mortgagee who obtains a decree for foreclosure on the basis of his mortgage comes into possession of the mortgaged property on the basis of his mortgage. His possession, in so far as it affects the party excluded from the mortgage suit, would be that of a mortgagee and not adverse to the mortgagors, for the obvious reason that the foreclosure decree does not destroy his equity of redemption : *Case law reviewed.* [P 145 C 1]

M. R. Bobde — for Appellants.

A. Razak — for Respondents 1 to 3.

Judgment. — This is plaintiffs' appeal from the concurring judgment of the Additional District Judge, Chhindwara, in Civil Appeal No. 5-A of 1937 delivered on 30th October 1937. This appeal arises out of a protracted and contested litigation which had come up to the Judicial Commissioner's Court in interlocutory stages in Civil Revision No. 365 of 1934 decided on 29th October 1934 and again to the High Court in Civil Revision No. 688 of 1935 dated 5th November 1936. In the last mentioned civil revision Pollock J., directed that there should be a decision of two points : (1) whether Mt. Imam Bi was sufficiently represented in the mortgage suit and therefore bound by these proceedings, and (2) whether the plaintiffs had been in adverse possession for more than 12 years. The trial Court determined both these issues in the negative and passed a decree as follows :

I pass a decree in plaintiffs' favour and declare that land No. 34=173.20 acres is a portion of Patti No. 1 of 4 annas belonging to plaintiffs and Imam Bi jointly and that it was wrongly included in Patti No. 2 of 12 annas in the last settlement. I also declare that lands Nos. 280=266.90, 90=1.05, 87=1.05, 229=.25, 140=.48 form part of Patti No. 2 of 12 annas and that they were wrongly included in Patti No. 3, i. e. the shamlat patti in the last settlement. I also declare that land No. 223=10.12 forms part of Patti No. 2. I further declare that plaintiffs hold 1/3rd share in Patti No. 2 of 12 annas. I further declare that plaintiffs and Imam Bi jointly hold ½ share in shamlat patti No. 3.

On appeal from that decree the first appellate Court remanded the case for findings on issues 1-C and 2-C out of the issues which had been framed by Mr. Shrivastava on 29th February 1932. They were :

1-C: Whether plaintiff and his predecessors remained in exclusive possession of the said 4 annas share from 5th May 1894 till to-day ?

2-C: Whether right of defendant 3 over her share if any is extinguished by plaintiffs' adverse possession since 1894 ?

The finding on issue 1 was in the affirmative and on issue 2 was in the negative. The lower appellate Court agreed with the findings of the trial Court and confirmed its decree. This appeal is preferred against that decree. The plaintiffs' case is that as a result of an imperfect partition in 1898-99 the village Sirghodi was divided into three pattis. Patti No. 1 of 4 annas was allotted to Imam Bi, Nasiruddin and Abdul Gaffur, and Patti No. 3 was kept joint. Later on, the plaintiffs acquired another 4 annas share in Patti No. 2 together with a proportionate share in the joint Patti No. 3. The plaintiffs thus claimed 8 annas share in the village. They applied for an imperfect partition in 1928-29 and in those proceedings disputes arose not only as to the extent of the pattis but also the plaintiffs' interest in them. The revenue officer referred the plaintiffs to the civil Court and the plaintiffs filed the suit out of which this appeal arises on 15th January 1931 claiming the following declaratory reliefs : (1) that the plaintiffs have full proprietary rights over 265.70 acres constituting patti No. 1, (2) that they have one-third proprietary interest in the 799.84 acres of land constituting patti No. 2, and (3) that they

have a half share in 121.69 acres of land constituting patti No. 3.

The village Sirghodi was originally owned by the predecessor of Abdur Razak the father of respondent 3, Mt. Imam Bi. He had 4 annas share in it which he mortgaged to one Isnaji son of Dhannu Sao. The latter filed Civil Suit No. 47 of 1893 against Mt. Abbas Bi widow of Abdur Razak, Abdul Rahim son of Abdur Razak, and Abdul Gaffur son of Abdul Kadir, who were all heirs of the mortgagor Abdul Razak and obtained a final decree for foreclosure pursuant to which he took possession of foreclosed 4 annas share on 5th May 1894. Mt. Imam Bi Abdur Razak's daughter was not impleaded in the suit. The plaintiffs also acquired a share of 4 annas out of patti No. 2 from Nasiruddin but the particulars relating to it are not material for the disposal of this appeal. The main point which on the arguments arises in this appeal is whether the possession of the plaintiffs-appellants and their predecessor-in-interest was adverse to Mt. Imam Bi, respondent 3, as to extinguish her equity of redemption. On behalf of the appellants it is contended that the possession of the heirs of Abdur Razak who were impleaded in the mortgage suit had been adverse to Mt. Imam Bi since the death of her father in 1888-89 and that in any case the plaintiffs' possession since 5th May 1894 when they obtained actual possession of the property in execution of the foreclosure decree passed in the mortgage suit became adverse to her so as to extinguish her right.

As to the period prior to 5th May 1894 the question of adverse possession does not appear to be material for the obvious reason that even if the possession of Mt. Abbas Bi and Abdul Rahim (Abdur Razak's heirs) is assumed to be adverse to Mt. Imam Bi their adverse possession would commence only on the death of Abdur Razak which occurred in 1888 or 1889 and could not extinguish Mt. Imam Bi's right in 1893 in which year the appellants filed their suit to enforce their mortgage (Civil Suit No. 47 of 1893). Mt. Imam Bi's right of redemption was then outstanding and she was a necessary party to the mortgage suit. As she was not impleaded in the suit the mortgage decree cannot obviously affect her rights: *see* Mulla's Civil Procedure Code, p. 983. That appears to me to be a proposition so plain as not to admit of any controversy. I however do not agree that the possession of Mt. Abbas Bi and Abdul Rahim was at its inception adverse. It is true that Mt. Imam Bi's name was not entered in the register of proprietary mutation but that would not necessarily show that the possession of the co-heirs was adverse to Mt. Imam Bi. Inasmuch as they entered into possession under a lawful title, *viz.* that of co-owners, their possession could not be treated as being adverse to Mt. Imam Bi: *see* 11 N L R 164.[1] Unless there is a proof of ouster or clear denial of title of Mt. Imam Bi the possession held by her co-heirs must be deemed to be on her behalf and for her benefit. No evidence has been pointed out to show ouster or denial of possession on the part of Abbas Bi and Abdul Rahim. It is pertinent to notice that the contention in its present form was not raised in any of the previous stages of this long drawn out litigation.

There survives the question whether the possession of the plaintiffs who claimed under the foreclosure decree passed in Civil Suit No. 47 of 1893 became adverse to Mt. Imam Bi (who was not impleaded in the mortgage suit) from 5th May 1894 when their possession began. The appellants' contention is that inasmuch as the plaintiffs entered into possession of the property foreclosed by them as absolute and exclusive owners their possession must be regarded as being adverse to Mt. Imam Bi who was not a party to the suit and that her right of redemption was extinguished in 1906 when the appellants completed their 12 years of adverse possession. In a case of this character it was always recognized that the possession of the mortgagee would not be adverse to any interest excluded from the mortgage suit, in view of the principle laid down by their Lordships of the Privy Council in 32 Cal 296[2] in these terms:

> Their Lordships are satisfied that the possession has been that of the mortgagees throughout, and the question at issue is exclusively one between mortgagor and mortgagee. As between them neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiesence by the mortgagor not amounting to a release of the equity of redemption will be a bar or defence to a suit for redemption if the parties are otherwise entitled to redeem.

It is however urged that a long series of recent decisions have deprived the aforesaid Privy Council decision of its authority. I have therefore to examine some of the important and typical cases cited on either side. It cannot be gainsaid that if a person

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1. ('15) 2 AIR 1915 Nag 125 : 31 I C 464 : 11 NLR 164, Dina v. Bishambhar Sing.
2. ('05) 32 Cal 296 : 32 I A 23 : 8 Sar 734 : 1 C L J 584 : 9 C W N 201 (P C), Khiarajmal v. Daim.

whose interest in the mortgaged property necessitates his joinder in the mortgage suit is not impleaded in it any decree whether for sale or foreclosure passed in the suit does not bind the person so excluded from the suit. That person would have clearly a right under Art. 148 of Sch. 1, Limitation Act of 1908 to redeem the property within 60 years. That right would no doubt be extinguished by the adverse possession on the part of the mortgagee. Whether mortgagee's possession becomes adverse or not depends upon the nature of the right which the mortgagee asserts while entering into possession of the mortgaged property. If he enters into possession pursuant to the rights acquired by him under the mortgage his possession will in my opinion not be adverse. It is only when he takes possession in assertion of a right independently of the mortgage that his possession will become adverse.

I have now to examine the various cases to see what were the facts of each case and on what principle the case was decided. 32 Cal 296[2] is understood to be the leading case. The facts of that case are somewhat complicated but the outline of the case may be stated in brief. It was a suit for redemption of two mortgages of 1878. After the execution of the mortgages the mortgaged property was sold in execution of the decree obtained by a person other than the mortgagee against some of the mortgagors. The property was purchased in execution by the son of one of the mortgagors and it was not disputed that he was a benamidar for the mortgagees. In one of the suits one of the mortgagors by name Naurez and in another suit Nabibaksh another mortgagor were not impleaded. The question arose whether the judicial sales affected the interest of Naurez and Nabibaksh. Their Lordships of the Privy Council at p. 312 observed that though the sales could not be treated as void the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record, and that as against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. That point was again emphasised at p. 315. In 47 ALL 73[3] it was laid down following 32 Cal 296[2] that :

> A person who lawfully comes into possession of land as a mortgagee cannot, by setting up during the continuance of such relation any title adverse to that of the mortgagor or inconsistent with the real legal relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession.

In this case Sakaldip Singh and Ghazi Mal had executed a mortgage in 1865 in favour of Naurang Singh and Ujagar Singh. In 1869 Sakaldip Singh, Subh Karan Singh and Prayag Singh executed a zar-i-peshgi mortgage for 10 years in favour of the same mortgagees. In 1870 Binda Singh executed a third mortgage in favour of the same mortgagees. All these mortgagors had joint interest in the property. In 1869 Sakaldip Singh and Prayag Singh sold their equity of redemption to Bhawani Din Singh, Thakur Prasad Singh and Diwan Singh and in 1872 Binda Singh sold his equity of redemption to the same persons. The representatives of Thakur Prasad Singh sued for redemption of half the properties sold by the above deeds of sale alleging that the interest of Bhawani Din Singh, the owner of the other half of the equity of redemption, had passed to Naurang Singh one of the mortgagees. It was found that the possession of the mortgagees Naurang Singh and Ujagar Singh and their representatives was not adverse to those mortgagors who had not joined in the sales of the equity of redemption. It was pointed out that so long as the right of redemption was outstanding it was not open to the mortgagees in possession to set up an adverse title.

In 34 ALL 213[4] one Amir Haidar had executed mortgages in 1885 and 1886. Thereafter he bequeathed his property to his four grandsons. In 1889, three of them who were majors acting on their own behalf and as guardian of the fourth, sold a part of the mortgaged property to the mortgagees in satisfaction of the mortgage. In 1892 or 1893 the fourth grandson attained majority and brought a suit to redeem his one-fourth share in the year 1905. It was held that the sale of 1889 did not bind the plaintiff and that the mortgagees' possession was not adverse. Their Lordships observed at p. 222 that unless the plaintiff's remedy is barred by the Limitation Act, 15 of 1877, he was entitled to the relief prayed for, namely, redemption of mortgage to the extent of his one-fourth share. In A I R 1930 Oudh 17[5] there was a mortgage by three brothers but

3. ('25) 12 A I R 1925 All 133 : 80 I C 935 : 47 All 73 : 22 A L J 905, Bakha Singh v. Ram Narain Singh.

4. ('12) 34 All 213 : 13 I C 976 : 39 I A 49 : 15 O C 49 : 9 A L J 215 (P C), Mata Din v. Ahmad Ali.

5. ('30) 17 A I R 1930 Oudh 17 : 118 I C 808, Mt. Gujrati Kunwar v. Bhagwatidin Singh.

the mortgaged property was sold by only one of them and there was no evidence that the other brothers consented to this sale. The mortgagees who purchased the equity of redemption from him were in possession when the other two brothers who did not join in the sale sued for redemption of the mortgage. It was held following 32 Cal 296[2] that the mortgagees' possession was not adverse.

In A I R 1940 Oudh 97[6] it was held that where there are several co-mortgagors and the entire equity of redemption in the mortgage is transferred to the mortgagee by some only of the co-mortgagors, the possession of the mortgagee as regards other co-mortgagors remains only that of a mortgagee, and that a suit by such co-mortgagors would be governed by Art. 148, Limitation Act. As against these cases are those on which reliance is placed on behalf of the appellants. In 4 Lah 249[7] it was laid down that a mortgagee can set up adverse possession, if his possession at its inception was that of a trespasser. The facts were that a mortgage was executed in 1880 by the father of the plaintiffs in that case. That mortgage was superseded by another mortgage in 1884 executed by the same mortgagor. The plaintiffs' father in 1888 sold the mortgaged property to the representatives of the mortgagee and delivered possession of it and mutation effected in their names in 1890. It turned out that the sale of 1890 was an unregistered one but it was admitted for the purpose of proving the nature of vendees' possession as showing that of trespasser's. It was held, a mortgagee could set up adverse possession if his possession at its inception was that of a trespasser.

In 16 Lah 12[8] it was on the facts of the case held that the possession of the mortgagees was adverse to the mortgagors as they had taken possession under a sale deed from the mortgagors and their entry into possession was not in their capacity as the mortgagors but as vendees. In that case one Fiaz Ali Khan had a half share in two properties known as Kothi Bagh and Serai and the remaining half belonged to his minor nephews. Kothi Bagh property was subject to a mortgage. In 1893 Fiaz Ali Khan purporting to act for himself, and as guardian of his minor nephews sold both these properties to the mortgagees who took possession of Kothi Bagh property which was mortgaged to them as well as of Serai which had not been mortgaged to them. In 1923 Fiaz Ali Khan's nephews sued the successor in interest of the purchasers of Kothi Bagh and Serai for possession of the properties. It was found that the possession of the purchasers was not attributable to their rights under the mortgage but to the right under the sale deed of 1893 and consequently their possession had become adverse.

In 44 Mad 253[9] the plaintiff's father and three others mortgaged some property in 1871. There was an arrangement between the mortgagors and mortgagees in 1885 whereby the mortgage was discharged but that arrangement was by an oral transaction and not by a registered document. It was held following 43 Mad 244[10] that the possession of the mortgagees though began under an invalid arrangement was adverse to the mortgagors. In 53 Bom 676[11] there was a mortgage executed in 1870 which was followed by sale of the mortgaged property to the mortgagees in 1882. The sale was invalid under S. 9, Khoti Act, and in a previous litigation it was held that the mortgagees' possession had become adverse from the date of the invalid sale. In 50 ALL 986[12] there was a usufructuary mortgage with possession in 1873 which was followed in 1901 by the sale of the mortgaged property by the mortgagors to the mortgagees. In a suit for redemption by the representatives of the mortgagors it was held that the mortgagees' possession became adverse since 1901 when the parties by a common agreement put an end to the mortgagees' estate.

On analysis of the two lines of cases examined above the principle underlying the decisions becomes apparent. When there is a single mortgagor and he voluntarily assigns his equity of redemption to the mortgagee, he thereby intends to extinguish the mortgage and consequently the mortgagee's possession, being that of an owner, would be

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6. ('40) 27 A I R 1940 Oudh 97 : 185 I C 114 : 15 Luck 175 : 1939 O W N 1045, Kishen Gopal v. Abdul Latif.
7. ('23) 10 A I R 1923 Lah 495 : 73 I C 889 : 4 Lah 249, Qadar Bakhsh v. Mangha Mal.
8. ('34) 21 A I R 1934 Lah 902 : 154 I C 243 : 16 Lah 12 : 37 P L R 412, Nizam Din Khan v. Zulfikar Ali Khan.
9. ('21) 8 A I R 1921 Mad 82 : 62 I C 603 : 44 Mad 253 : 40 M L J 105, Kandasami Pillai v. Chinnabba.
10. ('19) 6 A I R 1919 P C 44 : 53 I C 901 : 43 Mad 244 : 46 I A 285 (P C), Varada Pillai v. Jeevarathnammal.
11. ('30) 17 A I R 1930 Bom 135 : 122 I C 113 : 53 Bom 676 : 31 Bom L R 778, Sheikh Ahmed v. Babu Devji.
12. ('28) 15 A I R 1928 All 726 : 118 I C 177 : 50 All 986 : 26 A L J 1084 (F B), Sohan Lal v. Mohan Lal.

adverse to the mortgagor. The same result would follow in case of several joint mortgagors transferring their equity of redemption to the mortgagee as well as in a case of some (one or more) of the mortgagors assigning their equity of redemption to the mortgagee in a manner binding on the other joint mortgagor or mortgagors. That is because the equity of redemption having coalesced with security, the mortgage itself comes to an end. The transferee's possession would be adverse even whether the assignment or transfer of equity of redemption is valid or invalid in form (e. g., by an unregistered instrument). In all these cases the mortgagee does not enter into possession under colour of mortgage or by working out his rights under the mortgage. His possession, originating as it does, independently of the mortgage cannot be regarded as a derivative or permissive possession. Among the cases reviewed above there is no doubt a conflict between 34 ALL 213[4] and 16 Lah 12,[8] but that is in my opinion more apparent than real. In the former case, the sale of the equity of redemption by three co-heirs was held to be not binding on the 4th co-heir. At p. 222 of 34 ALL 213[4] their Lordships of the Privy Council make it clear that there was no acquiescence on the part of that co-heir in the assignment of the equity of redemption. In the Lahore case, the sale by Faiz Ali Khan was found to be binding on his nephews. The result was that while in the one case the mortgage was not extinguished vis-a-vis the 4th co-heir, it was wholly wiped out in the Lahore case.

A mortgagee who obtains a decree for foreclosure on the basis of his mortgage comes into possession of the mortgaged property on the basis of his mortgage. His possession, in so far as it affects the party excluded from the mortgage suit, would be that of a mortgagee, for the obvious reason that the foreclosure decree does not destroy his equity of redemption. If the possession of the mortgagee obtained under a decree which is not binding on a party excluded from the suit is treated as being adverse to the excluded party it would lead to manifestly unreasonable result, for in every such case, the 60 years period of limitation available by law for the exercise of the right of redemption would for no fault of the party be reduced to 12 years. Under the law it is the duty of the mortgagee to implead all persons entitled to claim redemption and he cannot urge his own default as an excuse for curtailing and eventually extinguishing their right. For these reasons, I cannot accede to the appellants' contention that the appellants' possession became adverse. The result is that the appeal fails and is dismissed with costs.

W.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Nagpur 145

GRILLE J.

Abdul Gafoor and others — Appellants

v.

Emperor.

Criminal Appeals Nos. 42 and 43 of 1940, Decided on 27th July 1940, from order of First Class Magistrate, Buldana, D/- 2nd January 1940.

(a) Evidence Act (1872), S. 30 — Evidence against accused lacking requisite volume and certainty — Self-inculpatory confession by co-accused implicating accused can be used against latter.

Section 30 postulates that a self-inculpatory confession by a co-accused can be used against the accused where the evidence afforded against him—and some such evidence there must be—lacks the requisite volume and certainty to insure conviction. [P 149 C 1]

An information was given to the police that certain persons including the accused were to participate in a dacoity on a certain night and when late at night they were found to be away from their houses and a guard was kept by the police on their houses, they were found attempting to return to them at 3 o'clock in the morning and gave explanations of their absence which were unacceptable:

Held that the facts raised a very strong suspicion against the accused and that suspicion was confirmed and made certain by the confessions of their accomplices, confessions in which the accomplices did not exclude their own share in the dacoity : A I R 1930 Nag 242 (F B), *Ref.* [P 149 C 1]

(b) Criminal trial—Confession — Confession retracted — It does not follow that confession is untrue or was involuntary — Retracted confession should be used with caution and when true can be used against other co-accused.

It is wrong to say that when a confession is retracted it has no value at all as against the co-accused. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary and the truth or voluntariness of a confession operates equally, such a confession being self inculpatory in respect of the person who made it and the person implicated therein. Such retracted confessions must be used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true they may be taken into consideration in connexion with the evidence appearing in the case whether they are retracted or no : A I R 1934 Cal 853, *Not approved*; 28 Cal 689 and 38 Cal 559, *Expl., and Approved.* [P 149 C 2; P 150 C 1]

(c) Criminal trial — Confession — Confession retracted in respect of its voluntariness — No express denial of its truth—Court is not absolved

from examining truth of confession and considering whether it can be taken into account along with other evidence.

The fact that the retractions of a confession are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance does not absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence. [P 150 C 1]

(d) Penal Code (1860), S. 395 — Dacoity not accompanied by particular violence or brutality — Maximum sentence under S. 395 is not necessary.

In a case where the dacoity is not accompanied by any particular violence or brutality, the maximum sentence permitted by S. 395 is not necessary. [P 152 C 1]

M. Y. Shareef — for Appellants.

Y. S. Tambe — for the Crown.

Judgment. — This appeal is by seven persons and Criminal Appeal No. 43 of 1940 by one Ganpatsingh. All these eight persons have been convicted of dacoity and all have been sentenced in the aggregate to ten years' rigorous imprisonment each. Three dacoities are said to have been committed in the course of one night at the same village and all the appellants have been sentenced to six years rigorous imprisonment for the first dacoity, to two years for the second and to two years for the third. The fact that there are two appeals arises as Ganpatsingh claimed that he accompanied the other persons on instructions of the police and was in fact a police informant, and that consequently he should not have been convicted at all. His appeal has been separately argued, but this judgment will cover both appeals. The dacoity took place on the night of 16th August at the village of Pangri which is about four miles from Fattekherda, the nearest police station. Of the accused Abdul Gafoor, Syed Usman, Sheikh Hussein, Syed Miroo and Ramsingh are inhabitants of Fattekherda. Umarkhan is a resident of Pangri, and Sherali was temporarily staying at Pangri. Ganpatsingh is an inhabitant of Fattekherda. The raid on the village which occurred during a drizzling August night began at about 10 in the evening and lasted for about two hours.

The village is a small one of about 30 houses. The first house to be visited was that of Sawalaram (P. W. 30). The raid was conducted with very considerable noise so as to terrify the rest of the villagers, and corrugated iron roofs were beaten with sticks and stones thrown. Sawalaram was caught by two of the assailants and beaten with sticks and was told to hand over Rs. 1100 which he was said to have with him. He denied that he had any money. He was dragged out of his house and the assailants searched the house. His mother Mt. Ahelabai, who had been sleeping near him, called out to a servant, Hariba, to open the main door of the house; this was by way of precaution. This man did so and was beaten. The main part of the house was then ransacked, boxes were burst open, but nothing was found, and the dacoits eventually left the house taking with them no more than Rs. 25. The next house visited was that of Balwanta (P. W. 11) which was near by. Balwanta and the other inmates of his house had already fled, having heard the uproar at Sawalaram's. No details of the actual ransacking of this house are available, but when Balwanta returned after the dacoits had left the village, boxes were found broken open, clothes and papers littered on the floor, and silver ornaments were missing. After this the dacoits came back to the house of Bhiwaji (P. W. 6), which is next door to Sawalaram's. Bhiwaji fled to the Mahar quarter of the village, and when he came back he found a similar state of things to that which had prevailed in Balwanta's house. Silver ornaments were missing and money had been stolen. After that the house of Kachra is said to have been attacked, but this is not included in the charges in this case.

In the course of the events of this night the victims profess to have recognized five of the assailants. Sawalaram and his mother both recognized Abdul Gafoor as did Bhiwaji and Balwanta, although the latter says that he recognized him by his voice alone when a question was put by him to Umarkhan whom also he recognized by his voice. Umarkhan was also recognized by Sawalaram and his mother, and both profess to have seen him. They also speak to recognizing Sherali who was on a visit to their village, and in addition Sawalaram recognizes Ramsingh whom he identifies as wearing a gunny bag by way of a hood to keep off the rain, and Mt. Ahelabai identifies Sheikh Hussein, who is identified by no one else, as a man who was making a noise by beating the corrugated iron roof with his lathi. Syed Usman, Syed Miroo and Ganpatsingh were at no time identified in the village. The general concensus of the witnesses is that the raiding party numbered about nine. The village patel after the dacoits had departed made a hurried enquiry. Sawalaram who had been severely

beaten was unable to give any details at the time, and Gyanu Mahar, the village kamdar, left at 3 o'clock in the morning to report at the Fattekherda police station. He reached there at 4 in the morning and made his report. He found a crowd outside the police station and sat at Fattekherda till 1 o'clock as the police told him that he was wanted to help to carry the Sub-Inspector's luggage to Pangri when the latter proceeded to go for investigation. The crowd was as a matter of fact occasioned by the fact that the police had already arrested four men before Gyanu arrived to make his report of the dacoity, and although it has been strongly contended by the learned counsel for the seven appellants that Gyanu must have been fully aware of the identity of these people and that it was because he was so aware that the written report that he made at the dictation of the victims when he returned to Fattekherda was influenced by this knowledge, it is strange that not a single question was asked him in cross-examination to elicit from him that he knew who the people who had been arrested were or even that he knew that anyone had been arrested in respect of the dacoity.

The police at Fattekherda were not unaware that a dacoity was about to be committed although they were unaware of the locality where it was to take place. The station-house officer at the time was Sub-Inspector Pitale (P. W. 1), and he had received information on 13th August and on 15th August that some Rohillas and Bundelas of Fattekherda were planning a dacoity. Both these rumours had turned out to be false, and when he was warned again on 16th August at 9 P. M., he decided to verify the statement of his informant Lalsingh (P. W. 5) who is a brother of Ganpatsingh and who had brought Ganpatsingh, who, he says, was his own informant, to the police station that night to impress on the authorities the genuineness of his information. The Sub-Inspector accordingly visited the houses of certain people as they were suspicious characters, and he found that four of them were absent, namely Ramsingh (also Chainsingh who lives next door but who does not appear in the proceedings), Syed Miroo, Abdul Gafoor and Syed Usman. He sent for additional police constables and called out choukidars and other people and set posts round these houses. Towards 3 o'clock in the morning all these four persons were captured on the way back to their houses. Abdul Gafoor was accosted outside his own house, but ran away and was apprehended in his bagicha about a furlong away and captured after some resistance. Syed Usman was met near the baithak of Rohillas and claimed that although he was a married man with a family, he had been sleeping in the baithak and had gone out to ease himself and was returning. Ramsingh was met near his own house and said that he had come back from his field. He gives the time as before midnight.

The circumstances of the apprehension of Syed Miroo are somewhat different. When the other people were caught, there was a considerable noise, and the party watching Syed Miroo's house ran back to the police station thinking that their man had been caught. The others had, but not Syed Miroo, and consequently a constable was ordered to go back to Syed Miroo's house. A call was then made at the house and a reply was given that Syed Miroo was not there. The party waited and after some time they heard a thud on the earth as of someone jumping over a compound wall. They then heard a cough, they repeated the challenge and Syed Miroo came out of the house. I give these details in view of the apparent discrepancy which arises from the evidence of the police constable concerned, Mahomed Subhan, when he states that after arresting Ramsingh he was ordered to go to Miroo's house, when according to the Sub-Inspector a guard had already been posted there. It is thus clear that four of the people brought before the Court were actually arrested before any news of the dacoity had reached the police officers. The remaining three appellants and also Ganpatsingh were arrested on later days.

Some of the stolen property has been recovered from some of the accused. The fact that the dacoity did occur has not been disputed, neither has the identification of the articles recovered as being the property of those who suffered in the dacoities; all that is disputed is the identity of the raiders and their identification by the victims. Property was recovered from Sheikh Hussein, Sherali and Umarkhan in circumstances which make their participation in the dacoity — and it may be noted that they were all identified—positive. An ornament was also recovered from Ganpatsingh, and this I will deal with later. In addition, Sheikh Hussein, Umarkhan and Sherali all made detailed confessions which implicated all of the accused. These confessions were in no way self-exculpatory and tallied in a remarkable

degree in wealth of detail. All these three confessions were retracted in the Court of Session. There was also a confession recorded as such, although Ganpatsingh countered the statement, by Ganpatsingh. This may be left out of account as in the circumstances of Ganpatsingh's connexion with the affair the learned counsel appearing for the Crown has very rightly conceded the position contended for by the learned counsel for the appellants that Ganpatsingh's statement cannot be taken into evidence as against them. An attempt was made to argue that no evidence concerning the recovery of the property based on S. 27, Evidence Act, was admissible in view of the Privy Council ruling in A I R 1939 P C 47.[1] It was pointed out to the learned counsel that no fewer than four Judges of this Court including myself have recently held contrary to the interpretation that the learned counsel wished to put on this ruling, and consequently the argument was not pressed.

On the question of the identification principal stress is laid on the fact that the victims mentioned no names until the following afternoon when the Sub-Inspector arrived in the village and written complaints were taken from them which were written out by Gyanu. It is contended that by that time Gyanu must have known the names of the persons who had been arrested and had detailed these to the victims. This argument, however, is based only on supposition, and admittedly there is no evidence whatever to support it, and if it were true and all these identifications were false and prompted by the police and the kamdar, one would have expected the identifications to have included Syed Usman and Syed Miroo who had been arrested as well as those of Abdul Gafoor and Ramsingh. There is, however, no mention of these two persons. Included by name in the written report is also Umarkhan of whom the police knew nothing up to that time, and one of the names mentioned is of a man who was not arrested. This militates against police tutoring. One of the minor details which form the grounds of attack is that Bhiwaji stated that he was so afraid that he went to the Mahar part of the village and hid in Gyanu's house and that therefore he could not have been able to identify Gafoor, whom he says he did, and one Sabjalkhan whom he mentioned in his report, (Ex. P-27). It is clear, however, from his evidence that he is referring to different times. When Sawalaram's house was attacked, he hid near by and identified Gafoor. When the assailants entered his own house, which was the third, Sawalaram's house being the first, it was then that he ran to the Maharpura. There is thus no inconsistency.

The only other point is that Hariba, Sawalaram's servant, who was told to open the door and who was himself beaten, stated in cross-examination that when everything was over, he met his master again who told him that he was struck by thieves but could not recognize them, and that his wife and mother had said the same. It is not very difficult to elicit answers of this kind in cross-examination in the case of villagers like Hariba, and on the evidence of the patel it is apparent that Sawalaram was in no fit condition to give details before Gyanu was sent in to make the preliminary report. I consider that the evidence of identification is acceptable and true, and had there been any tutoring or embellishment on the part of the police, a much more perfect case would have been made out, particularly in respect of two of the accused who had already been arrested and against whom the evidence is less than against the others, namely Syed Usman and Syed Miroo. The evidence against the five people, Abdul Gafoor, Sheikh Hussein, Ramsingh, Umarkhan and Sherali is convincing. All have been identified as participating in the dacoity, property was recovered from three of them, and of those from whom property was not recovered Ramsingh was actually wearing a gunny bag over his head when arrested at 3 o'clock in the morning, and he was dressed like this when identified by Sawalaram; and Abdul Gafoor has been identified by all three victims. In respect of the remaining accused their conviction is dependant on whether the only substantive evidence against them, namely the circumstances of their arrest before the fact that any dacoity had actually been committed was known, can be supported by the confessions of their three co-accused, Sheikh Hussein, Umarkhan and Sherali. A reference has naturally been made to the Full Bench decision in the Judicial Commissioner's Court, Nagpur, in 26 N L R 229,[2] and reliance is placed on the judgment epitomized in the headnote, which runs :

The self-inculpatory confession of an accused implicating his co-accused is not a fact upon which

1. ('39) 26 A I R 1939 P C 47 : 180 I C 1 : 40 Cr L J 864 : 18 Pat 234 : I L R (1939) Kar PC 123 : 66 I A 66 (PC), Narayana Swami v. Emperor.

2. ('30)17 AIR 1930 Nag 242: 125 IC 673: 31 CrLJ 881: 26 NLR 229 (FB), Gobarya v. Emperor.

alone the conviction of his co-accused can legally be based. It cannot be said that such a confession, corroborated by other evidence, forms a legal basis for his conviction; for it is not permissible to start with the confession and proceed to enquire how far it receives corroboration from other evidence on record. Where there is other relevant matter implicating the co-accused, the course which the Judge is permitted by S. 30, Evidence Act, to take is to consider the confession along with the said matter and decide after such consideration whether or not conviction is justified.

The problem of course resolves itself into the question of fact whether the evidence against Syed Miroo and Syed Usman is sufficient to form a basis for conviction which would warrant the Court in taking the material appearing in the self-inculpatory confessions of Sheikh Hussein, Umarkhan and Sherali into account against the non-confessing accused therein implicated. Here we have the fact that information was given to the police that certain persons including the two accused Syed Miroo and Syed Usman were to participate in a dacoity that night, and when late at night they were found to be away from their houses and a guard was kept on their houses, they were found attempting to return to them at 3 o'clock in the morning and gave explanations of their absence which were unacceptable. It is urged that this is not enough to form a basis for a conviction and that it is possible that they may have been absent for purposes which they have not chosen to disclose and that these circumstances do not necessarily implicate them in the dacoity which took place. My considered opinion is that the circumstances do form a sufficient basis. Were a stronger basis required connecting them with the dacoity, a basis on which conviction itself would be permissible, then there would be no need of corroboration, or, to use the words of S. 30, Evidence Act, "of taking such confession into consideration," and the provisions of S. 30, Evidence Act, would be rendered otiose. The very existence of this provision postulates that it may be used in cases where the evidence afforded — and some such evidence there must be — lacks the requisite volume and certainty to insure conviction. The facts which have been proved, excluding what appears in the confessions raises a very strong suspicion against these two persons, and that suspicion has been confirmed and made certain by the confessions of their accomplices, confessions in which the accomplices do not exclude their own share in the dacoity.

Next it is urged that these confessions lose their entire force as against these two accused Syed Miroo and Syed Usman because they have been retracted, and the authority given for this proposition is a decision of the Calcutta High Court in 62 Cal 312.[3] In that case the conviction in a jury trial was set aside because inter alia the trying Judge did not in his charge to the jury inform them that when a confession is retracted, it has no value at all as against the co-accused. With the greatest respect I am unable to agree with this exposition of the law. The retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary, and the truth or voluntariness of a confession operates equally —such a confession being self-inculpatory— in respect of the person who made it and the person implicated therein. The extent to which such a confession operates against another person therein implicated has been discussed in the preceding paragraph. I can see no reason at all to hold that merely because these confessions have been retracted in the Court of Session, they were involuntarily made. The motive for making a self-inculpatory confession (and there is no question that all these three confessions are entirely self-inculpatory) is the very simple one of an expectation of leniency in the matter of sentence, and where a number of people are jointly tried and some have confessed to a Magistrate before the trial and some have not, it is again not unnatural that persons who have made confessions should retract them under pressure and persuasion by their fellows who have not confessed. There is of course ample opportunity for this while parties are under-trial prisoners, and there is nothing to support the statements made by two of these three confessing accused that the confessions were the result of police torture; that indeed is the common reason given and, barring the reason that they had changed their minds and thought better of it and were no longer trying to save their own skins, is the only reason for retracting which the confessing accused could possibly give. I am satisfied that these confessions were voluntary and that a mere allegation to the contrary raises no inherent probability that the confessions were not voluntarily made.

3. ('34) 21 AIR 1934 Cal 853 : 154 I C 273 : 36 Cr L J 485 : 62 Cal 312 : 39 C W N 27, Kashimuddin v. Emperor.

It must then be seen whether the confessions are true. In 62 Cal 312[3] the learned Judges referred in support of the proposition there enunciated to the decision in 38 Cal 559.[4] In that case Jenkins C. J. stated that to place any reliance on retracted confessions against a co-accused would be most unsafe, and referred to 28 Cal 689.[5] But a perusal of the following paragraphs will indicate that the learned Chief Justice disregarded the confessions implicating the co-accused because on examination they were found to be false, and in 28 Cal 689[5] it was not laid down as was laid down in 62 Cal 312[3] that such a confession has no value at all against the co-accused, but only that it should carry practically no weight, which dictum was somewhat modified by the subsequent remark that a very full corroboration would be necessary in such a case.

Now, no doubt when a confession is retracted and the truth of it denied, the person retracting has lied on one occasion or the other, and although in the case before me the retractions are merely in respect of the voluntariness of the statements and there is no express denial of the fact that the confessions were true in substance, it must be presumed that if these accused had been asked by the Magistrate, as they should have been, whether the confessions were false in substance or no, they would have replied in the affirmative. This does not, in my opinion, absolve the Court from examining the question whether the confessions are in fact true or not and, if true, whether they can be taken into consideration along with the other evidence. In the case before me the confessions are given with a wealth of detail in each case, and mutual corroboration which can leave no doubt at all as to their truth. It is to be noted that neither in 28 Cal 689[5] nor in 38 Cal 559[4] is it laid down that no weight at all is to be given to such retracted confessions. I am in respectful agreement with the proposition that such retracted confessions must be used with caution, but when it is possible to come to the conclusion that the confessions cannot be otherwise than true, I consider that they may be taken into consideration in connexion with the evidence appearing in the case, whether they are retracted or no.

In the present case all the three confessions agree as to the distribution of the booty which in the case of property other than cash was so inconsiderable that single ornaments had to be shared by the participants in the dacoity in pairs, and the distribution agrees in each case. There are differences in the confessions in respect of statements as to which persons entered which house in the four visits and the irruptions made into the houses that night, that is, discrepancies which are really no more than omissions except in the case of statements of the people who caught hold of Sawalaram, which bear the mark of truth and honesty and individual and uncollaboratory narrative, and police tutoring would not attempt to produce such detailed narrative on unessential points. On the one point on which they ought to be clear and in agreement and on which agreement is to be expected, namely the division of the spoils, they are in agreement. Where the confessions inspired by the police, the police would have taken care to see that there was equal and meticulous agreement on the question of who were the persons who actually caught hold of Sawalaram when his house was invaded. The result is that I am satisfied that the confessions are true, that they were voluntarily made and that they can be taken into consideration against the accused Syed Miroo and Syed Usman.

Ganpatsingh's case is a peculiar one. There is no doubt that he was the informant who warned the police as the result of which the houses of all the accused who have been arrested, residing in the village, except Sheikh Hussein were watched and their arrests effected. It is also clear that he was told to accompany the dacoits and when he protested against this was told sharply to obey orders and to report at the station house the next morning. The learned Magistrate has found that he betrayed his trust to the extent of retaining some of the stolen property in consequence of which he was arrested, and he has been given the sentence of ten years' rigorous imprisonment as if he had wholeheartedly participated in the dacoity with the others. I am of opinion that Ganpatsingh has been the victim of circumstances in that the Sub-Inspector Pitale who was in charge of the station house and to whom information was given, and at whose orders he accompanied the dacoits, was transferred during the early stages of the investigation. He admits that he was given an ornament which was subsequently recovered from him, and his story is that after the return of the expedition and the booty had

4. ('11) 38 Cal 559 : 10 I C 582 : 15 C W N 593 : 12 Cr L J 286, Emperor v. Lalit Mohan.
5. ('01) 28 Cal 689 : 5 C W N 670, Yasin v. King-Emperor.

been divided he went to the station house but did not find the Sub-Inspector there, so went to his own house, and when sent for the next morning said that he would come later as he was dressing a wound which he had received from a stone during the dacoity. He was then brought to the station house and had left behind the money and the ornament in his own house as he was on his way back from easing himself when the constable met him, and he then related the whole story to the Sub-Inspector. This would be on the morning of the 17th. He was then ill for a day or two, and when he went to the station house again, the Sub-Inspector was not there, a change in officers having taken place. He said he would relate everything to the previous Sub-Inspector, Mr. Pitale. He handed over the money which he had received to the new Sub-Inspector Desasingh, but not the kadola, as in his peculiar position of an informer he did not trust a new man. After he was arrested he had the kadola handed over by his daughter. Now, a good deal of this is confirmed by the prosecution witnesses.

Sub-Inspector Pitale did not investigate the case beyond 20th August and admits directing Ganpatsingh to accompany the dacoits. He admits seeing Ganpatsingh on the following day, namely 17th August, and Ganpatsingh stated to him that he would produce his portion of the stolen property, that is to say, that the police were aware on the next day that their informer had stolen property with him, which would appear to make any deliberate concealment on his part useless. The Sub-Inspector says that he instructed the station-house moharir, Ramsing, to seize the property from Ganpatsingh and also says in cross-examination that he saw Ganpatsingh on the after-noon of the 17th as he was going off to investigate and directed him to hand over the property, if any, to the thana moharir. This phrase, "if any," does not seem to agree with what he stated in cross-examination where he implies that Ganpatsingh had admitted that he had property, and Ramsingh, the moharir, also gives a slightly different version where he states that the station house officer's orders to him were that any property which might be produced by Ganpatsingh should be seized and that as Ganpatsingh did not produce any property he did not do anything more about it. This last portion of the evidence appears to me an excuse for not having recovered the property earlier when they were aware of its existence. Desasingh, the relieving Sub-Inspector, is P. W. 4, and he received orders to take over the investigation on 19th August and he began investigation the following day. He at once began with questioning Ganpatsingh, and after the latter had handed over the money he searched Ganpatsingh's house and arrested him the same day. This was before he had any communication with Sub-Inspector Pitale, from whom he took over, at the scene of the dacoity. On the 25th at Mehkar, Ganpatsingh agreed to produce the property, and they went to his house where the property was produced. The Sub-Inspector Desasingh says he was aware from the thana record that Ganpatsingh was the informer in the case and he arrested him because he had agreed to produce the money and had an injury to his forehead. He admits that Ganpatsingh immediately claimed to be an informer and that he had done what he had under the instructions of Sub-Inspector Pitale; yet he does not remember asking Pitale about this when he met him the next day at Pangri. Neither does he remember if Ganpatsingh's brother Lalsingh (P. W. 5) requested that Sub-Inspector Pitale should be sent for before Ganpatsingh was arrested. He arrested him on his own initiative without consulting his predecessor.

Now, what has weighed heavily with the learned Magistrate in convicting Ganpatsingh is the fact that the kadola was not recovered from him until a week later. It is of course quite possible that owing to the change of Sub-Inspectors, Ganpatsingh might have been under the impression that the new Sub-Inspector would not be aware that he had already told Pitale that he had an ornament in his possession and that he might be left in undisturbed possession of it. On the other hand, it is equally probable that Ganpatsingh, a police informer, who as such leads a precarious existence at the best of times, might well have distrusted a newcomer and considered that he would be endangering himself if he owned that he possessed part of the proceeds of the dacoity without being satisfied that the new Sub-Inspector knew that his predecessor had ordered him to accompany the dacoits, and I think the statement of his brother Lalsingh (P. W. 5) in cross examination to the effect that in the Mehkar lock-up he met Ganpatsingh and said "You are not a thief. You were sent by Pitale. If there is any property with you, give it up," and that Ganpatsingh said "I was sent by Pitale. I cannot trust the other police officers" is true

and reasonable. I think it probable that if there had not been this change of controlling officers at the beginning of the investigation, Ganpatsingh would not have been arrested at all. It is admitted by the learned counsel who appears for the Crown that at the most he can only press in respect of Ganpatsingh for a conviction under S. 411, I. P. C. Admittedly Ganpatsingh went with the dacoits in the capacity of a spy, and apparently an unwilling one, as he considered he had done his duty sufficiently to the police in giving the names of the people who were going to commit the dacoity. Having gone with them, he could not without awakening suspicion have declined to receive any share in the booty. It is also apparent that he admitted possession of his share on the following morning. I consider he should be given the benefit of the doubt and acquitted. He is accordingly acquitted and I direct that he be set at liberty forthwith.

There now remains the question of sentence on the other accused. The learned Magistrate appears to have adopted a somewhat unusual principle. He has sentenced the accused to six years rigorous imprisonment on account of the entry into the house of Sawalaram and two years rigorous imprisonment each for the entry into the other houses and directed that the sentences shall run consecutively, making the aggregate to ten years which is the maximum penalty for the offence. The offence so far as Sawalaram's house is concerned does not appear to be any more heinous than that of the entry into the other houses, and it is difficult to see any other reason for this allotment than that the Magistrate desired to pass the maximum sentence and was unable to divide it by three. Further I do not consider that this is a case in which the passing of the maximum sentence permitted by S. 395, I. P. C., was necessary. The dacoity was not accompanied by any particular violence or brutality. The sentences are reduced to five years rigorous imprisonment in each case.

G.N./R.K. *Order accordingly.*

A. I. R. 1941 Nagpur 152

VIVIAN BOSE J.

Nathmal Mathuradas Chandak — *Appellant*

v.

Balkrishna Gangabisan Marwadi — *Respondent.*

Misc. Appeal No. 140 of 1937, Decided on 20th September 1938, from order of 1st Addl. District Judge, Wardha, D/- 13th January 1937.

(a) Res judicata—Order on execution application to be res judicata on point whether it is "in accordance with law" must be made on merits — Order being ambiguous to be construed in applicant's favour—Order held not res judicata.

If there is a previous order of the Court operating as res judicata which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be reagitated at a subsequent stage of the execution. But before an order can operate as res judicata, it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground then there is no decision on the merits and when there is no decision on the merits, there is of course no res judicata. If it is ambiguous whether an order is on merits, then the ambiguity must be construed in favour of the person against whom the order is made. Hence an order "decree-holder absent. Application incorrect. He be awaited for 2nd November 1933," or a subsequent order "decree-holder absent. He has not yet turned up as yet though he was awaited till today. Application is therefore rejected with cost" will not operate as res judicata. [P 153 C 2; P 154 C 1]

(b) Civil P. C. (1908), O. 21, R. 11 (2) (b)—Order not specifying addresses of judgment-debtors is in accordance with law.

All that O. 21, R. 11 (2) (b) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. An application not specifying addresses of judgment-debtors is, therefore, in accordance with law. [P 154 C 1]

(c) Civil P. C. (1908), O. 21, R. 11 (2) (h) — Execution application showing costs slightly less than those awarded is in accordance with law.

If the decree-holder asks for more costs than are actually due to him, that might be another matter, but when he asks for something less, and the difference is of a trivial character, it cannot be held that the application is so vitiated as to be incapable of execution at all. [P 154 C 2]

(d) Civil P. C. (1908), O. 21, R. 11 (2) (e) — Application not specifying date of payment is in accordance with law.

All that O. 21, R. 11, sub-cl. (e) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore application not specifying such dates is in accordance with law. [P 154 C 2]

(e) Civil P. C. (1908), O. 21, Rr. 11 (2) (j), 12 and 13 — Application not showing particulars of moveables to be attached is in accordance with law.

Order 21, R. 11 (2) (j) states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the moveables of the judgment-debtor. It is clear from O. 21, Rr. 11 and 12 that the Code has drawn a distinction between moveables in the possession of the judgment-debtor and moveables belonging to him but not in his possession and immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of moveables when they are in the possession of the judgment-debtor, it is im-

possible to state that an application which does just what the Code requires is not in accordance with law. An application which does not specify particulars of moveable to be attached is, therefore, in accordance with law. [P 155 C 1]

(f) Civil P. C. (1908), S. 100 — Objection that execution application is fraudulent, not raised in first two Courts, must be disallowed in High Court.

An objection raised, in High Court but not raised in either of the Courts below to the effect that the present application for execution is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court must be disallowed. [P 155 C 1]

(g) Civil P. C. (1908), S. 100 — Objection that execution application was defective as not mentioning previous application must be disallowed to be raised for first time in second appeal.

An objection taken in High Court but not taken in the Courts below, namely that the present application for execution is defective in that it does not refer to the previous application and also does not mention the results of the previous application to which it refers must be disallowed. [P 155 C 1, 2]

M. R. Indurkar — for Appellant.

A. V. Khare, W. B. Pendharkar, S. P. Gole and K. P. Vaidya — for Respondent.

Order.—The main question here is whether the execution application, dated 14th March 1936, out of which this appeal arises, is within time. That depends upon the construction to be placed upon a previous application, dated 25th October 1933 and upon the two orders, dated 28th October 1933 and 2nd November 1933 passed on it. The first Court held that the application of 25th October 1933 was an application for execution made in accordance with law and that consequently the present application was within time. The lower appellate Court reversed this finding and came to the conclusion that the previous application was not in accordance with law because it did not mention either the place of residence of the judgment-debtor or the correct amount of costs due in execution. Consequently it has thrown out the present application and the decree-holder appeals.

Now I do not think there can be much doubt about the law. Under Art. 182, Limitation Act, an execution application is within time if it is filed within three years from the date of a previous application "made in accordance with law" to the proper Court or within three years of the date of the final order passed on such an application. The question then is whether the application of 25th October 1933 was "made in accordance with law." It has been decided in 31 N L R 126[1] that a liberal construction must be placed upon Art. 182 (5), Limitation Act. The objection of limitation is at all times a technical one and there is no reason why a Court of justice should endeavour to throw out a just claim unless the judgment-debtor can bring himself strictly within the four corners of the technicality upon which he relies. If he is technical, then there is no reason why he should not be met with technicality. Of course, if there is a previous order of the Court operating as res judicata which holds that the application under consideration was not made in accordance with law, then clearly that matter cannot be reagitated at a subsequent stage of the execution. But, before an order can operate as res judicata in the present circumstances, it must clearly decide that the application in question was not in accordance with law. If it merely rejects or dismisses the application on some other ground as, for instance, the non-appearance of the decree-holder, then there is no decision on the merits and when there is no decision on the merits, there is of course no res judicata. This has been decided by a Full Bench of the Judicial Commissioner's Court in 28 N L R 7[2] and also by a single Judge in 31 N L R 333.[3] Therefore what I have to see is whether there was a decision on the merits in respect of the application of 25th October 1933.

The first order passed in connexion with that application is dated 28th October 1933 and is to this effect: "Decree-holder absent. Application incorrect. He be awaited for 2nd November 1933." There is clearly no decision in this order. All it states is that the application is incorrect and therefore the decree-holder be awaited, that is to say, the Judge did not decide the question but made up his mind to await the explanation of the decree-holder and to withhold his decision until he had heard what he had to say. That order therefore clearly does not operate as res judicata in respect of this matter. The next order is dated 2nd November 1933 and is in these terms :

> Decree-holder absent. He has not yet turned up as yet though he was awaited till to-day. Application is therefore rejected with cost.

Here it is clear that the learned Judge has not rejected the application because it was not in accordance with law or because it was incorrect but because though he waited for the decree-dolder to turn up, he did not do so. That is to say the application

1. ('35) 22 AIR 1935 Nag 1: 153 I C 955: 31 N L R 126, Pilwasao v. Mt. Khairunnissa.

2. ('31) 18 A I R 1931 Nag 154 : 134 I C 681 : 28 N L R 7 (F B), Gulamali v. Rajkumar.

3. ('35) 22 A I R 1935 Nag 131 : 156 I C 114 : 31 N L R 333, Hanumanlala v. Sheonarayan.

was dismissed in default. It is unnecessary for me to decide whether a Judge in execution has power to dismiss an application in default or not. What I have to consider at the moment is whether there was a decision on the merits. It is clear from that order that there was not, and consequently it cannot operate as res judicata on this point. At the outside, all that can be urged in connexion with the order of 2nd November 1933 is that it was ambiguous but if that is so, then the ambiguity must be construed in favour of the person against whom the order is made. It would be unjust to place a party at a disadvantage because a Court uses language capable of two meanings. However, as I have said, in my opinion, there is no ambiguity. The application was clearly rejected not because it was incorrect but because the decree-holder did not turn up after he had been given an opportunity to do so. That being so, it is the duty of the Courts now to decide whether the previous application was in accordance with law or not. I fully agree with the learned counsel for the respondent that merely because an application of some sort is put in at a previous stage and nothing more is done about it, that would not serve to operate as a step-in-aid of execution. As I have said the application was attacked in the lower appellate Court on the two grounds set forth above. Two additional grounds were also urged in the arguments before me, namely that though there were repayments the dates of those repayments have not been mentioned in the application and also that the moveable property of which attachment is sought has not been described. I will deal with these objections one by one.

First of all as regards the address of the judgment-debtor all that O. 21, R. 11 (2) (b) requires is that the names of the parties should be specified in the application. It says nothing about the addresses. If this is compared with O. 7, R. 1 dealing with the particulars required in a plaint it will be seen that in the case of a plaint not only is the name of the defendant necessary but also his place of residence. Therefore, if a decree-holder complies precisely with the terms of O. 21, R. 11, it is impossible to say that his application is not in accordance with law, especially when the Code itself draws the distinction to which I have referred between plaints and applications for execution. It may be that in a given case the particulars required by the Code would be insufficient but in that case it is always open either for the Court or for the other side to ask for further and better particulars. The point is that an application which complies strictly with the terms of O. 21, R. 11 cannot be said to be not in accordance with law.

Turning next to the question of costs, this is dealt with in O. 21, R. 11 (2) (h). The amount of costs awarded in the present case amounted to Rs. 16-4-0 and the amount shown was Rs. 14. The question is whether this mistake or inaccuracy is enough to make the application so wrong as to be not in accordance with law. Now, these particulars are required to enable the Court to get on with the execution and to further the ends of justice, so I do not think they should be used in such a way as to frustrate justice. If the decree-holder had asked for more costs than were actually due to him, that might have been another matter, but here when he asks for something less and the difference is of such a trivial character, I find it impossible to hold that the application is so vitiated as to be incapable of execution at all. Therefore, although there has been a slight inaccurary, there has, in my opinion, been a substantial compliance with the provisions in this behalf.

Turning next to the objection about the omission to give the dates of payments all that sub-clause (e) requires is that the payments made should be specified in the application. It says nothing about the dates of these payments. Therefore, as I have said, technicality can be met with technicality and, so long as the requirements of the Code have been complied with, it is impossible to hold that the application is not in accordance with law. The same remarks apply to the objection that the property against which execution is sought has not been specified. As a matter of fact, it has been specified in a general manner. The application asks that the moveable property be attached. It is true it does not state whose moveable property, but since execution is sought against the judgment-debtor alone, it can only mean the moveable property of the judgment-debtor. Therefore, what remains to be determined is whether this property must be particularized. I have no doubt that it is desirable that this should be done and I have no doubt that when it is not done, it will ordinarily be necessary to ask for further and better particulars. But that is not the point. The question is whether the Code requires it in the first

instance. All that the clause in question of R. 11 states is :

The mode in which the assistance of the Court is required, whether (i) by the delivery of any property specifically decreed; (ii) by the attachment and sale, or by the sale without attachment, of any property, etc.

It will be noticed that it states nothing about the specification of the property. All that the decree-holder is required to set forth is the mode in which he seeks the assistance of the Court. This mode is sufficiently indicated when he states that he seeks attachment of the moveables of the judgment-debtor. Turning now to Rr. 12 and 13 of O. 21, when the application is for attachment of moveable property belonging to a judgment-debtor but not in his possession, the decree-holder is required to annex to the application an inventory of the property to be attached containing a reasonably accurate description of the same, and so also when an attachment is sought of immovable property, a description of it is required. It is clear then that the Code has drawn a distinction between moveables in the possession of the judgment-debtor and moveables belonging to him but not in his possession and immovable property in his possession. When the Code itself draws such a distinction and does not ask for a list of moveables when they are in the possession of the judgment-debtor, it is impossible to state that an application which does just what the Code requires is not in accordance with law. Consequently, I agree with the first Court that this application was made in accordance with law and disagree with the lower appellate Court. It follows the present application is within time.

An objection was raised in this Court which was not raised in either of the Courts below to the effect that the present application is fraudulent in that the decree-holder has suppressed certain particulars with the intention of misleading the Court. Since no plea of fraud was raised, I decline to allow it to be raised at this stage. Another objection is also taken which was not taken in the Courts below, namely that the present application for execution is defective in that it does not refer to the previous application of 25th October 1933 and also does not mention the results of the previous applications to which it does refer. It is stated that both were necessary under the provisions of the Code of Civil Procedure. I agree that those details are necessary but they are details which are mere matters of procedure and therefore an omission can be rectified in the course of the proceedings. When the judgment-debtor appeared in this case, the only objection he raised was an objection about limitation and he himself furnished the necessary particulars in respect of the missing application. This was on 4th July 1936. If the present objection had been taken at that stage, the decree-holder could easily have amended his application and the application would then have been within time even if regarded as having been filed on 4th July 1936. Since these objections were not taken at that stage and have been taken for the first time in second appeal, I disallow them. The appeal is allowed. The order of the lower appellate Court is reversed and that of the first Court restored. Execution will now continue. Costs here and in the lower appellate Court will be paid by the respondent. Counsel's fee Rs. 25.

W.N./R.K. *Appeal allowed.*

A. I. R. 1941 Nagpur 155

VIVIAN BOSE J.

Rambilas Harsukhdas Marwadi Maheshri — Plaintiff — Applicant

v.

Jai Kisan Jai Narayan—Defendant—Non-applicant.

Civil Revn. Nos. 386 and 387 of 1940, Decided on 24th October 1940, for revision of order of Addl. Dist. Judge, Ellichpur, D/- 29th April 1940.

(a) Criminal P. C. (1898), S. 476 — S. 476 assumes that offence appears to have been committed.

It is not correct to say that only after the Courts have come to a conclusion that an offence of the kind contemplated by S. 476 appears to have been committed they can direct their minds to the next question, namely whether it is expedient in the interests of justice that a prosecution should be launched. The section assumes that an offence appears to have been committed. [P 156 C 2]

(b) Criminal P. C. (1898), S. 476 — Decision of lower Courts under Ss. 476 and 476B cannot be interfered with by High Court under S. 115, Civil P. C.

The sum and substance of S. 476 is that before a prosecution can be launched either the first or the appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If in their opinion either of these elements is absent, then no prosecution can be launched. It is consequently not necessary for these two Courts to deal with both questions when in their opinion the answer to either is in the negative; also they can consider the questions in any order they please. And if they take up those questions or either of them and deal with them judicially and reach a conclusion, then the High Court has no jurisdiction whatever to interfere in revision under S. 115, Civil P. C., how-

ever wrong or erroneous the High Court may consider that conclusion to be. [P 157 C 1]

D. T. Mangalmurti — for Applicant.

T. L. Sheode — for Non-applicant.

Order. — This order will govern Civil Revision No. 386/40 and Civil Revision No. 387/40. They are directed against the orders of the lower Courts refusing to prosecute the non-applicants for the offences of perjury, forgery and false personation, said to have been committed either in, or in relation to, a proceeding in the first Court. Both Courts hold that there is no reasonable certainty of conviction and that in their opinion it is not expedient in the interests of justice that the prosecution asked for should be launched. The revision here is a civil revision under S. 115, Civil P. C., and I am of opinion that this Court has no jurisdiction to interfere. The matter is governed by Ss. 195, 476 and 476B, Criminal P. C. Under S. 195 no prosecution in respect of these offences can be launched except in the manner provided by S. 476. Section 476 confers the power to prosecute. That power is conferred in the first instance on the Court in which, or in relation to a proceeding in which, the offence or offences appear to have been committed. If that Court refuses to prosecute, then the power is transferred to the appellate Court under S. 476B. Except for these two Courts, no other Court, person or body has power to prosecute, not even the High Court unless it happens to be the appellate Court contemplated by Section 476B.

If therefore the lower Courts consider the matter under Ss. 476 and 476B and come to the conclusion that it is not, in their opinion, expedient in the interests of justice to prosecute, this Court has no power to compel them to do so. The discretion is theirs and theirs alone. The privilege belongs to them and no other person or body or tribunal can usurp it, or substitute its discretion for that of these Courts. They have to be of opinion that it is expedient to prosecute, not anybody else. See as to this a decision of the House of Lords in (1919) 88 L J Ch 287[1] at p. 294 and also 30 N L R 255[2] at p. 257. It is possible that this Court can interfere in revision if the lower Courts do not consider the matter under those sections or if they direct their minds to matters which are foreign to those sections, or if they act arbitrarily or capriciously. In that event, the order could be set aside and the lower Courts could be directed to apply their minds to the only matters material under those sections. But in no event could this Court acting under S. 115 substitute its opinion for that of either the first Court or the appellate Court and direct a prosecution however much it may be of opinion that it is desirable that one should be lauched.

Once the lower Courts consider the questions which arise under S. 476 and deal with the matter on the merits, then however wrong or erroneous their opinions may be, this Court cannot interfere. In no circumstances could, or at any rate in my opinion should, this Court send the case back in a matter of this kind for reconsideration on the same evidence and the same materials, because an order of that kind would be nothing more than a direction to the lower Court to act in accordance with the view of the High Court. In other words, it is tantamount to a direction to the lower Courts to substitute the opinion of the High Court for their opinions. That is something which the Legislature does not allow. It is something which S. 195 read with S. 476 expressly prohibits. The undesirability of remanding cases in such circumstances has been pointed out in 7 Rang 538[3] and stressed by me in 19 N L J 158[4] at p. 160. Coming now to S. 476, the material portion is as follows :

When . . . Court is . . . of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to etc. . . . which appears to have been committed etc. . . .

It is strenuously argued that Courts in such circumstances have to consider first whether an offence appears to have been committed or not, and only after they have come to a conclusion that an offence of the kind contemplated by S. 476 appears to have been committed can they direct their minds to the next question, namely whether it is expedient in the interests of justice that a prosecution should be launched. In my opinion, that is wrong. The section assumes that an offence appears to have been committed. Unless such an assumption were made it would be impossible to ask a Court to direct its mind to considering whether a prosecution should be launched. No Court would prosecute for an offence which does not appear to anybody to have been com-

1. (1919) 1919 A C 606 : 88 L J Ch 287 : 121 L T 65 : 63 S J 461 : 35 T L R 399, Weinberger v. Inglis.
2. ('34) 21 A I R 1934 Nag 126 : 149 I C 103 : 30 N L R 255, Thakurdas v. Secretary of State.
3. ('29) 16 A I R 1929 Rang 321 : 120 I C 912 : 31 Cr L J 186 : 7 Rang 538, Ma Nyein v. Maung Chit Hpu.
4. ('37) 24 A I R 1937 Nag 123 : 167 I C 569 : 19 N L J 158, Kartikram v. Emperor.

mitted, and it would be idle and foolish to ask it to consider whether in such circumstances it is expedient in the interests of justice to prosecute. The answer is self evident. Of course it is not. The section is dealing with a situation in which the Court has already had the matter before it in another capacity and ordinarily the Judge who presided at that stage will have had an opportunity of considering whether an offence of the kind we are dealing with appears to have been committed. If he indicates at that stage that in his opinion one does appear to have been committed, then clearly it is not necessary either for him or his successor to cover the same ground and all that is left for consideration is whether it is expedient in the ends of justice to prosecute.

If however the Judge in the original proceedings has not expressed an opinion to that effect, then the Court at this stage can either take it for granted that an offence appears to have been committed and state that even assuming that it is not in its opinion expedient to prosecute for reasons given, or it can look into the matter and state that in its opinion no offence appears to have been committed and if it reaches that conclusion, then clearly the only conclusion it can reach on the question of expediency is that in its opinion a prosecution is not expedient. The sum and substance of S. 476 is that before a prosecution can be launched either the first or the appellate Court must be of opinion both that an offence appears to have been committed and that it is expedient to prosecute. If in their opinion either of these elements is absent, then no prosecution can be launched. It is consequently not necessary for these two Courts to deal with both questions when in their opinion the answer to either is in the negative; also they can consider the questions in any order they please. And I repeat again that the opinion has to be their opinion and not the opinion of the High Court in revision. Also, if they take up those questions or either of them and deal with them judicially and reach a conclusion, then the High Court has no jurisdiction whatever to interfere in revision under S. 115, Civil P. C., however wrong or erroneous the High Court may consider that conclusion to be.

In the present case the first Court after setting out the facts and the allegations of the applicant about the commission of the various offences applied its mind to the question of expediency and came to the conclusion that a prosecution would not be likely to succeed and that it was not in the interests of justice to file complaints. The appellate Court went more fully into the matter. In para. 7 of its order, it directed its mind to the question whether there was sufficient material on record to reach a prima facie and definite conclusion that the offences complained of had been committed. It examined the evidence carefully — its order covers 17 typewritten pages—and it reached the conclusion that there is no sufficient material on record which would justify it in taking action under S. 476. It had power to do this. It entertained the matter and exercised jurisdiction. It has acted judicially. Consequently, its conclusions are final and this Court has no jurisdiction to interfere under S. 115, Civil P. C., whether the conclusions are right or wrong. The applications are dismissed with costs. Counsel's fee in Jaikisan's case (C. R. 387/40) Rs. 40, and in Maroti's case (C. R. 386/40) Rs. 35.

D.S./R.K. *Applications dismissed.*

A. I. R. 1941 Nagpur 157

NIYOGI J.

Govindram Jiwanram Agarwal Saokar — Objector — Applicant

v.

Harasaya Gangasaya Marwadi — Decree-holder — Non-applicant.

Civil Revn. No. 645 of 1937, Decided on 15th March 1938, for revision of order of Sub-Judge, Second Class, Ellichpur, D/- 4th August 1937.

Civil P. C. (1908), O. 21, Rr. 46 and 47 — Judgment-debtor owning share in property in possession of stranger — R. 46 as well as R. 47 comes into operation—Prohibitory orders should be issued not only to judgment-debtor but also to stranger in possession.

Rule 46 must be read with Rr. 43 and 47. Rule 46 applies even if the ownership of the judgment-debtor is fractional instead of being integral. Consequently, where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, R. 46 as well as R. 47 must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. [P 158 C 1, 2]

D. T. Mangalmurty — for Applicant.

A. L. Halwe — for Non-applicant.

Order. — This is an application in revision against an order passed in execution proceedings (in Miscellaneous Judicial Case No. 24 of 1937) on 4th August 1937. The non-applicant decree-holder attached some

quantity of cotton stored in Pandurang Ginning Factory as being the property of his judgment-debtor. The applicant who is judgment-debtor's father objected to the attachment. The lower Court found that the judgment-debtor had a half share in the cotton which alone was liable to be attached and sold. It further held that as a prohibitory notice under R. 47 of O. 21 had not been issued, the attachment was irregular and ordered a notice under R. 47 to be issued to the judgment-debtor. It, however, did not pass any order withdrawing the attachment. On behalf of the objector who feels aggrieved by the lower Court's order, it is urged that the lower Court ought to have held that the attachment had ceased or should have withdrawn the attachment. Reliance is placed on 59 Cal 808.[1] In that case, some moveable property of which the judgment-debtor was supposed to be the full owner was attached under R. 43 of O. 21. On an objection made by a stranger, it was found that the judgment-debtor was only a part owner of the property. The original attachment was therefore set aside and an order was made to issue a notice to the judgment-debtor under O. 21, Rule 47. That case does not afford much guidance for the decision of this case. In the present case the property was in the possession of the objector although it was in the immediate custody of the ginning factory. The question is whether the lower Court was right in issuing a prohibitory order to him under Rule 46 of Order 21.

It is vigorously contended that R. 46 is inapplicable in the circumstances of this case and that the only rule which is relevant is R. 47. I cannot assent to this argument. Rule 46 must be read with Rr. 43 and 47. Rule 43 contemplates a case of attachment of property of which the judgment-debtor is the full owner and in possession. Rule 46 refers to a case where the property of the judgment-debtor is not in his possession but in possession of a third party. Rule 47 relates to a case where the judgment-debtor is not the full owner of the property intended to be attached. Rule 47 is silent as to whether the property should be in possession of the judgment-debtor or not. Rule 46 only says "in the case of other moveable property not in the possession of the judgment-debtor." The other moveable property is the property other than that specified in cls. (a) and (b) of sub-r. (1). It therefore relates to all moveable property which is not in the possession of the judgment-debtor.

It is argued by the learned counsel for the applicant that if the ownership of the judgment-debtor is fractional instead of being integral R. 46 does not apply. I think it ought to apply for this reason : Rule 47 speaks of "share or interest of the judgment-debtor in moveable property" but does not explicitly state whether it refers to property in his possession. In the absence of any express allusion to possession it may well be construed as meaning all moveable property which is in his own possession or in the possession of a stranger. If R. 47 must apply in either case, then in the latter case when his property which takes the form of a fractional interest is in possession of somebody else it must also fall under R. 46 (1) (c) which applies to all cases of moveable property belonging to the judgment-debtor not being in his possession. The person who is in possession of the judgment-debtor's property is in possession of the property as a whole notwithstanding that the judgment-debtor is only a part owner of it.

The position would be elucidated in this way. A judgment-debtor may own X share or interest in property A. When property A is in possession of a stranger the stranger must be taken to be in possession of the whole of property X although from the point of view of the judgment-debtor it is a fractional share. Consequently, where the judgment-debtor owns a share or interest in some property which is in the possession of a stranger, R. 46 as well as R. 47 must come into operation so as to necessitate prohibitory orders being issued not only to the judgment-debtor but also to the stranger who is in possession of the property the judgment-debtor's share in which is intended to be attached. If, as contended for by the learned counsel for the applicant, R. 46 were not to apply to such a case the result would be stultification of the attachment. While the judgment-debtor will have the prohibitory order served on him the property of which the transfer is forbidden will be sold with impunity by the person in whose possession it happens to be. That will defeat the very purpose of the attachment. Such a result could not be intended by the Legislature. I am therefore of the opinion that the lower Court was right in issuing the prohibitory order to the objector who was in possession of the entire quan-

1. ('32) 19 A I R 1932 Cal 408 : 137 I C 672 : 59 Cal 808:54 C L J 488, Rajendranath Das v. Chairman, District Board, Jessore.

tity of cotton and further in not withdrawing the prohibitory order addressed to him. The application is dismissed with costs. Pleader's fee Rs. 20.

D.S./R.K. *Application dismissed.*

A. I. R. 1941 Nagpur 159

NIYOGI J.

Netram Sadaram Palliwal — Decree-holder — Appellant

v.

Bhagwan Wallaji Kunbi and another — Judgment-debtors — Respondents.

Misc. Appeal No. 275 of 1939, Decided on 16th December 1940, from order of First Addl. Dist. Judge, Nagpur, D/ 15th September 1939.

(a) C. P. Debt Conciliation Act (2 of 1933), Ss. 9, 8 (2) and 9-A—Signature on statement under S. 9 by creditor's son with his father's authority and consent is valid—Creditor's failure to sign statement under S. 9 is only defect of procedure and can be cured even in appeal — In such case Court should not proceed under S. 8 (2) but should grant time to creditor to remedy defect.

A statement under S. 9 is required to be signed and verified in the manner prescribed by O. 6, Rules 14 and 15, Civil P. C. A plaint must be regarded as having been duly signed within the meaning of O. 6, R. 14 even though the plaintiff's signature is not by plaintiff himself but by some other person duly authorized by the plaintiff. Consequently, a signature on a statement under S. 9 made by the son with the authority and consent of his father must be regarded as a valid signature. The creditor's failure to sign the statement of account is only a defect of procedure which would not be fatal to the statement itself and can be cured even in appeal. The statement under S. 9 (1) would be none the less a statement because of the absence of the creditor's signature. The right procedure for the board in such a case is to give an opportunity to the creditor to rectify the defect and not to deprive him of his civil right by proceeding under S. 8 (2). [P 159 C 2; P 160 C 1, 2]

(b) Civil P. C. (1908), O. 16, R. 6—Production of certified copy on behalf of party by other person—Letter of authority is not necessary.

Under O. 16, R. 6 even a witness who is summoned merely to produce a document is deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. A letter of authority for the production of a certified copy of a public document like a final decree in favour of the person producing it on behalf of the party is altogether unnecessary. [P 160 C 2]

R. N. Padhye and M. D. Khandekar — for Appellant.

N. B. Chandurkar — for Respondents.

Judgment. — This is plaintiff's appeal from the order passed by the first Additional District Judge, Nagpur, in Miscellaneous Appeal No. 35 of 1939 passed on 15th September 1939. The appellant obtained a final decree on a mortgage on 14th August 1937 and got the decree transferred to the Collector for the mortgaged property being sold. Pending those proceedings the respondents applied to the Debt Conciliation Board for settlement of their debts. Notices in usual course were issued to various creditors calling upon them to submit statements. The case was fixed before the Board for hearing on 14th July 1938. On that day the appellant's son by name Daulatram who was also a duly authorized agent filed a statement of accounts signed and verified by himself. On that day the other creditors were absent and failed to submit their statements with the result that their debts were declared to have been discharged. The statement filed by Daulatram however was apparently accepted without any objection and he was asked to file a certified copy of the final decree on 19th September 1938. On that day Daulatram tendered a certified copy of the final decree; curiously enough, the Board refused to accept the certified copy through him as he had no letter of authority from the creditor, and further declared the appellant's debt to have been discharged as the statement of account filed on behalf of the appellant had not been signed by him personally. Both the Courts below have concurred in the view that the statement filed on behalf of the appellant not having been signed by him personally was not a statement such as would fall within the purview of S. 9 (1), Debt Conciliation Act, and that consequently the Debt Conciliation Board was right in declaring the debt under S. 8 (2) to have been duly discharged.

I have no doubt that the Courts below have taken an erroneous view of the law. Section 9, Debt Conciliation Act, requires that the creditor should submit a statement of his debts. That statement is required to be signed and verified in the manner prescribed by the Code of Civil Procedure, 1908, for signing and verifying the same. That means that the statement of debts should conform to the procedure relating to pleadings as laid down in Rr. 14 and 15 of O. 6, Civil P. C., which requires the pleadings to be signed and verified. So far as the verification is concerned it can be done by any person proved to the satisfaction of the Court to be acquainted with the facts of the case. As regards the signing of the pleading it is provided in R. 14 that where a party pleading is by reason of absence or any

other good cause unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. It was pointed out in 22 ALL 55[1] that the mere fact that the plaint in a suit has not been signed by the plaintiff or by any person duly authorized by him in that behalf does not necessarily make the plaint absolutely void. The signing and verification of pleadings is not a matter of substance but of procedure only: *see* 40 ALL 147,[2] also Mulla's Civil Procedure Code, p. 541. The omission by a party to sign his pleadings is a defect which can be cured even in appeal. It is therefore clear that the appellant's failure to sign the statement of account was only a defect of procedure which would not be fatal to the statement itself. The statement under s. 9 (i), Debt Conciliation Act, would be nonetheless a statement because of the absence of the creditor's signature.

In the present case the statement was signed by Daulatram who held the power of attorney from his father to sign and verify pleadings. He was moreover a member of the joint family along with his father and was virtually a party to the proceeding. Consequently, his signature would be as good as the signature made by his father. Moreover, he signed the statement under the direction of his father. It is evident that the irregularity was of the flimsiest kind. My attention is invited to 1939 N L J 171.[3] That was a case of absence of verification and is not apposite. In I L R (1939) Nag 515[4] the Division Bench held that a plaint should be regarded as having been duly signed within the meaning of O. 6, R. 14, Civil P.C., even though the plaintiff's signature is not by plaintiff himself but by some other person duly authorized by the plaintiff. Following this view it must be held that the signature made by Daulatram with the authority and consent of his father was a valid signature. In fact the Board itself already accepted it without any objection on the day on which it was submitted. On 19th September 1938, they refused to accept the certified copy of the final decree tendered by one Daulatram on the ground that he held no letter of authority from the creditor. Possibly if he had letter of authority and the certified copy of the final decree had been accepted on that day the Board might not have turned their attention to the nominal irregularity in the statement. Under O. 16, R. 6, even a witness who is summoned merely to produce a document is deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same. A letter of authority for the production of a certified copy of a public document like a final decree was altogether unnecessary.

In my opinion when the statement as required by S. 9 (1) was actually filed, the debt to which the statement referred could not be declared to have been discharged under S. 8 (2). It may be conceded that S. 9A should be read along with S. 9 (1) in construing sub-s. (2) of S. 8, but S. 9A simply lays down a rule of procedure. Any defect of procedure cannot affect the substance of a party's claim. The Board exceeded their jurisdiction in making the declaration that they did under S. 8 (2), Debt Conciliation Act, in the face of the statement which they had actually received, a statement which was sound in substance though defective in form. The right procedure for the Board was to have given an opportunity to the appellant to rectify the defect and not to deprive him of his civil right. As the Debt Conciliation Board had no jurisdiction to declare the debt due on the final decree obtained by the appellant as having been duly discharged, their order under S. 8 (2), Debt Conciliation Act, must be pronounced to be void and of no effect. The lower appellate Court's order is set aside. It is however directed that the final decree proceedings will be stayed for a month to give an opportunity to the respondents to apply to the Debt Relief Court under S. 6, Central Provinces and Berar Relief of Indebtedness Act, 1939. As however the appellant was in default in not having submitted his statement in proper form, it is just and reasonable that he should bear the costs of these proceedings in all Courts.

G.N./R.K. *Appeal allowed.*

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1. (1900) 22 All 55 : 1899 A W N 172, Basdeo v. John Smidt.
2. ('18) 5 A I R 1918 All 275 : 44 I C 28 : 19 Cr L J 865 : 40 All 147 : 16 A L J 64, In the matter of Bisheshar Nath.
3. ('39) 1939 N L J 171, Babu v. Hiralal.
4. ('39) 26 A I R 1939 Nag 242 : 188 I C 405: ILR (1939) Nag 515, Sarju Prasad v. Badri Prasad.

(28) A. I. R. 1941 Nagpur 161

VIVIAN BOSE J.

Palia Harcharanlal Palia Thakurdas Brahmin — Appellant

v.

Raja Hirdesingh Ju Deo Raja Prahlad Singh Rajgond — Respondent.

Misc. Appeal No. 275 of 1937, Decided on 17th October 1938, from order of Addl. Dist. Judge, Narsinghpur, D/- 21st July 1937.

C. P. Debt Conciliation Act (2 of 1933), S. 2 (e) — Words "recoverable as an arrear of land revenue" mean debt recoverable in conceivable circumstances as land revenue—Nature of debt must be looked to — Compromise decree in suit for arrears of thekajama in proprietor's favour is excluded from purview of S. 2 (e).

The words "recoverable as an arrear of land revenue" in S. 2 (e) must be given their ordinary English meaning, that is to say, must be treated as words of description describing what could conceivably happen. Hence the definition in S. 2 (e) means that if the debt could be recovered in conceivable circumstances as an arrear of land revenue, then it is excluded from the definition. The nature of the debt, and not the point of time or the remedy for the recovery of the debt as land revenue under S. 157, C. P. Land Revenue Act, has to be looked to. A compromise decree passed in a suit for thekajama in favour of the proprietor is therefore excluded from the definition in S. 2 (e).

[P 161 C 2 ; P 162 C 1]

K. B. Tare — for Appellant.
M. N. Jog — for Respondent.

Judgment. — The appellant is the protected thekedar of mouza Piparia and the respondent is the proprietor. The respondent sued the appellant for a certain sum of money due to him as the thekajama for the year 1930-31. The suit was compromised on 7th July 1933 and it was agreed that Rs. 500 was to be paid with future interest in annual instalments of Rs. 100 each. After the respondent had obtained a decree, the appellant went to the Debt Conciliation Board and included this debt for conciliation. The respondent declined to accept the agreement and so a certificate was granted to the appellant under S. 15 (1), Debt Conciliation Act. It is dated 20th May 1936. The question now is whether the respondent can execute his decree or not. It is urged on his behalf that the Debt Conciliation Board had no power to take cognizance of the debt in suit because it is excluded from the definition of 'debt' given in S. 2 (e) of the Act. That definition states that :

Debt includes all liabilities owing to a creditor in cash or kind, secured or unsecured, payable under a decree or order of a civil Court or otherwise ..... but shall not include ..... anything recoverable as an arrear of land revenue.

The question is whether the debt in suit is covered by the exclusion or not. There can be no doubt that arrears of thekajama are recoverable as arrears of land revenue provided certain steps are taken and provided they are taken within a certain time. The relevant provision of law is S. 157, Land Revenue Act. Under that section if the application is made to the requisite revenue officer and if it is made within six months, then the arrears of thekajama can be recovered as arrears of land revenue, but not otherwise. It is therefore argued on behalf of the appellant that at all relevant times the debt in suit was not recoverable as arrears of land revenue and therefore does not fall within the exclusion referred to in S. 2 (e). It seems to me that such an interpretation would lead to difficulties. It would mean that a debt which remains identical throughout may at one stage be covered by the exclusion and at another not. Consider this case. A debtor applies to the Debt Conciliation Board and includes among his debts arrears of thekajama which at the date of the application are less than six months old. According to the definition that debt will be recoverable as an arrear of land revenue provided the requisite steps are taken. What is the Debt Conciliation Officer then to do? Is he to wait and see whether these steps will be taken in due course or is he to ascertain the intention of the creditor as to whether he intends to avail himself of the summary remedy provided by S. 157 or whether he intends to choose the more dilatory course of civil proceedings ? Or again, let us assume that the Debt Conciliation Officer comes to the conclusion that the summary remedy is the one which the creditor has in view and therefore excludes this debt from the conciliation. Then for some reason or other, the creditor instead of applying under S. 157 brings a civil suit. What is to happen ? Is he to be allowed to proceed with that civil suit because no certificate has been given under S. 15 (1), or what ?

It seems to me that the only way of avoiding these difficulties and the anomaly of having the self-same debt considered at one stage to be recoverable as an arrear of land revenue and at another not, is by giving the words "recoverable as an arrear of land revenue" their ordinary English meaning, that is to say, to treat them as words of description describing what could conceivably happen. Looked at from this point of view, the definition means that if the debt could be recovered in conceivable circumstances as an arrear of land revenue, then it

is excluded from the definition. We are not then to look to the point of time, or to the remedy, but to the nature of the debt, and that is what, in my opinion, the definition aims at. Looked at from that point of view, it is clear, as the learned Judge of the lower appellate Court holds that this debt falls within the exclusion. It follows that the Debt Conciliation Officer had no power to include it within the purview of his proceedings. The appeal fails and is dismissed with costs. Counsel's fee Rs. 25.

G.N./R.K. *Appeal dismissed.*

(28) A. I. R. 1941 Nagpur 162

STONE C. J.

Mohammad Abdul Karim Abdul Gani Mussalman—Defendant—Appellant

v.

Abdul Sattar Shaikh Abdul Kadar Musalman—Plaintiff—Respondent.

Appeal No. 328 of 1937, Decided on 5th October 1939, from appellate decree of 4th Addl. Disttrict Judge, Nagpur, D/- 17th April 1937.

Deed—Construction — Sale deed — Subject-matter of sale particularly described — That description cannot be varied by subsequent statement in ambiguous form of boundary lines on one side.

Where the subject-matter which is conveyed is particularly described in the deed of conveyance that description cannot be varied by a subsequent statement in an ambiguous form of boundary lines on one side. [P 163 C 2]

In a sale deed the description of the property sold was as follows : "One tiled simple house . . . . and there is courtyard behind . . . . . In this there are a pacca latrine and a water pipe. Length of all this is 33 feet south north and breadth 18 feet east west. This land together with the site, superstructure and the land within the boundary limits. . . . Boundaries of this (are as follows) : On the east there is a lane of three feet and a half as also a Sawari bungalow":

Held that what was conveyed was a courtyard that was 18 feet wide. The fact that it was stated that on the east there was a lane of 3½ feet as also a Sawari bungalow was not sufficient in law to cut down the grant so as to vary the parcel conveyed to a site not 18 feet wide but 14 feet wide : (1905) 2 Ch 164, *Rel. on.* [P 163 C 1]

M. R. Bobde — for Appellant.

A. R. Kulkarni — for Respondent.

Judgment. — This second appeal raises a question of construction of a deed whereby property was sold by the plaintiff to the defendant. The description of the property is, so far as it is necessary, stated as follows :

One tiled simple house . . . . . and there is courtyard behind . . . . . In this there are a pacca latrine and a water pipe. Length of all this is 33 feet south north and breadth 18 feet east west. This land together with the site, superstructure and the land within the boundary limits. . . . Boundaries of this (are as follows) : On the east there is a lane of three feet and a half as also a Sawari bungalow . . . . . .

In point of fact the house is 14 feet wide and to the east there is a lane or passage way varying in width 4 to 5 feet, and on the east of that there is the Sawari bungalow. The dispute is about the right to the lane. If the description is read as being substantially the sale of a site 18 feet wide then the passage way except for a few inches at one end passes and the defendant wins this case. If, on the other hand, it is taken that the eastern boundary is this passage way or lane then the lane is excluded from the conveyance and the plaintiff wins. A good deal of argument has been addressed to me showing that this is an ambiguous document and that therefore it is necessary to look to extrinsic facts in order to ascertain its true meaning. I am, however, of the opinion that the view expressed in Dart on Vendors and Purchasers, Vol. II (Edn. 8), p. 865, would apply here. There the learned editors are concerned with the case in (1866) L R 1 H L 222[1] and particularly Lord Westbury's dissenting view that the construction of a plan, which will be treated as part of the deed

was matter of law, so long only as its accuracy was unimpeached; being proved to be inaccurate, it became a question of fact what parcels were comprised in the lease; for it did not follow that, because the boundary line was drawn from the north-east corner of the house as incorrectly represented on the plan, it would have been drawn from the same point, if the true site of the house had been shown.

In that case Lord Westbury observed :

. . . . . the question here is not one of the interpretation of the deed itself, or even of the construction of the description of the parcels, but of the inference to be derived from a map as to the relative position of two objects, one of which was proved to be erroneously laid down. As soon as that proof was admitted, it became obvious that the true position in nature of the thing erroneously laid down, and the true relative position of the adjoining objects, must both be ascertained by external evidence.

That he came to the conclusion was a question for the jury and not a matter of law depending upon the construction of the deed. But quite apart from external evidence which goes to show that the vendor under the sale deed was himself a purchaser under another sale deed which described this property in a way to show that it was 18 feet wide and bounded on the east by the Sawari bungalow it seems to me that as a matter of construction the sale deed contains a prior description which is particular

1. (1866) L R 1 H L 222 : 35 L J Q B 214 : 15 L T 1, Lyle v. Richards.

and which is not cut down by a general description as to boundaries. In (1905) 2 Ch 164[2] at pp. 174 and 175 the following observation is to be found :

I cannot . . . . . agree with the learned Judge that the present case is one in which the undoubted rule that, when you have in the words of description a sufficiently certain definition of what is conveyed, inaccuracy of dimensions or of plans as delineated will not vitiate or affect that which is there sufficiently defined, applies, because the description itself is a description of a piece of land situate on the seashore of certain dimensions which are set forth. Those dimensions, in my opinion, are not an addition to something which has already been certainly described, but are part and parcel of the description itself. The words are not an inaccurate statement of a quality of that which had already been certainly described or defined, but are part and parcel of that description or definition. The dimensions in this case, to use the words appearing on p. 247 of Sheppard's Touchstone, are an essential part of the description and not a cumulative description in a case in which there is in the first place a sufficient certainty and demonstration.

Thus what is described and defined as the subject-matter of the sale is a site on which there is a house, a wall, and a compound, and that that site is 18 feet wide. One in point of fact finds that there is in that locality a site belonging to the vendor on which there is a house, a wall and a courtyard that is 18 feet wide. It seems to me that what is conveyed is therein described and the fact that it is stated that on the east there is a lane of 3½ feet as also a Sawari bungalow is not sufficient in law to cut down the grant so as to vary the parcel conveyed to a site not 18 feet wide but 14 feet wide : *see also* (1883) 22 Ch D 177[3] at p. 181, where Jessel, M. R., observed :

Then it is described as bounded on the east by (inter alia) the defendant's property. But this general description of the boundaries does not cut down the effect of the prior description. When after a description of a property it is stated that on one side it is bounded by a certain other property, and it appears that it is not so bounded for every inch, there is an inaccuracy in the statement of the boundary, but this is not enough to exclude what is not so bounded if it appears from the evidence to have been part of the property dealt with, and the previous description of that property is sufficient to include it.

Here it should be borne in mind that if the eastern boundary was a lane the statement of the boundary as also a Sawari bungalow is entirely meaningless. In fact, it was argued by Mr. Kulkarni for the respondent that these two words were mere surplusage. On the other hand it is to be observed if the description is followed out completely, that is to say, if full value is given to the words "breadth 18 feet east to west" that this carries to the Sawari bungalow for three-quarters of the length of the lane where the lane is 4 feet wide and the house is 14 feet wide and it does leave as the eastern boundary a part of the lane for the other quarter of the total length. I do not however rely on this point because it is one that has clearly not been in the mind of any of the parties to this transaction or to this case. But I rely upon the decision in (1905) 2 Ch 164[2] above mentioned and hold that as a matter of construction this is a case where the subject-matter is particularly described and that that description cannot be varied by a subsequent statement in an ambiguous form of boundary lines on one side. The appeal is accordingly allowed and the suit is dismissed with costs.

D.S./R.K. *Appeal allowed.*

2. (1905) 2 Ch 164 : 74 L J Ch 475 : 93 L T 574 : 53 W R 581 : 21 T L R 591, Mellor v. Walmesley.
3. (1883) 22 Ch D 177 : 52 L J Ch 291 : 48 L T 297 : 31 W R 488 : 47 J P 517, Francis v. Hayward.

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(28) A. I. R. 1941 Nagpur 163

CLARKE J.

Jankilal Raghunath Rai Agarwal and others — Applicants

v.

Deputy Commissioner, Bilaspur, and another — Non-applicants.

Civil Revision No. 256 of 1940, Decided on 13th February 1941, to revise order of Addl. Dist. Judge, Bilaspur, D/- 10th February 1940.

(a) C. P. Land Alienation Act (2 of 1916), S. 9 (1) (2) and (3) and Ss. 3, 1 (2) and (3) and 25 (2) — Date of commencement of Act in S. 9 (1) and (2) refers to date fixed under S. 1 (3)—Mortgage by conditional sale by Kanwar of Bilaspur in 1926 — Notifications under Ss. 1 (2) and 3 making Act applicable to Bilaspur and declaring Kanwars to be aboriginals issued in 1933—Subsequently on foreclosure decree being made absolute mortgagee put in possession—S. 9 does not apply—Deputy Commissioner cannot apply under S. 25 (2) of the Act.

The date of the commencement of the Act in S. 9 (1) and (2) refers to the date fixed under S. 1 (3), i. e., 15th April 1917. [P 165 C 2]

A Kanwar of Bilaspur tahsil mortgaged his village share by conditional sale in 1926. In 1933 notifications under Ss. 1 (2) and 3 were issued making the Act applicable to the Bilaspur tahsil and declaring the Kanwars to be aboriginal tribes for the purposes of the Act. Subsequently, the mortgagee enforced his mortgage by a suit and, on the making of the foreclosure decree absolute, was put in possession :

Held that S. 9 (1) did not affect the mortgage because it was not a mortgage made by a member of an aboriginal tribe after the commencement of the Act, since, when the mortgagor made it, he was not a member of an aboriginal tribe, nor did S. 9 (2) affect it because it was not a mortgage made by a member of an aboriginal tribe before the commencement of the Act, since it was not made before

the commencement of the Act and therefore S. 9 (3) did not apply. Consequently, the Deputy Commissioner had no authority to apply under S. 25 (2) for revision of the mortgage decree. [P 165 C 2]

(b) C. P. Land Alienation Act (2 of 1916), S. 25 (3) — Right of revision under S. 25 (3) is not reserved to Deputy Commissioner alone but is open to any party aggrieved.

The right of revision under S. 25 (3) is not reserved to the Deputy Commissioner alone but is open to any other aggrieved party. Section 25 (3) is merely an enabling provision and removes any doubt whether the Deputy Commissioner as an outsider to the litigation could apply for revision. [P 165 C 2; P 166 C 1]

V. V. Kelkar — for Applicants.

W. R. Puranik and R. K. Rao — for Non-applicant 2.

Order. — The following dates are necessary to be stated in order to understand this revision application. On 15th April 1917 the Central Provinces Land Alienation Act (II of 1916) came into force. On 3rd August 1926 one Madan Singh, a Kanwar by caste, mortgaged his village share by conditional sale to the present applicants. On 14th November 1933 the Local Government published two notifications under Ss. 1 (2) and 3, Central Provinces Land Alienation Act, (II of 1916), making the Act applicable to the Bilaspur tahsil of the Bilaspur district and declaring the Kanwars to be aboriginal tribes for the purposes of the said Act. In 1936 the mortgagees brought an action on their mortgage against the non-applicant Madan Singh. On 1st October 1936 the applicants obtained a preliminary decree in this suit. On 7th February 1938 the foreclosure decree was made absolute. On 7th April 1938 possession was delivered to the mortgagees applicants. On 15th September 1938 mutation of their names was effected in the revenue records. On 7th December 1938 the Deputy Commissioner made an application under S. 25 (2) of the Act to the Additional District Judge. Section 25 (2) provides as follows:

When it appears to the Deputy Commissioner that any Civil Court has, after the commencement of this Act, passed a decree or order contrary to any of the provisions thereof, the Deputy Commissioner may, within two months of the date upon which he is informed of such decree or order, apply for the revision of such decree or order to the Court, if any, to which an appeal would lie from such decree or order, or in any other case to the High Court and if the Court finds that such decree or order is contrary to any of the provisions of this Act, it shall alter it so as to make it consistent with this Act.

The Additional District Judge has found that the foreclosure decree is contrary to the provisions of the Act and he has accordingly set it aside and has referred the case to the Deputy Commissioner under S. 9 (3) of the Act. Against this order the present revision application has been made. Section 3 of the Act empowers the Chief Commissioner, now the Provincial Government, to declare by notification what bodies of persons in any area are to be deemed aboriginal tribes for the purposes of the Act and a notification under that section was published on 14th November 1933. Accordingly at the date when the mortgage deed was executed the mortgagor did not belong to an aboriginal tribe and therefore there was no obstacle in the way of the present applicants accepting the mortgage. A mortgage is considered by the Act to be a temporary alienation of land and S. 6 of the Act enumerated the kinds of mortgage which a member of an aboriginal tribe may enter into. A mortgage by conditional sale, which is the form of a mortgage with which the parties to this case are concerned, is not one of these. Accordingly, at the date of the execution of the mortgage, the mortgagor was free to execute such a mortgage without any restriction. The Additional District Judge has held that, since the suit was commenced after a notification had made the mortgagor a member of an aboriginal tribe, the Court had no jurisdiction to pass a foreclosure decree and therefore the Deputy Commissioner was entitled to make this application under S. 25 (2). Section 9 of the Act provides as follows:

9. (1) If, after the commencement of this Act, a member of an aboriginal tribe makes a mortgage of his land in any manner or form not permitted by or under this Act, the Deputy Commissioner shall have authority to revise and alter the terms of the mortgage as to bring it into accordance with such form of mortgage permitted by or under this Act as the mortgagee appears to him to be equitably entitled to claim.

(2) If a member of an aboriginal tribe has, before the commencement of this Act, made a mortgage of his land in which there is a condition intended to operate by way of conditional sale, the Deputy Commissioner shall have authority to put the mortgagee to his election whether he will agree to the said condition being struck out, or will accept, in lieu of the said mortgage, a mortgage in form (a) as provided by S. 6, sub-s. (1), which shall be made for such period not exceeding the period permitted by the said section and for such sum of money as the Deputy Commissioner considers to be equitable.

(3) If a suit is instituted in any civil Court on a mortgage to which sub-s. (1) applies, or if a suit for the enforcement of a condition intended to operate by way of conditional sale in a mortgage, made before the commencement of this Act, is instituted or is pending at the commencement of this Act, in any civil Court, or if an appeal in any such suit is instituted or is pending at the commencement of this Act, the Court shall, if it finds that the mortgage is enforceable or that the mortgagee is entitled to a decree absolute for foreclosure,

refer the case to the Deputy Commissioner with a view to the exercise of the power conferred by subss. (1) and (2) respectively.

It is necessary therefore to interpret S. 9 in order to see whether S. 25 (2) applies. On behalf of the non-applicants the learned Advocate-General has argued that since under Ss. 1 (2) and 3 of the Act the Act is to "extend only to such areas of the Central Provinces as the Provincial Government may, from time to time, notify in this behalf in the official gazette" and Government may notify what persons are to be deemed to be aboriginal tribe, the Act came into force in Bilaspur for members of the Kanwar community on 14th November 1933. Therefore it is argued that the mortgage in question had been made before the Act came into force and so under S. 9 (2) the Deputy Commissioner had authority to take action thereunder and under sub-s. (3) the Court was required to refer the case to the Deputy Commissioner in order that he might take action under sub-s. (2) and accordingly under S. 25 (2) the Deputy Commissioner was entitled to apply to the Additional District Judge for revision of the decree as being contrary to the provisions of the Act. To this the applicants reply that S. 9 (2) does not apply because the words "before the commencement of the Act" mean before 15th April 1917, which was the date when it came into force as is made clear by S. 1 (3) which says that the Act "shall come into force on such day as the Provincial Government may, by notification, direct", and it is also argued that S. 9 (1) does not apply because the mortgage was not made by a member of an aboriginal tribe, Kanwars not being aboriginal tribe on the date of the mortgage. Consequently, if neither S. 9 (1) nor S. 9 (2) applies, then S. 9 (3) cannot apply so as to require the civil Court to refer the case to the Deputy Commissioner and consequently the decree which the civil Court has passed is not contrary to any of the provisions of the Act and so the Deputy Commissioner has no right to apply under sub-s. (2) of S. 25. The question is which of these contentions is correct.

Apart from the notification under S. 1 (3) as to the date when the Act was to come into force the Act envisages two kinds of notifications by the Government which may take place at any time thereafter : (1) a notification under S. 1 (2) as to the areas to which the Act is to extend and (2) a notification under S. 3 as to the bodies of persons who are deemed aboriginal tribes for the purposes of the Act. If the provisions of S. 3 had been incorporated in S. 1 (2) so as to read that the Act should extend to such areas and to such bodies of persons as the Government might notify, then there would have been more force in the learned Advocate General's argument and it would have been possible to hold that S. 1 was intended to be read as a whole and that reading sub-ss. (2) and (3) together therefore the Act would only come into force for the areas and tribes affected from the time of the notification, but as it is, S. 3 being an entirely separate section from S. 1 with the defining S. 2 coming between, I can only hold that the expressions "after the commencement of this Act" and "before the commencement of this Act" in S. 9 refer to the date fixed under S. 1 (3). It is not correct to say therefore that the Act commenced for the Kanwar tribe on the date that they were notified to be aboriginal tribes. Consequently, it follows that if the commencement of the Act in S. 9 refers to the date promulgated under S. 1 (3), S. 9 does not affect the mortgage in this case at all. It was not a mortgage made by a member of an aboriginal tribe after the commencement of the Act, since, when the mortgagor made it, he was not a member of an aboriginal tribe, and so sub-s. (1) does not affect it; and it was not a mortgage made by a member of an aboriginal tribe before the commencement of the Act, because it was not made before the commencement of the Act. Therefore, under S. 9 (3), the civil Court was not required to refer the case to the Deputy Commissioner. It is true that the civil Court should under S. 25 (1) have sent to the Deputy Commissioner a copy of the decree in this suit, but that decree would not have been contrary to any of the provisions of the Act and consequently the Deputy Commissioner had no authority to apply under sub-s. (2) of S. 25 for revision of the decree.

It is not necessary in view of the above finding to consider other points raised by the applicants as to whether the Deputy Commissioner's application was within time or not. In any case, these grounds are not seriously pressed and the lower Court's reasoning for holding the application to be within time appears to be sound. One other point has been argued by the learned Advocate-General with which it is necessary to deal. It is said that no revision lies here since S. 25 (3) of the Act gives a right of applying for revision to the Deputy Commissioner and not to any other aggrieved

party. I do not think there is any force in this contention. Sub-section (3) appears to be merely an enabling provision so as to remove any doubt whether the Deputy Commissioner, as an outsider to the litigation, could apply for revision. If the Legislature had intended to reserve a right of revision to the Deputy Commissioner alone nothing could have been easier than to say that the decision of the appellate Court under sub-s. (2) would be final and no revision would lie therefrom except for the Deputy Commissioner in the event of his application under sub-s. (2) being rejected.

It follows that the lower Court's order setting aside the decree is illegal and must itself be set aside. The application of the Deputy Commissioner is accordingly rejected. Costs of this application and of the application to the Court below will be paid by Madan Singh. I allow Rs. 50 as counsel's fee in this Court.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Nagpur 166

PURANIK J.

Lalsa Motisa Shop, Ellichpur —
Plaintiff — Applicant

v.

Bhagwant Ramji Naik Kanao and others—Defendants—Non-applicants.

Civil Misc. Case No. 65 of 1940, Decided on 27th March 1940, for revision of order of First Addl. Dist. Judge, Akola, D/- 20th November 1939.

(a) Civil P. C. (1908), O. 1, R. 10 — Some of defendants in suit discharged by separate order — Judgment and decree against defendant on record not adjudicating upon discharged defendants' liability—Appeal against decree—Plaintiff cannot raise contention of discharged defendants' liability.

Some of the defendants to the suit were discharged by a separate order. The judgment and decree of the Court did not contain any adjudication regarding the liability of the discharged defendants. The decree in the suit passed against the defendant on record adjudicated questions as between him and the plaintiff :

Held that the plaintiff could not, in an appeal against the decree, raise the contention regarding the liability of the discharged defendants : A I R 1938 Nag 233, *Rel. on.* [P 166 C 2; P 167 C 1]

(b) Civil P. C. (1908), O. 1, R. 10, S. 2 (2) — Order under O. 1, R. 10 discharging defendant on ground that plaint disclosed no cause of action against him—Order being decree is appealable.

Where the name of a defendant is struck out under O. 1, R. 10 on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such : A I R 1919 Mad 871; A I R 1931 All 333; A I R 1930 Nag 122 and A I R 1938 Nag 233, *Rel. on*; A I R 1926 Nag 75, *Not foll.* [P 167 C 1]

W. B. Pendharkar and A. V. Khare — for Applicant.

Order. — This is an application for revision against an order passed by the lower Court on 20th November 1939 discharging defendants 2 to 9 from the suit. In the application for revision counsel for the applicant prayed that this Court may be pleased to set aside the finding and the order of discharge and to send the case back for further trial and for passing if possible a decree against the defendants and it was also prayed in the alternative that assuming that no revision lay this petition might be accepted by way of appeal and justice be done to the plaintiff as prayed. This led the office of this Court to see as to whether an application for revision lay or it should be treated as an appeal. The application was also accompanied by a copy of the judgment and decree. That judgment showed that after discharging defendants 2 to 9 from the array of the defendants the Court proceeded to decide the case against the defendant against whom the suit was tenable and decreed the claim against him. The office note suggests that as a decree has been passed in the case it is open to the applicant to agitate the question regarding the discharge of the other defendants in an appeal which can be filed by him against the decree that has been passed and in that view it was suggested that the revision application that has been filed was not tenable. The office also wanted a decision from the Court as to whether this application should be treated as a revision or an appeal. If it is treated as an appeal, the office is of opinion, that it is not properly stamped. Counsel for the applicant urged before me as this is an application against an order discharging the defendants the order must be treated as one passed under O. 1, R. 10, and as no appeal is provided for such an order an application for revision is tenable. He relied upon A I R 1926 Nag 75[1] and 29 ALL 325[2] and some other All India Reporter cases in support of his contention.

I think it proper to decide first the question as to whether the office is right in stating that the question that is being raised in the application could be raised by the applicant in an appeal against the decree that has been passed against defendant 1. I think this is not correct. The judgment and decree of the Court below do not contain any adjudication regarding the liability

1. ('26) 13 AIR 1926 Nag 75: 89 I C 331, Shanker Rao v. Raghunathrao.
2. ('07) 29 All 325 : 1907 A W N 68, Raghubans Puri v. Jyotis Swarupa.

of defendants 2 to 9 who were discharged by a separate order passed by the Court. The decree in the case which has been actually drawn up is a decree which can be said to be adjudicating the questions as between the plaintiff on the one hand and defendant 1 on the other only. In an appeal from such a decree it was not possible for the plaintiff applicant to have raised the contention regarding the liabilities of defendants 2 to 9. Bose J. in A I R 1938 Nag 233[3] has very clearly shown that such a question could not have been raised in an appeal against such a decree which adjudicated the rights of defendant 1 only.

This leaves me to decide as to whether the present application for revision should be registered as an application for revision or as a memorandum of appeal. This in its turn depends upon the construction of the order which has been passed. It may be an order under O. 1, R. 10, Civil P. C., but I find from the body of the order that the Court ordered the discharge of defendants 2 to 9 from the case as there was no cause of action against them and the Court has given its reasons for coming to the conclusion as to how there was no cause of action against these defendants. Such an adjudication will fall within the definition of a decree as given in S. 2 (2), Civil P.C. That is a formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. As it is a decree it has to be appealed against if it is intended to be challenged. In Mulla's Civil Procedure Code, p. 477, this point is made clear and it is stated that where the name of a defendant is struck out under O. 1, R. 10, Civil P. C., on the ground that the plaint does not disclose any cause of action against him, the order operates as a decree and is appealable as such. Cases relied on are 42 Mad 219[4] and 53 ALL 466.[5] The Judicial Commissioner's Court, Nagpur, also has taken a similar view in 26 N L R 24[6] and Bose J. in A I R 1938 Nag 233[3] had followed 26 N L R 24[6] in preference to A I R 1926 Nag 75.[1] I am of opinion that this application for revision must be treated as a memorandum of appeal and should be laid before the Division Bench for further decision regarding court-fee and other matters.

G.N./R.K. *Order accordingly.*

3. ('38) 25 AIR 1938 Nag 233: 176 I C 33, Chetanlal Purshottam v. G. S. Gupta.
4. ('19) 6 AIR 1919 Mad 871 : 49 I C 835: 42 Mad 219 : 36 M L J 169, Rama Rao v. The Raja of Pittapur.
5. ('31) 18 AIR 1931 All 333 : 131 I C 548 : 53 All 466: 1931 A L J 181, Sher Ali v. Jagmohan Ram.
6. ('30) 17 A I R 1930 Nag 122 : 127 I C 887 : 26 N L R 24, Punjaji v. Jairam.

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* (28) A. I. R. 1941 Nagpur 167

VIVIAN BOSE J.

Bibi Janbi w/o Abbas Ali Musalman — *Applicant*

v.

Abbas Ali Fateh Ali Musalman — *Non-applicant.*

Civil Revn. No. 71 of 1940, Decided on 27th November 1940, to revise order of Addl. Dist. Judge, Amraoti, D/- 26th November 1939.

(a) Mahomedan law — Dower — Wife's interest in deferred dower is vested interest.

The interest of the wife in deferred dower is a vested and not a contingent one. It is not liable to be displaced by the happening of any event not even her own death because her heirs can claim the money if she dies : A I R 1930 All 580 and A I R 1919 Lah 139, *Dissent.* [P 168 C 1]

*(b) Provincial Insolvency Act (1920), S. 9 (1) (b)—Husband's liability for deferred dower is debt.

Husband's liability under Mahomedan law for deferred dower is a debt within the meaning of S. 9(1)(b) and therefore can be basis for insolvency petition. [P 169 C 1]

J. R. Mudholkar — for Applicant.
B. T. Amlekar — for Non-applicant.

Order. — The applicant to this revision is the wife of the non-applicant. She applied in the lower Court to have her husband declared an insolvent on the ground that he owes her Rs. 586-4-0 for her dower and that he is fraudulently disposing of his immovable property in order to defraud her of her claim. The dower is deferred and both the lower Courts hold that it does not constitute a "debt" within the meaning of Section 9 (1) (b), Provincial Insolvency Act, because deferred dower is not payable till death or divorce neither of which has occurred. Only two cases touch the question directly. They are 52 ALL 560[1] and 50 I C 774.[2] In both, the ground of decision is that as deferred dower is not payable till death or divorce it is not possible to place a present value on the debt, and the latter decision adds that if the wife dies without leaving any heirs it may never be claimable at all. I am unable with respect to assent to either of these reasons. The interest of

1. ('30)17 AIR 1930 All 580:123 IC 754:52 All 560 1930 A L J 1038, Sughra Bibi v. Gaya Prasad.
2. ('19) 6 A I R 1919 Lah 139 : 50 I C 774 : 21 P L R 1919, Mirza Ali v. Qadari Khanam.

the wife is a vested and not a contingent one. It is not liable to be displaced by the happening of any event, not even her own death because her heirs can claim the money if she dies : *see* Tyabji's Muhammadan Law, Edn. 3, p. 176. The difference between vested and contingent remainders in English law will neatly illustrate the point. If land is granted to A for life, remainder to B for life, B's estate is vested even though if B dies before A, it will never come into possession. But if land is granted to A, a bachelor for life, and after his death to B's eldest son, the remainder to the eldest son is contingent because A may never have a son.

In my opinion the wife's interest is a vested one. And as to the other reason given, namely that the wife may die without heirs, that is a contingency which is likely to happen in the case of every future interest, whether it be vested or contingent, whether a loan or a mortgage or a promissory note or any other kind of liability payable at a future date. In point of fact the Provincial Insolvency Act contemplates contingent liabilities. Section 34 (2) speaks of "all debts and liabilities, present or future, certain or contingent." What we have to construe here are the words used in S. 9 (1) (b), Provincial Insolvency Act : "the debt is a liquidated sum payable either immediately or at some certain future time." There is, in my opinion, no doubt that a debt of this kind is a liquidated sum. We know its extent and we know that the sum will not vary whether it is paid today or 20 or 50 years hence. There is no question of interest and no question of discount. All we have to consider therefore is what do the words "at some certain future time" mean. In 50 Mad 396[3] at p. 401 Odgers J. considered, though he did not decide the point, that they probably meant "any time in the future which is capable of being ascertained," and I think with respect that he is right. In my opinion the key to the meaning of these words is to be found in Ss. 34 and 45 of the Act, and the decisions which interpret them or similar words in other Acts. I think these sections should all be read together and be construed as a whole. It would be ridiculous to hold that a debt, the defeating of which could form the foundation of an application for adjudication, could nevertheless not be proved and discharged after adjudication; and it would be equally absurd to hold that a debt which is capable of being proved cannot be used as a foundation for a bankruptcy petition.

The principle has, I think, been settled by the House of Lords in (1888) 13 A C 351.[4] In that case one Fothergill was the assignee of a lease which was to continue in force for fifty years and was still in force in 1883 when the acts which gave rise to the action were committed. The lease contained a covenant by which Fothergill was bound to deliver up the demised premises at the end of the term "well and sufficiently repaired." This covenant was broken in the year 1883. The lessors thereupon sued Fothergill for damages. They were met with the defence that in the interval Fothergill had been declared a bankrupt and had been duly discharged in 1875 eight years before the breach, that this was a "debt" provable in bankruptcy even though the breach was not committed till eight years after discharge, and, as the lessors had not put in a claim they were debarred from suing. This defence succeeded. It was argued before their Lordships that it was impossible to regard the problematical breach of a covenant at an unknown future date as a debt which would be proved, but their Lordships held otherwise. It was argued that it was impossible for any man to say whether the covenant would ever be broken at all, or if it was, whether it would be broken by Fothergill, for he in turn might have assigned to another. It was also argued that it would be impossible to foresee years before the event the extent of the damage even if it could be assumed that a breach would be likely. But none of this prevailed. Their Lordships pointed out that the object of the bankruptcy laws was to discharge the bankrupt as far as possible "from every possible liability". Lord Macnaghten quoting Mellish L. J. said :

> It is quite plain that the object of these sections is that the bankrupt shall be absolutely relieved from any liability under any contract he has ever entered into.

He also said :

> The liability of the bankrupt under a contract however extreme the difficulty of valuing that liability may be must be deemed to be a debt provable in bankruptcy, and therefore a debt from which the bankrupt is released by the order of discharge.

And again,

> the Act seems to treat every liability, arising from contract, which may result in payment of money

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3. ('27) 14 A I R 1927 Mad 153 : 99 I C 536 : 50 Mad 396 : 51 M L J 680, Venkatarama Aiyar v. Buran Sheriff.

4. (1888) 13 A C 351 : 58 L J Q B 44:59 L T 273 : 37 W R 177 : 53 J P 36, George Hardy v. Richard Fothergill.

or money's worth, as capable, at least prime facie of being estimated.

Their Lordships pointed out that annuities are provable in bankruptcy, and in 15 Lah 9[5] a claim for maintenance was held to be provable. In the realm of insurance the risk of a life and the duration of a voyage are computed every day by actuaries and others. In the House of Lords' case cited above, Lord Macnaghten said, dealing with the question at issue there:

I cannot think that a person of practical experience in dealing with leasehold property would have any great difficulty in making a fair estimate of the value of such a liability when he was once made acquainted with the circumstances of the particular case. Nor do I think that the Court would set aside as a matter of course an estimate founded on reasonable probability and practical experience.

And he concluded:

I cannot see that there would be any great difficulty in valuing the liability for the purpose of the Act of 1869, or, in other words, in assessing the amount of compensation which, under all the circumstances of the case, ought to be paid for the privilege of having the liability cancelled altogether.

I cannot see that there is any greater difficulty here. All that has to be estimated is the probable duration of the husband's life and the chances of his divorcing his wife. Section 45 provides a means of discounting dividends in respect of debts which are not payable at the date of the adjudication. They are to be treated as payable immediately ("presently" as the Act says) and a rebate of interest is deducted from the dividend computed from the date of the declaration of the dividend to the date when the debt would be payable. This date in a case like the present would have to be estimated along the lines suggested by the House of Lords—estimated as for example an insurance company would estimate the matter if it were called upon to do so. In my opinion, the husband's liability is a "debt" within the meaning of S. 9 (1) (b) and I hold consequently that the application lies. The order of the lower Court is set aside and the case is sent back to that Court for disposal according to law. The costs of this revision will abide the event. Counsel's fee for the applicant Rs. 10 and of the non-applicant Rs. 16.

D.S./R.K. *Revision allowed.*

5. ('33) 20 A I R 1933 Lah 901 : 149 I C 693 : 15 Lah 9 : 36 P L R 450, Mt. Champa v. Official Receiver, Karachi.

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(28) A. I. R. 1941 Nagpur 169

STONE C. J.

Bhagirathibai w/o Baboo Kedarnath — Defendant — Appellant

v.

Seth Rambaran Jankiram Sunar — Plaintiff — Respondent.

Appeal No. 314 of 1937, Decided on 5th October 1939, from appellate decree of Extra Addl. Dist. Judge, Jubbulpore, D/- 16th March 1937.

Limitation Act (1908), Art. 116—Sale void ab initio against rightful owner—Vendee put in possession by vendor but dispossessed by rightful owner — Suit for damages by vendee for breach of covenant for title and quiet enjoyment contained in sale deed—Limitation runs from date of dispossession—Vendee held entitled to rely on covenant in sale deed and claim indemnity.

When a sale is void ab initio as against the rightful owner and the vendee has been put in possession of the property by the vendor the limitation to claim damages for breach of covenant of title and quiet enjoyment contained in the sale deed runs from the date of dispossession of the vendee by the rightful owner under Art. 116: A I R 1932 Nag 5 (F B), *Rel. on.* [P 170 C 2]

After the vendor who had no title to the property sold had put the vendee in possession, the rightful owner instituted a suit against the vendee for possession and injunction restraining him from carrying on building work on the site alleged to have been purchased by him from his vendor. The suit was decreed. An appeal therefrom by the vendee was however dismissed and the defective title of his vendor declared by the appellate Court. The decree also directed him to deliver possession to the rightful owner. The vendee subsequently sued the vendor on the basis of a covenant contained in the sale deed to the following effect: "If either the entire or a part of the property sold passes out of your possession owing to any point of law, I will be responsible for payment of the entire consideration, together with damages and costs":

Held that having lost possession owing to the Court having passed a decree, whether right or wrong, for possession against him founded upon his vendor's defective title, the vendee was entitled to rely on the clause in the sale deed and claim indemnity, and that the cause of action for damages accrued at the date of dispossession. [P 171 C 1, 2]

Held further that the vendee would not be entitled to claim indemnity if the other case was in any way a collusive or fraudulent arrangement between the parties to it in order to get a Court to pass a decree unjustified by the facts to the detriment of the vendee. The fact that the vendee in the former suit appealed once only while he could have appealed twice did not show that the other case was a collusive one. [P 171 C 2]

M. B. Kinkhede and A. R. Kulkarni — for Appellant.

M. R. Bobde and K. C. Jain — for Respondent.

Judgment.—This is a defendant's appeal from a decree passed in a suit brought by the purchaser of a certain property particularized in the sale deed, EX. P-5. Broadly speaking the property is a site together with a dilapidated house thereon which appears

to have subsequently been removed by the plaintiff who built a house on the site. The claim was for a variety of things some of which have been disallowed, and no point arises with regard to them: indeed, no point arises with regard to any of these items. Before me two points have been raised : (1) relating to limitation, (2) relating to the legal effect of a notification made under S. 203, Land Revenue Act. The plaintiff's claim is founded fundamentally upon a covenant contained in the above mentioned sale deed to the following effect :

> If either the entire or a part of the property sold passes out of your possession owing to any point of law, I will be responsible for payment of the entire consideration, together with damages and costs.

The date of the sale was 15th March 1926. In 1929 the malguzar of the village in which the site was situate sued the purchaser, the present plaintiff, for possession and for an injunction to stop him carrying on the work of constructing the house above mentioned which he was then engaged upon. The result of that case was that the malguzar obtained a decree ordering the present plaintiff to deliver possession. Appeal was taken from that judgment to the District Judge, and in the result the judgment was upheld and the decree for possession confirmed. It should be added that the decree for possession included an order directing the present plaintiff, the then defendant, to remove the structure on the site within four months. That decree was dated 5th September 1930, and it was confirmed on appeal on 11th December 1930. Thereupon, in point of fact, the then defendant did not put the malguzar in possession but negotiated for a purchase of the site, and succeeded in his negotiations with the result that he purchased it from the malguzar on 23rd October 1931. Now he sues the defendant under the abovementioned covenant in the earlier sale deed; and the question is: Is he entitled to recover? This is a second appeal, and only points of law can be taken. The two points of law above mentioned are taken. The first of these I shall now deal with, that is the one relating to limitation.

The argument runs as follows: Assuming that the findings in the earlier case between the malguzar and the purchaser, the present plaintiff, are accepted as correct it means that at all material times the defendant had no title; because the Court granted the earlier decree it did on the ground that in 1917 the present defendant-vendor had abandoned the site and accordingly the malguzar thereupon obtained possession and title. Therefore, when this sale was concluded in 1926 the defendant had no title and the sale was void. Therefore, no rights were created, and the plaintiff's cause of action arose at the date of the sale: and in respect of that proposition 28 N L R 31[1] at p. 42 is relied upon. That is concerned with two cases, (1874) L R 9 Ex 99[2] and (1901) 2 Ch D 825.[3] The learned Judge states as follows :

> In the first mentioned case the plaintiff founded his action on the breach of a covenant for title as well as that for quiet enjoyment, but his case as to the breach of the covenant for quiet enjoyment having failed on technical grounds, it rested solely on the breach of the covenant for title. Baron Bramwell held that the breach of the covenant for title was not a continuing breach since "the covenant remains broken indeed but broken once for all." As the vendor was found to have no title to convey on the date of the conveyance, the breach of the covenant for title was held to have occurred on that date. From the observations made by Baron Bramwell in the course of his judgment viz., "of course, the statute of limitation would apply to any breach of covenant for quiet enjoyment which took place twenty years before suit" it is evident that if the action had been rightly laid as to the breach of the covenant for quiet possession, Baron Bramwell would indeed have treated the claim as being within time. In (1901) 2 Ch D 825,[3] the claim for damages was founded on the breach of the covenant for title only. It is apparent that these authorities have no direct bearing on a case in which damages are claimed on the basis of the breach of the covenant for quiet enjoyment, viz., disturbance of possession.

Accordingly in that case it was held :

> When the sale is void ab initio as against the rightful owner and the vendee has been put in possession of the property by the vendor the limitation to claim damages for breach of covenant of title contained in a registered deed under Art. 116, Limitation Act, runs from the date of dispossession of the vendee by the rightful owner.

Here the cause of action is stated in the claim to have arisen on 11th December 1930 when the plaintiff's appeal in the earlier suit was dismissed and the defective title of the defendant declared by the appellate Court. Earlier it had been put thus :

> . . . . the malguzar . . . asserted her right over the said plots and filed a civil suit against the plaintiff . . . and the plaintiff contested the same but ultimately it was held by judgment and decree dated 5th September 1930 that the present defendant had no right to sell the plot to the plaintiff and that the plot belonged to the malguzar and the plaintiff was ordered to vacate the plot.

So far there is not a word said about the fundamental covenant above mentioned, but

1. ('32) 19 A I R 1932 Nag 5 : 136 I C 225 : 28 N L R 31 (F B), Kashirao v. Zabu.
2. (1874) L R 9 Ex 99 : 43 L J Ex 57 : 30 L T 393 : 22 W R 547, Spoor v. Green.
3. (1901) 2 Ch D 825 : 70 L J Ch 822 : 85 L T 90: 50 W R 237, Turner v. Moon.

in the plaintiff's rejoinder there is this allegation:

> . . . . . the defendant undertook to guarantee his perfect title and indemnify the plaintiff against dispossession by whomsoever, then only the plaintiff agreed to purchase the property.

And again, he quotes the following words from the sale deed:

> If either the entire or a part of the property sold passes out of your possession owing to any point of law, I will be responsible for the payment of the entire consideration or damages and costs.

And then he alleges: "On the face of such statements the defendant cannot shirk his liability to indemnify the plaintiff." In other words, the plaintiff is pleading, very inelegantly it is true, two causes of action: (1) breach of the covenant of title, (2) breach of an express covenant of quiet enjoyment. He is pleading quite clearly that his cause of action arises when there is a breach of the second covenant, that is to say, when the decree of the lower appellate Court is passed with the result that he is directed to deliver possession to the malguzar. It seems to me therefore that even on the authority in 28 N L R 31[1] this is a case where one is concerned not with covenant for title only but with covenant for title and for quiet enjoyment and that the cause of action dates from the date of dispossession. I am therefore of the opinion that the limitation point fails.

The second point raised is as to the legal effect of a notification issued under S. 203, Land Revenue Act. The date of that notification is 3rd March 1928. The previous case went the way it did against the present plaintiff and in favour of the malguzar largely owing to certain admissions made by the present plaintiff in that suit which had the effect of persuading the Court that already in 1917 the present defendant-vendor to the knowledge of the present plaintiff-purchaser had lost title by abandonment and therefore the malguzar had gained title. It is said that that was an impossible result for a Court to arrive at in view of the effect of the wording of this notification which affected all suits then pending and directed the Court to treat the owners of sites situated as this was as persons having a heritable and transferable title. Therefore it is said that in that case the vendor (present defendant) should have been held to have had in 1926 a transferable title. But as the lower appellate Court has pointed out that notification could not possibly affect the position in 1917, 11 years before it was issued. If it could, it could equally affect the position in 1917, cure an immense range of cases of abandonment, and cause titles to be affected for an indefinite number of years past.

Quite apart from all that, in my opinion, what one is concerned with here is the fact that as a result of that previous litigation the present plaintiff has in fact lost in the eye of the law possession. It is true he has in point of fact acquired it by purchase, but that is neither here nor there. Whether that judgment is right or wrong it would make no difference. He has in fact lost possession. Having lost possession owing to a Court having passed a decree for possession against him founded upon his vendor's defective title, as that Court thought, he is, in my opinion, entitled to rely on the clause in the sale deed above quoted and claim indemnity. This of course would not be so if that other case was in any way a collusive or fraudulent arrangement between the parties to it in order to get a Court to pass a decree unjustified by the facts to the detriment of the present defendant; and it has been distinctly argued that there is some such flavour about the case, for it is said that the present plaintiff, the then defendant, lost that case largely because of his own false admissions and further that he was not very active in defending that case. It is said that he appealed once only while he could have appealed twice; had he appealed twice he might have won it. In my opinion that does not go to show that the other case was a collusive one. On the contrary the present plaintiff was in a very awkward position. He had started to build a house at the time of that case, and the loss of that case was a serious matter for him because it resulted in his being ordered to pull the house down, an order that he got out of only by re-buying the site at a figure within a hundred rupees of what he had given to the present defendant. In those circumstances, in my opinion, the two points of law argued fail. The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Nagpur 171

VIVIAN BOSE J.

Kaji Abdul Majid Shah — Applicant

v.

Mohammad Saheb Azizuddin and others — Opposite Party.

Criminal Revn. No. 93 of 1939, Decided on 1st September 1939, for revision of order of Addl. Sess. Judge, Wardha, D/- 17th January 1939.

(a) Criminal P. C. (1898), S. 145 — Person complaining about being forcibly ousted from possession by other side and asking for attachment of property and for appointment of receiver—Facts are sufficient to invest Court with jurisdiction to proceed under S. 145.

When a person comes forward and complains about being forcibly ousted from possession by the other side and asks for attachment of the property and for the appointment of a receiver and asks for action to be taken under S. 145 (which relates to land alone), there can be no reasonable doubt that he is setting forth all the necessary facts to invest the Court with jurisdiction to proceed under Section 145. [P 173 C 1]

(b) Criminal P. C. (1898), Ss. 145 and 147 — Dispute regarding right to receive offerings at certain shrine depending upon right to sit in particular spot—Order can be made either under S. 145 or under S. 147.

Where a dispute regarding the right to receive the offerings at a shrine centres around and depends upon the right to sit in a particular spot the dispute relates either to the possession of the land or to its use. Hence an order can be made under S. 145 or S. 147 : A I R 1938 Mad 537, *Rel. on*; 37 Cal 578, *Dissent.*; A I R 1927 Nag 333, *Expl., and Disting.* [P 174 C 1]

Hidayatullah — for Applicant.

M. Adhikari — for Opposite Party.

Order.—This is an extraordinary case in which both sides have totally abandoned the positions which they had adopted in the first Court and each has now taken up the position of his opponent in that Court. The question at issue is whether the trial Court had jurisdiction to make an order under S. 145, or in the alternative under S. 147, Criminal P. C. That of course depends upon whether the dispute relates to land or to the user of land. The position which the applicant before me adopted in the first Court was that he was in possession and that party No. 2, the non-applicants here, were interfering with that right to possession. This is strenuously denied in this Court and it is alleged that party No. 1, the applicant here, never referred to the question of possession at all. All he asked for was that Government as guardian of the peace, and custodian of law and order, should make suitable arrangements for the collection of offerings made by pilgrims at a certain shrine and for their distribution between the parties. He contends that the dispute relates exclusively to the offerings and has nothing whatever to do with the question of possession. This is exactly the position which had been taken up by the opposite party, party No. 2, in the first Court. That party now abandons that position and states that the matter does not relate exclusively to the right to receive the offerings but is inseparably bound up with the question of possession. What I have therefore to determine is whether any question about the right to possession of this shrine is involved in this case.

The proceeding started with the application of party No. 1, dated 24th February 1938. In it he stated that he was the landlord of the village in which the shrine is situate and the manager of the shrine. Then he stated that though he had been in possession of the shrine for a long time he feared the men on the other side and that therefore in order to avoid disputes he filed a civil suit against them in the year 1929. In that suit the Court of appeal decided that the applicant was not the sole wahiwatdar and had not the sole right to the income of the shrine. Then he continued after stating that during the pendency of the suit a receiver had been appointed.

After the suit was decided the applicant took possession of the shrine in the year 1933 and since then he has been in peaceful possession of the shrine and its management. Soon after the decision of the High Court which took place on 16th March 1937 the party arrayed against the applicant wanted to take forcible possession of the shrine.

The applicant then continued with other allegations and concluded by asking that a receiver be appointed by the Court to manage the shrine and make collections from the pilgrims and keep them in deposit until the sharers were able to get the dispute about their shares determined. Then in a later application, dated 31st January 1938, the applicant stated that the receiver who had been appointed in the civil suit had ceased to function and therefore the question again arose about the right to make the collections from the pilgrims and to manage the shrine generally, and the application continued :

The non-applicant and his son and relatives, the applicants learn, are now conspiring to create somehow further trouble and oust the applicants by force from the Pahad and Darga.

They therefore asked the Magistrate to take action and "maintain the applicants in their rights." Then followed a third statement made on 25th February 1938 on solemn affirmation. There he asks that action be taken under S. 145, Criminal P. C., and that the Darga be immediately placed under attachment and a receiver appointed. The question is whether these various applications deal with the right to possession or not. In order to understand that it is necessary to obtain a clear picture of the manner in which the collections from the pilgrims are made. The applicant describes that in his evidence as witness 1 for his party. He

states there that "there is a gadi on the Darga and Abdul Majid has the right to sit on it alone." It is explained here that the person who sits on this gadi is the one who receives the offerings from the various pilgrims. Therefore, it is clear that the best and perhaps the only feasible method of determining who is in possession of the shrine is by seeing who has been receiving these offerings and that, as I understand it, is the attitude adopted by the learned trying Magistrate. But to continue with the applicant's evidence: he stated later on in his evidence:

> From 2nd or 3rd May 1937, Abdul Majid's possession has been taken over by force by party No. 2. From 3rd May 1937 till the date on which this application was presented, I have got documentary evidence to prove that Abdul Majid had possession.

Reading all these applications and the evidence together, it is reasonably plain that though the main dispute between the parties relates to the income derived from the offerings made by the various pilgrims who visit the shrine, it is inextricably bound up with the question of possession. It is impossible to separate the one from the other so far as the dispute now before me is concerned. Of course as an abstract proposition of law, it is quite clear that one person may be entitled to sit on the gadi and thus receive the offerings while others are interested only in their subsequent distribution. In that sense the two questions are separate, but the criminal Courts acting under S. 145 are not interested in the latter of these two positions. All they have to see is which one of the two parties before them is really in possession. Therefore when a person comes forward and complains about being forcibly ousted from possession by the other side and asks for attachment of the property and for the appointment of a receiver and asks for action to be taken under S. 145 (which relates to land alone), there can, in my opinion, be no reasonable doubt that he is setting forth all the necessary facts to invest the Court with jurisdiction to proceed under S. 145. Acting on these various applications and the statement made on affirmation the learned Magistrate issued a preliminary order on 25th February 1938. The order is not very clear because what the learned Magistrate states is "that a dispute likely to cause a breach of the peace concerning the shares in the income" exists between the two parties before him. If that was all, I am clear that he would have had no right to proceed under S. 145, but he continues :

> I direct the said Abdul Majid on one side and Mohammad Sahib and others on the other to..... put in written statements of their respective claims as respects the fact of actual possession of the said Darga.

This last sentence makes it clear that what the learned Magistrate was investigating was the fact of possession and since in this case the dispute about the shares or rather the right to receive the income is inextricably bound up with that possession, the order read as a whole relates to the dispute between the parties regarding the possession of the land. Of the rulings cited by the learned counsel for the applicant party No. 1, 37 Cal 578,[1] related exclusively to the right to worship in a particular shrine and not to the use of the land. But the learned Judges went on to state at page 580 :

> It may be that it is impossible to perform the duties of a pujari without entering upon the land on which the temple is built. But it is the worship which is disputed and not the use of the land.

They therefore came to the conclusion that in such a case action could not be taken under S. 145. This view however is dissented from in a decision of the Madras High Court which is to be found in A I R 1938 Mad 537[2] at page 538. The learned Judge who decided that case states :

> It seems to me that where the dispute is regarding a right which is inseparably connected with the use of any land or building, it must be regarded as being within the purview of S. 147. It may be that the dispute in actual fact may have more to do with what a man does in the temple after entering into it and not so much with his actual entry into the temple; nevertheless where the right regarding which a dispute exists is one which is inseparably connected with the right to enter a building and cannot be dissociated from it the dispute cannot be said to be not one regarding an alleged right of user of the building.

With these remarks I agree and respectfully dissent from the interpretation given in the Calcutta ruling. Another Calcutta case was also relied on, namely 38 Cal 387,[3] but that merely states that

> an order made under S. 145 declaring a party entitled to the actual possession of a temple and its offerings is intra vires as to the temple, but not as to the offerings.

That in my opinion is unexceptionable. The only relevance of the offerings in this case is to determine who is in possession of the land. The Courts under S. 145 can clearly

1. ('10) 37 Cal 578 : 6 I C 182 : 12 C L J 22 : 14 C W N 611, Guiram Ghosal v. Lal Behari Das.
2. ('38) 25 A I R 1938 Mad 537 : 176 I C 127 : 39 Cr L J 705 : (1938) 1 M L J 817, Velappa v. Ramaswami.
3. ('11) 38 Cal 387 : 9 I C 6 : 13 C L J 445 : 16 C W N 574, Ram Saran v. Raghu Nandan Gir.

not determine who has the right to receive these offerings. Then there is the Madras case, 29 Mad 237[4] at page 238 which merely states that the real point in question there made it clear that

a dispute as to the right to use a mosque between persons claiming to be entitled to officiate as Kazi therein is a dispute coming within S. 147, Criminal Procedure Code.

As regards the ruling in 23 N L R 84[5] following the Calcutta cases just cited the learned Additional Judicial Commissioner had before him a case in which the dispute related exclusively to the right to receive a share of the income. It had nothing to do with the right to possession of the temple nor yet with the right to enter into the temple, worship there and receive the offerings at that spot. It appears to have been conceded that the offerings in that case were taken by the Raja of Mandhata and that the dispute centred around the manner in which those offerings were to be distributed after receipt. Therefore, that decision has nothing to do with the facts in this case. The objection taken is a very technical one. It is clear that the parties are anything but desirable characters—they had broken heads on previous occasions—and it is eminently desirable that a broad and common sense view should be taken and that the action of the authorities called upon to deal in a summary way with a situation likely to lead to a breach of the peace be upheld if that is at all possible. As I have said when one views the various applications made by the applicant and his evidence in a broad and common sense way it is quite clear that though the main dispute is as regards the right to receive the offerings it centres around and depends upon the right to sit in a particular spot and that relates either to the possession of the land or to its use. Therefore the order whether regarded as one made under S. 145 or under S. 147 is right. The application is dismissed.

D.S./R.K. *Application dismissed.*

4. ('06) 29 Mad 237: 4 Cr L J 58, Kader Batcha v. Kader Batcha Rowthan.
5. ('27) 14 A I R 1927 Nag 333 : 103 I C 415 : 23 N L R 84 : 28 Cr L J 687, Sobhagsingh v. Thakur Bakhtawar Singh.

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(28) A. I. R. 1941 Nagpur 174

STONE C. J. AND VIVIAN BOSE J.

Onkarsingh Sigdarsing

v.

Firm Shrikishan-Radhakishan.

First Appeal No. 88 of 1937, Decided on 8th January 1941, from decree of Sub-Judge, First Class, Khandwa, D/- 27th February 1937.

Specific Relief Act (1877), S. 42—Consequential relief — Fraud — *A* to defraud his creditors transferring his property to *B* — No third party defrauded —*A* can sue for mere declaration that property is his without claiming sale deed to be declared nominal and ineffective.

Where *A* to defraud his creditors transfers his property to *B*, *A* can sue for a mere declaration that the property belongs to him without claiming the relief that the sale deed be declared nominal and ineffective before any third party has been defrauded: 35 Cal 551 (PC), *Expl. and Rel. on.* [P 175 C 1]

P. N. Rudra — for Appellant.

K. B. Tare, and W. R. Puranik — for Respondents 1, and 1 to 3, respectively.

Judgment. — The plaintiff in this case seeks a declaration that he is the owner of certain properties. A preliminary issue was framed in the following terms :

Whether plaintiff is entitled to the relief of declaration which he seeks in this suit without claiming a relief that the sale deed executed by him in favour of defendants 2 and 3 be declared nominal and ineffective ?

On that preliminary issue the learned Judge has dismissed the suit. In our opinion he was wrong in so doing. In so saying we must not be taken as indicating in any way that this suit has any merits whatever nor must we be taken as indicating that on the merits it must obviously be dismissed. We have not gone into the merits. We have merely noted that it is founded in fraud and our conclusion is based entirely on the observations of their Lordships of the Privy Council in 35 Cal 551[1] which decision requires to be carefully understood in order that this case may be properly approached when it comes to the merits and in order that the present point can be fully understood. Their Lordships were there concerned with a contest between A and B. A started as the owner of certain property which property he colourably purported to transfer to B. That colourable transaction was admittedly a fraudulent one for the purpose of defrauding the creditors of A. Their Lordships had to consider B's argument that because the whole transaction was rooted in fraud therefore the maxim *in pari delicto potior est conditio possedentis* applied. They came to the conclusion that that maxim did not apply if A retraced his steps and sought to get the property back before any third party had been defrauded. If their Lordships' observations at pp. 558 and 559 are carefully examined, it will be seen that they are giving A a *locus pœnitentiæ* during which he can get rid of the effects

1. ('08) 35 Cal 551 : 35 I A 98 : 12 C W N 562 : 7 C L J 528 : 4 L B R 266 (P C), Pethorpermal Chetty v. Muniandy Servai.

of his fraud and that they are limiting that to circumstances during which the transaction remains unreal. Once it has any real content then their Lordships clearly indicate that it cannot be treated as a nullity because ex hypothesi if it has a real content it is not a nullity. They indicate that it has a real content if the position of third parties is thereby affected.

While the transaction is in the unreal state it may be regarded as nothing. Nothing passes; nothing is done; the whole thing is colourable and it begins and remains a mere matter of talk. There is no transfer, there is nothing to set aside and the property stays where it was. So viewed, obviously one is not concerned with a transfer passing title from A to B making B, it may be, the legal owner, trustee for A, or anything of that sort: one is not concerned therefore with a transfer which divests A and which requires a re-transfer before A can be re-invested. One is just concerned with a sham which has no effect at all. This however is assuming that A can retrace his steps. He can retrace his steps while the transaction is still merely a colourable transaction and remains unreal. It remains unreal as long as no third party is affected. Once a third party is affected, it becomes something other than unreal. Once that stage is reached, neither A nor B can say that the transaction is imaginary, colourable, or void. That being the state of the case, it is not necessary for A to seek a declaration setting aside the transaction. There is nothing to set aside. What A has got to ask for, as he has asked for here, is a declaration that the property is his. In order to get that declaration he has got to prove that he has retraced his steps in time. For that he has got to establish that the unreal nature of this transaction has never ceased. That will be the problem that he will be faced with when it comes to the merits in this case. The case will now go down for disposal on the merits. Costs hitherto incurred and of this appeal to abide the event.

G.N./R.K. *Case remanded.*

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(28) A. I. R. 1941 Nagpur 175

GRILLE J.

Emperor

v.

Shambai w/o Jiwanlal Dube and another — Accused.

Criminal Revn. No. 490 of 1940, Decided on 31st January 1941, to revise order of Magistrate First Class, Amraoti, D/- 23rd July 1940.

(a) Criminal P. C. (1898), S. 488 — Mere casual residence is not sufficient to give jurisdiction.

The general rule is that an application under S. 488 can only be entertained at the place where husband and wife last resided together, and this rule has been modified to the extent that it is possible for a husband to have more than one residence for the purpose of S. 488. Mere casual residence in a place for temporary purpose with no intention of remaining is not residence so as to attract jurisdiction under S. 488. [P 175 C 2; P 176 C 1]

Where therefore the husband in order to marry a second wife visits a place where he does not reside nor has ever resided and his first wife also comes to the same place to which she also is a stranger and files an application under S. 488, the Magistrate at that place has no jurisdiction to award maintenance under S. 488: A I R 1926 Oudh 268, *Rel. on*; A I R 1939 Cal 333, *Disting.*; A I R 1918 Cal 785, *Not followed.* [P 176 C 2]

(b) Criminal P. C. (1898), S. 488 — Husband offering to keep wife with him—Wife cannot be allowed maintenance.

A Magistrate cannot allow maintenance to the wife when the husband has offered to keep his wife with him even if the wife refuses to go with him on the alleged ground of ill-treatment which has not been established. [P 176 C 2]

B. L. Gupta — for Applicant.

G. G. Kane — for Accused.

Order. — This is a reference by the Sessions Judge, Amraoti, recommending that an order granting maintenance to Mt. Shambai passed against her husband should be set aside on the ground that the Court had no jurisdiction to entertain the application and also on other grounds. Jiwanlal and Shambai last lived together at Kharagpur in Bengal where Jiwanlal is employed by the Bengal Nagpur Railway. They had lived there for some years and they ceased to live together at least three years ago when Shambai returned to her native place in the United Provinces. In August last Jiwanlal went to Amraoti for the purpose of taking a second wife. While he was there for the celebration of the wedding, Shambai arrived from the United Provinces and presented her application. The Magistrate at Amraoti entertained the application on the ground that both parties had resided at Amraoti for a month or so although there is no evidence as to the time when either party arrived. Admittedly, the marriage took place on 7th July and the application was filed on the 13th. There is no evidence as to the date of Jiwanlal's arrival at Amraoti, and Shambai stated that she had stayed with him there for about a fortnight.

The general rule is that an application can only be entertained at the place where husband and wife last resided together, and this rule has been modified to the extent

that it has been held possible for a husband to have more than one residence for the purpose of S. 488. But, on a perusal of all the authorities, I can find no warrant for the proposition, with one exception, that a casual visit is to be taken as residence for the purpose of granting jurisdiction. It has been held that if the husband and wife go to a place for a couple of months, the husband returning at times to his main residence but going back to the temporary one, this is sufficient to confer jurisdiction. But the proposition enunciated by Stuart C. J. in A I R 1926 Oudh 268,[1] that casual residence in a place for temporary purpose with no intention of remaining is not residence so as to attract jurisdiction has, so far as I am aware, never been disputed and has been consistently quoted with approval. This is not one of the class of cases where the parties have no permanent abode and where temporary residence, for however short a period, has been held to attract jurisdiction.

Two cases have been cited by the learned counsel for Mt. Shambai. In one of these, I L R (1939) 1 Cal 345,[2] Edgley J. held in view of the words "resides or is" in sub-s. (8) of S. 488 that an application could be made where the opposite party had his place of business, although not his actual residence within the jurisdiction of the Magistrate to whom the application was made. There the opposite party resided within the jurisdiction of the Police Magistrate of Alipore but his place of business was within the jurisdiction of the Chief Presidency Magistrate. That case can have no application to the facts before me. The other case is 21 C W N 872.[3] There it was held that although the husband was a permanent resident of Darjeeling his visits to Calcutta on business, extending to some six weeks and renewed after an interval of a week for apparently further six weeks, would confer jurisdiction on the Calcutta Magistrate in whose Court the application was made. In view of the long list of authorities to the contrary of which the most pertinent to the present facts is the decision of Stuart C. J. in A I R 1926 Oudh 268,[1] I am unable with the greatest respect to follow this isolated decision and in any case it appears that the husband there concerned was in the habit of paying business visits to Calcutta from Darjeeling, and Calcutta was a place where in the words of Edgley J. in I L R (1939) 1 Cal 345[2] he could easily be found. In the case before me, if Mt. Shambai had bona fides for demanding maintenance from her husband, she could have done so at Kharagpur at any time within the previous three years. Instead of this she takes advantage of her husband's visit to Amraoti to get married, in a place where he does not reside and has never resided and to which she too is a stranger, and calls evidence of witnesses of that place who can obviously have no knowledge of the circumstances on which her claim to maintenance is based. It is clearly improper that there should be jurisdiction to hear the application and to decide it in such circumstances. If anything further was needed to show that the husband did not reside in Amraoti and had no intention of remaining there, it is to be found in the conduct of the wife in obtaining the issue of process before process-fee was paid, presumably by inducing the clerk responsible to act irregularly, and although the application was filed on 13th July, the stamp on it was purchased on 4th July, before her husband's wedding had taken place. Such undue precipitancy is clearly indicative of her knowledge that her husband was not resident in Amraoti and had no intention of remaining there beyond the time necessary to complete his marriage.

Apart from this, the Magistrate had no reason whatever to allow maintenance when the husband had offered to keep his wife with him. In her application she stated that she was perfectly prepared to live with him in spite of the fact that she had alleged beating in the past. No evidence to substantiate this allegation of beating was brought, and yet when the husband made the offer, she repudiated it, saying that she did not want to go with him as he had already given her trouble and would give her a lot more. This is entirely at variance with her application. On these grounds as well as on the ground that the Court had no jurisdiction the order is set aside.

G.N./R.K. *Application allowed.*

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1. ('26) 13 A I R 1926 Oudh 268: 95 I C 596 : 27 Cr L J 820: 1 Luck 343: 3 O W N 231, Mt. Ramdei v. Jhunni Lal.
2. ('39) 26 A I R 1939 Cal 333 : 181 I C 898 : 40 Cr L J 598 : I L R (1939) 1 Cal 345, Indu Bala Debi v. Satchid Prasad.
3. ('18) 5 A I R 1918 Cal 785 : 40 I C 706 : 18 Cr L J 706 : 21 C W N 872, Mrs. F. H. Jolly v. St. John William Jolly.

(28) A. I. R. 1941 Nagpur 177

VIVIAN BOSE J.

Sitaram Shrawan Koshti—Plaintiff—Applicant

v.

Bajya Parnya Bhoi — Defendant — Non-Applicant.

Civil Revn. No. 171 of 1940, Decided on 20th November 1940, to revise decree of Sub-Judge, Second Class, Katol, D/- 15th January 1940.

(a) Usurious Loans Act (10 of 1918 as amended by Act 11 of 1934), S. 3 — Court has power to act suo motu.

Under the Act as amended locally, the Court has power to act suo motu even though the plea as to re-opening of transaction is not raised by way of defence. If interest payable and in fact charged is excessive within the meaning of S. 3 (2) of the Act it entitles the Court to review the transaction. [P 177 C 2]

(b) Pleading — Repayment — Proof of — Repayment pleaded not specifically denied and admitted in pleading — Repayment should be taken to be proved.

Where it is only possible to reach the sum named by the plaintiff in the suit if credit is given for the repayment pleaded by the defendant the Court is justified in acting on that admission, especially when the plaintiff does not specifically deny the payment pleaded. [P 177 C 2]

(c) C. P. Money-lenders Act (13 of 1934 as amended from time to time), S. 2 (v)—Regular course of business—Isolated act of money-lending is not money-lending in regular course of business.

Isolated act of money-lending is an act of business, but not necessarily an act done in the regular course of business. Consequently, the Act does not apply to such a case. The Act only applies to money-lenders and therefore before it can be applied it must be shown by the person seeking to apply it and seeking to take advantage of its provisions that the plaintiff is a money-lender. [P 177 C 2; P 178 C 1]

(d) C. P. Reduction of Interest Act (32 of 1936) — Applicability — Act in force during suit on loan but repealed before judgment in suit — Court in its judgment cannot resort to provisions of Act.

The original loan was advanced long before the Act came into force. The Act was in force when the suit was in progress but was repealed before the lower Court gave its judgment:

Held that the Act contained a prohibition which prevented persons from recovering more than a certain rate of interest between certain date specified in the Act. Consequently before a Court could act under the provisions of the Act, it must be in force. It was not in force at the date of the judgment of the lower Court and consequently the lower Court was wrong in resorting to its provisions. [P 178 C 1]

(e) C. P. Money-lenders Act (13 of 1934) — Burden of proof.

The Act only applies to money-lenders and therefore before it can be applied it must be shown by the person seeking to apply it and seeking to take advantage of its provisions that the plaintiff is a money-lender. [P 178 C 1]

R. S. Kholkute — for Applicant.

A. L. Halwe — for Non-Applicant.

Order. — The first question which arises in this revision is whether the lower Court was right in re-opening the transaction on which the suit is founded. The suit is based on a promissory note dated 20th December 1936, which in turn is based on a bond of 28th June 1933. If the transaction can be re-opened then the further question arises whether a repayment of Rs. 55 has been proved. The lower Court has evidently re-opened the transaction although it has not stated why. In my opinion the learned Judge had a right, and indeed was bound to do so, under the Usurious Loans Act as amended locally. Section 3 states that " where, in any suit to which this Act applies, whether heard ex parte or otherwise, the Court has reason to believe, etc." That means clearly that the Court has power to act suo motu even though the plea is not raised by way of defence. The interest which according to the statement of the plaintiff was payable and which was in fact charged on the bond was 2 per cent. compound and is also the interest on the promissory note in suit. That is excessive within the meaning of S. 3 (2), Usurious Loans Act, and entitles the Court to review the transaction.

That brings me to the next point, viz., whether the repayment pleaded of Rs. 55 has been proved. No evidence has been taken in the case, and the lower Court has proceeded upon the pleadings. The plaintiff stated that he did not remember whether any payment had been made towards the previous bond, also that the amount stated in the promissory note was reached by calculating interest on the sum due on the bond at 2 per cent. compound. The lower Court made a calculation, and it is only possible to reach the sum named in the promissory note if credit is given for the repayment of Rs. 55 which has been pleaded. In the circumstances the lower Court was justified in acting on that admission, especially when it is borne in mind that the plaintiff did not specifically deny the payment pleaded. The lower Court has also disallowed interest under the Money-lenders Act. There is no proof that the plaintiff is a "money-lender". The definition of "money-lender" given in the Act is "a person who, in the regular course of business, advances a loan." There is no proof here that the loan was advanced in the regular course of business. The word "regular" shows that the plaintiff must have been in the habit of advancing loans to persons as a matter of regular business. If only an isolated act of

money-lending is shown to the Court it is impossible to state that that constitutes a regular course of business. It is an act of business, but not necessarily an act done in the regular course of business. Consequently, the lower Court was wrong in applying this Act.

It was argued that the burden is on the plaintiff to prove that he is not a money-lender. That however is incorrect. The Act only applies to money-lenders and therefore before it can be applied it must be shown by the person seeking to apply it and seeking to take advantage of its provisions that the plaintiff is a money-lender. Interest will therefore have to be allowed. As however the transaction was rightly re-opened this Court is left with a discretion as to the amount of interest which should be allowed. The Money-lenders Act indicates that 18 per cent. simple is a fair rate of interest on an unsecured loan. Interest will consequently be calculated at that rate upto the date of suit, and allowance will be given for the repayment of Rs. 55. The other repayment of Rs. 21 which was pleaded has already been rejected. The next question is whether the lower Court was right in applying the Reduction of Interest Act. The original loan was advanced long before the Act came into force, and consequently no question of vested interests arises. In fact, if anybody has vested interests which has been affected it is the plaintiff because on the date when he lent his money there was no thought in any one's mind that his interest would be arbitrarily reduced by the Legislature. The Act was however in force when the suit was in progress but was repealed before the lower Court gave its judgment. The Act contains a prohibition. It prevents persons from recovering more than a certain rate of interest between certain dates specified in the Act. If the prohibition is withdrawn it is clear that the original rights of the parties revive, and the Courts cannot enforce the prohibition which is withdrawn. Consequently before a Court can act under the provisions of the Act, that is to say, before it can enforce the prohibition contained therein the Act must be in force. It was not in force at the date of the judgment of the lower Court and consequently the lower Court was wrong in resorting to its provisions. The learned counsel for the defendant argues that as the plaintiff only claimed 6 per cent. in the plaint that is all he is entitled to. That is not correct. Six per cent. is claimed on the assumption that the transaction would not be re-opened. The claim in the plaint is for Rs. 58-13-0. According to the decision here it comes to only Rs. 38-8-0. The decree will accordingly be modified. Costs here and in the lower Court will be proportionate to success and failure. From date of suit to the date of this decree I allow interest at 4 per cent. per annum simple.

N.K./R.K. *Application partly allowed.*

***(28) A. I. R. 1941 Nagpur 178**

VIVIAN BOSE J.

Seth Thakurdas Gordhandas Gujrathi Mod — Applicant

v.

Dagdulal Ranchoddas Gangarade and another — Defendants —

Non-Applicants.

Civil Revn. Applns. Nos. 792 of 1939 and 125 of 1940, Decided on 14th November 1940, to revise order of Sub-Judge, Second Class, Khandwa, D/- 4th October 1939.

* Civil P. C. (1908), S. 151, O. 22, R. 1 and O. 1, R. 10 (2) — Scope — Inherent powers of Court—Real owner can apply to join as party to suit instituted by benamidar after benamidar's death either under S. 151 or under O. 1, R. 10 (2).

Provision of O. 22, R. 1 enures not only in favour of the legal representative but also in favour of any other person other than the legal representative. Even if the legal representative does not apply, the suit does not abate and if it is still alive the real owner can apply to be joined as a party to a suit instituted by the benamidar after the benamidar's death either under O. 1, R. 10 (2) or under S. 151 of the Code at any stage provided no injustice or inconvenience is caused to the other side and provided the same suit is continued and different cause of action and different pleas are not set up. The mere fact that an enquiry independent of and different from the original suit has first to be made does not mean that the suit is converted into one of a different character : A I R 1930 Mad 221, *Dissent.*; A I R 1918 P C 140, *Rel. on*; A I R 1929 Mad 268; 22 Cal 92 and A I R 1924 Lah 45, *Ref.*

[P 178 C 2; P 179 C 1, 2]

R. K. Rao — for Applicant.

R. S. Dabir — for Non-Applicants.

Order. — This order will govern Civil Revision No. 792/39 and Civil Revn. No. 125/40. Dealing with the former, the first question is whether the real owner can apply to be joined as a party to a suit instituted by the benamidar after the benamidar's death. The lower Court relying on A I R 1930 Mad 221[1] holds that he cannot. With due respect to the Madras learned Judge I am of opinion that that is wrong. Their Lordships of the Privy Council have decided in 46 Cal 566[2] at p. 575 that it is open to the real owner to apply

1. ('30) 17 AIR 1930 Mad 221 : 122 I C 175 : 58 M L J 57, Doraiswami v. Chidambaram.
2. ('18) 5 AIR 1918 PC 140 : 49 IC 1 : 46 Cal 566 46 I A 1 (P C), Gur Narayan v. Sheolal Singh.

to be joined in the action brought by the benamidar. In view of that pronouncement it is clear that the real owner has a right to be joined, and as he has that right it is clear that there must be some provision in the law somewhere which entitles him to be so joined. In my opinion, the provision is to be found either in O. 1, R. 10 (2) or in S. 151, Civil P. C. In A I R 1929 Mad 268[3] at p. 270 the real owner was allowed to be joined. The learned Madras Judges applied O. 1, R. 10. But in any case whatever the proper order may be it is clear from the decision of the Privy Council that the real owner has a right to be joined.

The next question is at what stage he can apply to be joined. In my opinion it is clear that he can be joined at any stage provided the suit brought by the benamidar is still alive and provided of course no injustice or inconvenience is caused to the other side. It is possible that the application might be refused if it is made at a very late stage and there is contest between the benamidar and the real owner or if the latter sets up a new case. He cannot of course be allowed to do that. In this case the person who is said to have been the benamidar died on 9th December 1938 and the application by the present applicant was made on 13th February 1939. At that date the suit had not abated; it was still alive. Order 22, R. 1 states that the death of a plaintiff shall not cause the suit to abate if the right to sue survives. The right to sue clearly survived in this case and therefore the suit did not abate. It not having been abated the real owner was entitled to apply to be joined. It is argued however that this provision is one which enures in favour of the legal representative and not of any other person. If the legal representative does not choose to apply, then, it is argued the suit abates. That in my opinion is not so. The order deals with the case in which the right to sue survives and it states that if the right to sue survives the suit does not abate. After that it is only the Limitation Act which causes the suit to abate if the application for substitution is not made within the time prescribed. If the suit does not abate and if it is still alive, then the real owner can, in my opinion, apply to be joined and once he is joined he can continue the suit. But as I have said he must continue the same suit and cannot set up a different cause of action or different pleas. It is argued that the mere fact that he is setting up a title in himself here changes the cause of action and converts the suit into one of a different character. That again is not so. The question whether he is the real owner is an independent one and his right to be joined depends upon whether he is the real owner or not. It is just as independent as whether a person is a legal representative or not. For that of course an enquiry has to be made and if the decision is that he is the legal representative (or the real owner in this case), then he is entitled to be joined and once he is joined, then the original suit continues. The fact that an enquiry independent of and different from the original suit has first to be made does not mean that the suit is converted into one of a different character. I need not in the circumstances dilate upon 22 Cal 92[4] and 4 Lah 72[5] because all they decide is that a new cause of action cannot be imported into the suit, and with that of course I agree.

It is pertinent to observe in this case that the legal representatives here do not wish to proceed with the suit and that they do not oppose the application of the applicant to be joined and proceed with the suit. The legal representatives appeared and filed an application to that effect. The learned counsel for the defendants non-applicants denies that the applicant is the real owner. Therefore unless this matter has already been enquired into and decided by the first Court an enquiry will be necessary in the same manner as an enquiry is necessary when a party applies to be joined as the legal representative and the other side denies that he is the legal representative. The mere fact that those who are said to be the legal representatives do not oppose the application does not conclude the matter. The application for revision is consequently allowed and the order of the lower Court is set aside. If no enquiry has been made as to whether the applicant is the real owner that enquiry will now be made by the lower Court. If it has been made and the conclusion is that the applicant is the real owner, then he will be joined and will be allowed to continue the suit. The costs of this revision will abide the result. That is to say, if in the result the applicant is found to be the real owner and is joined, the costs of this revision will be paid by the non-applicants. If, on the other

3. ('29) 16 AIR 1929 Mad 268 : 115 I C 340 : 55 M L J 856, Pitchayya v. Rattamma.

4. ('93) 22 Cal 92, Sham Chand Giri v. Bhayaram Panday.

5. ('24) 11 AIR 1924 Lah 45 : 74 I C 146 : 4 Lah 72, Ghuli v. Sawan.

hand, he fails, then he will pay the non-applicants their costs of this revision. Counsel's fee for the applicant Rs. 35 and for the non-applicants Rs.30. Civil Revision No.125/40 arises out of the same matter. An appeal was filed against the order of the lower Court to the District Judge, Nimar. This was filed by way of abundant caution and both sides are agreed that the appellate Court had no jurisdiction to entertain the appeal because no appeal lay. Consequently the order of the appellate Court dismissing the appeal on the ground that the real owner cannot apply to be joined is set aside. The appeal was dismissed there without notice to the other side and so no question of costs arose. There will be no order as to costs in this revision either.

N.K./R.K. *Application allowed.*

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(28) A. I. R. 1941 Nagpur 180

VIVIAN BOSE J.

Vilayatali Khan and another —
Plaintiffs 2 and 3 — Applicants

v.

Mt. Khairunnissa w/o Mohammad Server, Plaintiff 1 and others, Defendants — Non-applicants.

Misc. Civil Case No. 126 of 1940, Decided on 13th November 1940, to revise order of First Sub-Judge, Second Class, Amraoti, D/- 6-10-1939.

Civil P. C. (1908), S. 2 and O. 23, R. 1—Suit by three plaintiffs — Plaintiffs 2 and 3 deriving title from plaintiff 1 — Plaintiff 1 withdrawing suit — Court dismissing whole suit as withdrawn by plaintiff 1 —Decision is on merits and not simply under O. 23, R. 1 and is appealable — No revision lies — Mere absence of formal drawing up of decree does not invest High Court with jurisdiction to interfere in revision.

The decision that as soon as plaintiff 1 withdraws or compromises or abandons the suit, the other plaintiffs who derive title from her cannot succeed is a decision on the merits and is not simply an order permitting withdrawal under O. 23, R. 1. Such decision amounts to a decree within the meaning of S. 2 of the Code and is appealable and hence no revision lies against such a decision, and the mere fact that no appeal can be filed until the decree is formally drawn up would not invest High Court with jurisdiction to interfere in revision : 27 Cal 362; A I R 1922 Lah 267 and A I R 1928 Mad 496, *Disting.*; 8 N L R 92 and A I R 1930 Nag 122, *Ref.* [P 180 C 2; P 181 C 1, 2]

S. R. Mangrulkar — for Applicants.

R. N. Padhye, M. R. Bobde and M. Y. Shareef — for Non-applicants 3, 4, 5 and 9; 1; and 2, 6, 7, 11 and 12, respectively.

Order. — The real question here is whether an appeal lies or not. If an appeal lies it is clear that I have no jurisdiction to entertain this revision. In my opinion, an appeal lies. The facts are as follows : Plaintiff 1 made certain dispositions of property in favour of some of the defendants on 16th March 1931. In or about January 1939 she regretted her action and wanted to institute a suit for setting aside these alienations. It appears that she had not enough money to conduct the suit and so entered into an agreement with plaintiffs 2 and 3 under which they were to advance Rs. 800 towards the cost of her litigation and to obtain a one-fourth share in some of the fields in dispute. The agreement having been entered into all the three plaintiffs instituted the suit out of which these proceedings arise. After the suit had been instituted, plaintiff 1 came to an understanding with the defendants, changed her mind and stated that she desired to withdraw the suit unconditionally. The lower Court thereupon held that plaintiffs 2 and 3 had only purchased a contingent interest in the property and that if plaintiff 1 could not succeed in the suit and it was clear according to the learned Judge that she could not once she has stated that she did not wish to proceed and desired to withdraw, then plaintiffs 2 and 3 had no case and consequently it dismissed the suit as withdrawn by plaintiff 1. The question is whether this dismissal amounts to a decree within the meaning of S. 2, Civil P. C. If it does, it is appealable. The argument before me has proceeded upon the construction of O. 23, R. 1, Civil P. C. That order is not very happily worded but the meaning is clear. If the plaintiff seeking to withdraw is the sole plaintiff, then no question of permission arises unless the plaintiff wants to bring a fresh suit on the same cause of action. If she does not, then she is entitled to withdraw whether the Court likes it or not and whether the other side likes it or not. The penalty for withdrawal is that no fresh suit lies on the same cause of action. When, however, the plaintiff seeking withdrawal is not the sole plaintiff, then she cannot withdraw unless the others consent. In that case permission is required and what the Court has to determine is whether the others have consented to it or not. In the present case, the plaintiff who wanted to withdraw was not the sole plaintiff. The other plaintiffs had not consented and therefore clearly the plaintiff could not withdraw from the suit and the lower Court had no power to allow her to do so. But in my opinion the lower Court has not done that. What the lower Court states is that as soon as plaintiff 1 withdraws or compromises or abandons the suit, the other plain-

tiffs who derive title from her cannot succeed. Whether that is a right view of law or not is a matter with which I am not concerned. The point is that in my opinion the lower Court has decided this case on the merits and has not simply passed an order permitting withdrawal under O. 23, Rule 1.

It is argued, however, that the lower Court has clearly stated that the suit is dismissed not because in its opinion it cannot succeed on the merits but because it has been withdrawn by plaintiff 1. That in my opinion is not a true construction of the order. When read as a whole, as I have said, the lower Court considers that once plaintiff 1 abandons the claim, the others have no right of suit and therefore the sentence in which the learned Judge states that the suit is dismissed as withdrawn means that it is dismissed because plaintiff 1 has chosen to withdraw by which he means because plaintiff 1 has chosen to abandon the claim, and therefore the others have no right of suit. That as I say is a decision on the merits. As regards the rulings cited 27 Cal 362[1] and A I R 1922 Lah 267[2] have no application here because they deal with cases which were withdrawn with liberty to file a fresh suit, and the decision there is that an order allowing this is not a decree within the meaning of S. 2. In A I R 1928 Mad 496[3] the suit proceeded and there was no order of dismissal. The matter was entertained as a revision but the question whether an appeal lay or not was not decided and therefore that ruling also does not assist us here. The real difficulty which the learned counsel for the applicants has found here is that no decree has been drawn up and he has consequently found himself in a dilemma. According to 8 N L R 92[4] no appeal can be filed until a decree has been drawn up. Therefore according to the learned counsel no appeal lies. That in my opinion is not correct. An appeal clearly lies whenever the decision amounts to a decree within the meaning of S. 2. It may be that no appeal can be filed until the decree is formally drawn up but that would not invest this Court with jurisdiction to interfere in revision. The proper course, if that is really the law, would be to apply to the first Court to draw up its decree and then, if that Court refuses to do so apply either in revision, or in appeal, treating the order as a decree. That, however, is a matter which I do not decide because according to 26 N L R 24[5] it is not necessary for the party aggrieved to wait until a decree is drawn up, and the order or judgment itself can be treated as a decree within the meaning of S. 2 and an appeal can be filed. Again I do not decide whether this is right or wrong. All I decide is that the matter is appealable and therefore no revision lies. Whether all this would afford the applicants ground for asking for extension of time under S. 5, Limitation Act, is a matter which the Court before whom the appeal is brought will have to decide. I say nothing about it.

As an appeal lies the application is returned for presentation to the proper Court. The costs of this revision will be paid by the applicants, that is to say, by plaintiffs 2 and 3. There will, however, be only one set of costs as plaintiff 1 and the defendants have joined hands and now have the same interests. Counsel's fee Rupees 75. This will be divided between the three sets of non-applicants in the proportion of one-third each, that is to say, each set will get Rs. 25.

N.K./R.K. *Application returned.*

1. (1900) 27 Cal 362 : 4 C W N 41, Abdul Hossein v. Kasi Sahu.
2. ('22) 9 A I R 1922 Lah 267 : 65 I C 719, Sant Ram v. Mt. Sahib Kuar.
3. ('28) 15 A I R 1928 Mad 496 : 109 I C 404 : 55 M L J 120, Nanjunda Chettiar v. Nallakaruppan.
4. ('12) 8 N L R 92 : 15 I C 935, Mahu v. Kishen.
5. ('30) 17 A I R 1930 Nag 122 : 127 I C 887 : 26 N L R 24, Punjaji v. Jairam.

(28) A. I. R. 1941 Nagpur 181

STONE C. J. AND VIVIAN BOSE J.

Shri Mahadeoji through Pitain Matabhik — Plaintiff — Appellant

v.

Baldeo Prasad Mahadeo Prasad and others — Defendants — Respondents.

First Appeal No. 21 of 1936, Decided on 31st January 1940, from decree of Addl. Sub-Judge, First Class, Jubbulpore, D/- 5th November 1935.

(a) Adverse possession—Person entering into possession in fiduciary character — He must prove open assertion of hostile title to prove that his possession had become adverse.

Where a person has entered into possession in a fiduciary character it would be necessary for him to allege and prove an open assertion of a hostile title in order to show that the character of his possession, from that point on had changed.

[P 184 C 2]

(b) Limitation Act (1908), S. 10, Explanation — Section 10 does not apply to mere custodian or manager of property handed over to him for safe custody by legal or de facto manager.

Unless the seisin to the estate resides in the person sued S. 10 cannot apply. The seisin must, for the limited purposes of this section, reside in one person or set of persons and not in two. There cannot be a manager of a manager for the purposes of the explanation. A mere custodian or manager of

property handed over to him for safe custody or management by the legal or de facto manager cannot be reached by this section : A I R 1928 Bom 58, *Expl.* [P 185 C 1 2,]

(c) Limitation Act (1908), S. 10, Explanation —Explanation applies also to de facto managers.

The explanation to S. 10 applies as much to de facto managers as to those legally entitled. Because a person who wrongfully holds as trustee and pretends to act as such cannot turn round and reprobate the right which he asserts and claim to hold adversely to his beneficiary. An estoppel would arise : A I R 1920 Cal 558, *Rel. on.* [P 185 C 2; P 186 C 1]

(d) Trust—Person in possession of trust property cannot resist suit for possession by rightful owner on ground that somebody else placed him in possession and that he attorned to him.

A person in possession of trust property cannot resist a suit for possession by the rightful owners on the ground that somebody else placed him in possession and that he attorned to them. He would have at the very least to establish that he was a transferee for value who purchased in good faith without notice of the trust. But that is a very different matter from saying that the property vested in him in trust for a specific purpose. [P 186 C 1, 2]

(e) Limitation Act (1908), S. 10—"Specific purpose."

The specific purpose required by the section is the specific purpose mentioned in or deducible from the deed : A I R 1922 P C 212 and A I R 1931 P C 196, *Rel. on.* [P 186 C 2]

(f) Trust — Trustee de son tort and de facto manager — Powers of.

A trustee de son tort and a de facto manager is subject to the obligations and liabilites of the trustee or manager legally entitled to possession but he does not necessarily have all their rights and powers. [P 186 C 2]

(g) Limitation Act (1908), S. 10 — Persons suing not on behalf of trusts but as administrators of will—Section 10 does not apply.

Where persons are suing not on behalf of the trusts of the temple but as administrators of the will in order to enable them to administer the estate, S. 10 cannot apply : A I R 1922 P C 212 and A I R 1931 P C 196, *Rel. on.* [P 187 C 1]

(h) Limitation Act (1908), Arts. 109, 89 and 120—Person placed in rightful possession as custodian wrongfully withholding profits—Suit to recover profits is not governed by Art. 109 or Art. 89 but by Art. 120.

Where a person has been placed in rightful possession as custodian (supratdar) and receives profits but wrongfully withholds them, a suit to recover profits is not governed by Art. 109 or Art. 89 but by Article 120. [P 187 C 2]

(i) Limitation Act (1908), Art. 62—Suit to recover profits—Art. 62 does not apply.

Article 62 only applies when the defendant has received money as distinct from profits into his hands. Hence, Art. 62 does not apply where a suit is to recover profits. [P 187 C 2]

(j) Succession Act (1925), S. 332 — Assent of administrator not given to legatee's title — Administrator and not legatee is entitled to sue.

Where it has not been proved that the administrators had given their assent to the legatee's title, the title to the property bequeathed still vests in the administrators to the will and consequently the administrators and not legatee is at the moment entitled to sue. [P 183 C 2]

D. N. Chowdhari — for Appellant.

K. C. Jain — for Respondents 1 and 2.

Judgment. — This appeal arises out of a suit for the proceeds of property said to have been held on trust by the defendants. It was instituted in the following circumstances. One Bhola was the owner of the property in dispute. He executed a will, dated 8th May 1919 shortly before his death. This will is Ex. P-28. In it he dedicated certain properties, including the property now in dispute, to a temple of Shree Mahadeoji which he had built in the Jubbulpore District. He also made certain other bequests to his niece, Mt. Lachhia, and to two persons, Pitai and Munda. As regards the property dedicated to the temple he made the following arrangements in respect of its management. He stated, immediately after mentioning the bequests to Lachhi, Pitai and Munda, as follows :

All those who belong to my family shall be keeping a supervision over the property of the said temple as long as their lives last but they shall not have the authority to put the property of the temple to their own use . . . . . For superintending the management of the temple I appoint Ramlal son of Bachchu Kumbar, Devi son of Gayaprasad by caste Brahmin, Baldeoprasad son of Madhoprasad Brahmin, Babboosingh son of Ranjitsingh Thakur and Kamta son of Gajadhar Kumhar, residents of Bandhaiyapura, as panchas who are to keep an eye on the matter . . . . When there is nobody alive in my family, the entire management and supervision of the whole of my property shall rest with the panchas.

He appointed no executor under the will and therefore on his death the legatees, Pitai and Munda, applied for letters of administration with the will annexed and letters were granted in their favour on 26th September 1924. Disputes thereupon arose between the administrators Pitai and Munda on the one side and the reversioners of Bhola on the other. Therefore according to their story, they placed defendant 1, Baldeo, who is one of the panchas mentioned in the will, in possession of the property in dispute as trustee in order that it might be safe, and entered into an express understanding with him that the fields should be restored to them after the conclusion of the dispute with the reversioners. Defendant 1 is said to have entered upon possession on this understanding, and he is described as a trustee of the deity in the plaint. He, along with his wife, remained in possession for a number of years. According to the plaint possession was delivered in May or June 1920. After the conclusion of the litigation with

the reversioners, that is to say on or about 11th March 1929, Pitai and Munda asked defendant 1 to give back possession to them in accordance with the terms of the arrangement under which he had entered into possession. He refused and claimed that he was in possession, not in any fiduciary capacity, but as the agent of his wife who was the malguzarin of the property (the property in dispute being tenancy fields), and that he had obtained possession because the plaintiffs, who became the tenants of the fields under the will as trustees of the temple, were unable to pay the rent to the malguzar and so surrendered the fields. Pitai and Munda were therefore compelled to file a suit for possession. This they did in the Court of the subordinate Judge, Second Class, Jubbulpore, and obtained a decree which was later confirmed by the Court of the Judicial Commissioner. In that suit it was found that there was a trust and that defendant 1 had entered into possession in a fiduciary capacity. A decree for possession was accordingly given in favour of Pitai and Munda as sarbarakars of the temple of Shri Mahadeoji and possession was eventually handed over to them. The present suit is for profits and is consequent on the former litigation. It has been instituted by Shri Mahadeoji through Pitai who claims to be one of the sarbarakars of the plaintiff. In our opinion, this was wrong and the matter will now have to be set right. As the irregularity has not occasioned any injustice and has not misled any of the parties to the dispute and has not resulted in any of the questions at issue being improperly tried, we do not think it will be right to dismiss the suit altogether; nor indeed have we been asked to do so by the other side; in fact the mistake appears to have arisen partly because of the defendants' attitude in the previous case where they insisted that the idol and not the temple should sue. Amendment will therefore meet the ends of justice. The will dedicates the property to the temple and not to the deity. The relevant portion is in the following terms:

> Since the whole property is what I have acquired for myself and whereas I have had a temple of Shree Mahadeoji built in mohalla Bandhaipura, tahsil and district Jubbulpore, and it is my wish to dedicate some property to the temple so that the worship Bhog and expenses of the temple only may be carried out .... I therefore herein below write down the property that I dedicate to the said temple under the name of the temple.

It is clear then that the dedication is to the temple and not to the deity. Therefore whether the temple would have a right of suit or not (a matter on which we express no opinion) the deity Shri Mahadeoji has none. The title to the estate will eventually vest either in the trustees named in the will whoever they may be, or in the temple if it can exist as a juristic entity. But before the title to the property can completely vest in the legatee it is necessary that the assent of the administrators of the will should be obtained: *see* S. 332, Succession Act, which is in these terms:

> The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

There is no proof that this has been given. On the contrary, the evidence indicates that it has not. Therefore, in our opinion, the title to this property is still vested in the administrators to the will and consequently they, and neither the legatee or legatees nor the deity, are the persons who at the moment are entitled to sue. One of them, Pitai, has signed the plaint and has instituted the suit on behalf of the deity Shri Mahadeoji. The other Munda was joined as a defendant as he did not wish to join as a plaintiff, but he said that he admitted the claim. As therefore there is no dispute between Munda and himself in this matter, we consider that the ends of justice will be met by allowing Pitai to sue in a representative capacity on behalf of the administrators. The former suit for possession, instituted by Pitai and Munda against defendant 1 was instituted in a Court which was not competent to try the present suit. Therefore its findings are not res judicata and the judgment has no relevance here except to show that they are entitled to immediate possession (that of course is final between the parties) and that therefore they have a prima facie right to sue for profits. That means that we must decide the present case uninfluenced by the decision in the previous suit.

The learned counsel for the plaintiff-appellant objects to this. He says that this objection to his plea of res judicata was not taken in the lower Court and so cannot be raised here because it involves questions of fact, namely the extent of the jurisdiction of the trial Court in the former case. The reply to that is that the burden is on the plaintiff to sustain on his plea. In point of strictness his allegation should have been struck out. He did not raise the plea in his plaint, and in his reply merely stated that the matter is res judicata without setting out the materials necessary for the foundation of such a

plea. The defendant therefore had no assertion of fact before him to which he could, or need have, replied. As we have said, the plaintiff's case is that possession of the property was given to defendant 1 in a fiduciary capacity. The allegations are to be found in paras. 5 and 10 of the plaint. They are in these terms :

5. That in May or June 1920 Pitai and Munda (on the advice of the other panchas named in the will with a view to keep the fields immune from the forcible possession of the adverse party namely Mulloo and others) made over to defendant 1 and to be kept in his custody as a trustee for the plaintiff with an express understanding that the fields would be restored to the plaintiff after the conclusion of the dispute of heirship between the disputing parties.

10. That defendants 1 and 2 have been in possession of the fields from May 1920 to March 1931 as trustees on behalf of the plaintiff, and have not paid anything or rendered any account of income from the said fields, and the plaintiff is entitled to get the account explained and receive the profits from the defendants of the period the said defendants have been in possession as trustees.

The only reply which defendant 1 gave to this is : "The allegations in para. 5 are not admitted. This defendant was not created a trustee as stated." Defendant 2 stated :

This defendant has been in possession as malguzar and as against her the claim, if any, is barred by limitation at least till 30th March 1932 under Art. 109, Limitation Act.

Neither defendant has raised the plea taken in the former suit about the inability of the administrators to pay the rent and their surrender to the malguzarin for that reason. They cannot, therefore, as their learned counsel claimed the right to do, take advantage of their pleas in the former suit, especially as their counsel objected to the other side being given a like advantage. Not only is there no plea to this effect in the present suit, but there is no evidence either. So this contention must fail. The contentions of the plaintiff about the manner in which, and the conditions subject to which, possession was delivered to Baldeoprasad are fully borne out by his witness P. W. 10, Kamta, and by the plaintiff, Pitai, as P. W. 15. They make it clear that the land was handed over to defendant 1 for protection and safe custody. (Suprat is the word which Pitai uses.) He was asked to manage it and it was made clear to him that he was to return it at the conclusion of the contest with the reversioners. These witnesses are supported by the jamabandis which show the deity Shri Mahadeoji as the tenant in actual occupation.

On the other side is the evidence of deendant 1, Baldeoprasad, as D. W. 1. He does not say a word about the manner and conditions under which he entered into possession of the property nor of the character in which he held it, nor does he make any attempt to controvert the evidence of P. Ws. 10 and 15. We know also that this defendant attested the will, that he was present when it was scribed, that he appeared before the registering officer when it was registered, that he is the agent of his wife the malguzarin of this property, and that he manages all her affairs. All this renders it unlikely that he would not have known about the will and that this property was trust property. When in addition we find that P. Ws. 10 and 15 are uncontradicted we see no reason why we should not believe them. If believed, and we do believe them, then it is clear that defendant 1 entered into possession in a fiduciary capacity knowing that the property was trust property comprised in a Hindu religious endowment, and that he undertook to return the same on the conclusion of the dispute between the administrators and the reversioners.

The next question is about limitation. The defendant Baldeoprasad was placed in possession in the year 1920 and this suit was not instituted till the year 1935. The plaint is dated 30th March 1935. Profits are claimed for a period of 11 years, that is to say from 1920 till the year in which Pitai and Munda got back possession under the decree in the former suit. Now so far as the right to possession is concerned, it is clear on the facts given above that the defendants, (for defendant 2 has done no act apart from her husband, and though the malguzarin, is little more than a dummy), were in permissive possession throughout, and that they have neither alleged nor proved any assertion of a hostile title. As they entered into possession in a fiduciary character it would be necessary for them to allege and prove an open assertion of a hostile title in order to show that the character of their possession from that point on had changed. Therefore under the ordinary rules of limitation, quite apart from the special rules which apply to trust estates, the defendants could at no time have resisted the claim for possession. But the question of profits does not stand on the same footing. Under the ordinary law of limitation, profits would be claimable only for three or at the outside six years, according as to whether Art. 109 or Art. 120, Limitation Act, applied. But the plaint asserts here that S. 10 applies and so these bars do not apply. Section 10 (omitting matters which do not

appertain to this suit) can only apply if the suit is for the proceeds of property which has become vested in the defendant in trust for any specific purpose. The explanation to this section is in the following words:

> For the purposes of this section any property comprised in a Hindu . . . . . religious . . . . . endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.

In our opinion this point has been settled by their Lordships of the Privy Council. In 44 Mad 831[1] at p. 839 their Lordships decided that when property is gifted or devised to a Hindu temple or deity (it does not matter which) then it vests in the deity or the institution and not in the manager and that consequently S. 10 does not apply because the property cannot be said to have vested in such manager in trust. They reaffirmed this in 50 Cal 329[2] at p. 336. It is true the explanation to S. 10 has now made a difference and that since its introduction the manager of property comprised in a Hindu religious endowment (as also in a Mahomedan or Buddhist one) is deemed by a fiction of law to be a trustee and the property is deemed to be property vested in trust for a specific purpose, but the distinction between the person in whom the property is deemed to be vested and a mere manager of it holding under the former is still there. The seisin to the property, and by this we mean the actual de facto seisin and not necessarily the legal seisin, cannot reside in two persons at one and the same time unless of course they are co-owners or co-trustees holding under one right or one title, and what their Lordships hold is that unless the seisin to the estate resides in the person sued, the section cannot apply. This we think still holds good, the only difference being that by a fiction of law the seisin for the purposes of S. 10 is now deemed to reside in the manager when the conditions laid down in the explanation are fulfilled and that therefore one does not enquire further to see whether someone else is legally seised of the estate. But even now this fictitious seisin must for the limited purposes of this section reside in one person or set of persons and not in two. There cannot be a manager of a manager for the purposes of the explanation.

In 52 Cal 809[3] at p. 816, as also in 44 Mad 831[1] at p. 840, their Lordships of the Privy Council described the position of the shebait as "custodian of the idol and manager of its estate," and, as we have said, in their earlier decisions (before the addition of the explanation to the section), they held that such manager or custodian does not come within the purview of the section. In the same way we think that a mere custodian or manager of property handed over to him for safe custody or management by the legal or de facto manager, (that is to say by the person now deemed to be the trustee because of the explanation to S. 10), cannot be reached by this section either. As regards 52 Bom 184[4] upon which the learned counsel for the plaintiff-appellant relies, that was a case in which property was vested in the defendant as trustee for a specific purpose. There was no doubt about the trust there and it was express. It was not a case of a constructive or resultant trust. That decision therefore does not apply. Who then was the manager within the meaning of the explanation in this case — the administrators, Pitai and Munda, or defendant 1? In our view it was neither, but at best it was the former and not the latter.

Pitai and Munda acted in the previous suit as sarbarakars of the deity, and Pitai (who now sues alone) claims to occupy the same position in this case. It is clear that they entered upon possession of the property in suit, (property comprised in a Hindu religious endowment), because their case has always been that they handed over the property to defendant 1 for safe custody. In doing this they acted either as administrators (in which case S. 10 would not apply as we shall show presently) or they acted as sarbarakars. If they acted as the latter, as they say they did, then they acted as managers of the property and consequently they and not defendant 1 will be deemed to be the trustee within the meaning of S. 10. It would not matter in the least whether they entered upon the estate in that capacity in a legal right or assumed the management without title on their own responsibility, for the explanation to S. 10 applies as much to de facto managers as to those legally entitled. The reason is plain. A person who wrongfully holds as trustee and pretends to act as

1. ('22) 9 A I R 1922 P C 123 : 65 I C 161 : 48 I A 302 : 44 Mad 831 (P C), Vidya Varuthi v. Baluswami Ayyar.
2. ('23) 10 A I R 1923 P C 44 : 71 I C 646 : 50 I A 84 : 50 Cal 329 (P C), Abdur Rahim v. Narayan Das Aurora.
3. ('25) 12 A I R 1925 P C 139 : 87 I C 305 : 52 I A 245 : 52 Cal 809 (P C), Pramatha Nath Mullick v. Pradhyumna Kumar Mullick.
4. ('28) 15 A I R 1928 Bom 58 : 107 I C 705 : 52 Bom 184 : 30 Bom L R 45, Chintaman Ravji v. Khanderao Pandurang.

such cannot turn round and reprobate the right which he asserts and claim to hold adversely to his beneficiary. An estoppel would arise. It was held in 24 C W N 752[5] that a suit against a trustee de son tort for accounts during the period of his occupation lies at the instance of the lawful trustee and that no question of limitation arises. Therefore, if Pitai and Munda entered upon the property as sarbarakars, as they say they did, and assumed management of it in that capacity, then they would not be able to divest themselves of their responsibilities by handing the property over to another, especially as it is clear that they had no intention of abandoning their rights, whatever they may have been. P. W. 10 tells us that:

> There was no settlement as to for how many years the possession was to remain with the malguzar. (He is referring to Baldeo.) There was no agreement about the cultivation during the period of his charge of the land.

P. W. 15 states that the property was placed in the 'suprat' or custody of Baldeo. He says:

> We put the property in defendant's custody for protection during the suit and we asked him to pay malguzar's revenue and then return the field after the suit.

We are of opinion that this was merely an act of management on the part of Pitai and Munda in the same way as the action of a shebait who hands over temple jewels to a bank for safe custody would be. By no stretch of imagination would such an act constitute the bank a 'manager' of the jewels within the meaning of S. 10, nor would it divest the shebait of his responsibility and position. If Baldeo was a trustee at all, and it is possible to argue that he was according to the definition in Snell's Principles of Equity (Edn. 21), p. 126, he would be so in respect of a constructive and not a specific trust. His undertaking was to manage on behalf of Pitai and Munda and to restore the property, (and by implication its proceeds also), to the administrators. His direct responsibility was to them. The specific trusts, if any, would arise in their favour. That alone would be the specific purpose for which the property was vested in him if indeed it vested at all within the meaning of this section. We do not mean to suggest that the actual trustees of the temple would have no right of suit. Of course a person in possession of trust property cannot resist a suit for possession by the rightful owners on the ground that somebody else placed him in possession and that he attorned to them. He would have at the very least to establish that he was a transferee for value who purchased in good faith without notice of the trust. But that is a very different matter from saying that the property vested in him in trust for a specific purpose. As we have said, the only specific purpose deducible in the present case is the obligation to hand the property (and impliedly its proceeds as well) back to Pitai and Munda, whereas the specific purpose required by the section is the specific purpose mentioned in or deducible from the will: *see* 49 I A 37[6] and 10 Pat 851[7] at p. 870.

We have indicated above that at best Pitai and Munda were the managers within the meaning of the explanation and not Baldeo. That might or might not make them liable in a suit properly framed and instituted against them by the person or persons legally entitled to sue. We say nothing about that here. But it would not necessarily give them a right of suit in that capacity. A trustee de son tort and a de facto manager is subject to the obligations and liabilities of the trustee or manager legally entitled to possession but he does not necessarily have all their rights and powers. In the present case, and on the facts before us, (and again we make it clear that our decision is confined to the facts of this case and must not be taken as establishing a general proposition), we are of opinion that the only right of suit which Pitai and Munda possess is in their capacity as administrators to the will. The will is by no means clear. It dedicates the property to a temple, and then in one place it states:

> All those who belong to my family shall be keeping a supervision over the property of the said temple as long as their lives last;

and in another:

> When there is nobody alive in my family the entire management and supervision of the whole of my property shall rest with the panchas.

These passages would appear to indicate that the testator appointed the members of his family as the managing trustees for the period of their respective lives; and this interpretation is supported by the passage in which the panchas, among them defendant 1 Baldeo, are appointed

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5. ('20) 7 A I R 1920 Cal 558 : 57 I C 805 : 24 C W N 752, Dhanpat Singh v. Mohesh Nath Tewari.

6. ('22) 9 AIR 1922 P C 212 : 102 I C 832 : 49 I A 37 (PC), Khaw Sim Tek v. Chuah Hooi Gnoh Neoh.

7. ('31) 18 AIR 1931 P C 196 : 133 I C 705 : 10 Pat 851 : 58 I A 279 (PC), Chhatra Kumari Devi v. Mohan Bikram Shah.

for superintending the management of the temple I appoint .... as panchas who are to keep an eye on the matter.

But on the other hand the expression "all those who belong to my family" is vague, and even as regards them, all that the earlier passage states is that "they shall be keeping supervision over the property," and this conveys much the same sense as the word "superintending," used in connexion with the panchas. Then the last of these passages runs :

When there is nobody alive in my family the entire management and supervision of the whole of my property shall rest with the panchas.

This appears to indicate that the panchas were to have at least joint, though not sole, management of the property so long as members of the family were alive. It is therefore by no means clear that Pitai and Munda were constituted the sarbarakars or managers of this temple under the will. They set up this right in para. 2 of the plaint but it was challenged by Baldeo in para. 2 of his written statement and the plaintiffs were called upon to establish it. Beyond producing the will, they have made no attempt to do so, and the will, as we have said, is not clear. But in any case, even if the will be construed to the utmost in favour of Pitai and Munda, it is clear that they were not made the sole managers of the temple trusts. They have not pretended to act here on behalf of the whole body of trustees (whoever they may be) nor have they shown what right they have to do so. On the contrary they assert that they are the sarbarakars. Therefore we are unable to regard the right of suit as vesting in them in that capacity.

But as we have said they are the administrators to the will and so have a right of suit in that capacity because it is clear that at the date of the cause of action, namely while the property was in the hands of Baldeo, they did not hand it over to the legatee or legatees. They had merely placed Baldeo in possession till the conclusion of their fight with the reversioner of the testator. It follows they had not administered the estate, at any rate not this portion of it, up till then. Therefore in our opinion their real right to sue is as administrators. That being so S. 10 can in no event apply, for they are suing not on behalf of the trusts of the temple but as administrators of the will in order to enable them to administer the estate. This we think follows from the decisions of their Lordships of the Privy Council in 49 I A 37[6] and 10 Pat 851[7] at page 870.

If S. 10 does not apply then the suit will be governed by the ordinary rules of limitation. The only possible articles on this view are 89, 109 and 120. We do not think Art. 109 applies because the receipt of the profits was not wrongful. Baldeo was placed in rightful possession as an agent or manager and he rightfully received the profits in that capacity. It is not his receipt of them that is wrongful but his withholding of them after receipt. As regards Art. 89 we do not think Baldeo was an agent in the sense in which the word is used there. He has been described as a custodian (supratdar) by P.W. 15 and we think that that describes his position. We are of opinion that Art. 120 applies in a case of this kind. The lower Court considered that Art. 62 applied for one period of the occupation, namely from June 1920 to 11th March 1929 and it quoted 37 ALL 40.[8] That ruling has no application here because the person sued there had received actual money and the suit was to recover the sums received. Here the suit is to recover profits and not money. There is therefore no case here of money received by the defendant. Article 62 only applies when the defendant has received money as distinct from profits into his hands.

As regards the remaining period, namely from 11th March 1929 to 31st March 1931, all that the learned Judge says is that the defendant was there as a trespasser during that period. He does not decree the claim for those years and gives no reason for not doing so. But we take it he meant (though he does not say so) that the three years rule would apply from 11th March 1929 to 31st March 1931 and so that portion of the claim is beyond limitation. This would bring the case under Art. 109 but, as we have said, we do not think that a person who has been placed in rightful possession can be regarded as wrongfully receiving the profits during the period of his occupation even though he wrongfully declines to restore possession when he ought to do so. Baldeo was there in a fiduciary capacity and that continued till he parted with possession. The fact that he asserted a hostile title would not relieve him of his fiduciary liabilities until he had perfected that title. Till then he would still in the eye of the law be holding in his fiduciary capacity and would receive the profits in that capacity. Therefore in our opinion Art. 109 does not apply.

8. ('14) 1 AIR 1914 All 544: 27 I C 533: 37 All 40: 12 A L J 1256, Masih-ud-din v. Imtiaz-un-nissa Bibi.

The suit was instituted on 30th March 1935 and so the plaintiff is not entitled to profits received before 30th March 1929. We gather from the lower Court's judgment that the defendants were in possession down to 31st March 1931. Therefore two years' profits is all that can be claimed. What these would come to has not yet been determined. The lower Court considered the issue (No. 6) unnecessary. It will therefore be necessary to remand the case for determination of the following issue: "What were the amount or profits received by the defendants from the six fields in suit during the period 30th March 1929 to 31st March 1931"? The record together with the findings will be returned on or before 1st October 1939. A fortnight's time will be allowed for the filing of objections. (After receiving the findings their Lordships delivered the following further judgment.) Continuing our judgment, dated 27th July 1939, the findings have now been received. The lower Court holds that the gross income from the fields during each of the two years in question was Rs. 186. The rent paid was Rs. 40-12-0. So the annual net income was Rs. 145-12-0. The plaintiff-appellant contests these findings. His main grievance is that he was not allowed to adduce fresh evidence. The lower Court's reasons for shutting out further evidence is that the matter had already been put in issue before remand and the evidence was already there.

The issue already framed and the one remitted by us are not the same. The old issue asks what was the "proper annual income" from the fields. The issue we remitted asks what were the actual profits received. We are not concerned in a suit of this kind with what ought to have been received but with what was actually received, so there can be no doubt that the lower Court has not understood the difference between the two issues. However, as the plaintiff is the one who is making a grievance out of this what we have to see is whether he has been prejudiced. We do not think he has. It is unlikely that anyone would get more out of the property than it was worth. In any case, it is clear that the plaintiff would not underestimate the profits which he is claiming and aim at a figure lower than that which represents the actual receipts. Therefore, before remand his evidence would always be reaching out for the higher figure. It follows that if he wanted to mend his attitude after remand it could only have been in the direction of scaling down his previous claim. Consequently he is not prejudiced by a decision which still allowed him to strive for an inflated figure.

To be more precise. Before remand the plaintiff's evidence on the old issue could only have been along two lines: (1) to show what the fields ought to have fetched with proper management and (2) to show what they actually fetched, this with a view to show that in no event could his claim be allowed to fall below this figure. After remand, under the new issue he could not do more than show what they ought to have fetched: this, not because he would be entitled to that, but by way of showing that the defendants' figures are not to be relied upon. Therefore either way, so far as the plaintiff is concerned, he would be striving to prove much the same thing before and after remand. It follows that he is not prejudiced by the frame of the new issue and the shutting out of further evidence in support of it. We can understand the defendant having been prejudiced, but he does not complain and is content to accept the figure now reached by the lower Court. The plaintiff argued that his evidence before remand was only general. But that was his own fault. The issue was specific enough: "What would be the proper annual income from every one of the six fields in the years in question?" He was required therefore to direct his attention to each field and to each year and not to some vague general issue. The objections to the findings are dismissed. The lower Court's decree dismissing the plaintiff's suit is set aside and the plaintiff's claim will now be decreed for Rs. 291-4-0 and dismissed as regards the rest. Costs will be proportionate to success and failure throughout.

D.S./R.K. *Appeal partly allowed.*

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(28) A. I. R. 1941 Nagpur 188

STONE C. J. AND CLARKE J.

Ramgulzarilal Jagmohanlal Agarwal and another—Transferees

— Appellants

v.

Bhanuprasad Jamunaprasad Sao Agarwal — Respondent.

Misc. Appeal No. 181 of 1938, Decided on 18th October 1940, from order of Dist. Judge, Raipur, D/- 7th March 1938.

(a) Civil P. C. (1908), O. 41, R. 23 — Appellate Judge passing remand order on question of limitation—This does not mean that he has confirmed findings of lower Court on questions apart from that of limitation.

From the fact that the appellate Judge who passed the remand order found it necessary to pass a remand order on the question of limitation he cannot be taken to have confirmed the finding of the lower Court, apart from the question of limitation. Every case of remand must be considered on its own facts : A I R 1922 P C 51, *Expl.* [Question apart from the question of limitation was not decided.] [P 190 C 2; P 191 C 1]

(b) Provincial Insolvency Act (1920), S. 54— Question of fraudulent preference decided by lower Court on ground of onus of proof — Decision can be challenged in second appeal.

The finding of the lower appellate Court on the question of fraudulent preference would ordinarily be one of fact and outside the province of High Court sitting in second appeal, but whether the burden has been correctly laid or not is a question of law and can be considered in second appeal. [P 191 C 1]

(c) Provincial Insolvency Act (1920), S. 54— Onus of proof—Transfers by insolvent of all his property on eve of insolvency—Transfers being in respect of old debts and made in favour of relation — Other acts of preference in favour of other creditors in evidence—Onus to prove that transfers are not fraudulent is shifted on to transferees.

It is true that the onus to prove that the transfer is fraudulent is initially on the person applying for annulment but where the evidence shows that with the exception of a small residential house the insolvent transferred all his property on the eve of bankruptcy and the transfers are in respect of old debts and are made in favour of a relation and there is evidence of other acts of preference in favour of other creditors, committed by the debtor shortly before or after the transaction impugned, these circumstances are quite sufficient to shift the onus of proof on to the transferees : *Case law reviewed.* [P 194 C 1, 2]

(d) Provincial Insolvency Act (1920), S. 54— Transfer by insolvent of his village share by sale of proprietary rights and surrender of occupancy rights—S. 54 can operate on surrender deed.

A surrender is certainly a transfer of an interest in property. Where the insolvent has tried to transfer the whole of his village share by the device of doing it in two stages : (a) by selling the proprietary rights and (b) by surrendering the occupancy rights, the whole transaction amounts to one complete transfer of the whole of the village share and S. 54 operates on the deed of surrender. [P 194 C 2]

M. B. Kinkhede and A. R. Kulkarni— for Appellants.

M. Adhikari and N. K. Banerji — for Respondent.

Judgment. — This is an appeal by the transferees of a 5 annas share of a village. The transfer was brought by means of two documents, a sale deed of the proprietary rights dated 27th February 1932 for Rs. 5000 and a surrender deed of cultivating rights in sir fields, effected two days later on 29th February 1932 for Rs. 950, both documents being registered on 4th March 1932. The insolvency Court has annulled this transaction under S. 54, Provincial Insolvency Act. Three questions arise for consideration : (a) whether the insolvency Court having once held that the transaction did not amount to a fraudulent preference was by reason of a remand from the appellate Court entitled to alter its opinion and come to a fresh conclusion that it did; (b) whether the finding that the transaction amounted to a fraudulent preference was correct on the evidence as it stands; and (c) whether the surrender of the cultivating rights in *sir* was a transaction on which S. 54, Provincial Insolvency Act, could operate.

In order to understand these questions it is necessary to state some facts and the previous history of the litigation. The transferor of the village share is one Banmali Lal, who before these insolvency proceedings commenced, was a cloth merchant at Raipur. He owned a shop in the Sadar Bazar worth Rs. 6000, a residential house worth about Rs. 1000 and the village share with which we are concerned, which we may take it to be worth approximately the price which it has fetched viz., Rs. 6000. His business was not a flourishing one and he ran into debt. The debts proved in his insolvency amount to some Rs. 15,000. On 13th December 1931, he mortgaged his shop with one Balkishan Nathani, the consideration for the mortgage being Rs. 3000 of old debts. The mortgage deed was registered on 10th March 1932. On 27th and 29th February 1932 he executed the two documents with which we are concerned in this appeal and registered them as stated on 4th March 1932. On 16th June 1932 another creditor Bhanu Prasad presented a petition to adjudicate Banmali Lal insolvent. The three transactions which we have mentioned were set out in the petition as the acts of insolvency which justified the petition. An order of adjudication was passed on 11th April 1933 before which date Banmali Lal appears also to have successfully disposed of his stock in trade and moveables. Thus at the date of his adjudication he had only one house in his possession worth about Rs. 1000 and had got rid of his immovable property worth some Rs. 12,000. On 23rd December 1933 Bhanu Prasad applied to have all these three transactions annulled under Ss. 53 and 54, Provincial Insolvency Act.

The Court took up the case of the mortgage of the house separately from that of the sale and surrender of the village share. He passed orders in the case of the village share on 21st February 1935 holding that the

transaction fell neither under S. 53 nor S. 54 and so he dismissed the application for annulment. Bhanu Prasad appealed to the District Judge against this order, but before the District Judge had disposed of the appeal on 10th September 1935 the lower Court on 15th July 1935 disposed of the other annulment application in respect of the house property and in that case he held that the transaction fell under S. 54 but not under S. 53 of the Act and so he annulled that transaction. That case also went to the District Judge on appeal and was dismissed on 4th November 1936 and a revision application to the High Court was also dismissed on 12th November 1937. That brought the contention to an end in respect of the house property, the finding being that it was a fraudulent preference which attracted the provisions of S. 54. Meanwhile, on 10th September 1935, the District Judge had remanded the matter of the village share in the following terms, omitting unnecessary words:

> It is argued on behalf of the appellant (Bhanu Prasad) that the debts for the satisfaction of which the two transfers were made were barred by limitation. On the date of those transfers. . . the learned counsel for the respondents . . . . stated that this point was not raised before the lower Court and . . . that he had in his possession documents which clearly showed that the debts were within limitation on the date of the transfers. . . . The question whether the debts were barred by limitation on the date of the transfers is an important question and . . . without a proper decision on it the case cannot be decided satisfactorily . . . on this point. I therefore . . . . remand the case for proper pleadings on this point of limitation. Fresh opportunity should be given to the parties to lead evidence. . . .

After remand, the subordinate Judge framed six fresh issues all of which dealt with the point of limitation and the applicants proceeded to give evidence bearing on that point alone. Then in spite of finding the point of limitation in favour of the transferees the trial Court reconsidered its previous finding that the transfers were not a fraudulent preference, and on this occasion it held that they were a fraudulent preference. Before us learned counsel for the appellant-transferees urged that this *volte face* on the part of the lower Court was illegal; it was only asked to find on a point of limitation and instead of confining itself to that point it proceeded to reconsider its previous finding on the merits. Objection to that action on the part of the trial Court was also made to the lower appellate Court where the learned District Judge, who was a different officer from the Judge who passed the order of remand, observed that the point was not devoid of force but that as his learned predecessor had set aside the lower Court's order completely it must be presumed that he was acting under S. 151, Civil P. C., and not under O. 41, R. 25 and so he held that the case was open once more before the lower Court which was quite justified in coming to a different conclusion if it thought it proper to do so. That the lower appellate Court was wrong in its view of the matter is the subject of the first of the three questions which we have set out at the commencement of the order as requiring our consideration.

Learned counsel for the appellants contends that from the fact that Mr. Mangalmurti who passed the remand order found it necessary to pass a remand order on the question of limitation should be taken to have confirmed the finding of the lower Court, apart from the question of limitation, and reliance is placed on A I R 1922 P C 51[1] where their Lordships have held that where a remand was ordered on one of the two points raised, any one of which would have been sufficient to dispose of the case, the remand order must be deemed to have confirmed the decision on other point. The facts there however were very different from the facts before us. There the question was whether an application for execution of a decree was within limitation in 1916, and in order to decide that question it was necessary to establish that there had been previous execution proceedings in 1904 and that the judgment-debtor had been served with notice of execution in 1916. The Judge of the lower Court considered the question whether there had been previous execution proceedings in 1904 and came to the conclusion that there had, but his judgment did not reveal whether he had considered the question as to the judgment-debtor being served with notice in 1916. The High Court therefore remanded the case for a finding on this second point. Their Lordships of the Privy Council therefore observed that the High Court must be taken to have agreed with the lower Court as to what took place in 1904, because otherwise it would not have been necessary to remand the case for a finding about the service of notice in 1916. From our study of the case it does not appear to us that their Lordships intended to lay down any principle of universal application in A I R 1922 P C 51.[1] They appear to have been adverting only to the special circumstances in the case before them. It

1. ('22) 9 A I R 1922 P C 51 : 74 I C 597 (P C), Sripat Singh v. Rai Hariram.

seems to us that every case of a remand must be considered on its own facts. Here Mr. Mangalmurti clearly had not at all considered the correctness of the lower Court's findings; in fact he says :

> The question whether the debts were barred by limitation on the date of the transfers is an important question and will affect the decision on other points. Without a proper decision on it the case cannot be decided satisfactorily.

This shows that he was leaving the question undecided until he had the lower Court's finding on the point of limitation before him. It was therefore the duty of his successor when the case returned from the lower Court to decide the points which were raised in the appeal. Whatever was his view of the correctness or otherwise of the lower Court in reopening the question whether the transfer amounted to a fraudulent preference, he still had to decide that question himself on appeal and he has decided it in favour of Bhanu Prasad. We are not therefore concerned in this Court with the correctness of the original Court's action. In other words even though we proceed on the basis of the original findings of the insolvency Court on the question of undue preference this makes no practical difference as the finding that is binding on us as a finding of fact is the finding of the lower appellate Court. We next take up the second question for determination and this is the real crux of the matter, namely whether the lower appellate Court rightly decided the question of fraudulent preference. This finding would ordinarily be one of fact and outside our province sitting in second appeal, but in the present case the learned District Judge has decided it by reason of his view as to where the onus of proof lies since he considers the evidence to be unsatisfactory on both sides. Whether the burden has been correctly laid or not is a question of law. The learned District Judge has said in para. 6 of his judgment :

> As regards the onus it is on the applicant, but it is not a fixed onus and once it is shown that a creditor has been preferred by the debtor on the eve of his bankruptcy, the onus to prove good faith is shifted on the transferee creditor. In the present case, neither party has led every good evidence but the respondent has shown that barring a house, which also was at the same time mortgaged by the insolvent, all the available property was transferred by him in favour of the appellants. These transfers were effected on the eve of bankruptcy and it was necessary for the appellant to prove the motive of the debtor in making the transfers in their favour. The debtor was examined as N.A.W. 3, but he does not say a word as to why the transfers were effected by him. There is also no appreciable evidence of any pressure having been brought on the insolvent for effecting the transfers. The transfers thus, for all purposes, appear to be a voluntary act of the debtor and it amounts to a fraudulent preference.

The learned Judge is quite correct that the burden is initially on the applicant. That is now settled law, but is he correct in saying that the burden is shifted once it is shown that a creditor has in fact been preferred on the eve of bankruptcy? He has not given any authority for his view but there are quite a number of authorities which support him as well as a number which do not. Of those which support him we would mention (1924) 2 Ch 515[2] at p. 531, A I R 1926 Sind 123,[3] 107 I C 210,[4] A I R 1932 Lah 321,[5] A I R 1935 Cal 190[6] and I L R (1938) 2 Cal 275.[7] On the other side, inter alia, is the dissenting judgment of Pollock, M. R. in (1924) 2 Ch 515[2] which, being the opinion of so eminent a Judge, deserves great respect. In most of the cases to which we have referred there are other cogent circumstances which have combined to satisfy the Court that the transfer then under consideration was fraudulent or was not fraudulent as the case might be. In (1859) 25 Beav 88=53 E R 569[8] Sir J. Romilly M. R. observes, in a case which was a debtor's petition :

> Fraudulent preference is of two sorts: one is, when a man, on the eve of bankruptcy, knowing he is about to become bankrupt, of his own mere motion and will, sends to a creditor, informs him of the fact, and gives him some property, in order that the creditor may obtain something for himself over and above that which he can get by proving under the bankruptcy that is a fraudulent preference. But it must proceed voluntarily from the bankrupt himself, for if the creditor comes and insists on being paid or on having security, the fact of the debtor giving way and acceding to the request does not make it a fraudulent preference...
>
> The amount of pressure is not a matter of very considerable importance, because, to make the transaction fraudulent, the preference must proceed voluntarily from the bankrupt himself, which it does not if he be induced to do it by the pressure of the creditor whether it be much or little.
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> • • • •

In this case I cannot see anything to satisfy me that it was voluntary. The letters show that Fesenmeyer was insisting that Archbutt should pay or secure the amount due to him.

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2. (1924) 2 Ch 515 : (1924) B & C R 143 : 69 S J 35, In re Cohen ; Exparte Trustee.
3. ('26) 13 A I R 1926 Sind 123 : 93 I C 372, Official Receiver v. Kewalmal.
4. ('28) 107 I C 210, Nechaldas v. Official Receiver.
5. ('32) 19 A I R 1932 Lah 321 : 137 I C 55 : 33 P L R 255, Dina Nath v. Labhu Ram.
6. ('35) 22 A I R 1935 Cal 190 : 60 C L J 253, Panmall Jesraj v. J. Macleod.
7. ('38) 25 A I R 1938 Cal 417 : 178 I C 727 : I L R (1938) 2 Cal 275 : 42 C W N 554, Rama Nanda Paul v. Pankaj Kumar Ghosh.
8. (1859) 25 Beav 88 : 3 De G & J 13 : 53 E R 569, Johnson v. Fesenmeyer.

If, in point of fact, he had assigned all his stock-in-trade and everything by which he could carry on business, and which would have rendered it impossible to carry on business except at the mere will and pleasure of the assignee of the property, the case might have been different . . . . .

. . . To render it (the transaction) invalid, there must be a disposition on the part of the insolvent to favour that particular creditor, and this is generally shown by the fact that the first step or proposal towards the disposal of the property in favour of that creditor proceeds from the insolvent debtor. But if the creditor, although he knows that the debtor is insolvent, presses and insists upon having a security for his debt, and the debtor yields to that pressure, and gives the security, although it may be well known to both, at the same time, that the effect will be to give to that particular creditor an advantage over the other creditors of the insolvent, the transaction, in my opinion, is perfectly good and valid.

In (1876) 2 Ch 127[9] a solicitor, shortly before absconding as an insolvent debtor, had given securities to the defendant, who was one of his clerks and a bona fide creditor. The bankrupt left on 28th October 1872 having two days previously signed a declaration admitting his inability to pay his debts. The defendant had been pressing for security. It was held, on a suit by the trustee in bankruptcy to set aside the securities as being a fraudulent preference, that the pressure and promise were sufficient to rebut the presumption of a fraudulent preference arising from the circumstances and would sustain the deeds even if the knowledge of the insolvency were brought home to the defendant. The learned Vice-Chancellor who delivered the judgment in that case says at page 134 :

A debtor must not of his own mere motion, without pressure or application, give a security to a creditor on the eve of bankruptcy, and if he does, that is a fraudulent preference. But if there be any pressure or negotiation for a security on the part of the creditor, then the fact that the creditor knows the debtor to be in embarrassed circumstances is no objection to the validity of the security;

and at p. 136 there is the following passage:

If there is a mixed motive, if the debtor is partly influenced by a demand of the creditor, or by negotiations with him, the act is not a purely voluntary act, and is not a fraudulent preference, although the creditor may be a friend whom the debtor wishes to prefer. In the present case, I think that there was a bona fide demand for security, and then a bona fide negotiation as to what the security should be; and though the debtor might know that he was hopelessly insolvent, he did not contemplate immediate bankruptcy, but was trying to stave it off;

and then another passage at p. 137 :

. . . . Therefore I consider the law to be settled that, if there be a bona fide negotiation for security and the security be given on the very eve of the bankruptcy, and the person taking the security knows the debtor was hopelessly insolvent, the transaction is valid according to law, and that everything depends upon the bona fides of the transaction.

In (1901) 1 K B 710,[10] a case of a creditor's petition, the petition was presented on 2nd June grounded on an act of bankruptcy committed on the previous 17th May, and on 27th June a receiving order was made against him and adjudication followed. The bankrupt being a solicitor had committed a breach of trust of his client's money and deposited his own securities to make good the loss and it was admitted that throughout May the bankrupt was hopelessly insolvent and that he was aware of his insolvency, also that he had committed similar breaches of trust in some thirty other trust estates and had attempted to make similar restitution in some cases but not in others. Vaughan Williams L. J. in the Court of appeal says :

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is not need for any evidence that that view was expressed in so many words by the bankrupt: it is a presumption which would arise from the transaction. Now then, suppose that, in addition to that fact of payment on the eve of bankruptcy, there is also proof that the money so paid was paid by the bankrupt in order to make good a breach of trust : in that case it appears to me that the presumption arising from the fact of that payment being on the eve of bankruptcy would cease to operate: it would be negatived. There prima facie it appears to me that, if you have no other considerations at all, the proper inference is that the presumption of an intention to prefer is dislodged, and the presumption is the other way. Of course that presumption would not be conclusive; one must look round and see what other circumstances there are . . . One has to look at the circumstances at the time, and see from them what his dominant view was.

The case in (1924) 2 Ch 515,[2] so far as the opinions of the majority of the Court are concerned, supports the view of the learned District Judge, but Pollock M. R. in a dissenting judgment is of a different opinion. In that case the bankrupt passed post-dated cheques to 108 creditors and on the day before the cheques matured paid off one of the creditors in cash taking back the cheque which had been sent to that creditor. On a creditor's petition being presented the trustee in bankruptcy moved for the cancellation of this transaction as being a fraudulent preference. There was apparently no

9. (1876) 2 Ch 127: 34 L T 408, Smith v. Pilgrim.

10. (1901) 1 K B 710: 71 L J K B 390: 84 L T 430: 49 W R 291: 8 Manson 145: 17 T L R 296, In re Lake; Ex parte Dyer.

reason why the bankrupt should have selected this creditor for payment out of 108 creditors to whom he was indebted. Pollock M. R. having stated that the initial onus lay on the trustee to give evidence that the debtor's dominant motive was to prefer the creditor, observes that evidence of kinship would prima facie discharge the onus upon the trustee:

> There are other facts which do likewise; and if the onus is discharged, no doubt the debtor must then displace the prima facie evidence of a dominant intention to prefer given by the trustee. This can be done by proving that the payment was made under pressure, or for one or other of the many reasons indicated by Phillimore J. in (1913) 2 K B 80[11] at p. 85. But the trustee must discharge the onus that lies upon him. Has he done so here? No doubt all the attending circumstances should be taken into account . . . The fact that a number of cheques were sent out by the debtor on 20th July does not appeal to be indicative of anything more than that the debtor expected to have means at his service with which to meet them when they fell due on 31st July. No doubt there is the fact of the payment with its attendant result of preference on 30th July, but there is no more. We are not at liberty . . . to accept that fact as sufficient. I cannot speculate or surmise in order to supply the deficiency. Without evidence, the matter must be left where it is, unexplained, and without any character given to, or purpose proved in relation to, the mere payment . . . .

The other two learned Judges who delivered judgments in that case considered that the onus had shifted to the transferee who had failed to discharge it. After stating the facts, Warrington L. J. at p. 538 says:

> The payment was purely voluntary. No threat of proceedings had been held out by the appellants. No special consequences of an unpleasant nature, such as those the effect of which was considered in (1899) A C 419,[12] from the non-payment of the debt were to be apprehended. It was not long overdue. The debtor had only ten days earlier taken the step of sending to the 108 creditors post-dated cheques all payable on the same day, 31st July—thus putting them all on an equality. Then on 30th July, at a time when he must have already determined to give the notice of suspension actually given on the next day, he selects the particular creditor and pays him in full with money which but for such payment would have been distributed amongst the creditors generally. The conclusion seems to me to be inevitable. The payment being purely voluntary and the circumstances attending it being what I have described, I must and do infer that, for some reason or another of which we are ignorant, or for no definite reason in fact and for no other motive, he selected the particular creditors for preferential treatment, and therefore made the payment with a view to preferring them. I can find no rule of law which prevents me from drawing what seems to me an obvious inference.
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> . . . . . .

It is true there is here nothing of any special nature in the relations between the bankrupt and the particular creditors tending to make probable a desire to prefer them. But the absence of such a circumstance which, if it were present, would make the inference easier, does not prevent its being drawn if the other circumstances lead to it.

This was in substance also the opinion of Sargent L. J. At p. 544 he says:

> No case has been cited to us nor do I think any case can be found where a debtor in imminent expectation of bankruptcy has given a preference in fact to a particular creditor, which is apparently voluntary and is wholly unexplained, and where that preference in fact has been held good. To hold otherwise in this case would, in my judgment, be inconsistent with the whole course of decision in bankruptcy in such cases and would revolutionise the settled law in this respect. . . . . A clearer case of knowledge of immediate impending bankruptcy and of a purely voluntary payment it would be difficult to imagine.

Turning now to cases from India, the view of the Sind Judicial Commissioner's Court, as expressed in A I R 1926 Sind 123[3] and 107 I C 210,[4] appears to be that the onus is in the first instance on the official receiver to prove that the dominant or the substantial or effective, though not necessarily the sole motive, the insolvent had in view in making such payments was to prefer that particular creditor:

> But the onus is shifted on to the bankrupt to prove the contrary when he makes such payments on the eve of his bankruptcy. There is in such a case no need for any evidence that that view was expressed in so many words by the bankrupt. Where the reason of such payment remains unexplained, it is competent for the Court to hold that a prima facie case of fraudulent preference has been established and to act on it.

In 107 I C 210[4] a Bench of the same High Court considered that the onus is shifted if it is proved that the insolvent made the payment or transferred the property in discharge of an old debt and on the eve of bankruptcy. In A I R 1931 ALL 142,[13] the case of a debtor's petition, the Allahabad High Court appears to have held the view that in view of the fact that the initiative came from the insolvent that would have been enough to shift the onus but for the fact that a suit was pending against the insolvent on the part of the transferees and therefore their Lordships considered that there was pressure which saved the transaction from being a fraudulent preference. In A I R 1932 Lah 321[5] Addison J. follows the Sind rulings, to which we have referred above, and comes to the same conclusion that the mortgage being effected on the eve of bankruptcy and in lieu of an old debt it

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11. (1913) 2 K B 80 : 82 L J K B 526 : 108 L T 495: 20 Manson 15: 29 T L R 225, In re Ramsay Ex parte Deacon.
12. (1899) 1899 A C 419:68 L J Q B 866: 80 L T 841 : 6 Manson 264: 15 T L R 418, Sharp v. Jackson.
13. ('31) 18 AIR 1931 All 142 : 135 I C 117 : 1931 A L J 26, Kashi Nath v. Official Receiver.

was for the mortgagee to establish that he brought pressure upon his debtor and if he failed to do so the transaction must be taken to be a fraudulent preference. In A I R 1934 Rang 208[14] a Bench considered a number of English cases, including some of those which we have mentioned above, and came to the conclusion that it made a considerable difference as to whether the insolvent was disposing of all his property or only a portion of his property. In A I R 1935 Cal 190[15] the lower Court had found that the receiver had failed to discharge the onus of proving fraudulent preference. The High Court pointed out that the lower Court had overlooked the very important circumstance that payment was made very shortly before the application for insolvency was filed and this would show that undue preference was intended. That was also a debtor's petition. Finally in I L R (1938) 2 Cal 275[7] Mukherjea J. observed :

> If a debtor transfers a valuable property on the eve of insolvency to a creditor of his, the consideration being the past debt due to the creditor, an inference of undue preference can legitimately be drawn. But if the debtor approaches a creditor for a loan and substantial advance is made by the latter who insists as a part of the same bargain, on the payment of the existing debt, the debtor consenting to it cannot be said to have voluntarily given preference to the creditor.

It appears to us in the light of the observations of so many learned Judges who have handled the matter that as regards the shifting of the onus of proof some distinction should be made between debtors' and creditors' petitions. In the same class as debtor's petition we would also place those creditors' petitions which are the result of acts of insolvency which leave no doubt but that the debtor is contemplating insolvency as for instance, where he absconds or gives notice to his creditors that he has suspended or is about to suspend payment. In such cases, we think, that it would take a smaller amount of evidence to shift the onus of proof on to the creditor who seeks to annul the transaction. Where however a creditor files a petition and puts forward as an act of insolvency the very transaction which he subsequently seeks to annul, then we think that something more than the mere making of payment on the eve of insolvency is required. How much more would depend on the circumstances of the individual case. In the present case the evidence shows that with the exception of a small residential house the insolvent transferred all his property on the eve of bankruptcy. The transfers which are before us were in respect of old debts and were made in favour of a relation, although not a close relation.

Then again the mortgage of the house to Balkishan about the same time had already been annulled as a fraudulent preference and it has been laid down in (1913) 2 K B 80[11] that where a trustee in bankruptcy attacks a transaction between a debtor and his creditor as a fraudulent preference, evidence of other acts of preference in favour of other creditors, committed by the debtor shortly before or after the transaction impugned, is admissible to show the debtor's intent. This was followed by Pollock J. in I L R (1937) Nag 78.[16] We consider that these circumstances were quite sufficient to shift the onus of proof on to the transferees. They have endeavoured to show that there was pressure, but evidence of such pressure consists only in the statement of Firturam (N. A. W. 2), a servant of the transferees, that they wanted to file a suit for the amount due to them, but they had not issued any notice to the debtors, they had only mentioned the matter orally. In the circumstances we are accordingly of the opinion that the learned Judge committed no error of law in placing the onus of proof where he did and that his finding cannot be disturbed.

There now remains the last point about whether the surrender deed was a transaction on which S. 54 could operate. For this learned counsel for the appellants relies on A I R 1925 Nag 455[17] and 26 N L R 46.[18] The former of these cases was not a case under the Provincial Insolvency Act at all. The question was whether a surrender deed was an alienation within the meaning of R. 11, Sch. 3, Civil P. C. For the purposes of the Insolvency Act, "transfer of property" has been stated in S. 2 (1) (f) to include a transfer of any interest in property. A surrender is certainly a transfer of an interest in property. 26 N L R 46[18] is a case in which as a result of an order of adjudication the insolvent's property vested in the receiver. The Court held that the cultivating rights in *sir* could not vest in the receiver because on

14. ('34) 21 AIR 1934 Rang 208 : 153 I C 19, Chettiar Firm v. U Maung.
15. ('35) 22 AIR 1935 Cal 190 : 60 C L J 253, Panmal Jasraj v. J. Macleod.
16. ('37) 24 A I R 1937 Nag 117 : 167 I C 833 : I L R (1937) Nag 78, Gopal v. Bajirao.
17. ('25) 12 A I R 1925 Nag 455 : 89 I C 174, Maroti v. Krishna Rao.
18. ('29) 16 A I R 1929 Nag 338 : 121 I C 54 : 26 N L R 46, Nagoba v. A. V. Zinjarde.

the loss of the proprietary rights the insolvents became occupancy tenants of their *sir* land. Such a case is quite different from the case before us where the insolvent has tried to transfer the whole of his village share by the device of doing it in two stages: (a) by selling the proprietary rights and (b) by surrendering the occupancy rights. The whole transaction has to be taken together and amounts to one complete transfer of the whole of the village share. Accordingly, we see no reason to interfere with the findings of the lower appellate Court. The appeal is dismissed with costs. Counsel's fee Rs. 50.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Nagpur 195

STONE C. J. AND CLARKE J.

Surajmal Govindram Agarwal, Akola and another — Appellants

v.

Baxiram Rodmal Firm, Akola — Respondents.

Misc. Appeal No. 196 of 1938, Decided on 10th September 1940, from order of Second Addl. Dist. Judge, Akola, D/- 30th April 1938.

(a) Civil P. C. (1908), S. 144 — Under S. 144 court rate of interest must be taken as fairly compensating litigant — Evidence to determine rate of interest is not necessary unless some special reason is shown—Reason for adducing evidence being to increase interest or to reduce it — No evidence is necessary — Court rate is proper.

Under S. 144 the court rate must always be taken as the rate that fairly compensates litigants. No evidence need be taken for the purpose of determining the rate of interest to be awarded under S. 144 unless some special reason is shown. Where the reason stated, on the one hand to increase the interest and on the other hand to reduce it, is irrelevant the court rate must be deemed to be the proper one : (1871) L R 3 P C 465 and ('35) 22 A I R 1935 P C 12, *Rel. on.* [P 196 C 2]

(b) Civil P. C. (1908), S. 144— *A* suing *B* and seeking to attach his property — *C* standing surety for *B* to extent of Rs. 54,000—*A* obtaining decree for Rs. 96,000 and realising Rs. 54,000 from *C* — After five years, *A's* decree reduced in appeal to Rs. 33,000 — Disallowance of interest after date of suit by appellate Court held did not affect quantum of amount to which *A* found entitled — *C* held entitled to refund of amount paid in excess of Rs. 33,000 and interest at court rate.

A in his suit against *B* sought to attach *B's* property before judgment whereupon *C* stood surety for *B* to the extent of Rs. 54,000. *A* obtained a decree for Rs. 96,000 and realised the sum of Rs. 54,000 from *C* but after five years the decretal amount was reduced to Rs. 33,000 in appeal. The appeal Court granted the decree for the amount as it stood at the date of the suit. In *C's* claim for restitution :

Held that the fact that the appellate Court disallowed interest to *A* from the date of the suit did not affect the quantum of the amount to which he was found entitled and therefore *C* could claim by way of restitution only the amount paid by him in excess of Rs. 33,000 with interest at the court rate from the date of over-payment until the date of payment back. [P 196 C 1; P 197 C 1]

W. R. Puranik and M. D. Khandekar — for Appellants.

R. N. Padhye — for Respondents.

G. V. Deshmukh — for Respondent No. 7.

Judgment. — This miscellaneous appeal raises the question as to the proper procedure to be followed where restitution is claimed under S. 144, Civil P. C., in order to ascertain whether interest should be granted and if so at what rate. It is said by the appellants that in this case the learned Judge having indicated that he would take evidence on the question of the loss suffered, he settled the issues so as to include the following question,

3 (a) Whether interest is claimable or not in this claim for restitution. 3 (b) How much interest should be allowed ?

He however proceeded to deal with that issue without giving the patries time to adduce any evidence to show at what rate interest should be allowed. It has been indicated before us on the one hand that if the learned Judge had gone into the evidence he would have found that in point of fact the appellants are entitled to no interest at all except as regards Rs. 2000 because as regards Rs. 20,000 the judgment-debtor had deposited that sum with the surety and accordingly the surety had not been out of pocket. They paid Rs. 22,000 too much to the decree-holder, but they got Rs. 20,000 in hand from the judgment-debtor and consequently, apart from interest on Rs. 2000, no damage was suffered by the surety. On the other hand, it is suggested that if we went into the evidence we should find that this surety had had to borrow money at an extremely high rate of interest as a consequence of having to pay out too much to the decree-holder and that therefore he is entitled to claim by way of damages interest at the rate he had paid.

Had we thought that either of those matters was relevant, we should have considered it necessary to remand this case for the taking of evidence. But we think that the true principle upon which Courts should operate in these restitution matters when considering interest, whether interest should be granted and if so at what rate, is laid down by the Privy Council in an appeal from the

Supreme Court of Hongkong reported in (1871) L R 3 P C 465[1] followed by the Privy Council in A I R 1935 P C 12.[2] Before examining that principle it is desirable to state shortly what the facts here are : A sued B and having filed his suit applied to the Court for an attachment before judgment. In order to avoid having his property attached, B offered to find a surety and he found C whom the Court accepted and who stood surety for the decretal amount up to a maximum of Rs. 54,000. In point of fact, the decree that the trial Court passed was for Rs. 96,000 and thereupon the decree-holder operating under S. 145, Civil P. C., proceeded in execution against the surety and recovered from him up to the maximum for which the surety was liable, that is to say Rs. 54,000. As regards the balance he proceeded against the judgment-debtor. The steps he took against the judgment-debtor we need not consider. The judgment-debtor appealed and on appeal, which was heard some five years later, the appellate Court cut down the decree from over Rs. 95,000 to under rupees 35,000, to be accurate Rs. 31,433 together with interest from a certain date at 6 per cent. and made certain adjustments as regards costs.

As a consequence, it is apparent that C had paid too much and it is not disputed before us what the quantum was of the excess. It is Rupees 21,285-12-0. That is the amount that C can recover and to that amount under the powers conferred upon the Court by S. 144 can be added an additional amount by way of interest or an additional amount by way of damages and so forth. What is under discussion here is the amount that should be added by way of interest. In the case from Hongkong the Court in Hongkong when giving restitution was asked also to award interest and the Court refused to do so on the ground that it considered that it had no power. Such a question in view of the terms of S. 144, Civil P. C., could not arise in India. The matter went before the Judicial Committee and the Judicial Committee held as a matter of general principle and justice that a Court had power to grant interest because, to use the language of the Earl of Cairns,

their Lordships are of opinion, that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

It is contended, on the part of the respondents here, that the principal sum being restored to the present petitioners, they have no right to recover from them any interest. It is obvious that, if that is so, injury, and very grave injury, will be done to the petitioners. They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake and wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without the ordinary fruits which are derived from the enjoyment of money. On the other hand, those fruits will have been enjoyed, or may have been enjoyed, by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far therefore as principle is concerned, their Lordships have no doubt or hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest, during the time that the money has been withheld.

In that case the bank that was claiming the interest was complaining that it had lost the use of this money. Their Lordships did not, however, order any enquiry to find out what the damage was. They proceeded entirely on the basis that justice was met by giving the ordinary court rate, for their order at p. 477 was that they directed the court

to add to the sums repaid by the respondents to the appellants for principal and interest, the interest due on the said sums at the rate usually allowed by the Supreme Court of Hong Kong, from the (date of the overpayment) to the (date of restitution.)

We think that the court rate must always be taken as the rate that fairly compensates litigants unless there be some special reason shown to the contrary. The only doubt we felt was whether it should not be open to a litigant to adduce evidence to show that some special reason exists in this case especially as the learned Judge had rather indicated that he would be taking evidence in future or to determine issue 3 (b). But as we have already said the two points put before us as a reason on the one hand to increase the interest and on the other hand to reduce it would be quite irrelevant and no other special ground has been indicated, and therefore we think that the court rate is the proper rate.

1. (1871) L R 3 P C 465 : 40 L J P C 1 : 24 L T 111 : 19 W R 449 : 7 Moo P C (NS) 314, Rodger v. Comptoir D'Escompte de Paris.
2. ('35) 22 A I R 1935 P C 12 : 153 I C 654 (P C), Guran Ditta v. T. R. Ditta.

That leads to the other point which has been argued and which we think is entirely without substance. It is said that in the suit in which a decree was eventually given for Rs. 33,000 and odd after the Court of first instance had given a decree for Rs. 96,000 the appellate Court indicated its displeasure at the behaviour of the plaintiff by disallowing interest throughout, and indeed in effect restricted the right of the plaintiff to be paid anything to a date as from the date of the judgment. Therefore, it is said that when in point of fact five years before operating under the decree for Rs. 96,000 the plaintiff got the surety to pay him Rs. 54,000 in truth and in fact he was not entitled to anything if you look at the matter with the eyes of the final appellate Court. Therefore, the surety did not merely pay Rs. 21,285-12-0 too much, he paid Rs. 54,000 too much. Therefore he should now be allowed restitution on the basis of Rs. 54,000 overpaid, interest on Rs. 54,000 overpaid, interest to be calculated at the rate he had to pay and the decree-holder should only be allowed as from the date of the appellate Court's decree the amount of that decree made payable to the plaintiff. Looked at of course in that way the bill become a very high one. But it seems to us to be quite impossible to regard the matter in that way. The appellate Court, it is true, disallowed the plaintiff interest from the date of suit onwards. That meant that the amount it found the plaintiff entitled to was the amount that the plaintiff was entitled to as at the date of suit. He was entitled to that amount at the date of suit and thereafter onwards of course he could not execute any decree until he got a decree. His right was always to that sum. His power to execute that decree is when he got that decree. The fact that he was disallowed any interest after the date of suit does not affect the quantum of the sum to which he was entitled. Accordingly when on 24th February 1928 he recovered Rs. 54,000 from the surety he was entitled to recover Rs. 33,000 and odd from the surety. Taking into account costs and interest, as we have said, that shows that the overpayment was Rs. 21,285-12-0. It follows, in our opinion, that the learned Judge was right in directing restitution of that amount together with court rate of interest as from the date of overpayment until the date of payment back. The appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Nagpur 197

CLARKE J.

Shankar Balkrishna Hatekar—Defendant—Judgment-debtor—Applicant

v.

Shree Gopal Krishna Sansthan, Barshi-Takli—Opposite Party.

Civil Revn. No. 13 of 1940, Decided on 17th December 1940, for revision of order of Second Sub-Judge, First Class, Akola, D/- 9th October 1939 and 9th November 1940.

Civil P. C. (1908), O. 23, R. 3 — Form of decree—Decree of Small Cause Court — Amendment creating charge — Effect on executability —Compromise covering matters relating to suit and matters not relating to suit — Recital of whole agreement concluding with order relative to part which is subject of suit, or introducing agreement in schedule to decree are only proper and effective methods of carrying out terms of O. 23, R. 3 — Small cause decree not carrying out terms in either of ways suggested, subsequently changed by appending terms of compromise creating charge, as schedule to decree — Change was amendment of decree which affected its capability of execution—Being Small Cause Court decree creating charge on immovable property it was void and inoperative.

Where a compromise has been arrived at between the parties and covers both matters relating to the suit and matters not relating to the suit a perfectly proper and effective method of carrying out the terms of O. 23, R. 3 would be to recite the whole of the agreement and then to conclude with an order relative to that part which was subject of the suit, or in the alternative it could introduce the agreement in a schedule to the decree.

[P 197 C 1; P 198 C 1, 2]

A decree of a Small Cause Court did not carry out the terms of O. 23, R. 3 in either of the ways suggested above. It merely said that a certain sum was payable in seven yearly instalments and it then recited the conditions on which it became exigible and concluded with a direction that the claim would be a charge on a certain immovable property of the judgment-debtor. Later on, a translation of the actual terms of the compromise was appended as a schedule to the decree :

Held that the Court had carried out the requirements of O. 23, R. 3 which it had not carried out before. That was nothing else than an amendment of the decree which amendment made a difference of its capability of execution, so far as the decree of such Court sought to create a charge on immovable property, it must be regarded as void and inoperative: ('19) 6 A I R 1919 P C 79, *Rel. on;* ('34) 21 A I R 1934 Nag 147, *Disting.*; ('39) 26 A I R 1939 Nag 118, *Rel. on.* [P 199 C 1, 2]

V. L. Oke and W. B. Pendharkar— for Applicant.

V. K. Rajwade—for Opposite Party.

Order. — The applicant in the present revision application is the judgment-debtor against whom there is in existence a compromise decree passed in favour of the non-applicants decree-holders. As the decree originally stood, it provided that defendant 1 should pay Rs. 350 to the plaintiffs in seven yearly instalments commencing on 15th

April 1938. The decree was to be exigible to the extent of its full value either on default of the first instalment or on the default of any two subsequent instalments. The decree finished with the sentence : "Plaintiffs' decree claim to have charge on defendant's field S. No. 29, area 5.20 of M. Hingna."

This decree was passed by a Court of Small Causes. When the decree became exigible by reason of default in payment, the decree-holders applied to execute the decree not against survey No. 29 but personally against the judgment-debtor who objected saying that under the terms of the compromise the decree-holders were required to proceed against survey No. 29 and could not proceed against the judgment-debtor personally and as the Small Cause Court was incompetent to pass a decree affecting immovable property the decree was not capable of execution. The lower Court, by its order under revision dated 9th October 1939, held following A I R 1934 Nag 140,[1] that the decree was a personal decree in spite of the fact that it created a charge on survey No. 29 and that the decree-holders were at liberty to execute the decree in any manner that they desired. Although therefore the charge could not be enforced by the Small Cause Court, the decree-holders could proceed in execution against other property of the judgment-debtor. Against this order the judgment-debtor applied in revision, complaining that the decree, as it stood, was not in terms of the compromise and that it could not be executed since it was a Small Cause Court's decree, that Court being precluded from charging immovable property. The application came before Bose J., who, on 30th September 1940, observed that, as it was the contention of the judgment-debtor that the decree was not in accordance with the terms of the compromise, his only remedy was to ask the Court which passed the decree to amend it, and he allowed the judgment-debtor one month within which to apply for amendment, adding that the revision would be proceeded with after the disposal of that application. Accordingly the judgment-debtor presented an application to the lower Court under S. 152, Civil P. C., asking that the decree be amended and drawn up in accordance with the terms of the compromise. On that application the lower Court has passed an order on 9th November 1940 in which the learned Judge refers to an observation of their Lordships of the Privy Council in 47 Cal 485[2] at p. 495 where they say that where a compromise has been arrived at between the parties and covers both matters relating to the suit and matters not relating to the suit a perfectly proper and effective method of carrying out the terms of O. 23, R. 3, Civil P. C., which is the rule requiring a Court to order a compromise to be recorded and to pass a decree in accordance therewith as far as it relates to the suit, would be to recite the whole of the agreement and then to conclude with an order relative to that part which was subject of the suit or in the alternative it could introduce the agreement in a schedule to a decree. After quoting these observations of their Lordships the lower Court says in paragraph 9 :

> I do not propose to amend the decree. I only add a schedule of the terms of the agreement . . . A full translation of the agreement dated 7th July 1938 will appear now as an appendix to the decree. The application in substance is dismissed.

Accordingly now the revision application has come before me to be proceeded with in accordance with the directions of Bose J. in his order dated 30th September 1940.

The applicant, judgment-debtor contends that, although the lower Court says that he does not propose to amend the decree and has also said that the application for amendment is dismissed, it has in effect amended the decree by appending the compromise agreement as a schedule to the decree as was suggested by their Lordships in the ruling mentioned in the previous paragraph and that the decree having been thus amended the decree-holders are precluded by the terms of the compromise from executing this decree which is ultra vires of a Small Cause Court. The lower Court appears to have considered that it made no difference to the decree whether the compromise agreement was appended or not for as the learned Judge says :

> The primary clause of payment of the decretal amount by the defendant is not smothered, mutilated or destroyed by the subsequent clauses of the manner in which the amount was to be realized by the decree-holder,

and it was because of this view that the nature of the decree was in no way altered that he purports to dismiss the application for amendment saying that he did not propose to amend the decree. Accordingly, the question now is whether the appending of the compromise agreement to the decree amounts to an amendment and if it does

1. ('34) 21 A I R 1934 Nag 140 : 150 I C 95, Shyamshankar v. Nathuram.

2. ('19) 6 A I R 1919 P C 79 : 53 I C 534 : 47 Cal 485 : 46 I A 240 (P C), Hemanta Kumari Debi v. Midnapur Zamindari Co.

has it made any difference to the ability of the decree-holders to execute the decree? On the first point, the non-applicants urge that the addition of an appendix to the decree is not an amendment thereof and that in the passage which the lower Court has quoted from 47 Cal 485[2] their Lordships were only stating what was the practice in England and that they did not lay down any rule that the Courts in India were to record compromise decrees in this manner. It is true that the passage quoted by the lower Court is prefaced by the words : "Their Lordships are not aware of the exact system by which documents are recorded in the Courts in India." but when they go on to say that a perfectly proper and effectual method of carrying out the terms of O. 23, R. 3 would be to introduce the agreement in a schedule to the decree, that means that it would be a perfectly proper and effectual method in India, and so when a Court in India thereafter does so, it must be held to be carrying out the provisions of O. 23, R. 3. The decree, as it stood at first, did not carry out the terms of O. 23, R. 3 in either of the ways suggested by their Lordships; it neither recited the whole of the agreement and then concluded with an order relative to that part that was subject of the suit nor did it introduce the agreement in a schedule to the decree. It merely said that the sum of Rs. 350 was payable in seven yearly instalments commencing on 15th April 1938 and it then recited the conditions on which it became exigible and concluded with a direction that the claim would be a charge on survey No. 29. Accordingly by now appending a translation of the actual terms of the compromise as a schedule to the decree the lower Court has carried out the requirements of O. 23, R. 3 which it had not carried out before. That is nothing else than an amendment of the decree, so that the applicant is correct when he says that although the learned Judge did not purport to amend the decree he did in fact amend it.

The second question remaining then is whether this amendment makes any difference of its capability of execution. As I have said the lower Court does not think that it does so by reason of the fact that the primary clause of payment has not been altered, but if the compromise agreement is read as a whole, it means that if there is no default the judgment-debtor will pay Rs. 50 every year to the decree-holders for seven years. As soon as there is a default in the payment of the first instalment or in the payment of any two subsequent instalments survey No. 29 is to be attached and sold for the whole amount of the decretal debt. There has admittedly been a default of this nature and therefore the whole amount has become recoverable by attachment and sale of survey No. 29. The non-applicants have referred me to 30 N L R 325[3] in which it was held that where in a suit for money a decree based on a compromise is passed creating a charge on certain property for the satisfaction of the decretal debt, the decree is capable of execution by sale of the charged properties without the institution of a suit to enforce the charge under S. 67, T. P. Act. That however was not a Small Cause Court case. The power of a Small Cause Court to declare a charge on immovable property has been considered by Niyogi J. in A I R 1939 Nag 118[4] and with its reasoning I respectfully concur, as also with his conclusion, that so far as the decree of such Court seeks to create a charge on immovable property, it must be regarded as void and inoperative. The result is that the revision application succeeds and the application for execution of the decree must be rejected. Costs in the execution Court and in this Court on the decree-holders; I allow Rs. 50 as counsel's fee.

N.K./R.K. *Application allowed.*

3. ('34) 21 A I R 1934 Nag 147 : 150 I C 492 : 30 N L R 325, Kawatikabai v. Bachraj Jamanlal.
4. ('39) 26 AIR 1939 Nag 118: 182 I C 102, Ganga Prasad v. Ratan Chand.

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* (28) A. I. R. 1941 Nagpur 199

STONE C. J. AND VIVIAN BOSE J.

Damodhar Narayan Kunbi—Plaintiff — Appellant

v.

Narayan Gangaji Mankar and others— Defendants — Respondents.

Second Appeal No. 311 of 1937, Decided on 11th October 1940, from decree of Dist. Judge, Amraoti, D/- 21st December 1936.

(a) Res judicata—Separate pre-emption suits by *A* and *B* consolidated—*A* made defendant 2 in *B's* suit—*A's* claim to pre-emption negatived and *B's* suit decreed — Appeal by defendants 1 and 3 but not by *A*—*A's* suit dismissed— Appeal by *A* held not rendered incompetent by reason of his failure to appeal from decree in *B's* suit.

Separate pre-emption suits filed by *A* and *B* were by order consolidated. *A* was impleaded as defendant 2 in *B's* suit. *A's* claim for pre-emption in that suit was negatived and *B's* suit was decreed. Defendants 1 and 3 in *B's* suit appealed but *A* did not. *A's* suit was subsequently dismissed and in the appeal by *A* it was contended that his appeal was rendered incompetent by reason of his failure to appeal from the decree in *B's* suit.

Held that the appeal by *A* against the dismissal of his suit was competent : ('27) 14 A I R 1927 Lah 289 (F B), *Rel. on.* [P 200 C 1, 2]

(b) Berar Land Revenue Code (1928), Ss. 173 and 182—Joint Hindu family consisting of father and minor sons—Sale by father—Minor son can pre-empt—Addition of son's name by father to sale deed does not make son vendor.

Where a father, manager of a joint Hindu family consisting of himself and his minor sons, sells property, one of the sons has a right to pre-empt. The fact that the father added the minor son's name to the sale deed does not make the minor a vendor: ('25) 12 A I R 1925 P C 18 and ('29) 16 A I R 1929 Oudh 265 (F B), *Rel. on*; ('25) 12 A I R 1925 Nag 160; ('20) 7 A I R 1920 All 131; ('33) 20 A I R 1933 All 758 and ('35) 22 A I R 1935 Lah 560, *Not approved.* [P 200 C 2; P 202 C 1]

(c) Hindu law—Joint family—Minor — No guardian of minor member can be appointed under Guardians and Wards Act though one may be appointed under inherent power of High Court—Hindu father cannot be regarded guardian, as parent or delegate from Sovereign, of undivided son's property—Father cannot make his act more binding by purporting to act as son's guardian.

Where the minor is a member of an undivided joint Hindu family (at any rate where the Mitakshara law applies) there cannot be a guardian appointed under the Guardians and Wards Act though there may be one appointed under the inherent power of the High Court. But there is really no place for such a conception of a Hindu father being guardian, as parent or as delegate from the Sovereign, of the undivided son's property. Such a son has no individual property. The father's act binds the son's share in a wide range of cases quite apart from the idea of guardianship. This power is based on the absence of illegality, the presence of necessity, and the right to manage. He cannot make his act more binding by purporting to act as the son's guardian : 25 All 407 (P C), *Ref.* [P 202 C 1, 2]

Dr. D. W. Kathalay, R. N. Padhye and P. Y. Deshpande — for Appellant.

D. T. Mangalmurti, M. R. Bobde and N. T. Mangalmurti, and B. L. Gupta — for Respondents 3, and 8, respectively.

Judgment. — It is first necessary to dispose of a preliminary objection. To understand it certain facts must be stated. Two pre-emption suits were filed, one by the present appellant, Damodhar (74A of 1935), one by Vithoba (62A of 1935). In 62A of 1935 Damodhar was defendant 2. He raised the objection that he had a preferential right. His father and brother were co-defendants. The defence of Damodhar was found against and the suit decreed. Defendant 1 and defendant 3 appealed, but defendant 2 did not. Suit No. 74A of 1935 was dismissed. Damodhar appealed. This is the second appeal. It is objected that it is incompetent because Damodhar's failure to appeal from the decree in 62A of 1935 concludes the matter against him. The answer is that the two suits were by order consolidated. Agreeing as we do with the majority in 8 Lah 384,[1] we consider that there is no force in the preliminary objection.

The point of substance is : if a father, manager of a joint Hindu family consisting of himself and minor sons, sells property has one of the sons a right to pre-empt under the provisions of the Berar Land Revenue Code? At the time of the sale all the sons (three) were minors. Pre-emption is dealt with in Chap. 14, Berar Land Revenue Code. Section 173 defines an "occupant in a survey-number" as meaning

> a person having the right of an occupant, whether in his sole right or jointly with others in that survey-number, or in any portion of it.

It is said that when the manager of a joint Hindu family sells he represents the family and in truth and in fact the family sells. A I R 1925 Nag 160[2] treated the family as the occupant. In such a case in 42 ALL 264[3] it was stated that each cosharer was "practically" a vendor. Obviously a vendor cannot pre-empt. Therefore it is said a member of the family cannot pre-empt whether the sale is or is not binding on them. On the other hand, in 4 Luck 370[4] a Full Bench decided that, under the laws of Oudh, a member of a family could pre-empt. It was there pointed out that a member could admit the validity of the sale; i. e., its binding nature as against his share or in other words the fact that there was necessity justifying the sale, without turning himself into a vendor. As Misra J., observes in the above case at page 384 :

> It is one thing to say that the sale is binding upon him (a member of a joint Hindu family) and quite (another) to say that he is to be treated as a vendor.

42 ALL 264[3] is a short judgment and the learned Judges seem to have been impressed by the view that the members seeking to pre-empt were "practically parties to the sale." They observe :

> This is not a case in which the property has been sold by the manager against the wishes of the other members.

This seems to be based on the fact that the members sought to set aside the sale as not binding, alternatively, if binding, sought to pre-empt and from that part of

1. ('27) 14 A I R 1927 Lah 289 : 104 I C 849 : 8 Lah 384 : 28 P L R 712 (F B), Mt. Lachhmi v. Mt. Bhulli.
2. ('25) 12 AIR 1925 Nag 160 : 81 I C 1009, Kisan v. Sitaram.
3. ('20) 7 AIR 1920 All 131 : 55 I C 87 : 42 All 264 : 18 A L J 116, Pratap Narain Singh v. Shiam Lal.
4. ('29) 16 AIR 1929 Oudh 265 : 115 I C 433 : 4 Luck 370 : 6 O W N 249 (F B), Himanchal Singh v. Ajodhiya Singh.

the lower Court's decision which dismissed the claim to set the sale aside they did not appeal. The learned Judges also stress the question :

> Whether a man can pre-empt a sale in which a portion of his own property has actually been legally and validly transferred and in which case he is practically a vendor.

This case was followed in 55 ALL 972.[5] There it was pointed out that the manager can and does act in the interest of the entire family, and in such a case the fact that no consent could be given by a minor coparcener is immaterial. Before pre-emption arises it must be assumed that the sale is good, and if good it is binding on the coparcener whose position is that of vendor. 42 ALL 264[3] was followed and 4 Luck 370[4] dissented from in A I R 1935 Lah 560.[6] These last three cases are all short judgments which do not depend for their decisions on the provisions of any particular Act. The last named case does not even glance at the Privy Council decision in 6 Lah 1.[7] That case is generally regarded as the leading case on the question of the rights of a father in a joint Hindu family as regards the family property. The question was whether on a father's insolvency the son's interest vests in the Official Assignee. It was held by the High Court (largely influenced by the doctrine of stare decisis) that it did. The Judicial Committee, however, pointed out what went to the Official Assignee by universal transfer by operation of law were the father's rights and the father's right included his share in the coparcenary property and a limited power to transfer the shares of others. Until a sale took place of the other shareholder's interest such interest was untouched and accordingly adjudication of the father left the son as an "owner" entitled to pre-empt under the provisions of the Punjab Pre-emption Act, 1913. Of course in that case the property not having in fact been sold by the Official Assignee the question whether the coparceners seeking pre-emption were thereby barred did not arise. It is, however, a little difficult to see why, assuming an Official Assignee sold not merely the share of the father, but also an item of family property, the non-insolvent coparceners should thereby be regarded as vendors. The sale is not being made under any authority flowing from them ; it is not being made with their consent ; it may well be made in the teeth of their opposition. Why then are they to be regarded as vendors so as to be shut out from pre-emption ?

However that may be, we are here concerned not with the general but with the statutory position. This minor has the right of an occupant jointly with others. The scheme of the Act provides inter alia that if A, B, C jointly possess the right of an occupant in area (survey-number) X, and A proposes to sell his "interest" he "may" give notice to B and C stating the extent of the interest to be sold and the price. Then B or C may within a given time (two months) deposit the price. Thereupon B or C obtains a right. That right consists in the power to compel a sale of the indicated interest at the price deposited. (Section 176.) Clearly, there may be a conflict of right between B and C. Priority depends on relationship or, that failing, extent of interest. (Section 179.) Apart from S. 176, S. 182 gives a right to pre-empt for a fair consideration. That is the section under which this suit is apparently brought because in the plaint para. 3 (b) it is alleged :

> Plaintiff has not been served with any notice of sale so plaintiff's right of pre-emption is not affected in any way.

Defendant 4 was also claiming pre-emption. The plaintiff claimed priority based on relationship. The plaintiff alleged that defendant 1 was the vendor and that defendants 1, 2 and 3 were joint with plaintiff. The four owned 8 annas share in the survey-number. What was sold was 2 annas share. The learned Judge of the lower appellate Court has dismissed the plaintiff's appeal on the ground that the Hindu father is an agent for his sons, minors though they be, and therefore they are principals and accordingly vendors. He observes :

> It appears to me that if the Oudh ruling were followed, any sale of property by a manager of the joint family could be set aside by the coparceners so long as the coparceners were willing to refund the consideration.

That appears to us hardly to do justice to the Oudh decision and ignores the purpose of pre-emption laws which give to a limited class in certain circumstances this very right, viz., to set aside a sale to a stranger on tendering the price or a reasonable price. It is by no means obvious why a minor coparcener should be placed in a worse position than an adult joint owner. Because A has a right to sell B's property,

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5. ('33) 20 AIR 1933 All 758 : 145 I C 547 : 55 All 972, Ram Singh v. Deo Narain.
6. ('35) 22 AIR 1935 Lah 560 : 156 I C 15, Khuda Baksh v. Lahori Mal.
7. ('25) 12 AIR 1925 P C 18 : 84 I C 883 : 6 Lah 1 : 52 I A 22 (P C), Sat Narain v. Behari Lal.

(e. g., because of attachment followed by a Court order) it does not follow that B is the vendor. In many cases B is resisting to the utmost of his power. In many cases (of which sale in execution is perhaps the most common) the sale is effected and is binding. In many cases transfer is by vesting order. In these cases of sales in invitum is it correct to say that the person whose property is sold is the vendor? He is certainly not a contracting party. What is the difference between such a case and this? In such a case A (a Court or the like) is given, by statute, power to sell B's property to satisfy C's debt in certain circumstances. In this case the Hindu law gives to A (a father) power to sell the property of B (a son) to satisfy C's debt in certain, and different, circumstances. The only difference is in the circumstances. That difference gives no logical basis for treating B as not a vendor in the first case put and as a vendor in the second. Both sales are against his wishes. Both sales are nevertheless binding. In both cases the binding factor does not come from him but from law statutory or customary as the case may be. In all the circumstances we prefer the Oudh view.

It is urged that even so in this case the plaintiff is a vendor because he is a party and he is a party because, though a minor, his father, purporting to act as guardian, has included his name in the sale deed. There is of course the conception of guardianship in Hindu law: see Mayne on Hindu Law and Usage, para. 231, page 299, (Edn. 10). But this guardianship is a guardianship of the person, or, it may be, where there is separation, of property. But where the minor is a member of an undivided joint Hindu family (at any rate where the Mitakshara law, as here, applies) there cannot be a guardian appointed under the Guardians and Wards Act, 30 I A 165,[8] though there may be one appointed under the inherent power of the High Court. But there is really no place for such a conception of a Hindu father being guardian, as parent or as delegate from the Sovereign, of the undivided son's property. Such a son has no individual property. The father's act binds the son's share in a wide range of cases quite apart from the idea of guardianship. This power is based on the absence of illegality, the presence of necessity, and the right to manage. He cannot make his act more binding by purporting to act as the son's guardian and the inclusion of the son's name in the deed has little more effect than adding weight to evidence to show that the sons in question were then born. We do not think that the fact that the father added the minor son's name to the sale deed makes the minor a vendor. The appeal accordingly succeeds.

Although the suits 74-A of 1935 and 62-A of 1935 were consolidated some question arose about the effect of consolidation. This question we have already examined. As a consequence of the doubt that arose there were two appeals as though the suits had not been consolidated. These two appeals were (1) by Damodhar, appellant to this appeal (Second Appeal No. 311 of 1937), and (2) by Sadashiv and Narayan, appellants in Second Appeal No. 166 of 1937. The Second Appeal No. 166 of 1937, obviously fails if Second Appeal No. 311 of 1937 succeeds and accordingly it is not pressed. As the first has succeeded and as the suits were consolidated there should be one decree. As in the one suit (74-A of 1935) the present successful appellant claimed pre-emption and in the other (62-A of 1935) a stranger to the family, one Vithoba, claimed pre-emption it follows that the claim in each suit has succeeded but the plaintiff in Civil Suit No. 74-A of 1935 being a member of the family has priority over Vithoba, a stranger, based on relationship—the Act as between two persons claiming pre-emption giving priority to the one more nearly related. Thus there will be one composite decree. (See O. 20, R. 14). That decree will declare that Damodhar has the right of pre-emption and that Vithoba has the right of pre-emption and that the right of the first is prior to that of the second and may be exercised and completed within three months failing which that right will be deemed to be lost and Vithoba may then exercise his. By Vithoba we must be taken to mean not only Vithoba personally but those parties claiming through him. As to costs we think, seeing that in substance these disputes have been between a family on the one hand and the stranger on the other, that one suit brought by a member of this undivided family has succeeded and one has failed, that costs throughout in both matters shall fall as incurred save that Damodhar will get the costs of this appeal.

G.N./R.K. *Appeal allowed.*

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8. ('08) 25 All 407 : 30 I A 165 : 8 Sar 483 (P C), Gharib-ul-lah v. Khalak Singh.

(28) A. I. R. 1941 Nagpur 203

GRILLE AND GRUER JJ.

Provincial Government — Appellant

v.

Nemichand Beharilal Jain Parwar — Accused — Respondent.

Criminal Appeal No. 2 of 1941, Decided on 26th February 1941, from order of Magistrate, Second Class, Khurai, D/- 23rd September 1940.

(a) C. P. Municipalities Act (2 of 1922), S. 179 (1) (b-1), Bye-law (11)—Purchase of linseed in municipal market—Refusal to take delivery on ground that linseed was mixed with lot of mud — Offence of breach of bye-law is committed — Bye-law is not unreasonable interference with trade, and comes under head of regulating use of markets mentioned in S. 179 (1) (b-1) — It is not in restraint of trade and is not ultra vires— Even assuming latter part bad that part may be separated from good part instead of declaring whole bye-law void.

Bye-law (11) in no way goes against the general rule of contract or the provisions of the Sale of Goods Act. On the contrary it simply emphasizes them. Nor does it hamper trade. On the contrary it helps trade by introducing certainty into dealings and making people careful and avoiding subsequent futile disputes. [P 204 C 2]

Even assuming last part of the bye-law forbidding rejection of commodities because they were not upto sample is an unreasonable restriction, the bad part of bye-law may be separated from a good part, as it can be done with respect to this bye-law, instead of declaring the whole bye-law void: (1898) 2 Q B 91; (1902) 1 K B 160; (1896) 1 Q B 290; (1830) 1 B & Ad 92 and (1881) 7 Q B D 32, *Rel. on*; AIR 1933 Nag 68, *Disting.*; (1880) 5 Q B D 456, *Not approved.* [P 204 C 2]

(b) Interpretation of Statutes—Rules and bye-laws — Rules framed under statutory powers should not be in excess or repugnant to those powers or general principles of law.

Rules and bye-laws made under statutory powers enforceable by penalties must, on pain of invalidity be not unreasonable, nor in excess of the statutory power authorizing them nor repugnant to that statute or to the general principles of law. [P 204 C 1]

W. R. Puranik, Advocate-General — for Appellant.

W. B. Pendharkar — for Respondent.

Judgment. — This is an appeal by the Provincial Government against the acquittal of one Nemichand Jain of the offence of breach of a bye-law framed by the Municipal Committee, Bina. On 27th April 1940, the accused purchased in auction in the municipal market a bag of linseed from one Suma. Later he refused to take delivery saying, according to the prosecution, that there was a lot of mud mixed with the linseed. Bye-law 11 which he is alleged to have violated has been translated as follows :

Buyers shall satisfy themselves as to the quality of any commodities before these are put to auction. They shall not be allowed to cancel any purchase on the ground that they had not inspected the commodities or commodities were not up to sample.

This bye-law purports to be made under S. 179 (1) (b), Central Provinces Municipalities Act. The respondent's defence was two-fold: First, he did not take delivery of the linseed because the seller had refused to weigh unless the price was first paid: therefore on the facts he has not broken the bye-law. Secondly, the bye-law is void and ultra vires (a) because it is made under S. 179 (1) (b) which gives no authority for the making of such a bye-law, and (b) because in any case it is an unreasonable interference with trade, and does not come under the head of regulating the use of markets mentioned in S. 179 (1) (b-1). The trial Court has disbelieved the defence evidence and upheld the prosecution version about the facts. It also holds that the bye-law was really made under S. 179 (1) (b-1) which was then in force and the mention of S. 179 (1) (b) is a clerical mistake. On the third point however the trial Court held that the bye-law is in restraint of trade, and as the municipal committee was not expressly authorized to pass such a bye-law it is ultra vires. Accordingly the accused was acquitted. Learned counsel for the respondent supports the acquittal on all the ground previously urged. The point about the sub-section of S. 179 need not detain us. The word 'markets' used to appear in sub-s. (b). When sub-s. (b-1) was enacted it was taken out of (b) and put into (b-1). Therefore at all times the municipal committee was entitled to pass bye-laws for regulating markets and a wrong reference to the sub-section is merely a clerical mistake which could never make the bye-law void.

A perusal of the record convinces us that the reason why the linseed was refused was as stated by the prosecution. This is deposed to by the tax moharrir Mohan Prasad, (P. W. 3), Md. Hafiz (P. W. 4), municipal committee member, and Summa the seller (P. W. 6). The evidence in support of the accused's version is that of Ganeshprasad, weighman, (D. W. 1), Budhua (D. W. 2), a coolie, and Kanchhedilal (D. W. 3), another weighman. Their evidence is flimsy, and the facts they state are most improbable. D. W. 1 has a grudge against the municipal committee while D. W. 2 works in accused's shop. The evidence of D. W. 3 is vague. We uphold the finding of the trial Court on this point. We have no doubt that such a bye-law does fall under the heading of regulating the use of markets. The chief feature of the market is the putting up of grain to

auction, and rules regulating these auctions thereby regulate the use of the market. Such rules, if wisely framed, afford salutary protection to sellers and purchasers alike and secure stability in trading and avoid needless disputes. No doubt, the bye-laws must be reasonable and not repugnant to the general law. The principles to which they must conform will be seen from the following quotations: Maxwell's Interpretation of Statutes, Edn. 8, p. 260 :

> Rules and by-laws made under statutory powers enforceable by penalties . . . . must, on pain of invalidity, be not unreasonable, nor in excess of the statutory power authorizing them, nor repugnant to that statute or to the general principles of law.

Page 261 :

> Courts of justice are slow to condemn municipal by-laws as invalid, on the supposed ground of unreasonableness, and support them if possible by a 'benevolent' interpretation, crediting those who have to administer them with an intention to do so in a reasonable manner, and with being the best Judges whether a particular bye-law is required in their district or not.

Halsbury's Laws of England, Vol. 8, p. 47:

> A bye-law must not be repugnant to the general law. It is not repugnant merely because it supplements the general law and deals with something which is not dealt with by the general law. But it must not alter, either expressly or by necessary implication the general law by making that lawful which the general law makes unlawful, or that unlawful which the general law makes lawful.

(1898) 2 Q B 91[1]:

> The Court ought to be slow to hold that a bye-law is void for unreasonableness. A bye-law . . . . . ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

(1902) 1 K B 160[2] at p. 166 :

> A bye-law is not repugnant to the general law merely because it creates a new offence, and says that something shall be unlawful which the law does not say is unlawful . . . . . (It) is repugnant if it adds something inconsistent with the provisions of a statute creating the same offence; but if it adds something not inconsistent, that is not sufficient to make the bye-law bad as repugnant.

Now let us apply these principles to the facts of the present case. For the respondent reliance is placed on A I R 1933 Nag 68.[3] There the facts were different. It was held that a bye-law prohibiting traders from demanding or accepting customary deductions on account of charity, gratuity or services of private persons, was in excess of the power conferred on the municipality. We have some doubt about the correctness of that decision, but it might be supported on the ground that the custom of the market, unless obviously unreasonable, should not be interfered with. However that may be, each bye-law must be judged on its own merits or demerits. It is admitted that this was not a sale by sample. The bag of linseed was there exposed in the market and could have been examined. Kunjilal (P. W. 5), another bidder, says that Nemichand and he both had examined the linseed before bidding. Even if Nemichand did not, he had the opportunity of doing so. The first rule applicable to purchase of a specific article is that of "caveat emptor". According to S. 16(2), Sale of Goods Act, there is an implied condition that the goods shall be of merchantable quality but with the important proviso that if the buyer has examined the goods there shall be no implied condition as regards defects which such examination ought to have revealed. It would be just the same if he had an opportunity of examining and did not take advantage of it. Thus, the bye-law under examination in no way goes against the general rule of contract or the provisions of the Sale of Goods Act. On the contrary, it simply emphasizes them. Nor can we concede that such a provision hampers trade. On the contrary, it should help trade by introducing certainty into dealings and making people careful and avoiding subsequent futile disputes. One argument advanced without much conviction was that at least the last part of the bye-law forbidding the rejection of commodities because they were not up to sample is an unreasonable restriction, and it is urged that if one part of the bye-law is void the whole of it becomes ultra vires. We do not at all concede that even the second part is unreasonable. But assuming that it is, the reference quoted by learned counsel himself shows that there is strong weight of authority in favour of separating a bad part of a bye-law from a good part where that can be done instead of declaring it all void. The passage occurs in Craies' Statute Law, Edn. 4th, p. 280, and we rely on the dictum of Lindley L. J., in (1896) 1 Q B 290[4] at p. 292 :

> There is plenty of authority for saying that if a bye-law can be divided, one part may be rejected as bad while the rest may be held to be good.

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1. (1898) 2 Q B 91 : 67 L J Q B 782 : 78 L T 647 : 46 W R 630 : 62 J P 469 : 14 T L R 416, Kruse v. Johnson.
2. (1902) 1 K B 160 : 71 L J K B 105 : 85 L T 683 : 50 W R 216 : 66 J P 117 : 20 Cox C C 104 : 18 T L R 72, Gentel v. Rapps.
3. ('33) 20 A I R 1933 Nag 68 : 142 I C 857 ; 34 Cr L J 408, Merchant Kareligunj v. Notified Area Committee.
4. (1896) 1 Q B 290 : 65 L J M C 55 : 74 L T 137 : 44 W R 398 : 18 Cox C C 244 : 60 J P 164, Strickland v. Hayes.

That later judgment of the appellate Court is of greater authority than the previous judgment of Cockburn, C. J. in (1880) 5 Q B D 456[5] at p. 463 in which he said that a bye-law being entire, if it be unreasonable in any part shall be void for the whole. That dictum which is relied on by the respondent does not seem to have been followed elsewhere. On the contrary the opinions in (1830) 1 B & Ad 92[6] and in (1881) 7 Q B D 32[7] are that a bye-law if severable can be good in part and bad in part. We conclude therefore that there was no good reason at all for declaring this bye-law to be ultra vires or void. We allow the appeal and convict the accused of a breach of this bye-law, No. 11. The learned Advocate-General assures us that this appeal is brought merely to vindicate the bye-law and he is not interested in pressing for a substantial penalty. We treat the offence as a technical one and fine the accused Re. 1 only.

N.K./R.K. *Appeal allowed.*

5. (1880) 5 Q B D 456 : 49 L J Q B 761 : 43 L T 281 : 29 W R 56 : 44 J P 781, Saunders v. South Eastern Ry.
6. (1830) 1 B & Ad 92 : 8 L J (o s) K B 333, Clark v. Denton.
7. (1881) 7 Q B D 32 : 50 L J M C 78 : 44 L T 609 : 29 W R 565 : 45 J P 650, Dyson v. L. & N. W. Ry.

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(28) A. I. R. 1941 Nagpur 205

VIVIAN BOSE J.

K. C. Majumdar — Defendant — Applicant

v.

Surajsingh Ramnareshsingh Rajput — Plaintiff — Opposite Party.

Civil Revn. No. 617 of 1939, Decided on 13th September 1940, from order of A. S. J. II, Sihora, D/- 13th September 1939.

(a) Civil P. C. (1908), O. 11, R. 1, O. 3, R. 1 and Appendix C, Form No. 3—Words 'any other law' in O. 3, R. 1—Meaning—O. 3, R. 1 governs O. 11, R. 1—Party ordered to answer interrogatories — No special direction to answer personally — Party can answer through recognized agent—Agent can swear affidavit.

The words 'any other law' in O. 3, R. 1 refer to law other than the Code and therefore O. 3, R. 1 governs O. 11, R. 1. Consequently a party to a suit who is ordered to answer interrogatories is not bound to answer them personally in the absence of a special direction to that effect. In such a case the party's recognized agent who knows the facts can answer the interrogatories and the affidavit can be sworn to by him: ('39) 26 AIR 1939 Nag 186 (F B), *Rel. on.* [P 206 C 1, 2]

(b) Civil P. C. (1908), O. 3, R. 1 — Application for stay of proceedings — Party can apply through pleader unless otherwise directed.

A party can apply for the stay of proceedings through his pleader unless the Court directs otherwise and requires the party to make the application in person : ('38) 25 A I R 1938 Nag 272, *Rel. on.* [P 206 C 2]

(c) Civil P. C. (1908), O. 3, R. 1 and S. 115 (c) —Code empowering party to act through recognized agent — Court not requiring party to do same in person—Court cannot arbitrarily reject that act and mulct party in costs — High Court can interfere under S. 115 (c).

When the Code expressly gives a party a right to perform a certain act through a recognized agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the party in costs because he has chosen to do that which the Code expressly allows him to do. That is a material irregularity on a question of procedure and justifies interference in revision under S. 115 (c). [P 207 C 1]

J. Sen — for Applicant.

T. B. Pendharkar — for Opposite Party.

Order. — The question here is whether, when a party to a suit is ordered to answer interrogatories, he is bound in the absence of a special direction to that effect to answer personally, or whether he can answer through some recognized agent who knows the facts; that is to say, must an affidavit be sworn to by the party himself or can this be done by a recognized agent? The plaintiff administered a set of interrogatories and the defendant was required to file a reply to them by 31st August 1939. The reply was filed but the affidavit was made by an agent of the defendant and not by the defendant himself. The lower Court thereupon stated that the defendant was at fault and saddled him with Rs. 20 adjournment costs and the defendant was told to file his reply to the interrogatories in proper form within ten days. On the next hearing, 12th September 1939, the defendant's pleader put in an application for stay because the defendant desired to contest the correctness of the previous order in the High Court. This application was not signed by the defendant either and it was rejected on that ground. On the following day, 13th September 1939, the defendant's pleader asked for further time to enable his client to comply with the Court's order about swearing the affidavit personally. Time was granted, but on condition that Rs. 25 was paid as adjournment costs. The revision is against these two orders, that is to say, against the first order of 31st August 1939 in which the reply to the interrogatories was rejected because the affidavit was not sworn to by the defendant personally and in which the defendant was required to pay Rs. 20 as adjournment costs, and against the order of 13th September 1939 where the defendant was required to pay further adjournment costs of Rs. 25.

The learned counsel for the plaintiff-non-applicant relies on O. 11, R. 1, Civil P. C., read with Form No. 3 to Appendix C. Order 11, R. 1, states that in any suit the plaintiff or defendant may by leave of the Court deliver interrogatories in writing for the examination "of the opposite parties or any one or more of such parties." The form in Appendix C indicates that the answer contemplated by the form should be given by the party himself. As against this however there is a more general rule, O. 3, R. 1, which states that :

> Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting on his behalf.

Then there is a proviso which states that the Court can, if it so desires, direct that such appearance or act shall be made by the party in person. The question is whether this rule, which is a general one, governs O. 11, R. 1, or not. I have not been referred to any authority on the point and it does not seem as if there are any Indian cases bearing on the subject. Mulla in his Civil Procedure Code, Edn. 10 at p. 615, refers to some English cases under O. 11, R. 8, which state that a party to a suit is not excused from answering interrogatories on the ground that they relate to matters which are not within his own knowledge but are within the knowledge of his agents or servants if such knowledge has been acquired by them in the ordinary course of their employment. But this does not touch the matter in question here because the question here is not whether the defendant can refuse to answer the interrogatories at all (because they have been answered) but whether he must answer personally instead of through a recognized agent. On the whole, it seems to me that O. 3, R. 1, governs O. 11, R. 1. The former order is a general one and has general application. Therefore unless there is something specific to show that its provisions are not intended to apply to some act or appearance in some particular case, it ought in my opinion to be applied.

It is contended however that O. 3, R. 1, expressly states that it is to apply "except where otherwise expressly provided by any law for the time being in force" and it is argued that O. 11, R. 1, read with Form No. 3 to Appendix C is such other law. A similar expression was considered by a Full Bench of this Court in I L R (1939) Nag 250[1] at p. 257. The words under consideration there are to be found in S. 89, Civil P. C., and are almost identical with the words in O. 3, R. 1. It was held by the Full Bench that the words "any other law" in S. 89 do not mean other parts of the Code but refer to laws other than the Code, and it is pointed out that when the intention is to exclude other parts of the Code the language used is "except as herinafter provided" or something of that kind. As these or similar words are not used in O. 3, R. 1, I am of opinion that the words used refer to laws other than the Code. In the circumstances the lower Court was, in my opinion, wrong in rejecting the answers to the interrogatories forthwith on 31st August 1939 and in requiring the defendant to pay Rs. 20 adjournment costs. The Court had power to order the defendant to answer the interrogatories in person. Had the learned Judge done so in the first instance, then of course this order would have been perfectly correct; but it appears that no such order was passed when the interrogatories were ordered to be answered. Therefore the defendant was at liberty to act either through himself or through a recognized agent as provided by O. 3, R. 1. He chose to act through a recognized agent. He therefore did what the law allowed him to do and if he did that, the learned Judge could not saddle him with costs. All he could do was to state that in the circumstances he required the defendant to answer the interrogatories personally, and if thereafter the defendant disobeyed them he could either strike out the defence or give him another chance on terms that he pay costs. It must not however be interpreted as in any way encouraging the practice of answering through agents. As a general rule, it is salutory and wholesome that the defendant himself should be made to swear to what he says. But there will always be exceptions, and in any case as the Code allows an alternative a party cannot be penalised for following it, unless he has been expressly ordered to do the contrary.

Turning next to the order of 12th September 1939, the application there was rejected because it was not signed by the applicant. But there again the defendant, who was the applicant, had every right to apply through his pleader unless the Court directed otherwise. It had not directed otherwise

1. ('39) 26 A I R 1939 Nag 186: 183 I C 128: I L R (1939) Nag 250 (F B), Ramdayal v. Sheodayal.

up to that point and therefore all that the Court ought to have done was to require the defendant to make the application in person. This matter has been expressly decided in I L R (1939) Nag 157.[2] As regards the adjournment costs of Rs. 25 ordered on 13th September 1939, the lower Court had jurisdiction to pass such an order. The interrogatories ought to have been answered in person within the ten days allowed but they were not answered. Of course, the defendant has given a reasonable explanation as to why this was not done and it appears that it was not due to any contumaciousness on his part, but at the same time the order, whether right or wrong, was within the competence of the Court to make. The only question is whether, if the learned Judge had realised that the Code allows a defendant to answer through a recognized agent unless otherwise ordered, he would have required the answers to the interrogatories to be made in person. If he had not required that, then these adjournment costs would have been unnecessary. As I am interfering with the first order I think that in the interests of justice I ought to interfere with this order also.

The question then remains whether I have jurisdiction to interfere in revision with orders of this kind. In my opinion the matter falls within S. 115 (c), Civil P. C. When the Code expressly gives a party a right to perform a certain act through a recognized agent and the Court has not directed him to perform it in person, the Court cannot arbitrarily reject that act and mulct the defendant in costs because he has chosen to do that which the Code expressly allows him to do. That, in my opinion, is a material irregularity on a question of procedure and justifies interference in revision. It appears that the defendant has now complied with the Court's order and has answered the interrogatories in person. Therefore all that it is necessary for me to do is to set aside the two orders of 31st August 1939 and 13th September 1939 in so far as they relate to the payment of adjournment costs of Rs. 20 and Rs. 25 respectively. The application is allowed. Costs will be paid by the non-applicant. Counsel's fee Rs. 15.

G.N./R.K. *Revision allowed.*

2. ('38) 25 A I R 1938 Nag 272: 177 I C 409: I L R (1939) Nag 157, Mt. Boro Bai v. Ramsunder.

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* (28) A. I. R. 1941 Nagpur 207

VIVIAN BOSE J.

Balanna and another — Defendants — Applicants

v.

Firm Khudai Nazar Khan, brother Khudai Dad Khan — Plaintiffs — Non-applicants.

Civil Revn. No. 127 of 1940, Decided on 13th December 1940, against decree of Addl. Judge, Small Causes, Nagpur, D/- 18th December 1939.

(a) Negotiable Instruments Act (1881), S. 118 — S. 118 contemplates not only "negotiation" but also "transfers."

Section 118 contemplates not only 'negotiation' which is a special form of transfer, but also 'transfers.' [P 208 C 1]

*(b) Negotiable Instruments Act (1881), S. 78 — S. 78 does not deal with right of suit — Real owner can sue provided he is in position to obtain good discharge for defendant.

Section 78 does not deal with a right of suit. The real owner is entitled to sue provided he is in a position to obtain a good discharge for the defendant. The fact that a person not the holder cannot claim the privileges of a holder does not disentitle him from suing: ('32) 19 A I R 1932 Pat 346 and ('32) 19 A I R 1932 Lah 620, *Rel. on;* ('31) 18 A I R 1931 Cal 387, *Dissent.; Case law discussed.* [P 208 C 2]

A. Shrinivas Rao — for Applicants.

M. Samiullah Khan — for Non-applicants.

Order.—There are two brothers Khudai Dad Khan and Khudai Nazar Khan. They form a partnership firm. This fact is denied but the lower Court has found in favour of the partnership (it runs under the name and style of "Khudai Nazar Khan brother Khudai Dad Khan,") and as the firm was registered on 5th December 1934, I do not think there can be any doubt on that point. In any case, I am not going to interfere on the facts. These brothers have sued as a firm on the basis of two promissory notes dated 29th March 1926 and 19th April 1936. The difficulty in their way is that the notes are in favour of Khudai Dad Khan and not in favour of the firm, and that Khudai Dad Khan had not signed the plaint. It is true he has been mentioned as a proprietor, and it is true that Khudai Nazar Khan has signed on behalf of the firm, but the objection is taken that the firm has no right of suit, the note not being in its favour, and that Nazar Khan has no authority to represent his brother Dad Khan personally. Therefore it is argued, the suit does not lie.

There is some difference of opinion on this point. Of the cases cited 55 Cal 551[1] is

1. ('28) 15 AIR 1928 Cal 148: 105 I C 549: 55 Cal 551, Brojo Lal Saha Banikya v. Budh Nath Pyarilal & Co.

not quite in point, because the partner in whose name the note was issued actually signed the plaint and what was held was that though he signed on behalf of a firm in which he was a partner, that merely meant that he was signing on behalf of a number of plaintiffs including himself, and as he had a right of suit any way, the fact that he added others as plaintiffs, could not non-suit him. But wider issues were also raised and one of the learned Judges was of opinion that the Law Merchant of England could not be applied to negotiable instruments in the mofussil where the Negotiable Instruments Act is in force. And as to that Act he considered that S. 78 did not prohibit a person other than the 'holder' from suing, especially when he is in a position to obtain a good discharge from the 'holder.' A later decision, 58 Cal 752,[2] dissented from this and held that the real owner cannot sue even though the holder is joined as a defendant and is willing to give a good discharge.

The Patna view is that the beneficiary can sue provided he is in a position to give a good discharge through the holder ; 11 Pat 616.[3] The Patna Full Bench decided in 16 Pat 74,[4] that an assignee under a registered instrument can sue. The case is not in point here but it shows that S. 78 is not as drastic as 58 Cal 752[2] would make it. Section 118, Negotiable Instruments Act, contemplates not only "negotiation," which is a special form of transfer, but also "transfers." We also know that if the 'holder' dies his legal representative can sue even though his name does not appear in the instrument. Therefore, it is not quite accurate to say that no one but the 'holder' can ever sue. A I R 1939 Pat 347[5] follows 58 Cal 752,[2] but does not refer to the earlier decision of that Court, moreover, it was a single Judge decision, whereas 11 Pat 616[3] was decided by two Judges and the Full Bench by five. But so far as the facts are concerned, it was held that the benamidar whose name appears on the instrument has a right of suit, a conclusion with which I fully agree. That was also the conclusion reached in 14 Lah 19.[6] It was held that the benamidar, who was the "holder" had a right of suit. 15 N L J 45[7] decided the same thing. The Allahabad High Court takes the broader of the two views in 53 ALL 5[8] and holds that the true owner can sue if he can obtain a good discharge for the defendant and thus prevents him from being sued successfully again. In Madras the real owner was not allowed to sue : A I R 1940 Mad 90.[9]

I consider this point in 27 N L R 327,[10] and my view there, as here, is that it is not correct to say that no person who is not named in the note can ever sue. I agreed however that the doctrine of benami cannot be applied to negotiable instruments, but at the same time expressed no opinion about the situation which would arise if the real owner was in a position to give a good discharge—a situation which did not arise in that case. I left that question open. But the question does arise here, and I am of opinion that the broader view taken in Patna and Lahore is the right one. Although the doctrine of benami does not apply as such to negotiable instruments, the decisions of the Privy Council upholding benami transactions cannot be altogether ignored. I see no reason why a narrow view of the law which would defeat a just claim should be taken. I do not think S. 78 deals with a right of suit, for as I have already pointed out there are cases in which a person who is not the 'holder' can sue. Once these two principles are accepted, then I see no reason why the real owner should not be entitled to sue provided he is in a position to obtain a good discharge for the defendant. The Court must of course always be careful to see that the position of the defendant is fully safeguarded, but if that is done, I see no reason why there should be any further difficulty if the 'holder' and the real owner are agreed between themselves. Of course, a person not the holder cannot claim the privileges of a 'holder' as I have pointed out at p. 330 of 27 N L R 327,[10] but that does not in my opinion, disentitle him from suing. In this case Khudai Dad Khan has entered the box and is evidently agreeable to the decree being passed in favour of the partnership, but I think he should formally give

2. ('31) 18 A I R 1931 Cal 387 : 131 I C 570 : 58 Cal 752 : 53 C L J 37 : 35 C W N 53, Harikishore Barua v. Gura Mia Chaudhuri.
3. ('32) 19 AIR 1932 Pat 346 : 140 I C 572 : 11 Pat 616, Surajman Prasad v. Sadanand Misra.
4. ('37) 24 AIR 1937 Pat 100 : 167 I C 57 : 16 Pat 74 : 17 P L T 919 (FB), Ghanshyam Das v. Ragho Sahu.
5. ('39) 26 AIR 1939 Pat 347 : 183 I C 60, Raghubir Mahto v. Ramasray Bhagat.
6. ('32) 19 AIR 1932 Lah 620 : 140 I C 13 : 14 Lah 19 : 33 P L R 937, Jaswant v. Govind Ram.
7. ('32) 15 N L J 45 : 141 I C 330, Narayan v. Uttamrao.
8. ('31) 18 AIR 1931 All 108 : 130 I C 698 : 53 All 5 : 1930 A L J 1509, Sewa Ram v. Hoti Lal.
9. ('40) 27 AIR 1940 Mad 90 : 189 I C 685 : (1939) 2 M L J 812, Veeraraghavaswami v. Mangamma.
10. ('32) 19 AIR 1932 Nag 23 : 137 I C 33 : 27 N L R 327, Gulabgir v. Nathmal.

the defendant a proper discharge before the decree is upheld.

I therefore dismiss the application provided the plaintiff, that is to say the firm which has sued, obtains within one month from today a proper discharge from Khudai Dad Khan, exonerating the defendant from all liability to him personally under the note. If this is not done within the time allowed, the appeal will be allowed and the plaintiff's claim will then be dismissed with costs. The instrument of discharge will be filed in this Court. I do not allow the plaintiff his costs of this revision because the difficulty experienced here, and it is a real one, has been due to his own carelessness.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 209

STONE C. J. AND VIVIAN BOSE J.

Ganpat Gangaji Patil—Defendant 2—Appellant

v.

Namdeo Bhagwanji Patil, Plaintiff and others, Defendants — Respondents.

First Appeal No. 119 of 1936, Decided on 23rd January 1940, from decree of Addl. Dist. Judge, Yeotmal, D/- 28th February 1936.

(a) Deed — Construction — Partition deed — Deed held to be instrument of partition and hence registrable.

The deed which came into existence as a result of partition between the parties ran as follows: "You and I are real brothers and were all joint up to this day. But today you and I have separated. And the undermentioned moveable and immovable property is allotted to your share." It then set out the property allotted to the share of the brother in whose favour the document was executed and continued; "the aforesaid moveable and immovable property has been allotted to your share and is delivered into your share. Therefore, neither I nor my heirs have left any right and interest therein." Then followed certain items of property which were kept joint and the document stated in respect of them, "this property is joint. However, we will have the same partitioned on the decision of the appeal. . . . . On getting the possession through Court, we will get it partitioned half and half. I have written and signed this receipt list at Sakhara with my free will and pleasure and while in full possession of senses." Then the name and address of the scribe was set out, and the signature of the executant followed by the signatures of three attesting witnesses:

Held that the use of the present tense and the form of the document, particularly the concluding portion which spoke of the document having been executed "with my free will and pleasure and while in full possession of senses" and also the fact that as many as three attesting witnesses were called, suggested that the document was "meant to embody the expression of will necessary to effect the change in the legal relation contemplated and therefore the document required registration: ('38) 25 A I R 1938 Nag 434; ('32) 19 A I R 1932 P C 55 and ('23) 10 A I R 1923 P C 50, *Rel. on.* [P 211 C 2]

(b) Hindu law—Partition—Partition by panchas—Agreement of parties and not decision of panchas effects partition — Panchas only help parties in arriving at common result — Oral agreement arrived at reduced to writing—Document and not oral agreement effects partition.

In the case of a partition by panchas the thing which legally concludes the matter is not their decision but the agreement of the parties, and the only part which the panchas play is in helping the parties to arrive at a common result. That, from a legal point of view, is on the same footing as an agreement reached orally. If, however, the parties desire that the agreement though reached orally should not be the final and operative agreement but that it should be reduced to the form of a document, then the final and operative matter which effects the change in the legal relationship is the writing and not the previous oral agreement. [P 212 C 1]

(c) Deed — Construction — Partition — Document carefully and solemnly drawn up with counterpart signed by parties reciting properties received—Document held partition deed.

The material part of a careful and elaborate document which was solemnly drawn up with a counterpart signed by the other side and which purported to be a partition deed ran as follows: "Thus, in the presence of all the panchas I have read this receipt of the moveable and immovable property and in respect of the aforesaid one-half share: and after fully taking into consideration all the aforesaid moveable and immovable property we both brothers have taken our respective receipts in the presence of the panchas":

Held that the counterparts together were intended by the parties to embody and legally effect the actual partition between them. [P 212 C 1]

(d) Hindu law—Partition — Nature explained — Intention as well as its declaration to other cosharers is necessary to effect severance of joint status — Declaration can be effected without any formality—But if reduced to writing it falls under S. 17 (1) (b), Registration Act, and is struck at by S. 49 of that Act.

Partition, unlike a sale or transfer which consists in its essence of a single act, is a continuing state of fact. No question of transfer of title arises. Each parcener already has complete title to and dominion over every parcel of the joint estate. Partition is consequently only a change in the mode of enjoyment of the joint property coupled with an alteration in status, the joint title being divided into a number of separate ones. Although no particular formality is required there must be not only a mental decision on the part of a member to effect the change but also an outward expression of it which is communicated to the cosharers, or at any rate to some of them. The intention and the declaration are both necessary ingredients in the matter of effecting severance. It is true that this declaration does not have to be reduced to the form of a document and can be effected "without any formality" but if it is reduced to writing it falls within the purview of S. 17 (1) (b), Registration

Act, and is struck at by S. 49 of the Act. It is consequently inadmissible in evidence not only as regards that aspect of partition which relates to a division of property by metes and bounds but also as to that which relates to a severance of title: 15 C W N 375 and ('29) 16 AIR 1929 P C 269, *Rel. on.* [P 213 C 1, 2; P 214 C 1]

(e) Hindu law—Partition—Unregistered partition deed — Common desire of parties to act on unregistered deed and their action in doing so springs from original intention to separate and amounts to confirmation of original agreement — Such confirmation itself constitutes fresh and subsequent agreement which in itself is enough to effect complete partition — Such agreement can be proved by unregistered deed — Purposes for which unregistered deed is admissible, stated.

The common desire of the parties to act upon an unregistered partition deed and their action in doing so, springs from a continuation of the original intention to separate and amounts to a confirmation of the original agreement. Such confirmation in itself constitutes a fresh and subsequent agreement which is enough in itself to effect complete partition; and that agreement is provable in any of the usual ways. The subsequent agreement being a collateral transaction within the meaning of S. 49, Registration Act, an unregistered document can be used as material in proof of it. Of course, it cannot prove such agreement in itself because no such agreement can be deemed to have been in existence at the date of its execution but it can be used to corroborate other evidence or facts and can be used in conjunction with other evidence to show that such subsequent agreement was likely and to elucidate the intention of the parties in effecting such subsequent agreement. It can also be used to show the character of the possession and the nature of the title, provided there is other evidence to establish separate possession: ('27) 14 AIR 1927 Nag 113, *Appr.*; ('22) 9 AIR 1922 All 493 and 15 C W N 375, *Ref.* [P 214 C 1, 2]

(f) Hindu law—Partition — Suit for — Defendant admitting to have held property exclusively and separately — Aforesaid fact need not be proved — Character of possession alone should be considered.

Where the defendant in a partition suit admits that the property was held exclusively and separately that fact need not be proved and all that the Court is concerned to see is the character of the possession. [P 215 C 1]

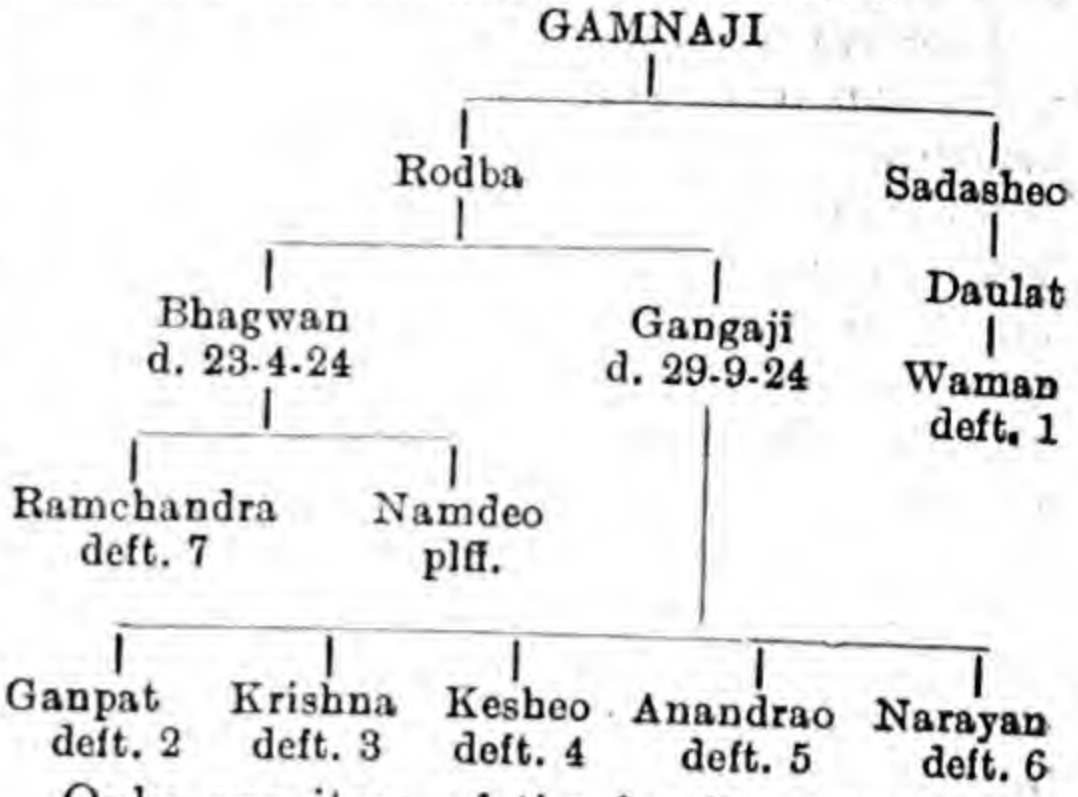
(g) Hindu law—Partition—Separation of title and division of joint property except one item established—Suit for partition of aforesaid item alone is competent.

Where it is established that a partition embraced not only a separation of title but also a division of the joint estate barring a certain item of property a suit for the partition of that item alone is competent. [P 215 C 2]

M. B. Kinkhede and A. R. Kulkarni — for Appellant.

M. R. Bobde, R. N. Padhye and V. V. Kelkar — for Respondents 1, 7 and 2 respectively.

Judgment.—Plaintiff-respondent 1 sued in the lower Court for partition. The relationship between the parties will be seen from the following genealogical tree.



Only one item of the family property is in dispute in the case, namely an 8 annas share of M. Mangi. According to the plaintiff this 8 annas is owned by the sons of Bhagwan and Gangaji, each set of sons being interested to the extent of 4 annas. The other 8 annas share is owned by defendant 1. His branch separated long ago and got this 8 annas. Defendant 1 is consequently not directly interested in this suit. But it was necessary to join him because some of the home farm appertaining to the 8 annas in suit lies in his patti and consequently there can be no proper division of the farm of that patti without his presence. According to the plaintiff there was a partition on 2nd April 1924 (Ex. 7 D-1) between Bhagwan and Gangaji but the 8 annas share now in suit was not divided by metes and bounds because litigation was pending in respect of it, but each took a separate though undivided half in it. On 14th June 1925 there was a second partition, after the death of Bhagwan and Gangaji, between the sons of Gangaji. In it Gangaji's undivided 4 annas share was assigned to defendant 2 Ganpat. On 22nd May 1928 a third partition (Ex. P-33) was effected between the sons of Bhagwan. In it 4 annas out of the 8 annas in suit was assigned to the plaintiff's share. The plaintiff now wants this 4 annas to be ascertained and divided off from the rest by metes and bounds. The difficulty in his way is that the deeds, Ex. 7-D-1 and Ex. P-33, relating to the first and third partitions, are unregistered and the question is whether the plaintiff can prove them.

His learned counsel argued that it did not much matter whether this could be done or not because if this property was not then divided, then he has a right to claim division now, and as there is no quarrel between his brother defendant 7, and himself, except

on a minor point which does not concern us here, he is still entitled to 4 annas, or at any rate, at the worst, he should be given 2 annas and his brother 2 annas. The defendant's reply to this is that a partition cannot be partial, and that if the plaintiff wants to have the family estate divided it must all be brought into the hotchpot and consequently this suit, which is for the division of only one item of property, does not lie. Dealing first with the question of non-registration, the plaintiff's contention is that the deeds referred to are not instruments of partition: they merely recite a past event. Therefore, they do not require registration. This question was dealt with by a Division Bench of this Court, to which one of us (Bose J.) was a party, in 1938 N L J 82,[1] and the law, founded on two decisions of the Privy Council, was expressed as follows:

> It can be accepted at once that mere lists of property do not form an instrument of partition and so would not require registration, but what we have to determine here is whether these documents are mere lists or in themselves purport to 'create, declare, assign, limit, or extinguish ..... any right, title or interest' in the property which is admittedly over Rs. 100 in value. The question is whether these lists merely contain the recital of past events or in themselves embody the expression of will necessary to effect the change in the legal relation contemplated.

The two Privy Council decisions on which this is based are 11 Pat 272[2] at p. 279 and 50 Cal 338[3] at page 345. We have therefore to scrutinize these documents. Exhibit 7-D-1 calls itself a receipt. It recites:

> You and I are real brothers and were all joint up to this day. But today you and I have separated. And the undermentioned moveable and immovable property is allotted to your share.

It then sets out the property allotted to the share of the brother in whose favour the document is executed and continues:

> The aforesaid moveable and immovable property has been allotted to your share and is delivered into your share. Therefore neither I nor my heirs have left any right and interest therein.

Then follow certain items of property which are kept joint and the document states in respect of them:

> This property is joint. However we will have the same partitioned on the decision of the appeal . . . On getting the possession through Court, we will get it partitioned half and half. I have written and signed this receipt list at Sakhara with my free will and pleasure and while in full possession of senses.

The document is then dated, the name and address of the scribe is set out, and the signature of the executant. This is followed by the signatures of three attesting witnesses. We have no doubt that this document was "meant to embody the expression of will necessary to effect the change in the legal relation comtemplated." The use of the present tense suggests that, also its form, particularly the concluding portion which speaks of the document having been executed "with my free will and pleasure and while in full possession of senses." Also the fact that as many as three attesting witnesses were called. It is not usual to take all these pains except in documents intended to effect a change in legal relations. The idea was plainly that the whole thing should be reduced to writing and that the change should be effected by a written instrument so that there could be no doubt or uncertainty about the fact and details of the partition. That being so, the document required registration. This is also the position in respect of Ex. P-33. It has a doubtful clause in the beginning which is couched in the past tense, namely:

> Panchas have delivered the below mentioned moveable and immovable property into the possession of the said Namdeo ..... I admit the same.

But reading the document as a whole, we have no doubt that the intention was to make this the final and operative thing. It has to be remembered that finality is reached orally in nearly every transaction which is reduced to writing and that but for an intention to reduce the matter to writing the oral agreement would in itself constitute a valid and binding contract. But if the intention is that the writing is to be the operative contract, then the former verbal agreement falls to the ground. It has also to be understood that the word "panchas" can be used in a double sense. It can be used to signify arbitrators. That is to say, it can relate to a position in which there has been a reference to arbitrators with an award. In that event the change in the legal relationship would be effected by the award and not by the subsequent writing by the parties. But more generally the panchas are disinterested friends who are called in to give advice and help. They suggest a particular form of division. Each side makes modifications and gradually the parties work down to an agreement, and finally

1. ('38) 25 AIR 1938 Nag 434 : 178 I C 293 : I L R (1938) Nag 604 : 1938 N L J 82, Narayan Sakharam v. Cooperative Central Bank Malkapur.
2. ('32) 19 AIR 1932 P C 55 : 186 I C 798 : 59 I A 130 : 11 Pat 272 (PC), Bageshwari Charan Singh v. Jagarnath Kuari.
3. ('23) 10 AIR 1923 P C 50 : 71 I C 650 : 50 I A 77 : 1 Rang 66 : 50 Cal 338 (PC), Subramonian v. Lutchman.

these friends say "there now, you take that and you that." In one sense of course it can be said that the division is effected by these panchas, and that is what the layman, speaking loosely, usually says. But when the position is carefully analysed the thing which legally concludes the matter is not their decision but the agreement of the parties, and the only part which the panchas play is in helping the parties to arrive at a common result. That, from a legal point of view, is on the same footing as an agreement reached orally. If, however, the parties desire that the agreement though reached orally should not be the final and operative agreement but that it should be reduced to the form of a document, then the final and operative matter which effects the change in the legal relationship is the writing and not the previous oral agreement. That we think is the position here.

The form of Ex. P-33 weighs with us as did the form of Ex. 7-D1, especially the concluding portion, which is much as before. Then there is a sentence in the middle which is couched in the present, and not the past tense: "one anna three pie share out of which one anna (shown) is separated of Mouze Wasari." Then again towards the end there is the following passage :

> Thus in the presence of all the panchas I have read this receipt of the moveable and immovable property in respect of the aforesaid one-half share: and after fully taking into consideration all the aforesaid moveable and immovable property we both brothers have taken our respective receipts in the presence of the panchas.

Then again we find the name of the scribe set out and the signature of the executant. We can find no meaning in this careful and elaborate document which was so solemnly drawn up with a counterpart signed by the other side if the two together were not intended by the parties to embody and legally effect the actual partition between them. We, therefore, agree with the lower Court in thinking that these documents required registration and that not having been registered they were struck out by S. 49, Registration Act.

The next question is whether they can be used in the evidence at all, and if so how. That depends upon the nature of partition under the Hindu law. It was argued that when analysed, the matter is found to consist of two separate elements which are distinct from one another and which can come into existence independently. The one is notional and relates to title, the other physical and relates to the occupation and possession of property. It was pointed out that a division in title can be effected without any division of property, and 12 N L R 113[4] at p. 120 was relied on.

It was then argued that instruments of partition which deal only with the first element, namely, a severance of joint status and title, can always be looked at whether registered or not, and it was said that though instruments of the second kind, which deal with a division of property, require registration, they can always be used to prove a severance of title. It was argued that no law requires that the severance in status should be effected by a registered instrument, or even by writing. It was pointed out that it is enough for one coparcener to declare unequivocally his determination to separate and to indicate that that determination is a fixed one. This, it was said, can be done by unilateral action and does not require the consent or assent of any other person. It was contended that the severance in title can be effected by a mere determination to sever and that no overt act or outward declaration of this intention is necessary. An extreme case was put. It was contended that man could suddenly awake in the middle of the night and say to himself 'I am separate," and that that would be enough. He need not disclose this to any one and could, if he so chose, keep his secret locked in his heart for as long as he liked. Then years later he could reveal what he had done, and if believed, all the consequences which flow from a severance in status would take effect from that date. That is how the argument was put in its most extreme form. An illustration easier to follow is that the man could reduce his intention to writing, sign and date it, and then without telling anybody a word about what he had done lock the statement up in his drawer and keep it there safe from prying eyes. It was argued that this would have the same effect.

We do not think that the matter can be put in that extreme form. It is true that the texts quoted by the Privy Council in 12 N L R 113[4] at p. 121 say that "partition is a particular condition of the mind" and that it can be effected by "mere intention," but they also indicate that that intention must be accompanied by a declaration "I am separate from thee." This shows, we

4. ('16) 3 A I R 1916 P C 104 ; 37 I C 321 : 43 I A 151 : 43 Cal 1031 : 12 N L R 113 (P C), Mt. Girja Bai v. Sadashiv.

think, that the person separating has to tell at least those from whom he intends to separate about his intention. Their Lordships express the position thus at page 122. "Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, etc." Therefore it is clear that there must be not only a mental decision to effect the change but also an outward expression of it which is communicated to the co-sharers, or at any rate to some of them. The texts which their Lordships quote state that

> . . . a partition is effected by the mere declaration 'I am separate from thee', for partition is a particular condition of the mind and the declaration is indicative of the same.

And again: "From this it is known that without any formality partition can be effected by mere intention." It seems to us therefore that the intention and the declaration are both necessary ingredients in the matter of effecting severance. It is true that this declaration does not have to be reduced to the form of a document. It can be effected "without any formality." But if it is reduced to writing, then it seems to us that it is an instrument of the kind contemplated by S. 17 (1) (b), Registration Act. It either "creates" or purports to create "a right, title or interest in immovable property," or at any rate it "declares" or "purports to declare" that such exists. Such a document says that whereas the right, title and interest before execution was joint now it is several. It says that after execution the property to which it relates has ceased to be joint family property, that is to say, it either creates a separate title and separate interests which are different and distinct from a joint title and joint interests, or it declares that they now exist, whereas they did not exist before. We think that such a document falls within the purview of S. 17 (1) (b) and that it is struck at by S. 49. It would consequently be inadmissible in evidence not only as regards that aspect of partition which relates to a division of property by metes and bounds but also as to that which relates to a severance of title. In this we agree with 15 C W N 375[5] at p. 378 and we think that this conclusion is a necessary corollary to the decision of their Lordships of the Privy Council in 51 ALL 771.[6]

The next question is whether and how far the deed can come in under the proviso to S. 49 which allows documents which would otherwise be excluded, to be used as evidence "of any collateral transaction not required to be effected by a registered instrument." In 43 Mad 244[7] at p. 249 their Lordships of the Privy Council allowed an unregistered deed of gift, which required registration, to be used not to prove a gift, (because no legal title passed) but to prove that the donee thereafter held in her own right. We think the same rule applies here. It may be that these unregistered deeds did not in themselves effect any legal severance of title, but if the parties thought they did and acted on that belief, and in fact held their shares in severalty from that time, then we think that those facts can be proved and that the documents can be used to show the nature and character of the possession after their execution. But once that is done, once it is shown that the parties actually severed their interests and acted on these documents, then the partitions with which they severally deal are fully and completely established. The distinction is a subtle one but is real. Partition, unlike a sale or transfer which consists in its essence of a single act, is a continuing state of fact. It does not require any formality, and therefore if parties actually divide their estate and agree to hold in severalty there is an end of the matter. They are bound by their agreement. The documents we are dealing with would not bring about any separation of title or division of property because they are unregistered but the subsequent actings of the parties in pursuance of an intention to divide would.

An illustration will show what we mean. One member of a coparcenary writes a letter to his fellow coparceners telling them of his intention to separate and sends it by messenger. On the way the letter is lost or destroyed or burnt, and never arrives. There would be no partition, notional or otherwise, because, as we have shown, the declaration of an intention to separate has to be communicated to at least one other coparcener. But if thereafter the writer of the letter were to go to the other coparceners and tell them about the letter, if they were then to divide up the property between them and agree to hold it separately, and actually do so, then there would

5. ('11) 15 C W N 375: 6 I C 346: 12 C L J 25, Upendra Nath v. Umesh Chandra.
6. ('29) 16 A I R 1929 P C 269: 119 I C 633: 56 I A 363: 51 All 771 (P C), James Skinner v. R. H. Skinner.
7. ('19) 6 A I R 1919 P C 44: 53 I C 901: 46 I A 285: 43 Mad 244 (P C), Varada Pillai v. Jeevarathnammal

be a complete partition. It would be effected not by the lost or destroyed letter, which in the result proved ineffective, but by the subsequent agreement and actings; and these facts could be proved in the ordinary way. If no direct proof of agreement were available, it could be inferred if the necessary material were there, and the fact that the letter we are speaking of had been written and sent would be relevant and material. In itself the letter would be useless to effect the partition, but it would be material to show that the course of events which followed upon its execution had reference to a subsequent agreement to divide and to hold in severalty.

The matter can be put in another way: If these documents which we have been considering had been registered they would in themselves have brought about a separation of title and a division of property. Thereafter, the parties to the agreement could have insisted on having its terms carried out. *A* could say that property X fell to his share and that it must be given to him. But being unregistered they are ineffective to bring about a partition, and therefore if the parties did nothing else, if they did not confirm that agreement, or act upon it and carry out its terms, then *A* would not be able to demand property X. All he could do would be to ask for a fresh division and in it property X might or might not fall to his share. But if the parties confirm the unregistered agreement, or act upon it and carry out its terms, and do so with the intention of separating, then partition would be complete, and *A* would be able to claim property X, not under the unregistered document but in virtue of the subsequent agreement confirming the original intention.

No question of transfer of title arises in partition. Each parcener already has complete title to and dominion over every parcel of the joint estate. Partition is consequently only a change in the mode of enjoyment of the joint property coupled with an alteration in status, the joint title being divided into a number of separate ones. No particular formality is required, and therefore although a document by which the parties had intended to have this division effected may, in the result, prove ineffective for that purpose, nevertheless their common desire to act upon it, and their action in doing so, would spring from a continuation of the original intention, and that at any particular moment of time would amount to a confirmation of the original agreement; and if for any reason the original agreement were to fall to the ground, or be unprovable, such confirmation would in itself constitute a fresh and subsequent agreement which would be enough in itself to effect complete partition; and that agreement would be provable in any of the usual ways. We think that that is the true position and we think that that was the decision in A I R 1927 Nag 113.[8]

The rulings cited before us, namely 45 ALL 21,[9] 15 C W N 375[5] and AIR 1927 Nag 113,[8] do not consider the position of the unregistered document in relation to this subsequent agreement. All they decide is that oral evidence is admissible of the fact of partition. In our opinion the subsequent agreement of which we have spoken is "a collateral transaction not required to be effected by a registered instrument" within the meaning of S. 49, Registration Act. Therefore, the unregistered document can be used as material in proof of it. Of course it cannot prove such agreement in itself because no such agreement can be deemed to have been in existence at the date of its execution. But it could be used to corroborate other evidence or facts. It could be used in conjunction with other evidence to show that such subsequent agreement was likely and to elucidate the intention of the parties in effecting such subsequent agreement. It could be used to show the character of the possession and the nature of the title, provided there is other evidence to establish separate possession. Coming now to the facts of this case. The first partition is said to have been made on 2nd April 1924. We will ignore the unregistered deed, Ex. 7 D-1, for the present and examine the other evidence. First of all there is Ex. 7 D-3, a letter dated 5th June 1924, written by defendant 2, Ganpat, to a couple of the panchas who are said to have effected or brought about the partition. It says:

In my absence at Sakhara you divided our estate into two shares. But I do not know anything at all. Similarly as there is ill-will between Gangaji Patil and myself I have no means to know how the shares were made. Hence both of you should come and explain as soon as possible the partition lists made in respect of the immovable property. As the property is ancestral, rights thereto vest in me as well. Hence, please explain to me as soon as possible the particulars of the shares with the details of the properties with acres and all other things falling thereto.

8. ('27) 14 AIR 1927 Nag 113: 99 I C 448, Jiji Bai v. Ratan Singh.
9. ('22) 9 A I R 1922 All 493: 70 I C 953: 45 All 21: 20 A L J 777, Jai Ram Das v. Raj Narain.

This is clear proof of the fact that either Ganpat's father Gangaji had made a declaration of his intention to separate or that Bhagwan had done so, and that this declaration had been communicated to Ganpat. It is also proof of the fact that either Gangaji or Bhagwan, or both, had persisted in this intention, had got panchas to divide the property, and that a division was made. The unregistered instrument of partition, Ex. 7 D-1, can be used to corroborate this evidence. Reading the two together there can be no doubt that the first element of partition, namely the separation of title in the year 1924, is completely established.

As regards the second element, the division of property, Ex. 7 D-1 is powerless to effect that, and Ex. 7-D-3 shows, for what it is worth, that Ganpat was not a party to the division. Therefore, he is not bound by it, for of course a division of the estate cannot be made unless all the coparceners consent or the Courts direct it. But it shows that he was aware that a certain division of property had been suggested and that all he asked was to be told its terms in order that he might decide whether to accept them or not. But, if we find that subsequently the parties continued in separate possession in accordance with the terms of the unregistered deed it will be legitimate to infer that Ganpat on learning of the terms did not object and so confirmed and ratified the arrangement, that is to say that he was also a consenting party. We turn next to the pleadings. The plaintiff had set up this partition of 1924 (including a division of the estate by metes and bounds) in his plaint. In his rejoinder defendant 2, Ganpat denied the partition but admitted that the property has been divided and that it was in the separate and exclusive possession of Gangaji's sons. This is his statement:

> It is already denied that there was a partition in 1924 between Bhagwan and Gangaji as alleged. It is admitted there was an arrangement between the sons of Gangaji to enjoy the property that was in the management of their father, separately and exclusively for the sake of convenience. But there was no partition.

He also said that the partition, if any, was in any event unfair. But that is another matter. We need not travel beyond the pleas of defendant 2 because he is the only appellant. As he admits that the property was held exclusively and separately that fact need not be proved, and all we are now concerned to see is the character of the possession. But if proof were needed, it is to be found in the deposition of defendant 2 himself as 2 D. W. 4. He was forced to admit the truth of these facts. There is also the evidence of P. Ws. 5, 6 and 7 and Ex. P-16 the order of the Commissioner, dated 21st March 1929 directing mutation in the Record of Rights enquiry. After the admission in Ex. 7-D-3 about the severance of the joint status, it would be difficult to resist the conclusion that the subsequent division of the estate was not in pursuance of such an intention but Ex. 7-D-1 places the matter beyond doubt. This unregistered document can be used for this limited and collateral purpose. We hold, therefore, that there was a partition in 1924 which included a division of the estate by metes and bounds.

As regards Ganpat's contention that this was in any event unfair, until he chooses to sue to have it set aside it must stand. But, in any case, there is no proof of unfairness, so, that can be set on one side. The subsequent partitions of 1925 and 1928 are not of much moment. The one of 1925 was between Gangaji's sons and the one of 1928 between the plaintiff and his brother, defendant 7. So far as they are concerned (that is to say the plaintiff and his brother) this partition between them is admitted except on a small detail which does not affect us. As regards the one between Gangaji's sons it does not matter to the plaintiff whether they are divided or not so long as the main division in 1924 is upheld. It is the case of all the parties that the property in suit was never divided. The plaintiff says, because litigation was then pending in respect of it, defendant 2 says, because there was never a partition. It is clear then that the plaintiff is entitled to claim a division of this property in any event. The only relevance of the partition of 1924 is that if it never took place then the plaintiff would be obliged to bring into hotchpot all the property in his possession and would be obliged to ask for a complete partition. He could not demand a partial partition. But in view of our findings that the partition of 1924 is established and that it embraced not only a separation of title but also a division of the joint estate barring the property now in suit, the plaintiff's right of suit is clear.

Respondent 8, Abdul Razak Ahmad died during the pendency of the appeal. His legal representatives were not brought on record and the appellant gave him up. The appeal therefore abated as against him. As regards defendant 1, his learned counsel stated that nothing was claimed for or against him and that he had no interest in the suit beyond

the one stated in the plaint. He did not oppose the plaintiff's claim and said that he had nothing to urge either for or against the appeal. The decision of the lower Court is upheld and the appeal is dismissed with costs which will be separately apportioned. The plaintiff (respondent 1) will be paid his full costs separately. Defendant 1, Waman, (respondent 2) will get only nominal costs which we assess at Rs. 30. Defendant 7, Ramchandra, (respondent 7), will also get nominal costs. The remaining respondents who are the appellant's brothers will get no costs.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Nagpur 216

STONE C. J. AND CLARKE J.

Kisanlal Hanumanbux Firm —
Plaintiff — Applicant

v.

Tansukhrai Binjraj and others —
Defendants — Non-applicants.

Misc. Civil Case No. 107 of 1940, Decided on 7th October 1940, from decree of Pollock J., in S. A. No. 740 of 1937, D/- 2nd April 1940.

(a) Limitation Act (1908), S. 29—Term 'law' whether includes rule of Court *(Quære)*.

Whether the term 'law' as used in S. 29 includes a rule of Court. [P 216 C 2]

(b) Limitation Act (1908), S. 4 — 'Office' and 'Court' are two separate things.

Section 4 is not concerned with an office but with a Court. 'Office' and 'Court' are two separate things: ('39) 26 A I R 1939 Pat 667 (F B), *Rel. on.* [P 217 C 1]

*** (c) Limitation Act (1908), S. 4—High Court notification providing that Court will remain closed for summer vacation except for certain business including filing of Letters Patent Appeals — Court cannot be said to be closed for purpose of filing Letters Patent Appeals.**

Whether the Court is open or closed depends on whether the business in question can be done. Where there is a rule which states that the Court will be open on certain days for certain business the Court (despite the long vacation) cannot be treated as closed so far as such business is concerned. Hence, where the notification relating to the disposal of work during summer vacation has provided that the Court would be closed except for certain business which includes filing of Letters Patent Appeals the Court cannot be said to be closed for purpose of filing Letters Patent Appeals and hence S. 4 cannot be applied in such a case: ('23) 10 A I R 1923 Mad 435; 5 Mad 189 (F B) and ('16) 3 A I R 1916 Mad 3 (F B), *Rel. on.* [P 217 C 1, 2]

V. K. Sanghi — for Applicant.

J. R. Mudholkar — for Non-applicants.

Judgment. — This raises a question of limitation. Admittedly, the matter is out of time unless S. 4, Limitation Act, can be prayed in aid. The matter in question is a Letters Patent Appeal. The time for appealing is fixed by rules of Court. In I L R (1939) Nag 124[1] it was indicated that A I R 1921 Lah 237[2] and A I R 1934 Pat 353[3] might be in the way of applying S. 4. Section 4 only relates to cases where a time has been prescribed. Prescribed means, prima facie, prescribed by the Act in question. Section 29, however, brings in any time prescribed by "any special or local law." The above cases decide that "law" as used in S. 29 does not include a rule of Court but is restricted apparently to Acts of a Legislature. The General Clauses Act by an amendment in 1937 included the following:

'Indian law' shall include any law, ordinance, order, by-law, rule or regulation passed or made at any time by any competent Legislature, authority, or person in British India (S. 3 (27a)).

See also S. 4A (1). Here the expression used is not "Indian law" but "law" and it could be argued that as the General Clauses Act finds it necessary to provide that "Indian law" includes a rule made by the appropriate authority in India it would not include a rule but for the provision. We, however, hesitate to decide the matter on this ground. The term "law" is not the same as the term "Act" and even the term "Act" includes rules of Court in some cases, e. g., Scotland where "Act of Sederunt" means a rule of Court relating to procedure. One can properly speak of customary law and the word, according to its derivation, means, merely, that which is laid down and fixed. It does not depend on the nature of the body that lays it down. If that body has the power to lay down a binding rule the rule becomes a law which has to be obeyed. Different considerations, of course, apply if the rule is ultra vires as in 8 Rang 380.[4] The Judicial Committee in 57 ALL 242[5] laid down the broad proposition that outside the limited discretion conferred by the Limitation Act in certain cases the Court has no discretion to relieve a suitor from its provisions.

That leads to the next point. Granted that "law" can be given the extended mean-

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1. ('39) 26 A I R 1939 Nag 122: 182 I C 970: I L R (1939) Nag 124, Secy. of State v. Mt. Geeta.
2. ('21) 8 AIR 1921 Lah 237: 60 I C 737, Fatteh Muhammad v. Chothu Ram.
3. ('34) 21 AIR 1934 Pat 353: 151 I C 107: 15 P L T 301, Mukund v. Niranjan.
4. ('30) 17 AIR 1930 Rang 228: 127 I C 161: 8 Rang 380 (F B), Abdul Ganny v. I. M. Russel.
5. ('35) 22 AIR 1935 P C 85: 155 I C 205: 57 All 242: 62 I A 80 (P C), Maqbul Ahmad v. Onkar Pratap Narain Singh.

ing above referred to, it is said that S. 4 can only be prayed in aid here if the Court was closed and the Court was not closed within the meaning of S. 4. Section 10, General Clauses Act, admittedly does not assist the appellant. It is urged that S. 4, Limitation Act, is not concerned with an office but with a Court. We agree with the view expressed in A I R 1939 Pat 667[6] at p. 677 that "office" and "Court" are two separate things. It is said that a Court is closed when the Judge of that Court is not sitting or when notification is made that the Court is closed. It is argued that it is neither here nor there that the business in hand, which consists in filing an appeal, can, in fact, be done as usual. Owing to the ruling in I L R (1939) Nag 124,[1] which gave a warning that S. 4 might not be available in cases of Letters Patent Appeals owing to the two rulings first cited, Letters Patent Appeals are now dealt with differently from all other appeals. In the case of Letters Patent Appeals it was notified that they would be accepted during the vacation. It will be remembered that during the vacation the High Court is not absolutely closed. Two or three Judges remain but it is closed for certain business including ordinary appeals. For this type of business the Court is closed within the meaning of S. 4. For other business, including a very limited class of civil business, the Court is open. Whether open or closed depends on whether the business in question can be done. Here this particular kind of business can be done and the rule permitting it was made because of the danger expressed in I L R (1939) Nag 124[1] where a warning was given.

In 46 Mad 938[7] following two Full Bench decisions, 5 Mad 189[8] and 38 Mad 295,[9] it was decided that where there is a rule which states that the Court will be open on certain days for certain business the Court (despite the long vacation) cannot be treated as closed so far as such business is concerned. In 51 Bom 848[10] the same view was taken on the broad ground that S 4 is a legislative recognition of the maxim *actus curiæ neminem gravabit*. That is to say if a litigant is prevented from doing a thing, which he has to do in a given time, by the act of the Court itself justice demands that he shall be allowed to do it immediately the obstacle is removed. If therefore you find that the act in question can be done despite the vacation the Court is not closed for that purpose and the purpose of S. 4 is not attracted. In the same sense is A I R 1933 Lah 239[11] and A I R 1924 Bom 144.[12] Here notification was made on 18th March 1940 about the disposal of work during the summer vacation of 1940. This notification states, inter alia, as follows :

> The High Court of Judicature at Nagpur will remain closed on the civil side from Monday the 15th April to Sunday the 23rd June 1940, both days inclusive.

Certain criminal work is then provided for. Then, in para. 6 the following is notified :

> No new institutions on the civil side will be received during the vacation except urgent applications for interlocutory orders, which will be dealt with by the vacation Judges, and appeals under the Letters Patent to this Court.

Then, in para. 8, the following is notified:

> The office will remain open to the public on working days throughout the above period and will transact business as usual.

It is obvious from a perusal of the above that the office is open as usual and that the Court is closed except for certain business which includes the business in question. It cannot therefore be said to be closed for this purpose. It follows that the appeal is barred by time. The appeal is accordingly dismissed with costs.

D.S./R.K. *Appeal dismissed.*

6. ('39) 26 A I R 1939 Pat 667 : 185 I C 353 : 19 Pat 123 : 20 P L T 905 (F B), Lachmeshwar Prasad v. Girdharri Lal.
7. ('23) 10 AIR 1923 Mad 435: 70 I C 888: 46 Mad 938: 44 M L J 100, British India Steam Navigation Co. Ltd. v. Sharafally.
8. ('82) 5 Mad 189 (F B), Nachiyappa v. Ayyasami.
9. ('16) 3 A I R 1916 Mad 3 : 29 I C 449 : 38 Mad 295 (F B), Receiver of the Niddavole and Medur Estates v. Suraparazu.
10. ('27) 14 A I R 1927 Bom 480: 103 I C 540 : 51 Bom 848 : 29 Bom L R 981, Dharamsi Morarji Chemical Co., Ltd. v. Ochhavlal Hargovandas.
11. ('33) 20 A I R 1933 Lah 239 : 142 I C 307 : 34 P L R 338, Hiralal v. Sojan Chand.
12. ('24) 11 A I R 1924 Bom 144 : 89 I C 529 : 25 Bom L R 1296, Tata Industrial Bank v. Abdul Husein.

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(28) A. I. R. 1941 Nagpur 217

CLARKE J.

Mt. Gangoo w/o Narayan Kunbi and another — Defendants — Applicants

v.

Mt. Saloo w/o Chindhu and others — Plaintiffs — Non-Applicants.

Civil Revn. Appln. No. 393 of 1940, Decided on 18th December 1940, for revision of order of Addl. Dist. Judge, Nagpur, D/- 25th April 1940.

(a) Court-fees Act (1870), S. 12—Decision as to court-fee is not final under S. 12 unless both parties are heard.

A decision as to court fee payable is not final within the meaning of S. 12 unless it is reached after both sides have had a chance to be heard. Consequently, where the Court after hearing the

appellant decides ex parte that the memo is properly stamped but subsequently after hearing both the parties comes to the conclusion that the memo is insufficiently stamped, the later decision must be taken to be final between the parties within the meaning of S. 12 : 20 All 11 (FB) and ('33) 20 AIR 1933 Pat 234, *Rel. on*; ('37) 24 A I R 1937 Pat 514, *Disting.* [P 219 C 2]

(b) Court-fee—Partition suit — Appeal—Appellant must pay court-fee paid by plaintiff in lower Court.

In the case of an appeal against a decree in a partition suit the appellant must pay the same court-fee which the plaintiff paid in the lower Court : ('30) 17 A I R 1930 Rang 164 and ('29) 16 A I R 1929 Sind 161, *Rel. on*; ('22) 9 A I R 1922 Mad 211, *Approved*; 27 All 151, *Expl.* [P 220 C 1]

A. R. Kulkarni — for Applicants.

K. A. Potey and R. R. Dandige — for Non-Applicants.

Order.— Applicant 1, Gangu is the sister of non-applicants 1 and 2, Salu and Kamalji. Applicant 2 is the husband of Gangu, while non-applicant 3 Govinda is a transferee from Salu and Kamalji. The three non-applicants brought this suit against the two applicants and others for partition and separate possession of two-thirds share of a house. Their contentions, as far as they are material to this revision application, were that the three sisters had obtained title under a gift deed from Mt. Sakhu, that after disputes had arisen between Salu and Kamalji on the one side and Gangu and her husband on the other, proceedings under S. 145, Criminal P. C., were instituted, as a result of which Gangu and her husband were placed in possession of the house. Salu and Kamalji therefore with the help of plaintiff 3 Govinda, to whom they had transferred half their share in the house, brought this action to obtain possession of their share from the defendants. The applicants' case in the lower Court was that the gift deed was void, that even if it was not void the plaintiffs could not obtain separate possession of their share as long as the donor Sakhu was alive because it was so recited in the gift deed, and that the plaintiffs' claim was barred by limitation. The trial Court held that the gift deed was valid, and that the clause in it which barred the partition of the house during the lifetime of Sakhu, was void, that the suit was not barred by limitation, and hence the Court passed a decree for partition of the house and at the same time orderd the applicants to pay Rs. 50 as compensatory costs under S. 35A, Civil P. C., to the plaintiffs. Against this decree the applicants appealed to the District Judge and challenged the above findings and the order to pay costs under S. 35A. The Deputy Clerk of Court drew the attention of the learned Judge to the necessity for considering the adequacy of the court-fees which the appellants had paid : Rs. 15 for a declaration that the plaintiffs were not entitled to claim partition, Rs. 15 for a declaration that the sale deed executed by plaintiffs 1 and 2 in favour of Govinda, plaintiff 3, was void and Rs. 3-12-0 for a relief against the order to pay Rs. 50 costs under S. 35A, Civil P. C., total Rs 33-12-0. The Additional District Judge, before whom the appeal came, heard the appellant's counsel on the question of court-fee, and on 8th January 1940 passed the following order in the order sheet :

> The memo of appeal is properly stamped. The appeal is admitted. Intimation be sent to the lower Court. I have heard the appellant's counsel. Notices to issue to the respondents.

When the respondents appeared on 26th February 1940 they took an objection to the sufficiency of the court-fee, which the appellants had paid, and the question was set down for argument on 5th March 1940 on which date the appellants applied to amend their memorandum of appeal by striking out grounds 1, 8 and 9. Grounds 8 and 9 cover the limitation point, while ground 1 challenges the interpretation of the gift deed by the trial Court. By striking out these grounds, the appellants made it clear that they were giving up their opposition to the title of plaintiffs 1 and 2 under the gift deed and that they only desired to oppose the finding of the lower Court as to the plaintiffs' right to separate possession. The right of the plaintiffs to joint possession was recognized by this application for amendment. The applicants' contention now being that, in so far as the gift deed precluded partition of the property during the lifetime of the donor, it could not be partitioned. They also desired to contest the validity of the transfer by plaintiffs 1 and 2 to plaintiff 3 and the order to pay Rs. 50 compensatory costs. If this amendment were allowed they claimed that the court-fee which they had paid would be sufficient. The Additional District Judge has held that the memorandum of appeal is insufficiently stamped, ad valorem court-fee being necessary, and that the amendment, which the appellants desired to make, would not affect the court-fee payable by them. He therefore gave them time to pay the deficiency, amounting to Rs. 141. Before the time expired the appellants presented this application for revision to the High Court and obtained an

order staying the operation of the lower appellate Court's order which required them to pay deficient court-fee by a certain date. The applicants before me have taken up two positions :

(a) That the learned Additional District Judge, having on 8th January 1940 held that the memo of appeal was properly stamped, could not reconsider that order and hold that it was insufficiently stamped.

(b) That by reason of the applicant's admitting the title of the plaintiffs to the house by their amendment application there was in point of fact no deficiency in the court-fee which they had paid.

These then are the points which I am required to consider.

(a)—On this question the applicants rely on S. 12, Court-fees Act, which provides :

(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

The point was considered in 20 ALL 11[1] by a Full Bench which observed at p. 17:

When the Legislature intends to confer the status of finality upon an ex parte decision, it does so in plain and explicit terms, as in S. 5, Court-fees Act. In the absence of clear and unequivocal language to the contrary, I must hold that a decision to be 'final as between the parties' must be a judicial decision upon a hearing in which the general judicial maxim of '*Audi alteram partem*' has been observed. If then a plaint or memorandum of appeal has been so filed it surely would be open to the defendant at the hearing to contend that the fees paid were insufficient, and that for that reason the plaint on the files of the Court was not a valid plaint. On deciding such a plea—as is the case here—the Court would in my opinion come to the 'decision,' which, under the wording of S. 12, Court-fees Act, would be final as between the parties.

In 12 Pat 694,[2] which has been referred to by the lower appellate Court, an ex parte decision was given by the Stamp Reporter which he subsequently corrected, as was done by the lower appellate Court in this case. Mr. Kulkarni on behalf of the applicants would distinguish that case on the ground that it was a decision of the Stamp Reporter and not of a Judge. Nevertheless the reasoning of the learned Judge applies just as much to a case in which the decision is reached by a Judge as it does in the case of a decision reached by a Stamp Reporter. In that case it was suggested by the Government pleader that

the question of the sufficiency of the stamp on the memorandum of appeal must always be regarded as open until the appeal is finally heard and disposed of, in view of the the provisions of the first part of S. 12, Court-fees Act, which directs that every question relating to valuation for the purpose of determining the amount of any fee chargeable on a memorandum of appeal shall be decided by the Court in which such memorandum is filed; and it is suggested that at the final hearing of the appeal it is open to the respondent to object that the memorandum of appeal has not been properly stamped. This view is certainly correct as applying to Courts subordinate to the High Court.

In the other case, to which the lower appellate Court has referred, it has given a wrong reference having cited A I R 1937 Pat 234, the correct page is 514—and the ruling is officially reported in 16 Pat 491.[3] As far as that case is concerned, I agree with Mr. Kulkarni that it is distinguishable because it only refers to the practice of the Patna High Court. 20 ALL 11[1] and 12 Pat 694[2] are however good authority for the view that the decision is not final within the meaning of S. 12, Court-fees Act, unless it is reached after both sides have had a chance to be heard.

(b)—On this question also I am of opinion that the lower Court has come to a correct decision. It is said by Mr. Kulkarni that the applicants were fully within their rights in giving up part of their case for which he relied on the language of O. 2, R. 2, Civil P. C., and in 5 N L R 88[4] at p. 91. He also argues, relying on 15 C P L R 120,[5] that the valuation for the computation of court-fees of a suit for partition depends upon whether the relief sought is merely a change in the mode of enjoyment of the property, or the enforcement of a disputed right. In the case before me he says that after giving up the part of his case which challenged the validity of the deed of gift he was only seeking a change in the mode of enjoyment of the admittedly joint property. He also relied on 27 ALL 151[6] for his contention that when a plaintiff in the initial stage of the litigation abandons a portion of his claim he is not compellable to pay court-fees in respect of the portion abandoned under penalty of having the whole of his suit dismissed. Mutatis mutandis he says that this applies

1. ('97) 20 All 11 : 1897 A W N 157 (F B), Amjad Ali v. Muhammad Israil.
2. ('33) 20 A I R 1933 Pat 234 : 144 I C 684 : 12 Pat 694 : 14 P L T 180, Sideshwari Prasad v. Ram Kumar Rai.
3. ('37) 24 A I R 1937 Pat 514 : 170 I C 959 : 16 Pat 491 : 18 P L T 438, Nand Kishore v. Achambit Kumar,
4. ('09) 5 N L R 88 : 3 I C 61, Sitaram v. Mt. Ohhotkai.
5. ('02) 15 C P L R 120, Sripati v. Shridhar.
6. ('05) 27 All 151 : 1 A L J 577, Ram Prasad v. Bhiman.

equally well to an appellant as to a plaintiff. As far as the Allahabad case is concerned, it is worth mention that the learned Judges before making the pronouncement prefaced it by saying that it was not without a good deal of hesitation that they had come to this decision and they concluded it by saying that

the matter is, we admit, one which is capable of argument on both sides, and it is with some hesitation that we have come to this decision.

So the decision cannot be said to be a very strong one in favour of the applicants. In 45 Mad 246,[7] it was held that the test of a valuation of an appeal is the value of the relief which is sought to be got rid of. A I R 1929 Sind 161[8] and A I R 1930 Rang 164[9] are sufficient authority for holding that in a case, such as this, the appellant must pay the same court-fee which the plaintiff paid in the lower Court. The lower appellate Court is therefore correct in requiring the applicants to pay Rs. 141 more. The application accordingly fails and is dismissed with costs. Counsel's fee Rs. 15. The applicants had about a week remaining within which to pay the deficient court-fee at the time when they presented this application for revision. I therefore allow them one more week within which to pay the deficient court-fee in the lower appellate Court, if they wish to have a decision on the merits of their case. The lower appellate Court will have power to enlarge this time if in its view such a course seemed just and equitable.

G.N./R.K. *Application dismissed.*

7. ('22) 9 A I R 1922 Mad 211 : 68 I C 444 : 45 Mad 246 : 41 M L J 587, In re Porkodi Achi.
8. ('29) 16 A I R 1929 Sind 161 : 116 I C 110, Mithomal v, Bashomal.
9. ('30) 17 A I R 1930 Rang 164 : 126 I C 645, Abdul Rahman v. A. B. Crisp.

(28) A. I. R. 1941 Nagpur 220

NIYOGI AND CLARKE JJ.

Goreylal and others — Appellants

v.

Pandit Dayashankar and another — Respondents.

Misc. Appeal No. 256 of 1939, Decided on 5th March 1941, from order of Dist. Judge, Chhindwara, D/- 8th September 1939.

Court-fees Act (1870), Ss. 4, 6 and 28 — S. 6 does not bar application of S. 149, Civil P. C.

Section 6 does not bar the application of S. 149, Civil P. C. Any conflict that is likely to arise between Ss. 4 and 6, Court-fees Act, and S. 149, Civil P. C., is resolved by S. 28, Court-fees Act. A memorandum of appeal which is insufficiently stamped can only be received by mistake or inadvertence or when it is accompanied by an application praying for extension of time under S. 149, Civil P. C. When it is once received and comes before the Court, it falls to be dealt with under S. 149, Civil P. C., read with S. 28, Court fees Act. The Court acting under S. 149, Civil P. C., may reject the memorandum as inadmissible in cases in which it sees no ground for extension of time to make good the deficiency or merely return it in either case it being open to the appellant to present fresh memo of appeal on sufficient court-fee: *Case law discussed.*

[P 221 C 1, 2]

M. Hidayatullah — for Appellants.

W. B. Pendharkar — for Respondents.

Order. — The question that arises upon this reference may be formulated as follows: Whether S. 6, Court-fees Act, bars the application of S. 149, Civil P. C.? Section 6, Court-fees Act, provides that no document of any of the kinds specified as chargeable in Sch. 1 or 2 to that Act "shall be filed, exhibited or recorded in any Court of justice or shall be received or furnished by any public officer" unless in respect of such document there be paid the prescribed fees. The contention raised on behalf of the appellant is that as the aforesaid section prohibits the reception of a memorandum of appeal inadequately stamped, the duty of the receiving officer and of the Court is merely to return the memorandum of appeal and that the appellate Court has no jurisdiction to reject it which it could have only when it had authority to receive it. The contention is manifestly repugnant to the plain terms of S. 149, Civil P. C., which authorises the Court to extend, in its discretion, time for payment of the deficient court-fees and, were it to prevail, would render that section otiose. The contention apparently exposes a conflict between S 6, Court-fees Act, and S. 149, Civil Procedure Code.

In 38 Bom 41[1] it was held that S. 149, Civil P. C., was independent of S. 6, Court-fees Act, which was explained as prohibiting only the reception of insufficiently stamped documents as if they were sufficiently stamped. That view did not commend itself to Sulaiman, Ag. C. J., in 50 ALL 980[2] in which the insufficiently stamped memorandum of appeal was returned to the appellant under S. 6, Court-fees Act, for the reason that the failure to pay requisite court-fees was intentional. The same view had been taken in 3

1. ('14) 1 A I R 1914 Bom 249 : 21 I C 337 : 38 Bom 41 : 15 Bom L R 902, Achut Ramchandra Pai v. Nagappa Bab Balgya.
2. ('29) 16 A I R 1929 All 75 : 118 I C 228 : 50 All 980 : 26 A L J 1199, Brijbhukhan v. Tota Ram.

Pat L J 74,[3] 1 Lah 234[4] and 27 M L J 677.[5] In 59 Cal 388[6] the view of the Allahabad, Patna, Lahore and Madras High Courts was followed in preference to that of the Bombay High Court, but it was pointed out that the rejection of the appeal meant only refusal to entertain or receive it and that it did not preclude presentation of the appeal on sufficient stamp. In 61 Cal 663[7] reference was made to S. 4, Court-fees Act, (which is the same as S. 6 but made applicable only to the High Courts and Presidency Small Cause Courts) as being imperative in its terms to prohibit reception of documents inadequately stamped, but it was observed that, notwithstanding that section, the Court had a discretionary power under S. 149, Civil P. C., to admit the documents and grant extension of time to enable the appellant to make good the deficiency in cases of bona fide mistake. The same view was taken in A I R 1929 Nag 294.[8] In 26 N L R 183[9] Macnair, A. J. C., declined to follow 38 Bom 41[1] and on examination of the provisions of Ss. 4 and 6, Court-fees Act, and S. 149, Civil P. C., attempted reconciliation of the conflict by holding that while the Judge was not bound to permit the appellant to pay court-fees on a subsequent date, it was open to him to admit the insufficiently stamped appeals in exercise of his discretion in proper cases and grant time for making good the deficiency.

Any conflict that is likely to arise between Ss. 4 and 6, Court-fees Act, and S. 149, Civil P. C., is resolved by S. 28, Court-fees Act, which declares a document not properly stamped as being invalid unless and until it is properly stamped but confers authority on the presiding Judge to order, in a fit case, that such document be stamped as he may direct. A memorandum of appeal which is insufficiently stamped can only be received by mistake or inadvertence or when it is accompanied by an application praying for extension of time under S. 149, Civil P. C. When it is once received and comes before the Court, it falls to be dealt with under S. 149, Civil P. C., read with S. 28, Court-fees Act. This furnishes a conclusive answer to the contention that S. 6, Court-fees Act, bars the application of S. 149, Civil P. C. The Court acting under that section may reject the memorandum as inadmissible in cases in which it sees no ground for extension of time to make good the deficiency or merely return it as was done in 50 ALL 980.[2] Whether it is "rejected" or "returned" it does not preclude the appellant from presenting a fresh memorandum of appeal on sufficient court-fees. Our answer to the question is in the negative. This case will now go back to the referring Judge for decision on the merits.

G.N./R.K. *Answer accordingly.*

3. ('17) 4 A I R 1917 Pat 26 : 42 I C 675 : 3 Pat L J 74, Ram Sahay Ram Pande v. Lakshmi Narain Singh.
4. ('20) 7 A I R 1920 Lah 92 : 57 I C 215 : 1 Lah 234 : 144 P L R 1920, Lekh Ram v. Ramji Das.
5. ('15) 2 A I R 1915 Mad 426 : 26 I C 33 : 27 M L J 677, Narayana Rao v. Seshamma.
6. ('32) 19 A I R 1932 Cal 482 : 138 I C 643 : 59 Cal 388, Jnanadasundari Shaha v. Madhabchandra Mala.
7. ('34) 21 A I R 1934 Cal 659 : 153 I C 201 : 61 Cal 663 : 38 C W N 650, Khatumannessa Bibi v. Durijyodhan Ray Chaudhuri.
8. ('29) 16 A I R 1929 Nag 294 : 119 I C 700, Shyamlal v. Gaurishankar.
9. ('30) 17 A I R 1930 Nag 224 : 124 I C 241 ; 26 N L R 183, Atmaram v. Singhai Kasturchand.

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(28) A. I. R. 1941 Nagpur 221

GRILLE AND GRUER JJ.

Ganpati Kothu Teli — Plaintiff — Appellant

v.

Sakharam Daulat Kunbi — Defendant — Respondent.

Second Appeal No. 671 of 1937, Decided on 7th April 1941, from appellate decree of 4th Addl. Dist. Judge, Nagpur, D/- 29th June 1937.

(a) Co-sharers — Surrender to single co-sharer amounts to transfer.

A single co-sharer is not entitled to take a surrender and if he does so the transaction is a transfer : S. A. No. 410 of 1935 and ('26) 13 A I R 1926 Nag 345, *Rel. on.* [P 222 C 1]

(b) C. P. Tenancy Act (1 of 1920), S. 13 — Lambardar omitting to apply under S. 13 — He can sue his co-sharer for possession of holding surrendered by tenant to him.

A lambardar who omits to apply under S. 13 for possession of an occupancy holding surrendered by the tenant to his co-sharer can sue his co-sharer in the civil Court for joint possession of the holding, inasmuch as when a lambardar sues his co-sharer in the civil Court for joint possession of the holding he does so as a co-sharer, which he can do in spite of the fact that he could as lambardar sue to set aside the transfer under S. 13 and claim to be put into exclusive possession of the whole holding on behalf of the proprietary body : ('26) 13 A I R 1926 Nag 345, *Foll.* ; S. A. No. 410 of 1935 and ('40) 27 A I R 1940 Nag 370, *Approved.*

[P 221 C 2; P 222 C 1; P 223 C 1]

M. R. Rajkarne and G. D. Dhawle — for Appellant.

A. V. Zinjarde and S. A. Zinjarde — for Respondent.

Order. — The question referred to us for decision has been framed by Niyogi J. as follows :

Can a lambardar who omitted to apply under S. 13, Central Provinces Tenancy Act, for posses-

sion of an occupancy holding surrendered by the tenant to his co-sharer, sue his co-sharer in the civil Court for joint possession of the holding ?

The occupancy field in question was No. 25 of mouza Zullar in which the plaintiff and defendant are both 2 anna co-sharers of mahal No. 2. Plaintiff is also Sadar Lambardar of the whole mahal. The tenant of survey No. 25 surrendered it in favour of the defendant on 20th March 1934 by a registered deed. The plaint states that the defendant had no right to accept the surrender and take possession of the suit property, but assuming that he could take a valid surrender, defendant has taken it on behalf of the plaintiff co-sharer and defendant's possession is on behalf of the plaintiff. The relief asked for is that the suit property be partitioned and half be given into plaintiff's possession, or plaintiff be put in joint possession of the suit property, or plaintiff be compensated in money value to the extent of his share. On a preliminary objection the issue was framed whether the civil Court's jurisdiction was barred by the Tenancy Act. The trial Court dismissed the suit holding that as the surrender to a co-sharer was a transfer, the remedy of the lambardar was to apply under S. 13, Central Provinces Tenancy Act, and the civil Court had no jurisdiction. This dismissal of the claim was upheld by the lower appellate Court.

In making the reference, Niyogi J., refers to 22 N L R 86[1] in which a lambardar was allowed to treat a transfer as a surrender and on that footing to claim joint possession in the civil Court. He questions the correctness of that decision. The first argument pressed on us by learned counsel for the appellant is that a surrender to a co-sharer is not necessarily a transfer: the plaintiff was entitled to treat it as a surrender to himself also on the ground that he impliedly consented to it. There is nothing however about implied consent in the plaint or pleadings. A single co-sharer is not entitled to take a surrender, and it has been consistently held that if he does so the transaction is a transfer. The latest case on the point, which will shortly be published in the Indian Law Reports Series is Second Appeal No. 410 of 1935[2] in which the learned Judges remark :

> There is a long line of cases which decide that one co-sharer cannot, for his own benefit, take a surrender .... If a co-sharer purport, without this authority, to take a surrender he has been treated as a transferee and the matter has been dealt with as falling under S. 12 and not under section 89.

Later on in the case, 22 N L R 86[1] is discussed and generally approved. The Judges agree with the view that in that case the consideration was not illegal within the meaning of S. 23, Contract Act, and the transaction was not one void ab initio. It was also noted that in that case the lambardar did not attack the transaction by proceeding under S. 13 but he asked a civil Court to put him in possession and was met by a defence based on those equities which the civil Court is bound to give effect to. The plaint in the present case is not drafted so clearly as it might be, but it seems clear that the relief asked for is based on the position that plaintiff is a co-sharer. The plaint does mention that he is a lambardar also and that the defendant had no right to accept the surrender; but the transfer is in fact accepted and plaintiff claims joint possession or separate possession after partition. Plaintiff's learned counsel indicates that he is willing to pay his share in the cost of acquisition. Now as the suit is not one to set aside a transfer under S. 13, Tenancy Act, the jurisdiction of the civil Court is not excluded under S. 105 (c) of that Act.

It is however argued for the other side that the plaintiff could have got the same relief if he had chosen to contest the transfer under S. 13, and as he has slept over his remedy for about 2½ years it should now be refused to him. No doubt the lambardar could have obtained possession under S. 13, Tenancy Act, on behalf of all the co-sharers including himself. That procedure was followed in S. A. No. 410 of 1935[2] and was approved in A I R 1940 Nag 370.[3] But why should he, more than any other co-sharer, be compelled to have recourse to that remedy? That remedy he has as a representative. Any other co-sharer, not the lambardar, has in the civil Court his private remedy of joint possession on paying his quota. Why should the lambardar not have that private remedy also in his capacity as share-holder? We do not think that the fact of there being only two co-sharers would make any difference. In 22 N L R 86[1] the plaintiff in appeal was given possession only of his one anna share and not the shares of the remaining co-sharers. If in the present case the lambardar had sued as such he would

1. ('26) 13 A I R 1926 Nag 345 : 94 I C 941 : 22 N L R 86, Waman Rao v. Shrawan.
2. Second Appeal No. 410 of 1935, Lachhmansingh v. Motisingh.
3. ('40) 27 A I R 1940 Nag 370: 192 I C 291: 1940 N L J 480, Nilkant Laxman v. Vishwanath Janardhan.

necessarily have asked for possession of the whole field (on behalf of the proprietary body) instead of joint possession with the other share holders. We therefore see no reason to dissent from 22 N L R 86,[1] and our answer to the question put to us is in the affirmative because we hold that when a lambardar sues his co-sharer in the civil Court for joint possession of the holding he is so suing as a co-sharer, which he may do in spite of the fact that he could as lambardar sue to set aside the transfer under S. 13, Tenancy Act, and claim to be put into exclusive possession of the whole holding on behalf of the proprietary body.

G.N./R.K. *Answer accordingly.*

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(28) A. I. R. 1941 Nagpur 223

VIVIAN BOSE J.

Nazir Abbas Sujjat Ali — Applicant

v.

Raza Azamshah Raja Suleman Shah and others — Non-Applicants.

Civil Revn. No. 858 of 1939, Decided on 12th November 1940, for revision of order of Dist. Judge, Nagpur, D/- 5th November 1939.

Civil P. C. (1908), S. 2 (2) and O. 6, R. 5 — Suit for damages — Plaintiff ordered to furnish certain particulars — Plaintiff even after several opportunities failing to furnish particulars — Court thereupon passing order discharging defendant — Order held amounted to decree and was appealable.

In a suit for damages the plaintiff was ordered by the trial Court to furnish certain particulars. The plaintiff was given two opportunities to do so but he was unable to give the required particulars. Thereupon the trial Court passed an order whereby the defendants were discharged :

Held that the order of dismissal amounted to a decree within the meaning of S. 2 (2) and hence an appeal lay from it : ('32) 19 A I R 1932 Mad 316, *Dissent*; ('30) 17 A I R 1930 Mad 473, *Disting.*; ('24) 11 A I R 1924 All 17, *Expl.* [P 224 C 2]

A. Ahamad — for Applicant.

R. N. Padhye — for Non-Applicant 1.

Order. — The question here is whether the appellate Court had jurisdiction to entertain the appeal in respect of which this revision has been filed. The contention is that no appeal lay from the order of the first Court complained of before the appellate Court and that consequently the order of the appellate Court reversing the first Court's order was made without jurisdiction. The facts are as follows. The plaintiff instituted a suit for damages against five persons and was ordered by the trial Court to furnish certain particulars. The plaintiff was given two opportunities to do so but was not able to satisfy the first Court. Accordingly that Court passed the order which has given rise to the trouble in this case. The order is a curious one and, so far as it is relevant, is in these terms :

> The plaint does not mention anything as to when the amounts were alleged to have been embezzled. Under the circumstances it is not possible to proceed with the case. It is fair that the defendants, especially defendant 4, should know about the period in which the amounts were said to have been embezzled. As the plaintiff insists on not giving the period in which the sums are alleged to have been embezzled, the defendants have no case to meet. The defendants are therefore discharged .... The plaintiff shall bear his own costs and pay the costs of the defendants in the suit.

It is contended on behalf of defendant 4, who is the applicant before me, that this is an order dismissing the suit under O. 6, R. 5, Civil P. C., and that no appeal lies from such an order. Reliance is placed upon A I R 1932 Mad 316.[1] The learned counsel also relies on three other cases, (1893) 1 Q B 185,[2] 53 Mad 645[3] and 45 ALL 624.[4] So far as the last two cases are concerned, I do not think they touch the point at issue here. In 53 Mad 645[3] the defendant was ordered by the Court to furnish further and better particulars of a matter pleaded in his written statement and on his failure to comply with the order, the Court struck out his defence. The appellate Court held that the Court had jurisdiction to do that. The matter was entertained as an appeal and no question appears to have been raised as to whether an appeal lay or did not lie. In any case the order of the first Court was upheld and so the question in the result became immaterial. As regards 45 ALL 624,[4] I am not able to follow what is meant. The passage relied upon is to be found at page 627 and is in these terms :

> If the order is disobeyed, and the plaintiff is in default, he should have his action stayed; and if the defendant is in default, his defence should be struck out.

I am not clear what the learned Judges mean by saying that action should be stayed. The complaint in the case was about the action of the defendants and was that they had not furnished proper particulars.

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1. ('32) 19 A I R 1932 Mad 316 : 137 I C 842, Vasudevan Nambiyar v. Nedungathiripad.
2. (1893) 1 Q B 185 62 L J Q B 114: 4 R 144: 67 L T 742 41 W R 181, Davey v. Bentinck.
3. ('30) 17 A I R 1930 Mad 473 : 126 I C 629 : 53 Mad 645 : 59 M L J 22, Nedungadi Bank Ltd. v. Official Assignee of Madras.
4. ('24) 11 A I R 1924 All 17 : 74 I C 466 : 45 All 624 : 21 A L J 571, Gauri Shankar v. Mt. Manki Kunwar.

The remarks quoted therefore were merely incidental and were not necessary for the decision of that case and as I say I am not able to understand exactly what was meant by saying that if the plaintiff is in default, he should have his action stayed. So far as the English case is concerned, the position there was that the plaintiff was ordered to furnish certain particulars. He omitted to do so and was given a further opportunity. When he still omitted to do so, an order was passed saying that unless the particulars were furnished within a week, his action would be dismissed with costs. The particulars were not furnished and so the action was dismissed with costs. The question before the appellate Court was whether the Court had jurisdiction to do this. The learned appellate Judges decided that the order of the Court could be upheld in one of two ways. The first is that a plaint or a statement of claim, as it is called in England, not disclosing proper particulars in effect discloses no cause of action against the defendants, and therefore the suit can be dismissed on the ground that it discloses no cause of action. The other ground on which the order could be supported was that under the rules of the Supreme Court a Court is given power when ordering further particulars to be furnished to impose conditions.

In the English case the condition imposed was that if the particulars were not furnished within ten days the action would be dismissed. No such condition is to be found in the orders of the Court in the present case. Consequently I am unable to construe the various orders which were made as imposing a term under O. 6, R. 5, to the effect that the suit would be dismissed if the particulars were not furnished. But even if that be the construction, the result is, according to A I R 1932 Mad 316,[1] that the suit is dismissed. If it is dismissed, then clearly in my opinion the dismissal amounts to a decree within the meaning of S. 2 (2), Civil P. C. There can be no doubt that that order conclusively determines the rights of the parties in the suit. No fresh suit can be brought on the same cause of action and the matter is consequently final so far as the Court making the order is concerned. That being so, an appeal will clearly lie. With the utmost respect I am unable to agree with the learned Madras Judges and respectfully dissent from their view. In my opinion, if the order bears the construction which, according to the Madras learned Judges, it should bear, then clearly an appeal lies.

The other way of dealing with this matter, and in my opinion the proper way, is to strike out that portion of the pleading which is defective. In this case it would appear to amount to a striking out the whole of the plaint so far as the material allegations are concerned. If that is done then clearly the plaint will disclose no cause of action and the dismissal of the suit will consequently be on that account, and that is what the appellate Court considers to have been the case here. But whatever it is, it is clear that the order of the first Court cannot be left in the inconclusive state which it would appear to bear on the face of it. The defendants cannot be discharged in this manner. Either the plaint will have to be rejected or the suit will have to be dismissed, and the order must be taken to mean one of these two things. Whichever of the two is taken, an appeal would in my opinion lie. Consequently, the appellate Court had jurisdiction to entertain the appeal. That being so, the order on the merits cannot be contested here in revision. The application is dismissed with costs. Counsel's fee Rs. 40.

D.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 224

POLLOCK J.

In re Himloo Jaddu Gond—Accused.

Criminal Revn. No. 139 of 1941, Decided on 18th April 1941, by Sess. Judge, Hoshangabad, for revision of order of Magistrate, First Class, Betul.

Criminal P. C. (1898), S. 209 (1) — Whether committal should be made — Test indicated — Whether offence falls under S. 302 or S. 304, Penal Code — Question as a rule being difficult for Magistrate to decide should be left to Sessions Court — Whether committal would result in conviction under S. 302 held doubtful — Sentence imposed by Magistrate not inadequate —High Court held could not interfere in revision with Magistrate's order convicting accused under S. 304.

The test to be applied in deciding whether a committal ought or ought not to be made on the facts is that assuming the whole of the evidence against the accused to be true, is there a case which a Judge at a trial could leave to a jury: ('35) 22 A I R 1935 Nag 202 and 9 C W N 829, *Rel. on.* [P 225 C 2]

But a Magistrate ought not to take upon himself the responsibility of trying a case which taking a reasonable view of the effect of the depositions must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise. The question whether an offence falls under S. 302 or

S. 304, Penal Code, being as a rule a difficult question which a Magistrate is as a rule not qualified by training or experience to decide, should be left to the Sessions Court : ('32) 19 A I R 1932 Rang 193, *Rel. on.* [P 225 C 2]

In a quarrel between *H* and his step-father *G*, *G* first kicked *H* whereupon *H* picked up an iron rod and struck *G* 4 or 5 times. *G* died of his injuries. None of the 5 external injuries was serious and death was due to the fracture of three ribs which had penetrated his spleen. The spleen was not enlarged or in any way abnormal. The doctor who performed the post mortem examination was of opinion that the fracture of the ribs could not be caused by a blow from the iron rod but was due to indirect violence and might have been caused by a blow of the knee on the chest of the deceased. The Magistrate convicted *H* under S. 304 and sentenced him to three years' rigorous imprisonment :

Held that in the particular case it was doubtful if a committal to the Court of Session would result in a conviction under S. 302 nor was the sentence imposed, considering the youth of the accused so inadequate as to justify interference by the High Court in revision with the Magistrate's order convicting the accused under S. 304. [P 225 C 2]

W. C. Dutt—for the Crown.

Order. — The accused Himlu was prosecuted before Mr. Dwivedi, Magistrate, first class, and charged under S. 302, Penal Code. The learned Magistrate after hearing the evidence for the prosecution came to the conclusion that the offence committed was an offence under S. 304 and not under S. 302, Penal Code, and he framed a charge under S. 304 and eventually convicted Himlu under that section and sentenced him to three years' rigorous imprisonment. The learned Sessions Judge has reported the case under S. 438, Criminal P. C., and has recommended that the proceedings should be quashed and that the learned Magistrate should be directed to commit the accused for trial at Sessions. The evidence shows that there was a quarrel between Himlu and his step-father Garsu in which Garsu first kicked Himlu. Then Himlu picked up an iron rod and struck Garsu 4 or 5 times. Garsu died of his injuries. None of the 5 external injuries was serious and death was due to the fracture of three ribs which had penetrated his spleen. The spleen was not enlarged or in any way abnormal. The doctor who performed the post mortem examination was of opinion that the fracture of the ribs could not be caused by a blow from the iron rod but was due to indirect violence and might have been caused by a blow of the knee on the chest of the deceased.

The learned Magistrate held that the accused must be presumed to have known that he was likely to cause the death of his victim, but held that exception No. 4 to S. 300, Penal Code, applied and that the culpable homicide was not murder because it was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. The learned Magistrate, however, omitted to consider whether the accused had taken undue advantage or acted in a cruel or unusual manner. The question is whether in the words of S. 209 (1), Criminal P. C., there were not sufficient grounds for committing the accused person for trial. In 31 N L R 360[1] at page 362, Grille J. cited with approval the dictum of Harington J. in 9 C W N 829[2] :

The test which should be applied to decide whether a committal ought or ought not to be made on the facts is this—assuming that the whole of the evidence telling against the accused is true, is there a case which a judge at a trial could leave to a jury? If the evidence is such that a judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to be made. If there is any evidence which calls for an answer, however great the preponderance in favour of the prisoner may be, then the committal is proper.

If the present case had been tried before a jury, I think the question whether the offence fell under S. 302, Penal Code, or S. 304, Penal Code, would certainly have been left to the jury. I agree with the remarks of Page C. J. in 10 Rang 495[3] at p. 497:

A Magistrate ought not to take upon himself the responsibility of trying a case which taking a reasonable view of the effect of the depositions must be regarded as involving the trial of the accused for a grave offence or one in which complicated or difficult questions of law or fact arise.

The question whether an offence falls under S. 302 or S. 304, Penal Code, is as a rule a difficult question which a Magistrate is as a rule not qualified by training or experience to decide, and it should therefore be left to the Sessions Court. In this particular case I doubt if a committal to the Court of Session would result in a conviction under S. 302 Penal Code, nor do I think that the sentence imposed, considering the youth of the accused, was so inadequate that I ought to interfere in revision. The reference is therefore not accepted.

G.N./R.K. *Reference not accepted.*

1. ('35) 22 A I R 1935 Nag 202 : 158 I C 537 : 36 Cr L J 1389 : 31 N L R 360, Maroti v. Emperor.
2. ('05) 9 C W N 829:2 Cr L J 534, Sheobux Ram v. Emperor.
3. ('32) 19 A I R 1932 Rang 193 : 141 I C 256 : 34 Cr L J 187 : 10 Rang 495, Emperor v. Maung Chit Sein.

(28) A. I. R. 1941 Nagpur 226

STONE C. J. AND VIVIAN BOSE J.

Manager, Court of Wards, Dewan Bahadur Seth Jiwandas Estate, Jubbulpore — Judgment-debtor — Appellant

v.

Seth Moolchand Seth Hiralal Oswal — Decree-holder — Respondent.

Misc. Appeals Nos. 294, 293 and 292 of 1938, and Civil Revns. Nos. 864 of 1938 and 50, 580 and 688 of 1939, Decided on 24th July 1940, from order of Extra. Addl. Dist. Judge, Jubbulpore, D/- 19th November 1938.

(a) C. P. Debt Conciliation Act (2 of 1933), S. 4 Proviso — Word 'prescribed' means prescribed by rules.

Where, as in S. 4, Proviso, the word 'prescribed' is used simpliciter in a context which makes it perfectly easy to do the prescribing by rules, 'prescribed' must have its defined meaning of "prescribed by rules." [P 228 C 1, 2]

(b) C. P. General Clauses Act (1 of 1914), S. 22 — Rule and notification — Difference explained.

A rule is not a rule until there has been prior publication which opens to the public the opportunity to object, whereas a notification can be without any prior publication and no one has a chance to object before the notification becomes operative. [P 228 C 2]

(c) C. P. Debt Conciliation Act (2 of 1933), S. 7 (1) Proviso — Words "at any time" — Meaning.

It is not correct to say that the words "at any time" must mean any time before the Board has accepted the application. [P 229 C 1]

(d) C. P. Debt Conciliation Act (2 of 1933), S. 7A—Construction.

It is not proper construction of S. 7A to say that if the application is made not under the powers conferred by S. 4 but in flat violation of the provisions of that section it is not an application under section 4. [P 229 C 2]

(e) Mandamus — Power of Nagpur High Court.

Nagpur High Court has no power to issue a writ of mandamus on the Debt Conciliation Board. [P 230 C 1]

(f) Interpretation of statutes — Acts ousting jurisdiction of civil Court must be strictly construed.

Acts which oust the jurisdiction of the civil Court or interfere with the common law rights of a subject are to be very strictly construed: ('30) 17 A I R 1930 Nag 205 and ('28) 15 A I R 1928 Lah 121 (FB), *Rel. on.* [P 230 C 2]

(g) Jurisdiction—Body constituted by statute to exercise certain functions — Civil Court cannot interfere with those functions unless body has acted outside its powers.

If a body is constituted by statute to exercise certain functions then a civil Court cannot either interfere with those functions or treat an act done by the body as a nullity unless the civil Court has got some special supervising power, for example by appeal, or unless the body has acted, while doing this act, outside its powers. [P230 C 2]

J. Sen — for Appellant.

W. B. Pendharkar — for Respondent.

Judgment. — This order governs Miscellaneous Appeals Nos. 294 of 1938, 293 of 1938, 292 of 1938 and Civil Revisions Nos. 864 of 1938, 50 of 1939, 580 of 1939 and 688 of 1939. These miscellaneous appeals and civil revisions all raise the same point which is one arising out of a notification purporting to be made under the powers conferred by the Debt Conciliation Act, whereby the Government purported to increase in certain districts the limit provided in S. 4 of the Act. A proviso to sub-s. (1) of that section prevents certain debtors, even debtors within the meaning of S. 2 (f), from making an application to the Debt Conciliation Board. In the original Act the proviso reads as follows :

Provided that no application shall be made if the debtor's debts exceed twenty-five thousand rupees or such larger amount as may be prescribed for each area.

Later, by Act 17 of 1937, the words "twenty-five thousand" were altered to "fifty thousand." In March 1938, that is to say, about a year after the change from twenty-five thousand to fifty thousand there was a notification in the Government Gazette to the effect that debtors within certain areas could put in applications if their debts did not exceed ten lakhs. As a consequence an entirely new class of debtors was introduced in certain districts into the scheme of this Act which hitherto had been regarded as an Act having for its purpose the conciliation of agriculturists' debts in cases where the debtor was not very heavily indebted. That notification is dated 4th March 1938. Thereupon, the two applications that we have now to consider were made. The two debtors in question are debtors whose debts exceed Rs. 50,000 but do not exceed ten lakhs. On 10th June 1938 Government issued another notification reducing the ambit again to Rs. 50,000, and on 7th July 1938 the Revenue Secretary to Government circulated to the appropriate Commissioners as follows :

Please request all Chairmen of Debt Conciliation Boards to reject all applications for conciliation of debts above Rs. 50,000 in which conciliation has not taken place.

Following upon that the Chairman of the Debt Conciliation Board at Jubbulpore, which is the Board in question here, passed an order as follows on one of the applications :

The applicants-debtors file an application, praying for time on the ground that a deputation has

gone to the Provincial Government for revoking the order of the Provincial Government to cancel all applications of debts above Rs. 50,000. The creditors appearing are shown the application as well as the orders of Government conveyed by Revenue Department Memo. No. 3180-2915-XII dated 7th July 1938. The creditors are told that an adjournment can be granted provided that they are willing and not objecting to the application. The creditors raise an objection and urge that the application must be rejected in view of the clear orders conveyed in the memo against which no orders in supersession have yet been received.

As the creditors are not prepared to grant an adjournment, however, short it may be, we cannot act against the orders of the Government only on the mere application of the applicants-debtors disclosing an intention of representation.

We, therefore, in accordance with the aforesaid memorandum, (viz., No. 3180-2915-XII, dated 7th July from the Revenue Department) reject this application in which no conciliation has taken place.

For statistical purposes the rejection should be deemed under S. 7, Debt Conciliation Act.

In the other case the Board passed the following order :

. . . . . We cannot but act in accordance with the instructions conveyed in the memorandum concerned. The applicants' remedy lies before authority issuing it and not before the Board. Accordingly acting in accordance with the said memorandum, viz., Revenue Department Memorandum No. 3180-2915-XII, dated 7th July 1938 we reject this application in which the debts amount to more than Rs. 50,000 and no conciliation has taken place.

For statistical purposes the application should be shown rejected under S. 7, Debt Conciliation Act.

As a consequence of those two orders, the board treated the applications of the two debtors in question as disposed of, did not accordingly thereafter take any steps for conciliation, with the result that when in the year 1939 these Boards were in effect wound up the board treated these applications as finished with and therefore did not consider it necessary further to examine into them before finally ceasing the function. It is necessary to say a word about the termination of the Board's activities. In 1939 there was passed for the Central Provinces and Berar the Relief of Indebtedness Act of 1939. That Act gives very powerful rights to debtors and takes the place of the old conciliation proceedings and by S. 26 provides that

all proceedings for the settlement of debts not exceeding Rs. 25,000 pending before (a Debt Conciliation Board) shall be transferred to (a Debt Relief Court).

It will be seen that there is a difference between the pecuniary limit of Rs. 25,000 there fixed and the Rs. 50,000 fixed in the proviso to S. 4 (1), as amended by Act, 17 of 1937, of the Debt Conciliation Act. That gap was provided for administratively by Government keeping on the Boards until they had finally disposed of all the Rupees 25,000 and over cases with the result that when the time came when they had disposed of all those they had in some districts a great number of Rs. 25,000 and under cases still pending. All those cases were transferred to the Debt Relief Courts and the Boards were dissolved with the result that at the present moment and for nearly a year now there is and has been no Board functioning. This is a matter which one has to bear in mind when considering what to do in this very unusual case. The problem is created by the fact that the Board received these applications, entertained them to the extent at any rate of taking them on their file. What further steps were taken we do not know. Whether it ever got as far as issuing form No. 3 or form No. 4, schedule to the Rules we do not know. What is at any rate clear is that a certificate was issued in form No. 2. That certificate says as follows : "This is to certify that an application has been made to this Board for the settlement of" then details are set out. That is signed by the Chairman, and the result of that certificate is to attract the provisions of S. 21 of the Act which says as follows :

When an application has been made to a Board under S. 4, any suit or other proceedings then pending before a civil Court in respect of any debt for the settlement of which application has been made shall be suspended until the Board has disposed of the application.

These various miscellaneous appeals and civil revisions are concerned either with proceedings in a civil Court before decree or with proceedings in a civil Court after decree against one or other of these two debtors brought by various creditors. These proceedings were, as a consequence of the issue of various certificates to the various Courts, stayed, and it is the argument of the appellant that they remain stayed because the Board has never disposed of the application. In point of fact, as we have seen above, the Board has purported to dispose of the application. It has rejected the application, and it has power to dismiss an application under S. 7 (1) which provides as follows:

On receipt of an application under S. 4, the Board shall pass an order fixing a date and place for hearing the application :

Provided that the Board may at any time dismiss the application if, for reasons to be stated in writing, it does not consider it desirable to attempt to effect a settlement between the debtor and his creditors.

It is said that here the Board was not purporting, when it rejected this applica-

tion, to say "we dismiss this application because we have no jurisdiction." It had in fact, according to the argument, already accepted jurisdiction. That acceptance of jurisdiction had not been objected to and not having been objected to it became impossible either for the creditor later on to object or for this Court to consider the question: *see* section 7A. It is argued that what the Board did was to reject the application for a reason that is wholly irrational and entirely unsuited to the activities of a quasi-judicial tribunal which has to bring its mind to bear on the case before it and cannot act on the directions or orders of another. That is how, as we understand it, the argument is put. The Board having given reasons which are unreasonable, and which cannot support the order of rejection it is as though that order had never been made. If the order has, in the eye of the law, never been made the application has never been rejected. If the application has never been rejected it is still persisting. If it is still persisting the matter has not been disposed of under S. 21. If the matter has not been disposed of under S. 21, the certificate still has the effect of suspending proceedings in a civil Court and if the proceedings are still suspended in a civil Court these unfortunate creditors cannot now, and cannot hereafter either, litigate their suits on their debts or execute the decrees that they have obtained. That position must remain for ever unless it be possible to resuscitate these Boards and persuade the Board to dismiss the application again for a reason to be stated in writing but this time for a reason that is reasonable, or to conciliate. In resolving this problem which is by no means obvious it is necessary to mention several provisions of the Debt Conciliation Act. First of all, it will be noted that S. 4 proviso says "or such larger amount as may be prescribed for each area." If we turn to S. 2 (f) we shall find a lower limit fixed as follows :

> Whose debts exceed Rupees 150; or such lower amount, not being less than fifty rupees, as the Local Government may, by notification, prescribe for a particular area.

By S. 2 (g) we find that "prescribed" means "prescribed by rules made under this Act." There are a number of other provisions relating to prescribing in this Act, for example S. 5: "verified in the manner prescribed by the Civil Procedure Code, 1908." But we think that it is beyond any doubt that where we find, as in S. 4 proviso, the word "prescribed" used simpliciter in a context which makes it perfectly easy to do the prescribing by rules, "prescribed" must have its defined meaning of "prescribed by rules." This is made clearer by the fact that in S. 2 (f) "prescribed" means and was stated to mean by notification and in S. 5 "prescribed" means in the manner prescribed by the Civil Procedure Code. If we turn to S. 26 we find:

> (1) All rules for which provision is made in this Act shall be made by the Local Government and shall be consistent with this Act.
>
> (2) All rules shall be subject to the condition of previous publication.

In point of fact, as we have seen, there was no rule changing the limit from Rupees 50,000 to Rs. 10,00,000. What there was, was a notification. The difference is not trifling. Its substance consists in the fact that a rule is not a rule until there has been prior publication which opens to the public the opportunity to object, whereas a notification can be without any prior publication and no one has a chance to object before the notification becomes operative: *see* S. 22, C. P. General Clauses Act. Our conclusion on this branch of the case is that here there has been no lawful increase of the upper limit from Rs. 50,000. Therefore, the applications that were made in this case were applications forbidden by the proviso to S. 4; therefore had the Board, when it received the Revenue Secretary's letter said, "We find that these applications are misconceived ; the upper limit has never been extended and we have no jurisdiction as required by law. They are applications that should never have been made and although we have accepted them, we now, on our own motion, operating under the powers conferred by S. 19 of the Act review our order accepting these applications and dismiss them," that would have been an order that would have carried out the law in every particular and would have had the effect of disposing of these applications and terminating the effect of the certificates.

The Board could have said all those things had it known the true facts of the case. But instead of giving those good reasons, it accepted the orders of Government, and because of the orders of Government and for those reasons, so far as we can see, alone dismissed the applications. It has of course been urged that if you look at the whole of the order it is apparent that the creditors here were not going to conciliate. They had discovered a fundamental defect. They had got Government to take action and they were in such a strong position that it would have been quite idle to have gone on with these

proceedings. Again, had the Board given that as its reason for dismissing the applications, nobody could have argued, we conceive, at any rate with any hope of success, that the Board had done anything irregular or ultra vires or improper. It is further argued on behalf of the appellants that S. 7 (1) proviso would not really allow the Board even to do that. It does not empower the Board to dismiss the applications for any such reasons as above indicated because, it is said, once the Board has admitted the applications as being within its jurisdiction that concludes the Board and it has then got to go on and "at any time" must therefore mean any time before it has accepted the application. We do not think that that is the proper construction to be put on this proviso especially bearing in mind the provisions of S. 19. It is also said that it is no ground to act under S. 7 that there is no prospect of an amicable settlement. The proper section to operate under is S. 14 which says:

If no amicable settlement is arrived at under sub-s. (1) of S. 12, the Board shall dismiss the application.

The result would be the same but it is said that the Board here has not purported to do that: it has purported to act under S. 7. It has done what it had done not because there was no hope of a settlement but because it was told to do so, and that is a mere nullity with the effect noted above. At one time there were a number of decisions come to by this High Court relating to the power of the civil Courts to interfere with the operations of this special body, and the general position taken up was that the Courts had power to regard as of no effect certificates made or orders passed by a Board if passed in the absence of jurisdiction and that a Board, for example, that issued a certificate on the application of an ironmonger effected nothing by the issue of such a certificate because an ironmonger is not a debtor within the meaning of the Act, and not being a debtor could not make an application under S. 4. That group of cases will be found in I L R (1938) Nag 489,[1] I L R (1937) Nag 530,[2] 19 N L J 16,[3] 20 N L J 203[4] and 21 N L J 17.[5] As a consequence an amending Act, 15 of 1936, was passed which incorporated S. 7A, and that section has been the subject of much debate before us now. It provides as follows :

(1) If, on receipt of an application under S. 4, the Board admits the application as being within its jurisdiction or, under sub-s. (1) of S. 7, dismisses it on the ground of want of jurisdiction, a debtor or his creditor may, within thirty days from the date of admission or of the order of dismissal, as the case may be, make an objection in writing to the Board against such admission or dismissal.

(2) On receipt of an objection under sub-s. (1), the board shall make such order thereon as it thinks fit and it shall be final.

(3) If no objection is made under sub-s. (1), or if an objection is made and decided under sub-s. (2), the jurisdiction of the board shall not be questioned in any civil Court.

It is said that it has no effect unless the board is operating on an application made under S. 4. Accordingly, if the application is made not under the powers conferred by S. 4 but in flat violation of the provisions of that section, it is not an application under S. 4, and if it is not an application under S. 4 then whether the board admits it or not a civil Court can still challenge the jurisdiction of the board to entertain it. We find it very difficult to give that construction to this section without making nonsense of S. 7A and reducing it to nothing at all so far as the civil Courts are concerned because of course if the application is in accordance with the provisions of S. 4 the board would have jurisdiction. It is said however in answer to that that the words, "as being within its jurisdiction" mean as being within its territorial jurisdiction and so you have got the position that granted the application is in accordance with S. 4 so that one can correctly speak of it as being an application under S. 4 then if the board admits the application as being within its territorial jurisdiction there is nothing for the civil Court to do by way of challenging that jurisdiction : the civil Court must assume that the board has jurisdiction; or, if the board has rejected it, that the civil Court must assume that the board had no jurisdiction and proceed accordingly. Bearing in mind the cases which we know led up to this modification we are not prepared to found this judgment on that construction although there is something to be said for a construction that gives value to the words "under S. 4," which one finds running right through this Act, and gives value to the words "as being within its jurisdiction."

But here we think that the matter can be properly and fairly disposed of on other

1. ('37) 24 A I R 1937 Nag 259: 170 I C 905: I L R (1938) Nag 489, Shivdin v. Ramratan.
2. ('37) 24 A I R 1937 Nag 195: 174 I C 991: I L R (1937) Nag 530, Sarupchand v. Barelal.
3. ('36) 19 N L J 16, Bapu Sakharam v. Shrinandanlal.
4. ('37) 20 N L J 203, Thakur Lachmansingh v. Durgaprasad.
5. ('38) 25 A I R 1938 Nag 373: 182 I C 81: (1938) 21 N L J 17, Tikaram v. Ganpat.

grounds. One must bear in mind the fact that this Court has no power to issue a writ of mandamus (and, even if it had, that there is now no board to whom this Court can address an order). One must also remember that the board has in fact disposed of these applications by rejecting them and has therefore not recalled its certificate which certificate will, so far as we can see, live for ever unless, as is argued, it is deemed to have come to an end when the board came to an end or unless it came to an end when the board in fact disposed of the applications whether rightly or wrongly. Viewing the matter as a whole, we consider that we are justified in treating the board as having disposed of the applications in accordance with law if in all the circumstances the position is such that the board could and should have rejected these applications at the time when in fact it rejected them. We think that the true position can be stated as follows: Where the Court has the powers which the High Court has in England and which certain High Courts, but not this, have in India of issuing the various prerogative writs or analogous proceedings then the position cannot be better stated than by Farwell L. J., in (1910) 2 K B 165[6] at page 179:

> If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases, but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries, and the High Court since the Judicature Acts, has exercised over such tribunals.

Where the power exists what happens is that the High Court sets the tribunal right and the matter proceeds along right lines to some proper conclusion. But if we said that this order of dismissal is wrong because it was made on extraneous considerations such as a memorandum issued from the Secretariat we should not be setting anything right at all. We cannot follow it up by directing the Board to dispose of these applications according to law. We have not that power if there were a Board, and there is not a Board. What we should be doing would be perpetuating an injustice by giving legal efficacy for ever to certificates which prevent litigants from suing according to ordinary law and pursuing their ordinary remedies in a civil Court. That is a thing which one would naturally hesitate to do.

There is a long line of cases which lay down two broad propositions. The one is that Acts which oust the jurisdiction of the Court or interfere with the common law rights of a subject are to be very strictly construed. See for example A I R 1930 Nag 205[7] and 9 Lah 504.[8] The other general line is that if a body is constituted by statute to exercise certain functions then a civil Court cannot either interfere with those functions or treat an act done by the body as a nullity unless the civil Court has got some special supervising power, for example by appeal, or unless the body has acted, while doing this act, outside its powers. If that be the case, then it is as though the act had been done by a mere man-in-the-street. He has got no power to do it, he has got no power to issue the certificate or give the decision or the order or the injunction or whatever it may be, and the law says: "You had no power to do this"; therefore we treat it as not done. See for example, the various cases where taxes were imposed and they were imposed in a way which was beyond the power of the body imposing them. They are imposed, they are collected, and then a civil Court has to consider a claim to get the money back and the question arises: Can a civil Court interfere seeing that a statutory body has imposed the tax and collected the tax? Despite the fact that the statute says that the civil Court in this case and that cannot interfere, in case after case the civil Court has discovered that it can interfere because the body doing all these things did them in a way which was outside its powers. See for example 26 N L R 217,[9] 18 N L R 121,[10] 8 N L R 107[11] and 30 N L R

6. (1910) 2 K B 165 : 79 L J K B 595 : 102 L T 578 : 74 J P 259: 8 L G R 549 : 26 T L R 422, Rex v. Board of Education.

7. ('30) 17 A I R 1930 Nag 205 : 122 I C 703, Balaji Kunbi v. Chindya.

8. ('28) 15 A I R 1928 Lah 121 : 108 I C 748 : 9 Lah 504 : 29 P L R 396 (F B), Ali Muhammad v. Hakim.

9. ('30) 17 A I R 1930 Nag 153 : 122 I C 691 : 26 N L R 217, Bagmal Kisandayal Ginning Factory v. Municipal Committee, Akot.

10. ('22) 9 A I R 1922 Nag 10 : 65 I C 532 : 18 N L R 121, Municipal Committee, Malkapur v. A. W. Dalal.

11. ('12) 8 N L R 107 : 16 I C 449, G. I. P. Ry. Co. v. Amraoti Municipality.

121.[12] For example, if an Act gives to a public officer the power to determine certain questions and says to the Courts that the decisions of that officer shall be final still the Courts can question his decision if the criticism amounts to this, that the officer acted outside the powers conferred upon him by the statute because then the position is not that of the authorized officer deciding the point; it is as though a man-in-the-street had decided the point. Neither the man-in-the-street nor the officer had power to decide what the officer purported to decide and the Courts can challenge the one as well as the other. See for example, A I R 1930 Nag 205[7] and A I R 1931 Nag 48[13] a decision under the Co-operative Societies Act, 35 Cal 859[14] a case of assessment of municipal taxes which turns on the fact that the act done by the special body was outside its powers and so enabled the Court to challenge it although there were provisions in the Act excluding the Court's powers. Then there are such cases as the *Coffee Housekeeper's case*, 51 Mad 876.[15] There the person was accused of keeping a coffee-house without a license. He took up the position that he had in effect a license. His license, it was true, had been cancelled but it had been unlawfully cancelled and the question was: could the civil Court inquire into the lawfulness or unlawfulness of the cancellation of his license by a person who under an Act was empowered to cancel licenses? Again the Court said: "Did this person so authorized act within his powers? If he did, we cannot inquire into the matter. If he did not, we can." The learned Judges there came to the conclusion that the authorized person had acted beyond the scope of his power. He had not properly cancelled the license, therefore, the license was uncancelled, therefore, the man could not be convicted of carrying on a coffee-house without a license. That case distinguishes A I R 1925 Mad 476[16] where the question was: should a person be convicted of driving without a license? The accused said that he had really got a license. Of course he had applied for one and it had improperly been refused. There it was observed:

> I do not think that his order can be regarded as an absolute nullity as is argued and the case considered as one in which no order has been passed. It may be that the accused can claim damages against the President if he is able to establish that the President exercised his powers under S. 212 not bona fide but with malice on account of personal ill-feeling against him. That question will have to be considered when a proper case is brought; but in this prosecution the accused, in order to escape punishment, must show that he had a license given by the President of the District Board or he comes under cl. 11 of S. 212.

In I L R (1938) Mad 1040[17] the question was with regard to customs dues. Various authorities are given power to assess and settle customs dues and they had assessed and settled them here. The question then came, on a suit to recover them back, whether the civil Court could question the finality of those orders made. It was held that the civil Court could because, once again, it was a case where the authorities had exceeded their jurisdiction. But at page 1046 there is the following observation:

> . . . . adjudications by Customs Officers dealing with an offence committed under S. 182 have prima facie to be regarded as adjudications by a special tribunal and as such are not examinable by a civil Court except where they have acted without jurisdiction or in contravention of fundamental principles of judicial procedure.

Here it is said that this tribunal operated in contravention of fundamental principles of judicial procedure, that the Board never brought its mind to bear; it decided nothing, it merely followed orders and therefore, it made no decision but irrationally and wrongfully rejected an application and that part of its work was a mere nullity with the consequences already detailed. If this was a matter falling within a High Court's power to issue a prerogative writ it may well be that the proper course would be for us to refer the matter back with directions to this Board to dispose of these applications in accordance with law and in so doing it would be perfectly proper for us to point out what our conception of the law is. If we did that, that is to say, if we pointed out to the Board that this was a case in which no proper application had ever been made and that the applicants in question were not within the scope of the Debt Conciliation Act we have very little doubt that the

12. ('34) 21 A I R 1934 P C 62 : 147 I C 894 : 61 I A 125 : 30 N L R 121 (P C), Radha Kishan Jaikishan v. Municipal Committee, Khandwa.
13. ('31) 18 A I R 1931 Nag 48 : 130 I C 820, Koyal v. Bhondlal.
14. ('08) 35 Cal 859 : 12 C W N 709 : 7 C L J 631, Chairman of Giridih Municipality v. Srish Chandra Mozumdar.
15. ('28) 15 A I R 1928 Mad 847 : 110 I C 454 : 51 Mad 876 : 29 Cr L J 710 : 55 M L J 566, Municipal Council, Chidambaram v. Thirunayana Iyengar.
16. ('25) 12 A I R 1925 Mad 476 : 86 I C 57 : 26 Cr L J 681 : 48 M L J 132, Krishnaswami v. Emperor.
17. ('38) 25 A I R 1938 Mad 608 : 181 I C 821 : I L R (1938) Mad 1040, Mask & Co. v. Secretary of State.

result would be that the Board would dismiss the applications under its power of review given by S. 19 whereupon the certificates would terminate. That being the proper result, it also happens to be the result arrived at if we do not interfere at all but say, "Although the reasons given by the Board do not commend themselves to us, still the Board has jurisdiction to dismiss these applications and to dismiss them at any time." It has in point of fact dismissed those applications and that act is something more than a nullity because it has had the result of preventing the Board going on with this conciliation right up to the time of its dispersal and this Board has been dissolved by Government in the belief that the Board had disposed of all its pending cases which pending cases would have included these two.

It may be observed that on the other side a very considerable number of cases including in particular 48 Cal 138[18] and A I R 1926 Cal 1101[19] have been referred to in order to point out the distinction between an erroneous decision and a decision that is a nullity. It has been urged that although we may think very little of the reasons given by the Board in dismissing these applications still it had power to dismiss them and it has in fact dismissed them and that is not for this civil Court to say that not only in our opinion was the dismissal wrong but that it was absolutely null and void. If a body has jurisdiction to decide a case it has jurisdiction to decide it wrongly as well as rightly. The difficulty that we feel about that kind of argument, for which very many more cases have been cited before us, is that we apprehend that what the Board did here does not amount to a decision at all. It did not purport to act otherwise than under directions and we gravely doubt whether that is deciding a matter, it may possibly be that it has disposed of a matter. It has been pointed out that S. 22 does not demand that the Board shall decide anything. It only demands that the Board shall dispose of a thing. If the Chairman tore up a lot of applications and threw them in the fire he would be disposing of them and it would not be a mere nullity though it were an act of irrational temper; the result would be that the Board would not go on to conciliate and if the Board did not proceed as a result of the irrational act the civil Courts would still be stayed unless such irrational act were treated as terminating the effectiveness of the certificate.

Looking at the matter broadly, therefore, and bearing in mind the fact that the Board does not exist now and that the applications should, in point of law, have been dismissed at the time they were—though we think better reasons should have been given — and bearing in mind that to keep these certificates on foot perpetually would be to work a gross injustice and cause very severe loss to the creditors, we are of the opinion, though for other reasons, that the learned Judge was right in refusing to stay proceedings any further in each of these matters. The miscellaneous appeals and the civil revisions are accordingly dismissed with costs.

D.S./R.K. *Appeals and revisions dismissed.*

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18. ('21) 8 A I R 1921 Cal 34 : 58 I C 806 : 48 Cal 138 : 31 C L J 482 : 24 C W N 723 (F B), Hriday Nath Roy v. Ram Chandra Barna.

19. ('26) 13 A I R 1926 Cal 1101 : 97 I C 770 : 45 C L J 24 : 30 C W N 940, Ishan Chandra v. Moomraj Khan.

(28) A. I. R. 1941 Nagpur 232

NIYOGI J.

Vinayak Laxman Oke — Plaintiff — Appellant

v.

Municipal Committee, Akola — Defendant — Respondent.

Second Appeal No. 571 of 1939, Decided on 11th November 1940, from decree of Third Addl. Dist. Judge, Akola, D/- 6th November 1939.

(a) C. P. Municipalities Act (2 of 1922), Ss. 175 and 176—Rule-making power of Provincial Government is subject to limitations in Ss. 175 and 176 which do not confer on it any power to impose pecuniary burden for public purpose.

In framing the rules the Local Government cannot overlook the limitations contained in S. 175 (1) of the Act that they should be consistent with the Act. If the rules framed under the statute are in excess of or in contravention and inconsistent with the provisions of the statute, they must be regarded as ultra vires and ineffective. Neither S. 175 (1) nor S. 176 (1) confer on the Local Government expressly or by implication the power to impose pecuniary burden for any public purpose: ('34) 21 A I R 1934 Cal 537, *Rel. on.* [P 236 C 1]

(b) C. P. Municipalities Act (2 of 1922 as applied to Berar)—Rules 19, 20 and 21 made by Local Government for collection of cycle tax—Rules being in excess of Government's power and in contravention of Act are ultra vires and of no effect.

The sole object of compelling the payment of 0-4-0 for the metal disc for cycle registration is to prevent evasion by facilitating its detection. The saving of harassment to the cycle owner is subsi-

diary and consequential to the main object. It cannot be gainsaid that preventing evasion of the tax is a public purpose and the sum of 0-4-0 which is compulsorily recovered is so recovered for public purpose. The device, while it facilitates detection and checks evasion saves the Municipal Committee from the necessity of maintaining an expensive inspecting staff. The levy of 0-4-0 is therefore a tax. Hence, Rr. 20 and 21 of the rules framed by the Local Government are ultra vires and inoperative. So also R. 19, which is a direct contravention of S. 72 of the Act is equally ultra vires and of no effect: (1938) 4 All E L R 200; ('34) 21 A I R 1934 Cal 537 and (1922) 91 L J K B 897, *Ref.*

[P 235 C 1; P 236 C 2]

Y. V. Jakatdar and M. W. Samudra — for Appellant.

V. L. Oke, Appellant, in person.

M. R. Bobde — for Respondent.

Judgment. — This is a plaintiff's appeal from the judgment of the third Additional District Judge, Akola, in Civil Appeal No. 1-A of 1939 delivered on 6th December 1939. The Municipal Committee, Akola, imposed a tax on bicycles in use within the limits of the Akola Municipality. The tax proper is fixed at Re. 1 per bicycle and the Committee recovers a sum of four annas in addition to it, expressly on account of the cost of a metal disc containing the registration number of the cycle which is to be affixed to the cycle at a prominent place in accordance with the rules framed by the Local Government under Ss. 71 and 76, Municipalities Act, 1922, as applied to Berar. The appellant owns three bicycles and he had to pay Rs. 3 as tax and annas 12 as cost of the three metal discs. The appellant's contention was that Rules 19 to 29 of the rules made by the Local Government were ultra vires being in excess of its powers and in contravention of the Municipalities Act. On this contention he claimed from the Municipal Committee a refund of 12 annas which have been recovered from him on account of the metal discs supplied to him. He also prayed for a decree of injunction permanently restraining the Municipal Committee from recovering four annas per bicycle as either cost of the metal disc or as fee for registration of the bicycle. The claim succeeded in the Court of first instance but failed in the lower appellate Court. The only point for determination which arises in this appeal is whether Rr. 19 to 29 of the rules made by the Local Government in exercise of the powers conferred upon them by Ss. 71 and 76, Municipalities Act, 1922, (C. P. Act, 2 of 1922) as applied to Berar and published under Notification No. 2047-5-M-VIII dated 21st March 1936, are ultra vires and of no effect. The rules purport to be rules for the assessment and the collection of the bicycle tax and they are as follows:

19. Every person owning, possessing or using a bicycle which is liable to be taxed shall be bound to inform the Secretary regarding the number and description of the bicycle kept and used by him within a week from the date he comes into possession.

20. On receipt of such information and the amount of tax and the cost of the metal disc referred to in Rule 21 the Committee shall register the bicycle.

21. The Committee shall keep a register of all bicycles numbered serially for each ward for each financial year and shall issue a metal disc bearing the registration number on payment of annas 4 per disc.

22. Every owner shall affix the disk to his bicycle in such a manner that it is easily visible to inspecting officers of the Committee, and shall maintain it in good condition.

Note: — In the event of the metal disc being, accidentally lost, destroyed, defaced or obliterated, the owner shall obtain a duplicate on payment of annas 4.

Note 2.—The person in whose name a bicycle is registered shall be deemed to be the owner of it for purposes of these rules.

23. Every bicycle shall be registered annually in the first fortnight of April.

24. If a bicycle is used and kept unregistered such possessor, user or owner shall be liable to pay double the tax specified in R. 1 (2) of the imposition rules for that year as a penalty for evading assessment.

25. The payment of penalty shall not bar a prosecution.

26. Notice of transfer of ownership of a bicycle during the currency of registration shall be given in writing to the Secretary by the transferee within one week from the date of transfer. On receipt of such notice the Secretary shall make the necessary alteration in the register, and if necessary, issue a fresh registration number.

27. No refund of registration fee shall be granted for any cause whatever.

28. The registration shall ordinarily be done in the first fortnight of April but no registration done on any subsequent date shall have effect beyond 31st March next following.

29. A breach of Rr. 2, 19, 22 or 26 shall be punishable with a fine which may extend to Rs. 50.

The appellant's contention is that the levy of four annas is in the nature of a tax. The appellant does not question the necessity of the rule to equip the cycle with a disc for the purpose of prevention and detection of the evasion in payment of the tax. His argument is that such an impost which is substantially a tax can be levied only in accordance with the procedure laid down in S. 67, Municipalities Act, and not by rules made by the Local Government under Ss. 71, 76 or 175 or 176 as the Provincial Government has no power to tax independently of the provisions of the Municipalities Act. The relevant sections are as follows:

71. The Local Government may make rules under this Act regulating the assessment of taxes and for preventing evasion of assessment.

76. The Local Government may make rules under this Act regulating the collection of taxes, and such rules may provide for the prevention of evasion of payment, for the payment of lump sums in composition, and for the fixing of fees payable for notices of demand.

175 (1). All rules for which provision is made in this Act shall be made by the Local Government and shall be consistent with this Act.

176 (1). In addition to any power specially conferred by this Act, the Local Government may make rules generally for the purpose of carrying into effect the provisions of this Act.

The appellant does not deny the power of the Local Government to make any rules for assessment or collection of the bicycle tax intended to prevent evasion of the tax, but he contends that notwithstanding such power it is incompetent to recover any amounts even though they may be necessary for meeting the expenses of any device to prevent evasion of the tax and that under whatever name money is recovered it becomes in substance a tax. In order to determine whether to recover annas four amounts to a tax one must look to the definition of the word tax. Tax as ordinarily understood is a pecuniary burden imposed upon the subjects for the support of the Government. Aiyangar in his law of Municipal Corporations in British India at p. 269, Edn. 2, describes the nature of tax as follows :

Taxes are defined as being the enforced personal contribution of persons and property levied by the authority of the State for the support of the Government and for all public needs. Taxes are burdens or charges imposed by the Legislature, or under its authority, upon persons and property to raise money for public as distinct from private purposes or to accomplish some end or object public in its nature. A public use or purpose is of the essence of a tax.

Then he cites the following passage from an American case :

Taxes proper or general taxes proceed upon the theory that the existence of Government is a necessity; that it cannot continue without means to pay its expenses; that for those means it has the right to compel all citizens and property owners within its limits to contribute; and that for such contribution it renders no return of special benefit to any property, but only secures to the citizen that general benefit which results from protection to his person and property and the promotion of those various schemes which have for their object the welfare of all.

The Municipalities Act contains the definition of "tax" : see S. 3 (n). It says ""tax" includes any toll, rate, due, fee or other impost specified in S. 66." In AIR 1939 Nag 171[1] at p. 172 Grille J., interpreted that definition as comprising only those imposts by whatever name they may be called, specified in S. 66 and that the word "tax" would not include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in S. 66. This levy of four annas would be a tax if (1) it is recovered for the support of the Municipal Committee or for any public purpose, and (2) if it is of a nature which would bring it under S. 66, Municipalities Act. The relevant rules will have to be examined in the light of these two tests. They are as follows :

Rule 20. On receipt of such information and the amount of tax and the cost of the metal disc referred to in R. 21 the Committee shall register the bicycle.

Rule 21. The Committee shall keep a register of all bicycles numbered serially for each ward for each financial year and shall issue a metal disc bearing the registration number on payment of annas four per disc.

Rule 22. Every owner shall affix the disc to his bicycle in such a manner that it is easily visible to inspecting officers of the Committee and shall maintain it in good condition.

Note.—In the event of the metal disc being accidentally lost, destroyed, defaced or obliterated, the owner shall obtain a duplicate on payment of annas four.

Rule 27. No refund of registration fee shall be granted for any cause whatever.

On the true construction of these rules, it would appear that the metal disc which is to be affixed to the bicycle is intended to show that the bicycle tax has been paid and that the bicycle is registered. That is obviously meant to facilitate detection of non-payment of tax. The bicycle is such a species of vehicle that it is extremely difficult to prevent evasion of payment of the tax on it. It would, therefore, be not unreasonable to insist upon its bearing some symbol to indicate the payment of tax assessed on it. The question is: which party should bear the cost? This question is approached from two different view points. On behalf of the taxpayer, it is contended that the affixing of the disc is mainly, if not wholly, for the benefit of the Municipal Committee. Its object is to prevent evasion of the payment of the cycle-tax by facilitating detection of non-payment of the tax. Whether it is meant for one or the other purpose, it is a municipal and therefore a public purpose. On the other hand, the contention on behalf of the Municipal Committee is that the device is intended to save the taxpayer from the harassment which is apt to be caused by constant inspections.

1. ('39) 26 AIR 1939 Nag 171 : 181 I C 520 : 40 Cr L J 556, Amrutlal v. Municipal Committee, Amraoti.

Both points of view are plausible but it has to be seen which of the two purposes attributed to the disc is the primary and substantial, and which is subsidiary and consequential. If obviation of harassment to the taxpayer were the principal object, the affixing of the disc to the bicycle could well be left to the option of the taxpayer. He who does not mind being exposed to constant inspections may choose to use his bicycle devoid of the disc or he may always carry with him his registration number or the receipt evidencing the payment of the tax. Others may be disposed to pay 0-4-0 and get the disc from the Municipal Committee to rid themselves of the attentions of the inspectorial staff. Why have the rules not followed this obvious course? It is because the taxpayers would not care to pay 0-4-0 and get the disc from the Municipal Committee and the Municipal Committee would have to employ a special staff for detection of the evasion of the tax. In order to avoid this contingency, it was necessary to make the payment of 0-4-0 compulsory. In fact this payment coupled with the disc issued on such payment in no way prevents evasion, for the reason that a man who pays the tax of Re. 1 also pays 0-4-0 for the disc and registration of the cycle (*see* R. 20). The dishonest man who does not pay the tax escapes also the payment of the extra 0-4-0. It is, therefore, clear that the disc serves as evidence of payment not to prevent evasion. Its indirect effect may be to expose those who evade payment of the tax by making detection easy. The affixing of the disc on the bicycle narrows the field of inspection and facilitates detection of delinquents. The conclusion is, therefore, irresistible that the sole object of compelling the payment of 0-4-0 is to prevent evasion by facilitating its detection. The saving of harassment to the cycle owner is subsidiary and consequential to the main object. It cannot be gainsaid that preventing evasion of the tax is a public purpose. We thus arrive at the position that the sum of 0-4-0 which is compulsorily recovered is so recovered for a public purpose. The device, while it facilitates detection and checks evasion, saves the Municipal Committee from the necessity of maintaining an expensive inspecting staff. The levy of 0-4-0 is therefore a tax.

The appellant relies on 48 Cal 161,[2] 35 Bom 412,[3] A I R 1934 Cal 537,[4] A I R 1925 Nag 393[5] and A I R 1930 Nag 73.[6] Out of them the two cases which are helpful are (1938) 4 ALL E L R 200[7] and A I R 1934 Cal 537.[4] In the English case, under the provisions of a local Act the defendants were granted licenses for the erection of advertisements on houses, and in respect of each license the corporation asked for a fee. It was contended that they were entitled to do so because the Act provided that the licences might be granted under and subject to such terms and conditions as the corporation might deem proper. It was held that, upon the true construction of the Act, the terms and conditions could not include the payment of a fee in respect of the granting of the licence. That case follows the ruling in (1922) 91 L J K B 897.[8] In that case it was laid down that when statutory authority has been given to the Executive Government to make regulations controlling acts to be done by His Majesty's subjects, a minister cannot, without the express authority of Parliament demand money for exercising his power of control in a particular way, such money to be applied to some public purpose, to be determined by the Government. The charge amounted to levying of money for the use of the Crown without the authority of Parliament. The observations of Lord Buckmaster at p. 900 are significant. They are :

> The powers so given are no doubt extensive and very drastic, but they do not include the power of levying upon any man payment of money which the Food Controller must receive as part of a national fund and can only apply under proper sanction for national purposes.

Lord Wrenbury makes it clear that the power to make regulations could not authorise the Executive to demand and receive money as the price of exercising its power of control in a particular way, such money to be applied to some public purpose to be determined by the Executive. The Noble Lord interpreted such a demand as the assertion of a right in the executive to

2. ('21) 8 A I R 1921 Cal 40 : 61 I C 107 : 32 C L J 421 : 48 Cal 161, Killing Valley Tea Co. Ltd. v. Secy. of State.

3. ('11) 35 Bom 412 : 11 I C 610 : 13 Bom L R 494, Emperor v. B. H. DeSouza.

4. ('34) 21 A I R 1934 Cal 537 : 151 I C 165 : 38 C W N 459, Barisal Co-operative Central Bank v. Benoy Bhusan Gupta.

5. ('25) 12 A I R 1925 Nag 393 : 88 I C 28 : 26 Cr L J 1084, Emperor v. Shriballabh.

6. ('30) 17 A I R 1930 Nag 73 : 123 I C 417, Noksing v. Bholusing.

7. (1938) 4 All E L R 200, Liverpool Corporation v. Arthur Maiden Ltd.

8. (1922) 91 L J K B 897 : 127 L T 822 : 66 S J 630 : 38 T L R 781, Attorney-General v. Wilts United Dairies.

impose taxation. In framing the rules the local Government cannot overlook the limitation contained in S. 175 (1), Municipalities Act, that they should be consistent with the Act. If the rules framed under the statute are in excess of or in contravention and inconsistent with the provisions of the statute, they must be regarded as ultra vires and ineffective: *see* A I R 1934 Cal 537.[4] That proposition is so clear that no authority is in fact necessary to confirm it. It appears to me that neither S. 175 (1) nor S. 176 (1) confer on the local Government expressly or by implication the power to impose pecuniary burdens for any public purpose. My attention is invited to the rules for the grant of copies of municipal records, maps etc., made under S. 176 (1), Municipalities Act, (p. 310, C. P. Municipal Manual, 1935) and it is contended that the power to levy fees or charges for work done or something supplied must be deemed to be implicit in the power of framing rules under S. 176, if not under S. 175, C. P. Municipalities Act. I cannot accede to the contention for the obvious reason that the recovery of copying fees is not for a public purpose and there is no compulsion as in the case of the person paying the cycle-tax. There is no obligation imposed by the rules on any person to apply for copies as there is in the case of a cycle owner who pays the tax. Nor is the supplying of copies for a public purpose as is the supplying of metal disc (which is to facilitate detection and to prevent evasion of the tax). The copying fees therefore do not bear any valid analogy. On the other hand, the provisions of the Motor Vehicles Act (Act 4 of 1939) supplies an analogy which lends assurance to the view I have taken. Section 21 of that Act gives power to the Provincial Government to make rules for the purpose of carrying into effect the provisions of that Act and states that such rules may provide for :

(c) the issue of duplicate licenses to replace licenses (licenses to drive a motor vehicle)..... or the fees to be charged therefor.

It is in pursuance of this special power that Central Provinces and Berar Motor Vehicles Rules 1940 provide for a fee of Rs. 5 for a duplicate license (R. 11-D). There is no such authority conferred by R. 76, Municipalities Act. On the other hand, the specific grant of power of fixing the fees payable for notices of demand in the same section tends to negative the power to levy any fees necessary for any step in the prevention of evasion of payment of any tax. Moreover, R. 27 of the rules under consideration refers to the levy of 4 annas as a registration fee. Section 66, C. P. Municipalities Act, includes fees on the registration of cattle (cl. 9). In view of the definition contained in S. 3 (n) of that Act, the registration fee is a tax. It is clear that the Act regards registration fees as a tax. If so, would it make any difference if the fee is for the registration of a bicycle instead of cattle? In my opinion there is no difference in principle. The registration fee levied in either case goes with the municipal fund (S. 61, C. P. Municipalities Act). It is true that in the present instance the taxpayer gets something in return viz., the metal disc, but that would not make the levy any the less a tax. In case of conservancy tax or market dues, the Municipal Committee also renders appropriate services in return; nevertheless they fall within the ambit of the definition of the tax : S. 3 (n). In conclusion, I agree with the appellant that the charge of 4 annas levied along with the recovery of the cycle tax and in addition to it is a tax and that Rr. 20 and 21 of the rules framed by the Local Government is ultra vires and inoperative. This does not however preclude any taxpayer from paying it in return for the disc if he is willing to do so. It only means that the Municipal Committee cannot compel the taxpayer to make the payment as a condition precedent to the registration of the cycle in respect of which the tax of Re. 1 had been paid. The Municipal Committee is bound to register the cycle on payment of the tax of Re. 1. On the view I have taken above, the other rules in so far as they have bearing on the rule enforcing payment of 4 annas in addition to the tax of Re. 1 will be deemed to be ultra vires and of no effect. As to R. 19, I agree with the appellant that it is a direct contravention of S. 72, C. P. Municipalities Act. It must therefore be pronounced to be equally ultra vires and of no effect. The result is that the appeal succeeds and the decree of the original Court is restored with costs in all the Courts.

N.K./R.K. *Appeal allowed.*

*** (28) A. I. R. 1941 Nagpur 236**

STONE C. J. AND VIVIAN BOSE J.

Ganpatrao Shamrao Saraf —
Plaintiff — Applicant

v.

Rama Ganpati Teli — Defendant —
Non-applicant.

Misc. Case No. 46 of 1941, Decided on 21st February 1941, for review of judgment of Pollock J., in S. A. No. 495 of 1937, D/- 25th January 1940.

*** Court-fees Act (1870), Sch. 1, Arts. 4 and 5 —Application for review to pay lower court-fee must be made simply within 90 days mentioned in Act and time of vacation or time for obtaining copy of judgment cannot be excluded in computing this period though in proper case Court has discretion to extend time — Provisions of Limitation Act do not affect this result.**

There is a distinction between the limitation allowed for the filing of an application for review of judgment for the purposes of the Limitation Act and of the time within which the application must be presented to obtain a lower court-fee prescribed by the Court-fees Act. [P 237 C 2]

The two Acts are not in pari materia; and in computing the period of 90 days from the date of the decree, within which an application for review of judgment may be presented on payment of half the fee leviable on plaint or memorandum of appeal the time during which the Court is closed for vacation or time for obtaining copy cannot be excluded though where the delay is not caused due to applicant's laches the Court has power to give certificate directing a refund. But this power is discretionary: Misc. Civil Case No. 69 of 1940, *OVERRULED*; ('35) 22 A I R 1935 Nag 164, *Affirmed*; 9 Mad 134 and 7 C P L R 111, *Rel. on*; 9 C L R 479 and 15 C L J 505, *Ref.* [P 237 C 2; P 238 C 1]

N. T. Mangalmurti and W. H. Dhabe — for Applicant.

D. B. Najbile — for Non-applicant.

Order. — This is a reference made by the Taxing Judge and raises the following questions :

(1) Has Miscellaneous Civil Case No. 69 of 1940 been correctly decided by the Taxing Judge who has excluded copying time from the 90 days prescribed by Art. 4 to Sch. 1, Court-fees Act?

(2) Has not 31 N L R 260[1] been correctly decided in that it does not exclude the period of the vacation or any part thereof from the 90 days allowed by Art. 4 to Sch. 1, Court-fees Act?

The point is whether when considering the obligation of an applicant for a review to pay court-fees, an obligation that depends to some extent on the time at which the application is made, one calculates that time according to rules applicable to times laid down in the Limitation Act or whether one takes the 90 days mentioned in the Court-fees Act as simply 90 days. The Court-fees Act provides, inter alia, as follows (Sch. 1, Article 4) :

Application for review of judgment, if presented on or after the ninetieth day from the date of the decree.	The fee leviable on the plaint or memorandum of appeal.

Article 5 is as follows :

Application for review of judgment, if presented before the ninetieth day from the date of the decree.	One-half of the fee leviable on the plaint or memorandum of appeal.

Section 14, Court-fees Act, provides :

Where an application for a review of judgment is presented on or after the ninetieth day from the date of the decree, the Court unless the delay was caused by the applicant's laches, may, in its discretion, grant him a certificate authorizing him to receive back from the Collector so much of the fee paid on the application as exceeds the fee which would have been payable had it been presented before such day.

The present question is : Are Sundays, holidays or other days during which the Court is closed, or time for copying excluded in computing the 90 days as they would be if we were considering not a time prescribed by the Court-fees Act in which a particular reduced fee may be received but were calculating the time in which the application for review might be made. Were one calculating the time in which an application for review of judgment could be made one would consider Ss. 4 and 12, Limitation Act, and then one would be enabled to extend the time in a variety of ways by applying the various provisions of the Limitation Act. In 9 Mad 134[2] it was decided that

in computing the period of eighty-nine days from the date of decree, within which an application for review of judgment may be presented on payment of half the fee leviable on the plaint or memorandum of appeal the time during which the Court is closed for vacation cannot be excluded.

It was pointed out there that the Court-fees Act and the Limitation Act are not in pari materia. The learned Judge at p. 135 observes :

It is true that the old Code generally dealt indiscriminately with matters of stamp, matters of limitation and matters of procedure, but the inconvenience of this soon became apparent and they have long since been separated and are governed by distinct Acts, each of which contains its own rules and principles. In this very point of delay, for example, the Limitation Act has its S. 5 containing a proviso that an application for review may be admitted freely after the period of limitation if the applicant can show sufficient cause for the delay. The Court-fees Act, on the other hand, has its S. 14, the provisions of which are not quite similar though evidently aimed at the same class of cases and it seems to me that in regard to stamp questions that alone can be looked to.

9 Mad 134[2] was followed in 7 C P L R 111.[3] It was again followed in 31 N L R 260[1] where the question of the applicability of S. 10, General Clauses Act, was also considered together with two other cases, 9 C L R 479[4] and 15 C L J 505.[5] We would prefer to exclude S. 10, General Clauses Act, on the ground that in terms that section applies

1. ('35) 22 AIR 1935 Nag 164 : 157 I C 178 : 31 N L R 260, Trimbak v. Narayan.
2. ('86) 9 Mad 134, In re Kota.
3. ('94) 7 C P L R 111, Hiralal Ramdhan v. Mt. Gangabai.
4. ('82) 9 C L R 479, In re Doorga Prosunno.
5. ('12) 15 C L J 505 : 15 I C 455, Sayera Bibi v. Bhunath Haldar.

only to Acts made after the commencement of the General Clauses Act, that is to say, 1897, and by S. 10 (2) "to all Acts of the Governor-General in Council and Regulations made on or after the fourteenth day of January 1887." We do not understand that as making it apply to Acts passed before 14th January 1887. The Court-fees Act was passed in 1870. In our opinion, therefore, the answers to the questions put are as follows : (1) No. (2) Yes. It should be observed that there is a power to give a certificate directing a refund in a proper case, that is to say, where the delay is not caused by the applicant's laches. The power even so is discretionary. It might well be granted, in our opinion, if the applicant was out of time because of difficulties created owing to the Courts being closed. Any application for a refund should be made to the proper Court. This Court is concerned with the answer to the two questions. There is an inconvenience here owing to the war. The learned Judge whose judgment is under review is Pollock J. He, at the present moment, is not in India but is expected back shortly. We do not think it desirable to delay matters until his return in order to give the applicant time within which to pay the increased court-fee. We order therefore that if he pay the increased court-fee within one week it should be accepted.

N.K./R.K. *Reference answered.*

*** (28) A. I. R. 1941 Nagpur 238**

CLARKE J.

Kisanlal Sadasukh Marwadi —

Applicant

v.

Gulam Dastagir Ghasumiya and others — *Opposite Party.*

Civil Revn. No. 350 of 1940, Decided on 20th March 1941, to revise order of Addl. Dist. Judge, Akola, D/- 5th March 1940.

* Provincial Insolvency Act (1920), Ss. 38 and 17—Debtor dying before adjudication—Order of adjudication passed subsequently — Debtor's legal representatives can enter into composition with his creditors under S. 38 — Composition with creditors being one of proceedings for realization and distribution of debtor's property composition scheme comes within purview of S. 17 — Fair composition must be taken to be necessary within meaning of S. 17.

Where a debtor dies before he is adjudged insolvent and an order of adjudication is subsequently passed against him, his legal representatives can enter into a composition with his creditors in accordance with S. 38. Composition with creditors being one of the proceedings for the realization and distribution of property of the debtor a composition scheme falls within the purview of S. 17 and if the proposed composition is not a fair one to all concerned, the Court has ample power to refuse sanction to such composition. If it is a fair one, it is certainly necessary or at least desirable for the realization and distribution of the property of the debtor within the meaning of S. 17 : ('28) 15 A I R 1928 Mad 476 ; ('28) 15 A I R 1928 Mad 480 and (1886) 54 L T (N S) 682, *Rel. on*; ('33) 20 AIR 1933 Lah 997, *Disting.*; ('35) 22 AIR 1935 Lah 935, *Ref.*

[P 238 C 2; P 239 C 2]

J. R. Mudholkar — for Applicant.

W. W Bhole — for Opposite Party.

Order. — This revision application raises an interesting point of law which appears to be res integra in this country. The question is whether, where a debtor has died before he has been adjudged insolvent and an order of adjudication is subsequently passed against him, his legal representatives can enter into a composition with his creditors in accordance with S. 38, Provincial Insolvency Act. Section 17 of the Act provides:

> If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realization and distribution of the property of the debtor.

It is contended on behalf of the applicant, who objects to the scheme which the Courts below have approved of, that a composition with creditors is not necessary for the realization and distribution of the property of the debtor and that s. 17 therefore does not apply to any such scheme. It is also contended that under S. 38 only the debtor can submit a proposal for a composition with his creditors and that the legal representatives of the debtor are not included. In 51 Mad 344[1] it was held that under S. 17, Provincial Insolvency Act, an application by a debtor for adjudication made while he was alive could be continued after his death, when he could be adjudged insolvent. Although that is not the point in the case before me, there is some reasoning of the learned Judges who decided that case which is of assistance in determining the question which I have to decide. The learned Judges have pointed out the change which has taken place in the wording of S. 17, whereby the words "as if he were alive" have been omitted and the words "so far as may be necessary for the realization and distribution of the property of the debtor" included in S. 17, and they point out that the petition having been presented, the words "pro-

1. ('28) 15 A I R 1928 Mad 476 : 109 I C 94 : 51 Mad 344 : 54 M L J 585, Venkatarama Aiyar v. Official Receiver, Tinnevelly.

ceedings in the matter" include subsequent steps in connexion with it, and they say at page 346:

> We think that the alteration of the language in S. 17 is only intended to show clearly the nature of the proceedings, that is, that the proceedings are only for the realization and distribution of the property.

In 51 Mad 495[2] the same question arose for decision before another Bench of the Madras High Court, which explained the necessity for the change in the wording of S. 17. It was pointed out that

> in order to obviate any difficulty that might arise in continuing the proceedings by reason of these provisions (Ss. 37 and 43) the words above mentioned were enacted. All that is necessary after the insolvent's death is to see that the assets of the insolvent are realized and distributed among the creditors.

There is, therefore, no material alteration in the wording of S. 17 as far as this case is concerned. The corresponding section of the English Bankruptcy Act is framed in the same language that was used in S. 17, Provincial Insolvency Act, before the change above referred to, that is to say, the provision there is that the proceedings are to continue as though the debtor was alive. In (1886) 54 L T (NS) 682[3] it was held that if on the death of a bankrupt two days after filing his petition the debtor's representatives make arrangements with the creditors, the Court will use the discretion given to it by S. 108; that means that the Court can entertain and sanction a composition with the creditors come to by the representatives of the deceased bankrupt; and as I have already held that the wording of S. 17, Provincial Insolvency Act, makes no material difference, it follows that under the Provincial Insolvency Act also the representatives of a deceased insolvent can make a composition with the creditors.

On behalf of the applicant Mr. Mudholkar has referred to me a decision in A I R 1933 Lah 997,[4] where it was held that on the death of an insolvent there is an automatic discharge of the insolvent. From this he seeks to argue that there can be no scope for a composition with the creditors. That case was, however, one in which the property had been already distributed prior to the death of the insolvent, and the Court consequently held that the proceedings must automatically be held to have terminated. That follows from S. 17 itself, which allows the proceedings to continue only as far as may be necessary for the realization and distribution of the property of the debtor. The property of the debtor having been once distributed, there is no scope for the continuation of the proceedings after the death of the insolvent. Another Judge of the Lahore High Court in A I R 1935 Lah 935[5] on the question of discharge took a different view from the learned Judge in A I R 1933 Lah 997[4] and held that the minor sons of the debtor who had been declared insolvent after his death could ask the Court for a discharge, that is to say that there was no automatic discharge of the insolvent by reason of his death. On behalf of the non-applicants I have been invited to accept the reasoning in this case as analogous for the purpose of holding that the representatives of the deceased insolvent could make a composition with the creditors. I do not think it is necessary to consider the question whether a discharge is automatic or not, since it appears to me that S. 17 contains all the necessary provisions for supporting the order of the lower Courts in this case. Composition with creditors is one of the proceedings for the realization and distribution of the property of the debtor, and if the proposed composition is not a fair one to all concerned, the Court has ample power to refuse sanction to such composition. If it is a fair one, as it has been held to be by one of the two Courts in the case before me, it is in my view certainly necessary or at least desirable for the realization and distribution of the property of the debtor. There is, therefore, no reason to interfere with the order of the lower Court remanding the case. The application is dismissed. As, however, the point is not without difficulty and is as I have said, res integra, I make no order for costs.

G.N./R.K. *Application dismissed.*

2. ('28) 15 A I R 1928 Mad 480 : 110 I C 167 : 51 Mad 495 : 55 M L J 235, Bamathai Anni v. Kanniappa Mudaliar.
3. (1886) 54 L T (NS) 682, In re Walkar.
4. ('33) 20 A I R 1933 Lah 997 : 147 I C 695, Asa Nand v. Bishan Singh.
5. ('35) 22 A I R 1935 Lah 935 : 160 I C 708, Nanak Chand v. Official Receiver.

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* (28) A. I. R. 1941 Nagpur 239

VIVIAN BOSE J.

Khairullah Khan and Agajan Khan firm—Decree-holder—Applicant

v.

Mirajankhan Khudaidadkhan — Judgment-creditor—Non-applicant.

Civil Revn. No. 833 of 1939, Decided on 25th October 1940, from order of Court of 3rd Sub-Judge, 2nd Class, Nagpur, D/- 8th November 1939.

*Civil P. C (1908 as amended in 1937), Ss. 60 and 73—S. 60 does not affect S. 73—S. 60 proviso protects certain judgment-debtors and does not give one decree-holder priority over other—*A* obtaining decree against *B* in 1936 and attaching Rs. 60 out of his salary of Rs. 130 — *C* obtaining decree against *B* in 1938 and applying under S. 73—*C* held entitled to rateable distribution out of Rs. 60.

Section 60 as amended in 1937 does not affect the provisions of S. 73. The proviso to S. 60 is designed to protect certain judgment-debtors and not to give one decree-holder priority over another. Moreover, in cases falling under S. 60 (1) (c) the provisions of the Proviso can be waived by the judgment-debtor. Consequently, where *A* obtains a decree against *B* in 1936 and attaches Rs. 60 out of his salary of Rs. 130 and *C* also obtains a decree against *B* in 1938 and applies under S. 73, *C* is entitled to reteable distribution out of Rs. 60. It cannot be said that because under S. 60 as amended in 1937, Rupees 115 out of Rs. 130 would be exempt from attachment, *C* can claim rateable distribution of Rs. 15 only out of Rs. 60 attached by *A*, because it does not matter how the assets reach the Court's hands. Once they get there, they must be rateably distributed : ('19) 6 A I R 1919 Mad 647; ('21) 8 A I R 1921 Cal 749 and ('38) 25 A I R 1938 Sind 144, *Rel. on*; 36 Bom 156, *Not approved*; 40 Cal 619, *Disting.* [P 240 C 2; P 241 C 1]

M. Samiullakhan—for Applicant.

R. F. Rustomjee — for Non-applicant.

Order. — The question here is about the power of the Court to order rateable distribution. The applicant firm obtained two simple money decrees against one Deoranjan, a Government servant, in 1936. His salary was Rs. 130 a month. Under proviso 1 (i) to S. 60, Civil P. C., one-half of this salary was exempt from attachment and it appears that Rs. 60 a month was actually attached each month. The non-applicant obtained his decree against the same judgment-debtor in 1938 and asked for rateable distribution in the Rs. 60 which the applicant was receiving. In between these two dates, the Code of Civil Procedure (second amendment) Act of 1937 was passed. That Act states that the first Rs. 100 of the salary of any public officer plus one-half the remainder shall be exempt from attachment. This means that under this Act only Rs. 15 of the judgment-debtor's salary could be attached. It is admitted that this Act does not affect the applicant's rights under his decree and that he can continue to attach at the rate of Rs. 60 a month until satisfaction. But it is argued that the Act does fasten on the non-applicant's decree and that therefore he cannot attach more than Rupees 15 a month and consequently cannot ask for rateable distribution in any sum exceeding Rs. 15. The argument for the non-applicant is that S. 73, Civil P. C., has nothing to do with S. 60. Section 60 is concerned with attachment and sale. The non-applicant says that he does not want to attach anything and so is not concerned with S. 60. What he asks is that the assets which the Court finds in its hands through the execution of another decree be rateably distributed. The Rs. 60 are in the Court's hands. They are assets received in execution of a decree and the non-applicant holds a decree against the same judgment-debtor. Therefore, every ingredient of S. 73 is satisfied. Consequently, the non-applicant contends that effect must be given to its terms.

There is not much authority on this point. The only case directly in point is A I R 1938 Sind 144[1] where a single Judge held in circumstances similar to the present that S. 60 does not control S. 73. This principle finds support in A I R 1921 Cal 749,[2] 40 Cal 619[3] and 41 Mad 616.[4] They also point out that the new Code enlarges the scope of S. 295 of the old Code (present S. 73) and that now it does not matter how the assets reach the Court's hands. Once they get there they must be rateably distributed. The only decision to the contrary is 36 Bom 156.[5] It is not precisely in point in that it does not refer to a matter falling under S. 60 but the ratio decidendi applies, and if that decision is followed then the applicant's contention must prevail. The point is a difficult one and the reasons for and against appear to be almost equally balanced. On the whole I prefer the view taken in 41 Mad 616[4] to the one taken in the Bombay case. I think the change which S. 73 effects is significant in that, to quote Seshagiri Ayyar J.,

> the intention of the Legislature is to afford every creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. Therefore, unless there is something clear in the language of the provisions of the Code to exempt a payment from being applied to the benefit of all the creditors, Courts should incline to the view that monies in the hands of the Court should be shared by all decree-holders rateably.

The proviso to S. 60 is after all designed to protect certain judgment-debtors and not to give one decree-holder priority over another. It has been held in cases falling under S. 60 (1) (c) that the provisions of the pro-

1. ('38) 25 A I R (1938) Sind 144: 176 I C 682, Kewalmal v. Rodrigues.
2. ('21) 8 A I R 1921 Cal 749: 70 I C 541: 35 C L J 827, Hari Charan Roy v. Birendra Nath.
3. ('13) 40 Cal 619: 18 I C 839: 19 C W N 1125: 18 C L J 144, Harai Saha v. Faizlur Rahman.
4. ('19) 6 A I R 1919 Mad 647: 47 I C 538: 41 Mad 616: 35 M L J 150, Thiraviyam Pillai v. Lakshmana Pillai.
5. ('12) 36 Bom 156 : 12 I C 911 : 13 Bom L R 1193, Sorabji Cooverji v. Kala Raghunath.

viso can be waived by the judgment-debtor. In the circumstances, seeing that rateable distribution does not in any way affect the judgment-debtor, I prefer the Sind, Calcutta and Madras views. 40 Cal 619[3] appears at first sight to be against this view but I think that case is distinguishable. It was distinguished in the later Calcutta case cited above. The sale proceeds of an execution were deposited in Court there and the usual application was made for rateable distribution. Later the sale was set aside and the learned Judges held that after the setting aside of the sale the proceeds were no longer available for distribution. I think it is possible to regard the deposit in such a case as conditional, the condition being confirmation of the sale. If the sale is not confirmed, the money has to be returned under the Code and S. 73 does not in my opinion control those provisions any more than S. 60 controls S. 73 in the view I take. The lower Court has I think decided the case aright. The application is dismissed with costs. Counsel's fee Rs. 15.

G.N./R.K. *Application dismissed.*

*** (28) A. I. R. 1941 Nagpur 241**

GRUER J.

Emperor

v.

V. B. Kolte and another—Opposite Party.

Misc. Criminal Case No. 55 of 1940, Decided on 2nd June 1941, Reference made by Magistrate, First Class, Nagpur, D/- 24th August 1940.

***Contempt—Contempt of Court—Interference with administration of justice — Court should not be too sensitive where no harm is caused or intended to be caused — Non-party to proceedings sending notice to one of parties demanding damages and apology for reference made about him in written statement held did not commit contempt.**

Interference with the administration of justice is one of the well-recognized heads of contempt. What has to be seen is whether the person sought to be proceeded for contempt did interfere or did intend to interfere with the administration of justice. Courts, no doubt, have to be jealous to guard against any interference with their functions, but, on the other hand, they should not be too sensitive where no harm has been caused or was intended to be caused. [P 241 C 2; P 242 C 1; P 243 C 1]

Where a person who was non-party to certain criminal proceedings sent a notice to the accused demanding damages and apology for the latter having made references about him in the written statement :

Held, that his action did not amount to contempt of Court : ('40) 27 A I R 1940 All 114, *Rel. on ; Case law referred.* [P 243 C 1]

J. Sen, R. K. Rao, M. Adhikari and N. T. Mangalmurti — for Non-Applicant 2.

Order. — These proceedings have been submitted by Mr. B. P. Pathak, Magistrate, first class, Nagpur, for action to be taken under the Contempt of Courts Act against the non-applicants, Mr. V. B. Kolte, Assistant Professor, King Edward College, Amraoti, and his counsel, Dr. P. S. Deshmukh, Advocate, Amraoti. A case under S. 7, Copyright Act, was pending in that Magistrate's Court. The complainant was one B. S. Pandit, and the accused was N. K. Behere who moved the Magistrate to take the present proceedings. In the course of his written statement he had stated that this non-applicant (Professor Kolte) and one other gentleman had an interest in the book in question, and in that connexion he made certain allegations about the nature of the interest, which were considered by them to be insulting and defamatory. Accordingly Dr. Deshmukh acting on behalf of his client sent to Mr. Behere a notice, which it is said amounts to contempt of Court. In that notice after reproducing the offending part of the statement it is set out that the statement is thoroughly irrelevant for the purpose of a decision of the case, was made deliberately and maliciously with the intention of harming and knowing that it would harm the reputation of Professor Kolte, etc. Behere was therefore called on by it to make amends within four days by paying a sum of Rs. 2500 damages and publishing a public and unconditional apology in three newspapers. The notice concludes : "If you fail my client would be forced to take such civil and criminal action as he may be advised."

On being asked to show cause, the non-applicants contend that their action did not amount to contempt of Court as they were justified in protecting Mr. Kolte's interests and they had no intention of obstructing the pending proceedings. Dr. Deshmukh in his written statement has also tendered an unconditional apology in the event of the Court finding that in fact he has been guilty of contempt. The learned Magistrate in his order of reference relies on two cases, A I R 1940 Nag 110=I L R (1940) Nag 69[1] and 57 ALL 573.[2] It is not possible to give a comprehensive definition of what amounts to contempt of Court, but as the learned Judges state in 57 ALL 573[2] interference with the administration of justice is one of the well-recognized heads of

1. ('40) 27 A I R 1940 Nag 110 : 189 I C 58 : 41 Cr L J 709 : I L R (1940) Nag 69, Telhara Cotton Ginning Co. Ltd. v. Kashinath Gangadhar.
2. ('35) 22 A I R 1935 All 117 : 159 I C 193 : 57 All 573 : 1935 A L J 29, Rajendra Singh v. Uma Prasad.

7 N L R 190,[1] 25 N L R 52,[3] 39 Cal 704[5] and 1940 N L J 96[9] relate to the setting aside of documents and not to the setting aside of a decree or award. They can therefore be easily distinguished. 16 N L R 84,[2] 38 Mad 922[4] and I L R (1939) Nag 373[8] relate to decrees. A I R 1930 Nag 73[6] is a case where an adoption was sought to be set aside. The only case of all those mentioned above, in which an award was sought to be set aside, and in which it was held that ad valorem court-fee was necessary is A I R 1932 Oudh 224.[7] Accordingly if the learned Additional District Judge is correct in saying that under Rule 33 of the Co-operative Societies Rules the award of the Registrar is a decree, then he is right to hold on the authority in 16 N L R 84[2] and 38 Mad 922[4] that ad valorem court-fee is necessary, but Rule 33 does not say that an award by the Registrar is a decree. What the rule says is that

> any award, decision or order mentioned in R. 32 shall, on application to such Court (civil Court), be enforced in the same manner as a decree of such Court.

The rule therefore recognises that the award, decision or order is not a decree. That being so, those cases, which hold that a suit for a declaration that a decree is not binding must be stamped ad valorem are also distinguishable. Therefore the only case of those mentioned above which has to be considered by reason of its reference to the setting aside of an award is A I R 1932 Oudh 224.[7] To that may be added A I R 1924 Mad 489[10] and A I R 1927 Cal 45.[11] All these are cases under the Land Acquisition Act in which the land acquisition officer awarded compensation and on an appeal against the amount of compensation awarded it was held that the decision of the lower Court was a decree and therefore ad valorem court-fee was payable; but under the Land Acquisition Act, S. 26 (2) every award under Part 3 of the Act, under which the award which was being contested in that case had been made, is deemed to be a decree. There is a vast difference between an award being deemed to be a decree and an award being executable as a decree. Therefore those cases also are no authority for any case other than under the Land Acquisition Act. Accordingly there being apparently no direct authority, I must examine the question with reference to the actual provisions of the Court-fees Act and the general principles of law. As to the general principles to be observed they have been mentioned by Kinkhede A. J. C. in A I R 1930 Nag 73[6] at p. 76 where he has observed that

> it is a rule of construction peculiar to fiscal enactments that they must be very strictly construed so as not to impose an unnecessarily heavy burden on the subject. Such an act being a taxing statute must use very clear and unambiguous language,

quoting certain observations of learned Judges in (1869) L R 4 H L 100[12] at p. 122 and (1902) 1 K B 388.[13] The learned Additional Judicial Commissioner has also referred to another principle in the interpretation of statutes, namely that a Court cannot alter the law or read into the statute words which it thinks should have been there. In I L R (1939) Nag 373[8] at p. 375 this Court interpreted apparently with approval the view of the Full Bench of the Madras High Court which in 38 Mad 922[4] amounted to this that

> it does not matter how you frame your prayer. What matters is what must be done in order, if that prayer be granted, to make the granting of it effective.

In the case before me, no doubt the plaintiffs have asked for a declaration, but reading their plaint as a whole, it is clear that what they really want is that the award of the Registrar should be set aside. There is a specific provision in the Court-fees Act for the setting aside of awards, viz., Art. 17 (iv) of Sch. 2. For this a fixed fee of Rs. 15 is laid down in this province. It has been said that the award referred to there is an award by arbitrators and not the decision of the Registrar of Co-operative Societies, but an award is not defined in the Court-fees Act and I see no reason to limit the interpretation of the term to an award by arbitrators. The dictionary meaning of an award is a "judicial decision." Certain kinds of awards have been termed "decrees" by the Civil Procedure Code, therefore, it would appear to me that any judicial decision which is not a decree might be considered to be an award for the purposes of Art. 17 (iv), Court-fees Act.

In 35 Cal 202[14] their Lordships of the Privy Council held that a suit brought by a plaintiff, whose objection to the attachment of property in execution proceedings had been dismissed, to establish her title to the property by a declaration and

10. ('24) 11 A I R 1924 Mad 489: 78 I C 435: 46 M L J 150, In re Assistant Commissioner of Labour.
11. ('27) 14 A I R 1927 Cal 45: 97 I C 140, Secretary of State v. K. S. Bannerjee.
12. (1869) L R 4 H L 100: 38 L J Ex 205: 21 L T 370, Partington v. Attorney-General.
13. (1902) 1 K B 388: 71 L J K B 289: 85 L T 714: 50 W R 210: 66 J P 132: 18 T L R 111, Attorney-General v. Earl of Selborne.
14. ('08) 35 Cal 202 : 35 I A 22 : 7 C L J 36 : 12 C W N 169 (P C), Phul Kumari v. Ghansham Misra.

for an injunction to restrain the defendant from executing his decree fell under Art. 17 (i), Court-fees Act, and therefore the fixed fee referred to in that article was payable on the plaint. Their Lordships, therefore, although 4 Bom 515[15] does not appear to have been brought to their notice, in effect confirmed the correctness of the Full Bench decision of the Bombay High Court, which was to the same effect. The ratio decidendi is very clearly set out in 4 Bom 515[15] and although it was a case under Art. 17 (i), the reasoning applies with full force to Art. 17 (iv). In that case the plaintiff prayed for a decree declaring the plaintiff's right to sell certain property covered by a mortgage which was then being executed and to recover his money by virtue of the said right. He paid the fixed fee ordained by Article 17 (i). The High Court observed that such a suit might fall either under S. 7 (iv) (c) or under Article 17 (i) of Sch. 2 and, therefore, it was their duty, inasmuch as the Court-fees Act is a fiscal enactment, to adopt that which generally would press least heavily on the subject and that was Art. 17 (i). The same can be said here because the case before me can fall under S. 7 (iv) (c) or under Art. 17 (iv) of Sch. 2 and that being so it behoves me to adopt that which presses least heavily on the plaintiffs, viz., Art. 17 (iv). A suit to which Art. 17 (v) applies could also be said to be a suit for a declaration that an adoption is invalid and for the consequential relief of having it set aside, but nevertheless a fixed fee has been provided for such a suit. In this connexion my attention has been drawn to A I R 1930 Nag 73[6] from which I have quoted above, as being a suit to set aside an adoption in which ad valorem court-fee was required to be paid, but the decision in A I R 1930 Nag 73[6] turned not upon Art. 17 (v) but on the notification under S. 9, Suits Valuation Act. It was because of that notification that ad valorem court-fee was held to be payable. Otherwise I have no doubt that a fixed fee under Art. 17 (v) would have been payable.

For the above reasons I hold that this suit falls under Art. 17 (iv) of Sch. 2 to the Court-fees Act and that the fee which has been paid is sufficient. The order of the lower Court requiring the applicants to pay ad valorem court-fee is set aside and the case will proceed on the court-fee already paid. Costs of this application will be costs in the suit. I allow Rs. 75 as counsel's fee.

G.N./R.K. *Application allowed.*

15. ('80) 4 Bom 515 (F B), Dayachand Nemchand v. Hemchand Dharamchand.

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(28) A. I. R. 1941 Nagpur 245

NIYOGI AND GRUER JJ.

Gulab Nathuram — Defendant — Appellant

v.

Bindraban Sheocharan — Plaintiff — Respondent.

Second Appeal No. 393 of 1938, Decided on 7th April 1941, from appellate decree of Extra Additional District Judge, Saugor, D/- 24th February 1938.

C. P. Land Revenue Act (2 of 1917), Ss. 122, 123, 187 and 157 (3) — Cosharer defaulting in paying land revenue — Lambardar or sadar lambardar paying revenue on behalf of defaulting cosharer acquires charge on defaulting cosharer's share—He can charge interest in such case on equitable principles.

A lambardar or sadar lambardar who pays arrears of land revenue on behalf of his defaulting cosharer acquires a charge on the share of the defaulting cosharer or patti lambardar inasmuch as he stands in the position of a co-mortgagor so as to be entitled to the benefit of the securities on the principle of subrogation embodied in S. 92, T. P. Act, and even if the benefit of the Crown charge be not available to a private party the principle of maritime salvage lien as a principle of equity applies to such a case: 11 M I A 241 (P C), *Rel. on*; 7 C P L R 42 and 11 C P L R 111, *Not approved*; ('32) 19 AIR 1932 Nag 171, *Approved*. [245 C 2; P 249 C 1]

The lambardar or sadar lambardar is, in such cases, entitled to charge interest on equitable principles and the more so because of the specific provision in S. 157 (3), C. P. Land Revenue Act: ('32) 19 AIR 1932 Nag 171, *Rel. on*; ('38) 25 A I R 1938 P C 67, *Expl.* [P 249 C 1]

J. Sen — for Appellant.

A. V. Khare — for Respondent.

Order. — The questions which have been referred to this Bench are :

1. Whether a lambardar or sadar lambardar who pays arrears of land revenue on behalf of his defaulting cosharer acquires a charge on the share of the defaulting cosharer or the patti lambardar.

2. Whether the lambardar or sadar lambardar is, in such cases, entitled to charge interest; if so, on what principle ?

The facts out of which these questions have arisen are as follows : The appellant is a lambardar of Patti No. 2 of Mouza Bamana and the respondent is the sardar lambardar. On 14th January 1934, the respondent paid into the Government treasury a sum of Rs. 73-5-9 on account of land revenue of Patti No. 2 payable for the year 1933-34 and instituted his suit on 19th February 1937 to recover that amount from the appellant with a prayer that it should be declared a charge on the patti. The suit was dismissed in the

trial Court as being beyond three years as computed from 14th January 1934. The lower appellate Court held that inasmuch as the plaintiff was seeking to enforce a charge on the patti, the three years' limitation should be computed from the end of the agricultural year 1933-34, i. e., 1st June 1934 under S. 160, C. P. Land Revenue Act, and decreed the claim. There has been an acute controversy on the point whether a co-owner who has paid land revenue in full is entitled to a charge on the shares of his defaulting co-owners. In 14 Cal 809,[1] 14 ALL 273,[2] 26 Bom 437,[3] 7 Pat 613,[4] 6 Rang 500,[5] 7 C P L R 42[6] and 11 C P L R 111[7] the answer was given in the negative. The contrary view was taken in 26 Mad 686[8] and 28 N L R 214.[9] Before the question came to be settled in Calcutta and Allahabad in the two Full Bench cases, the course of decisions was not uniform and even in the Full Bench cases the opinion was far from being unanimous. In Bengal, the old Saddar Diwani Court has held that a cosharer who paid the land revenue was not entitled to a charge. The opinion veered round to the other side in 14 Beng L R 155[10] on the strength of the dictum of their Lordships of the Privy Council in 11 M I A 241[11] at p. 258. Lord Romilly in delivering the judgment in the last-mentioned case made the following observations :

> Considering that the payment of the revenue by the mortgagee will prevent the Talook from being sold, their Lordships would, if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the Talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Talook as against all persons interested therein for the amount of the money so paid.

This dictum was interpreted in 14 Beng L R 155[10] by Markby and Mitter JJ., as laying down a broad principle of maritime salvage-lien in favour of cosharers who, by payment of land revenue on behalf of their defaulting cosharers, saved the whole mahal from being lost to the proprietary body. Doubts having arisen as to the correctness of that interpretation the question was brought up for consideration before a Full Bench of five Judges in 14 Cal 809[1] and it was held by a majority of 3 to 2 Judges that the interpretation was erroneous; among the majority was Tottenham J., who had himself been of the contrary opinion. In Allahabad, 11 M I A 258[11] was followed in 8 ALL 384[12] at p. 386 but in view of the Full Bench decision in 14 Cal 809[1] the matter came to be considered in 14 ALL 273[2] by a Full Bench of five Judges who by a majority of 4 to 1 accepted the majority view of the Calcutta Full Bench. Edge C. J., who wrote the leading judgment declared his conversion to that view. In 11 Bom 313,[13] which was a case decided before 14 Cal 809,[1] Sargent C. J., and Birdwood J. expressed their opinion that the view taken in 14 Beng L R 155[10] on the basis of Lord Romilly's dictum in 11 M I A 241[11] was in accordance with justice, equity and good conscience and that it should be followed in India although the question as to the co-owner's payment in creating a charge on the other interests which shared the benefit of the payment was still unsettled in England. That view did not commend itself to Lawrence C. J., in 26 Bom 437[3] which came to be decided after the two aforesaid Full Bench decisions of the Calcutta and Allahabad High Courts. The learned Chief Justice was of opinion that the payment by a co-owner for protecting his own interest would not by itself entitle him to a charge on the share of his defaulting co-owners, although it might entitle him to obtain contribution.

In 7 Pat 613[4] the arguments on either side were exhaustively considered and although the opinion was in favour of the view taken by the majority of the Judges in the Calcutta Full Bench case it was conceded that the arguments in favour of the charge were entitled to weight. The decision in that case was in some measure influenced by the rule of practice obtaining in that Court not to depart from cursus curiae of the Calcutta High Court. On the other hand the course

1. ('87) 14 Cal 809 (F B), Kinu Ram Das v. Mozaffer Hosain Shaha.
2. ('92) 14 All 273 : 1892 A W N 117 (F B), Seth Chitor Mal v. Shib Lal.
3. ('02) 26 Bom 437 : 4 Bom L R 90, Shivrao v. Pundlik.
4. ('28) 15 AIR 1928 Pat 641 : 111 I C 84 : 7 Pat 613 : 9 P L T 573, Bhuneshwari Kuer v. Manir Khan.
5. ('28) 15 A I R 1928 Rang 278 : 113 I C 801 : 6 Rang 500, U Shwe Bwa v. Maung Thauk Kya.
6. ('94) 7 C P L R 42, Hirasa v. Lakhansing.
7. ('98) 11 C P L R 111, Balaji Sonar v. Govinda.
8. ('03) 26 Mad 686 (F B), Rajah of Vizianagram v. Rajah Setrucherla Somasekhararaz.
9. ('32) 19 A I R 1932 Nag 171 : 140 I C 532 : 28 N L R 214, Manoharlal v. Kanhaiyalal.
10. ('75) 14 Beng L R 155 : 22 W R 411, Syed Enayet Hossein v. Muddun Moonee Shahoon.
11. ('67) 11 M I A 241 : 8 W R 17 : 2 Suther 77 : 2 Sar 275 (P C), Nugenderchunder Ghose v. Sreemutty Kaminee Dossee.
12. ('86) 8 All 384 : 1886 A W N 134, Lachman Singh v. Salig Ram.
13. ('87) 11 Bom 313, Achut Ramchandra Pal v. Hari Kamti.

of decisions in the Madras High Court has been consistently against the majority view of the Calcutta and Allahabad Full Bench cases as will appear from 11 Mad 452,[14] 26 Mad 686[8] and 36 Mad 493.[15] The difference of opinion turns on the question whether such a charge can be sustained on any broad principle of equity recognized by the British Courts. It is common ground that in the Courts of Ireland the charge was held to arise in favour of the paying co-owner on the principle of the maritime salvage lien. The reason why that principle should not be applied in India is to be found in the following observations of Edge C. J., in 14 ALL 273[2] at pp. 299, 300:

> Justice, equity and good conscience are captivating terms; but before a Judge applies what may appear to him at first sight to be in accordance with justice, equity and good conscience, he must be careful to see that his views are based on sound general principles, and are not in conflict with the intentions of the Legislature or with sound principles recognized by authority. In my opinion, justice, equity and good conscience do not require us in India to go so far afield as the Irish Courts, in order there to seek for, and thence to import into India, novel principles of equity, based on unsound analogy, and rejected as unsound by Judges of such authority as Bowen and Fry L. JJ., and not followed by such an authority as the late Cotton L. J. in (1887) 34 Ch D 234.[16]

In 26 Mad 686[8] it was shown that the principle of maritime salvage lien was neither opposed to the fundamental English conception of equity, nor to the principles underlying the relevant provisions of the Transfer of Property Act nor to the policy of the Government as reflected in the various enactments in India. No doubt, Fry L. J., in (1883) 23 Ch D 552[17] and Bowen L. J., in (1887) 34 Ch D 234[16] were not prepared to apply the principle of the salvage lien to the facts immediately before them but from the observations made by Lindley L. J., in (1890) 62 L T (NS) 475[18] (referred to in 26 Mad 686[8] at p. 705) it cannot be maintained that the doctrine of salvage lien is foreign to the English ideas of equity:

> I do not, however, regard the plaintiffs' claim to a lien as necessarily excluded by the propositions in (1883) 23 Ch D 552.[17] If an owner of onerous property agrees with me to indemnify me or my property which may fall on me or my property, and the owner makes default, and I or my property have to bear those burdens, I am inclined to think that I should have, as against the owner of the onerous property, a lien on it for the money expended by me in bearing that burden which as between him and me he ought to bear. I should, in the case supposed, have preserved the onerous property for him under circumstances which entitled me to it at his expense, and I do not think that in such a case my sole remedy is by an action for damages against him; the existence of such personal remedy would not, I think, exclude such lien. I am not aware of any decision inconsistent with this view and the principles on which many cases of equitable lien depend seem to me to support a lien in such a case.

These observations which were made with reference to payment by a stranger cannot be inappropriate in the case of payment by a co-owner who shares with his defaulting co-owner the common obligation to pay land revenue. That the principle of the maritime salvage lien is not wholly foreign to English Courts is also clear from the decision of their Lordships of the Privy Council in 21 Cal 142.[19] That was a case of a bona fide payment pending litigation of Government revenue and cesses for the preservation of the estate by a person as a consequence of which the estate was adjudged to his opponent. Their Lordships pointed out that his claim to recover the sums paid him was in the nature of salvage. This doctrine had been recognised by their Lordships in 11 M I A 241 [11] at p. 258 in the observation

> that the person who had such an interest in the Talook as entitled him to pay the revenue due to the Government, and did actually pay it, was thereby entitled to a charge on the Talook as against all persons interested therein for the amount of the money so paid.

No doubt, in that case it was the mortgagee who had paid the revenue, but the principle reflected in the aforesaid dictum is wide enough to include the case of a co-sharer. This principle is fully recognised in American Courts as will be evident from the statement of the law contained in Freeman on Co-tenancy and Partition, at p. 321, (para. 263) as follows:

> But we think all claims by one co-tenant against another, arising out of the common property, and disconnected alike from any agreement between the parties, and from any circumstances which clearly establish that one must necessarily have been authorised to act for the other, must, in their assertion, be limited to the declaration and enforcement of a lien against the property. If a different rule prevailed, every part owner would constantly incur the hazard of being required to pay, for the removal of incumbrances, sums in excess of the value of the estate.

Even apart from the principle of maritime salvage lien, the well recognized prin-

14. ('88) 11 Mad 452, Seshagiri v. Pichu.
15. ('13) 36 Mad 493 : 15 I C 262, Amman Paruykyi v. Pakran Haji.
16. (1887) 34 Ch D 234 : 56 L J Ch 707 : 56 L T 220 : 35 W R 143, Falcke v. Scottish Imperial Insurance Co.
17. (1883) 23 Ch D 552 : 52 L J Ch 762 : 48 L T 564 : 31 W R 561, In re Leslie, Leslie v. French.
18. (1890) 62 L T (NS) 475, Strutt v. Tippett.
19. ('94) 21 Cal 142 : 20 I A 160 : 6 Suther 366 (P C), Dakhina Mohon Roy v. Saroda Mohan Roy.

ciple of subrogation may well come into operation in cases such as the present. In 11 Mad 452[14] Muthusamy Iyer J., based his decision in favour of a charge on the principle of subrogation, although Bhashyam Aiyangar J., in 26 Mad 686[8] preferred to rest his decision on the principle underlying Ss. 82 and 100, T. P. Act. That principle of equity is now crystallised in S. 92, T. P. Act, which, when read with S. 100 of that Act, would apply to the case of a charge. There is nothing in the policy or the letter of the revenue law of our province to repel its application. On the other hand, the provision in S. 138, C. P. Land Revenue Act, whereby a purchaser of any estate or mahal, share or land sold for arrears of land revenue acquires it free from incumbrance, tends to show that the purchaser gets the benefit of the first charge in favour of the Crown. That is because the land revenue comes to be paid out of the sale proceeds. His position is precisely the same as that of a purchaser in execution of a mortgage decree obtained by the first of a series of incumbrancers. Not only the auction purchaser of an estate sold for recovery of arrears payable directly to the Crown under S. 122, C. P. Land Revenue Act, 1917, but also one who purchases a village share under S. 157 (3) of that Act for recovery of the amount due from a cosharer but not paid by him and paid by the lambardar, obtains a title free from any incumbrance as was held in 18 N L J 149[20] by Subhedar A. J. C., and in 18 N L J 185[21] by the Revenue Member. In the latter case it was observed :

> It cannot have been the intention that because the sum was first paid by the sadar lambardar the security from which the sum so paid was subsequently to be recovered should be less than if it were recovered direct. This would mean that the primary provision of s. 122, Land Revenue Act, which makes land revenue a first charge on all land would be abrogated. The incumbrance might be such that no recovery could be made subject to it and the sum paid could not be recovered. The intention of treating money due as an arrear of land revenue is to give that priority . . . .

In 30 N L R 240[22] at pp. 245-246 Staples A. J. C., expressed a different view as to priority of the purchaser, but implicit in these decisions is the recognition of the fact that the first charge in favour of the Crown is of the same nature and legal effect as that contemplated in S. 100, T. P. Act. If so, it must logically follow that the cosharers in a village stand to each other in the relation of co-mortgagors so as to attract the application of the rule of subrogation embodied in S. 92, T. P. Act. In this respect, it is pertinent to notice that S. 128 (d) provides the transferring of the share of any cosharer who has not paid his quota of land revenue to any cosharer who is willing to pay. This point is made clearer in R. 9 of O. 39, Civil P. C., which says that where land paying revenue to Government is the subject-matter of a suit, if the party in possession neglects to pay land revenue and such land is ordered to be sold, any party to the suit claiming to have interest in such land, may be put in immediate possession of the land upon payment of revenue by him. That clearly shows that the payment of land revenue due by the defaulting cosharer transfers to him the latter's interest in the property instead of merely creating a personal liability against him.

The old view of the Judicial Commissioner's Court enunciated in 7 C P L R 42[6] and 11 C P L R 111[7] followed the Full Bench decisions of the Allahabad and Calcutta High Courts presumably for the reason that in those times the first charge in favour of the Crown was supposed to be an incident of the Crown's prerogative, the benefit of which could not pass to the subject. Section 65 of the old C. P. Land Revenue Act, 1881, made revenue payable under a sub-settlement but not revenue payable under a settlement the first charge. The provision about land revenue being a first charge was made in the Act of 1917 following perhaps Ss. 141 and 142, U. P. Land Revenue Act, 1901. The old view was abandoned in 28 N L R 214[9] in which Macnair J. C. regarded the sadar-lambardar who paid land revenue as being in the position of a surety in view of the obligation laid on him to collect and pay land revenue by S. 123, C. P. Land Revenue Act. It is well known that a surety is entitled to the benefit of the securities and it is to be borne in mind that it is on this principle that the right of one of several joint debtors to be subrogated to the security of the common creditor arises (*see* Ghosh's Law of Mortgage, 4th edition, p. 347). The view taken by Macnair J. C., finds support in the two recent decisions of the Division Bench of this High Court, 1939 N L J 477[23] and A I R 1940 Nag 156.[24]

20. ('35) 22 A I R 1935 Nag 185: 158 I C 263 : 18 N L J 149, Manrakhanlal v. Parmanand.
21. ('35) 18 N L J 185, Nanhusao v. Nandlal.
22. ('34) 21 A I R 1934 Nag 201: 148 I C 714 : 30 N L R 240, Yedha Society v. Pragdas.
23. ('39) 26 AIR 1939 Nag 302 : 185 I C 780 : 1939 N L J 477, Zalliram v. Mangalsingh.
24. ('40) 27 A I R 1940 Nag 156 : 190 I C 641, Sitaram v. Krishnarao.

Thus, it is clear from the foregoing discussion, that a cosharer who is liable to discharge the indivisible obligation to pay land revenue which constitutes the primary charge on the estate, stands in the position of a co-mortgagor so as to be entitled to the benefit of the securities on the principle of subrogation embodied in S. 92, Transfer of Property Act; even if the benefit of the Crown charge is assumed for the sake of argument to be not available to a private party, the trend of the revenue legislation and the decisions of both the highest revenue and judicial authorities would justify the adoption of the principle of maritime salvage lien as a principle of equity in view of the observations made by their Lordships in 11 M I A 241[11] at p. 258. Our answer to the first question is in the affirmative.

As to the second question, we see no reason to dissent from the view of Macnair J. C., in 28 N L R 214.[9] Nothing that has been said by their Lordships of the Privy Council in I L R (1938) 2 Cal 72[25] impairs the soundness of that view. That the statute itself contemplates award of interest is clear from the wording of S. 157 (3), Central Provinces Land Revenue Act. If the paying cosharer is entitled to recover interest when he pursues the summary remedy under that section there is no reason why he should be denied interest when he sues in the civil Court. In the Calcutta case cited above their Lordships lay down that considerations of equity would justify the award of interest in a case to which the Interest Act does not apply. In a case such as the present, the principle of equity comes to the aid of the cosharer who pays land revenue, as has already been shown. The same equity must dictate the award of interest, the more so because of the specific provision in S. 157 (3), C. P. Land Revenue Act. Our answer to the second question is in the affirmative.

G.N./R.K. *Answer accordingly.*

25. ('38) 25 A I R 1938 P C 67 : 173 I C 15 : 65 I A 66 : I L R (1938) 2 Cal 72: 32 S L R 374 (P C), B. N. Ry. Co., Ltd. v. Ratanji Ramaji.

(28) A. I. R. 1941 Nagpur 249

VIVIAN BOSE J.

Abdul Majid Khan — Plaintiff — Applicant.

v.

Digambar Jairam Kunbi and another — Defendants — Opposite Party.

Civil Revn. No. 636 of 1939, Decided on 15th October 1940, from decree of Sub-Judge, Second Class, Darwha, D/- 3rd August 1939.

(a) C. P. Debt Conciliation Act (2 of 1933), Ss. 8, 8 (2) and 9 (1) — Conditions of S. 8 fulfilled — Operation of S. 8 (2) is automatic and independent of order of Board—Civil Court has jurisdiction to determine whether conditions requisite for operation of S. 8 (2) were present or not — Aforesaid conditions not present — Board's order under S. 8 (2) cannot bind civil Court.

Section 8 (2) brings into operation a sort of guillotine which is automatic and which is independent of any order of the Board. The civil Court has jurisdiction in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic ; if they were not present then no order of the Board purporting to discharge the debt for the reason given in S. 8 (2) can bind the civil Court : ('37) 24 A I R 1937 Nag 259 and 20 N L J 29, *Foll.*; 1940 N L J 256 and 1939 N L J 171, *Expl.*

[P 250 C 1]

(b) Interpretation of statutes—Statute harsh and effecting departure from ordinary law — It must be construed strictly in favour of subject relying on ordinary law.

A harsh Act, such as the C. P. Debt Conciliation Act in so far as it affects a departure from the ordinary law, ought to be strictly construed and in favour of the subject who relies upon the ordinary laws of the land. [P 251 C 1]

(c) C. P. Debt Conciliation Act (2 of 1933), Ss. 8 (1) and (2) and 9A — Omission to verify statement as required by S. 9A is curable and not fatal defect — Unverified statement — No objection taken and matter allowed to proceed — Party concerned afforded no opportunity to cure defect—Statement must be deemed to have substantially complied with S. 8 (1).

An omission to verify statements as required by S. 9A is a curable irregularity and not a fatal defect. If no objection is taken at the time and the matter is allowed to proceed on the basis of the unverified statement and the party concerned is afforded no opportunity of setting the irregularity right, then the statement should be regarded as complying substantially with the provisions of section 8 (1). [P 251 C 2]

R. N. Padhye and T. B. Pendharkar — for Applicant.

V. K. Rajwade — for Opposite Party 1.

Order. — The suit is based on two promissory notes. The defendants admit execution and admit that they would be liable for the claim except for a defence which they raise under S. 8 (2), Debt Conciliation Act. It appears that the defendants went to the Debt Conciliation Board and included this among other debts. Notices were issued to the plaintiff and the other creditors, and on 26th October 1936 the plaintiff submitted his written statement purporting to act under S. 8 (1), Debt Conciliation Act. That statement however was not verified in accordance with the provisions of S. 9A, but no objection was taken to this before the Board, nor did the Board reject the

statement for that reason or object to it; on the contrary it proceeded to endeavour to bring about a conciliation. On the next hearing (10th November 1937) the Board stated that it had seen the papers, which of course would have included this written statement, and again no objection was taken, and the Board told the agents of the parties to consult their masters about a conciliation which had been proposed. On the next hearing (17th March 1938) the creditors stated that they did not want to settle. The Board thereupon stated that after scrutiny of the plaintiff's written statement it found that it was not properly verified: therefore it was not a proper statement in law, and in the absence of a proper statement the debt stands discharged under S. 8 (2). It thereupon issued a certificate under S. 15 (1), Debt Conciliation Act, in respect of this and other debts.

The lower Court decides that it has no jurisdiction to entertain this claim because the question whether the order of the Debt Conciliation Board discharging the debt under S. 8 (2) was correct or not cannot be gone into by the civil Court. The learned Judge relies on 1939 N L J 171.[1] The question is not free from difficulty, but the decisions seem to be uniform, except for the ruling just cited, that S. 8 (2) of the Act brings into operation a sort of guillotine which is automatic and which is independent of any order of the Board. If the facts stated in that section are present then the guillotine falls; if they are not then the guillotine cannot fall, and no order of the Board stating that it has fallen can affect the position. The civil Court has in each case to determine whether in fact the matters which bring the provisions of S. 8 (2) into operation were present or not. If they were present then the discharge is automatic; if they were not present then no order of the board purporting to discharge the debt for the reason given in S. 8 (2) is binding on a civil Court. These rulings include a decision of the Division Bench in I L R (1938) Nag 489[2] at pp. 493 and 495 and also a decision of a single Judge in 20 N L J 29.[3] Gruer J., in 1939 NLJ 171[1] also appears to be of that opinion, because he states that though it is difficult to reconcile two dicta which he quoted from the decision of the Division Bench he concludes that he is bound to follow the one which holds that consideration of the point by the civil Courts is not shut out by the Debt Conciliation Act. I am also referred by Mr. Rajwade for the non-applicants to a decision in 1940 N L J 256[4] which states that although the civil Court can enquire into the question whether a Debt Conciliation Board has exceeded its jurisdiction yet the Court will not interfere with the board's order if the proceedings before the board were with jurisdiction. But the point here is that the operation of S. 8 (2) is independent of the board and is automatic. No question of the board's jurisdiction to determine whether the matters which S. 8 requires are present or not arises. As I have just said all the rulings are agreed that what the board chooses to say on this question is neither here nor there. It is for the civil Court to determine when the matter comes before it whether the facts which bring S. 8 (2) into play are present or not. It is no part of the board's business to discharge debts under section 8 (2).

The difficulty in the case, however, is due to another passage in 1939 N L J 171.[1] In dealing with the merits of the board's decision in that case Gruer J., appears to have been of the opinion that the view of the board that an unverified statement is no statement at all under the law was correct. But I am not clear about the ratio decidendi upon which the learned Judge proceeds, because after stating that the board in his opinion acted harshly in not giving the plaintiff in that case time for amendment of the statement, which he agrees it could have done, he continues:

> The Legislature, however, in S. 18 expressly provides that no appeal or application for revision shall lie against any order passed by a board, and when the civil Court finds that that order, although harsh, is technically correct it cannot interfere.

The decision consequently appears to me to be based upon the assumption that the board is required under the Debt Conciliation Act to pass an order of discharge under S. 8 (2), and that if it does so no civil Court can question that order. That, however, as I have shown, is directly contrary to the decisions which I have cited above including the decision of the Division Bench, and with respect appears to me to be contrary to what Gruer J., himself had stated a little earlier in his decision. I therefore do not feel bound by the decision because naturally

1. ('39) 1939 N L J 171, Baboo v. Heeralal.
2. ('37) 24 A I R 1937 Nag 259 : 170 I C 905 : 20 N L J 57 : I L R (1938) Nag 489, Shivdin v. Ramratan.
3. ('37) 20 N L J 29, Motiram v. Bhurmalsao.
4. ('40) 1940 N L J 256, Jawarchand v. Tapiram.

I have to follow the decision of the Division Bench.

I have therefore now to decide whether, quite apart from the Board's view of the matter, an unverified written statement is fatal under S. 8 (2). There is no doubt that the Act is not very clearly worded and that it is possible to take either view. On the whole I am inclined to take the view which disturbs the existing law as little as possible. The Act is a harsh one, and it has repeatedly been held that in so far as it affects a departure from the ordinary law it ought to be strictly construed and construed in favour of the subject who relies upon the ordinary laws of the land. Section 8 (1) requires a statement of debts to be submitted. Section 8 (2) states : "Every debt of which a statement is not submitted . . . shall be deemed . . . to have been duly discharged, etc." So far as this section is concerned no question of verification arises. Section 9 (1) then sets out certain particulars which the creditor is bound to set out in his statement, and then comes the provision which is relevant to this case, viz., S. 9-A. That is mandatory in its terms in that it uses the word 'shall,' and it requires every statement submitted under sub-section (1) of S. 8 to be signed and verified in the manner prescribed by the Code of Civil Procedure for signing and verifying plaints. The question arises however whether an omission to do so is a curable irregularity, or whether it is a fatal defect. It is clear that every irregularity in the statement cannot be held to invalidate it and thus bring into operation the very harsh provision of S. 8 (2). It must therefore be a question for decision in every case whether the irregularity complained of is so fatal as to go to the root of the matter and make the statement in point of law no statement at all. That is the ordinary rule which is followed in the civil Courts in respect of the provisions of the Civil Procedure Code even where the Code employs language which is as mandatory as the language we find in S. 9-A.

Even in the matter of verification of plaints, we find O. 6, R. 15, Civil P. C., employing language which is just as mandatory as that to be found in S. 9-A. It has however never been doubted that an unverified plaint is not a nullity; it has never been doubted that the defect, if discovered in time, can be cured; and it has never been doubted that a decree passed on the basis of such a plaint when not cured is not a nullity; that is to say, the plaint even though not verified is a valid document. There seems to be no reason why the same rule of interpretation should not be applied in the case of the Debt Conciliation Act, especially when, as I have said, the Act is a harsh one, taking away rights and privileges which the ordinary law confers. In the circumstances, I am of opinion that the type of irregularity which we find here is a curable one and is not fatal. If no objection is taken at the time, and the matter is allowed to proceed on the basis of the unverified statement and the party concerned is afforded no opportunity of setting the irregularity right then, in my opinion, the statement should be regarded as complying substantially with the provisions of S. 8 (1) in exactly the same way as a plaint would in similar circumstances be regarded as complying substantially with the provisions of the Code of Civil Procedure even though not verified. The application is allowed, and the claim will now be decreed. But the effect of the certificate given by the Debt Conciliation Board under S. 15 (1), Debt Conciliation Act, will be given effect to, that is to say, the plaintiff will not be allowed either interest or costs, and the enforcement of this decree will be postponed in accordance with the provisions of S. 15, Debt Conciliation Act. Costs of this revision will be paid by the non-applicants No counsel's fee as no certificate has been filed.

G.N./R.K. *Application allowed.*

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* (28) A. I. R. 1941 Nagpur 251

STONE C. J. AND CLARKE J.

Mohanlal Madangopal Marwadi —
Defendant 2—Appellant

v.

Vinayak Sadasheo Sonak and others —
Plaintiffs—Respondents.

First Appeal No. 107 of 1936, Decided on 28th October 1940, from decree of Addl. Sub-Judge, First Class, Amraoti, D/- 26th August 1936.

* Contract Act (1872), S. 12—Insanity—Onus is on person alleging insanity — Person established to be usually of unsound mind—Burden of proof is on party alleging execution of document during lucid interval — Evidence as to insanity—Cumulative effect should be gauged.

No doubt the onus of proving insanity is in the first place on the person who alleges it, the normal presumption being of sanity. But once it has been established that the person is usually of unsound mind the burden of proof is on the party who alleges that the document was executed during a lucid interval : *Case law relied on.* [P 252 C 2]

The circumstances evidencing insanity should be considered together and not individually and their

cumulative effect should be gauged: ('19) 6 AIR 1919 P C 6, *Rel. on.* [P 254 C 2]

R. N. Padhye — for Appellant.

P. Y. Deshpande — for Respondents 1 to 3.

Judgment.—This is an appeal by defendant 2 against a preliminary foreclosure decree on a mortgage executed by one Govinda on 28th May 1920 to secure a sum of Rs. 3000 alleged to have been advanced to him by four mortgagees whose representatives are the respondents in this appeal. The appellant is the subsequent transferee of part of the mortgaged property. The mortgagor Govinda is dead. The main defence of the appellant in the lower Court was that at the time of executing the mortgage Govinda was of unsound mind and incapable of understanding the nature of the mortgage contract which was therefore void. This contention forms the basis in the lower Court of issue 3 which has been dealt with in para. 8 of the judgment in the following way :

Issue 3. — On the point of Govinda's unsound condition of mind all that the defendant's evidence shows is that he was at times of unsound mind. Even this evidence comes from persons who had little personal knowledge about it. Jani who must be the best informed person about her husband's mental condition deposed that Govinda used to behave well and give no trouble if he were to get his meals regularly and tobacco when wanted by him. The defendant has thus failed to prove that Govinda was imbecile or was of unsound mind at the time of the execution of the mortgage-deed in suit. I find accordingly.

This shows that the lower Court placed the burden of proving the unsoundness of Govinda's mind on the appellant who according to the learned Judge had failed to discharge it. No doubt the onus of proving insanity is in the first place on the person who alleges it, the normal presumption being of sanity. In this connexion the learned counsel for the respondents has placed before us A I R 1923 Pat 187[1] and A I R 1927 Cal 889.[2] Both these were cases which turned on the primary burden of proving insanity which, as we have just stated, lies on the party alleging it. The Courts held that in the circumstances of those cases the party alleging the insanity had failed to prove it. Different considerations arise however where there is sufficient evidence to discharge this primary burden, for instance, such a case would be as in 40 Mad 660[3] where the person whose mental capacity was being considered had been certified to be a lunatic under the Lunacy Acts. A similar case is that in (1848) 11 Beav 105[4] where it is said :

The finding of the jury upon a commission of lunacy that a party is lunatic, throws the burthen of proof on those who contend the contrary. The presumption is not then as it would otherwise be, in favour of sanity or soundness of mind, but the contrary must be proved; that is, they who allege the sanity of a person at a time subsequent to that at which he has been found lunatic under a commission, have the burthen cast on them of proving the soundness of mind of such person.

But the shifting of the burden of proof is not confined to cases where the lunatic has been certified. If there is sufficient evidence to prove that the person whose mental capacity is in doubt is usually of unsound mind, then the burden shifts to the person who alleges his sanity to prove that the contract was made during a lucid interval. This is recognised by S. 12 of the Contract Act. The section says :

A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

This principle also finds support in (1778-1794) 29 E R 632 at p. 634[5] :

If derangement be alleged, it is clearly incumbent on the party alleging it, to prove such derangement; if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers . . . and it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement.

See also A I R 1932 Rang 24[6] in which the learned Judge refers to the passage which we have cited in (1771-1794) 29 E R 632[5] and says :

This, no doubt, would be a satisfactory method where the unsoundness of mind has been proved by definite expert evidence, but in the present case there is no evidence of that kind.

1. ('23) 10 AIR 1923 Pat 187 : 68 I C 372 : 4 P L T 17, Mahomed Yakub v. Abdul Quddus.
2. ('27) 14 AIR 1927 Cal 889 : 104 I C 527 : 55 Cal 285, Ram Sunder v. Kali Narain.
3. ('17) 4 AIR 1917 Mad 265 : 33 I C 578 : 40 Mad 660, Seshamma v. Padmanabha Rao.
4. (1848) 11 Beav 105 : 12 Jur 444 : 83 R R 122, Snook v. Watts.
5. (1778-1794) 29 E R 632, Attorney-General v. Parnther.
6. ('32) 19 A I R 1932 Rang 24 : 137 I C 766, U Aung Ya v. Ma E Mai.

The learned Judge then goes on to discuss the evidence in the case before him and holds that it is sufficient to prove that at the time when the old lady, whose mental capacity was under consideration, executed the document, the validity of which was in question she had a lucid interval. A I R 1940 Mad 73[7] is a case where an old man was found to be suffering from senile dementia previous to the time at which he executed the documents which were in question in the case; it was held that the nature of the executant's derangement was such that it was improbable that he would show any improvement in the course of time, and hence the burden of proof was on the party who alleged that he had executed the documents while of sound mind. The evidence was then examined and the conclusion reached that the circumstances coupled with the nature of the executant's disability were sufficient for the Court to hold that he was of unsound mind when he executed the documents. Therefore taking into consideration the above case law together with the provisions of S. 12, Contract Act, we hold the view that once it has been established that the person is usually of unsound mind the burden of proof is on the party who alleges that the document was executed during a lucid interval.

That being so, we next have to examine the facts and circumstances in order to determine whether Govinda was usually sane or insane. As far as the evidence of his insanity is concerned, we have the statements made by Motiram (D. W. 1), who was the agent of Jani, the wife of Govinda, to the effect that, on the day he joined the service with Jani, while a police enquiry was going on, a settlement was arrived at in a dispute between Soni and Jani as to who was to look after Govinda and his property, that Soni should remain in possession of the property and that Govinda should live with her while Jani went to reside with her father. Jani was dissatisfied with this decision and applied to the Sessions Judge, presumably the witness meant the District Judge, for regaining possession of her husband Govinda and the proceedings were probably under the Lunacy Act. The witness goes on to say that before the enquiry had ended a compromise was effected and hence Govinda was not declared a lunatic. The next witness Ukandrao (D. W. 2) states that Govinda was insane and used to answer irrelevantly when he was spoken to. He was brought back from the village of Mangroli by the Circle Inspector and was questioned as to why he had gone there and he replied that he had been taken there by Bhanji, respondent 4, whereupon the Circle Inspector gave Govinda in charge of Jani who managed his estate. In cross-examination this witness stated that Govinda used at times to talk sensibly and at times not. This visit of the Circle Inspector took place about a fortnight after the execution of the mortgage in suit. Similarly, witness 3 for the defence, Ramchandra, says that Govinda was "a little half mad and used to act on what others used to tell him." His estate was managed by Soni for a time and thereafter by Jani. This witness also speaks of Govinda being brought from Mangroli by the Circle Inspector of Police and given in the custody of Jani. At this time, the witness adds, he looked like a half mad man. The value of this witness's evidence would not be great if taken alone because in cross-examination he admits that he only considered Govinda to be half mad because he spoke little and answered 'yes' when asked if he would come to his village and sometimes gave no answer at all when questioned. Nevertheless the evidence has some value specially when taken in conjunction with the other evidence in the case.

Witness 5 for the defence is Mt. Jani, who is the only witness about whom the learned Judge of the lower Court has said anything. He discounts her evidence because she says that Govinda gave no trouble as long as his meals were regularly given and tobacco when required. This statement is certainly made by Jani, but it is not all that she says. She commences her deposition by saying that on account of Govinda being mad the panchas advised her to marry him so that he might be properly looked after and she accordingly married him some 16 years before the date of her deposition and she looked after him. She also corroborates the other witnesses, to whom we have referred above, as to Govinda being brought back by the police and given in Jani's custody. The nature of Govinda's derangement according to Jani was apparently melancholia. Witness 6 for the defence, Kedaji, also speaks of Govinda's insanity, saying that he used to throw stones at times. The witness was apparently in Govinda's service for two or three years during which time he behaved normally for weeks at a time. The witness used to look after his cultivation and

7. ('40) 27 A I R 1940 Mad 73, Govindaswami v. Srinivasa Rao.

sometimes used to feed him and had occasions to lock him up when he became violent. He also speaks of Govinda being brought to Jani by the police. It is noteworthy that Kedaji does not say that Govinda ever threw stones at him although he does not say that he did not. It is noteworthy because Uttam Singh (D. W. 9) gives Kedaji as the source of his information when he says that Govinda used to throw stones, adding that he threw a stone at Kedaji in his presence. This witness avers that Govinda was mad and used to throw stones at people and assault passers-by unnecessarily. He used at times to sit on the roof of his house and throw stones or tiles at passers-by and sometimes had to be chained with iron chains. He was mad in 1919 when the panchayatnama (Ex. 2 D. 6) was executed. The only evidence on the plaintiff respondents' side to rebut the above evidence is that of respondent 4, Bhanji, who was the principal defendant in the case and very much interested in the result. He says that Govinda was not a lunatic or insane or of weak intellect. In fact one of the plaintiffs' own witnesses, Ramchandra (P. W. 3), has admitted that Govinda was sane at times and insane at times.

When, in addition to this oral evidence of Govinda's insanity, we examine the circumstances which have come to light in the case, we feel convinced that Govinda's normal state of mind was unsound. He was a kind of village idiot. Thus we find that before the mortgage in suit was executed Govinda had partitioned his property equally with Soni, his brother's daughter. No doubt a gift of property by one relation to another would not be any indication of unsoundness of mind, but it was not a deed of gift that was executed but a partition deed, and a partition is usually executed only when the persons between whom the property is to be partitioned have each a claim on that property. Soni had no claim to this property and hence it is curious, to say the least, that Govinda should have found it necessary to partition the property with her. Then again we find that the partition deed and the mortgage in suit were not executed at Borgaon, where Govinda ordinarily resided, but at Mangruli where Soni was living with Bhanji who was keeping her. Govinda was in some way induced to go to Mangruli, and while there he was presumably to some extent under the influence of Soni and Bhanji and we find him executing the questioned document whilst there. Then again the mortgage purports to have been executed for a consideration of Rs. 3000 which is said to have been required by Govinda for the liquidation of his debts to others and for the improvement of his cultivation. There is no evidence whatsoever of anybody having been paid off by Govinda or on behalf of Govinda out of the mortgage money. Nothing could have been easier, if this recital in the document were true, than to have examined at least one of the creditors paid out of the money, and moreover the evidence shows that Govinda was not managing his own cultivation but either Soni before she went to live with Bhanji or Jani or paid agents managed it for him. It seems improbable therefore that Govinda while staying in their village without the help of Jani or of any agent should have taken a loan for purposes of his cultivation. Thus it has not been proved that he required money at the time.

It is true that a show was made of paying over the money before the Sub-Registrar, but there was nothing to prevent the money being taken back as soon as the parties came out of the Sub-Registrar's office. If the Sub-Registrar had been examined as a witness, as he was in A I R 1932 Rang 24,[6] and had said that at the time when the transactions took place in his presence Govinda appeared to be in a perfectly normal state of mind, that would have been something, but the Sub-Registrar has not been examined in this case. Besides this the circumstances of the bringing back of Govinda by the police, the commencement of proceedings in lunacy in the Court of the District Judge, the marriage of Jani to Govinda in order that he should have somebody to look after him, all point to the fact of Govinda being a man of weak intellect. Finally it is admitted that nothing was repaid towards the mortgage debt; nevertheless no action was taken to enforce the debt by a suit until the very end of the period of limitation, and even limitation was only saved by the fact that the civil Court vacation was continuing at the time when the period of limitation would normally have expired. These circumstances, taken individually, would of themselves be of little value to prove insanity, but, as has been pointed out by their Lordships of the Privy Council in 15 N L R 68,[8] they have to be considered together and their cumulative effect gauged. The cumulative effect then of all this evidence convinces us that

8. ('19) 6 A I R 1919 P C 6: 50 I C 264: 15 N L R 68 (P C), Ghunsham Das v. Umapershad.

insanity was the normal state of Govinda's mind, and therefore the burden was on the respondents to prove that the transaction in question took place during a lucid interval. There is no evidence of this beyond the bare statement of Bhanji himself to which we have referred. Bhanji entered the witness-box in rebuttal of the defendants' evidence. It was surely his duty to rebut the evidence of insanity which had been adduced by the defendants. Apart from his own bare statement, there is not a particle of evidence examined in rebuttal on the question of Govinda's state of mind.

The only difficulty which we felt in coming to a conclusion in favour of the appellant was the fact that the appellant himself had acquired his interest in the mortgaged property from Govinda. If Govinda was, as we think he was, a lunatic it would appear that the appellant's claim to the fields is no better than that of the respondents since he, like them, has acquired his interest from a lunatic. In their reply to the written statement of the defendants the plaintiffs actually made this point in para. 13 where they say:

> The defendants have also got their title from this very Govinda, subsequent to the mortgage. The defendants or their transferors, who got the property from Govinda, having acquired the property from the very source—Govinda—cannot challenge the transaction of the plaintiffs on the ground that Govinda was not competent to transfer.

But although they took the point they do not seem to have pressed it; no issue was framed in respect of it. No argument was addressed apparently in the Court below on these lines since the learned Judge has said nothing about it in his judgment, and even before us the respondents' counsel has not said anything on this aspect of the case. The defendant did not acquire his interest directly from Govinda but from the transferees of Govinda, and possibly the respondents may have felt that the defendant would have been able to advance some plea which would have had the effect of neutralising this contention on their part if it had been pressed. Since therefore the respondents have not chosen to press this point on their own behalf, we do not consider that we should press it for them. The defendant is admittedly in possession of the mortgaged fields and must remain in possession of them unless the plaintiffs can establish a better title. For the reasons which we have set out we do not consider that they have established a better title. The appeal accordingly succeeds and the plaintiffs' suit is dismissed with costs in both Courts.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Nagpur 255

VIVIAN BOSE J.

Rambhaoo Lalji Tote — Plaintiff — Appellant

v.

Gurudayal Nagolal Khatri — Defendant 4 — Respondent.

Appeal No. 580 of 1938, Decided on 14th March 1941, from appellate decree of Addl. Dist. Judge, Amraoti, D/- 23rd December 1937.

(a) Hindu law—Alienation — Legal necessity — Necessity and benefit to estate are questions of fact—Plea as to necessity and benefit expressly waived in trial Court — First Appellate Court is justified in refusing it to be raised before it—Nor can it be raised in second appeal.

It is beyond doubt that an alienee who wishes to bind the shares of persons not a party to his mortgage has to allege and prove necessity or benefit or antecedent debt or something of that kind. Where the plea of legal necessity and benefit to the estate has been expressly waived in the trial Court by the plaintiff, the first Appellate Court is justified in refusing it to be raised before it and being a question of fact the plea cannot be raised in second appeal. [P 256 C 2 ; P 257 C 1]

(b) Hindu law — Alienation— Joint family — Necessity depends upon pressure on estate—Family in affluent circumstances and well in position to pay its debts—There can be no necessity to alienate to satisfy debt.

It is well settled that under the Hindu law necessity depends upon pressure on the estate. If therefore the joint family is in affluent circumstances and can well afford to pay its debts there can be no pressure, and consequently there can be no necessity for alienating to satisfy the debts. [P 258 C 1]

(c) Stamp Act (1899), S. 36—Pronote insufficiently stamped admitted in evidence—It is not open to parties or to Court to call it in question on ground of insufficiency of stamp.

Where an insufficiently stamped pronote has been admitted in evidence it is not open to either side, and still less to the Court, to call it in question on the ground of the insufficiency of the stamp. It has to be treated as if it had been properly stamped: 1938 N L J Notes 57, *Foll.*; ('27) 14 A I R 1927 Nag 241, *Ref.* [P 257 C 2]

(d) Hindu law—Debts — Father's antecedent debt— Son is liable — Non-father manager can alienate son's share provided there is legal necessity — But father manager can alienate it irrespective of necessity.

Under the Hindu law the sons are liable to pay their father's antecedent debts. The non-father manager can alienate a son's share for this purpose provided it is necessary to do so. Whether it is necessary will depend upon the circumstances of the family. But the father manager stands on a higher footing vis a vis his sons and can alienate

for his own antecedent debts whether it is necessary or not: ('33) 20 A I R 1933 All 273 (FB), *Foll.*; ('24) 11 A I R 1924 P C 50, *Expl. and Rel. on* ; 13 Cal 21 (P C), *Ref.* [P 258 C 2]

(e) Pleadings — Waiver — Plea of necessity held waived.

In reply to the express pleas of the defendants the plaintiff stated that the debt was binding because it was antecedent and that consequently the question of legal necessity did not arise :

Held that there was clear waiver of the question of legal necessity. [P 257 C 1]

M. R. Bobde and T. P. Naik—for Appellant.

Judgment. — The only question with which we are concerned in this appeal is whether defendant 4 Gurudayal is liable on the mortgage in suit. It will be necessary to have the family tree to understand the facts. The tree is as follows :

PANDULAL

Sheshlal (defendant 1)	Kesheolal (defendant 2)	Narayanlal (defendant 3)	Nagolal (dead)
Ramdayal (defendant 5)	Sheodayal (defendant 6)	Shrikisanlal (defendant 7)	Gurudayal (defendant 4).

The suit is on a mortgage, Ex. P-1 dated 16th June 1933, executed by the first three defendants who are the sons of Pandulal shown in the tree. It was executed by them personally and was also executed by defendant 1 on behalf of defendant 4 who was then and still is a minor, his father Nagolal having died previous to this. The mortgage was for Rupees 4000. This Rs. 4000 was due on a promissory note dated 9th April 1929 (Ex. P 3) executed by all the four sons of Pandulal. That note in turn was executed as a renewal of an earlier note Ex. D-10 dated 16th January 1926 which was also executed by all the four sons of Pandulal. Nagolal died after the execution of the second promissory note, Ex. P-3, and the question is whether defendant 4's uncles as managers of the family could alienate his share in the family property for a debt for which the father Nagolal was responsible.

There are various ways in which the share of defendant 4 could be reached in circumstances like these. It would be possible for the plaintiff to allege and prove either legal necessity or benefit to the estate, or it would perhaps be possible to rely on the rule of antecedent debt. So far as the questions of legal necessity and benefit to the estate are concerned, I do not think we can go into them here because they were expressly set on one side by the plaintiff in the lower Courts and being questions of fact cannot be raised in second appeal. It is denied in this Court that the matter was waived in the Courts below and there is a ground of appeal to that effect. But the learned Judge of the lower appellate Court states that it was expressly waived in the first Court. The passage in which he says so reads thus :

The question of legal necessity was expressly waived aside by counsel for the plaintiff in the original Court and the doctrine of antecedent debt relied upon. There was no attempt to make out legal necessity, and in these circumstances there is no need to ask if it is present.

It would appear from this passage that there was an attempt to raise this question in the lower appellate Court but the learned Judge brushed it aside on the ground that the question had been expressly waived in the first Court. We have consequently to go back to the proceedings in that Court to see whether this is so. It is beyond doubt that an alienee who wishes to bind the shares of persons not a party to his mortgage has to allege and prove necessity or benefit or antecedent debt or something of that kind. He has to show why persons who have not signed the document are nevertheless liable upon it. No attempt was made to show this in the plaint. The defendants however went out of their way to state that even if the consideration for the mortgage was proved, the same was not binding upon them because there was neither legal necessity nor family benefit, and one set of defendants stated in explicit terms that the family was then in affluent circumstances and was consequently in a position to pay off its debts and that therefore even if those debts existed there was no necessity to mortgage.

It is well settled that necessity depends upon pressure on the estate. If therefore the family is in affluent circumstances and can well afford to pay its debts, it is clear that there can be no pressure, and that consequently there can be no necessity for alienating to satisfy the debts. The learned counsel who appeared for the plaintiff in the first Court appears to have realised this because he stated in reply to these express pleas of the defendants that the debt was binding because it was antecedent and that consequently the question of legal necessity did not arise. The exact plea is as follows :

The debt for which the mortgage deed in suit was executed constitutes a valid antecedent debt of defendant 4's father and therefore the mortgage deed is binding on the share of defendant 4 as well as the other minor defendants, irrespective of the question of legal necessity or benefit of the family

In my opinion, this is clear waiver of the question of legal necessity. The position which the learned counsel was adopting was that an enquiry into the circumstances of the family was unnecessary because, even conceding that they were in an affluent condition the debt is still binding on defendant 4 because so far as he is concerned it is an antecedent debt. The pleadings, or what passes for pleadings in this Province, then continued. The defendant stated that even if the debt was antecedent it had been borrowed for an illegal purpose, namely the starting of a new business which was not an ancestral business of the family. The plaintiff denied this and set out what the debt had been borrowed for, namely for cultivation purposes, and therefore alleged that the debt was neither illegal nor immoral and consequently formed a good antecedent debt. In these circumstances the lower Court was justified in declining to enter into the questions of necessity and benefit. It will be noticed that there was no issue about these questions in the first Court. It is clear therefore that the matter was not tried and it is clear that it was not tried because of the attitude which the plaintiff adopted. I cannot allow the matter to be raised here.

That leaves outstanding a difficult question of law, namely, whether the father alone can alienate for an antecedent debt of his or whether a manager can also do so for a debt of the father of the person sought to be made liable. But before entering into that, I will dispose of another point which arises in the case, namely whether the debt, antecedent or otherwise, was time-barred at the date of the mortgage. That depends upon whether the promissory note, Ex. P-3, constituted a good ground of liability. The finding of the lower appellate Court is that it did not because it was insufficiently stamped as a promissory note. It bore a stamp of only one anna.

The learned counsel for the appellant argues that even though the stamp was insufficient to make this document a good promissory note, it was enough to make it a good acknowledgment, and he relies on a decision in 10 N L J 45[1] which states that a document insufficiently stamped as a promissory note can be used as an acknowledgment if it bears a one anna stamp. I need not decide here whether that case was rightly decided because in my opinion the matter is settled in another way by a Division Bench of this Court in 1938 NLJ Notes 57.[2] Section 35 of the Stamp Act states that no instrument chargeable with duty shall be admitted in evidence for any purpose if it is not duly stamped, but S. 36 states that if in spite of this the document is admitted then it shall not be called in question at any stage of the same suit on the ground that it was not duly stamped. Now Ex. P-3 was admitted in evidence in the lower Court and consequently it was not open to either side, and still less to the Court, to call it in question on the ground of the insufficiency of the stamp. It had to be treated as if it had been properly stamped. If it is so treated, then clearly the debt due at the time of the mortgage was not time-barred.

Going back now to the point which raises the only real difficulty in the case, the learned counsel for the appellant relies on a decision of their Lordships of the Privy Council in 46 ALL 95[3] at p. 104 and particularly on the third proposition enunciated by their Lordships on that page. Unfortunately, the language used by their Lordships is ambiguous. They have set out five propositions. In the first, they deal with the right of the managing coparcener of a joint undivided estate to alienate or burden the property qua manager. In the second, they state "if he is the father ..." In the third they state "if he purports to burden the estate by mortgage. . . . " . The question is whether the word "he" used in the third proposition relates to the managing coparcener referred to in the first or to the father referred to in the second. It might refer to either. Unfortunately also there is not much in the body of the judgment which can elucidate the difficulty and consequently the decision does not, in my opinion, assist us in the present case.

The learned Judge of the lower appellate Court has relied upon a Full Bench decision of the Allahabad High Court in 55 ALL 370.[4] The position there was much the same as here and what the learned Judges held was that the father alone has the privilege of alienating for an antecedent debt and that if a manager who is not the father attempts to do so, then the alienation is not binding on the "son" even though it would have been binding on him had the alienation been

1. ('27) 14 A I R 1927 Nag 241 : 104 I C 470 : 10 N L J 45, Udaram Maguiram v. Laxman Marwari.

2. ('38) 1938 N L J Notes 57, Nawab Mohiuddin v. Balabux.

3. ('24) 11 AIR 1924 P C 50 : 77 I C 689 : 46 All 95 : 51 I A 129 (PC), Brij Narain v. Mangal Prasad.

4. ('33) 20 AIR 1933 All 273 : 142 I C 333 : 55 All 370 : 1933 ALJ 123 (FB), Chiranji Lal v. Bankey Lal.

made by his father. The learned Judges however appeared to have considered that the fact that the debt was due by the father might make it necessary for the manager to alienate so as to bind the son for the simple reason that that debt would constitute pressure on the estate and would therefore be for a necessary purpose. They accordingly remanded the case to enable the question of necessity to be tried. I was asked to do the same here but as I have said necessity depends not only on the existence of a debt and of its nature but also on the circumstances of the family. If they were in affluent circumstances and could have paid off the debt, clearly there was no necessity to mortgage. As that question has been shut out the course adopted in the Allahabad case cannot be taken and we are therefore left with the proposition of law with which the learned Judges dealt. As to that the learned Judges did not consider the question for themselves because they were of opinion that the matter was settled by the Privy Council in 46 ALL 95.[3] They took the word "he" in the third proposition to refer to the father as distinct from a manager who is not the father, and there is certainly much to be said for that point of view. But as their Lordships were not considering this particular point in 46 ALL 95,[3] and as the other construction which is contended for on behalf of the appellant in this case is also possible, I prefer to examine the question independently, especially as it is one of considerable importance.

I do not think anything can be gained by going back to the original texts because, as the Judicial Committee has remarked in 46 ALL 95[3] at pp. 101 and 102, the present position has been reached as a result of a long course of decisions which, stare decisis, cannot be unsettled now. The rule is illogical. It is destructive of the principle of independent coparcenary rights in the sons, (which is the fundamental right), and so I do not think it should be extended further than the decisions warrant. At best it is an exception grafted on to the fundamental position by Judges. As to the authorities, there also I do not think any useful purpose will be served by scrutinising them at length because the rules they embody have been summed up by the Judicial Committee in 13 Cal 21[5] at p. 25 and have been quoted in 46 ALL 95[3] at p. 102. Lord Hobhouse said in the former case :

> Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality.
>
> In the latter case their Lordships remark:
>
> It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mitakshara law that the manager cannot burden the estate for his own purposes . . . On the other hand there is the obligation of the son to discharge his father's debts, based on the doctrine of pious duty, but perhaps reflecting a remnant . . . from the older laws of Manu under which the son had no interest during the father's life-time.

If this is how the position arose, and their Lordships would appear to suggest that that is probably the case, then there is a wide difference between the father's powers and the powers of a manager who is not the father. If the former derives his power from the residuum left to him from the old days when the sons had no right during his life-time, then the rule cannot apply to the non-father manager because he never had such rights. His powers have always been limited to alienating for necessity or for benefit. In the circumstances I agree with the conclusion reached in 55 ALL 370.[4] There can of course be no doubt that the sons are liable to pay their father's antecedent debts, and I think there can be no doubt that the non-father manager can alienate a son's share for this purpose provided it is necessary to do so. Whether it is necessary will depend upon the circumstances of the family. But the father-manager stands on a higher footing vis a vis his sons and he can alienate for his own antecedent debts whether it is necessary or not. That appears to be the distinction between the two. The decision appealed from is therefore correct and the appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

5. ('86) 13 Cal 21 : 13 I A 1 : 4 Sar 682 (P C), Nanomi Babuasin v. Modhun Mohun.

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(28) A. I. R. 1941 Nagpur 258

CLARKE J.

Jamnadass Nagindass — Defendant —Applicant

v.

Beharilal Bishweshwarlal Zunzunwalla — Plaintiff — Non-Applicant.

Civil Revn. No. 220 of 1940, Decided on 25th November 1940, for revision of order of 3rd Sub-Judge, 2nd Class, Nagpur, D/- 12th February 1940.

(a) Civil P. C. (1908), O. 23, R. 1 (2)—Object stated—Words "sufficient ground" in R. 1 (2) refer to defect in suit shutting out fair trial on

merits and arising out of bona fide error by plaintiff or Court which can be rectified only by trial de novo.

The main object of O. 23, R. 1 (2) is to prevent the defeat of justice on technical grounds. The words "sufficient grounds" in the aforesaid rule refer to some defect in the suit, which has the effect of shutting out a fair trial on the merits, and arises out of some error made in good faith by the plaintiff, or by the Court at the instance of either party which can only be effectively set right by a trial de novo : 5 N L R 88 and ('17) 4 A I R 1917 Nag 121, *Foll.* [P 260 C 1]

The plaintiff sued for refund of goods purchased by him as the goods were not of the standard agreed upon. The defendant denied that the goods supplied were not up to the agreed quality and counterclaimed the price of the goods sought to be recovered by the plaintiff on the ground that plaintiff had not paid the same. The plaintiff however subsequently filed an application to withdraw the suit with permission to bring a fresh suit on the ground that he had sold the goods and realised a reasonable price. The permission was granted by the trial Court:

***Held* that by being able to sell the goods which the plaintiff had purchased from the defendant, at a satisfactory figure, the plaintiff thereby no longer suffered any damage, and his whole cause of action had vanished. There was therefore no need to reserve any right to bring a fresh action. [P 260 C 1]**

(b) Civil P. C. (1908), O. 8, R. 6 — Suit on regular side — Defendant claiming set-off or making counterclaim — Plaintiff's claim breaking down by reason of withdrawal or otherwise — Defendant can claim decree for set-off in same Court in same suit—Counterclaim triable by Court of Small Causes — Defendant cannot agitate it in regular Court in which suit was filed.

In the case of a genuine set-off, such as is contemplated by O. 8, R. 6 if the plaintiff's claim breaks down for any reason including a withdrawal the defendant is entitled to have his set-off considered by the same Court, and can be given a decree for a set-off in the same suit, but where his claim is not a genuine set-off but a counter-claim which is triable by the Small Cause Court, he cannot agitate it in the regular Court in which the suit was instituted : 9 C W N 748 and ('34) 21 AIR 1934 All 543, *Expl.* [P 261 C 1]

P. P. Deo — for Applicant.

R. G. Limsay — for Non-applicant.

Order.—The plaintiff brought this action to obtain a refund of the price of certain materials which he had purchased from the defendant on the ground that they were not up to the standard of quality which was agreed upon. He claimed a refund of Rs. 373 which he had paid to the defendant. The latter denied that the materials supplied were not up to the agreed quality, and, on the ground that the plaintiff had not paid Rs. 373, which was the price of the materials he counter-claimed Rs. 373. Subsequently on the 12th February 1940, when the case was fixed for evidence, the plaintiff's pleader made the following statement to the Court, which was the Court of the third Subordinate Judge, second class :

Plaintiff has sold the films in dispute, and they have fetched a reasonable price. He does not therefore wish to prosecute this suit, but reserves his right to raise these points by way of defence in case the defendant chooses to file a suit against him. Under the circumstances permission should be granted to him to bring a fresh suit, if necessary.

Upon this statement the Court passed the following order :

Plaintiff is allowed to withdraw this suit, with the permission to bring a fresh suit, if necessary. He shall pay defendant's full costs. Pleader's fees on the admission scale.

Thereafter, holding that by the withdrawal of the suit the counterclaim had become a separate suit which was triable by the Small Cause Court, he returned the written statement as a plaint to be presented in the proper Court. The defendant has accordingly presented his claim in the Small Cause Court, but that Court, I am informed, has postponed registration of the suit until this application has been decided, as it was doubtful whether it had any right to entertain the claim in the circumstances in which it came to be presented to it. The application raises two questions for determination : (i) whether the lower Court was right in reserving to the plaintiff permission to bring a fresh action on withdrawing this action, and (ii) whether the lower Court was right in returning the written statement for presentation as a plaint to the Small Cause Court.

(i). On this point the contention of the applicant is that, once the plaintiff was satisfied with his bargain with the defendant by reason of his having disposed of the goods at an adequate price to a third party, that was the end of his suit, and the only question remaining to be decided was whether he had paid the consideration of Rs. 373 to the defendant or not. There was no need therefore to reserve to the plaintiff a right to bring a fresh action and the matter did not fall within the purview of O. 23, R. 1 (2), Civil P. C. The order purports to be made under O. 23, R. 1 (2) (b), which is to the following effect :

Where the Court is satisfied that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

The non-applicant in support of the lower Court's order argued that the order is not a

final order but is conditional, the condition being that set out in the statement quoted at the beginning of this order, that it will only operate if it is rendered necessary in defence of the defendant's suit to recover Rs. 373 from him. The order does not make this clear, but even if it did, I am of the opinion that the circumstances are not such as to justify the application of O. 23, R. 1 (2). The circumstances in which that rule comes into play have been explained in 5 N L R 88[1] and A I R 1917 Nag 121[2] with which I fully concur. In 5 N L R 88[1] the learned Additional Judicial Commissioner referred to a ruling by the Judicial Committee of the Privy Council in 13 M I A 160[3] which was given prior to the present Civil Procedure Code. Therein, their Lordships prescribed the limits within which the power of the Court to allow a fresh suit could be used. The Courts, according to that ruling, were limited to questions of form. The learned Additional Judicial Commissioner then pointed out that, when the law was codified in the Civil Procedure Code, effect was given to this pronouncement of their Lordships by requiring the Court to be satisfied (a) that the suit must fail by reason of some formal defect or (b) that there were sufficient grounds for allowing withdrawal or abandonment of a suit or part of a suit with liberty to bring a fresh suit. He then pointed out that the main object of this rule is to prevent the defeat of justice on technical grounds, and that the words "sufficient grounds" in the rule referred to some defect in the suit, which had the effect of shutting out a fair trial on the merits, and arose out of some error made in good faith by the plaintiff, or by the Court at the instance of either party, which could only be effectively set right by a trial de novo. In A I R 1917 Nag 121[2] the same view is expressed.

In the case before me there was no defect which shut out a fair trial. What had happened was that, by being able to sell the materials, which the plaintiff had purchased from the defendant, at a satisfactory figure, he thereby no longer suffered any damage, and his whole cause of action had vanished. There was therefore no need to reserve any right to bring a fresh action. The request seems to have been made to the Court out of excess of caution, the plaintiff being afraid that he might not be able to meet the direct issue which would arise on the defendant's claim for Rupees 373, that direct issue being whether the plaintiff had or had not paid the money, and he hoped to be able to avoid payment, if it was found that he had not paid, by some of the pleas which he had put forward in this case. That is not, to my mind, the purpose of O. 23, R. 1 (2). Consequently the order of the lower Court reserving permission to the plaintiff to bring a fresh suit is illegal and must be set aside. The plaintiff's suit will be withdrawn without permission to bring a fresh action.

(ii). This is a very curious point in respect of which I am unable to find any parallel. On the disappearance of the plaintiff's claim the defendant's counter-claim is left high and dry and is of a kind triable by a Court of Small Causes. Is the defendant to take back his claim and place it before the Small Cause Court or should the matter be concluded by the Court in which the question was first ventilated? In 56 ALL 912[4] at p. 920 Niamat-ullah J. felt some difficulty in holding that the defendant's claim to a set-off came within the purview of O. 8, R. 6. Bennet J., the other member of the Bench, felt no such difficulty. The difficulty which Niamat-ullah J. felt has been expressed by him in the following passage :

> It is clear that defendants 1 to 3 intended to make a counter-claim against the plaintiff for Rs. 212-12-0 and paid a court-fee of Rs. 16-8-0. For all practical purposes para. 17 of their written statement might well have been considered to be a plaint; and as the plaintiff did not deny that that sum was due to the firm Bachu Lal Lalta Prasad, a decree in favour of defendants 1 to 3 could have been passed but for the difficulty that the defendants' claim in its nature is one cognizable by the Court of Small Causes, and the Additional District Judge, before whom the suit was pending had no jurisdiction to pass a decree in a suit cognizable by a Court of Small Causes.

The learned Judge however did not desire to differ from the opinion of Bennet J., since he considered that the latter's view led to substantial justice between the parties, and for that reason he did not record his dissent on the ground mentioned. If that ground of dissent is correct, then it decides the point, which I am now considering, in favour of the non-applicant. 9 C W N 748[5] was a case of a genuine set-off and not a case of a counter-claim, and although the amount claimed by the defendant was triable by the

1. ('09) 5 N L R 88 : 3 I C 61, Sitaram v. Mt. Chhotkai.
2. ('17) 4 AIR 1917 Nag 121 : 48 I C 1005, Doma v. Dayaram.
3. ('69-70) 13 M I A 160 : 3 Beng L R P C 48 : 12 W R P C 48: 2 Suther 269: 2 Sar 500 (PC), Watson v. Collector of Rajeshahye.
4. ('34) 21 AIR 1934 All 548 : 150 I C 433 : 56 All 912: 1934 A L J 393, Bansidhar Kunjilal v. Lalta Prasad.
5. ('05) 9 C W N 748, R. S. Hart v. A. W. Groser.

Small Cause Court, the High Court allowed the matter to be agitated in the regular Court as it was a set-off. It seems to me that I can arrive at an adequate decision by reconciling these two decisions and by holding that in the case of a genuine set-off, such as is contemplated by O. 8, R. 6, if the plaintiff's claim breaks down for any reason including a withdrawal, as in the present case, then the defendant would be entitled to have his set-off considered by the same Court, and he could be given a decree for a set-off in the same suit, but where his claim is not a genuine set-off but is a counter-claim, as it is in the present case, then, if that counter-claim lies in the Small Cause Court he cannot agitate it in the regular Court. The lower Court should really never have allowed the defence to be raised because it was a counter-claim and not a set-off and was not cognizable by it. That being so, the Court was right in returning the written statement for presentation to the proper Court. On this point therefore the application fails. The parties, having partly succeeded and partly failed, will pay their own costs of this application.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Nagpur 261

VIVIAN BOSE J.

Mohammad Hussain Khan Wajir Mohammad Khan — Defendant 1 — Applicant

v.

Bala Laxman Kunbi, Plaintiff and another, Defendant 2 — Non-Applicants.

Civil Revn. No. 62 of 1940, Decided on 21st November 1940, from decree of Sub-Judge, 2nd Class, Kelapur, D/- 22nd November 1939.

(a) Trust—Tripartite agreement among debtor and his two creditors *A* and *B* — Agreement providing that *A* should reduce his claim, that debtor should transfer his immovable property to *B* in full satisfaction of *B*'s claim and that *B* should pay *A*'s claim on behalf of debtor—This does not constitute trust in favour of *A*.

It is essential in every trust which is not wholly unilateral that there should be a confidence reposed. Secondly, in every trust the beneficiary is clothed with title to the property—not indeed a legal title because that resides in the trustee—but an equitable one. Thirdly no trustee can use trust property for his own benefit. He is bound to hold for the benefit of the beneficiary and is liable to account to him for it. [P 262 C 2 ; P 263 C 1]

Where in accordance with a tripartite agreement among a debtor and his two creditors *A* and *B* it is agreed that *A* should reduce his claim, that the debtor should transfer his immovable property to *B* in full satisfaction of *B*'s claim and that *B* should pay *A* on behalf of the debtor, there is no trust in favour of *A*. [P 263 C 1]

(b) Civil P. C. (1908), S. 115 — Rule that High Court should not exercise its discretionary powers in revision when lower Court has done substantial justice, when applies stated.

It is true that High Court ought not to exercise its discretionary powers in revision when lower Court has done substantial justice. But the substantial justice referred to in such rule relates to rights to which a party has a legal as opposed to a purely moral claim. The rule applies when owing to some technical rule of procedure or to some stupid blundering the claim is likely to fail whereas had the proper rule or remedy been applied it would have succeeded. It does not refer to cases where whatever the plaintiff had done his claim could not in any event have succeeded. If a plaintiff's suit is barred by time on the date on which it is instituted there is nothing that he can do to remedy the defect and consequently the rule referred to is not attracted. [P 263 C 1, 2]

R. R. Dandige — for Applicant.

R. S. Dabir — for Non-applicant No. 1.

Order.—The plaintiff had a money decree for Rs. 201-8-6 outstanding against defendant 2. Defendant 1 also had a claim for Rs. 1000 against defendant 2. Defendant 2 went to the Debt Conciliation Board and the following agreement was reached. In the first place the plaintiff agreed to scale down his demands to Rs. 175 and agreed to recover this sum in two instalments. Defendant 1 for his part agreed to reduce his claim to Rs. 600. It was also agreed that defendant 2 should transfer to the first a part of her immovable property in full satisfaction of this Rs. 600. The third term in this tripartite agreement is the one which concerns us here. It is recorded by the Debt Conciliation Board in the following terms and is to be found in Ex. P-2 :

Mohmad Husain (defendant 1) undertakes to pay these instalments for the debtor and to execute an agreement to that effect in her favour.

The instalments were fixed at Rs. 75 payable on 15th March 1935, and Rs. 100 payable on 15th March 1936. The first instalment appears to have been paid and apparently Rs. 25 was paid on the second. At any rate, the plaintiff admits that he has received Rs. 100 and confines his suit to the balance Rs. 75. He has joined both defendants 1 and 2 to the action but has only asked for a decree against defendant 1 in the first instance because under the agreement referred to above defendant 1 had agreed to pay the debt of defendant 2 and the plaintiff had agreed to look to him. A decree has been passed accordingly and defendant 1 applies in revision. The defence to the action is limitation. The agreement referred to

above was reached on 3rd January 1935, that being the date of the order sheet Ex. P-2, in which it was recorded. Under it the second kist for which the suit is brought was payable on 15th March 1936. The suit was not filed till 20th March 1939 and consequently defendant 1 urges that the claim is beyond time. In the plaint the cause of action has been given as 15th March 1936, and no explanation has been offered to show how the claim is within time. The defence of limitation was taken and no attempt was made to amend the plaint. In argument before me, the plaintiff relies on the registered agreement, Ex. P-1. But defendant 1 was not a party to this. The document is between the plaintiff and defendant 2. Consequently in so far as the suit is grounded on contract, Ex. P-1 is no use whatever against defendant 1. The contract with him is not in this document but is the oral agreement entered into before the Board the terms of which the Chairman has recorded in the order sheet Ex. P-2.

But the learned counsel for the plaintiff urges that his suit is not founded in contract but in trust. He argues that the plaintiff is a stranger to the consideration and so there can be no contract between the plaintiff and defendant 1. Under the transaction before the Board defendant 1 received property from the second on the understanding that he would do something for the benefit of the plaintiff, namely pay him the money which defendant 2 owed him. This the learned counsel states constitutes a trust which the plaintiff who is the beneficiary can enforce so long as defendant 1 retains possession of the property, and he refers me to Iyer's Law of Contracts, Edn. 3, p. 618. I am clear that the rule to which Iyer refers has no application here. The plaintiff was not a stranger to the contract nor was he a stranger to the consideration. He was a party to the contract and, as is the case in every other composition which creditors make with their debtors received consideration under it. When the transaction is carefully analysed, it will be found that the consideration, which the plaintiff received for his promise to abandon part of his claim and to release defendant 2 provided the first paid, was the promise of defendant 1 likewise to abandon a part of his claim and to pay the plaintiff in place of defendant 2. The whole constituted a valid and binding contract between the plaintiff and defendant 1 and can be enforced by the former. The cases referred to by Iyer are cases in which the person suing is not a party to the contract at all and in which no consideration moves from him. In such cases he can only sue if there is a trust under which he is the beneficiary. It is sometimes difficult to distinguish a trust from a contract because the law of trusts and the law of contracts overlap in places and because, as Maitland points out at p. 54 of his book on Equity, it is

> impossible so to define a contract that the definition shall not cover at least three quarters of all the trusts that are created.

But various tests serve to separate the two. In the first place it is essential in every trust which is not wholly unilateral that there should be a confidence reposed. In a hard business deal though each party may trust the other to carry out his part of the bargain neither reposes confidence in the other in the sense in which the term is used in the law of trusts. To put it in another way there is always a fiduciary relationship between trustee and beneficiary, but none between creditor and debtor as such. The following examples culled from the American Law Institutes Volume on Trusts, p. 41, S. 12 under the heading "A debt is not a trust" will illustrate the difference. (1) A transfers to B a bond to hold in trust for C. That creates a trust which gives C an interest in the bond and entitles him to sue should B act to his (C's) detriment. (2) A transfers to B a bond, and in consideration of the transfer B agrees to pay Rs. 1000 to C. There is no trust. C obtains no interest in the bond and has no right of action in respect of it. This latter illustration is almost exactly the case here with the exception that in place of the bond immovable property was transferred and instead of C being outside this transaction he was a party to the consideration. And that brings me to a second test; in every trust the beneficiary is clothed with title to the property not indeed a legal title because that resides in the trustee, but an equitable one. He is possessed of what in England is called the equitable estate. This is to be gathered from Salmond's Jurisprudence, Edn. 7, p. 286, from which the following passage is quoted by Aiyar in his Commentaries on the Indian Trusts Act at p. 16:

> A trust is more than obligation to use one's property for the benefit of another; it is an obligation to use it for the benefit of another in whom it is concurrently vested. The beneficiary has more than a mere personal right against his trustee to the performance of the obligations of the trust. He is himself an owner of the trust property.

Following this up we find from S. 56, Trusts Act, that

where there is only one beneficiary and he is competent to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust property to him or them, or to such person as he or they may direct.

It would be idle to contend in the present case that the tripartite agreement which we are considering gave the plaintiff-applicant any interest in the property transferred and still less that it gave him a right to compel defendant 1 to transfer the property to him. That brings me to a third test. No trustee can use trust property for his own benefit. He is bound to hold for the benefit of the beneficiary and is liable to account to him for it. It can hardly be contended here that, so far as the property is concerned, there was not a sale out and out to defendant 1. It can scarcely be pretended that he was not the sole owner of it and that he could not for example sell or mortgage it for his own benefit. Still another test is this. Lewin in his Law of Trusts and Maitland in his Equity both quote a definition of trust which is to be found in Coke on Littleton. It is as follows:

A confidence reposed in some other, not issuing out of land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que trust has no remedy but by subpoena in Chancery.

This definition is not wholly accurate as Maitland points out and as is also shown by the American Law Institute, but it serves to bring out a general broad distinction. In the ordinary way equity merely supplemented the law and would not intervene where a remedy lay at law. Therefore, if an obligation could be effectively enforced contractually or as a debt by the common law Courts equity would not intervene. There can be no doubt here that whatever else this agreement constituted, it brought into existence a valid and binding contract enforceable as such. That being so, there is no trust. It was then argued that even if the lower Court is wrong in its law, as the defence is a technical one raised to defeat a just claim, this Court ought not to exercise its discretionary powers in revision in the applicant's favour. The lower Court has done substantial justice and so its decision should stand. I was referred to a decision of Clarke J. in Civil Revision No. 862 of 1939 where he applied this rule following certain Allahabad and Lucknow decisions. I do not doubt the soundness of the rule but it has to be applied with care. The substantial justice referred to there relates to rights to which a party has a legal as opposed to a purely moral claim. The rule applies when owing to some technical rule of procedure or to some stupid blundering the claim is likely to fail whereas had the proper rule or remedy been applied, it would have succeeded. It does not refer to cases where whatever the plaintiff had done his claim could not in any event have succeeded. If a plaintiff's suit is barred by time on the date on which it is instituted there is nothing that he can do to remedy the defect and consequently the rule referred to is not attracted.

The application is allowed. The decree of the lower Court is set aside and the plaintiff's claim is dismissed against both defendants with costs here and in the lower Court. Counsel's fee Rs. 10. The reason for dismissing the claim against defendant 2 as well is that under the agreement on which the suit is founded defendant 2's debt was completely extinguished. The plaintiff for good consideration undertook to release defendant 2 from her obligation and agreed to look wholly to defendant 1. This operated as a complete extinguishment of defendant 2's liability. Defendant 1 was not here a mere surety who guaranteed performance by defendant 2. He took upon himself the complete burden of the debt. Consequently there was nothing left over on which the plaintiff could proceed against defendant 2.

D.S./R.K. *Application allowed.*

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* (28) A. I. R. 1941 Nagpur 263

CLARKE J.

Hansraj Hukumchand Agarwal and another, Defendants 2 and 3 — Applicants

v.

Shankarlal Lodhulal and another — Non-applicants.

Civil Revn. Appln. No. 169 of 1939, Decided on 8th January 1941, from order of First Sub-Judge, 2nd Class, Gondia, D/- 16th January 1939.

* Civil P. C. (1908), S. 115 — Arbitration— Order superseding award as beyond authority is not revisable.

Order superseding award of arbitrator on the ground that the arbitrator had exceeded his authority is not revisable under S. 115 : *Case law reviewed.* [P 268 C 1]

R. L. Asirkar — for Applicants.

M. B. Kinkhede — for Non-applicant 1.

Order. — This application for revision is the outcome of a suit for accounts of a dissolved partnership. The parties consist of

three groups : A the plaintiff, B the defendants 1 to 3, of whom defendant 1 has died since the suit was brought, defendants 2 and 3 being parties to this revision application, and C defendant 4. Group B were the active partners while groups A and C were sleeping partners who provided only the capital of the partnership business. The suit was instituted in August 1935 and proceeded in the ordinary way until a preliminary decree was passed in March 1937. The preliminary decree declared the share of the parties, the date of the dissolution of the partnership and ordered accounts to be taken of the partnership business. A commissioner was appointed to make the accounts. He worked as commissioner until 18th January 1938, when the parties all agreed to appoint him arbitrator and applied to the Court to that effect. The Court accordingly acceded to their request and appointed the commissioner arbitrator and referred to him the following matter to be decided :

> What amount each of the parties has to pay on account of his share in losses or what amount each of the parties has to receive on account of his share in the profits of the partnership business, keeping in mind the directions given in the preliminary decree dated 25th March 1937 ?

The Court also permitted him to make use of the proceedings before him as commissioner. The arbitrator submitted his award on 17th March 1938 by which he directed that group A should receive Rs. 2794-4-3 from group C and Rs. 1399-9-3 from group B. The Court gave the requisite time to the parties to submit their objections, if any, to the award. No objections were submitted by groups A or B but group C, that is to say defendant 4, raised certain objections. Now it so happened that, apart from partnership dealings, there had also been private dealings between the parties. Certain payments made by group B to groups A and C were appropriated towards the private dealings, while other payments were appropriated towards the partnership dealings. The arbitrator therefore considered it impossible to make a just and equitable settlement of accounts as regards the partnership dealings unless he knew whether the payments appropriated towards the private dealings had been properly appropriated. He therefore looked into the private accounts of groups A and C and on finding therein that certain items had not been properly appropriated he debited them to the partnership account, thereby increasing the amount which defendant 4 had to pay to the plaintiff. The objection therefore which defendant 4 raised before the lower Court was against the deduction of some of these items. He alleged that the arbitrator by going into these private accounts, when his instructions were to look into the partnership accounts only, had exceeded his powers under the order of reference and had thereby been guilty of misconduct, and therefore the award was invalid and should be superseded. The lower Court has agreed with these observations of defendant 4 and has superseded the award. Against that order both groups A and B have made separate revision applications. This order, besides dealing with the application of group B—defendants 2 and 3—will also dispose of the plaintiff's application, Civil Revision No. 170 of 1939. According to the applicants in both applications the Court had no jurisdiction to supersede the award of the arbitrator on such grounds since the arbitrator had not exceeded his authority but was required to look into the private account of the parties, otherwise he could not have come to a just and proper finding as to the state of the partnership accounts. Defendant 4 supports the order of the lower Court on the merits and also contends that the order is not revisable under S. 115, Civil P. C. The first question therefore which requires to be considered is whether the order superseding the award is open to revision or not.

One of the grounds put forward is that it is not revisable because it is appealable. It is said that the award was an agreed settlement between the parties and falls under O. 23, R. 3, Civil Procedure Code, and is therefore appealable under O. 43, R. 1 (m). Whatever may be the views of the other High Courts on this question, the view of this Court is settled by the Full Bench decision in I L R (1939) Nag 250[1] which holds that an award in arbitration cannot be recorded as an adjustment by compromise under O. 23, R. 3. It is true that that was a case of arbitration without the permission of the Court, but if that is the law in a case of arbitration without the permission of the Court, it is the law a fortiori in an arbitration with the permission of the Court. Hence the revisability of the lower Court's order is not taken away by its being appealable since it is not appealable.

It is however contended much more strenuously that the order is not revisable because it is not a 'case' within the mean-

1. ('39) 26 AIR 1939 Nag 186 : 183 I C 128 : ILR (1939) Nag 250 (FB), Ramdayal v. Sheodayal.

ing of that word in S. 115, Civil P. C. Reliance in support of this contention is placed on 26 Bom 551,[2] 30 Cal 397,[3] 47 Bom 721,[4] 47 ALL 121,[5] 47 ALL 916,[6] 53 ALL 1006,[7] A I R 1932 Bom 232[8] and 14 Lah 715.[9] For holding that the order is revisable the applicants rely on (1891) A C 31,[10] 43 ALL 305,[11] 46 ALL 686,[12] A I R 1928 Lah 550,[13] A I R 1929 Lah 369,[14] 48 ALL 239,[15] 51 ALL 1010,[16] 57 ALL 459,[17] 57 ALL 678,[18] I L R (1936) Nag 44,[19] 16 Pat 742,[20] I L R (1937) ALL 317[21] and A I R 1940 Oudh 405.[22] (1891) A C 31[10] is of course relied on only because of the legal principles there disclosed. It obviously has no bearing on the interpretation of S. 115, Civil P. C. There

2. ('02) 26 Bom 551 : 4 Bom L R 267, Damodar v. Raghunath.
3. ('03) 30 Cal 397 : 7 C W N 545 (FB), Kali Charan v. Sarat Chunder.
4. ('23) 10 AIR 1923 Bom 402 : 73 I C 464 : 47 Bom 721 : 25 Bom L R 443, Chimanbhai v. Keshavlal.
5. ('25) 12 AIR 1925 All 458 : 85 I C 502 : 47 All 121, Shah Muhammad Fakhurddin v. Rahimullah Shah.
6. ('25) 12 AIR 1925 All 566 : 89 I C 173 : 47 All 916 : 23 A L J 656, Rudra Prasad v. Mathura Prasad.
7. ('32) 19 AIR 1932 All 452 : 136 I C 568 : 53 All 1006 : 1931 A L J 842, Bisal Singh v. Faqira Singh.
8. ('32) 19 AIR 1932 Bom 232 : 138 I C 215 : 34 Bom L R 376, Nasarwanji v. Jamshedji.
9. ('33) 20 AIR 1933 Lah 692 : 143 I C 309 : 14 Lah 715 : 34 P L R 651, Ram Sarup v. Mohan Lal.
10. (1891) 1891 A C 31, Adams v. Great North of Scotland Railway Co.
11. ('21) 8 AIR 1921 All 16 : 60 I C 857 : 43 All 305 : 19 A L J 33, Kanhaiya Lal v. Jagannath Persad.
12. ('24) 11 AIR 1924 All 788 : 82 I C 16 : 46 All 686 : 22 A L J 676, Gobind Singh v. Bhirgu Nath Singh.
13. ('28) 15 AIR 1928 Lah 550 : 110 I C 833, Neba Ram v. Khota Ram.
14. ('29) 16 AIR 1929 Lah 369 : 111 I C 145, Harbhajan Singh v. Kalu Mal.
15. ('26) 13 AIR 1926 All 238 : 91 I C 930 : 48 All 239 : 24 A L J 235, Gopal Das v. Baij Nath.
16. ('29) 16 AIR 1929 All 743 : 122 I C 685 : 51 All 1010 : 1929 A L J 918, Bhola Nath v. Raghunath Das.
17. ('35) 22 AIR 1935 All 353 : 153 I C 65 : 57 All 459 : 1934 A L J 989, Ruramal Ramnath v. Kapilman Misir.
18. ('35) 22 AIR 1935 P C 185 : 157 I C 894 : 57 All 678 : 62 I A 257 (P C), Atma Ram v. Beni Prasad.
19. ('36) 23 AIR 1936 Nag 197 : 165 I C 556 : I L R (1936) Nag 44, Tulsiram v. Jhanaklal.
20. ('38) 25 AIR 1938 Pat 231 : 175 I C 468 : 16 Pat 742 : 19 P L T 549, Satish Chandra v. P. N. Das & Co.
21. ('37) 24 AIR 1937 All 65 : 167 I C 99 : I L R (1937) All 317 : 1936 A L J 1333 (FB), Mariam Bibi v. Amina Bibi.
22. ('40) 27 AIR 1940 Oudh 405 : 189 I C 344 : 16 Luck 79 : 1940 O W N 670, Phool Chand v. Mool Chand.

the parties entered into a contract under which disputes between them were to be referred to arbitration. The disputes arose were referred to the arbitrator who made an award. The appellants before their Lordships contended that the award was ultra vires and corrupt. One of their complaints was that the arbitrator had exceeded his instructions. The lower Court set aside the award. Their Lordships held that the arbitrator had not exceeded his jurisdiction and that the award could not be attacked. At p. 45, Lord Watson observed :

> I think I state the law correctly when I say that it will be a good ground of reduction at the instance of either party, if he is able to show independently of the Regulation either that the arbiter has exceeded what are called in Scotland the *fines compromissi*, or that in the course of the arbitration he has disregarded any one of the express conditions contained in the contract of submission, or any one of those important conditions which the law implies in every submission . . . And so in those cases where an act innocently committed by the arbiter amounts to misconduct which in the opinion of the Court, would naturally imply that justice had not been done between the parties, the award must be set aside.

These observations, so far as they go, are against the applicants who have cited this case, but it actually does not serve as any guide to the interpretation of S. 115, Civil P. C., which is the section that I am required to interpret. In 1901 their Lordships of the Privy Council had before them the case in 29 Cal 167[23] at a time when the present Civil Procedure Code was not in force but the Code of 1882 was in force. Their Lordships observed at p. 183 that

> the time has long gone by since the Courts of this country shewed any disposition to sit as a Court of appeal on awards in respect of matters of fact or in respect of matters of law,

and they referred to (1891) A C 31.[10] In that case the Court had pronounced a decree in accordance with the award of the arbitrators which appeared on its face to be a fair and reasonable settlement of the matters in dispute. Their Lordships agreed with the finding of the Chief Court of the Punjab that no appeal lay from the decree and observed that :

> In the case of an award revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present the finality of any award would be open to question.

Their Lordships then went on to criticise the action of the Chief Court in interfering with the decree which the lower Court had pronounced in accordance with the award,

23. ('02) 29 Cal 167 : 29 I A 51 : 6 C W N 226 : 8 Sar 154 (P C), Ghulam Khan v. Muhammad Hassan.

observing that even if the arbitrators had erred in law or in fact the award was not thereby vitiated, and therefore the Subordinate Judge by pronouncing a decree in accordance with it had not exceeded his jurisdiction, and therefore the Chief Court had no jurisdiction to interfere with the decree under the section of the old Code corresponding to S. 115 of the present Civil P. C. Thus, their Lordships there held that the High Court had no jurisdiction under S. 115 to interfere in revision with a decree passed by the lower Court in accordance with an award of arbitrators even if the arbitrators were wrong in deciding any points of law or fact.

The question before me is whether the High Court can interfere in revision with an order of the lower Court which supersedes an award of the arbitrators by holding that the arbitrators had exceeded their jurisdiction. 29 Cal 167[23] is not therefore a direct authority on this point, although the observations of their Lordships which I have quoted would be equally applicable to either case.

26 Bom 551[2] held that, where an award on a reference to arbitration in the course of a suit is superseded on the ground of the arbitrator's misconduct, the order superseding the award is not subject to revision. It is an interlocutory order and may be a ground of appeal against the decree passed in the suit. The Court has there followed a Full Bench ruling of the Allahabad High Court reported in 5 ALL 293[24] to the same effect. If the arbitrator in the present case has exceeded his jurisdiction that would amount to misconduct on his part and therefore if 5 ALL 293[24] and 26 Bom 551[2] are good law, no revision would lie in the case before me. 30 Cal 397[3] is a Full Bench decision of the Calcutta High Court to the same effect. 43 ALL 305[11] supports the applicants that the High Court can interfere in revision. The facts of that case were most exceptional because the lower Court had superseded the award of the arbitrators on a totally inadequate ground. As the learned Judges say, the decision of the Subordinate Judge was clearly indefensible. The ground upon which he had interfered was no ground at all for questioning either the arbitration proceedings or the award. The High Court held accordingly that in the circumstances the lower Court had no jurisdiction to reverse the order of reference, which it had in substance done, and in superseding the order it had acted with material irregularity and so its order was liable to revision. The learned Judges are also careful to point out that their decision is not to be taken as departing in any way from the principle of inviolability which attaches to decisions, either upholding or rejecting objections under Para. 15 of Sch. 2, Civil P. C., when they are in fact decisions upon real objections of invalidity to the arbitration proceedings and award. In the case before me the objections are real objections to the invalidity of the award and so 43 ALL 305[11] is distinguishable.

47 Bom 721[4] follows 26 Bom 551[2] and is against the applicants. In 46 ALL 686,[12] the lower Court had pronounced a decree in accordance with the award and had refused to set it aside. The High Court observed that there are only two ways of getting rid of an award, one by getting it set aside under paras. 15 and 16 of Sch. 2 or by a revision application, where the lower Court had committed a material irregularity in the course of the proceedings before him to decide whether or not the award was objectionable. In the present case the lower Court has not committed any such material irregularity in the proceedings before it. The learned Judge had jurisdiction to decide whether the arbitrator had been guilty of misconduct or not and he has held that he was. Even therefore if the lower Court is wrong in so holding, the error has not been brought about by any material irregularity in the proceedings and therefore even according to the Allahabad decision no revision would lie.

47 ALL 121[6] and 47 ALL 916[6] both support the non-applicant that no revision lies. 48 ALL 239[15] also supports the non-applicant because it holds that although a revision may lie in certain circumstances it does not lie where, as here, objections are raised as to the proceedings before the arbitrator and they are the subject of a decision by the trial Court. In such a case it cannot be said that there has been any irregularity committed by the Court in the exercise of its jurisdiction. A I R 1928 Lah 550[13] is a case where the Court accepted the award and not one in which it set it aside. Moreover, it is a single Judge decision and only one Punjab case not officially reported was cited by the learned Judge in support of the proposition that no revision lay. AIR 1929 Lah 369[14] was a case in which the same Judge held that as the error was in the Court referring the case to arbitration with-

24. ('83) 5 All 293 : 1883 A W N 39 (FB), Chattar Singh v. Lekhraj Singh.

out a properly constituted agreement to refer, all the arbitration proceedings in such reference were invalid. That case can, therefore, be easily distinguished, and moreover, it has been overruled by the Lahore High Court in 14 Lah 715[9] which I shall discuss below. 51 ALL 1010[16] is a case in which the arbitration proceedings were superseded before the delivery of the award by the arbitrators. It is, therefore, no guide. 53 ALL 1006[7] supports the non-applicant and follows 47 ALL 121,[5] 47 ALL 916[6] and 5 ALL 293.[24] One of the learned Judges who decided 53 ALL 1006[7] was a party to the decision in 51 ALL 1010.[16] He tried to distinguish the two cases but felt some difficulty in doing so. Nevertheless, in view of the direct application of three cases just referred to —5 ALL 293,[24] 47 ALL 121[5] and 47 ALL 916[6]— he held that no revision lay against an order superseding an award. So, if the case of a supersession before award cannot be distinguished from a supersession after award, then the authority of 51 ALL 1010[16] is considerably shaken by 53 ALL 1006.[7]

A I R 1932 Bom 232[8] takes the same view as the earlier decision in 26 Bom 551[2] which supports the non-applicant. 14 Lah 715[9] holds that no revision lies where the Court refused to supersede an award. The learned Judges observed that there is no difference between a case in which an award is set aside and where the Court refused to set it aside; both are interlocutory orders, and in neither case has the suit concluded and in both cases further action is necessary. 57 ALL 459[17] relates to the amendment of a plaint and not to arbitration proceedings. The remarks of the learned Judge there are obiter as far as arbitration cases are concerned. There it is said :

> I am of opinion that an interlocutory order which terminates a proceeding started by an application should be considered to be the "decision" of a "case" within the meaning of S. 115, provided such proceeding is so far distinct from the suit itself that it can be separated from it as a collateral matter . . . . . I would, therefore, consider each case on its own merits and find whether the rule accepted in the later Full Bench cases is applicable to it. In my opinion the Court should err in doubtful cases on the side of entertaining a revision rather than refusing to do so, if it is found that the subordinate Court exercised a jurisdiction not possessed by it or failed to exercise its jurisdiction, or acted illegally or with material irregularity in the exercise of it.

In I L R (1937) ALL 317[21] a Full Bench distinguishes between cases in which the error is in the proceedings before the arbitrator and those in which it is in the proceedings before the Court. In the former case it holds that a revision does not lie while in the latter revision lies. This case crystallises the final view of the Allahabad High Court on this vexed question. At p. 323 the learned Chief Justice observes :

> It seems to me that there is a clear distinction between the proceedings before an arbitrator and the proceedings in the Court itself, whether before the reference is made to the arbitrator or after the receipt of his award. So far as the proceedings before the arbitrator are concerned, they can be taken exception to by way of objections to the award when it is delivered and the trial Court has exclusive authority to consider such objections and to dispose of them finally. Whether it decides them in favour of the objector or against him, the matter cannot be reopened in the appellate or revisional Court because at the very most the trial Court has erred on a point of law in deciding the objection in the way it has done. But so far as the proceedings before the Court itself are concerned, that Court cannot be made the sole judge of the propriety of its own proceedings. It should not have the final word on the question whether it has acted without jurisdiction or with illegality or material irregularity in the exercise of such jurisdiction. In such a case therefore, even if the proceedings have terminated in a decree in terms of an award and even though no appeal lies from such a decree, it is open to the High Court to interfere in revision and set aside the orders which have been passed by the Court itself, provided they are vitiated either by want of jurisdiction or illegality or irregularity in the exercise of jurisdiction.

At p. 327 he observes :

> When the reference itself is challenged on the ground of its initial invalidity the attack is directed not against the award itself but against the procedure adopted by the Court in its exercise of jurisdiction. There is ample authority in this Court in support of the view that the revisional powers exist.

In the case before me the error, if error there be, is one on the part of the arbitrator, the only error of the Court, if there is an error, being on a point of law in deciding the objection in the way it has done. This ruling also supports the non-applicant. In A I R 1940 Oudh 405[22] the facts were very peculiar. There were two awards. After the arbitrator had given an award the Court remitted it for reconsideration on a ground which the High Court considered improper and the arbitrator then gave a modified award. The High Court held that the Court in remitting the award to the arbitrator had exceeded its jurisdiction and therefore it interfered. The case thus falls within the second class of cases referred to in I L R (1937) ALL 317[21] above and is therefore distinguishable from the case before me. In 16 Pat 742[20] the point was raised as to whether the High Court had jurisdiction under S. 115, Civil P. C., to interfere with the order of a Subordinate Judge ordering an award of arbitrators to be filed, but the

Court did not discuss the question because the case could be decided on an entirely different ground and accordingly the case was decided on a different ground. Finally I have been referred to I L R (1936) Nag 44[19] as being a case in which Pollock J. had interfered in revision with an order superseding an arbitration award. That however was a case in which the trial Court accepted the award and on appeal the District Judge came to the conclusion that the arbitrators had exceeded their jurisdiction and set aside the award. It was not the order of the trial Court which was being revised but the order of the District Judge. Although Pollock J. has at some length gone into the merits and into the case law on the subject of superseding awards, with all respect, I am of opinion that that case could have been decided on the simple ground that whereas para. 16 (2) of Sch. 2 bars an appeal except on certain grounds which did not exist in that case, the District Judge had proceeded to hear and decide an appeal and in appeal had set aside the lower Court's order. Therefore the District Judge's order was clearly without jurisdiction and the High Court must interfere.

Accordingly on a review of the above authorities it appears to me to be clear that there is a marked preponderance of judicial opinion in favour of the view that no revision lies. That being so, it is not necessary to go into the merits of these applications. They are both dismissed with costs. Counsel's fee Rs. 50. I allow only one set of counsel's fees.

K.S./R.K. *Applications dismissed.*

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(28) A. I. R. 1941 Nagpur 268

CLARKE J.

Kuleshwarprasad Narsingprasad Agarwal and another — Plaintiffs — Applicants

v.

Dwarkanath Beniram Shukla and others — Defendants — Non-applicants.

Civil Revn. Appln. No. 93 of 1940, Decided on 10th February 1941, to revise order of Sub-Judge, First Class, Raipur, D/- 20th December 1939.

(a) C. P. and Berar Relief of Indebtedness Act (14 of 1939), Ss. 20 and 23—Ss. 20 and 23 totally bar jurisdiction of civil Court in respect of any matter pending before Debt Relief Court —Notice under S. 6 (3) of Act issued—Civil Court staying proceedings—No revision lies to High Court from stay order.

The C. P. and Berar Debt Relief Act provides a complete code of appeal for any person aggrieved by an order of the Debt Relief Court. Ss. 20 and 23 bar the jurisdiction of the civil Court in respect of any matter pending before the Debt Relief Court. Consequently it is not open to a party to avoid the aforesaid provisions by applying for revision to the High Court against the civil Court's order staying the proceedings before it in obedience to the notice issued by the Debt Relief Court under S. 6 (3) of the Act : ('40) 27 A I R 1940 P C 105, *Rel. on*; 1940 N L J 562, *Expl.*; ('37) 24 A I R 1937 Nag 259 and ('38) 25 A I R 1938 Nag 373, *Disting.*

[P 268 C 2; P 269 C 1; P 270 C 1,2]

(b) C. P. and Berar Relief of Indebtedness Act (14 of 1939), S. 6 (3) — Mortgage — Preliminary decree passed against mortgagor and his transferees—Pending application for final decree transferees applying to Debt Relief Court — Mortgage being one and indivisible, proceedings for final decree must be stayed for both mortgagor and transferees or for none.

Where preliminary mortgage decree is passed against the mortgagor and his transferees and pending the application for making the decree final the transferees alone apply to the Debt Relief Court, the mortgage being one and indivisible, the proceedings for final decree must be stayed under S. 6 (3) for both the mortgagor and the transferees or for none. [P 271 C 1]

J. Sen, A. V. Khare and W. B. Pendharkar — for Applicants.

R. G. Rau — for Non-applicants 4 to 7.

Order.—The applicants obtained a preliminary decree for foreclosure of a mortgage against the seven non-applicants on 28th August 1936. The first three non-applicants are the sons of the mortgagor while the last four non-applicants are subsequent transferees of a part of the mortgaged property. During the pendency of proceedings to make the preliminary decree absolute the last four non-applicants made a joint application to the Debt Relief Court under S. 6 (1), Central Provinces and Berar Relief of Indebtedness Act (14 of 1939), praying for the determination of this debt which they owed to the applicants. Thereupon the Debt Relief Court under S. 6 (3) of the Act, after admitting the application, issued a notice to the civil Court, which in obedience thereto stayed the proceedings for making the foreclosure decree absolute. Against this order staying the proceedings the applicants have come in revision.

The main contention on the part of the applicants is that the Debt Relief Court had no jurisdiction to entertain the application of non-applicants 4 to 7 since they were not persons entitled to present such an application and therefore the civil Court should have refused to stay proceedings and that even if the Court was right in staying proceedings as far as those non-applicants

were concerned who applied to the Debt Relief Court, it could not stay them in respect of the first three non-applicants who had made no such application. On behalf of the applicants, Mr. Sen advanced several arguments to show that the Debt Relief Court had no jurisdiction to entertain the application under S. 6. In the first place, it is said that they are not debtors because the mortgage being by conditional sale the mortgagors were under no personal liability to pay the mortgage money, much less were the subsequent transferees under any such obligation. Secondly, non-applicants 4 to 7 were not debtors because they had not incurred any debt to the mortgagee; all that they had done was to purchase part of the mortgaged property. So far from owing money and being unable to pay their debts they had been able to find ready money to purchase this property. Thirdly a joint application to the Debt Relief Court by transferees who had taken separate transfers was not tenable under the Central Provinces and Berar Relief of Indebtedness Act, and fourthly that under S. 4 (j) of the Act this transaction did not come under the Act at all.

In my view, it is not necessary to go into these questions here. The proper forum for agitating them is the Debt Relief Court before which the present applicants will be necessary parties. I agree with the non-applicants that a revision application on the part of the applicants in the present circumstances is untenable. The terms of Ss. 20 and 23, Central Provinces and Berar Relief of Indebtedness Act, are very clear and bar the jurisdiction of the civil Court. I have been referred to certain rulings of this Court under the old Debt Conciliation Act in which it was held that a revision application could be entertained in certain circumstances, but the provisions of the Relief of Indebtedness Act are not by any means the same as those of the Debt Conciliation Act and rulings therefore which were given under the old Act do not necessarily apply to the Relief of Indebtedness Act. Such rulings are : A I R 1938 Nag 373,[1] 1940 N L J 562[2] and I L R (1938) Nag 489.[3] A I R 1938 Nag 373[1] was a case in which a Debt Conciliation Board had discharged a decree-holder's debt in consequence of his default in submitting a statement when the debtor had no right to present any petition to the Board not being an agriculturist. Niyogi J. held that in such cases the civil Court had power to enquire into the question whether a special tribunal created for a specific purpose had acted within the limits of the enactment which created it. Apart from the question of the different wording of the two Acts, that was a case in which a Board had passed a final order, and, unless the civil Court could intervene in a case where the Board flagrantly exceeded its powers, the aggrieved party would have been left without any remedy. In the case before me the special tribunal has still to decide whether the non-applicants are entitled to put in motion the powers allowed to such tribunals by the Act, and furthermore a right of appeal to the District Court is provided if the decision of the Board goes against the applicants. 1940 N L J 562,[2] which is a decision to which I was myself a party, was a case in which the application to the Board was made before the addition of S. 7-A to the Debt Conciliation Act and we observed at page 564 :

> After the passing of S. 7-A in respect of applications made after S. 7-A was passed the civil Court cannot go into the question of jurisdiction but as regards applications pending when S. 7-A was passed it can.

That ruling is therefore authority for holding that even under the old Debt Conciliation Act after the passing of S. 7-A the civil Court could not have entertained a question of jurisdiction. I L R (1938) Nag 489[3] was a case in which the facts were somewhat similar to A I R 1938 Nag 373.[1] The decision is based on S. 16, Debt Conciliation Act, which as I shall presently point out, is materially different from the similar provisions in the Relief of Indebtedness Act. There, this Court found some difficulty in understanding what was meant by a suit in respect of "any matter pending before a Board" such as is envisaged by S. 16 (a) (i), Debt Conciliation Act. That decision was also based on the Act as it stood before S. 7-A was inserted in it and in the last sentence of the ruling the Court observed that their decision would not apply if S. 7-A had been in force. Accordingly, it remains to examine S. 7-A and S. 16, Debt Conciliation Act and compare them with Ss. 20 and 23, Central Provinces and Berar Relief of Indebtedness Act. Before the passing of S. 7-A the only section which governed the jurisdiction of the civil Court was S. 16 which provided that :

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1. ('38) 25 AIR 1938 Nag 373: 182 I C 81, Tikaram v. Ganpat.
2. ('40) 1940 N L J 562, Beniram v. Ramkrishna.
3. ('37) 24 AIR 1937 Nag 259 : 170 I C 905 : ILR (1938) Nag 489, Shivdin v. Ramratan.

No civil Court shall entertain—

(a) any suit in respect of—(i) any matter pending before a Board, or (ii) the validity of any procedure or the legality of any agreement made under this Act, or (iii) the recovery of any debt recorded as wholly or partly payable under an agreement registered under sub-s. (2) of S. 12 from any person who, as a debtor, was party to such agreement, whether such agreement is subsisting or not, or (iv) the recovery of any debt which has been deemed to have been duly discharged under sub-s. (2) of S. 8, except a debt which is revived under the proviso to that sub-section;

(b) any application to execute a decree, the execution of which is suspended under sub-s. (3) of Section 15.

That is to say the jurisdiction of the civil Court was barred in respect of suits of four different kinds and in respect of applications for execution of a decree suspended under S. 15 (3), and as was pointed out in I L R (1938) Nag 489,[3] it was difficult to understand what was meant by suits of the first two kinds. After the enactment of S. 7-A the jurisdiction of the Board was not allowed to be questioned in any civil Court. Now, under the new Act, the matter is governed by Ss. 20 and 23. Section 20 lays down that any person aggrieved by an order of a Debt Relief Court may apply to the District Court for revision of the order on the grounds: (a) that it was contrary to law, (b) that the Debt Relief Court had exceeded its jurisdiction, and (c) as to the fairness of instalments fixed by the Court, and the section then goes on to provide that, subject to such orders as the District Court may pass thereon, such order shall be final and no application for revision shall lie against such order.

Section 23 provides that subject to the provisions of section 20 the jurisdiction of the civil Courts shall be barred in respect of "(a) any matter pending before a Debt Relief Court" and certain other matters with which I am not at present concerned. Reading these two sections together, it is difficult to understand how the jurisdiction of the civil Court could have been more effectively barred. Comparing S. 23 with the old S. 16, Debt Conciliation Act, whereas the old Act barred a civil suit in respect of a matter pending before a Board, the present Act bars the jurisdiction of the civil Court in respect of any matter pending before a Debt Relief Court. The new section is therefore very much wider than the old and the difficulty which this Court felt in understanding the meaning of S. 16 (a) (i) and (ii) of the old Act could not have been felt in respect of S. 23 (a) of the present Act. In I L R (1940) Mad 599,[4] their Lordships of the Judicial Committee were considering somewhat similar provisions in the Sea Customs Act (8 of 1878). At p. 614 they observe:

It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

They then point out that the provisions of the Act which they were considering provided a precise and self-contained code of appeal in regard to obligations created by the statute and they add:

It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the civil Courts;

and they held therefore that the jurisdiction of the civil Courts was excluded. At p. 615 they went on to observe:

The determination of this question must rest on the terms of the particular statute which is under consideration, and decisions on other statutory provisions are not of material assistance, except in so far as general principles of construction are laid down.

Applying these general principles to the provisions of the Relief of Indebtedness Act I find that the terms are expressed even more strongly than in the Sea Customs Act so as to bar the jurisdiction of the civil Court. The Sea Customs Act has no provision similar to S. 20, Relief of Indebtedness Act, which after providing a right of application to a superior tribunal for revision of an order of the Court specifically bars an application for revision against the order of the superior Court. Accepting therefore the principles laid down by their Lordships of the Privy Council it is clear that the present Act provides a complete code of appeal for any person aggrieved by an order of the Debt Relief Court and it is impossible for the present applicants to avoid that procedure by applying for revision against the order of the civil Court which has acted in obedience to directions received from the Debt Relief Court for which there is provision made in the Act. The correct procedure therefore for the applicants was to raise the questions that they have raised before me before the Debt Relief Court and, if that Court came to a conclusion adverse to them, to apply, under S. 20 of the District Court for

4. ('40) 27 A I R 1940 P C 105 : 188 I C 231 : 67 IA 222 : I L R (1940) Mad 599: I L R (1940) Kar P C 194 (P C), Secretary of State v. Mask & Co.

redress of their grievance. They cannot omit that procedure and agitate the questions in the High Court in the guise of an application for revision of the civil Court's order, which is merely carrying out the directions of the Debt Relief Court to stay the proceedings.

As regards the contention of the applicants that even if the proceedings have to be stayed against those non-applicants who applied to the Debt Relief Court they should continue at any rate against the non-applicants who did not so apply. I need only point out, as was said before me by Mr. Sen on behalf of the applicants, that under Ss. 60 and 67, T. P. Act, a mortgage is one and indivisible, and it would not be feasible therefore and would lead to impossible situations if such a course as is suggested were to be adopted. The mortgage being one and indivisible the proceedings for making the decree final must be stayed for all the non-applicants or for none. Accordingly the application fails and is dismissed with costs. I allow Rs. 20 as counsel's fee.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 271

CLARKE J.

Gopal Madhorao Deshpande —
Defendant — Applicant

v.

Achut Sadasheo Deshpande —
Plaintiff — Non-applicant.

Civil Revn. Appln. No. 111 of 1940, Decided on 22nd January 1941, for revision of decree of Sub-Judge, Second Class, Jalgaon, D/- 15th December 1939.

(a) Provincial Small Cause Courts Act (1887), Art. 13 — Suit on promissory note executed for dues in respect of interest in hereditary office is not barred by Art. 13.

Where the suit is a suit on a promissory note executed for dues payable to the plaintiff by reason of his interest in the hereditary office it is not barred by Art. 13 because the suit is not to recover the dues but to recover money on a negotiable instrument : 29 Cal 461 (PC) and 35 All 558, *Disting.*; ('28) 10 A I R 1923 All 420, *Rel. on.* [P 272 C 1]

(b) Civil P. C. (1908), S. 11 —Consent decree — Pleas settled by consent — Same pleas are res judicata in subsequent suit by successor-in-interest.

A party is estopped from raising the pleas which were raised in the former suit by his predecessor-in-interest and which were settled by consent: ('39) 26 AIR 1939 Pat 225, *Expl., and Disting.*; (1867) L R 1 H L Sc 117; (1895) 1 Ch D 37; 13 MIA 497 (PC) and 36 Bom 283, *Rel. on*; ('26) 13 AIR 1926 Cal 672, *Expl., and Rel. on.* [P 273 C 1]

(c) Promissory note — Interest —Promissory note mentioning rate of interest —Party cannot lead evidence to prove that rate of interest was different—Nor can he be given different interest by way of damages.

Where a promissory note is silent as to interest evidence is not admissible to prove a contemporary oral agreement to pay a certain rate of interest under s. 92. If that is the case where the document is silent as to the rate of interest, a fortiori evidence is not admissible in a case where the document mentions a rate of interest to prove that the rate was different from that mentioned in the document. Nor does the question of awarding interest by way of damages arise in such a case : ('20) 7 AIR 1920 Nag 131, *Rel. on.* [P 273 C 1]

W. B. Pendharkar — for Applicant.

A. L. Halwe — for Non-applicant.

Order. — The non-applicant-plaintiff brought this action in the Small Cause Court, Jalgaon, on a promissory note executed in his favour by the applicant-defendant on 27th May 1936 for Rs. 266. He has added to the principal sum of Rs. 266, Rs. 72 by way of interest and has, therefore, sued for a total sum of Rs. 338. The first contention raised by the applicant before me is one which he did not raise in the lower Court, namely as to the jurisdiction of the Small Cause Court to entertain this suit. He contends that the suit falls under Art. 13 of the schedule to the Small Cause Courts Act and is therefore excepted from the cognizance of a Small Cause Court. Article 13 excepts from the cognizance of such a Court

a suit to enforce payment of the allowance or fees respectively called malikana and hakk or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immovable property or in an hereditary office or in a shrine or other religious institution.

The promissory note (Ex. P-1) recites that the executor has to pay to the executee Rs. 266 "on account of rusum of Deshpandeship for the two years 1934-35 and 1935-36 at Rs. 133 per annum." Therefore, according to the applicant, this is a suit of the kind referred to in Art. 13. The non-applicant-plaintiff contends that whatever may be the origin of the consideration for the promissory note, the suit is a suit on a promissory note and is not a suit to recover dues payable to the plaintiff by reason of his interest in a hereditary office. The question, therefore, which I have to decide is whether I can go behind the promissory note and consider what was the nature of the consideration for it. In support of his argument that the Court can go behind the negotiable instrument itself and look into the nature of the consideration there-

for the applicant relies on 29 Cal 461[1] and 35 ALL 558.[2] The former is a Privy Council case in which a suit had been brought on two promissory notes and it was urged that the consideration for these promissory notes was illegal, the transactions being the outcome of gambling transactions. Their Lordships found that the transactions were gambling transactions and void under S. 30, Contract Act, and they therefore dismissed the suit on those promissory notes. The latter case also was one of promissory notes being given for gambling transactions. The case was decided on the first proviso to S. 92, Evidence Act, but S. 92 has no application to the facts of the case before me. These cases are therefore easily distinguishable. I agree with the learned counsel for the non-applicant that in the circumstances of this case it is not barred by Article 13 because the suit is not to recover the dues but to recover money on a negotiable instrument. The case is similar to A I R 1923 ALL 420[3] in that it is a suit to recover a sum due under a contract entered into between the parties and is therefore of a small cause nature.

The next question is whether an earlier decision in Civil Suit No. 28 of 1882 between the predecessors of the present parties operates as res judicata in the present suit. This point arises in the following manner. The plaintiff's predecessor brought the said action in 1882 to recover 7 years' arrears of the same dues, amounting to Rs. 973 odd, from the predecessor of the defendant. The suit was compromised by the defendant paying Rs. 931 to the plaintiff in that case. The lower Court has held that that decision operates as res judicata as to the liability of the defendant to pay the said dues to the plaintiff. On behalf of the applicant it is contended that a consent decree cannot operate as res judicata against anyone except the parties who actually consented to the decree, and reliance is placed on A I R 1939 Pat 225,[4] but that case is not to the point at all; in that case the plaintiff's father had brought a suit along with certain other persons against one Hanuman Bux and others to recover possession of a village. The plaintiff's father died during the pendency of that suit and his heirs refused to join as plaintiffs. Consequently, they were joined as pro forma defendants. A decree followed with which Hanuman Bux was dissatisfied and appealed. In the appellate Court he compromised the dispute with the other contending parties. The plaintiff however was no party to that compromise. When therefore the plaintiff brought a subsequent suit challenging the validity of the compromise, the Court held that, as he had not been a party to the compromise, he was not bound by it. In that case the plaintiff was not the successor-in-interest of one of the parties who had agreed to the compromise, as are the parties to the case before me. That case therefore has no application to the question now raised.

In (1867) L R 1 H L Sc 117[5] the House of Lords entertained no doubt that a compromise decree would be as much binding on the actual parties to it and their privies in interest as if a judgment had been arrived at after the case had been fought out. In (1895) 1 Ch D 37[6] the Official Receiver who was the successor-in-interest of the South American & Mexican Co. was not allowed to reagitate a question which had been settled by a consent decree. In 13 M I A 497[7] it was held by the Privy Council that when a state of facts is accepted as the basis of a compromise whereby a suit pending decision is amicably adjusted and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say for the purpose of reviving the controversy that the real state of things was otherwise. The same view was expressed in 36 Bom 283.[8] In AIR 1926 Cal 672[9] it is true that a Division Bench of the High Court expressed the view that a consent decree did not come within the rule of res judicata but it held that a consent decree raised an estoppel as much as a decree passed in invitum and it held that the consent decree which was before it was binding as between the consenting parties

1. ('02) 29 Cal 461 : 28 I A 239 : 5 C W N 714 : 8 Sar 101 (PC), Kong Yee Lone & Co. v. Lowjee Nanjee.
2. ('13) 35 All 558 : 21 I C 878 : 11 A L J 854, Balgobind v. Bhaggu Mal.
3. ('23) 10 AIR 1923 All 420 : 73 I C 217 : 21 A L J 312, Collector of Bulandshahr v. Ram Sarup.
4. ('39) 26 AIR 1939 Pat 225 : 179 I C 884 ; 20 PLT 346, Manki Kanak Ratan v. Sundarmunda.
5. (1867) L R 1 H L Sc 117; Jenkins v. Robertson.
6. (1895) 1 Ch D 37 : 64 L J Ch 189 : 12 R 1 : 71 L T 594 : 43 W R 131, In re South American & Mexican Co.
7. ('70) 13 M I A 497 : 6 Beng L R 202 : 14 W R 33 : 2 Suther 365 : 2 Sar 601 (P C), Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Hari Krishna Devi Garu.
8. ('12) 36 Bom 283 : 12 I C 535 : 13 Bom L R 950, Bhaishankar Nanabhai v. Morarji Keshavji & Co.
9. ('26) 13 A I R 1926 Cal 672 : 94 I C 844 : 43 C L J 116, Sivadas v. Birendra.

and their successors in interest. That case therefore also supports the contention of non-applicant. The law on the subject can be said to be sufficiently clear that the applicant-defendant is estopped from raising the pleas which were raised in the former suit by his predecessor in interest and which were settled by consent. This plea which the applicant has sought to raise in this suit is that the plaintiff is not entitled to the emoluments of his office as moharir. It is because he raised this contention that he went on to plead that the promissory note in suit was without consideration. It follows therefore from the finding of the point of res judicata that the promissory note must be held to have been executed for consideration and to be valid.

The only other point made by the applicant in this case is as to the amount of interest to which the plaintiff is entitled. The promissory note (EX. P. 1) expressly provides for interest at the rate of one per cent. per annum. The lower Court has held that the rate there mentioned was a mistake, "per annum" being mentioned by mistake for "per mensem" and it held that there was an agreement to pay interest at one per cent. per month and that even if there was no agreement the plaintiff is entitled to interest by way of damages at the rate of ten per cent. per annum which he has charged in his statement of claim and this is the rate which has been allowed. In 16 N L R 68[10] it was held that where a promissory note is silent as to interest, evidence is not admissible to prove a contemporary oral agreement to pay a certain rate of interest under S. 92, Evidence Act. If that is the case where the document is silent as to the rate of interest a fortiori evidence is not admissible in a case where the document mentions a rate of interest to prove that the rate was different from that mentioned in the document. Section 79, Negotiable Instruments Act, provides that where interest at a specified rate is expressly made payable on a promissory note interest should be calculated at the rate specified. No question of awarding interest by way of damages therefore arose. Accordingly, the revision application fails except on the point of interest. The decree will be modified so as to allow the plaintiff interest at one per cent. per annum instead of ten per cent. Costs throughout will be proportionate. Counsel's fee Rs. 15.

N.K./R.K. *Application dismissed.*

10. ('20) 7 A I R 1920 Nag 131 : 56 I C 249 : 16 N L R 68, Pentaya v. Keshcorao.

(28) A. I. R. 1941 Nagpur 273

CLARKE J.

District Council, Wardha through Dr. H. M. Hasan — Defendant — Applicant

v.

Anna Daulatrao Kunbi — Plaintiff — Non-Applicant.

Civil Revn. No. 394 of 1940, Decided on 18th December 1940, to revise decree of the Sub-Judge, Second Class, Arvi, D/- 3rd May 1940.

(a) Provincial Small Cause Courts Act (1887), S. 25 — Lower Court's order doing substantial justice — High Court will not interfere in revision.

Where the lower Court's order has done substantial justice the High Court will not interfere in revision under S. 25 : 13 All 277 (F B); ('29) 16 A I R 1929 Nag 70; ('36) 23 A I R 1936 Oudh 247; ('38) 25 AIR 1938 Bom 223 and ('39) 26 AIR 1939 Oudh 141, *Rel. on.* [P 274 C 2]

(b) C. P. Local Self-Government Act (4 of 1920), S. 75 — Contract in breach of S. 75 is illegal.

Where the Legislature says that the breach of one of its provisions shall be deemed to be an offence under the Penal Code then that provision of law must be intended to protect the public and the breach is therefore impliedly prohibited and therefore illegal. Consequently a contract in breach of the provisions of S. 75 is illegal : 24 Bom 622; 26 Mad 156 and ('27) 14 A I R 1927 Lah 333, *Disting.* [P 275 C 2]

(c) C. P. Local Self-Government Act (4 of 1920), S. 75 — Construction — Word "respectively" should be read after words "with that Council, Board or Committee" — Member of Committee interested in contract with District Council — No offence is committed.

Section 75 should be read as though the word "respectively" were inserted after the words "with that Council, Board or Committee" in that section. Therefore S. 75 does not necessarily mean that if a member, officer or servant of a committee is interested in a contract with the District Council he shall be deemed to have committed an offence. [P 275 C 2; P 276 C 1]

(d) C. P. Local Self-Government Act (4 of 1920), S. 73 — S. 73 does not apply to actions based on breach of contract — District Council taking premises on lease for placing school therein — Suit by lessor for arrears of rent — S. 73 does not apply — Limitation for suit is governed by ordinary law.

Section 73 does not apply to actions based upon contracts entered into by the District Council. [P 276 C 1]

The District Council obtained a lease of certain premises for the purpose of placing a school therein. In the suit by the lessor for the recovery of arrears of rent :

Held that although the placing of a school in the lessor's premises was an act by the Council done under the Act but the suit being for the Council's failure to pay rent agreed upon by it with the lessor S. 73 did not apply and therefore notice under

S. 73 (1) was not necessary and the limitation for the suit was governed not by S. 73 (2) but by the ordinary law of limitation which provided three years : ('30) 17 A I R 1930 Nag 179, *Foll.*; 2 Mad 124, *Expl.*; ('33) 20 A I R 1933 Bom 164, *Approved.* [P 276 C 1]

(e) Pleadings — Amendment — Suit by plaintiff for arrears of rent of house leased — Defendant pleading lease to be void—Plaintiff seeking to base his claim under S. 65, Contract Act, by amending plaint — Amendment held did not introduce new case and could be allowed.

Where in his suit for recovery of rent of the house leased by him, the plaintiff applies to amend his plaint as soon as he knows of the defendant's plea that the agreement of lease is void and to base his claim under S. 65 the plaintiff is entitled to the amendment inasmuch as it does not introduce a new case : ('38) 25 A I R 1938 Nag 388, *Disting.*; ('28) 15 A I R 1928 Nag 27, *Rel. on.* [P 276 C 2]

(f) Civil P. C. (1908), O. 6, R. 17 — Amendment allowed subject to costs—Party accepting costs cannot challenge amendment unless he expressly reserved such right.

Where an amendment is allowed subject to the payment of costs to the other party, the party receiving the costs cannot challenge the amendment subsequently unless he has expressly reserved his right to do so while accepting the costs : ('34) 21 AIR 1934 Nag 163, *Foll.* [P 277 C 1]

(g) Contract Act (1872), S. 65 — Agreement void ab initio — S. 65 applies.

An agreement discovered to be void under S. 65 is one discovered to be not enforceable by law, and, on the language of the section, includes an agreement that was void in that sense from its inception, as distinct from a contract that becomes void : ('22) 9 A I R 1922 P C 403, *Foll.*; *Case law relied on.* [P 277 C 2]

(h) Interest — Court cannot allow interest merely because money due is withheld.

A Court has no power to award interest merely because money due is withheld and the plaintiff was unnecessarily delayed : ('29) 16 AIR 1929 Nag 170, *Foll.*; ('34) 21 AIR 1934 Nag 78; ('33) 20 AIR 1933 Pat 196 and ('30) 17 A I R 1930 Mad 727, *Approved.* [P 277 C 2]

(i) Contract Act (1872), S. 65 — Suit for compensation for use and occupation of house — Interest prior to suit cannot be allowed.

In the case of suit under S. 65 for compensation for use and occupation of a house, interest prior to the date of the suit cannot be allowed : ('38) 25 AIR 1938 P C 67, *Rel. on.* [P 278 C 1]

S. R. Mangrulkar and G. D. Bhide — for Applicant.

R. K. Rao and S. K. Wankhede — for Non-applicant.

Order. — Daulatrao, the father of the plaintiff, was a member of the school committee at a place called Khadki in the Wardha District. The school there was housed in a building which belonged to Daulatrao and now belongs to the plaintiff. This building was leased to the District Council, Wardha, by Daulatrao at a rent of Rs. 4 per month. The rent was duly paid by the District Council up to 31st August 1936 but thereafter they stopped paying rent by reason apparently of an objection taken by the auditors when auditing their accounts. Accordingly the plaintiff has brought this action on 16th August 1939 to recover rent at Rs. 4 per month from 1st September 1936 to 31st July 1939. Alternatively in case it be held that the lease was illegal or void, he claimed compensation for the use and occupation of the house by the District Council for the period in suit. The Small Cause Court has held that the lease was void under S. 75, Local Self-Government Act, but the plaintiff has succeeded on the alternative claim by virtue of S. 65, Contract Act. The District Council has applied for revision of this decree which includes interest and notice charges.

The District Council has challenged this decree before me on several grounds. First it is said that the absence of a notice under S. 73 (1), Local Self-Government Act, is fatal to the suit. Secondly it is said that the suit is barred by limitation under S. 73 (2) of the Act, not having been brought within six months of the accrual of the cause of action. Thirdly it is said that as the suit on the lease has been held to be void under S. 75, as being opposed to public policy, the suit must fail on the alternative claim for compensation for use and occupation. Finally it is said that no interest or notice charges should have been allowed against the applicant council. The non-applicant-plaintiff, on the other hand, contends that the finding that the contract is void under S. 75 of the Act is wrong. These then are the points which I am required to consider. I may say at the outset that even if the application could not be dismissed on the merits it could be dismissed on the ground that the lower Court's order has done substantial justice and, where such is the case, the High Court will not interfere in revision under Sec. 25, Small Cause Courts Act. It is only just and equitable that if the District Council has had the use of the plaintiff's house they should pay for it at a reasonable rate, and it is not suggested that the rate which has been allowed by the Court is unreasonable: 13 ALL 277,[1] AIR 1929 Nag 70,[2] A I R 1936 Oudh 247,[3] A I R 1938

1. ('91) 13 All 277 : 1891 A W N 81 (FB), Muhammad Bakar v. Bahal Singh.
2. ('29) 16 AIR 1929 Nag 70 : 114 I C 288, Village Sanitation Panchayat v. S. R. Deshmukh.
3. ('36) 23 AIR 1936 Oudh 247 : 161 I C 389 : 1936 O W N 330, C. P. Clarke v. Agha Aziz Khan.

Bom 223[4] and 14 Luck 588.[5]

I shall next take up the question whether the suit on the contract is void under S. 75, Local Self-Government Act. On behalf of the non-applicant-plaintiff Mr. Rao has argued that s. 75 does not say that a contract made in contravention of the section shall be void but it only says that if a member, officer or servant of any Council, etc., is interested in a contract made with that body he shall be deemed to have committed an offence under S. 168, Penal Code. It is said that this language does not attract the provisions of S. 23, Contract Act. I have been referred to Anson's Principles of the English Law of Contract, 18th Edn., p. 211, where a distinction is drawn between statutes which declare a contract to be illegal and void and those which impose a penalty on the parties without declaring it to be illegal or void. It is stated that this is one of the latter class since the Legislature has merely imposed a penalty on one of the parties to the contract. I have also been referred to 24 Bom 622,[6] 26 Mad 156[7] and 8 Lah 310.[8]

After the passage which I have referred to from p. 211 of Anson the learned author goes on to explain that in those instances where the Legislature imposes a penalty on the parties to a contract without declaring the contract to be illegal or void, the effect depends on the construction of a particular statute, and if there is any doubt as to its intention it is material to ask whether the object of the Act in imposing the penalty is merely to protect the revenue or whether it is to protect the general public or some class of the general public, since in the latter case it is probable that the act for the doing of which the penalty is imposed is impliedly prohibited by the statute and therefore illegal. The cases cited by Mr. Rao are all cases in which the object of the Act is obviously to protect the revenue and therefore it can be said that the parties can make such a contract provided they pay for it. Thus in 24 Bom 622[6] the statute concerned was the Tolls Act (Bombay Act, 3 of 1875) S. 10 of which prohibits the sub-letting of the lease from Government to collect tolls without the previous permission of the Collector and authorizes the Collector to impose a fine for breach of any of the conditions of the lease. 26 Mad 156[7] was a similar case under S. 16, Canals and Public Ferries Act (2 of 1890 (Madras)). 8 Lah 310[8] was a case in which an Indian State prohibited the person, who took a contract from the State to cut and remove bamboos from its jungles, from having partners. The Court said at page 314 :

> There is nothing to indicate that the agreement in question was forbidden by law. All that can be said of the condition is that it was imposed for administrative purposes. The State might have refused to recognise the partners under the agreement, but none of them was competent to wriggle out of it on that ground.

None of these were cases in which the statute said that a breach of its conditions shall be deemed to be an offence under the Penal Code, as is the case here. It is quite clear that if the Legislature says that the breach of one of its provisions shall be deemed to be an offence under the Penal Code, then that provision of law must be intended to protect the public and the breach is therefore impliedly prohibited and therefore illegal. This contention therefore of the non-applicant has no force. At the same time, while S. 75 makes a contract, which is a clear breach of its provisions, illegal and void, it is by no means clear that the present contract is a breach of the provisions of that section. The wording of the section is :

> If any member, officer, or servant of any Council, Board or Committee established under this Act is directly or indirectly interested in any contract made with that Council, Board or Committee, he shall be deemed to have committed an offence under S. 168, Penal Code.

It is true that the word "respectively" does not appear after the words "with that Council, Board or Committee," but the ordinary sense of the language would appear to be the same as if the word "respectively" had been inserted. Thus, it seems to be the intention of the Legislature that if a member, officer or servant of the District Council is interested in a contract made with the District Council, he shall be deemed to have committed an offence, and similarly, if a member, officer or servant of a Local Board is interested in a contract with the Local Board, he shall be deemed to have committed an offence, and if a member, officer or servant of a committee is interested in a contract made with that committee, he shall be deemed to have committed an

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4. ('38) 25 AIR 1938 Bom 223 : 174 I C 1004 : 40 Bom L R 125, Bell & Co., Ltd. v. Waman Hemraj.
5. ('39) 26 A I R 1939 Oudh 141 : 180 I C 15 : 14 Luck 588 : 1939 O W N 203, Zaman Khan v. Ram Asre.
6. (1900) 24 Bom 622 : 2 Bom L R 483, Bhikanbhai v. Hiralal Ramdin.
7. ('03) 26 Mad 156, Abdulla v. Mammod.
8. ('27) 14 A I R 1927 Lah 333 : 100 I C 846 : 8 Lah 310 : 28 P L R 161, Abdullah v. Allah Dia.

offence. It does not necessarily mean that if a member, officer or servant of a committee is interested in a contract with the District Council he shall be deemed to have committed an offence. That is what has been done here. It is for this reason that I am not at all sure that there has been a breach of the provisions of S. 75. At the same time as the word "respectively," which would have made this position clear, has not been inserted, it may have been the intention of the Legislature to prohibit all contracts, without the leave of the Government, made between any of the bodies mentioned and the members, officers or servants of any of them. For this reason I do not propose to interfere with the finding of the lower Court as to the contract being void under S. 75. I shall deal next with S. 73 of the Act. That section provides :

73 (1)—No suit shall be instituted against any Council, Board or Committee established under this Act or against any member, officer or servant thereof, or any person acting under the direction of any such Council, Board, Committee, officer or servant, for anything done or purporting to be done under this Act or any rule or bye-law made under it, until the expiration of two months next after notice in writing, stating the cause of action, the name and the place of abode of the intending plaintiff, and the relief which he claims, has been, in the case of a Council, Board or Committee delivered or left at its office, and in the case of any member, officer, servant or person as aforesaid, delivered to him or left at his office or usual place of abode.

(2) Every such suit, unless it is a suit for the recovery of immovable property, or for a declaration of title thereto, shall be dismissed, unless it is instituted within six months from the date of the cause of action and unless service of notice as aforesaid is admitted or proved.

It is contended by the applicant Council that the act of placing a school in the plaintiff's house was an act done by the Council under the Local Self-Government Act and therefore under sub-s. (1) of S. 73, a notice was necessary before a suit was filed. No doubt the placing of a school in the plaintiff's house was an act done by the Council under the Act, but it is not for that act that the Council is being sued; it is for the failure on the part of the Council to pay rent which had been agreed upon with the owner of the house. 26 N L R 81[9] is therefore direct authority for holding that S. 73 does not apply to this suit and that the period of limitation will not be that which is provided by sub-s. (2) but the period provided by the ordinary law of limitation which is three years. Mr. Mangrulkar on behalf of the Council has relied on 2 Mad 124,[10] 46 Bom 123[11] and A I R 1923 ALL 267.[12] Of these, 2 Mad 124[10] is against him and 46 Bom 123[11] has been disapproved of in 26 N L R 81[9] and has been distinguished in 57 Bom 67,[13] which holds the same view as in 26 N L R 81.[9] A I R 1923 ALL 267[12] has also been distinguished in 26 N L R 81[9] on account of the special wording of the section which was being there considered. I see no reason therefore for not following 26 N L R 81.[9]

Next it is said on behalf of the applicant that even if the period of limitation is three years and not six months, that part of the claim, which is more than three years before the date of the amendment of the plaint whereby the plaintiff was permitted to sue for compensation for use and occupation of the property, would be barred by limitation. The plaint, as at first presented, only claimed a relief of recovery of the arrears of rent under the agreement. On 24th January 1940 the plaintiff was allowed to amend his plaint by adding an alternative prayer. It is said therefore, relying on I L R 1939 Nag 194,[14] that the part of the claim which relates to the period before 24th January 1937 is barred by limitation, i. e., the claim for the period from 1st September 1936 to 23rd January 1937. I L R (1939) Nag 194[14] says:

Amendments should readily be allowed unless they prejudice the rights of the opposite party. An amendment of the plaint should not ordinarily be allowed when the application is made at a very late stage and the result of the amendment is to bring on the record a new case which on the date of the amendment is time barred.

I L R (1939) Nag 194[14] is no bar to the amendment in the case before me; here the application for amendment was not made at a late stage. As soon as the plaintiff knew what was the District Council's defence and that the plea was being taken that the agreement was void, he applied to amend the plaint on 25th October 1939. Moreover, the result of the amendment was not to bring on the record a new case; the plaintiff wanted the money to which he was entitled by reason of the occupation of his

9. ('30) 17 AIR 193 Nag 179 : 123 I C 903 : 26 N L R 81, K. L. Yogi & Co. v. The District Council, Buldana.

10. ('78) 2 Mad 124, Mayandi v. McQuhae.

11. ('22) 9 A I R 1922 Bom 380 : 64 I C 357 : 46 Bom 123 : 23 Bom L R 881, Baban Hemraj v. City Municipality, Poona.

12. ('23) 10 A I R 1923 All 267 : 71 I C 1032 : 21 A L J 161, Abdul Wahid v. Municipal Board, Allahabad.

13. ('33) 20 A I R 1933 Bom 164 : 142 I C 625 : 57 Bom 67 : 35 Bom L R 55, District Local Board, Poona v. Vishnu Raghoba.

14. ('38) 25 A I R 1938 Nag 388 : 176 I C 728 : I L R (1939) Nag 194, Lachhamansingh v. Mahendralal Choudhari.

house by the Council, and, if he could not obtain it on the basis of the agreement, he claimed it by reason of S. 65, Contract Act. Had the defendant not pleaded the bar of S. 75, Local Self-Government Act, it would have been unnecessary for the plaintiff to fall back on S. 65, Contract Act. In I L R (1939) Nag 194[14] the application for amendment was made after all the evidence, oral and documentary, had been put in and the case was at the argument's stage, and moreover by the amendment the plaintiffs in that case sought to found their claim not upon the document on which they originally based it but upon an earlier agreement, so that case is easily distinguishable. 23 N L R 152[15] is a ruling which is more appropriate to the facts of this case.

There is also another fatal objection to this contention on the part of the applicant. The amendment was allowed subject to the payment of Rs. 4 as costs to the defendant and the latter accepted those costs without demur. The applicant therefore cannot be permitted to challenge the order. In 30 N L R 347[16] it was held, following A I R 1930 Mad 268[17] and A I R 1933 Mad 410[18]:

> If under the terms of the order a party receives costs, subject to which the other party has been allowed a relief, the former will not be permitted to challenge the order. He will, of course, be entitled to do so provided he either does not accept the benefit allowed to him under the order or accepts it expressly reserving his right to challenge the order.

I now come to the material ground on which the lower Court has granted the plaintiff the relief which he claimed, namely, that under S. 65, Contract Act, he is entitled to compensation for use and occupation of the house by the Council. That section provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

It is said on behalf of the applicant that this section has no application to a case, such as this, where the agreement is void ab initio by reason of a provision of law. It is also said that the section only applies to cases like that mentioned in Illustration (a) to the section, where a promise was made to marry a person who was dead at the date of the promise. In view however of the pronouncement of their Lordships of the Privy Council in 45 ALL 179[19] at p. 184 no such position is tenable. In the words of their Lordships:

> An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void. The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.

This case was followed in A I R 1929 Nag 241[20] and A I R 1929 Nag 257,[21] 53 Mad 309,[22] 54 Mad 112[23] and was the view held in 20 N L R 87.[24] See also 11 Bom L R 693,[25] 54 Cal 189[26] at p. 217, 48 Cal 790[27] at p. 827, 11 Lah 121,[28] 11 Lah 375,[29] 58 Mad 65[30] and A I R 1936 Mad 98.[31] The only question now outstanding is as to the claim for interest and notice charges. The only ground on which the lower Court has allowed this part of the claim is that the plaintiff was unnecessarily delayed. In 25 N L R 81[32] it was held that the

> Courts have no power to award interest merely because money due is withheld. A plaintiff must

15. ('28) 15 A I R 1928 Nag 27 : 105 I C 43 : 23 N L R 152, Tribeniprasad v. Ramdas.
16. ('34) 21 A I R 1934 Nag 163 : 150 I C 845 : 30 N L R 347, Abdul Rahmankhan v. Failkoos Mohamad Khan.
17. ('30) 17 A I R 1930 Mad 268 : 123 I C 337 : 58 M L J 137, Venkatarayudu v. Rama Krishnayya.
18. ('33) 20 A I R 1933 Mad 410 : 142 I C 903, Prayag Dossjee v. Venkata Perumal.
19. ('22) 9 A I R 1922 P C 403: 71 I C 629: 50 I A 69 : 45 All 179 : 26 O C 223 (P C), Thakurain Harnath Kuar v. Indar Bahadur Singh.
20. ('29) 16 A I R 1929 Nag 241 : 116 I C 497, Sadia v. Ambhiria.
21. ('29) 16 A I R 1929 Nag 257 : 118 I C 865, Rajeshwar v. Ajabsingh.
22. ('30) 17 A I R 1930 Mad 132: 124 I C 502 : 53 Mad 309: 57 M L J 756, Thangammal Ayyar v. Krishnan.
23. ('30) 17 A I R 1930 Mad 945 : 129 I C 51 : 54 Mad 112: 60 M L J 117, Appaswami Ayyangar v. Narayanswami Ayyar.
24. ('24) 11 A I R 1924 Nag 132: 78 I C 343: 20 N L R 87, Narayan v. Motisa.
25. ('09) 11 Bom L R 693: 3 I C 761, Jijibhai Laldas v. Nagji Gulab.
26. ('27) 14 A I R 1927 Cal 465: 103 I C 2: 54 Cal 189, Mohamed Ebrahim Molla v. Commissioners for the Port of Chittagong.
27. ('16) 3 A I R 1916 Cal 136: 35 I C 305: 43 Cal 790: 23 C L J 26: 20 C W N 370, Mathura Mohan Saha v. Ram Kumar Saha & Chittagong District Board.
28. ('29) 16 A I R 1929 Lah 742: 121 I C 187 : 11 Lah 121: 31 P L R 403, Municipal Committee, Gujranwala v. Fazal Din.
29. ('30) 17 A I R 1930 Lah 364 : 120 I C 615: 11 Lah 375 : 31 P L R 765, Secretary of State v. G. T. Sarin & Co.
30. ('34) 21 A I R 1934 Mad 480 : 151 I C 46 : 58 Mad 65 : 67 M L J 38, Arunachala Nadar v. Municipal Council, Srivilliputtur.
31. ('36) 23 A I R 1936 Mad 98 : 161 I C 46, Madura Municipality v. Raman Servai.
32. ('29) 16 A I R 1929 Nag 170: 116 I C 669 : 25 N L R 81, P. P. Deo v. Narayan.

allege and prove facts by virtue of which it can be held that the interest claimed was payable under a provision of the law or a settled principle.

This ruling was quoted with approval in 30 N L R 213[33] at p. 217 and the same view was expressed in 12 Pat 216.[34] See also 53 Mad 549.[35] In I L R (1938) 2 Cal 72[36] the Privy Council allowed interest from the date of suit until realisation in a case where a contractor entered into a contract with a railway company to execute certain works at scheduled rates which were found insufficient and were abandoned by mutual consent but the works were continued and completed. Compensation was allowed to the contractor on a *quantum meruit* basis as in the case before me. In view of that pronouncement of their Lordships, I am of opinion that the lower Court should not have allowed interest prior to the date of suit, and no claim has been made for future interest; but I see no reason whatever for disallowing notice charges. The result is that the lower Court's decree will be reduced by Rs. 8-2-6, which is the amount allowed for interest, and the decree will be for Rs. 140-15-6. The applicant, having failed to all but a very minute extent, will pay costs of the application. I allow Rs. 20 as counsel's fee.

G.N./R.K. *Order accordingly.*

33. ('34) 21 A I R 1934 Nag 78 : 148 I C 822 : 30 N L R 213, Navnitdas v. Mancharsa.
34. ('33) 20 A I R 1933 Pat 196 : 146 I C 56 : 12 Pat 216 : 14 P L T 149, J. H. Pattinson v. Bindhya Debi.
35. ('30) 17 A I R 1930 Mad 727: 127 I C 630 : 53 Mad 549: 59 M L J 358, Nanchappa Goundan v. Ittichathara Mannadiar.
36. ('38) 25 A I R 1938 P C 67: 173 I C 15: 65 I A 66 : I L R (1938) 2 Cal 72 : 32 S L R 374 (PC), Bengal Nagpur Railway Co., Ltd. v. Ratanji Ramji.

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(28) A. I. R. 1941 Nagpur 278

NIYOGI AND GRUER JJ.

Kesheorao Bapuji Yende—Plaintiff — Applicant

v.

Ganeshrao Shamrao Kunbi and another—Defendants—Non-Applicants.

Civil Revn. Appln. No. 632 of 1939, Decided on 24th March 1941, from order of the Dist. Judge, Wardha, D/- 5th August 1939.

Civil P. C. (1908), S. 115 and O. 43, R. 1 (a) —Appellate Court's order under O. 43, R. 1 (a) is not immune from operation of S. 115—Appellate Court by its wrong decision making subordinate Court assume or abdicate jurisdiction or lending it support in doing so — High Court can interfere in revision — Under S. 115 High Court is concerned with original and not appellate Court's order — Question as to legality or illegality of appellate Court's order becomes immaterial.

The attributes of jurisdiction are external to the tribunal and independent of its decision. The appellate Court's order under O. 43, R. 1 (a) is not immune from the operation of S. 115. If the appellate Court assumes or abdicates jurisdiction by its own wrong decision, the High Court has jurisdiction to rectify the error in revision. Consequently where the appellate Court, by its wrong decision, makes a Court subordinate to it assume or abdicate jurisdiction or lends support to it in doing so, its decision cannot but be pronounced as illegal or at any rate irregular exercise of jurisdiction and therefore would fall under S. 115 (c). Moreover the decision of the appellate Court in such a case amounts to the exercise of a jurisdiction not vested in it by law and therefore the decision would fall under S. 115 (a) inasmuch as the appellate Court can neither confer on the sub-Court a jurisdiction which it has not under the law nor take away from the sub-Court a jurisdiction vested in it by law : ('30) 17 A I R 1930 All 713 (FB) *Rel. on.* [P 279 C 2; P 280 C 1]

Moreover, the High Court under S. 115 is not concerned with the order of the appellate Court so much as with the order of the original Court, whether or not it is affirmed by the appellate Court, because the only question which under S. 115 is material for the High Court is whether the original Court has or has not jurisdiction to try, and not whether the appellate Court's order is right or wrong. Since S. 115 empowers the High Court to send for the record of the case of its own motion, notwithstanding the appellate order, it must also give power to pass the necessary order affecting jurisdiction of the original Court. From this point of view the issue as to the legality or the illegality of the lower appellate Court's order becomes immaterial : ('26) 13 A I R 1926 All 58 and ('25) 12 A I R 1925 Oudh 163, *Rel. on*; ('37) 24 A I R 1937 Nag 39, *held correctly decided; Case law reviewed.* [P 279 C 1]

D. T. Mangalmurti — for Applicant.

V. V. Kelkar — for Non-applicants.

Niyogi J. — I concur with Gruer J. in answering the question in the affirmative. I wish to add what follows. The serious difficulties and anomalies envisaged by Bose J. in his referring order arise in my opinion from the assumption that the appellate Court is in a privileged position as compared with the original Court. The learned Judge observes:

Therefore, so far as the first Court is concerned I think the issue is clear cut and simple. Its duty is to try the case, and it either has or has not jurisdiction to do so. If it has and refuses to exercise it there is a refusal to exercise jurisdiction whatever the reason may be. If it has not jurisdiction and decides that it has, again the matter is revisable because there is then an attempt to exercise a jurisdiction which the Court does not possess. But the position of the appellate Court is not as clear "because" express jurisdiction is conferred upon the Court under O. 43, Rule 1 (a) to determine whether an order of the first Court returning a

plaint for presentation to the proper Court is right or wrong.

On these premises the learned Judge's conclusion is that the lower appellate Court's order, though wrong, is not illegal so as to debar the High Court from interfering with its order. One answer to that is that the High Court is not concerned with the order of the appellate Court so much as with the order of the original Court, whether or not it is affirmed by the appellate Court. That is because the only question which under S. 115, Civil P. C., is material for the High Court is whether the original Court has or has not jurisdiction to try, and not whether the appellate Court's order is right or wrong. Since S. 115, Civil P. C., gives power to the High Court to send for the record of the case of its own motion, notwithstanding the appellate order, it must also give power to pass the necessary order affecting jurisdiction of the original Court. From this point of view, the issue as to the legality or the illegality of the lower appellate Court's order becomes immaterial. But, in my opinion, the order of the lower appellate Court, if wrong, is one that would fall under Cls. (a) and (c), S. 115, Civil P. C. If O. 43, R. 1 (a), Civil P. C., expressly provides a right of appeal from an order of the original Court returning a plaint for presentation to the proper Court, it by necessary implication postulates that the original Court has in the first instance jurisdiction to determine whether or not it has jurisdiction to try a particular suit. If the original Court has jurisdiction to decide that issue, and it decides it wrongly, that decision being a wrong decision as contradistinguished from an illegal decision may be immune from the cognisance of the High Court under S. 115, C. P. C. Nevertheless Bose J. is prepared to concede (para. 8 of the referring order) :

Had the learned Judge accepted the plaint his decision would, in my opinion, have been open to scrutiny in revision.

If ex hypothesi an illegal and not a wrong order is open to scrutiny and the High Court can interfere with the original Court's order only on the ground of its being illegal, can it be said that the illegality lies not in the order itself but in the action of the Court in relation to the suit which follows the order? The action of the Court flows from the decision as effect from cause. It is obvious that the illegality in the effect must be shared by the cause. It must therefore be held that the decision is not merely wrong but illegal. The High Court's power of revision comes into play because the original Court while exercising its jurisdiction in deciding whether or not it has jurisdiction to try the suit has decided wrongly so as to give jurisdiction to itself when the law does not give it or to renounce jurisdiction when the law gives it. Has the Court jurisdiction to assume or abdicate its jurisdiction by its own wrong order ? It would indeed be bold to say that it has; but granting that it has, can it be said that it is a valid exercise of jurisdiction ?

Now if the original Court's order is amenable to correction under S. 115, Civil P. C., I fail to see why the appellate Court's order cannot be, since both the Courts act in exercise of the jurisdiction vested in them by law. When the High Court sends for the record of any "case" it is primarily and immediately concerned with the jurisdiction of the Court which has to try or has tried the "case." A question of jurisdiction when raised in the Court of first instance can be decided in one of two ways, viz., that the Court has jurisdiction or has not jurisdiction. In the first case, the case is directly brought before the High Court; in the second case it comes to the High Court through the medium of the appellate Court. Whichever way it comes, the issue before the High Court is identical, viz., whether the Court of first instance has jurisdiction. No Court subordinate to the High Court has final power to decide that question. Its decision is final and its finality bears with it the presumption of correctness. If the High Court were not to act upon its decision because the appellate Court's order is sacrosanct, the result would be obviously contrary to law since the High Court itself would be guilty of failure to exercise jurisdiction vested in it by law in permitting the original Court to usurp or renounce jurisdiction according to the nature of the appellate Court's order. A train of reasoning which leads to such a strange and capricious result cannot possibly be sound. The flaw in the reasoning lies in the assumption that the appellate Court's order is immune from the operation of S. 115, Civil P. C. If the appellate Court were to assume or abdicate jurisdiction by its own wrong decision, it cannot be disputed that the High Court would have jurisdiction to rectify the error in revision. I fail to see why that Court should enjoy immunity when it, by its wrong decision, makes a Court subordinate to it assume or abdicate jurisdiction or lends support to it in doing so.

Bose J. rightly observes that the attributes of jurisdiction are external to the tribunal and independent of its decision. That is so, because jurisdiction is authority to decide matters in controversy, and the limits of that authority are imposed by the Legislature. While the original and appellate Courts as well as the High Court have power to decide questions of jurisdiction, the decision of the High Court is final. The jurisdiction cannot therefore be independent of the decision of the High Court as in the case of the Subordinate Courts. When the High Court differs from the appellate Court's decision it has jurisdiction to interfere under S. 115, Civil P. C., because the appellate Court cannot by its order confer or take away the jurisdiction of any Court. If that is so, how can the appellate Court be regarded to have exercised its jurisdiction legally when its order resulted in conferring on another Court an authority which it has not under the law or in taking away authority which it has under the law ? An exercise of jurisdiction which manifestly runs counter to the law cannot but be pronounced as illegal or at any rate irregular exercise of jurisdiction. On this view the case would fall under cl. (c) of S. 115, Civil Procedure Code.

The question may be viewed from another angle. If the appellate Court holds that a Court subordinate to it has jurisdiction when it has not, has the appellate Court jurisdiction to confer authority on a Court which it has none under the law ? If it has not, would it not be right to say that the appellate Court has exercised a jurisdiction not vested in it by law ? If, on the other hand, the appellate Court holds that a Court has no jurisdiction when it has it under the law, has that Court jurisdiction to take away from another Court an authority that is vested in it by law ? If it has not, would it not be again right to say that the appellate Court has exercised a jurisdiction not vested in it by law ? The case would thus fall under cl. (a) of S. 115, Civil P. C. This was the conclusion reached in the Full Bench case reported in 53 ALL 75.[1]

Gruer J. — The question referred to us for decision is whether the case in I L R (1937) Nag 97[2] has been rightly decided. That case held that where a civil Court found that it had no jurisdiction to try a case and that order was upheld by the District Judge in appeal the orders of the lower Courts amounted to refusing to try the case and to exercise the jurisdiction that is vested in them and therefore the High Court has power to interfere under cl. (b) of S. 115, Civil P. C. The case out of which this reference arises was one for arrears of rent which was brought in accordance with S. 106, proviso, Central Provinces Tenancy Act, in the Court of a Judge who was also a revenue officer. The Judge held that on the facts the case could not be one for arrears of rent and therefore returned the plaint for presentation to a regular civil Court. That order was upheld in appeal. Bose J. therefore puts the question, "Has the High Court, in these circumstances, jurisdiction under S. 115 of the Code to entertain a revision against the order of the appellate Court ?" He finds no difficulty in holding that so far as the trial Court is concerned the learned Judge refused to exercise jurisdiction, but he would distinguish the position of the appellate Court whose function is not to try the case but to decide whether the order of the first Court about jurisdiction is right or wrong. In doing so, if it duly discharges the duty which the law imposes upon it, how does that attract the provisions of either cls. (a), (b) or (c) of section 115 ?

It cannot be disputed that the District Judge had on appeal made to him under O. 43, R. 1, Civil P. C., jurisdiction to examine the order of the lower Court returning the plaint and to decide whether that order was right or wrong. It therefore cannot with any show of reason be said that there has been violation of cls. (a) and (b) of S. 115 by the appellate Court. So far as cl. (c) is concerned, it is not alleged that there has been any irregularity in procedure. So the Judge has not acted with material irregularity in the exercise of his jurisdiction. The view however has been taken in some cases that where a Judge when dealing with a matter of jurisdiction passes an order which is wrong in law he is acting illegally in the exercise of his jurisdiction. That view is to be found in 32 Cal 146[3] which is followed in I L R (1937) Nag 97[2] under discussion. On this point I agree with the reasoning of Bose J. in para. 13 of the referring order that an illegal decision is to be distinguished from a wrong decision or one which is wrong

1. ('30) 17 AIR 1930 All 713 : 127 I C 434 : 53 All 75 : 1930 A L J 1233 (FB), Ram Iqbal Rai v. Telesari Kuari.
2. ('37) 24 AIR 1937 Nag 39 : 167 I C 700 : I L R (1937) Nag 97, Mt. Kanij Johra v. Raja Hussain.
3. ('05) 32 Cal 146, Zamiran v. Fateh Ali.

in law : 41 Cal 323[4] at pp. 337 and 340, 53 I A 271[5] and 11 Cal 6.[6] In 40 Mad 793[7] their Lordships said :

> The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

Now, no doubt, a question of jurisdiction is involved in a wrong decision in law on a point of jurisdiction, but it is not a logical inference from the above pronouncement of their Lordships, to say that the section is directed against all conclusions of law or fact in which the question of jurisdiction is involved. A Judge is not acting illegally merely because he takes a mistaken view on a law point. I therefore do not agree with the proposition stated in A I R 1928 Bom 548[8] that where the question of law involved is a question of jurisdiction the High Court has power to interfere in revision even when the lower appellate Court has committed only a mistake of law.

If then we confine ourselves strictly to the District Judge's order the line of reasoning and the position arrived at by Bose J. appears to me to be logically correct. One has however to consider that the weight of authority is against the view now propounded that no revision lies. Bose J. has also candidly admitted that his view involves serious difficulties and anomalies although he attempts to show that they can partly be got over. The position in the different High Courts would seem to be as follows : Bombay, Madras and Patna held consistently that revision lies : 15 Bom 148,[9] 20 Bom 50,[10] 1 Pat 232,[11] 39 Mad 195.[12] In Calcutta, 32 Cal 146[3] dissented from the old case in 1 C W N 626.[13] In Allahabad there has been some inconsistency, but even where it was held that the error of the appellate Court was not open to revision the High Court reversed the order of the Court of first instance : 48 ALL 168;[14] *see also* 8 ALL 111,[15] 43 ALL 334[16] and 53 ALL 75.[1] In the Lahore High Court and the Oudh Judicial Commissioner's Court there was a difference of opinion : A I R 1934 Lah 536,[17] A I R 1934 Lah 108,[18] A I R 1929 Lah 83,[19] A I R 1933 Lah 210;[20] *see also*, A I R 1917 Oudh 49,[21] A I R 1923 Oudh 38,[22] A I R 1925 Oudh 163,[23] A I R 1926 Oudh 31,[24] 4 Luck 347[25] and 4 Luck 667.[26]

The difficulty can be got round if one adopts the view set out in various cases including 48 ALL 168[14] and A I R 1925 Oudh 163[23] that the Court is not confined to an enquiry as to the jurisdiction exercised by the lower appellate Court alone but can revise the original order. Section 115, Civil P. C., empowers the High Court to call for the record of any case decided by any Court subordinate to it and in which no appeal lies to itself. The conditions are therefore fulfilled as an appeal lay not to the High Court but to the District Judge's Court. As the High Court can act suo motu it could therefore revise the order of the first Court although it is moved by a motion to revise the order of the appellate Court. Of course that involves going behind the appellate Court's order although the reasons on which it was based might be considered. Where, as here, the appellate Court's order confirms that of the first Court it can be said that the original order remains alive and so

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4. ('14) 1 A I R 1914 Cal 388 : 23 I C 977 : 41 Cal 323, Shew Prosad v. Ram Chunder.
5. ('26) 13 A I R 1926 P C 142 : 99 I C 749 : 54 Cal 338 : 53 I A 271 (P C), Umed Mal v. Chand Mal.
6. ('85) 11 Cal 6 : 11 I A 237 (P C), Amir Hassan Khan v. Sheo Baksh Singh.
7. ('17) 4 A I R 1917 P C 71 : 40 I C 650 : 40 Mad 793 : 44 I A 261 (P C), Balakrishna Udayar v. Vasudeva Ayyar.
8. ('28) 15 A I R 1928 Bom 548 : 112 I C 734 : 30 Bom L R 1391, Nandlal v. Kisanlal.
9. ('91) 15 Bom 148, Vishvanath Govind v. Rambhat.
10. ('96) 20 Bom 50, Girdharlal Hargovandas v. Lallu Jagjivan.
11. ('22) 9 A I R 1922 Pat 525 : 65 I C 122 : 3 P L T 445 : 1 Pat 232, Ram Prasad Rai v. Mahesh Kant.
12. ('15) 2 A I R 1915 Mad 1223 : 18 I C 555 : 39 Mad 195 : 24 MLJ 112 (FB), Atchayya v. Venkata Seetharamachandra Rao.
13. ('97) 1 C W N 626, Mathura Nath v. Umesh Chandra.
14. ('26) 13 A I R 1926 All 58 : 90 I C 353 : 48 All 168 : 24 A L J 83, Bisheshar Prasad v. Raghubir.
15. ('86) 8 All 111 : 1886 A W N 28, Badami Kuar v. Dinu Rai.
16. ('21) 8 A I R 1921 All 226 : 61 I C 36 : 43 All 334 : 19 A L J 110, Chandu Lal v. Koka Mal.
17. ('34) 21 A I R 1934 Lah 536 : 151 I C 416, Tulsi Ram v. Rattan Chand.
18. ('34) 21 A I R 1934 Lah 108 : 149 I C 1105, Co-operative Society, Indora v. Salig Ram.
19. ('29) 16 A I R 1929 Lah 83 : 108 I C 597, Cotton Trading Syndicate v. Malawa Mal.
20. ('33) 20 A I R 1933 Lah 210 : 141 I C 421 : 34 P L R 233, Bansari Das v. Ram Chandar.
21. ('17) 4 A I R 1917 Oudh 49 : 41 I C 125, Bhagwati v. Gobind Dat.
22. ('23) 10 A I R 1923 Oudh 38 : 79 I C 237, Khunai Dewari v. Mt. Dil Kunwar.
23. ('25) 12 A I R 1925 Oudh 163 : 80 I C 694, Abdullah v. Mahammad Nazir.
24. ('26) 13 A I R 1926 Oudh 31 : 90 I C 430, Haidri Khanam v. Ahmad Ali.
25. ('29) 16 A I R 1929 Oudh 91 : 114 I C 507 : 4 Luck 347 : 5 O W N 1117, Manohar Lal v. Mohre Lal.
26. ('30) 17 A I R 1930 Oudh 2 : 118 I C 807 : 4 Luck 667 : 7 O W N 573, Lachman Prasad v. Raghubar Dayal.

can be revised. I confess that a difficulty would arise where the appellate Court upsets the order of the first Court because that would mean that the High Court would be revising and upholding an order which has already been set aside by a competent Court. Even so I am not prepared to say that that could not be done. In the case out of which this reference arises and in I L R (1937) Nag 97[2] no such difficulty arises as the lower Courts have come to the same decision. It is to be observed that Pollock J. deals with the two lower Courts together where he says the orders of the lower Courts amounted to refusing to try the case. I think that that decision was correct in holding that the Court had power to interfere under cl. (b) of S. 115, Civil P. C. That interference however should be taken to be with the order of the trial Court which happens to be confirmed in appeal, and not with the order of the appellate Court itself.

G.N./R.K. *Answer accordingly.*

⁎ (28) A. I. R. 1941 Nagpur 282

NIYOGI J.

Dattatraya Vishnu Bapat — Applicant

v.

Registrar, Co-operative Societies, C. P. and Berar, Nagpur and another — Opposite Party.

Misc. Civil Appln. No. 51 of 1940, Decided on 16th September 1940, for writs of certiorari.

(a) Interpretation of statutes — Acts of Parliament regulating powers of Courts in India — English doctrines should not be implicated.

In regard to the interpretation of statutes passed by the Parliament to define or regulate the powers of the Courts in India their language ought not to be enlarged by any implication of English doctrines: ('28) 15 AIR 1928 P C 99 and ('28) 15 AIR 1928 P C 2, *Rel. on.* [P 284 C 1]

⁎ (b) Certiorari — Writ of — Nagpur High Court cannot issue.

The High Courts in India other than the Chartered High Courts (e.g., Nagpur High Court) have not the powers to issue the prerogative writ of certiorari either under the Letters Patent or the Government of India Act. [P 286 C 1]

The High Court of Nagpur has no other jurisdiction or authority except as provided in Ss. 24 and 115, Civil P. C., or Ss. 435 and 439, Criminal P. C.; *Case law discussed.* [P 287 C 1]

Applicant in person.

Order. — This is an application for a writ of certiorari. The applicant is a shareholder of the Akola Co-operative Adat Shop Ltd. That society applied for an award against Akola Central Bank in 1936-37 to recover its adat fund of Rs. 2000 in accordance with the resolution passed at a general meeting held in 1927. When the registrar served a notice on the bank it suggested liquidation of the adat shop as a remedy. Later on the bank was suspended and taken over by the Government co-operative department. The registrar deputed the circle auditor attached to the Akola Central Bank to make enquiry into the financial condition of the adat shop under S. 35, Co-operative Societies Act, and thereafter ordered cancellation of the registration of the adat shop under S. 39 (1) of that Act. The registrar appointed the circle auditor as liquidator on 27th October 1937. Against the registrar's order the applicant filed an appeal to the Provincial Government which summarily dismissed it on 14th April 1939 without notice to the applicant. The applicant has applied for a writ of certiorari to issue against the registrar of the co-operative society and the co-operative circle auditor, Akola, and call for records relating to the matter of cancellation of the registered co-operative adat shop which is alleged to be solvent with a view to quash the Government's order.

The applicant has himself argued his application before me and has placed at my disposal his argument in writing. His argument in short is that this Court under its Letters Patent and Ss. 223 and 224, Government of India Act, has been vested with all the powers of the King's Bench Division of the Supreme Court of England, that by Ss. 219 and 220, Government of India Act, all the High Courts in India are put on the same level as to their jurisdiction and authority, and that the Nagpur High Court is thus empowered to issue a writ of certiorari in the exercise of the extraordinary original civil jurisdiction. The fact that this High Court had issued a writ of habeas corpus in a case reported in 1938 N L J 423[1] is relied on as a precedent.

The point is of first impression. The solution of the problem presented by this application involves an enquiry into the nature and origin of the writs of certiorari as well as the constitution and jurisdiction of the power and authority of the various High Courts in India. The writ of certiorari is one of the principal prerogative writs which under the common law powers, the Court of King's Bench was authorized to issue.

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1. ('38) 25 A I R 1938 Nag 513: 180 I C 594: 1938 N L J 423: 40 Cr L J 397: I L R (1940) Nag 1 (F B), Venkatesh Yeshwant Deshpande v. Emperor.

The writs owe their name to the fact that they originally issued only at the suit of the Crown, and from the early years of the 18th century they were also available to the subjects as supplementary remedies against the wrong doing of public authorities (Stephen's Commentaries, Vol. IV, p. 545, Edition 19). As the result of the Judicature Act of 1873 the various Courts such as the King's Bench, the Common Pleas, the Court of Exchequer, etc., were merged in the Supreme Court of Judicature. Among the Common Law Courts, the King's Bench Division was the first in rank. There the King was always presumed to sit in person and it enjoyed the authority to issue prerogative writs such as mandamus for the purpose of compelling discharge of a public duty by persons or bodies on whom such duty was cast, or such as prohibition to restrain excessive jurisdiction by inferior Courts or by writ of certiorari to take cases from them and bring them before itself. There are many varieties of this writ but all of them are commands issued to the inferior Courts to send their proceedings to be examined by the King's Bench Division of the Supreme Court of England. A form of such a writ is given at p. 147 of Vol. I, Stephen's Commentaries on the Laws of England, Edn. 19. The characteristics of this writ are described by Scrutton L. J., in (1931) 2 K B 215[2] at p. 233 in this way :

> The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction ; and therefore, the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. There has been a great deal of discussion and a large number of cases extending the meaning of "Court." It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court: if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari.

There are elaborate discussions of this writ in (1924) 1 K B 171[3] and (1929) 1 K B 619.[4] In (1906) 2 K B 501[5] at p. 535 Moulton, L. J., pointed out that the procedure of certiorari applies in many cases in which the body whose acts are criticised would not ordinarily be called a Court, nor would its acts be ordinarily termed "judicial acts" and observed that the true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. The question is whether the power to issue these prerogative writs including the one under consideration has been conferred on this High Court by the Letters Patent or the Government of India Act of 1935. Stress is laid on para. 5 of the Letters Patent which provides that all writs, summonses, precepts, rules, orders and other mandatory process to be used, issued or awarded by the High Court of Judicature at Nagpur shall run and be in the name and style of Us, or of Our Heirs and Successors. That only dictates the form but does not purport to endow the High Court with authority in that behalf; nor can such authority be implied from the wording of any other paragraph in the Letters Patent. Paragraph 9 no doubt gives power to remove and to try and determine, as a Court of extraordinary original jurisdiction, but that relates only to a suit falling within the jurisdiction of any Court subject to its superintendence. It is analogous to the provisions of S. 24, Civil P. C. Much reliance is placed on Ss. 223 and 224, Government of India Act, 1935. The latter section relates to the administrative functions of the High Court and cannot be taken to apply to a case which involves exercise of judicial authority by this Court. Section 223 of that Act runs as follows :

> *223.* Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of Part 3 of this Act.

This section reproduces the substance of the provisions of Ss. 106 (1), 108 and 112, Government of India Act of 1915. Part 3, Government of India Act, 1935, came into force on 1st April 1937 and this section only confirms such jurisdiction as any High Court

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2. (1931) 2 K B 215 : 144 L T 464 : 100 L J K B 760 : 47 R R 227 : 95 J P 89 : 29 L G R 252 : 75 S J 138, Rex v. London County Council.
3. (1924) 1 K B 171 : 93 L J K B 390 : 130 L T 164 : 88 J P 13, Rex v. Electricity Commissioners.
4. (1929) 1 K B 619 : 98 L J K B 636 : 141 L T 6 : 27 L G R 677 : 73 S J 49 : 45 T L R 345, Rex v. Minister of Health.
5. (1906) 2 K B 501 : 75 L J K B 745 : 95 L T 399: 70 J P 485:22 T L R 603, Rex v. Woodhouse.

possessed before that date. It is not helpful in determining the extent of jurisdiction of this High Court which was established but 15 months before Part 3, Government of India Act, came into force. Section 219 provides that the various Courts specified therein shall, in relation to British India, be deemed to be High Courts for purposes of the Government of India Act, but that does not abolish the distinction between the Chartered High Courts and other High Courts in point of constitution and jurisdiction; nor would the fact that the provisions of Chap. 2 of Part 9 of that Act are made applicable by sub-s. (2) of that section to every High Court in British India destroy the effect of the plain provisions of s. 223 which expressly declares that the jurisdiction of, and the law administered in the existing High Courts shall be the same as immediately before the commencement of Part 3 of this Act.

It is suggested that because this High Court is established by His Majesty's Letters Patent it becomes clothed with all the power and authority which the King's Bench Division of the High Court of Justice in England is under the English Common Law empowered to do. The argument would indeed be sound were the common law of England the common law of India. Their Lordships of the Privy Council in 9 Lah 510[6] at p. 518 observed in regard to the interpretation of Indian statutes that their language ought not to be enlarged by any implication of English doctrines. To the same effect are to be found observations in 7 Pat 221[7] at p. 227. These observations, though they were made in regard to the statutes passed by the Indian Legislature, are eqally applicable to those passed by the Parliament to define or regulate the powers of the Courts in India, and would appear to reprobate any attempt to enlarge the meaning of expressions used in such enactments by importing the considerations of the common law of England. The assumption involved in the argument is contradicted by the very terms of S. 223, Government of India Act, which leaves every High Court free to exercise such jurisdiction and authority as that particular High Court had or could exercise on the date specified therein. The expression "shall be the same as immediately before the commencement of Part 3 of this Act" is highly significant. To grasp the meaning of that expression it is necessary to inspect the terms of the Letters Patent of the High Courts of Madras, Bombay and Calcutta as distinguished from other High Courts in India, and the Charters which preceded the Letters Patents. For the purpose of the present discussion it would suffice to examine the constitution of the Calcutta High Court. That High Court came to be established originally as a Supreme Court by a Charter dated 26th March 1774 which was granted under 13 Geo. III, Ch. 63, popularly known as the Regulating Act. Section 13 of that Act empowered the King to establish by Charter or Letters Patent Supreme Courts at Madras, Bombay and Fort William in Bengal with such powers as by the said Charter might be granted or committed to the said Court. Section 14 provided that the jurisdiction, powers and authority to be conferred upon the Supreme Courts were to extend to all British subjects who would reside in the Kingdoms or Province of Bengal, Bihar and Orissa under the protection of the said East India Company. It was in pursuance of this power that by cl. 4 of the Charter dated 26th March 1774 it was ordained as follows :

> And it is our further will and pleasure that the said Chief Justice . . . to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England by the Common Law thereof.

By cl. 21 of that Charter, the Court of Requests and Court of Quarter Sessions established at Fort William, and the Justices, Sheriffs and Magistrates appointed for the said districts were made subject to the order and control of the Supreme Court in such sort, manner and form as the inferior Courts and Magistrates of and in England were, by law, subject to the order and control of the Court of King's Bench, and to that end the Supreme Court was empowered to issue writs of mandamus, certiorari, procedendo or error to be directed to such Courts or Magistrates : *see* 41 Cal 173[8] at pp. 204 and 205. After the Indian High Courts Act of 1861 came into operation Letters Patent were issued in 1862, which were superseded by a fresh Letters Patent dated 28th December 1865 : *see* p. 1333, Mulla's Civil Procedure Code. In the preamble to the Letters Patent it was declared that the High Court to be

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6. ('28) 15 AIR 1928 P C 99 : 108 I C 678 : 9 Lah 510 : 55 I A 154 (PC), Chunna Mal-Ram Nath v. Mool Chand-Ram Bhagat.

7. ('28) 15 AIR 1928 P C 2 : 107 I C 14 : 7 Pat 221 : 55 I A 18 (PC), Mt. Ramanandi Kuer v. Mt. Kalawati Kuer.

8. ('14)1 AIR 1914 Cal 69 : 20 I C 81 : 41 Cal 173 : 18 C L J 452 : 14 Cr L J 321 : 17 C W N 1253 (S B), Legal Remembrancer v. Matilal Ghose.

established should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under the said Act at the time of the abolition of such last mentioned Courts, and in para. 2 it was specifically provided that notwithstanding the revocation of the said Letters Patent of 1862 the High Court of Judicature at Fort William in Bengal would continue as from the time of the original establishment thereof, the High Court of Judicature at Fort William in Bengal. It must be observed that the preamble referred to above was drawn up in terms of S. 9, Indian High Courts Act of 1861. The Supreme Courts of Madras and Bombay were also established by similar Charters in 1801 and 1823 and their constitution and authority were the same as those of the Calcutta High Court. The High Court of Allahabad was established by Letters Patent issued on 17th March 1866, but in them the special authority which had been conferred on the three Presidency High Courts by their Charters was not mentioned. That High Court was simply declared to be a Court of Record and its Letters Patent do not, in their terms, materially differ from those of the High Court of Patna, established in 1916, of the High Court of Lahore established in 1919 or of the High Court of Rangoon established in 1922 or of the Nagpur High Court established in 1936.

Although the Chartered High Courts of Madras, Bombay and Calcutta have the power to issue prerogative writs, that power was materially restricted by legislation. Section 45, Specific Relief Act, declared that the High Courts of Judicature at Fort William in Bengal, Madras and Bombay had the power to require any specific act to be done or forborne by a person holding a public office only within the local limits of its original civil jurisdiction. Section 50 of that Act abolished the power to issue any writ of mandamus. It was pointed out by Coutts Trotter J., in 40 Mad 125[9] at p.136 that though the proceedings under S. 45, Specific Relief Act, were analogous to the proceedings for obtaining the English writ of mandamus, care must be taken to see that the analogy of the English cases does not lead one outside the words of the Indian statute. It is pertinent to notice that the Specific Relief Act was passed in 1877 when the High Court of Allahabad had already been brought into existence. Non-mention of that High Court in that section clearly goes to show that the Letters Patent which constituted it did not concede that authority to it. It was for this reason that when the Rangoon High Court came to be established in 1922 the power to issue the writ of mandamus was granted to it by its inclusion in S. 45, as a result of Act 11 of 1923. The question whether the Patna High Court had power to issue the prerogative writ of mandamus independently of S. 45, Specific Relief Act, came up for consideration before a Full Bench of that Court in a case reported in 10 Pat 218,[10] and it was held that it had no such power.

Similarly the common law power of the Chartered High Court to issue the prerogative writ of habeas corpus was abrogated by S. 491, Criminal P. C. There was no doubt a controversy on the question whether the High Courts retained their power notwithstanding S. 491, Criminal P. C., as will appear from 50 Bom 616[11] and 45 Mad 14[12] and 54 Cal 727,[13] but that controversy is now set at rest by the decision of their Lordships in A I R 1939 P C 213 [14] where their Lordships approving the view taken in 54 Cal 727[13] ruled that a High Court or any Judge of it cannot issue a common law writ of habeas corpus in any case covered by S. 491, Criminal P. C. As to the writ of certiorari a question arose in 36 Mad 72[15] whether or not the Madras High Court had jurisdiction to issue a writ on an officer beyond the limits of its jurisdiction. The learned Judges who composed the Bench differed in their views as to the extent of jurisdiction of the Madras High Court, but both attributed the power of the High Court to issue such writs to the Charter which established it and Letters Patent which subsequently confirmed the authority derived from the Char-

9. ('18) 5 AIR 1918 Mad 763 : 38 I C 847 : 40 Mad 125 : 31 M L J 634, In the matter of G. A. Natesan.

10. ('30) 17 AIR 1930 Pat 538 : 129 I C 529 : 10 Pat 218 : 11 P L T 839 (F B), Surajmull Brijlal v. Commissioner of Income-Tax, B & O.

11. ('26) 13 A I R 1926 Bom 332 : 95 I C 49 : 27 Cr L J 721 : 50 Bom 616 : 28 Bom L R 471, Mahomedalli Allabux v. Ismailji Abdulali.

12. ('22) 9 A I R 1922 Mad 215 : 68 I C 26 : 23 Cr L J 490 : 45 Mad 14 : 41 M L J 441, In re Elaya Nair.

13. ('27) 14 A I R 1927 Cal 496 : 102 I C 647 : 54 Cal 727 : 31 C W N 593, Girindra Nath v. Birendra Nath.

14. ('39) 26 A I R 1939 P C 213 : 182 I C 551 : 40 Cr L J 675 : I L R (1939) Mad 744 : 66 I A 222 : I L R (1939) Kar P C 324 (PC), C. P. Matthen v. District Magistrate, Trivandram.

15. ('13) 36 Mad 72 : 16 I C 755 : 23 M L J 393 : 13 Cr L J 723, In re Nataraja Iyer.

ter. In 43 Mad 146[16] it was contended before their Lordships of the Privy Council that the High Court of Madras had no power to issue a writ of certiorari with regard to which contention their Lordships observed as follows :

> It would seem that at any rate the three High Courts of Calcutta, Madras and Bombay possessed the power of issuing this writ : *see* 1 Knapp 1[17] at pp. 49, 51 and 55 and 11 Cal 275.[18] Whether any of the other Courts which are by definition High Courts for the purposes of this Act have the power to issue writs of certiorari is another question.

It is apparent that their Lordships entertained a doubt and that doubt was warranted by the fact that while the three Presidency Courts had that common law power derived from their Charters the other High Courts had not. It therefore appears clear to me that the High Courts in India other than the Chartered High Courts have not the power to issue the prerogative writ of certiorari either under the Letters Patent or the Government of India Act. But it is said that the power to issue prerogative writs arises by necessary implication from its status as a Court of Record. It is true that para. 1 of the Letters Patent of the Nagpur High Court constitutes it to be a Court of Record and that S. 220, sub-s. (1), Government of India Act, declares every High Court to be a Court of Record. A Court of Record simply means a Court whose acts and judicial proceedings are enrolled for a perpetual memorial and testimony; and the rolls are called the Records of the Court. These Records are of such high authority that their truth cannot be called in question in any Court. All Courts of Record are the Courts of the King, in right of his crown and royal dignity; and they comprise both superior and inferior Courts, e. g., County Courts. A Court of Record has power to fine and imprison for contempt of its authority, so that if a new Court possessing this power is set up it ipso facto becomes a Court of Record : *see* Stephen's Commentaries on the Laws of England, Vol. 1, pp. 94-95, Edn. 19. In 41 Cal 173[8] at p. 213 Jenkins, C. J., pointed out that the power of the King's Bench to punish for interference with the lower Courts did not arise from its being a Court of Record but from its common law powers as *custos morum*. There the question was whether the High Court of Calcutta could punish a person for contempt of a mofussil Court beyond the limits of that Court's original jurisdiction and Jenkins C. J., had to consider whether that Court had power by the very fact that it was a Court of Record. As he was of opinion that the power to punish for contempt was vested in that Court as a common law power within the limits of its original jurisdiction it could not be exercised beyond the limits of its original jurisdiction. In that case the observations made by the learned Chief Justice are pertinent here, viz. :

> And I may here point out that this would hardly have been a satisfactory basis for the jurisdiction invoked, as it would be of use only where the common law prevails. A jurisdiction so founded would, as far as I can see, be of no use to the High Court of Allahabad, to any High Court established under the recent Act, or to any of the Chief Courts, but would belong only to the three High Courts which are vested with common law powers.

My attention is invited to 3 F L J 61,[19] 1 F L J 4[20] and 1 F L J 167.[21] These are cases relating to the issue of the writ of certiorari but they all arose in the chartered High Courts. In the first mentioned case Lokur J., expressly relied upon the powers conferred upon the Bombay High Court by the Letters Patent and the Charter Act, which powers were co-extensive with those of the King's Bench in England: *see* p. 67. In 1 F L J 4[20] the Madras High Court founded its jurisdiction on its Charter. In fact in both these cases the contention was that ss. 223 and 224, Government of India Act, deprived the Chartered High Courts of their authority to issue prerogative writ of certiorari. In both the cases the contention was overruled. There is again the question whether or not the Registrar is a Court, that is a person exercising judicial functions as opposed to administrative function. Reference may be made in this behalf to the English cases already cited and to 24 Mad 121,[22] 36 Mad 72,[15] and 39 Mad 414,[23] but it is unnecessary to go into the question as I

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16. ('19) 6 A I R 1919 P C 31 : 52 I C 209 : 20 Cr L J 593 : 43 Mad 146 : 46 I A 176 (PC), Annie Besant v. Advocate-General of Madras.
17. (1829) 1 Knapp 1, Re the Justices of the Supreme Court of Judicature at Bombay.
18. ('85) 11 Cal 275, Nundo Lal Bose v. Corporation of the Town of Calcutta.
19. ('39) 26 A I R 1939 Bom 471 : 187 I C 8 : 41 Bom L R 984 : (1940) 3 F L J H C 61, Muljee Sicka & Co. v. Municipal Commissioner, Bombay.
20. ('37) 24 A I R 1937 Mad 660 : 173 I C 169 : I L R (1938) Mad 162 : (1937) 1 F L J 4, B. S. Moorthi v. Eli Vadapally.
21. ('38) 25 A I R 1938 Cal 385 : 181 I C 973 : 42 C W N 230 : I L R (1938) 1 Cal 476 : (1937) 1 F L J H C 167, Sm. Indumati Devi Chowdhuri v. Bengal Court of Wards.
22. ('01) 24 Mad 121 : 2 Weir 170, Queen-Empress v. Munda Shetti.
23. ('16) 3 A I R 1916 Mad 555 : 28 I C 97 : 39 Mad 414 : 28 M L J 123 : 16 Cr L J 241, In re Venkata Hanumatha Rao.

hold that this Court has no power to issue the prerogative writ asked for.

To summarise:

(1) The power now exercised by the King's Bench Division of the Supreme Court in England to issue prerogative writs was derived from the common law of England.

(2) The High Courts of Bombay, Madras and Calcutta were endowed with that power by their respective Charters and that was affirmed by the subsequent Letters Patent and also by S. 223, Government of India Act, 1935.

(3) That with the development of the legislative machinery in India their power derived as above from the common law of England was circumscribed by legislation such as Ss. 45 and 50, Specific Relief Act, and S. 491, Criminal Procedure Code.

(4) That the non-mention of the High Courts other than the Chartered ones in S. 45, Specific Relief Act, and the inclusion therein of the Rangoon High Court by Act 11 of 1923 and the inclusion of other non-chartered High Courts in S. 491, Cr. P. C., by Act 12 of 1923 negatives the existence in them of the common law power to issue prerogative writs.

(5) The doubt expressed by Jenkins C. J., in 41 Cal 173[8] at p. 214 and by their Lordships of the Privy Council in 43 Mad 146[16] at p. 159 was resolved by a Full Bench of the Patna High Court in 10 Pat 218,[10] at least so far as that High Court was concerned against the assumption of the existence of the common law power in the High Courts other than the chartered ones.

(6) Section 224 (2), Government of India Act, denies to the High Courts jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision. This would preclude any High Court (presumably other than the Chartered High Courts) from exercising jurisdiction over the acts of any public authority even though they are judicial as opposed to merely administrative.

It must follow that the High Court of Nagpur has no other jurisdiction or authority except as provided in S. 24 and S. 115, Civil P. C., or Ss. 435 and 439, Criminal P. C. I dismiss the application without notice to the other side.

R.K. *Application dismissed.*

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* (28) A. I. R. 1941 Nagpur 287

CLARKE J.

Ramlal Balaram Patil — Plaintiff — Appellant

v.

Rakhdu Pandu Halbi and others — Defendants — Respondents.

Second Appeal No. 228 of 1938, Decided on 25th October 1940, from appellate decree of Second Addl. Dist. Judge, Bhandara, D/- 13th December 1937.

(a) Easements Act (1882), S. 13 (a), (c) and (e)—Easement of necessity defined.

An easement of necessity is one without which the dominant heritage cannot be used at all. [P 288 C 2]

* (b) Easements Act (1882), Ss. 13 (d) and 5—Right to use water for irrigation through artificial watercourse is apparent and continuous easement—Transferor must be deemed to have reserved such easement when parting with servient heritage.

The dominant heritage is only entitled to the quasi-easements if they are apparent and continuous, but even then they can be expressly excluded in the document of transfer. Accordingly where no light is thrown by any document of transfer on the question whether such easement is or is not to attach, the criterion is whether the easement is apparent and continuous or not. If it is either non-apparent or discontinuous, then the dominant heritage will only be entitled to the easement if it is expressly mentioned in the document of severance as an attribute of that heritage. [P 288 C 2]

A right to use water for irrigation purposes through an artificial watercourse being a continuous and apparent easement, the transferor must be deemed to have reserved it under S. 13 (d) at the time of transferring the servient heritage when the deed of transfer is silent on the question whether such easement is or is not to attach : *Case law discussed.* [P 289 C 1]

P. N. Rudra — for Appellant.

Y. V. Jahatdar — for Respondents.

Judgment. — The appellant-plaintiff is the occupancy tenant of field No. 402/1 of village Ghiwari whilst the respondents-defendants are the owners of khudkasht fields Nos. 328/2 and 329. Originally the eight anna share of the village, in which these three fields lie, belonged to the plaintiff and his brother jointly, but in 1927 they separated. Subsequently in 1932 the plaintiff sold his four anna share of the village to his brother Hiralal and thereby became an ex-proprietary occupancy tenant of the sir field No. 402/1. In the same year Hiralal sold the eight anna village share to one Dayaram, who in 1935 sold four khudkasht fields including Nos. 328/2 and 329 to the defendants. The plaintiff claims that his field No. 402/1 enjoys a right of irrigation from fields Nos. 328/2 and 329 but that the defendants have obstructed this right and hence he

claims a permanent injunction restraining the defendants from interfering with his right of irrigation from those fields and a mandatory injunction to restore the embankments to their original condition in which they were while the right of irrigation was being enjoyed. The defendants have denied the plaintiff's right to irrigate his field from theirs, and the only question for determination in this appeal is whether such a right exists and requires to be protected by injunction. The plaintiff relies on S. 13 (d), Easements Act. The lower appellate Court has considered this question in paras. 6 and 7 of its judgment. The fields originally belonged to a common owner before the plaintiff acquired his occupancy rights to field No. 402/1 by the sale of his four anna share to his brother. Referring to that time of common ownership the learned Additional District Judge says :

> An easement by the plaintiff on his own land is a contradiction in itself. When the plaintiff was using the water from the two fields for his field No. 402/1 he did it as owner of all the fields and his user over his own site as owner would not give him any right of easement;

and he cites 104 I C 503[1] as his authority for this proposition. No doubt it is true here, as it was in 104 I C 503,[1] that while both properties belonged to the same owner no question of any easement could arise, but that does not mean that no easement could arise as soon as the properties ceased to belong to the same owner. Then the learned Judge goes on to consider the effect of S. 13, Easements Act, and he expresses the opinion that that section cannot apply to the facts of this case because it gives a right to the transferee over the property of the transferor and not a right to the transferor over the property of the transferee. Here the transferor claims a right over the property of the transferee. Therefore he thinks that that section does not apply. Accordingly he considers that unless the right was specifically reserved by the plaintiff at the time when he sold fields Nos. 328/2 and 329 he could not retain any such right of irrigation. He distinguishes A I R 1930 ALL 313,[2] upon which the plaintiff relied in his Court, by saying that that case was one of partition for which there is a special provision in S. 13 and hence it could not support the plaintiff's claim where severance between the properties came about by a sale. In support of his opinion that the plaintiff must specifically reserve the rights if he wished to retain them the learned Judge has cited 18 Bom 616,[3] but S. 13 was not in force when the facts of that case came into existence : it was decided on general principles of law. We are here required to see whether S. 13 of the Act applies.

The scheme of the section is perfectly clear. It provides for six different situations which may arise where one person transfers or bequeaths immovable property. These six situations are covered by sub-ss. (a) to (f). Sub-sections (a) and (b) deal with the effect on the transferee's rights; sub-ss. (c) and (d) deal with the effect on the transferor's right; while sub-ss. (e) and (f) deal with the rights of the parties to a partition. Sub-sections (a), (c) and (e) all describe the result in law where an easement is necessary for the enjoyment of the property. These are called "easements of necessity" and they apply where the dominant heritage cannot be used at all unless the easement exists. In each of the three cases of an easement of necessity the dominant heritage is entitled to the easement, whatever may be the nature of the easement. Sub-sections (b), (d) and (f) refer to the so called "quasi easements." The dominant heritage is only entitled to these if they are apparent and continuous, and even then they could be expressly excluded in the document of transfer. Accordingly where, as in the present case, no light is thrown by any document of transfer on the question whether such easement is or is not to attach, the criterion is whether the easement is apparent and continuous or not. If it is either non-apparent or discontinuous, then the dominant heritage will only be entitled to the easement if it is expressly mentioned in the document of severance as an attribute of that heritage. The meaning of continuous and apparent easements is explained in S. 5 of the Act as follows :

> Easements are either continuous or discontinuous, apparent or non-apparent.
>
> A continuous easement is one whose enjoyment is, or may be, continual without the act of man.
>
> A discontinuous easement is one that needs the act of man for its enjoyment.
>
> An apparent easement is one the existence of which is shown by some permanent sign which, upon careful inspection by a competent person, would be visible to him.
>
> A non-apparent easement is one that has no such sign.

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1. ('27) 14 A I R 1927 Nag 386 : 104 I C 503, Tulsiram v. Ganpat.
2. ('30) 17 A I R 1930 All 313 : 127 I C 520, Chhatermal v. Jugal Kishore.
3. ('94) 18 Bom 616, Chunilal Mancharam v. Manishankar Atmaram.

It is obvious that the easement in the present case is apparent. The only question is whether it is continuous, that is to say, whether its enjoyment is or may be continual without the act of man. The case of (1871) 6 Ch A 166[4] was a case in which the owner of properties A and B laid pipes to carry water from property B to property A for the purpose of supplying cattle sheds on property A with water. He sold property A to the plaintiff who enjoyed the right to the water until it was stopped by a purchaser of property B. The Court held that that was a continuous easement. In 2 Mad 46,[5] a watercourse across the servient heritage was held to be an apparent and continuous easement: *see also* 4 Cal 633[6] at pp. 639 and 642, 26 Mad 51,[7] 34 Mad 487,[8] A I R 1924 Mad 108,[9] A I R 1924 Mad 812,[10] A I R 1930 Pat 7,[11] A I R 1931 Mad 561[12] and 58 ALL 662.[13] It follows that the easement here was a continuous and apparent easement, and therefore under S. 13 (d) of the Act, the plaintiff must be deemed to have reserved it when he parted with fields Nos. 328/2 and 329 and consequently he will be entitled now to the use of the water from those fields. The result is that the lower appellate Court's decree is set aside and the trial Court's decree restored. Costs throughout on the respondents.

G.N./R.K. *Appeal allowed.*

4. (1871) 6 Ch A 166 : 40 L J Ch 126 : 24 L T 209 : 19 W R 833, Watts v. Kelson.
5. ('78-80) 2 Mad 46, Morgan v. Kirby.
6. ('79) 4 Cal 633 : 6 I A 33 : 3 Sar 856 (P C), Ramessur Persad Narain Sing v. Koonj Behary Pattuk.
7. ('03) 26 Mad 51, Raja Suraneni Venkata Papayya Rau v. Secretary of State.
8. ('11) 34 Mad 487 : 7 I C 575 : 1910 M W N 571 : 8 M L T 292, Chintakindy Parvatamma v. Lanka Sanyasi.
9. ('24) 11 A I R 1924 Mad 108 : 76 I C 331 : 45 M L J 724, Gangulu v. Jagannatham.
10. ('24) 11 A I R 1924 Mad 812 : 81 I C 133 : 47 M L J 302, Souriraja Naidu v. Rajagopalan.
11. ('30) 17 A I R 1930 Pat 7 : 124 I C 385 : 11 P L T 637, Kartic Manjhi v. Banamali.
12. ('31) 18 A I R 1931 Mad 561 : 135 I C 349 : 60 M L J 662, Zamindar of Nandigam v. Raja of Vizianagaram.
13. ('36) 23 A I R 1936 All 90 : 160 I C 879 : 58 All 662 : 1935 A L J 1330 (F B), Brijmohan Lal v. Hazari Lal.

(28) A. I. R. 1941 Nagpur 289

CLARKE J.

Mangilal Nandram — Plaintiff — Applicant

v.

Zamsingh Ghagu and others — Defendants — Non-applicants.

Civil Revn. Appln. No. 157 of 1940, Decided on 16th January 1941, from order of 2nd Sub-Judge, First Class, Khandwa, D/- 17th January 1940.

(a) Civil P. C. (1908), S. 115 and O. 6, R. 17 —Order disallowing amendment shutting out part of plaintiff's claim—Revision lies.

An order refusing to allow an amendment of the plaint and thereby shutting out a part of the plaintiff's claim being a case decided within the meaning of S. 115, is open to revision : ('33) 20 A I R 1933 All 374, *Foll.* [P 290 C 2]

(b) Civil P. C. (1908), S. 115—Appeal maintainable — Order may still be interfered with in revision.

Where the effect of allowing a revision in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the Court will interpret S. 115 liberally and will interfere in revision : ('33) 20 A I R 1933 All 374, *Foll.* [P 290 C 2]

(c) Civil P. C. (1908), O. 6, R. 17 — Suit by plaintiff on acknowledgment executed by defendant in plaintiff's account book — Defendant denying cash consideration pleading suit to be not maintainable and praying for reopening of accounts — Plaintiff immediately applying for amending plaint so as to base claim on original transaction—Amendment held could be allowed since case introduced by it though new was not inconsistent.

The plaintiff brought an action on the last day of limitation to recover a certain sum on the basis of stamped acknowledgment executed by the defendant in the plaintiff's account book. The defendant admitted execution of acknowledgment but denied receipt of cash consideration and pleaded that suit was not maintainable as based on mere acknowledgment and that if suit was maintainable previous transactions between the parties be reopened as the acknowledgment was executed on taking account of those transactions. As the defendant denied cash consideration the plaintiff sought to amend the plaint and to base his claim on the original transaction. The amended claim was however barred on the date of the application for amendment which was filed immediately after the defendant's written statement denying cash consideration :

Held that the plaintiff was entitled to the amendment which though introduced a new case did not introduce an inconsistent case. Even if it could be said that the amendment was sought at a late stage and that it sought to introduce a new and inconsistent cause of action, the special circumstances (defendant himself in his written statement having asked for reopening the previous transactions) of the case justified the amendment of the plaint : 11 M I A 468 (PC); ('21) 8 A I R 1921 P C 50 and ('33) 20 A I R 1933 Bom 476, *Rel. on*; ('22) 9 A I R 1922 P C 249, *Disting.*; ('38) 25 A I R 1938 Nag 388, *Expl.* [P 291 C 2 ; P 292 C 1]

R. S. Dabir — for Applicant.

K. B. Tare — for Non-applicant 1.

Order. — The applicant-plaintiff brought this action to recover Rs. 4000 on the basis of a stamped acknowledgment executed by defendant 1 in the plaintiff's account book on 9th February 1936. This acknowledgment is Ex. P-1 and testifies to the fact of a sum of Rs. 4000 cash in Government currency as payable by defendant 1 and his son Beosingh. The action was brought on the last day of limitation for such a suit, namely on 9th February 1939. The defendants admitted executing the acknowledgment but denied that cash consideration was received from the plaintiff on 9th February 1936. According to them the acknowledgment was executed on the taking of an account of the previous transactions between the parties. They contended, in the first place, that the document on which the plaintiff sued was a bare acknowledgment which could not form the basis of a suit. In the alternative, if it should be held that the plaintiff could sue on this document, they demanded that the previous transactions should be reopened under the Central Provinces debt legislation and that they should be given relief in respect of the rate of interest charged on the debt as well as an instalment decree. The last of the written statements of the several defendants was filed on 6th October 1939. There is no material difference between the written statements of any of the defendants. On the same date the plaintiff in reply asked for time to apply for amendment of his plaint which was allowed and at the next hearing, 16th November 1939, the plaintiff submitted his application for amending the plaint and the defendants took another adjournment until 16th January 1940 in order to reply thereto. They duly replied and the case was argued.

The plaintiff in his amendment application stated that the amendment was necessary by reason of the defendants denying that the transaction of 9th February 1936 was a cash transaction in spite of an agreement between them that it should be treated as though it has been a cash advance of that date. The plaintiff explained that he had accepted this agreement as a novation of the original contract but that inasmuch as the defendant was now denying that it was a cash transaction it would be necessary to go into the previous accounts. He therefore set out the transactions which commenced on 19th May 1930 with a loan of Rs. 2000 to defendant 1 acknowledged in the plaintiff's account book in the same way as the acknowledgment of 9th February 1936. This acknowledgment of 19th May 1930 was acknowledged afresh on 23rd February 1933 when the admitted liability was Rs. 2822-8-0 and again on 9th February 1936 by the acknowledgment on which the suit was brought. By his application the plaintiff sought to base his suit on the original transaction of 19th May 1930, the limitation being saved by the acknowledgments of 1933 and 1936. The lower Court has rejected the application for amendment, relying on I L R (1939) Nag 194[1] and holding that by the amendment the plaintiff is seeking to make out a new and inconsistent case which would have been barred by limitation at the date of the application for amendment.

The first point which I have to consider is whether in view of the fact that the plaintiff would have a right of appeal on this question if the case were allowed to proceed to judgment I should interfere in revision at this stage. The answer to this is given in 55 ALL 256[2] where it was held that in a case like this a revision lies because the effect of the lower Court's order is to shut out a part of the plaintiff's claim and is therefore a "case decided" within the meaning of S. 115, Civil P. C. It was also there held that where the effect of allowing a revision in a matter in which an appeal might also lie, will be a convenience to the parties and will save expense, the Court will interpret S. 115 liberally. With these observations I respectfully concur. Although Mr. Dabir on behalf of the applicant has spent some time arguing whether Ex. P-1 is a bare acknowledgment or not, it is not for me to decide this question at this stage as that is a question which the lower Court will have to decide in the suit. The only question which I have to decide is whether the lower Court acted with material irregularity in the exercise of its jurisdiction in disallowing the plaintiff's application for amendment. In 11 M I A 468[3] the Privy Council allowed an amendment of the pleadings long after the suit would have been barred by limitation if it had been freshly instituted on that date. Their Lordships observed that in the circumstances of the case before them the defence of limitation would be

1. ('38) 25 A I R 1938 Nag 388 : 176 I C 728 : I L R (1939) Nag 194, Lachhamansingh v. Mahendralal Choudhari.
2. ('33) 20 A I R 1933 All 374 : 145 I C 859 : 55 All 256 : 1933 A L J 268, Kishan Lal Babu Lal v. Ram Chandra.
3. ('67) 11 M I A 468 : 9 W R 9 : 2 Suth 107 : 2 Sar 320 (P C), Mohummud Zahoor Ali Khan v. Mt. Thakooranee Rutta Koer.

inequitable and as the case had been heard ex parte and the respondent was not before their Lordships they could not put her on terms as to her defence to a fresh suit. They therefore allowed the plaintiff to amend his plaint. 48 Cal 110[4] is another case in which their Lordships considered that the special circumstances of the case warranted an amendment of the plaint after the expiry of the period of limitation. They observed at page 116 :

> That there was full power to make the amendment cannot be disputed, and though such a power should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases, (*see* for example 11 M I A 468[3]), where such considerations are outweighed by the special circumstances of the case, and their Lordships are not prepared to differ from the Judicial Commissioner in thinking that the present case is one.

As has been pointed out in I L R (1939) Nag 194[1] unless there are special circumstances such as existed in 11 M I A 468[3] and 48 Cal 110[4] the effect should be given to the rule laid down by their Lordships in 36 Cal 780[5] to the effect that the Court should refuse to entertain at a late stage of the case a new question the solution of which must depend on evidence. In both 36 Cal 780[5] and I L R (1939) Nag 194[1] the amendment was sought at a very late stage after the evidence was closed and the cases were fixed for arguments. The Division Bench has however been careful to observe that

> amendments should always be made with great readiness .... but where one sees an amendment asked for at so late a stage which introduces a new cause of action after the period of limitation for a fresh suit has expired then exceptional circumstances must be present "to justify a Court letting the plaintiff do in one litigation what he cannot do in another."

I L R (1939) Nag 194[1] therefore amounts to this : Amendments should be allowed with great readiness but, if all the following circumstances exist, i. e., if the application is made at a late stage, and especially if at the time of the application for amendment a suit on the amended plaint would be barred by limitation, and if the amendment seeks to introduce a new and inconsistent case, then special circumstances must exist before amendment should be allowed. In the present case the only feature present of those set out above is that a fresh suit on the amended plaint would be barred by limitation. The application was not made at a late stage and it does not to my mind seek to introduce a new and inconsistent case. The application was made as soon as the defendants had submitted their written statements. Moreover, in I L R (1939) Nag 194,[1] the plaintiffs stated in their plaint, after reciting the documents which they filed with the plaint, "there is no other paper either in the possession of the plaintiffs or other persons to be produced in evidence of the claim," which was interpreted as meaning that the document on which they wished to rely by way of amendment was irrelevant to the claim which they originally pleaded. In the case before me the plaintiff says in para. 6 of the plaint : "The plaintiff ... will produce other papers that will be found necessary after statements of the defendants." I would draw attention to certain other observations of their Lordships in 48 Cal 110[4] at p. 116 where they say :

> But their Lordships are in full agreement with the statement made by the Judicial Commissioner that, "however defective the frame of the suit may be, the plaintiffs' object was to pre-empt the land, their cause of action was one and the same whether they sued for possession or not." If this be so, all that happened was that the plaintiffs, through some clumsy blundering, attempted to assert rights that they undoubtedly possessed under the statute in a form which the statute did not permit. But if once it be accepted that they were attempting to establish those rights there is no sufficient reason shown for disturbing the judgment of the Judicial Commissioner, who thinks they should be at liberty to express their intention in a plainer and less ambiguous manner.

The Division Bench in I L R (1939) Nag 194[1] considered that the case before them was similar to 48 Cal 832,[6] another Privy Council case in which leave to amend was refused. 48 Cal 832[6] has been explained and distinguished in 57 Bom 802[7] in which there was a suit on a promissory note executed by one of the defendants and the plaintiff having sued that defendant and another defendant he was allowed to amend his plaint so as to base his claim against the other defendant on the transactions which gave rise to the promissory note. There, as here, the real subject-matter of the suit was the indebtedness of the defendants. The amendment, although it may seek to introduce a new case, does not seek to introduce an inconsistent case. Furthermore, even if

4. ('21) 8 A I R 1921 P C 50 : 57 I C 606 : 48 Cal 110 : 47 I A 255 (P C), Charan Das v. Amir Khan.
5. ('09) 36 Cal 780 : 3 I C 882 : 36 I A 103 : 10 C L J 58 : 13 C W N 920 : 93 P R 1909 (P C), Lala Rup Narain v. Gopal Devi.
6. ('22) 9 AIR 1922 P C 249 : 63 I C 914 : 48 Cal 832 : 48 I A 214 : 4 U B R 30 (PC), Ma Shwe Mya v. Maung Mo Hnaung.
7. ('33) 20 AIR 1933 Bom 476 : 147 I C 426 : 57 Bom 802 : 35 Bom L R 965, Sarafalli Mahomadali v. Mahasukhbhai Jechandbhai.

it could be said that the amendment here was sought at a late stage and that it sought to introduce a new and inconsistent cause of action, the special circumstances of this case would appear to justify an amendment of the plaint. These special circumstances are that the defendants themselves have in their written statement asked for the previous transactions to be reopened. The plaintiff has only acceded to their wish by agreeing to the reopening of the transactions. I hold therefore that the amendment should have been allowed. I see no reason for putting the plaintiff on terms as to costs. The application is allowed and the finding on the preliminary issue will be 'yes' instead of 'no.' Costs of the application on the non-applicants. I allow Rs. 20 as counsel's fee.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Nagpur 292

CLARKE J.

Municipal Committee, Bilaspur —
Defendant — Applicant

v.

Wamanrao Vinayakrao Brahmin —
Plaintiff — Non-applicant.

Civil Revn. No. 263 of 1940, Decided on 20th December 1940, for revision of decree of Judge, Small Cause Court, Raipur, D/- 8th December 1939.

(a) Civil P. C. (1908), O. 18, R. 18 — Parties agreeing to accept opinion of Judge on certain point requiring spot inspection and leading no evidence — Opinion of Judge formed on spot inspection can be accepted in place of evidence.

It is true that in an ordinary case the opinion of the Judge formed on spot inspection cannot take the place of evidence, but where the parties had agreed to accept the opinion of the Judge on certain point requiring spot inspection and for that reason led no evidence, in such special circumstances, the opinion of the Judge can be accepted in place of evidence. [P 292 C 2]

(b) C. P. Municipalities Act (2 of 1922), S. 133 (1) (e) — Flour mill, unless raising offensive noises, smell or smoke, is not licensable under Section 133 (1) (e).

Section 133 (1) (e) means that the manufactory, engine-house or place of business must be capable of description as one from which offensive or unwholesome smells, noises or smoke arise. It is obviously not intended that any manufactory should require a license whether offensive or unwholesome smells, noises or smoke arise from it or not. Hence if a flour mill is to be licensable under this section it must be one from which offensive or unwholesome smells, noises or smoke arise.

[P 293 C 1, 2]

(c) Interpretation of statutes—Marginal note.

The marginal note can be taken into consideration showing the intention of a section.

[P 293 C 1, 2]

T. P. Naik — for Applicant.
G. R. Deo — for Non-applicant.

Order. — The non-applicant Wamanrao owns a flour mill within the limits of the Bilaspur Municipality. The latter recovered from him Rs. 53 by way of license fee under S. 133, Central Provinces Municipalities Act. Wamanrao brought this action to recover that amount from the municipality on the ground that his was not a business which fell within the description of businesses taxable under S. 133. He has been successful in the lower Court, and hence the Municipal Committee has now come up in revision. Only two points arise for determination. The first is one of fact whether in point of fact the non-applicant's business is of an offensive nature; the other is one of law as to whether on the finding that the business is not of an offensive nature it is nevertheless taxable under S. 133. On the first point the parties led no evidence but they agreed to accept the opinion of the Judge himself on a spot inspection of the non-applicant's factory. The Judge accordingly visited the factory and, as he says, he found that the mill was run by a small electric motor which made a pleasant humming sound scarcely audible outside the mill and he failed to detect any kind of offensive smell. He therefore found that the mill did not produce any offensive smell or noise. The applicant committee has objected before me to the finding being based on the personal opinion of the Judge. Obviously the opinion of a Judge as formed by an inspection of the subject-matter of the dispute is envisaged by the provisions of O. 18, R. 18, Civil P. C. If the Judge was not expected to form any opinion of what he saw himself, there could be no object in allowing a spot inspection. I am not prepared to say that in an ordinary case the opinion of the Judge so formed could take the place of evidence, but in the present case, in view of the fact that the parties had agreed to accept the opinion of the Judge on that point, and for that reason led no evidence, in such special circumstances, the opinion of the Judge could be accepted in place of evidence. The situation is similar to the taking of a special oath by a party or the constitution of the Court as an arbitrator for the purpose of one particular finding. I therefore accept the finding of the learned Judge that the non-applicant's business was not of an offensive nature from the point of view of noise or smell. The second question turns on the interpretation of S. 133 (1) (e), Central Provinces Municipalities Act. There is a marginal note at the commencement of S. 133 to the effect that

the section deals with the "power to regulate offensive or dangerous trades." The section then provides that

> no place within the limits of a municipality shall be used for any of the following purposes . . . . except under a license obtained by the owner or occupier from the committee and renewable annually.

The purposes mentioned are :

> (a) melting tallow, (b) boiling bones, offal or blood, (c) as a soap-house, oil boiling house, dyeing house or tannery, (d) as a brick-kiln, pottery or lime-kiln, (e) as any other manufactory, engine-house or place of business from which offensive or unwholesome smells, noises or smoke arise, (f) as a yard or depot for trade in grain, hay, straw, cotton, oilseed, oilcake, thatching grass, wood, charcoal or coal or other dangerously inflammable material, (g) as a store-house for any explosive or for petroleum or any inflammable oil spirit.

Now it is obvious that all these trades or businesses specified by description in (a) to (g) above are either offensive or dangerous trades. When therefore in (e) the Legislature describes "as any other manufactory, engine-house or place of business from which offensive or unwholesome smells, noises or smoke arise" it means that the manufactory, engine-house or place of business must be capable of description as one from which offensive or unwholesome smells, noises or smoke arise. It is obviously not intended that any manufactory should require a license whether offensive or unwholesome smells, noises or smoke arise from it or not. That is the interpretation which the applicant committee desires to place on the section. Mr. Naik on behalf of the committee has spent a considerable time in arguing that the presence of a comma after "manufactory" and the absence of commas after "engine-house" and "place of business" means that the manufactory is excluded from those businesses which have to be of an offensive or unwholesome nature before they become liable to license. He has cited a number of cases where the language of other Acts and the punctuation therein have been considered and discussed and the effect of the punctuation in those Acts has been commented upon. It is useless, however, to argue from the wording of other Acts to the wording of this Act. In order to interpret the section one has to read it as a whole and if it is clear what the intention of the Legislature is, and that meaning is the plain meaning of the words used, then it is improper to strain the language so as to endeavour to make it mean something else. The marginal note can be taken into consideration showing that the section is only intended to regulate offensive or dangerous trades. When that fact is borne in mind it is absurd to suppose that any manufactory, whether it is offensive or dangerous or not, is intended to be subject to license. If that were so, there was no object in specifying a number of offensive or dangerous manufactories before mentioning in clause (e) "any other manufactory etc."

I have frequently observed that typists and printers in this country are in the habit, when giving a list of items, of putting a comma between each item except the last two which are usually separated by the words 'and' or 'or'. The idea is that the word 'and' or the word 'or' takes the place of a comma. I am aware that that is not strictly correct and that a comma should also appear before the word 'and' or the word 'or'. It seems however to have become a more or less usual practice and that is all that the printer appears to have done in the present instance. Another instance of the same thing is observable in the very same clause (e) of S. 133 (1), where the clause finishes with the words "unwholesome smells, noises or smoke arise" there is no comma after the word 'noises' because the word 'or' comes in between. It is obviously not intended that smells or noises or smoke should be divided into two groups, one consisting of the word 'smells' and the other 'noises and smoke'. Similarly as far as the manufactory, engine-house or place of business are concerned, it is not intended that they should have been in two groups one consisting of the manufactory and the other of engine-house and place of business. I entirely agree therefore with the interpretation which the learned Judge has placed on the section. I must not however be understood to say that no flour mill can be of a nature which requires a license under this section, but I do say that if a flour mill is to be licensable under this section it must be one from which offensive or unwholesome smells, noises or smoke arise. There is therefore no cause for interference. The application is dismissed with costs. I allow Rs. 20 as counsel's fee.

D.S./R.K. *Application dismissed.*

(28) A. I. R. 1941 Nagpur 294

VIVIAN BOSE J.

C. Khisty — Plaintiff — Applicant

v.

K. B. Subbarao — Defendant —

Opposite Party.

Civil Revn. No. 447 of 1939, Decided on 9th September 1940, for revision of order of 1st Sub-Judge, 2nd Class (Small Cause Jurisdiction), Nagpur, D/- 12th June 1939.

(a) Acknowledgment—No cause of action can be founded on acknowledgment.

No cause of action can be founded on an acknowledgment. All that an acknowledgment can do is to extend limitation. [P 294 C 2]

(b) Usurious Loans Act (1918)—Disapproval of extortionate claims is based on inherent inequity of transaction.

The disapproval with which extortionate claims are viewed in Courts is based on the inherent inequity of the transaction and not on the capacity in which a plaintiff seeks to enforce it. [P 294 C 2]

(c) Usurious Loans Act (1918 as amended by C. P. Act, 11 of 1934), S. 2 (3) (b)—Act makes no distinction between types of Court to which it is to apply.

As regards the jurisdiction of the Court, the Usurious Loans Act makes no distinction between the types of Court to which it is to apply. It is applied to all suits which fulfil the conditions set out in S. 2 (3) (b), irrespective of the kind of Court in which they are instituted. [P 295 C 2]

(d) Usurious Loans Act (1918 as amended by C. P. Act, 11 of 1934), S. 3 (1) (b) — Suit to enforce agreement by way of settlement of accounts is cognizable by Court of Small Causes —It can reopen accounts under S. 3 (1) (b).

A suit for the enforcement of an agreement by way of settlement of accounts is cognizable by a Court of Small Causes, and the mere fact that accounts have to be taken for the disposal of the suit does not turn the suit into one for an account and therefore does not prevent the Court from taking the accounts. The Usurious Loans Act of 1918 as amended by the Local Act, 11 of 1934, applies to such a suit and the Court of Small Causes can reopen accounts under S. 3 (1) (b). [P 295 C 2; P 296 C 1]

(e) Usurious Loans Act (1918 as amended by C. P. Act, 11 of 1934), S. 3—S. 3 is mandatory—Court is bound to exercise powers conferred by S. 3 irrespective of payment of court-fee.

Section 3 is mandatory and the Court is bound to exercise the powers conferred the moment the facts bring the claim within the ambit of the Act. There is no question about payment of court-fees or anything else. [P 296 C 1]

S. P. Kotwal — for Applicant.

W. Dutt and A. L. Halve — for Opposite Party.

Order. — This revision raises two interesting points. On 10th February 1931, the defendant executed a mortgage in favour of the plaintiff's father for Rs. 2000. Interest was at Re. 1-4-0 per cent. per month. Some years later the plaintiff's father died leaving a will under which the plaintiff was appointed executor to his estate. The plaintiff is acting, and has acted, in this matter, as his father's executor. On 22nd March 1936, there was a settlement of accounts between the plaintiff and the defendant. It is not clear from the plaint what form this settlement took. All that the plaint says is:

That on 22nd March 1936 the defendant named above made account and a sum of Rs. 125 was found due from him on account of interest on mortgage . . . . over and above the principal.

The plaint then continues:

The defendant paid off the principal and acknowledged the amount of Rs. 125 as due from him. The defendant promised to pay the sum of Rs. 125 within a year (by four instalments of Rs. 31-4-0 each).

No instalments were paid and the claim here is for this Rs. 125, which is treated in the plaint as the principal and for interest at 9 per cent. per annum on it. The date of the cause of action is stated to be 22nd March 1937. The only document relied on in the plaint is Ex. P-1 which the plaint describes, and rightly, as an acknowledgment. Now it is clear that no cause of action can be founded on an acknowledgment. All that an acknowledgment can do is to extend limitation. The cause of action here is therefore either the mortgage or a fresh contract which after discharging the mortgage constituted a fresh foundation of liability. No such contract has been pleaded, nor has Ex. P-2, on which reliance was placed in the arguments before me, been relied on or even referred to in the plaint. Therefore, strictly speaking, in the absence of an application for leave to amend, the plaint should have been thrown out in limine on the ground that it disclosed no cause of action. I am averse to technicalities but I see no reason why the law should be strained in favour of a pleader who is exacting his last pound of flesh in the most approved moneylender style. It is true he is acting as an executor but the disapproval with which extortionate claims are viewed in Courts is based on the inherent inequity of the transaction and not on the capacity in which a plaintiff seeks to enforce it. It will be seen that the unfortunate defendant had paid Rs. 1525 as interest on a secured debt in respect of a loan of Rs. 2000 in just over five years, and though he paid as much as Rs. 2000 when the accounts were made up he was not forgiven this paltry sum of Rs. 125. However, I do not think it will be in the interest of either side to throw out the claim on this technical ground though

the objection was taken by the defendant in the lower Court. It will only mean further litigation of a much heavier character on the mortgage which will probably end in the same way. I will therefore treat this case, as I have been asked to treat it here by the plaintiff's learned counsel, as one based on a transaction dated 22nd March 1936, which resulted in an agreement settling the accounts on the mortgage and furnishing a fresh foundation of liability in respect of Rs. 125 and its interest.

The question then is whether the Usurious Loans Act of 1918, as amended locally by C. P. Act, 11 of 1934, applies in a case of this kind. The fundamental objection is that this results in a Small Cause Court reopening accounts on a mortgage when a Court of that nature is debarred from entertaining a suit on the mortgage itself. But of course if the Legislature permits this to be done its provisions must be given effect to. Section 2 (3) (b), Usurious Loans Act, states that 'suit to which this Act relates' means any suit—

. . . . .

(b) for the enforcement of . . . . any agreement, whether by way of settlement of account or otherwise, made after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act.

The amended Act came into force on 15th June 1934. The loan on the mortgage was made before the Act came into force (on 10th February 1931), but the section quoted above states expressly that the Act is to apply in respect of any loan made either before or after the commencement of the Act. Therefore whether we take the date of the original Act of 1918 as the crucial date or that of the amended Act of 1934, the mortgage in question is covered by the provision of this sub-section. The sub-section also applies to any agreement whether by way of settlement of account or otherwise, 'made after the commencement of this Act.' The settlement of account in question here was effected on 22nd March 1936, that is to say after the amended Act came into force (and certainly after the original Act). Therefore, it applies to the transaction in suit so far as its date is concerned.

The section also applies to any agreement "whether by way of settlement of account or otherwise." This agreement is, according to the hypothesis on which we are proceeding, by way of settlement of account. If it is not, then as I have said the suit must fail. But if the agreement is not by way of settlement of account, then it is "otherwise" and so is still covered by the Act. That being so, the Act applies completely and all we have to see is whether the matter is beyond the competence of a Court of Small Causes. The various rulings cited in argument about retrospection and the like have no relevance here because there is no room for ambiguity in the language of the Act; nor is there any question about pending proceedings because the suit was instituted long after the Act of 1934 came into operation. It is quite clear, and is so stated in express terms, that the Act is to operate in respect of all suits for the enforcement of agreements made after the commencement of the Act in respect of loans made either before or after its commencement. Those conditions are fulfilled. As regards the jurisdiction of the Court, the Usurious Loans Act makes no distinction between the types of Court to which it is to apply. It is applied to all suits which fulfil the conditions set out above irrespective of the kind of Court in which they are instituted. And S. 3 empowers all Courts without restriction of any kind in which these suits are admitted to exercise the powers conferred by S. 3 (1) (b). These powers enable such Courts (without restriction) to reopen any account already taken between the debtor and the creditor within a limit of 12 years "notwithstanding any agreement purporting to close previous dealings and to create a new obligation." Therefore so far as the Usurious Loans Act is concerned the matter is completely covered.

Turning next to S. 15, Provincial Small Cause Courts Act, the prohibition there is in respect of "suits" excepted from the cognizance of a "Court of Small Causes" and the second schedule sets out the kind of suits excluded. Among them are suits for foreclosure or for redemption, and a suit for accounts. But the present suit is not a suit of that character. It is a suit for the enforcement of an agreement dated 22nd March 1936 and is cognizable by a Court of Small Causes. Once the suit is cognizable a Small Cause Court can exercise all the powers which any ordinary Court dealing with that type of suit can exercise. The Small Cause Courts Act contains no restriction about what the Court may or may not do once the suit is entertained except that in certain matters the procedure of the Court is simplified. It has for instance repeatedly been held that the mere fact that accounts have to be taken for the disposal of the suit does not turn the suit into one for an account and therefore does not prevent the

Court from taking the accounts. The same principle applies here. I am therefore of opinion that the Usurious Loans Act of 1918 as amended by the local Act 11 of 1934 applies here.

Once that is accepted then no exception can be taken to what the lower Court has done in this case. But it is argued that it was wrong in ordering the defendant to refund anything when no claim for refund was made and no court-fees paid in respect of it. That however is not what the Act requires. The Act provides special protection to debtors against the extortions of greedy and grasping lenders of money. Its provisions are drastic but there is no need for any person to place himself within its reach. The remedy lies in his own hands and if he does not choose to avail himself of it by exercising the moderation which the Legislature expects of him in his demands he has only himself to thank when the law clamps down on him with a heavy hand. Section 3 is mandatory and the Court is bound to exercise the powers conferred the moment the facts bring the claim within the ambit of the Act. There is no question about payment of court-fees or anything else. The application fails and is dismissed with costs. No counsel's fee as no certificate has been filed.

D.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 296

GRUER J.

Harbans Singh Hira Singh
Accused — Applicant

v.

Emperor.

Criminal Revn. No. 49 of 1941, Decided on 21st May 1941, Report made by Sessions Judge, Nagpur, in Criminal Revision No. 148 of 1940.

Arms Act (1878), S. 19 (f)—Family living jointly in same house — Head of family is presumed to be in possession of unlicensed arms found in house—Presumption is rebuttable—Weight to be attached to presumption varies with circumstances.

In the case of a family whether Hindu or non-Hindu living jointly in the same house the head of the family is presumed to be in possession of the unlicensed arms that may be found in the house. The presumption is rebuttable and the weight to be attached to the presumption must vary according to circumstances. It can easily be rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the family. The strength of the presumption would also vary according to the improbability that the article owing to its size, etc., could have escaped the notice of the head of the family : ('37) 24 AIR 1937 Pesh 73 and ('29) 16 A I R 1929 Lah 872, *Rel. on ;* ('32) 19 AIR 1932 All 441 and ('34) 21 A I R 1934 All 548, *Ref.*

[P 297 C 1, 2]

W. C. Dutt, Advocate-General — for the Crown.

Order. — One Harbans Singh, Sikh, has been convicted under S. 19 (f), Arms Act, of being in possession of seven live cartridges (.22 bore) and six caps without a license, and sentenced to pay a fine of Rs. 25. The question is whether possession has been legally proved against him. The learned Sessions Judge, Nagpur, thinks not and has referred the case under S. 438, Criminal P. C. The learned Advocate-General has argued in support of the conviction. The accused is absent and unrepresented. The facts found are that at the time when the house was searched both the accused Harbans Singh and his younger brother Jagjit Singh, who was accused 2, and their families were living in this house which had been taken on rent from Boodsing (P. W. 5). There is some difference in the evidence between Boodsing and his son Dr. Ramsing (P. W. 1) concerning whether accused took the house in his own name or in that of the younger brother. But that is not very material. The Magistrate finds that when accused 1 took the house on rent he was manager of the family and his younger brother Jagjit Singh joined him later to live there. The cartridges and caps were found in one box and a toy pistol, for which no license was required, was found in another. There is no proof that these boxes belonged to one of the brothers rather than the other. Harbans Singh's defence, which has been disbelieved, was that he never occupied or took on rent this house but lived in another one in circle No. 16 with his parents. The learned Sessions Juege thinks that as the ownership of the box has not been made out and as the two brothers are Sikhs and therefore do not form a joint Hindu family it is impossible to hold the applicant responsible simply because of his being elder. For the Crown it is argued that as the two brothers were living jointly in one house and the elder was managing affairs it does not matter that they were not a Hindu joint family ; in the circumstances there is a presumption that Harbans Singh must have known what was in the house, and he has not at all rebutted that presumption : on the contrary he denied entirely residing in the house, which has been disbelieved.

I am referred to the following cases: 54 ALL 411[1] was a case of a joint Hindu family. It was held that S. 19 (f), Arms Act, did not speak of "exclusive" possession and that there was a presumption that a gun in their house was in the possession and control of all the adult members of the family. The Judge indicated that so far as the section was concerned Hindus were in the same position as Mahomedans or Indian Christians, the point being that the accused was one of the persons who lived in the house and one of the adult male members of the family. In A I R 1934 ALL 548[2] Sulaiman C. J. and King J. said that every such case must be decided on its own facts. There the article was a twelve-inch pistol which was in a kothri occupied by the accused and his sons. It was held that the accused must have been aware of the presence of the pistol. In A I R 1929 Lah 872[3] the accused was presumably a Sikh as his name was Karam Singh. He occupied the house jointly with his wife and his father. It was laid down that in the case of a house occupied by a joint family there is an initial presumption that an article found therein is in the possession of the head of the family. In A I R 1937 Pesh 73[4] three possible inferences are considered which may be drawn when several persons jointly occupy a house. The Court accepted the third view that the head of the house is responsible for unlicensed arms recovered from it unless it is shown that one of the other occupants had exclusive possession of them. The case in 15 Pat 696[5] was relied on. In this last case there was a joint Hindu family. But I do not see why the same principle should not apply to other (non-Hindu) families living jointly in the same house. I agree with the view taken in the Peshawar case. The weight to be attached to the presumption must vary according to circumstances. It could easily be rebutted by showing that the room or receptacle in question was in the particular and exclusive possession of one member of the family. That is not the case here. The strength of the presumption would also vary according to the improbability that the article, owing to its size etc., could have escaped the notice of the head of the family. In the present case the articles are small, but I still think that there is a presumption against Harbans Singh, which he has attempted to rebut by a false plea altogether. I think that the conviction and sentence are proper and should be maintained. The reference is refused.

G.N./R.K. *Reference refused.*

1. ('32) 19 AIR 1932 All 441 : 139 I C 153 : 33 Cr L J 719: 54 All 411: 1932 A L J 570, Emperor v. Sikhdar.
2. ('34) 21 AIR 1934 All 548 : 147 I C 625 : 35 Cr L J 428 : 1934 A L J 366, Jwala v. Emperor.
3. ('29) 16 AIR 1929 Lah 872 : 116 I C 718 : 30 Cr L J 668, Karam Singh v. Emperor.
4. ('37) 24 AIR 1937 Pesh 73 : 169 I C 681 : 38 Cr L J 838, Emperor v. Mir Ahmad.
5. ('36) 23 AIR 1936 Pat 512 : 165 I C 803 : 38 Cr L J 100 : 15 Pat 696 : 17 P L T 573, Mangar Koiri v. Emperor.

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* (28) A. I. R. 1941 Nagpur 297

NIYOGI J.

Shamrao Bhaurao Marathe —
Defendant — Appellant

v.

Krishnarao Bhaurao Marathe —
Plaintiff — Respondent.

Second Appeal No. 258 of 1940, Decided on 4th April 1941, from appellate decree of 2nd Addl. Dist. Judge, Nagpur, D/- 9th March 1940.

* Hindu law — Succession — Brothers — Self-acquired property of deceased brother — Brother living with deceased and brother living separate are both entitled to equal shares.

Under the Hindu law while the brothers are regarded as distinct individuals the father and son are regarded as constituting one entity which can be broken up only by a partition. The natural and necessary result of the distinction is that while the son's interest in his father's self-acquired property arises by birth, that of a person in the self-acquired property of his brother arises on the death of the propositus; the property passes by succession and becomes not the ancestral but the self-acquisition of the brother inheriting it. The principle of representation which applies in the case of the devolution of property from father to son does not operate in the case of a brother's succession to a brother. Consequently, the circumstance as to the inheriting brother being joint with or separate from the deceased brother whose property he inherits becomes wholly immaterial. Jointness in estate is a different thing from mere jointness in residence or even mess, for the former involves the conception of a coparcenary. [P 300 C 1, 2]

Consequently a brother by the fact of his mere living together with his deceased brother can be in no better position than the other brother who was living separately, and therefore the property of the deceased brother falls to be regulated entirely by the principle of succession so as to entitle both the brothers to take it in equal shares : ('40) 27 A I R 1940 Cal 157, *Approved*; *Case law discussed.* [P 300 C 2]

D. T. Mangalmurti, N. T. Mangalmurti and K. B. Tare — for Appellant.

R. N. Padhye, P. R. Padhye and G. S. Padhye — for Respondent.

Judgment. — This is defendant's appeal from the reversing judgment of the second Additional District Judge, Nagpur in Civil Appeal No. 99-A of 1939 delivered on 9th

March 1940. The parties are brothers and the dispute relates to the nature of their right to succession to the moveable and immovable property left by their brother named Raoji who died on 15th April 1938. The respondent plaintiff claimed half share in the said property which is contested by the appellant defendant who claims it entirely for himself on the ground that he was joint with his brother Raoji, or at any rate living with him at his death, and that on that account he became the sole heir to it in preference to the plaintiff who was separate. The trial Court found that the portion of the house marked blue in the map filed with the plaint was Raoji's self-acquired property and that the other portion marked red was the joint property of Raoji and the defendant. As the defendant was partially joint with Raoji, it held that he was entitled to inherit his property entirely to the exclusion of the plaintiff. The lower appellate Court concurred in the trial Court's finding that the house in dispute was the self-acquired property but differed in respect of the site under the house marked red. It however differed from the trial Court in holding that the property being the self-acquired property of Raoji the surviving brothers were entitled to share it equally by inheritance.

On behalf of the appellant an attempt is made to show that the house in dispute was not the self-acquired property of Raoji but that it was the joint property of Raoji and the appellant. I am not much impressed with the contention in view of the clear and unequivocal statement made in the course of the pleadings on behalf of the appellant on 3rd July 1939. In that statement it was admitted that all the property in suit save a portion of the site purchased by the defendant-appellant was the self-acquired property of the deceased Raoji, but it was claimed that as they were joint the appellant was entitled to preference. That statement was made by the appellant's advocate and in the witness-box the defendant admitted that it was made under his instructions. He confirmed the correctness of the statement and stated that he claimed Raoji's estate because he lived with him and was fed by him. In the face of this clear statement made by the advocate the correctness of which was confirmed in the witness-box by the appellant there is no scope left for the contention that the property was joint property and that as such it passed by survivorship to the appellant. Much elaborate arguments were addressed on either side on the point of law involved in the case. Before discussing the law it is desirable to state the relevant facts. Raoji migrated to Nagpur and as he became settled his brothers (the parties to this appeal) followed him. Each of them separately earned his living by personal labour but they were evidently living together under the same roof. The plaintiff began to live separate from Raoji since 1933 or 1934, while the defendant continued to reside with him as before. There was no partition as such of any property.

It is common ground that the brothers had no ancestral property. It is however possible under the Hindu law to create a joint property with all the incidents of coparcenary in the absence of any ancestral nucleus, as for example where brothers living together acquire property by joint labour or with the aid of the funds thrown by them out of their separate acquisitions into the common stock. In the present case there is no evidence that the brothers pooled their resources and treated them as joint fund. To countenance any hypothesis that the property left by Raoji was the common property of the brothers, the defendant Shamrao stated in the witness-box that Raoji and himself were carrying on business of selling milk, firewood and kerosene oil but he was unable to state what the net profits per annum were. It is unnecessary to pursue this line of enquiry in view of the admission that the property in suit was the self-acquired property of the deceased Raoji. The situation was that Raoji and the defendant Shamrao, including or excluding the plaintiff, never intended to throw their acquisitions into the common stock. Raoji purchased one house in execution sale in 1911 and subsequently acquired adjoining land from the municipal committee for extension of his house. The defendant similarly had acquired an area of 440½ square feet on which a portion of the house stands but the evidence does not indicate that it was purchased out of the joint funds. Although Raoji and Shamrao were living together there is no evidence of any intention to pool their resources for the purpose of acquiring joint property. It is for this reason that the defendant was driven to admit that the house left by Raoji was his self-acquired property. Nor is there anything to show that apart from the property in dispute there was any property jointly acquired or possessed by Raoji and Shamrao. Beyond the fact that Shamrao was living with Raoji there is no circumstance to

justify the assumption of their having formed themselves into a joint family owning joint property. The fact that the defendant does not claim any part of property left by Raoji on the ground of survivorship proves the absence of any joint property. Thus, the relations between Raoji and Shamrao were not such as to clothe them with rights of co-ownership in respect of any property. In the absence of co-ownership there could be no claim on the ground of survivorship. Consequently the rights of the parties fall to be decided only on the basis of the circumstance that while defendant Shamrao was living with Raoji, the plaintiff was living separate.

The real question therefore is whether the self-acquired property left by a deceased brother passes entirely to a brother living with him (as contradistinguished from being joint with him in property) to the exclusion of another brother who was living separate. In the course of the argument reference is made to 22 Bom 101,[1] 32 Mad 377,[2] 44 Mad 499,[3] 11 W R 308,[4] 17 A L J 151,[5] 5 Luck 649,[6] A I R 1940 Cal 157[7] and A I R 1926 Sind 42.[8] These cases do not all deal with the question of the succession to the self-acquired property of a brother. 13 C P L R 137,[9] 22 Bom 101,[1] 32 Mad 377,[2] 44 Mad 499,[3] 5 Luck 649,[6] 17 A L J 151[5] and 55 Mad 577,[10] are concerned with the question of succession to the self-acquired property of a father and not of succession to that of a brother. The considerations in the case of father's property are different from those arising in the case of property left by a brother. The property of the father which is held in common with his undivided or re-united son is in every sense a coparcenary property which on the death of the father would devolve not by inheritance but by survivorship. The self-acquired property of the father though capable of being alienated at the will of the father becomes ancestral when at his death it devolves on his son. In so far as the son is undivided or re-united or re-born after partition between the father and his other sons, his status vis-a-vis his father is that of a co-owner. Consequently, the self-acquired property left by the father would be in the nature of an accretion to his interest in the joint property and when it devolves on the undivided, the re-united or the son born after partition, it does so as if it were coparcenary property. Hence the preference accorded to the undivided son in respect of succession to the self-acquired property of the father. That is in accordance with the ancient authorities. The Mitakshara enunciates two modes of devolution of property, viz., survivorship and succession. The rule of survivorship applies to joint family property and that of succession applies to property held in absolute severalty. This is expressed in the Mitakshara as follows :

> It (i. e. heritage—Daya) is of two sorts : unobstructed (apratibandha) or liable to obstruction (sapratibandha). The wealth of the father or of the paternal grandfather becomes the property of his sons or grandsons; and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest upon the demise of the owner if there be no male issue .... This is an inheritance subject to obstruction (Mitakshara Chap. 1, S. 1, para. 3). Therefore it is a settled point that the property in the paternal or ancestral estate is by birth although the father have independent power in the disposal of effects. .... but he is subject to the control of his sons, in regard to the moveable estate, whether acquired by himself or inherited from his father... (Mitakshara, Chap. 1, S. 1, para. 2).

But in Chap. 1, S. 5, paras. 9 and 10, the Mitakshara concedes that the father has a predominant interest in the property acquired by himself and that therefore the son must acquiesce in the father's disposal of his own acquired property. Sarkar in his work on the Hindu Law at p. 367, relying on the aforesaid passages in the Mitakshara, propounds the law to be that a son's right to the father's self-acquired property arises by birth and notes that the only difference in his rights to the self-acquired as opposed to ancestral property lies in the father's power of disposition in regard to his self-acquired property. Thus it is evident that the son has the same interest (by birth) in either kind of property. Consequently the father's self-acquired property devolves by survivorship on his son and becomes ancestral in his hands. The self-acquired property

1. ('99) 22 Bom 101, Fakirappa v. Yellappa.
2. ('09) 32 Mad 377 : 2 I C 519 : 5 M L T 67, Nana Tawker v. Ramachandra Tawker.
3. ('21) 8 A I R 1921 Mad 168 : 62 I C 944 : 44 Mad 499 : 40 M L J 481 (FB), Vairavan Chettiar v. Srinivasachariar.
4. ('69) 11 W R 308 : 3 Beng L R A C 7, Keshub Ram v. Nund Kishore.
5. ('19) 6 A I R 1919 All 223 : 49 I C 620 : 17 A L J 151, Kunwar Bahadur v. Madho Prasad.
6. ('30) 17 A I R 1930 Oudh 77 : 123 I C 861 : 5 Luck 649 : 7 O W N 1, Badri Nath v. Hardeo.
7. ('40) 27 A I R 1940 Cal 157 : 187 I C 330 : 70 C L J 294 : 43 C W N 937, Jyotish Chandra v. Profulla Chandra.
8. ('26) 13 A I R 1926 Sind 42 : 89 I C 164, Devibai v. Dayabhoy Motilal.
9. (1900) 13 C P L R 137, Chudaman Singh v. Sakharam.
10. ('32) 19 A I R 1932 Mad 361 : 137 I C 765 : 55 Mad 577 : 62 M L J 436, Narasimha Rao v. Narasimham.

of the father is thus in its nature a coparcenary property vis-a-vis his son who therefore takes it on his father's death as a surviving coparcener. It must therefore follow that a son who does not fulfil the condition of being a coparcener with his father is not entitled to the father's self-acquired property. That accounts for the preference accorded to the undivided son. The decision of Ranade J. in 22 Bom 101[1] is based on the recognition of this principle. In 5 Luck 649[6] the contrary view was taken and that was apparently due to the misunderstanding of the effect of certain observations made in 17 A L J 151[5] with reference to the son merely living away from the father, as has been explained in 55 Mad 577.[10]

The question is whether the above principle is applicable in the case of brothers. The only distinction which the law recognizes in their case is that between full and half brothers, and that is based on the doctrine of propinquity (under the Mitakshara). A man's relationship to his brother is not so close and vital as that of father to his son. The son under the Vedic text is the alter ego of the father (आत्मा वै पुत्र नामासि) and the word पुत्र (son) is wide enough to embrace a grandson and great-grandson: *see* 37 ALL 604.[11] It will thus appear that while the brothers are regarded as distinct individuals the father and son are regarded as constituting one entity which can be broken up only by a partition. The natural and necessary result of the distinction is that while the son's interest in his father's self-acquired property arises by birth, that of a person in the self-acquired property of his brother arises on the death of the propositus; the property passes by succession and becomes not the ancestral but the self-acquisition of the brother inheriting it. The principle of representation which applies in the case of the devolution of property from father to son does not operate in the case of a brother's succession to a brother. In view of the fundamental points of difference indicated above the circumstance as to the inheriting brother being joint with or separate from the deceased brother whose property he inherits becomes in my opinion wholly immaterial.

I am aware that in 11 W R 308[4] it was held that a united brother takes in preference to a separated brother. A somewhat different view was taken in A I R 1940 Cal 157.[7] The former case was referred to in A I R 1926 Sind 42[8] on a point which was not of immediate interest in that case. In none of these cases is there any discussion of the principle involved. But whatever can be said in favour of an undivided or a re-united brother, there can be obviously no legal significance in the fact of a brother merely living with the propositus. Jointness in estate is a different thing from mere jointness in residence or even mess, for the former involves the conception of a coparcenary. In the present case the appellant by the fact of his mere living together with his deceased brother was in no better position than the respondent who was living separately. In 11 W R 308[4] the brother who was accorded preference was actually joint in estate with the propositus. The position is made clear in A I R 1940 Cal 157[7] in these words :

> The principle of law according to the Dayabhaga school seems to be that if a brother dies leaving another brother who was living jointly with him that would not entitle the joint brother to have preference over a separated brother unless the former could be said to have reunited.

It will be noticed that the observation draws a pointed distinction between the cases of brothers reunited and brothers merely living together. The conclusion must therefore be that the property of the deceased brother falls to be regulated entirely by the principle of succession so as to entitle the parties to this appeal to take it in equal shares. The lower appellate Court's decree is affirmed and the appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

11. ('15) 2 AIR 1915 P C 70 : 30 I C 529 : 37 All 604 : 42 I A 208 (P C), Buddha Singh v. Laltu Singh.

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(28) A. I. R. 1941 Nagpur 300

NIYOGI J.

Provincial Government of C. P., and Berar through Deputy Commissioner, Nagpur — Plaintiff — Appellant

v.

Keshrichand Gulabsao and another — Defendants — Respondents.

Misc. Appeal No. 243 of 1939, Decided on 1st April 1941, from order of Second Addl. Dist. Judge, Nagpur, D/- 25th July 1939.

(a) C. P. Land Revenue Act (2 of 1917), S. 222 —Failure to lodge claim within three years of notification does not debar defence based on title.

The effect of S. 222 is only to preclude a suit and not to debar the defence based on title. A person's failure to lodge his claim within three years specified in S. 222 cannot deprive him of his right to defend his possession: 12 Cal 279 and 14 Bom 222, *Rel. on.* **[P 302 C 1, 2]**

(b) C. P. Land Revenue Act (2 of 1917), S. 222—S. 222 does not lay down prescription.

Section 222 cannot be interpreted as laying down a rule of prescription. [P 302 C 1]

W. R. Puranik (Advocate-General) and K. K. Thakur — for Appellant.

S. R. Mangrulkar — for Respondents.

Judgment. — This is an appeal from an order of remand passed by the Second Additional District Judge, Nagpur, in Civil Appeal No. 30-A of 1939 delivered on 25th July 1939. The Provincial Government filed the suit out of which this appeal arises for ejectment of the respondent from a piece of land marked by letters A B C D in the map filed with the plaint. It measures 23′ × 38′ and is situate at Nagpur. On 21st December 1914 certain plots including the one in suit were after due demarcation notified in the Government Gazette for being declared nazul. That notification was issued under S. 40, Central Provinces Land Revenue Act, (18 of 1881) then in force. It invited the claimants to submit their claims, if any, in writing within three months. Notification such as the one under S. 40 is deemed to be an advertisement under S. 1, Waste Lands Claims Act, 23 of 1863. No claim was received from any person within the three months time prescribed in the notification; nor was any claim made within three years under S. 18, Waste Lands Claims Act. In 1934 it was discovered that the respondent had encroached upon these lands whereon he was ordered to be ejected under S. 219, Central Provinces Land Revenue Act of 1917. The defendant thereupon filed Civil Suit No. 343-A of 1935 for a declaration of his title and an injunction prohibiting the Provincial Government from disturbing his possession. The Court rejected his claim for a declaration of his title but granted him the relief of injunction on the ground that under the proviso to S. 219, Central Provinces Land Revenue Act of 1917 the Deputy Commissioner could not eject the respondent as the encroachment had been made before the commencement of the Central Provinces Land Revenue Act of 1917. Consequently the appellant has filed the suit for ejectment as stated above.

The only point for determination is whether the respondent is precluded from offering his defence by S. 222, Central Provinces Land Revenue Act. The lower appellate Court relying on 12 Cal 279[1] held that the section did not debar the defence. In the Calcutta case the question was whether any provision of the Waste Lands Claims Act, 23 of 1863, deprived a person who has a good title and has been throughout in possession from defending his rights. That question was answered in the negative. Section 222 is in principle analogous to S. 18, Waste Lands Claims Act. That section runs as follows :

> If at any settlement before this Act came into force, waste lands have been demarcated as the property of the Crown, no claim of any person to, or in respect of, such lands shall be entertained by any civil Court after the expiry of three years from the date of such demarcation.

The contention put forward on behalf of the appellant is that the word 'claim' used in that section is comprehensive enough to include defence. The use of that word in cls. (g), (j), (m), (p) and (s) of S. 220, Central Provinces Land Revenue Act, indeed tends to support the contention. That section excepts certain matters altogether from the jurisdiction of the civil Courts. If it had been the intention of the Legislature to exclude such a claim as is under consideration from the jurisdiction of civil Courts the subject-matter of S. 222 would have been included in S. 220. As regards the matters which are excepted from the jurisdiction of the civil Courts under S. 220 exclusive jurisdiction has been given to the revenue authorities. The subject-matter of S. 222 is waste lands which are demarcated as the property of the Crown after some enquiry made by the revenue or settlement authorities. The lands are so declared and demarcated as the property of the Crown because of the presumption arising from the absence of any claim by any private individual to the lands within the time prescribed by the notification. The failure of the owner to assert his claim even when invited to do so cannot destroy his title to the property on any known principle of law or natural justice. Section 222, Central Provinces Land Revenue Act, debars the claim after the expiry of three years from the date of demarcation. The three years period laid down in that section is for making a claim for obtaining a particular remedy, namely the release of the land from the notification. It has therefore the effect of the rule of limitation. The rule of law is that there is no limitation against defence : *see* 20 C W N 957.[2]

It does not appear reasonable to assume that the three years period specified in S. 222, Central Provinces Land Revenue Act, was intended to have the effect of

1. ('86) 12 Cal 279, Kristo Chunder Dass v. Steel.

2. ('16) 3 A I R 1916 P C 172: 34 I C 37: 20 C W N 957 (P C), Sri Kishan Lal v. Mt. Kashmiro.

extinguishing the right to property. Even S. 28, Limitation Act, applies to persons out of possession and not to persons who are in possession. It does not prevent the persons in possession from making use of any legal defence available to them for maintaining their possession. I may for instance refer to 14 Bom 222.[3] In that case the plaintiffs induced the defendant by fraud to execute in their favour a deed of sale of the property in dispute. They neither paid the purchase money nor obtained possession of the property. More than 12 years after the transaction the plaintiffs sued for possession of the property on the basis of the sale deed. The defendant impeached the sale as fraudulent. The plaintiffs' contention was that as the defendant had not sued to set aside the deed on the ground of fraud within three years under Art. 91 or Art. 95, Limitation Act or within 12 years from the date of the sale his plea of fraud was barred by limitation. That plea was overruled on the ground that the rule of limitation does not apply to a defendant who relies on his actual possession which was never disturbed. Applying this principle, it is evident that the respondent's failure to lodge his claim within three years specified in S. 222, Central Provinces Land Revenue Act cannot deprive him of his right to defend his possession. Any view to the contrary would be repugnant to natural justice.

Section 222, Central Provinces Land Revenue Act, is indeed, capable of being viewed either as laying down a rule of limitation or prescription. In the former case, the failure to assert a claim within the period specified in that section would only bar the remedy. In the latter case, it would destroy the right but the one essential condition for the application of the rule of prescription is that the claimant must be out of possession. The rule of prescription cannot operate against a person in possession. Hence it is clear that that section cannot be interpreted as laying down a rule of prescription. This view derives support from the proviso to sub-s. (1) of S. 219, Central Provinces Land Revenue Act, which forbids the Deputy Commissioner from ejecting a person whose possession began before the Central Provinces Land Revenue Act of 1917 came into force. In such a case the Crown must institute a suit (as it has done in the present case) to recover possession. If the Legislature lays the onus on the Crown of proving its right, it cannot consistently debar the defence. For the foregoing reasons I agree with the view taken by the lower appellate Court that the effect of S. 222, Central Provinces Land Revenue Act, is only to preclude a suit and not to debar the defence based on title. The appeal is dismissed with costs.

R.K. *Appeal dismissed.*

3. ('90) 14 Bom 222, Hargovindas Lakhmidas v. Bajibhai Jijibhai.

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(28) A. I. R. 1941 Nagpur 302

POLLOCK AND GRUER JJ.

Emperor

v.

Mt. Gangoo — Accused.

Criminal Ref. No. 103 of 1941, Decided on 9th May 1941, made by Sessions Judge, Nagpur, D/- 4th February 1941.

Penal Code (1860), Ss. 307 and 328—Powdered glass administered—Intention to cause death present—Offence comes under S. 307 not Section 328.

Powdered glass is a mechanical irritant which may cause death. When it comes in contact with the lining of the stomach and the intestines it injures the mucous membrane and death may be the result of the congestion and shock so caused. If however, it is finely powdered and has not any sharp points or if it is well mixed with bulky food it need not cause any bad effects. The administration of powdered glass is therefore an act capable of causing death. The degree of probability should not enter into the question as it would be a very uncertain criterion to apply in deciding whether the act comes under S. 307 or S. 328. To bring the case under S. 307 it is sufficient if death is a possible result and if the intention is to cause death. [P 303 C 1, 2; P 304 C 1]

W. C. Dutt, Advocate-General — for the Crown.

N. B. Chandurkar — for Accused.

Order. — Mt. Gangoo Kunbin was tried with the aid of a jury for an offence under S. 307, Penal Code—attempt to murder her husband Dhanba by the administration of powdered glass in food. The jury brought in a unanimous verdict of not guilty stating that they could not decide that she had administered glass. This verdict has not been accepted by the Sessions Judge, Nagpur, who has referred the case to this Court under S. 307, Criminal P. C. We have heard learned counsel for the appellant and the learned Advocate-General for the Crown and are fully convinced that the verdict of the jury is perverse. There is clear evidence that powdered glass had been mixed in the flour out of which the bread was made which was served to Dhanba by his wife Mt. Gangoo and partly eaten by him. Powdered glass was detected by the chemical examiner in the flour, in pieces of

chapati made out of it and in faecal matter passed by Dhanba after he had eaten the bread. In the committing Magistrate's Court Gangoo had admitted having cooked food on that Monday morning and having served bread to her husband. In the Sessions Court she changed and said that it was her husband's grand-mother who cooked and served the food. There is nothing to support that, and it has not been suggested in cross-examination to the witnesses. Some attempt is now made to argue that proof is lacking that the powdered glass was put into the bread by the accused. We consider that the prosecution evidence leads to no other conclusion. Dhanba (P. W. 1) deposes that Ramchandra Patel asked his wife why she had put in glass and she said it was because she wanted to kill him. Ramchandra himself had corroborated this in his statement in the lower Court which in the Sessions Court he admitted to be a true one. Nilkanth, P.W. 3, deposed that accused said nothing when asked by Ramchandra, but later on he stated that she admitted to Doma having administered powdered glass and being asked by him what happened if a man was given powdered glass she said that he died. Doma himself said :

> It is true when I asked her again at the house of Kashirao that she had admitted that she put the powdered glass in.

In addition to this we have the conduct of the accused who took the Sub-Inspector and witnesses to a field and pointed out two stones, (Arts. E and F) on which she said she had pounded her bangles. 10 to 20 pieces of glass were recovered from there (Art. G). The particles in the case are blue and green, corresponding to the colours of the bangles worn by the accused. This discovery made by the accused is strong corroboration of the truth of her confession to the witnesses. We find therefore without doubt that she did administer powdered glass in the bread and that according to her confession her intention was to kill her husband. The question still remains whether the offence is one under S. 307 or only one under S. 328, Penal Code. The standard text-books of medical jurisprudence show that though powdered glass is not strictly speaking a poison it is in India popularly believed to be actively poisonous, and it is in fact a mechanical irritant which may cause death. When it comes in contact with the lining of the stomach and the intestines it injures the mucous membrane and death may be the result of the congestion and shock so caused. If however it is finely powdered and has not any sharp points or if it is well mixed with bulky food it need not cause any bad effects. In the present case the particles were large enough to be easily detected and the amount was considerable, as three bangles had been ground down. The intended victim did not eat the whole of the bread and he was given a purgative at the dispensary: hence he did not really become ill. In these circumstances, does S. 307, Penal Code, apply? It says :

> Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, etc.

We need not consider cases in which the act could not possibly have caused death, for instance, the attempted firing of an unloaded gun. In the present case the administration of powdered glass could have caused death although of course it may be said that survival was more probable than otherwise. Does the section then apply where a fatal result was possible but not very probable? The learned Advocate-General referred us to three cases : 1 Rang 209[1] is distinguishable as there, although the trigger was pulled it was not proved that the gun was loaded, and it might have been that the appellant was merely trying to frighten the complainant. It was therefore held that the act of the appellant could not per se possibly cause death. In 14 ALL 38[2] the trigger of a loaded blunderbuss was pulled, but the cap did not explode and so the gun failed to go off. Straight J. laid down the principle that if a person who has an evil intent does an act which is the last possible act that he could do towards the accomplishment of a particular crime that he has in his mind he is not entitled to pray in his aid an obstacle intervening not known to himself. The appellant was therefore convicted under S. 307, Penal Code. In 56 Bom 434[3] two shots from a revolver were fired, but owing to defective ammunition or to their striking a leather wallet and currency notes in the pocket of the intended victim they did not take effect. The Judges there followed the reasoning of Straight J. in 14 ALL 38[2] in preference to that in the older case in 4 Bom H C R 17.[4] That case

1. ('23) 10 A I R 1923 Rang 251 : 74 I C 1042 : 24 Cr L J 850 : 1 Rang 209, Nga Waik v. Emperor.
2. ('91) 14 All 38 : 1891 AWN 176, Queen-Empress v. Niddha.
3. ('32) 19 A I R 1932 Bom 279 : 138 I C 503 : 33 Cr L J 613 : 56 Bom 434 : 34 Bom L R 571, Emperor v. Vasudeo Balwant.
4. ('67) 4 Bom HCRCr 17, Reg v. Francis Cassidy.

was also distinguished on the facts, and in the case before them it was pointed out that it had not been satisfactorily established that the act of the accused was not one capable of causing death in the ordinary course. The conviction under S. 307 was therefore upheld. 4 Bom H C R Cr 17[4] has been referred to in A I R 1935 Nag 177[5] in which incised wounds had been caused by an axe. Subhedar A. J. C. accepted the principle that in order to bring the case under S. 307 the act must be capable of causing death in the natural and ordinary course of things, or in other words, that death might be caused if the act took effect. Applying that principle we think that the administration of powdered glass was certainly an act capable of causing death. We do not think that the degree of probability should enter into the question. It would be a very uncertain criterion to apply. In our view it is sufficient if death was a possible result and if the intention was to cause death. Both these factors are present in the case before us. We therefore hold that S. 307 does apply. The point is of little practical importance so far as this reference is concerned as S. 328 certainly could be applied and we do not propose to inflict even the maximum penalty allowed by that section.

The accused in this case is a young woman, apparently not more than 17 or 18 years of age. She had been living unhappily with her husband and does not seem to have been well treated by him. No doubt such reactions by wives against their husbands must be met by substantial penalties, but taking into account the detention and suspense already undergone by the accused we now sentence her to two years' rigorous imprisonment under S. 307, Penal Code, to take effect from this date.

R.K. *Reference accepted.*

5. ('35) 22 A I R 1935 Nag 177 : 155 I C 1014 : 36 Cr L J 854, Emperor v. Balli Jagoba.

(28) A. I. R. 1941 Nagpur 304

NIYOGI J.

Sir Madhaorao Ganesh Deshpande — Defendant — Appellant

v.

Keshao Gajanan Huddar and another — Plaintiffs — Respondents.

Misc. Appeal No. 22 of 1940, Decided on 4th April 1941, from order of 2nd Addl. Dist. Judge, Nagpur, D/- 9th January 1940.

(a) Civil P. C. (1908), O. 41, R. 23, O. 43, R. 1 (u) and O. 7, R. 11 — Preliminary point, explained — Words "disposed of the suit" in O. 41, R. 23 literally apply to rejection of plaint —Appeal from order rejecting plaint under O. 7, R. 11—Appellate Court setting aside order and remanding case — Order of remand falls under O. 41, R. 23 and is appealable under O. 43, Rule 1 (u).

A preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. The words "disposed of the suit" in O. 41, R. 23 literally apply to the case of rejection of a plaint. The order rejecting a plaint has the force of a decree under S. 2 (2), and the rejection of the plaint brings about the disposal of the suit. When an appeal is preferred against an order rejecting a plaint which has the force of a decree and the appellate Court sets aside that order and remands the case for the trial of the issues arising in the case, the order of remand must be treated as one under O. 41, R. 23 so as to give a right of appeal to the aggrieved party under O. 43, R. 1 (u): ('30) 17 A I R 1930 Nag 295, *Rel. on*; ('22) 9 A I R 1922 Mad 505 (FB), *Approved*; ('37) 24 A I R 1937 Lah 380, *Dissent*. [P 305 C 1, 2]

(b) Transfer of Property Act (1882), S. 51 — Plaintiff seeking benefit of improvements by transferee must pay court-fee on value of improvements.

A plaintiff who seeks the benefit of the improvements made by the transferee must pay court-fee on the value of the improvements. [P 305 C 2]

(c) Civil P. C. (1908), S. 149—Suit by plaintiff for possession of his share in house — At advanced stage of suit defendant raising plea that value of house was much more — Plaintiff is entitled to extension of time to make good deficiency in court-fee—Refusal to grant extension amounts to improper exercise of discretion.

Where in the course of the suit by the plaintiff for possession of his share in a house the defendant suddenly springs a surprise upon the plaintiff by raising the plea that the court-fee is not sufficient as the value of the house is much more than that described in the plaint, the plaintiff is entitled to an extension of time to make good the deficiency in court-fee. The refusal to extend time in such a case amounts to improper exercise of discretion. [P 305 C 2]

M. R. Indurkar and W. V. Deshpande — for Appellant.

G. R. Pradhan and P. Lobo—for Respondent 1.

Judgment.—This is defendant 1's appeal from the order of remand made by the Second Additional District Judge, Nagpur, in Civil Appeal No. 43 of 1939 on 9th January 1940. Respondent 1 instituted the suit out of which this appeal arises for a declaration that the sale deed dated 4th March 1920 executed by his brother for himself and on his behalf was bogus and fraudulent and for possession of his half share in the house. At a somewhat advanced stage in the suit the appellant raised the pleas that the value of the house was Rs. 8000 and that the plaintiff was bound to pay court-fees on Rs. 4000,

the value of his half share in the house. The trial Court found that the value of the house was Rs. 6000 and that the plaintiff was liable to pay court-fees on Rs. 3000. The plaintiff was allowed to make good the deficient court-fees which he was unable to do with the result that his plaint was rejected under O. 7, R. 11, Civil P. C. The plaintiff having appealed to the lower appellate Court, that Court concurred in the trial Court's finding that the value of the house is Rs. 6000 but was of opinion that the plaintiff was not liable to pay court-fees on the value of the improvements made by the purchaser (appellant) which enhanced the value of the house to Rs. 6000. It further held that the trial Court ought to have extended time to enable the plaintiff to make good the deficiency.

A preliminary point is raised on behalf of the plaintiff against the tenability of this appeal on the ground that the remand order was not one based under O. 41, R. 23, Civil P. C., liable to appeal under O. 43, R. 1 (u), Civil P. C. Reliance is placed on A I R 1937 Lah 380.[1] Although there is a discussion in that case as to whether the appellate Court's order remanding the suit after setting aside an order of rejection of the plaint was one made under O. 41, R. 23, the decision of the case actually rested on the view that rejection of the plaint for non-compliance of S. 80, Civil P. C., was not to be regarded as one falling under O. 7, R. 11. I fail to see why rejection of a plaint cannot be regarded as a preliminary point in an appeal from the rejection of a plaint. In 45 Mad 900[2] the Madras High Court defined the preliminary point as any point whether of fact or law the decision of which avoids the necessity for the full hearing of the suit. In 27 N L R 226[3] I held that a preliminary point is one which when determined in favour of the plaintiff permits the progress of the suit but when determined against him concludes the suit. In that case I had envisaged the possibility of the lower appellate Court's remanding the suit on setting aside the rejection of a plaint was an order falling under O. 41, R. 23, Civil P. C. I see no strong reason with due respect to the view taken in A I R 1937 Lah 380[1] to depart from the opinion expressed in the aforesaid case.

1. ('37) 24 A I R 1937 Lah 380 : 173 I C 365 : 39 P L R 720, Basheshar Nath v. Bidhi Chand.
2. ('22) 9 AIR 1922 Mad 505 : 69 I C 828 : 45 Mad 900 : 43 M L J 354 (FB), Raman Nayar v. Krishnan Nambudripad.
3. ('30) 17 A I R 1930 Nag 295 : 128 I C 407 : 27 N L R 226, Govinda v. Baliram.

The preliminary points may arise before or after admission of the plaint. In either case if the decision on the preliminary point is against the plaintiff that would stop the further progress of the suit so as to compel the Court to dispose of the suit finally without deciding the merits of the controversy. The words "where the Court from whose decision" and the "decree is reversed in appeal" occurring in R. 23 of O. 41, are significant. The words used are "disposed of the suit" and not "decided the suit". Those words literally apply to a case of rejection of a plaint. The order rejecting a plaint has the force of a decree under S. 2 (2), Civil P. C., and the rejection of the plaint brings about the disposal of the suit. When an appeal is preferred against an order rejecting a plaint which has the force of a decree and the appellate Court sets aside that order it has to remand the case for the trial of the issues arising in the case. The order of remand could not be made under any other provision of law except under O. 41, R. 23, Civil P. C. Consequently the lower appellate Court's order remanding the suit must be treated as one under O. 41, R. 23, Civil P. C., so as to give a right of appeal to the aggrieved party under O. 43, R. 1 (u). I therefore do not see my way to accede to the contention raised on behalf of the plaintiff that an appeal does not lie.

The lower appellate Court was obviously wrong in its view that the plaintiff was liable to pay court-fees only on the value of the house as it stood at the time when it was sold in 1931. That view would indeed have been sound had the plaintiff only asked for possession of the house after dismantling the additions made by the purchaser but in the plaint he has clearly asked for possession of the house as it stood on the day of the institution of the suit including the improvements made by the purchaser. He cannot on the one hand get the benefit of the improvements and on the other hand refuse to pay court-fees on the value of the improvements. I therefore see no reason to depart from the lower appellate Court's view as to the granting of the extension of time.

It rightly held that the trial Court failed to exercise proper discretion in refusing to extend time. The trial Court failed to advert to the important circumstance that the plaintiff was taken by surprise when during the course of the suit it was suddenly sprung upon him. The plaintiff only wanted extension of time which could well have been

granted. The appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Nagpur 306

VIVIAN BOSE J.

Ghasiram Milap Kurmi —
Plaintiff — Appellant
v.
Girdhari Sheo Prasad Kurmi and another — Defendants—Respondents.

Second Appeal No. 470 of 1938, Decided on 27th March 1941, from appellate decree of Dist. Judge, Raipur, D/- 5th April 1938.

(a) Lessor and Lessee — Finding that lease was genuine is one of fact.

A finding that the lease was a genuine transaction is a finding of fact. [P 306 C 2]

(b) Hindu law — Alienation — Legal necessity — Finding that there was no legal necessity is of fact.

The finding that there was no legal necessity for the alienation is one of fact and must be accepted in second appeal. [P 306 C 2]

(c) C. P. Tenancy Act (1 of 1920), Ss. 6 and 12 — Hindu widow cannot surrender her holding so as to defeat reversioner *(Obiter)*

A Hindu widow cannot surrender her holdings so as to defeat the reversioner, the reason being that the Tenancy Act secures the devolution of the tenure to the heirs specified in the Act and the limited owner cannot defeat the expectations of those heirs by surrender. [P 306 C 2]

(d) C. P. Land Revenue Act (2 of 1917), S. 188 — Permanent lease of khudkast land by Hindu widow granted in course of village management — Lease is binding on reversioner — Burden of proof.

The moment a landlord grants a permanent lease of his khudkast land, the lessee becomes an occupancy tenant and once that position is reached his tenure is governed by the C. P. Tenancy Act. Consequently, a permanent lease of her khudkast land granted by a Hindu widow in the course of village management in the capacity of a lambardar is binding on the reversioner and the tenant is entitled to the protection of the C. P. Tenancy Act : ('34) 21 A I R 1934 Nag 103, *Approved* : ('17) 4 A I R 1917 P C 33, *Disting.* [P 307 C 2]

C. P. Tenancy law does permit the leasing of lands and therefore the burden of displacing the tenancy created by a limited owner would lie on the person who pleaded that the act was not done in the ordinary course of village management. It does not lie on the tenant to show that there was legal necessity, though of course if that is established it would secure his tenure : ('18) 5 A I R 1918 Nag 218, *Expl.* [P 307 C 1]

M. R. Bobde — for Appellant.

M. B. Kinkhede — for Respondents.

Judgment. — This is a case of first impression or so I am told, and in any case I know of no authority which covers the point at issue except A I R 1934 Nag 103,[1] which has been cited in the Courts below, nor have counsel on either side been able to show me any ruling which is directly in point. The suit is by a reversioner for a declaration that an alienation in the shape of a permanent lease of khudkast land by a Hindu widow is not binding after her life time. Defendant 1 is the widow. On 31st October 1935 she leased the khudkast lands in suit to defendant 2 in perpetuity for a consideration of Rs. 1000. The defendant's case is that he (defendant 2) thereupon became an occupancy tenant and so is entitled to the protection afforded to such tenants by the Tenancy Act. The plaintiff's case, as set out in the plaint, is that this lease was for a fictitious consideration. Defendant 1 denied this and also went out of her way, in my opinion, wholly unnecessarily, to set up a plea of legal necessity. But, in addition, she pleaded in the alternative that in any event defendant 2 became a tenant. In reply the plaintiff reiterated his allegation about the fictitious nature of the consideration. The lower appellate Court finds that the consideration pleaded, namely Rs. 1000 was paid. It also finds that possession was delivered and upholds the lease as a genuine transaction. It also finds that there was no legal necessity. All these findings must of course be accepted as they are all findings of fact. The question is whether this is enough to enable the reversioner to succeed. His case is that the Hindu law applies to all tenancies and that under that law there can be no alienation by a limited owner except for necessity. This alienation was not for necessity and therefore does not enure beyond the lifetime of the widow.

It can be accepted at once that the Hindu law applies to tenancies in the Central Province up to a point but in my opinion not beyond that. It applies, for instance, in all matters of devolution and for that reason it has been held, after a considerable difference of opinion, that a Hindu widow cannot surrender her holdings so as to defeat the reversioner. But the reason, in my opinion, is that the Tenancy Act secures devolution of the tenure to the heirs specified in the Act. Therefore no limited holder can defeat the expectation of those heirs by a surrender. That however is an entirely different matter from the one under consideration because what we are dealing with here is a matter of village management. It is, in my opinion,

1. ('34) 21 A I R 1934 Nag 103 : 149 I C 687, Imrat Bai v. Mt. Phula.

beyond dispute that a widow has the right of village management and can give leases in the exercise of that right, and the question in every such case resolves itself into, not whether there was legal necessity for the lease, though that might be relevant in some cases, but whether the act was done in the ordinary course of village management. The burden of displacing the tenancy would lie on the person who pleaded that the act was not done in the ordinary course of village management. It does not lie on the tenant to show that there was legal necessity, though of course if that is established it would secure his tenure. The difference between a case of that kind and a case of ordinary alienation is that under the Tenancy Act a widow is entitled to manage the estate and is entitled in the exercise of that management to give out leases. It cannot be presumed in such circumstances that she has abused the rights. In the case of alienations, the widow has no right to alienate the family estate except for the purposes permitted by the Hindu law and the burden then is on the person seeking to justify an act which the Hindu law does not permit. The tenancy law does permit the leasing of lands. Therefore the burden is on the person who sets out to establish that something has been done which the law does not allow.

I cannot see that a reversioner is in any better or stronger position than a cosharer whose rights are vested. If a Hindu widow happens to be a cosharer in a village and happens to be appointed as lambardar, then no cosharer can challenge a lease of khudkast lands by her unless he is able to allege and prove that it was not an act of ordinary village management. I cannot see how a reversioner whose interests are not vested can be in a better position. It would lead to very anomalous results if that were so, for, whereas the cosharers would be bound by the tenancy so created, the reversioner would be entitled to set it aside. It would also lead to other inconveniences, for, a tenant would have to prove each time a widow died that his tenancy was given in the ordinary course of village management, and that I do not think would be a desirable view to take.

14 N L R 133[2] at p. 135 was cited by the learned counsel for the appellant for the proposition that a lease is a transfer and therefore when given lis pendens the usual rule applies and that therefore if a party to a litigation is affected by the transfer it cannot affect his rights. A decision of the Privy Council in 40 Mad 709[3] was also cited for the proposition that a permanent lease amounts to a transfer and that a limited owner cannot make a transfer of this kind except for necessity. But the Privy Council case was not dealing with an agricultural tenancy. So far as the Nagpur case is concerned, Batten A. J. C. recognized that a lease given in the ordinary course of village management would hold good even though given lis pendens, but he did not decide where the burden of proof lay. He held that on the facts before him, (that was also the decision of the lower Court), the circumstances disclosed that the real intention of the lessor was to save some of the property in suit for a member of his family and that therefore the lease in that case had not been given in the ordinary course of village management. That however does not assist us in determining where the burden of proof should lie, though with the principle of the decision I of course entirely agree.

A I R 1934 Nag 103[1] is in point here. There a Hindu widow executed a permanent lease of khudkast and *sir* lands. Pollock J. (A. J. C. as he then was) held, following the Privy Council decision to which I have just referred, that a permanent lease was a transfer which a widow could not make without necessity. But he held that, so far as the khudkast lands were concerned, the permanency of the tenure was derived not from the lease but from the Tenancy law and he held that the lessee who became first an ordinary and then an occupancy tenant was protected. That, in my opinion, is the exact position which arises here. The moment the lease was given, the defendant became an occupancy tenant, and once that position is reached, his tenure is governed by the usual conditions obtaining under the Act. Great stress was laid in argument upon S. 25, C. P. Tenancy Act, and it was argued that the wording of the section, which is that "an occupancy tenant shall not be ejected from his holding by his landlord except . . . . " indicates that it is only the landlord who lets the tenant into possession and those who derive title through this landlord cannot eject the tenant, and that this affords him no protection as against the reversioner. That is an argument with which

2. ('18) 5 A I R 1918 Nag 218 : 46 I C 762 : 14 N L R 133, Shri Ganesh v. Pandurang.

3. ('17) 4 A I R 1917 P C 33 : 39 I C 722 : 40 Mad 709 : 44 I A 147 (P C), Palaniappa Chetty v. Devasikamony Pandara Sannadhi.

I am not able to agree. It is true the reversioner does not derive title through the widow, but it is equally true that the tenure devolves under the ordinary law and that the moment the reversioner succeeds after the widow, he becomes the landlord of the village and therefore of all the tenants in that village. The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Nagpur 308

VIVIAN BOSE J.

Anandrao Baliram and others —
Defendants — Applicants

v.

Parvatibai w/o Tukaramji Patil —
Plaintiff — Non-applicant.

Civil Revn. No. 23 of 1940, Decided on 29th November 1940, to revise order of District Judge, Amraoti, D/- 24th August 1939.

(a) Limitation Act (1908), S. 5 — Revision application—Delay due to doubt raised by conflicting decisions as to whether appeal or revision lay—Court is justified in condoning delay.

Where the reason assigned for the delay in filing a revision application was the doubt which conflicting decisions had raised as to whether an appeal or a revision lay :

Held that delay could be condoned. [P 308 C 2]

(b) Civil P. C. (1908), S. 105 and O. 47, R. 7—Scope—Order previous to judgment and decree — Application for review of order — Review rejected — Appeal against judgment and decree —Matters in review raised in appeal—Appellant can do so under S. 105 but attack against review order will be limited to O. 47, R. 7.

An application for review of the previous order was filed on the date of judgment in the case. The application for review was rejected and the judgment in the case was delivered. In appeal against the judgment and decree the matters raised in petition for review were again raised :

Held, that this could be done under S. 105 but attack against review order would be limited to Order 47, R. 7. [P 309 C 2; P 310 C 1]

(c) Civil P. C. (1908), S. 151—Scope—Remand —Trial of lower Court not radically defective—Case should not be remanded under S. 151.

Before S. 151 can be resorted to for remanding a case, the trial of case by lower Court ought to be so radically defective as not to amount to trial at all; and where this is not the case provisions of S. 151 cannot be availed of : ('40) 27 A I R 1940 Nag 349, *Rel. on.* [P 310 C 2]

(d) Civil P. C. (1908), O. 41, Rr. 25, 26 —Remand for recording evidence and findings on issues not previously determined by trial Court —Judgment and decree by lower Court after compliance of remand order — Decree should be set aside and judgment should be regarded as findings contemplated by O. 41, Rr. 25 and 26, and proceedings after decree as proceedings contemplated by these rules.

If the remand is not under O. 41, R. 23, then no appeal lies against the remand order. The proper course to be followed by the appellate Court in remanding case for recording of evidence and findings on issues not previously determined is to retain seisin and send the case back for the recording of evidence and findings on the issues which the trial Court had not determined. The appellate Court then should hear objections to these findings and pass its own decree. Where this is not done and a decree is passed by the trial Court after remand then that decree should be set aside but all its proceedings up to that decree, including its judgment after remand should remain, with this difference that the judgment will be regarded as the findings contemplated by O. 41, Rr. 25 and 26 and the proceedings will be treated as proceedings contemplated by these rules. [P 310 C 2]

J. R. Mudholkar — for Applicants.

A. L. Halwe — for Non-applicant.

Order. — This revision was filed beyond time. The application was originally filed as an appeal and as an appeal it was within time, but Grille J., decided that the matter should be dealt with as a revision, so I have now to decide whether the delay should be condoned. The reason assigned for the delay is the doubt which conflicting decisions have raised as to whether an appeal lies or a revision. I think there is enough doubt on the point to justify this contention and so condone the delay. Next a preliminary objection is raised. The application is against a remand order. It is said that trial Court proceeded with the case after the order of remand and a decree has now been passed and that therefore the only remedy left is an appeal against the decree. I need not enter into this because I am of opinion that the application must fail on other grounds. The revision is against an order of remand made in the following circumstances. On 23rd June 1938 the case had been fixed for evidence in the first Court. The plaintiff had no witnesses present and an application which he made for the admission of two documents was dismissed. The trial Court recorded the fact that the plaintiff had not summoned any witnesses and that he had none present and so closed the plaintiff's case. The defendants naturally did not call any evidence either and also closed their case. The case was therefore closed all'round on 27th June 1938 as fixed for judgment. On that day the plaintiff filed an application for review of the previous order. The trial Court decided to hear it and so postponed delivery of judgment. On 17th December 1938 the application for review was rejected and judgment in the case was delivered. The plaintiff then appealed to the appellate Court against the judgment and decree and among

other points pressed again the matters which he had raised in his petition for review. The appellate Court held that the application for review was not really one for review but an application for revival of the proceedings and that the order of 17th December 1938 was an interlocutory order which merged in the final decree. Therefore the learned Judge held that he had power to enquire into these questions under S. 105, Civil P. C. This is attacked in revision.

It is admitted that if no application for review had been filed the order of 27th June 1938 could have been questioned in the appellate Court under S. 105. But it is contended, the moment there was a review against that order it merged in the order passed on the application for review and as no appeal lay against it it became final and so the matters decided by it could not be reagitated in the appellate Court. It was argued that S. 105 is controlled by O. 47, R. 7. I was referred to Chitaley's Civil Procedure Code, volume II, p. 826 where it is stated that an order granting a review is only appealable on the grounds mentioned in O. 47, R. 7, and therefore if the order is challenged on an appeal from the final decree it can only be challenged on the grounds specified under O. 47, R. 7. This it is said shows that S. 105 is controlled by O. 47, R. 7. I think there is some misunderstanding in the argument which can be cleared up if the matter is viewed algebraically. There are really three stages to consider. First of all, there is the original order (and perhaps decree). We will call that X. Then follows an application for review. But before that application can be entertained the provisions of O. 47, R. 1, must be attracted and the Court has to decide whether new and important matter has been discovered, or whether there is some mistake or error apparent on the face of the record, etc. If the Court comes to the conclusion that one or other of these grounds exist, then it decides that the review can be entertained. That decision it embodies in an order Y. The third stage is the final decree or order Z. The Court for example admits the fresh evidence, reconsiders its original order X and makes a fresh order Z. In many cases the second and third stages may be indistinguishable for the reason that the Court does not pass two separate orders but decides for example that there is an error on the face of the record and then and there alters its original order X and at once passes its final order Z. But technically the two stages are distinct however much they may be merged in one order. The decision that there is an error apparent on the face of the record, or whatever else the decision is, must always be there, and so also the decision that affects the original order X in such a way that it must be changed to Z. The distinction between the two is clearly brought out in the latter part of Order 47, Rule 7 (1) :

> Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final order or decree passed or made in the suit.

Once this is appreciated then it is possible to follow what O. 47, R. 7, and the cases referred to by Chitaley mean. O. 47, R. 7, states that when there is an appeal against Y, then the appeal only lies on the grounds set out in R. 7. It does not prevent an appeal against X in the ordinary way if the stage Z has not been reached, that is to say, if X is not altered. But once the stage Z is reached, then X disappears and is replaced by Z and thereafter the aggrieved party has two remedies. He can either appeal against Y or against Z. If he does the former and succeeds, Z goes and is replaced by X. If he does the latter, then Y remains and the matter resolves itself into an ordinary appeal against Z. If however in attacking Z the appellant also wishes to attack Y, then he is limited to the grounds set out in O. 47, R. 7, so far as his attack on Y is concerned.

A more concrete example will illustrate what I mean. A sues B on a loan. The defence is taken that the suit is out of time. B succeeds and the suit is dismissed. (This is what I have termed X). A is aggrieved and applies for review on the ground that he has discovered a document which operates as an acknowledgment and so brings his claim within time. The Court decides that this is now an important matter and entertains the review. (This is the order Y). It thereupon rehears the case and in spite of the defendant's opposition holds that the document is an acknowledgment which saves limitation and then decrees the claim. (This is the final decree which I have termed Z). This time B is aggrieved and he can do one of two things. He can appeal against Y, but if he does so he is limited to the narrow grounds set out in O. 47, R. 7. He cannot attack either X or Z. If he succeeds in his appeal, then Y is set aside and that means that Z goes too, and that results in a restoration of X without modification. But B is not limited to this position. He can also

appeal against the fresh decree Z on all the usual grounds. Consider what any other rule would mean. Take a large claim for over a lac on a promissory note. If the acknowledgment in the case put had been produced in the first instance and the claim had been decreed on the strength of it B would have been entitled to appeal to the High Court and possibly from there to the Privy Council. He could have attacked this acknowledgment on its merits. He could have contended that it did not amount in law to an acknowledgment, or that it was a forgery, or that it did not bear his signature. But if the present contention is sound, and if A, instead of producing the document at the trial, was allowed to do so in review, then B would be completely shut out from attacking the document on its merits. He would be confined to the plea that it was not new matter and that it was within his opponent's knowledge and could have been produced before the decree was passed, etc. It may well be that he is not in a position to do this though he is able to attack the document on its merits. It would, in my opinion, be absurd to hold that he is shut out from doing so and that he cannot attack the new and altered decree Z except upon the narrow grounds permitted by O. 47, R. 7. I am quite clear that he can and that O. 47, R. 7, has no reference to Z. It only refers to Y. I repeat, however, that if B chooses to attack Y in an appeal against Z, then in so far as the attack on Y is concerned he is still limited as aforesaid.

But all this does not really concern the present case because the argument raised and the authorities cited refer to cases in which the application for review is allowed and not to one in which it is rejected. In the present case the application was rejected and, therefore, we have never reached the further stage with which the authorities cited were dealing. If the application is rejected then the original order remains and it can be dealt with just as if there had never been an application for review. There can be no doubt that if the review proceedings are ignored, then the order complained of could have been attacked in the appeal against the decree under S. 105. The lower Court, therefore, had jurisdiction to entertain the appeal. The next question is whether the case was rightly remanded. It is contended on the strength of I L R (1940) Nag 538[1] that the lower Court had no power to remand and that it should have dealt with the case itself after re-settling the issues and after taking such further evidence as it thought fit. It is contended that the first Court's decision was not on a preliminary point and that, therefore, none of the provisions of the Civil Procedure Code permitting remand applied. I think there is substance in this contention. Section 151 can very seldom be resorted to. The trial would have to be so radically defective as not to amount to a trial at all before its provision could be availed of and that in my opinion was not the case here. The difficulty of holding otherwise will be seen at once in this case.

If the remand is not one under O. 41, R. 23, then no appeal lies against the remand order and this Court's powers in revision are very limited. It would not for example be able to entertain questions relating to the correctness of the decision of the appellate Court on the merits of its order of remand. This might result—I do not decide the question here and say that it would—but it might result in the remand order being final, whereas had the appellate Court retained seisin and passed the decree itself it is possible that the point on which the first Court's decision was reversed could have been contested in second appeal. Again, I do not say it can be, but it might. At the same time the practical difference, except as regards appeal is not very different. Had the proper course been followed the appellate Court would have retained seisin and sent the case back for the recording of evidence and findings on the issues which the trial Court had not determined. The appellate Court would then have heard objections to those findings and have passed its own decree. I will, therefore, place all the proceedings up to this point on the same footing as if the proper procedure had been followed. The result is as follows. The decree of the trial Court after remand is set aside but all its proceedings up to that decree, including its judgment after remand, will remain, with this difference that that judgment will be regarded as the findings contemplated by O. 41, Rr. 25 and 26, and the proceedings will be treated as the proceedings contemplated by these rules. I allow 14 days from the date of my order to file objections to the appellate Court, and direct the appellate Court to hear those objections and then pass its own decree. The costs of this revision will abide the event. Counsel's fee Rs. 40 for applicant and Rs. 17

1. ('40) 27 A I R 1940 Nag 349 : 191 I C 566 : I L R (1940) Nag 538, Sheolal v. Jugal Kishore.

for non-applicant these being the certificates filed.

K.S./R.K. *Application allowed.*

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(28) A. I. R. 1941 Nagpur 311

NIYOGI J.

Pt. Raghubarprasad Ramgulam Gurao — Plaintiff — Appellant

v.

Balloo Sheocharan and others — Defendants — Respondents.

Second Appeal No. 552 of 1938, Decided on 1st April 1941, from appellate decree of Extra Additional District Judge, Saugor, D/- 25th July 1938.

(a) Abadi—Landlord is presumed to be owner only of vacant site forming part of abadi — Weight of presumption though slightly impaired by existence of structure on site still landlord can be presumed to be owner.

The presumption in favour of the landlord being the owner of any land forming part of the abadi arises only in respect of a vacant site. Although the weight of the presumption is impaired to some extent by the existence of a structure on the site still the landlord may well be presumed to be the owner of the site. [P 312 C 1]

(b) Deed — Construction — Discrepancy between dimensions and boundaries—Description as to boundaries must prevail.

In the case of a discrepancy in a deed between the dimensions and boundaries of certain property, the description as to boundaries must prevail. [P 312 C 2]

(c) Adverse possession—Possession need not be brought to notice of owner—Possession overt and without any attempt at concealment is sufficient — Acts, such as tethering of cattle on site, using it for sitting in open or sleeping during hot weather or for depositing cow-dung cakes and firewood by themselves are not adverse—But they become adverse when they are so overt and exclusive as to be referable to title asserted by adverse possessor by virtue of sale deed in his favour.

Possession to be adverse need not be shown to have been brought to the knowledge of the person against whom it is claimed. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware of what is happening : ('34) 21 A I R 1934 P C 23, *Rel. on.* [P 313 C 1]

Acts such as the tethering of cattle on a site, using it for sitting in the open and for sleeping during hot weather and also for depositing cow-dung cakes and firewood standing by themselves may not be such as could be regarded as adverse but they become adverse and cease to be mere acts of casual possession without any idea of claiming title where they were so overt and exclusive as to be referable to the title which the adverse possessor asserts by virtue of a sale deed in his favour : 16 Bom 338 and ('16) 3 A I R 1916 Nag 90, *Disting.* [P 312 C 1, 2]

R. N. Padhye — for Appellant.

D. N. Choudhary and A. L. Halwe — for Respondents 2 to 4 and 1, respectively.

Judgment. — This is plaintiff's appeal from the reversing judgment of the Extra Additional District Judge, Saugor, in Civil Appeal No. 14-A of 1938 delivered on 25th July 1938. The appellant and the respondents owned houses adjoining each other in the town of Saugor and the dispute relates to a site designated in the map attached to the plaint by the letters ABCDEFG which is described throughout the litigation as a chabutra (platform). That piece of land is contiguous to the respondents' house. The appellant came to own the house by purchase in 1934. On the date of the institution of the suit that house was in the actual occupation of his tenant Kanhaiyalal. The dispute between the parties originated with Kanhaiyalal's insistence on his right to use the chabutra. The respondents protested by giving him a notice to desist from using it. Whereon the plaintiff as Kanhaiyalal's landlord sent a reply denying his right to the chabutra which he declared had been set apart for public Nistar (use). Thereafter he got the site of the chabutra transferred to him from the malguzar of Saugar under a sale deed dated 22nd February 1935 for Rs. 30 and attempted to take possession of it. In consequence of the resistance offered by the respondents there ensued criminal proceedings under S. 145, Criminal P. C., which resulted in the confirmation of the defendants' possession. The appellant thereon instituted the suit out of which this appeal arises for ejectment of the respondents on the ground that the land belonged to him. The respondents resisted the suit on the ground of their title and continuous acts of possession under colour of their title. The trial Court held that in view of the wajib-ul-arz of the town of Saugor in so far as it applied to the site in dispute there was a presumption that landlord was the owner of the site and that such acts of possession as the defendants were able to establish were not effective to displace the presumption of ownership in favour of the landlord from whom the appellant derived his title. It therefore decreed the suit. The lower appellate Court while conceding that the initial presumption of ownership was in favour of the landlord found that the site in dispute had been included in the premises purchased by the defendants in the year 1895 and that the various acts of possession proved by him were such as were consistent with his claim of title to the site. It therefore reversed the decree of the trial Court and dismissed the suit.

A very vigorous argument was addressed on behalf of the appellant to show that the lower appellate Court was in error on the point of presumption as to the ownership of the site as also the legal effect of the various acts of possession exercised by the defendants. The effect of the lower appellate Court's finding of fact is sought to be neutralized on the contention that the lower appellate Court drew upon his imagination and indulged in a good deal of speculation in a manner not justified by the actual evidence on record. There can be no doubt that the malguzar of Saugor, as pointed in Ex. P-6, the copy of a letter from the third Secretary to Government, Central Provinces, to the Commissioner of Settlement, Central Provinces, that in respect of the abadi in which the site in dispute is situated, has the same right as that of a malguzar of any village, but the presumption in favour of the landlord being the owner of any land forming part of the abadi would arise only in respect of a vacant site. It is common ground however that the site is not quite in its natural condition but has some sort of structure standing on it. There is no evidence that the landlord had built the structure however loose or temporary it may be. Although the existence of the chabutra impairs to some extent the weight of the presumption in favour of the landlord it may well be presumed that he was the owner of the site. But even starting with this initial presumption the appellant cannot succeed in the face of the finding that the site in dispute was included in the sale deed dated 12th June 1895 under which the respondents claimed and that the respondents had a shed on it which they had been using for tethering their cattle, and that they were using it for sitting in the open and sleeping on it during hot weather and also for depositing cow-dung cakes and fire-wood. The lower appellate Court also finds that besides the respondents none else occupied the site except some persons who obtained special permission of the defendants to use it.

The lower appellate Court's view that the site was included in the sale deed of 1895 is subjected to much criticism on the ground that it wrongly identified the chabutra marked in the rough sketch given in that sale deed with the site in dispute. It is said that the word chabutra noted in the sketch is the chabutra in front of the door and not the one in dispute. The contention is specious but not sound. It is true that the word chabutra is written so as to suggest that it was in front of the door but it must be borne in mind that the sketch shows a projection of the site beyond the limits of the courtyard. The word chabutra is so written in the sketch that it might as well refer to the site in suit which bulges out of the courtyard as it may refer to something in front of the door. There is however no plea that there was any chabutra in front of the door and the suggestion made for the first time in this Court on behalf of the appellant as to the existence of such a chabutra cannot be entertained at this late stage. On the pleadings in the case, there was only one chabutra and that was the one in suit. It would therefore not be wrong to regard the word chabutra noted in the sketch as referring to the one in dispute. Moreover, the sale deed purports to transfer "the house together with the ground within the boundary limits as shown in the map given below." Now, the western boundary of the house and the site sold is shown as the public road. The dimensions given are not consistent with the boundaries but it is a well-recognised rule of construction that when there is a discrepancy between the dimensions and the boundaries the description as to the boundaries will prevail. Viewing the sketch rough as it is in conjunction with the recitals in the sale deed there does not appear any doubt that the vendor intended to sell that piece of land including the house which lay within boundaries noted therein. It must therefore follow that the chabutra which abuts on the public road fell within the ambit of the sale deed.

The various acts of possession standing by themselves may not be such as could be regarded as adverse, but they cannot be considered divorced from the defendants' sale deed of 1895. They were not mere acts of casual possession without any idea of claiming title as those in 16 Bom 338[1] or 13 N L R 25[2] since they were so overt and exclusive as to be referable to the title which the respondents asserted by virtue of their sale deed of 1895. The appellant's contention that the respondents' possession was not to the knowledge of the landlord has not much force. In 61 Cal 262[3] a pertinent observation occurs as follows :

1. ('92) 16 Bom 338, Framji Cursetji v. Goculdas Madhowji.
2. ('16) 3 A I R 1916 Nag 90 : 39 I C 54 : 13 N L R 25, Radhikadas v. Harmohanlal.
3. ('34) 21 AIR 1934 P C 23 : 147 I C 545 : 61 Cal 262 : 61 I A 78 (P C), Secretary of State v. Debendralal Khan.

The classical requirement is that the possession should be *nec vinec claim nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought if he exercises due vigilance to be aware of what is happening. If the rights of the Crown have been openly usurped, it cannot be heard to plead that the fact was not brought to its notice.

It is pertinent to notice that in the cited case the defendant's right was founded only on adverse possession unlike the present case where the respondents have been able to prove their possession as being incidental to their ownership of it. The landlord himself admitted in the witness-box that there was a stone lining towards the south of the chabutra about two feet in height and that he had never made use of it. He was unable to give any special reason for selling the site to the plaintiff and he was reticent when the defendants by a notice challenged his right to transfer the site. Although there is no evidence to show who constructed the chabutra there it is clear from the drainage map Ex. D-3 that the chabutra had been in existence since 1892, that is three years prior to the defendants' sale deed. During all the time that the respondents had been using the site as appurtenant to their house the malguzar did not protest against its use by the respondents. It appears clear that for reasons best known to himself he has transferred the land to the plaintiff with a view to enable him to harass the respondents with no honest belief in his own right to it. The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

*** * (28) A. I. R. 1941 Nagpur 313**

STONE C. J. AND NIYOGI J.

Abdul Majid Shah — Appellant

v.

Abdul Sattar and others—Respondents.

Misc. Appeal No. of 1941, Decided on 24th July 1941, from order of Sub-Judge, First Class, Wardha, D/- 20th November 1940.

(a) Civil P. C. (1908), Ss. 144 and 2 (2) — Order under S. 144 conclusively determining matters in controversy is decree within S. 2 (2) (Per *Bose J.*)

An order under S. 144 conclusively deciding, so far as the Court is concerned, certain of the matters in controversy between the parties and ordering one of them as a consequence, first, to account, and then to pay certain sums of money together with interest to the other side is a decree within section 2 (2). [P 313 C 2]

*** * (b) Civil P. C. (1908), Ss. 144 and 47 — Court-fee : 18 N L R 15=('22) 9 A I R 1922 Nag 62=67 Ind Cas 225, *OVERRULED*.**

(Per Bench) — An order under S. 144 is not for court-fee purposes the same as an order under Sec. 47 : 18 N L R 15=('22) 9 A I R 1922 Nag 62=67 Ind Cas 225, impliedly overruled and held no longer good law: *Case law discussed*. [P 316 C 1,2]

Fida Husain — for Appellant.

W. R. Puranik, Advocate-General — for the Provincial Government.

ORDER OF REFERENCE

Vivian Bose J. — The facts are given in the taxing officer's order. The first question is whether the order under appeal has the force of a decree. The order is in two parts. The first part is to be found in what I might term the order proper which was delivered on 30th November 1940. The other part is in the order sheet of the same date. As both orders were delivered on the same day I think they should be read together and treated as one order. The portion of the order which is to be found in the part which I have termed the order proper decides that the respondents are entitled to restitution and orders the plaintiff to account. The other part of the order which is in the order sheet orders the plaintiff to deposit certain specified sums (which I take it were found due from the plaintiff on the accounting) in Court together with interest on them "for payment to the successful party" (that is the defendants), and further orders that in case of non-compliance within the time allowed the defendant shall be entitled to recover these sums by way of execution. I have no doubt that this is a decree within the meaning of S. 2 (2), Civil P. C. The order conclusively decides, so far as the lower Court is concerned, certain of the matters in controversy between the parties and orders one of them as a consequence, first, to account, and then, the account presumably having been given and accepted by the Court, to pay certain sums of money together with interest to the other side. The order therefore fulfils all the requirements of the first part of the definition in S. 2 (2) except that the matter in controversy is not in controversy in the suit but in a collateral proceeding. But S. 2 (2) states unequivocally that the determination of any question under S. 144 of the Code shall be deemed to be a decree. This is an order under S. 144. Therefore it must be treated as a decree.

I may state incidentally that unless it is so treated the present appeal cannot lie.

That of course is not a matter with which the taxing authorities are concerned, but if a party insists that he has a right of appeal and insists on putting in a memorandum of appeal he must stamp it accordingly. The next question is whether an order under S. 144 is to be considered as one under S. 47 for court-fee purposes. That depends upon whether the order relates to the "execution, discharge or satisfaction" of the decree in the suit out of which the proceedings in question was passed arise. The High Courts are divided on this point. Bombay and Madras have consistently taken the view that it does, Allahabad and Rangoon that it does not. Calcutta, Lahore and Patna have differed among themselves, the latest Calcutta and Lahore decisions agreeing with Allahabad and Rangoon. A Patna Full Bench also agrees with them. Nagpur has only one decision on the point and that ruling, while agreeing that logically "it seems no longer possible to hold that an application for restitution is one for the execution of the appellate decree which forms its basis" nevertheless goes on to hold that it does. This decision is reported in 18 N L R 15[1] at p. 20. The question is whether in the face of the large preponderance of authority on the other side 18 N L R 15[1] can still be treated as good law. I may remark that the question is not only of importance in matters relating to court-fees but also in questions arising out of articles 181 and 182, Limitation Act. The grounds on which the majority proceed can be summarized as follows :

(1) Orders under S. 144 are expressly declared to be "decrees" under S. 2 (2) of the Code. Under the Court-fees Act, all appeals must be stamped ad valorem unless there is provision to the contrary. There is provision to the contrary in the case of appeals under S. 47. It is to be found in a notification of the Governor-General in Council. There is no such provision covering appeals under S. 47. Whether this was accidental or deliberate hardly matters, but two High Courts, Allahabad and Calcutta, have thought that it was probably deliberate. In any event the learned Judge who decided 47 ALL 98[2] directed that a copy of his judgment, together with his recommendation that the exemption granted to appeals under S. 47 be also extended to appeals under S. 144, should be forwarded to Government. This was in 1924. No change has been made since then in spite of the recommendation. *(2)* The balance of authority under the old Code of 1882 was to the effect that an application for restitution under the old S. 583 (which corresponds to s. 144) was an application for execution within the meaning of old S. 244 (which corresponds to S. 47 in the present Code). The basis for those decisions was (a) that the old Code placed S. 583 under Chap. 41 which related to appeals and under that portion of it which was headed "the decree in appeal"; (b) that S. 583 expressly referred to restitution "under a decree passed in appeal under this chapter" and had the words

> when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same etc. . . . . and such Court shall proceed to execute the decree passed in appeal.

The present Code alters this radically : (a) it has removed the section from the chapter dealing with appeals and has placed it in Part 11 which is headed "Miscellaneous;" (b) the words about execution have been removed altogether. So also under the old Code S. 583 provided how the decree on appeal was to be executed. "In the new Code Ss. 37 and 38 provide how appellate Court decrees are to be executed and are placed in the chapter dealing with execution." It is considered that these alterations were deliberate and were intended to alter the old law. *(3)* By virtue of the definition in S. 2 (2) an order under S. 144 is itself a decree, or at any rate has the force of a decree, and so is capable of execution as such, and consequently it cannot be an order in execution. *(4)* Section 2 (2) states that the definition of a decree shall be deemed to include "the determination of any question within S. 47 or S. 144." If orders under S. 144 fall under S. 47 in any event then it would not have been necessary to separate them here. *(5)* Under S. 144 the Court ordering restitution is empowered to award interest. No Court could make such an order in execution when the decree did not provide for interest. Therefore an order under S. 144 cannot be an order in execution. *(6)* If an application for restitution is in reality an application for execution, then there was no need for S. 144 because such matters have already been provided for in S. 47. *(7)* The power to order restitution is really an inherent right which the Court exercises in order that no

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1. ('22) 9 A I R 1922 Nag 62: 67 I C 225: 18 N L R 15, Gobba v. Kanchhedilal.
2. ('25) 12 A I R 1925 All 137: 82 I C 321: 47 All 98: 22 A L J 881, Baijnath Das v. Balmakund.

party should suffer by reason of an order of the Court itself, the order causing injury being of course the decree which is reversed. It is only by doing violence to language that one can speak of the judgment of reversal as having made an additional decree by implication to the effect that the successful party will get from the other side what the latter had obtained meanwhile by execution of the original decree, and if such an order is already present by implication in the reversing decree, then clearly there would be no need for an additional order under Sec. 144 and so no need for Section 144. *(8)* That the Privy Council placed the right to direct restitution, and particularly the right to award interest, on the above grounds in a *Hong Kong case* and not on the ground that such an order is implicit in the decree of the appellate Court: (1871) L R 3 P C 465.[3]

These views are to be found in one form or another in the following cases: ILR (1937) 1 Cal 637[4] at p. 642, 47 ALL 98,[2] 8 Rang 271,[5] 3 Pat 371[6] and A I R 1930 Lah 24.[7] The arguments on the other side may be summarized as follows: (1) The right to restitution is inherent in the decree of reversal and is to be read into it by implication. Hence the order for restitution is an order in execution of the decree of reversal. (2) It would be anomalous to hold that while the application for restitution can be made on a Rs. 2 stamp (or a Rs. 3 as the case may be) the appeal from an order on such an application must be stamped ad valorem. (3) It would be unjust to require a party to pay ad valorem court-fees in a miscellaneous proceeding of this kind. (4) Under the old Code, it was clear that such orders were to be regarded as orders in execution and the new Code has not made any substantial change. (5) That in a sense an order directing restitution does relate to the execution of the first Court's decree as well as to that of the appellate Court reversing it. These views appear in 18 N L R 15,[1] A I R 1923 Mad 270,[8] A I R 1928 Lah 143,[9] 21 C W N 544,[10] 40 Mad 780,[11] 41 Bom 625[12] at p. 629, 45 Bom 1137[13] at p. 1140 and 4 Pat 294.[14] As regards these cases, it is to be observed that in spite of the Madras decisions the Madras Legislature considered it necessary to amend Art. 11 to Sch. 2, Court-fees Act, in the year 1922 so as to bring the article into line with the Madras decisions. The Madras decisions since the amendment are consequently not of assistance to those outside the Province of Madras. As regards the 21 C W N 544[10] case that ruling followed the old Calcutta decisions which dealt with the position under the old Code. The trend of decisions in that Court under the new Code are the other way round as was pointed out in I L R (1937) 1 Cal 637[4] at page 642. The Lahore case has not been followed in the later Lahore decisions, and 4 Pat 294[14] ignores the Full Bench in 3 Pat 371[6] and merely states that in a taxing matter the Taxing Judge should follow the rule laid down by his predecessor.

My own view, as at present advised, is that 18 N L R 15[1] was wrongly decided and should be overruled. This is particularly so in reference to the present case. The suit is for a declaration that the plaintiff has the right to collect the income from a shrine and for an injunction to restrain the defendant from doing so. The first Court granted the decree. Such a decree was incapable of execution (except as to costs) and the present matter arises out of collateral receiver's proceedings. The appellate Court reversed the first Court's decree and dismissed the claim. This decree is also incapable of execution (except of course as to costs). I cannot see how by any stretch of imagination an implied order to the plaintiff to refund money he has obtained from the receiver (or as receiver, whichever way one cares to view it, he himself being the

3. (1871) L R 3 P C 465 : 7 Moo P C 314 : 40 L J P C 1 : 24 L T 111 : 19 W R 449, Roger v. Comptoir D'Escompte De Paris.
4. ('37) 24 A I R 1937 Cal 152 : 171 I C 212 : ILR (1937) 1 Cal 637 : 65 C L J 165 : 41 C W N 157, Tarak Nath v. Panchanan Banerji.
5. ('30) 17 A I R 1930 Rang 241 : 126 I C 211 : 8 Rang 271, Mg. Hla Maung v. Ma Hnin Dauk.
6. ('25) 12 A I R 1925 Pat 1 : 78 I C 200 : 3 Pat 371 : 5 P L T 145 (F B), Balmukand Marwari v. Basanta Kumari Dasi.
7. ('30) 17 A I R 1930 Lah 24 : 113 I C 270, Gul Muhammad v. Sabz Ali Khan.
8. ('23) 10 AIR 1923 Mad 270 : 71 I C 173, Sudali Muthu v. Sudali Muthu.
9. ('28) 15 A I R 1928 Lah 143 : 107 I C 491, Rahmat Ali v. Rikhi Kesh.
10. ('18) 5 A I R 1918 Cal 335 : 39 I C 640 : 21 C W N 544, Madan Mohan v. Nogendra Nath.
11. ('17) 4 A I R 1917 Mad 185 : 38 I C 806 : 40 Mad 780, Somasundaram v. Chokkalinga Pillai.
12. ('17) 4 A I R 1917 Bom 210 : 41 I C 238 : 41 Bom 625 : 19 Bom L R 638, Kurgodigouda v. Ningangouda.
13. ('21) 8 A I R 1921 Bom 67 : 62 I C 233 : 45 Bom 1137 : 23 Bom L R 480, Hamidalli v. Ahmedalli.
14. ('25) 12 A I R 1925 Pat 577 : 92 I C 474 : 4 Pat 294 : 7 P L T 415, Sital Prasad v. Jagdeo Singh.

receiver) can be read into the appellate Court's decree. I therefore refer the matter to my Lord the Chief Justice for the constitution of a Bench of two or more Judges (18 N L R 15[1] is a single Judge decision) to consider the following question :

"Was 18 N L R 15[1] rightly decided in that it decides : (1) that an order under S. 144, Civil P. C., is an order in execution under S. 47, and (2) that the court-fees payable on an appeal from such an order is Rs. 2 (now Rs. 3)?"

Order of the Division Bench

The question referred has been introduced by an order which so fully examines the question that it is only necessary for us to indicate which current of authority we feel should be followed. We are of the opinion that that represented by ILR (1937) 1 Cal 637,[4] 1938 R L R 635,[15] 47 ALL 98[2] and A I R 1930 Lah 24[7] represents the better view as matters now stand under the Code of 1908 and the rules of 1921. We are not prepared to say that 18 N L R 15[1] was wrong. The rules were different then. They had been made at a time when the Code of 1882 was in force and under the provisions of S. 583 the position was different and perhaps justified what might be called the old view.

As the provisions and rules now stand, we are of the opinion that an order under S. 144 is essentially different from an order under S. 47. Such an order could not be obtained by proceedings under S. 47. A clear distinction is drawn between the two cases by S. 2 and although these two kinds of procedure are, so to speak, the two sides of the same coin that does not make a head the same as a tail. Already in 1924 one High Court recommended in a judgment that the Rules issued under the Court-fees Act (for the Central Provinces we are informed the relevant rules relating to reduction and remissions are contained in No. 79-292-XI and for Berar No. 97-292-XI Cl. (6)) might fairly be altered. This is a matter for Government. If Government is minded to make this concession after S. 47 in Cl. (6) would be added the words "or S. 144." The recommendation made in another Province in 1924 does not appear to have been accepted. There seems, however, no reason to charge different, essentially different, court-fees according as the appeal is against an order passed in execution or against an order passed in restitution proceedings. In the first case one side is making the other pay and in the second case the side who has paid under a decree subsequently set aside is getting his money back. If anything the second procedure should be cheaper than the first. Our answer is that an order under S. 144 is not for court-fee purposes the same as an order under S. 47. We stopped Mr. Kulkarni arguing the particular question : 'Was this an order under S. 144?' That does not arise out of the reference which is concerned with the general not with the particular. The matter will now go back for disposal in the light of the above and when the matter is disposed of, this judgment will be considered administratively for any action which may be thought necessary.

R.K. *Reference answered.*

15. ('39) 26 A I R 1939 Rang 32 : 179 I C 464 : 1938 R L R 635, Ma Htwe v. U Toke.

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(28) A. I. R. 1941 Nagpur 316

POLLOCK AND GRUER JJ.

In re Nathuram Gotiram Kayasth — *Accused* — *Applicant.*

Criminal Revn. Appln. No. 167 of 1941, Decided on 6th May 1941, for revision of order of Addl. Dist. Magistrate, Narsingpur, D/- 25-2-1941.

Criminal P. C. (1898), S. 439 — Revision against appellate order can be made direct to High Court : Cri. Revn. No. 122 of 1941, *OVERRULED.*

An application for revision of an order passed by a criminal Court of appeal may be made direct to the High Court; the applicant need not first apply to the Sessions Court : Cri. Revn. No. 122 of 1941, *OVERRULED*, Cri. Revision No. 398 of 1939, *Approved.* [P 317 C 1]

Hidayatullah — for Applicant.

ORDER OF REFERENCE

Pollock J. — This is an application for revision of the order of a criminal Court passed in appeal. In Criminal Revision No. 122 of 1941 (Guruprasad v. King-Emperor) Bose J. held that such an application must be made to the Sessions Court in the first instance. In Criminal Revision No. 398 of 1939 (Gaya Prasad v. King-Emperor) Gruer J. remarked :

This does not appear necessary in the case of revision of appellate orders, in accordance with the rules and practice of the High Court.

Rule 15 of Chap. 4 of the High Court Rules provides :

No petition for revision of an original order of a Magistrate shall be entertained unless it is accompanied by a copy of the order of the District Magistrate or Sessions Judge concerned refusing to refer the case to the High Court ;

but there appears to be no such provision for applications for revision of appellate orders. As it is desirable that this point should be settled, the case may, subject to the approval of the Chief Justice, be placed

before the Division Bench during the vacation after the issue of notice to the Advocate-General.

Opinion. — In our opinion it is clear from R. 15 of Chap. 4 of the High Court Rules that an application for revision of an order passed by a criminal Court of appeal may be made direct to the High Court, and that the applicant need not first apply to the Sessions Court. This rule appears to be based on the practice of the Judicial Commissioner's Court, laid down in the office order of 19th April 1929. We do not propose to recommend that the order should be altered so as to make it necessary that the applicant should first apply to the Sessions Court, because such a practice would throw an extra burden on the Sessions Court without effecting any appreciable saving of work in this Court.

R.K. *Reference answered.*

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(28) A. I. R. 1941 Nagpur 317

STONE C. J. AND VIVIAN BOSE J.

Byankat Paikaji Lonari Kunbi and another — Plaintiffs — Appellants

v.

Ramchandra Mahadeo Mule and another — Defendants — Respondents.

First Appeal No. 56 of 1937, Decided on 17th February 1941, from decree of Addl. Sub-Judge, First Class, Amraoti, D/- 24th November 1936.

(a) Religious endowment — Private or public —Property dedicated to idol — Owner disclaiming all interest and admitting that it belonged to idol — Temple built with money collected as also with dedicator's money—All transfer deeds to idol made in favour of idol — Dedicator mentioned and acting as one of panchas—Trust held one of public religious character.

Plaintiff who dedicated some property to an idol disclaimed all interest in the property and admitted that the property belonged to the idol. The temple was built with money contributed by the villagers and the plaintiff. Several properties were gifted to the idol by other people and all the deeds were made out in favour of the idol. Plaintiff was mentioned as one of the panchas and he was acting in that capacity. He filed a suit for a declaration that the temple and property owned by it did not constitute a public religious and charitable trust:

Held that there was a trust and that it was of a public religious character. [P 319 C 2]

(b) Religious endowment—Dedication of property to idol can be without registered instrument *(Obiter).*

A dedication of property to an idol is not a gift and consequently can be accomplished without a registered instrument: ('27) 14 A I R 1927 Mad 636 (FB); 37 Cal 128 and ('22) 9 A I R 1922 P C 123, *Rel. on.* [P 319 C 1]

(c) Charitable and Religious Trusts Act (1920), S. 3 — Dedication of property to idol is case of trust and is covered by S. 3.

Dedications of property to an idol are impressed with a trust of a religious nature and such a trust though of a special and peculiar kind is one which the Charitable and Religious Trusts Act is intended to cover: *Case law referred.* [P 321 C 1]

M. R. Bobde and W. R. Warhade — for Appellants.

D. T. Mangalmurti — for Respondents.

Judgment. — This claim is the offshoot of a petition under the Charitable and Religious Trusts Act of 1920. The plaintiffs undertook to institute a suit for the declaration contemplated by S. 5 (3) of the Act and this is that suit. The institution in question is a temple and deity known as the Shri Mahadeo Sansthan. It was founded by the first plaintiffs' grandfather Ganuji, though whether solely or in conjunction with others is a matter of dispute. The institution owns certain property which is described in the plaint. The plaintiffs disclaim all interest in this property except as regards the temple itself together with the site on which it stands, including its compound, and the portion of the field S. No. 94 known as S. No. 94 (1) on which, according to the plaintiffs, the temple stands. The exact nature of the interest which they claim is not clear but they ask for a declaration that the Sansthan and the property owned by it forms a private Sansthan and does not constitute a public religious and charitable trust. It is enough for their purpose if they can show that. There is no dispute as to what must be established in order to bring the matter within the purview of the Charitable and Religious Trusts Act. That is set out in S. 3 of the Act, and the points are also enumerated in a decision of the Judicial Committee of the Privy Council in almost identical language in 57 ALL 330[1] at pp. 342 and 343.

So far as the present suit is concerned they are the same as the requirements under S. 92, Civil P. C. Put shortly there must be a trust. It must be either express or constructive. It must have been either created, or it must be existing, for a public purpose. (We stress the alternative.) And that public purpose must be of a charitable or a religious nature. It is not denied here that if there was a trust then it was either express or constructive, nor is it denied that that trust would be of a religious

1. ('35) 22 A I R 1935 P C 97: 155 I C 409: 57 All 330 : 62 I A 146 (P C), Chhotabhai v. Jnan Chandra Basak.

nature. What is said is that there was no trust at all, and that in any event, if there was one, it was of a private character. It was argued that before a Court can reach the conclusion that there was a trust it must be clear about the following matters. It must first ascertain whether there was an author or authors, and if so who. Next it must be clear that there was an intention to create a trust and bear in mind that such intention must be indicated with reasonable certainty by the words or acts of the author. It must also find that there are trust properties and that there are beneficiaries. Unless all these elements are present there can be no trust. 57 ALL 330[1] at page 342 was again relied on.

There is no difficulty about finding an author in this case. If there was a trust at all then the author clearly was Ganuji, the grandfather of plaintiff 1, and possibly certain other members of the public, though their exact position is not clear. But certainly Ganuji's is. So also there is no difficulty about ascertaining the trust properties. It is clear from the plaint itself that the original property with which the institution was founded was the temple building and the site on which it stands, together with its compound, and a portion of the field S. No. 94. The remaining properties were subsequent accretions and are set out in para. 1 (b) of the plaint. As we say, there is no difficulty about these two points. Therefore all we have to see is whether Ganuji, either solely or in conjunction with others, had any intention of creating a trust, and if so, who are the beneficiaries.

As regards the first of these two points the lower Court finds that Ganuji did create a public trust. The plaintiffs' case as placed before us in argument was that there was no trust at all, and in any case that there was no public trust. They stated that the temple is a purely private institution, and though the public are allowed to worship there they are allowed to do so on sufferance as all the property is private property. But though they said that it is private property they made it clear that they do not claim any interest in it. They admitted that the property belongs to the idol which is installed in the temple and admitted that this idol is a juristic entity. But they contended nevertheless that the endowment is a private and not a public one. As regards the question of trust the plaintiffs expressly admitted on 6th November 1935 that there was a trust but said that they had the right to manage because "such right to manage the property goes by inheritance as the trust is a private one." We need not therefore trouble any further as to whether Ganuji, and possibly others with him, intended to create a trust or not. That is admitted, though it was at one time denied, and was again denied here. All we are now concerned to see is whether this trust was of a public or a private nature. That there can be a private religious endowment something along the above lines appears from Mayne's Hindu Law, Edition 10, page 915. The learned author says there :

> Religious endowments are of two kinds, public and private. In a public endowment the dedication is for the use or benefit of the public. But when property is set apart for the worship of a family god, in which the public are not interested, the endowment is a private one. The family idols are not however chattels or the property of the family. They are legal entities having, within limits, independent rights.

The question is whether the endowment in question was of that character. As to whether there was an endowment at all we do not think there can be any doubt. In the first place, as we have said, the plaintiffs disclaim all interest in the property and admit that it belongs to the idol. This could hardly have come about without an endowment of some kind, especially when the plaintiffs admit that there is a trust. In the next place, the plaintiffs have indicated in their plaint, and indicate this even more clearly in the witness box, that Ganuji had gifted or dedicated the properties about which we are now speaking to the idol. (We refer to the properties transferred at the time of installation and not to the subsequent accretions). This is also clear from the entries in the mutation register Ex. D-1. It is true the plaintiffs insist that nevertheless the whole institution was Ganuji's private property and that it is now their private property, but they seemed somewhat confused as to exactly what they meant by this and in the end they seemed to consider that this was so only in the sense that Ganuji retained the right of management and that later that right descended to them.

The lower Court finds against this. It holds that only part of the site now occupied by the temple and its premises was supplied by Ganuji and that the other part was given by one Ghasiram. The part which came from Ganuji was purchased by him in the plaintiffs' name on 20th October 1901 by the sale deed Ex. P-4. The material part of this deed is missing but the plaintiffs admit

in the plaint that Ganuji only had a half share in the field, and the figure "1/2" is still legible in the document. The plaintiffs' case is that the temple was erected wholly on the half of the field which was dedicated by Ganuji. But the defendants denied this and stated that a portion of the temple stands on the other half of the field, which according to them, was gifted by Ghasiram. They filed a map in support of their statement. Ghasiram himself entered the box as D. W. 7. He swears that he purchased the other half of this field (S. No. 94) from one Rasulkhan and he filed the sale deed Ex. P-20. He also swears that he orally gifted the site to the institution and that the temple partly stands on this site. We see no reason to disbelieve him, especially as the plaintiffs have offered no explanation as to how the other half of the field was acquired by the temple.

Whether an oral gift was sufficient to pass title is another matter. There is authority for the proposition that a dedication of property to an idol is not a gift and consequently can be accomplished without a registered instrument. See for example the Full Bench decision of the Madras High Court reported in 50 Mad 687,[2] also 37 Cal 128[3] at pp 142 and 153 and 155, 157, 161 and also that of the Privy Council in 44 Mad 831[4] at p. 843. But these are matters which do not concern us here because admittedly the institution has been in possession for over 12 years and so has now acquired a good title. The point is that half of the land on which the temple stands was donated by an outsider. There is also much evidence which has been believed in the Court below to show that the temple was built with the aid of funds collected from persons in the locality. It may well be that Ganuji contributed the bulk of the money but the witnesses who say that the hat was set round and that they were asked to contribute and did contribute are borne out in a remarkable way by actual evidence. It is proved that there are slabs on the floor of the temple containing the names of persons other than Ganuji. It is true that the slab bearing Ganuji's name has the word "malik" or "malak" (it is not clear which but they both mean the same thing—owner) appended to the name while the others do not, but that fact in itself is not enough in our opinion to displace the rest of the evidence. It is possible that the term was used in an honorific sense by the mason who inscribed the name, he having been engaged and paid by Ganuji, and Ganuji having been the principal donor. But whatever the reason we do not think that this in itself displaces the other evidence.

The conduct of the plaintiffs has also to be considered. After this installation of the idol other persons also made gifts or transfers to it. The deeds are all made out in favour of the idol and a number of panchas are named among them plaintiff 1. These deeds are Exs. P-1, P-2, P-3 and D-18. It is admitted by the plaintiffs that the institution owns the fields mentioned in these deeds, and it is clear that plaintiff 1 accepted these gifts or transfers on behalf of the idol along with others and allowed himself to be described as one of several panchas, and allowed those who were transferring the property to the idol to believe that he was acting in that capacity. That is powerful evidence in the defendants' favour. Looking at the evidence as a whole, and bearing in mind that we are an appellate Court, we see no reason to differ from the lower Court's finding that there was a trust and that it was of a public religious character. That leaves outstanding an argument to the effect that in the case of dedication of property to an idol there can be no trust. Who, it is asked, are the trustees? and who the beneficiary? Is the idol the trustee? Or is it the beneficiary? and if so where do the general public for whose use and convenience the institution was created and endowed with property come in? It must be remembered that in all trusts the legal estate resides in the trustees, while the beneficiary has only an equitable estate. Here, and in many other cases of this class, the legal estate to the property vests directly in the idol. The transfers are all in its name and not in the name of trustees. Their Lordships of the Privy Council insist that all the requirements of a trust must be rigidly fulfilled before action can be taken under the Charitable and Religious Trusts Act of 1920 : 57 ALL 330.[1] It is therefore argued that until one can say with definiteness who the beneficiaries are and who the trustees no proceedings can be taken under the Act.

The question is difficult when viewed like that but we do not feel ourselves called upon to solve it because we think the matter has been settled by their Lordships of the

2. ('27) 14 A I R 1927 Mad 636 : 103 I C 302 : 50 Mad 687 : 53 M L J 203 (F B), Narasimhaswami v. Venkatalingam.
3. ('10) 37 Cal 128 : 8 I C 642 : 10 C L J 355 : 14 C W N 18, Bhupati Nath v. Ramlal Maitra.
4. ('22) 9 AIR 1922 P C 123 : 65 I C 161 : 44 Mad 831 : 48 I A 302 (P C), Vidya Varuthi Thirtha v. Balusami Ayyar.

Privy Council. Whether dedications of this nature are trusts properly so called, or whether they form a special kind of trust peculiar to Hindu law, hardly matters, because we think that their Lordships have placed it beyond doubt that such dedications are impressed with a trust of a religious nature, and the question before their Lordships has usually been whether the trust was a public or a private one. In 23 W R 253[5] their Lordships decided that when property is dedicated to the religious service of an idol the property so dedicated and its rents are the property of the idol and not of the shebait. In 18 W R 226[6] their Lordships stated that the dedications which they were considering there, (endowments for the support and worship of certain idols) were "in the nature of trusts impressed on the property to be performed by the donee." It is true this case is not exactly in point because the gift there was not to the idol itself but to a third party and what their Lordships held was that the donee became a trustee in these circumstances, but the point is that they regarded such endowments as impressed with a trust. 14 M I A 289[7] is more to the point, as in that case the property appears to have been dedicated directly to the religious service of the idol. Again, their Lordships held that this established a religious trust. In 8 M I A 66[8] and in 5 Cal 438[9] also the properties were dedicated to the idols direct and were not assigned to trustees. The dedications there were of a complex nature, and their Lordships held that they did not constitute absolute dedications to the idols. But they held that the expenses of the upkeep and daily worship of the idols were to be charges on the properties and that only the balances which remained could be utilised by the sons of the testators and their offspring, (both cases were of wills) for their own benefit. Their Lordships did not use the word "trust" in either judgment, but as the legal estate in the properties in each case vested in the idol, the family of the testator could only have claimed a beneficial and not a legal interest in such moneys as their Lordships held they were entitled to, and that could only have been on the assumption that these wills constituted some kind of a trust. This question was considered by the Calcutta High Court in 23 Cal 645[10] at p. 655 and the learned Judges, after referring the decisions which hold that an idol in Hindu law is capable of holding property, and that property dedicated to an idol belongs to the idol and not the shebait, said :

> If it were necessary to give reasons in favour of a view so amply supported by authority, we should add that the opinion of Jagannath goes merely to show that an idol can be the owner of property only in a figurative sense, possession being held by a manager or trustee and that dedication of property to an idol is only a mode of creating a trust for religious purposes in perpetuity which is allowed by law. *See* 14 M I A 289.[7]

In 39 ALL 553[11] there was a gift out and out to an idol but the donor stipulated that members of his family should be the managers of the idol and he earmarked a certain part of the money to remunerate them as managers as long as they should so continue. Their Lordships of the Privy Council held at p. 560 that there was no reason why this should not be done, and so upheld the gift and the condition. Their Lordships did not indicate whether such a disposition of property would create a trust, but it is difficult to see in what other way the sons, to whom no direct gift was made, could claim an interest. 44 Mad 831,[4] another decision of the Judicial Committee, raises many doubts. Their Lordships held there at p. 839 that a trust is unknown to the Hindu system, pure and simple, in the sense in which the expression is used in English law, and their Lordships appeared to indicate at p. 843 that properties vested in an idol are not vested as specific trusts within the meaning of S. 10, Limitation Act. Nevertheless they stated at p. 844 that for all that they are in a sense trust properties. But their Lordships again stressed the distinction between the English law of trust and the legal relationships which spring out of a dedication, at pp. 849 and 854. In 8 Luck 351[12] their Lordships again spoke of a trustee in a case

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5. ('75) 2 I A 145 : 23 W R 253 : 14 Beng L R 450 : 3 Sar 449 : 3 Suther 102 (P C), Kumari Debya v. Golab Chand.
6. ('72) I A Sup Vol 86 : 11 Beng L R 86 : 18 W R 226 : 3 Sar 119 (P C), Collector of Moorshedabad v. Ranee Shebessuree.
7. ('70-72) 14 M I A 289 : 17 W R 41 : 10 Beng L R 19 : 2 Suther 512 : 3 Sar 23 (P C), Juggut Moheenee Dossee v. Mt. Sakhi Monee Dossee.
8. ('1859-61) 8 M I A 66 : 2 Suther 37 : 1 Sar 721 (P C), Sonatun Bysack v. Juggutsoondree Dossee.
9. ('80) 5 Cal 438 : 6 I A 182 : 5 C L R 296 : 4 Sar 58 : 3 Suther 694 (P C), Ashutosh Dutt v. Doorga Churn Chatterjee.
10. ('96) 23 Cal 645, Girijanund Datta Jha v. Sailajanund Datta Jha.
11. ('17) 4 AIR 1917 P C 177 : 42 I C 225 : 39 All 553 : 44 I A 187 : 20 O C 200 (P C), Jadunath Singh v. Thakur Sita Ramji.
12. ('33) 20 A I R 1933 P C 198 : 146 I C 1044 : 8 Luck 351 : 60 I A 263 (P C), Kanhaiya Lal v. Hamid Ali.

in which property had been dedicated to and had vested in an idol direct.

It would appear from these decisions that though the trust which arises in such cases is not the exact kind of trust which the English law contemplates, nevertheless, they are trusts, though of a special and peculiar kind. The question accordingly arises, are these special trusts the sort of trust which the Charitable and Religious Trusts Act of 1920 is intended to cover. We think they are. We have already noted that the language used in S. 3, Charitable and Religious Trusts Act of 1920, is the same as that used in S. 92, Civil P. C., 1908. Their Lordships of the Privy Council have twice permitted cases to be brought under this and the section in the old Code which corresponded to it, for a scheme. The first of these cases was under the old Code and is reported in 24 Bom 50.[13] The institution there was over 700 years old and it owned considerable properties. The second case was under S. 92 and is reported in 58 Mad 91.[14] It will be noticed that in some of their Lordships' cases, and in particular in the case last cited, their Lordships speak of "temples" and "institutions" as owning the property in suit. On the other hand, it would appear from their Lordships' decision in 52 Cal 809[15] at p. 815 that Hindu deities are juristic persons because idols are regarded in many ways as sentient beings. There are vivification ceremonies, etc. They are bathed and washed and clothed and fed as carefully and scrupulously as a living person.

The deity is, in short, conceived as a living being and is treated in the same way as the master of the house would be treated by his humble servant. The daily routine of life is gone through with minute accuracy; the vivified image is regaled with the necessaries and luxuries of life in due succession, even to the changing of clothes, the offering of cooked and uncooked food, and the retirement to rest.

These considerations would not apply to temples or to institutions. But in 44 Mad 831[4] at p. 839 their Lordships were definite that religious institutions known under different names are regarded as possessing juristic capacity, as well as idols. Anyway this appears to have resulted in many cases of a slurring of the distinction between the idol proper and the temple or institution of which it forms a part. This slurring is evident in the present case and will be seen in our judgment. The reason is that the plaintiffs and the witnesses sometimes refer to the deity, sometimes to the institution ("sansthan") and sometimes to the "temple," using them all however as interchangeable terms for the purpose of showing where the property is vested. We have been obliged to do so also in order to reflect the evidence and pleadings accurately. But we wish it to be understood that in our opinion what is meant throughout is that the property in this case was all dedicated to the idol and that it is the idol which owns it. The appeal fails and is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

13. (1900) 24 Bom 50 : 2 Bom L R 516, Chotalal v. Manohar Ganesh.
14. ('34) 21 A I R 1934 P C 230 : 151 I C 329 : 58 Mad 91 : 61 I A 405 (P C), Koman Nair v. Achuthan Nair.
15. ('25) 12 A I R 1925 P C 139 : 87 I C 805 : 52 Cal 809 : 52 I A 245 (P C), Pramatha Nath v. Pradyumna Kumar.

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(28) A. I. R. 1941 Nagpur 321

GRILLE J.

Bashirullahkhan Waisullakhan
Accused — Applicant
v.
Emperor.

Criminal Revn. Appln. No. 12 of 1941, Decided on 8th March 1941, for revision of order of Addl. Dist. Magistrate, Amraoti, D/- 5th November 1940.

Penal Code (1860), S. 170 — Person posing as C. I. D. Officer obtaining services of kamdar mahar is guilty under S. 170.

Kamdar mahars have certain obligations one of which is to render assistance to Government servants. Where therefore a person poses as a Government servant (C. I. D Officer) and by so doing obtains the services of the kamdar mahar, services which he would not otherwise have obtained and which the kamdar mahar was bound to give on demand by a Government officer, he does an act under the colour of the office which he had assumed and is guilty under S. 170: ('18) 5 A I R 1918 Pat 653, *Expl., and Disting.*; 27 All 294 and ('35) 22 A I R 1935 Lah 92, *Rel. on.* [P 322 C 2]

B. L. Gupta — for Applicant.

W. R. Puranik, Advocate-General — for the Crown.

Order. — The applicant has been convicted under S. 170, Penal Code, and was sentenced to four months rigorous imprisonment and a fine of Rs. 50. In appeal the conviction was upheld but in lieu of the sentence of imprisonment and fine he was directed, in view of his antecedents (he is a college student), to execute a bond under S. 562, Criminal P. C., for Rs. 200 with one surety in like amount for a period of six months, on which he would be released on probation. In this revision application the facts found are not challenged but it is contended that the facts found do not constitute an offence.

The applicant was travelling towards a village called Akhatwada by night. On the way he passed through the villages of Lehegaon and Ner. At Lehegaon he went to the patel's baithak. The patel was absent. He then asked the kamdar mahar to give him a cart on bigar, representing that he was an officer of the Criminal Investigation Department. The mahar failed to provide a cart, alleging that none was available. He then attempted to get a cart on payment, but the cartman did not agree to his terms. He then left a chit written on a cigarette carton with the mahar, stating that 8 annas had been paid to a certain mahar, which was untrue, and that the patel was absent, and signed it with a designation purporting to be that of a C. I. D. officer. He then proceeded to Ner on foot in the company of a schoolmaster and others. On the way he met the patel of Lehegaon, again repeated that he was a C. I. D. officer and told him to arrange for a cart for his superior officer. On arriving at Ner he made similar representations, and on his representation that he was a C. I. D. officer and going to Akhatwada to investigate a gambling case he asked for and obtained the services of the kamdar mahar to accompany him from there to Akhatwada.

It is contended that this act, which is the most material act inasmuch as services were demanded and obtained, is not an act done under colour of the office which he assumed, and reliance is placed on the decision of a Divisional Bench of the Patna High Court in A I R 1918 Pat 653.[1] It is contended that as this is a decision of two Judges it should take precedence over decisions of single Judges in other Courts although one of them is reported in an authorized law report, 27 ALL 294,[2] and the other, A I R 1935 Lah 92,[3] reported at a later date. In the Patna case a man was convicted under S. 170 for obtaining admission to the platform of a railway station without a platform ticket by pretending to be a C. I. D. officer. It was held in revision that no offence had been committed as the courtesy which the railway extended to members of the police might equally have been extended to other persons of high social position. For the Crown it is contended that this decision is incorrect and should not be followed, and reliance is placed on 27 ALL 294[2] and A I R 1935 Lah 92.[3] I do not think it is necessary to express an opinion as to the correctness of the Patna ruling as it can easily be distinguished from the facts of the case before me. The concession there obtained by the man posing as an officer was one that might have been obtained by other people. Kamdar mahars have certain obligations one of which is to render assistance to Government servants. The applicant posed as a Government servant and by so doing obtained the services of the kamdar mahar, services which he would not otherwise have obtained and which the kamdar mahar was bound to give on demand by a Government officer. He therefore did an act under the colour of the office which he had assumed. The case is certainly stronger than the one in 27 ALL 294,[2] in which the conviction was upheld, where a person posing as a head constable bullied a vegetable seller into selling him goods at a quarter of their actual value. The learned Additional District Magistrate has very correctly altered the sentence into an order under S. 562, Criminal P. C., and it is to be hoped that this will be a sufficient warning to the applicant. The application is dismissed.

R.K. *Application dismissed.*

1. ('18) 5 AIR 1918 Pat 653 : 43 I C 785 : 19 Cr L J 209 : 3 Pat L J 389, Sukhdeo Pathak v. Emperor.
2. ('05) 27 All 294 : 1 Cr L J 913 : 1 A L J 604 : 1904 A W N 232, Emperor v. Azizuddin.
3. ('35) 22 A I R 1935 Lah 92 : 159 I C 358 : 37 Cr L J 81, Roshan v. Emperor.

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(28) A. I. R. 1941 Nagpur 322

POLLOCK J.

Ganpatisingh Ramchandrasingh Kshatriya — Applicant

v.

Ramgopal Daddisao Bania and others — Non-applicants.

Civil Revn. Appln. No. 566 of 1940, Decided on 31st July 1941, for revision of order of Second Sub-Judge, Second Class, Nagpur, D/- 3rd September 1940.

(a) Civil P. C. (1908), O. 21, Rr. 95 and 97 — Complaint to resistance under R. 97 must be within 30 days — Failure to complain does not deprive purchaser's right to apply for delivery — To such application Art. 181 applies.

Rule 97 merely gives the auction purchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under Art. 167, Limitation Act; but if he fails to do so that does not take away his right to apply again under R. 95 for delivery of the property, in which case he must apply within three years from the date when the sale became absolute under Art. 181. An article in the Limitation Act allowing 30 days in which to apply under R. 97 cannot take away the right to apply under R. 95, to which a different article applies: ('19) 6 A I R 1919 Pat 425 (F B); 13 Mad 504; ('21) 8 AIR 1921 Mad 559 and 13 C W N 724, *Rel. on.* [P 323 C 2]

(b) Limitation Act (1908), Art. 167 — Purchaser successfully resisted not complaining under O. 21, R. 97, Civil P. C. — Purchaser applying for fresh possession under R. 95 — Complaint about resistance whether is not governed by Art. 167 and whether obstruction to fresh warrant amounts to fresh obstruction within Art. 167 *(Quære)*.

When an auction purchaser, whose possession under O. 21, R. 95, Civil P. C., is successfully resisted, does not apply under O. 21, R. 97 within 30 days but applies for a fresh warrant of possession under R. 95, it is doubtful whether the purchaser's fresh application under R. 97 complaining about the resistance of possession is not governed by Art. 167 and whether the obstruction is a fresh obstruction within Art. 167 : 11 Bom 473 ; 26 All 365 ; ('33) 20 A I R 1933 Bom 457 (FB) and 18 All 233, *Ref.*
[P 323 C 2 ; P 324 C 1]

(c) Civil P. C. (1908), S. 50 and O. 21, R. 97 — Auction purchaser applying for warrant of possession — Representatives of decree-holder need not be brought on record under S. 50 — Obstructor not claiming through judgment-debtor — His representatives also need not be brought.

A warrant of possession can be issued without bringing the legal representatives of the deceased decree-holder on the record under S. 50 when the decree has been fully satisfied. The proceedings under Rr. 95 and 97 are between the auction purchaser and persons who are presumably claiming to be in possession of the property; and if they are claiming not as the legal representatives of the judgment-debtor but on their own behalf, it is not necessary to bring any legal representatives on the record. [P 324 C 1]

B. R. Mandlekar — for Applicant.

K. A. Potey and B. T. Amlekar — for Non-applicant 1.

Order.—In execution of the decree obtained by Fakirchand and Abirchand against Ramchandra Singh a house was sold in execution and purchased by Ramgopal. The sale was confirmed on 29th January 1938. In 1938 Ramgopal applied to be placed in possession under O. 21, R. 95, Civil P. C., but he was successfully resisted and he made no application under R. 97 complaining of such resistance. It appears that Ramchandra Singh died in 1939, and on 1st February 1940 Ramgopal applied once again under O. 21, R. 95 to be placed in possession. This application has been opposed by the sons of Ramchandra Singh who claimed that they successfully resisted the claim on a previous occasion and that any complaint of resistance now is barred by Art. 167, Limitation Act.

The applicant in this Court, one of Ramchandra Singh's sons, relies on the decisions in 11 Bom 473[1] and 26 ALL 365.[2] 11 Bom 473[1] has been overruled in 35 Bom L R 1033[3] and the decision in 26 ALL 365[2] loses much of its force in view of the fact that one of the Judges, Knox J., had some doubt about the correctness of the conclusion and said he adhered to the opinion expressed in a previous decision, 18 ALL 233,[4] where it was held that the period of limitation for a second application under what is now R. 97 ran from the second resistance of which the complaint was being made. On the other hand, we have the decisions in 13 Mad 504[5] and 49 I C 150.[6] In the latter case the judgment of Coutts J., contains an exhaustive discussion of the case law on the point, and with his conclusions I respectfully agree. Rule 97, in my opinion, merely gives the auction purchaser the right to complain to the Court of the resistance offered to him. If he does so, he must do so within 30 days from the time of such resistance under Art. 167, Limitation Act; but if he fails to do so that does not, in my opinion, take away his right to apply again under R. 95 for delivery of the property, in which case he must apply within three years from the date when the sale became absolute, under Art. 181. An article in the Limitation Act allowing 30 days in which to apply under R. 97 cannot take away the right to apply under R. 95, to which a different article applies. This view is to be found in 66 I C 722[7] and 13 C W N 724.[8] It will be seen therefore that there is very little real difference of opinion between the various High Courts. I am therefore of opinion that the lower Court was correct in holding that a warrant of possesssion should be issued in favour of the auction purchaser. If that warrant is resisted and the auction purchaser complains of such resistance under R. 97, then it may have to be considered whether his complaint is within time. In 35 Bom L R 1033[3] at p. 1038 Beaumont C. J., stated :

If under the fresh warrant possession is obstructed and the decree-holder then applies under R. 97 complaining of the obstruction, and if the execution Judge then starts an inquiry under R. 98, in

1. ('87) 11 Bom 473, Vinayakrav Amrit v. Devrao Govind.
2. ('04) 26 All 365 : 1 A L J 86 : 1904 A W N 46, Kesri Narain v. Abul Hasan.
3. ('33) 20 A I R 1933 Bom 457 : 146 I C 11 : 35 Bom L R 1033 (FB), Mukund v. Tanu.
4. ('96) 18 All 233 ; 1896 A W N 84, Narain Das v. Hazari Lal.
5. ('90) 13 Mad 504, Muttia v. Appasami.
6. ('19) 6 A I R 1919 Pat 425 : 49 I C 150 : 4 Pat L J 94 (FB), Raghunandan Prosad v. Ramcharan Manda.
7. ('21) 8 A I R 1921 Mad 559 : 66 I C 722, Meyyappa Chetti v. Meyyappan Servai.
8. ('09) 13 C W N 724 : 1 I C 785, Baranagore Jute Factory Co. Ltd. v. Raj Kumar Rai.

my opinion, it will be open to the party obstructing to show that his obstruction is by the same person and in the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Art. 167 will then be a bar to the decree-holder's application. The mere fact that the application is made in respect of a fresh warrant for possession does not, in my view, involve that the obstruction is a fresh obstruction.

That is a point that may have to be considered. The applicant has also contended that there can be no issue of a warrant of possession without bringing the legal representatives of the deceased decree-holder on the record. I am informed that the decree has been fully satisfied, in which case there would be no need to bring the legal representatives on the record under S. 50, Civil P. C. These proceedings are between the auction purchaser and persons who are presumably claiming to be in possession of the property not as the legal representatives of the judgment debtor but on their own behalf. It is not necessary to bring any legal representatives on the record. The application for revision is dismissed with costs.

R.K. *Revision dismissed.*

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(28) A. I. R. 1941 Nagpur 324

POLLOCK J.

In re Harakchand Ghiwarmal Marwadi and another — Appellants.

Criminal Appeal No. 54 of 1941, Decided on 14th July 1941, from order of Sess. Judge, Nagpur, D/- 17th February 1941.

(a) Criminal P. C. (1898), S. 298 — Misdirection—Rape case — Telling jury that accusation is itself matter of significance amounts to serious misdirection.

As false accusations of rape are brought the Sessions Judge should ask the jury to consider whether the motive alleged by the defence for the making of a false charge was adequate in view of the stigma attaching to the person bringing such a charge but he ought not to tell the jury that the mere accusation is in itself a matter of significance. That amounts to a serious misdirection.

[P 325 C 2; P 326 C 1]

(b) Criminal P. C. (1898), S. 298—Misdirection—Hostile witness.

Where witnesses have been declared hostile the Sessions Judge should clearly tell the jury that as the witness has told a lie on one occasion they should receive his evidence with caution. [P 326 C 1]

(c) Criminal P. C. (1898), S. 298—Misdirection—Rape case.

The Sessions Judge in a rape case should warn the jury that it is the ordinary rule not to convict on the uncorroborated evidence of the prosecutrix.

[P 326 C 1]

(d) Criminal P. C. (1898), S. 423 — Jury trial —Verdict must be accepted unless erroneous.

The verdict of the jury must be accepted unless the appellate Court considers it erroneous.

[P 326 C 1]

(e) Criminal P. C. (1898), Ss. 537 (d) and 298— On examination of evidence appellate Court of opinion that verdict would be same even in absence of misdirection, Court should not interfere.

If the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably have come to any other decision it will not interfere: 21 Cal 955 and ('17) 4 A I R 1917 All 173, *Expl., and doubted;* ('40) 27 A I R 1940 Lah 87, *Foll.; Case law discussed.* [P 327 C 1]

(f) Criminal trial—Witness—Witness changing — If he intended to give false evidence but subsequently changes, he must say so.

It would be natural to expect that if the original intention of a witness was to give false evidence and he was persuaded to abandon this idea, he should say so. If this he has not done, there is no reason to suppose that he originally intended to give false evidence in support of a false charge.

[P 327 C 1]

W. C. Dutt and P. L. Bhargava—for Appellants.

R. F. Rustamji — for the Crown.

Judgment. — The appellants were tried before the Sessions Judge, Nagpur, with a jury. Accused 1, Harakchand, was charged under S. 376, Penal Code, with rape, under S. 214, Penal Code, with offering gratifications to witnesses and other persons connected with the case in consideration of their screening him from legal punishment for the offence of rape. Accused 2, Govinda, who was a servant of Harakchand, was charged with abetment of rape under S. 376/114, Penal Code. By the unanimous verdict of the jury, which was accepted by the Sessions Judge, Harakchand has been convicted under S. 376/511, Penal Code, of an attempt to commit rape and under S. 214/116 of instigating the subornation of evidence. Govinda has been convicted under S. 376/114, Penal Code, of abetting the rape.

The prosecutrix is Mt. Anjani (P. W. 2), whose age has been variously given as 15 and 17 though she was probably nearer 15 than 17 when the incident occurred on 9th September 1940. She was married and had lived with her husband as his wife, but at the time of this incident she was living in her parents' house at Bela. Her husband's house is only two houses away and she had left it because she was ill and part of the house had fallen down. Her story is as follows. At about 2 P. M., on Monday, 9th September, Siti, the mother of the accused Govinda, came to her parents' house, in which there was no one except herself and

her small nephew aged 2. Siti, on hearing that Anjani was not well, offered to give her some medicine, and some time in the afternoon she went to Siti's house to get that medicine. She called out to Siti and looked through the door and saw Harakchand and Govinda sitting in the verandah. Harakchand caught her left wrist with so much force that her bangles were broken and her forearm was cut and dragged her into the inner room. There Harakchand threw her on the ground, loosened her sari, sat on her, and had connexion with her. Meanwhile Govinda held her mouth. After she was released, she went out crying and outside she saw Sitaram (P. W. 10) without speaking to him. She returned home and when her brother came back in the evening she told him what had happened. On Tuesday morning they went to Bela out-post to make a report but found no one there. On returning they met the mukaddam and told him what had occurred. On Wednesday morning they again went but found nobody there; in the afternoon at about 2 P. M. they made a report. Her sari was seized the same day. This witness was cross-examined at very great length and in the course of that cross-examination she admitted that she did not know whether the accused had inserted his penis into her vagina.

A letter written by the accused Harakchand Ex. P. 8, to his brother, which was sent by a private messenger, was seized by the police on 18th September. In this letter Harakchand asked his brother to bribe the witnesses in the case and mentioned among others Sitaram (P. W. 10) and Radhabai (P. W. 14). In the committing Magistrate's Court Sitaram gave evidence corroborating Anjani's story. In the Sessions Court he stated that he saw Anjani enter Govinda's house, heard a cry from there, went to the spot, and saw somebody shut the door from inside. Later Radhabai came and he asked her to go and see what was happening. She went and returned saying that there were three persons in the lane adjoining Govinda's house, Siti, Anjani, and Anjani's husband. The public prosecutor obtained permission to cross-examine this witness, who then admitted that what he had said in the committing Magistrate's Court was true and that he had told Radhabai that there was something wrong in Govinda's house and she should go and see and that when she came back she said she had seen Anjani inside with Govinda gagging her and Harakchand sitting on her. Later he saw Anjani coming out of Govinda's house, weeping and with her sari not tucked up behind. He added that Anjani's husband came through the lane after Anjani had left.

Radhabai (P. W. 14) in the committing Magistrate's Court gave evidence in favour of the accused. In the Sessions Court she was merely tendered for cross-examination. She stated that she was asked by Sitaram to go to Govinda's house and see what was the matter and that there she saw Siti, Anjani, and Anjani's husband Mahadeo. She added that Mahadeo told Anjani to come with him and beat her and dragged her away. The learned Sessions Judge's summing up has been criticised on the ground of misdirection and non-direction. He started by properly pointing out that the burden lies upon the prosecution to prove its own case conclusively and that the accused cannot be convicted on the falseness of their own case. Harakchand and Govinda denied that there was any sort of incident on the afternoon of 9th September and Harakchand took the alternative plea that, if there was anything, it was merely adultery with Anjani's consent. The learned Sessions Judge pointed out that there could be only three possibilities: either the prosecution case was true, or it was false, or there was adultery, and he went on to say :

> Even though the burden always lies upon the prosecution to prove its case, I think you will have to consider that if you find these last two alternatives false or very improbable, the prosecution version of the case must be correspondingly strengthened.

That merely amounts to saying that if there are only three possibilities and you rule out two of them you will probably accept the third, and I do not think it should have misled the jury. The next remark however is, in my opinion, open to serious objection. The learned Sessions Judge says :

> It is an old saying that there is no smoke without fire, and the very fact that accusation of such a serious crime has been made against the accused is in itself a matter of significance.

It is generally unfair and always unjudicial to say that there is no smoke without fire, and the jury might be seriously misled by such a statement. False accusations of rape are brought. It would have been open to the Sessions Judge to ask the jury to consider whether the motive alleged by the defence for the making of a false charge was adequate in view of the stigma attaching to the person bringing such a charge, but he ought not to tell the jury that the mere accusation is in itself a matter of

significance. That, in my opinion, amounts to a serious misdirection. The non-direction complained of is that the learned Sessions Judge failed to tell the jury that it is only in exceptional cases that a person ought to be convicted of rape upon the uncorroborated evidence of the prosecutrix. In the present case there is the evidence of Sitaram (P. W. 10) to corroborate Anjani. It has however been said that Sitaram has told two conflicting stories and that the jury ought to have been warned not to accept his evidence except with great caution. The learned Sessions Judge told the jury that they did not necessarily have to reject his evidence because part of it was false or because he had attempted to change his evidence and that they would have to decide whether what he had said in support of the prosecution could be safely accepted or not. I think that the learned Sessions Judge should have clearly told the jury that as Sitaram had told a lie on one occasion they should receive his evidence with caution. I also think that he should certainly have warned the jury that it is the ordinary rule not to convict on the uncorroborated evidence of the prosecutrix, but that there was the evidence of Sitaram, if they believed it, to corroborate her.

Section 423 (2), Criminal P. C., provides that nothing shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. It is to be noted that the verdict of the jury must be accepted unless the appellate Court considers it erroneous, and S. 537 (d) of the Code provides that no finding or sentence shall be reversed or altered on appeal on account of any misdirection in any charge to a jury unless such misdirection has in fact occasioned a failure of justice. In 5 W R Cr 80[1] a Full Bench of the Calcutta High Court decided, under the Code as it then stood, that the verdict and conviction in a jury case ought not to be set aside if the Court was of opinion that the verdict was warranted by the evidence and that upon that evidence they would have upheld the conviction on appeal if the trial had been by the Judge with the aid of assessors instead of by jury. Sir Barnes Peacock C. J. remarked :

> It would lead to defeat and not promote justice, if a verdict were set aside and a new trial granted for a defective summing up with reference to the weight of evidence in a case in which the High Court would, upon evidence given in a trial, have affirmed a conviction if, instead of a trial by jury, the trial had been before a Judge and assessors. It appears to us that the question to be considered is not whether, upon a proper summing up of the whole evidence, a jury might possibly have given a different verdict, but whether the legitimate effect of the evidence would require a different verdict.

In 21 Cal 955[2] however it was held that where a verdict is vitiated owing to misdirection by the Judge, the appellate Court has no option but to set aside the verdict and direct a retrial. This makes it difficult to see what meaning is to be attached to S. 537 (d), Criminal P. C. The judgment made no reference to the decision in 5 W R Cr 80[1] and it was dissented from in 25 Cal 711[3] where it was held that once the verdict is out of the way there is no restriction on the powers of the Court to deal with the case, of which it has complete seisin, in any of the manners provided in S. 423, Criminal P. C. The dictum of Sir Barnes Peacock was cited with approval in 29 Cal 782[4] and that seems to be the view that now prevails in the Calcutta High Court: *see* 58 Cal 96[5] and A I R 1932 Cal 474.[6] A discussion of the case law on the point is to be found in the judgment of Blacker J. in A I R 1940 Lah 87.[7] The view taken in 21 Cal 955[2] was followed by Walsh J. in 39 ALL 348[8] without reference to any other case. With all due respect I can see nothing in the words of S. 423 (2), Criminal P. C., to suggest that an erroneous verdict against the accused but not one in his favour can be set aside. The contrary view has been taken by the High Courts of Madras and Bombay and the Judicial Commissioner's Courts of Sind and Nagpur : *see* 26 Mad 1,[9] 27 Bom 626,[10] A I R

1. (1866) 5 W R Cr 80 : Beng L R Sup Vol 459 (F B), In re Elahee Buksh.

2. ('94) 21 Cal 955, Wafadar Khan v. Queen-Empress.
3. ('98) 25 Cal 711: 2 C W N 369, Taju Pramanik v. Queen-Empress.
4. ('02) 29 Cal 782 : 6 C W N 553, Jamiruddi Masalli v. Emperor.
5. ('30) 17 A I R 1930 Cal 370 : 127 I C 657 : 32 Cr L J 10 : 58 Cal 96, Government of Bengal v. Santiram Mandal.
6. ('32) 19 A I R 1932 Cal 474 : 139 I C 873 : 33 Cr L J 854 : 59 Cal 1361 : 55 C L J 439, Saroj Kumar v. Emperor.
7. ('40) 27 A I R 1940 Lah 87 : 187 I C 456 : 41 Cr L J 482, Arnold Monteath Mathews v. Emperor.
8. ('17) 4 A I R 1917 All 173 : 39 I C 331 : 18 Cr L J 491 : 39 All 348 : 15 A L J 205, Emperor v. Ikram-ud-din.
9. ('03) 26 Mad 1 : 2 Weir 521, Emperor v. Edward William Smither.
10. ('03) 27 Bom 626 : 5 Bom L R 599, Emperor v. Waman.

1933 Bom 153,[11] A I R 1925 Sind 116[12] and A I R 1926 Nag 53.[13] The conclusion reached by Blacker J. was that if the Court after examining the evidence finds that, even if the misdirection had not occurred, the jury could not reasonably have come to any other decision it will not interfere. I respectfully agree that in such cases the Court should not interfere.

I now turn to consider the evidence. The medical evidence shows that Anjani had a lacerated wound on the back of the left forearm caused by the breaking of her bangle, an abrasion on the back of the lower 1/3rd of the outer part of the left thigh, an irregular mark of discolouration 4″ in length and 2″ at the widest part on the outer part of the back lower third of the left thigh, an irregular mark of discolouration $1'' \times \frac{1}{2}''$ on the back of the right thigh, and an irregular mark of discolouration $3'' \times 1''$ on the outer side of the upper third of the right leg. There were also four scattered small abrasions on the right ankle. There were no signs of injuries on the private parts. The doctor who examined Anjani stated that these injuries could be caused in the course of the struggle between an unwilling woman and a man raping her. Harakchand was found to be suffering from gonorrhœa, but there is no evidence to show that Anjani was infected. It is clear that Sitaram and Radhabai were originally expected to give evidence in favour of the prosecution, and in the letter (Ex. p. 8) the accused Harakchand asked his brother to bribe them so that they would not give evidence against him. Either these two witnesses had been originally persuaded to give evidence in support of a false charge and were subsequently induced by friends of the accused to abandon that idea or they originally intended to give evidence in support of a true charge and were induced by friends of the accused to lie. As the learned Sessions Judge has pointed out, it would be natural to expect that, if their original intention was to give false evidence and they were persuaded to abandon this idea, they should say so. This they have not done, and there is, in my opinion, no reason to suppose that they originally intended to give false evidence in support of a false charge. I consider that Sitaram's evidence should therefore be accepted.

The accused has offered no evidence of any motive for the bringing of a false case against them, and the fact that there was some delay in the reporting of the case suggests that the whole thing was not a concocted affair. It is obvious that there was some sort of assault on Anjani at the house of Govinda that afternoon, and this has been conceded in this Court. The learned counsel for the accused, however, has contended that it was merely an indecent assault and did not amount to rape, and that the Sessions Judge ought to have put this possibility before the jury. It was not a possibility that seems to have occurred to anyone in the Sessions Court and it is obviously incompatible with most of the evidence in the case. I think that Harakchand was perhaps fortunate not to be convicted of rape ; but, in view of Anjani's admission, which may have been due to confusion and was not necessarily a true admission, that there was no penetration and the fact that she was not infected with gonorrhœa, it was natural enough for the jury to convict him of an attempt to rape rather than rape. The defence tried to explain the injuries on Anjani by saying that they were caused by a beating by her husband, and on that point there is the evidence of Radhabai. That evidence is obviously false, and if Anjani really had been beaten by her husband there would have been probably some other evidence forthcoming on that point. The injuries on her were not such as one would expect from a beating, nor were the injuries such as one would expect to find as the result of an indecent assault. On Anjani's lungra, which was seized on 11th September, marks of spermatozoa, not identified as human, and human blood-stains were found. There has been a certain amount of confusion about her clothes and why they were not washed and when they were seized, but there is, in my opinion, no good reason to doubt her story that the lungra which was seized by the police on the 11th was the one she was wearing at the time of the incident. If that is so, the marks of spermatozoa are further proof of an attempt to rape.

The convictions of Harakchand under S. 376/511 and of Govinda under S. 376/114, Penal Code, are, therefore, upheld. It is admitted that if Harakchand's conviction of an attempt to rape is upheld, then his conviction under S. 214/116, Penal Code, must

11. ('33) 20 A I R 1933 Bom 153 : 148 I C 553 : 35 Cr L J 747 : 35 Bom L R 174, Ramchandra v. Emperor.
12. ('25) 12 A I R 1925 Sind 116 : 81 I C 249 : 25 Cr L J 761, Topandas v. Emperor.
13. ('26) 13 A I R 1926 Nag 53 : 88 I C 178 : 26 Cr L J 1090, Ramprasad v. Emperor.

also be upheld. The learned Sessions Judge stated that he took an extremely serious view of the case, not only because of the circumstances in which the offence was committed but also because of the physical condition of the accused and the disparity of the position of the accused and the victim, and that he was imposing the maximum sentences permissible. I agree that the fact that Harakchand was suffering from gonorrhœa at the time increases the heinousness of the offence, but I do not see that the disparity between the positions, apparently social positions, of the accused and his victim makes much difference; I should not regard it as a palliation of this offence of rape if the victim had been of an equal or higher social position. For an attempt to commit rape I think that the sentence is somewhat high and I reduce it to four years' rigorous imprisonment. I also think that the sentence of three years imposed on Govinda is unnecessarily high as he was acting under Harakchand's orders, and I reduce this sentence to two years' rigorous imprisonment.

Where the offence which the accused is seeking to have screened is an attempt to commit rape, the offence under S. 214, Penal Code, is punishable with imprisonment for a term which may extend to one fourth part of the longest term of imprisonment provided for an attempt to commit rape, i. e., one-fourth part of 5 years or 15 months. The maximum punishment for the abetment of such an offence is under S. 116, Penal Code, one-fourth of that term. The sentence imposed on Harakchand under S. 214/116, Penal Code, is, therefore, reduced from nine months to three months' rigorous imprisonment, and it will run concurrently with his other sentence. The sentences of fine will stand.

R.K. *Sentences reduced.*

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(28) A. I. R. 1941 Nagpur 328

STONE C. J. and NIYOGI J.

Mohammad Khudabax Sheikh Abu Pinjara — Defendant 1 — Appellant

v.

Ramchandra Rao Govindrao Kunbi and others — Respondents.

Second Appeal No. 171 of 1936, Decided on 16th July 1941, from appellate decree of Dist. Judge Chhindwara, D/- 22nd January 1936.

(a) C. P. Tenancy Act (1 of 1920), S. 12 (4) — Document prima facie not embodying transfer prohibited by Act— Registering Officer is bound to admit document to registration—Registration however does not cure defects in conveyance.

Where, in point of fact, the registering authority receives a document his function is to peruse the instrument and to see whether it purports to make a prohibited transfer, and, if he thinks that it does not embody any such transfer, he is bound to admit it to registration. The resulting registration cannot be regarded as void but at the same time the fact that the document is registered does not in the least cure the defects in the conveyance: ('36) 23 A I R 1936 P C 301 *Rel. on*; ('16) 3 A I R 1916 Nag 22 and ('27) 14 A I R 1927 Nag 30 *Expl.*

[P 329 C 2]

(b) C. P. Tenancy Act (1of 1920), Ss. 35, 12— Registered surrender by tenant of occupancy holding to stranger — Surrender is invalid — If transaction amounts to abandonment lambardar's remedy is under S. 35—If it is transfer in violation of S. 12 lambardar must proceed before revenue authorities — Suit for possession in civil Court should be dismissed.

Two occupancy fields were surrendered by tenants to one *B*, who posed himself as sadar lambardar in January 1920. The lambardar in January 1932 brought a suit against *B* in the civil Court for possession. The surrender was registered:

Held (1) that the document was not a surrender as *B* was neither lambardar, cosharer nor landlord;

[P 330 C 1]

(2) that if the tenants did not validly surrender the holding, they could effectively get rid of their tenant rights only by abandonment. In that case the remedy of the lambardar was to proceed under S. 35, Tenancy Act; [P 330 C 1,2]

(3) that if the transaction amounted to a transfer in violation of S. 12, the proper course for the lambardar to pursue was to proceed before the revenue authorities. Hence the suit for possession must be dismissed: ('40) 27 A I R 1940 Nag 49 (F B), *Ref.*

[P 330 C 2]

R. S. Dabir — for Appellant.

D. B. Najbile and R. Kaushalendra Rao — for Respondent 1.

Judgment. — This is a second appeal by defendant 1 to a suit for possession. The plaintiff is the lambardar of patti No. 1 in the village Ambada. The subject-matter of the suit was ordinary fields in patti No. 1 which were held by two tenants, Chichkoo and Chanu in 1919-20. The suit was filed on 13th January 1932. Defendant 1 is closely connected with Baji Patel. Baji Patel is the person from whom the defendants derive the interest they have, and Baji Patel on 13th January 1920 purported, as sadar lambardar, to take a surrender from the tenants, Chichkoo and Chanu. In point of fact it has been found that at that time Baji Patel was not a lambardar and he was not a cosharer of patti No. 1 and this judgment proceeds on that basis. In other words, this is a case of a tenant purporting to surrender to a stranger his tenancy by a deed in January 1920, just 12 years before this suit was filed. That deed was registered. The plaintiff took a number of points. In the first

place he said that the conveyance was not a surrender at all. Secondly he said that it was not properly or lawfully registered and that registration should have been refused because of the provision of S. 12 (4), Tenancy Act, which reproduces, with certain important alterations, S. 46 (5), of the Act of 1898. The sub-section provides as follows :

> Notwithstanding anything contained in the Indian Registration Act, 1908, no officer empowered to register documents thereunder shall admit to registration any document which purports to contravene the provisions of this section.

'This section' is the section which permits an occupancy tenant to transfer to certain persons and for certain purposes only. Nobody doubts that had the tenants in this case transferred to Baji Patel, that transfer would have been an infraction of S. 12. But they did not purport to transfer. As we have observed, they purported to surrender, and they purported to surrender to him as lambardar which he was not. It is said that that is a fraud on the registration officer, that the registration is wholly void, and that consequently we cannot even look at the document. If we do not look at the document the defendants can show no title in themselves and it is said therefore that the landlord can eject them as trespassers within a time limit of 12 years.

The learned lower appellate Judge has come to the conclusion that there has been no surrender. He has, however, come to the conclusion that what purported to be a surrender deed is in point of fact an unauthorised transfer. That finding of the lower appellate Court has not been adopted by the counsel for the respondents before us for reasons that are apparent from what we say hereafter. He has been very careful to deny that this is a transfer struck at by S. 12. On the contrary he says that it has no legal content at all : it is not a surrender and it is not a transfer ; it is just another thing. The lower appellate Judge, however, holding that the registration was in contravention of S. 12 (4) basing his opinion on 22 N L R 128[1] has held the registration to be void. Therefore no transfer could be proved and there was therefore no transfer within the meaning of S. 54, T. P. Act. Thus he arrived at the conclusion that the landlord was in a position to treat these persons as trespassers and accordingly this was a case of an illegal transfer under S. 12, and the jurisdiction of the civil Court was not barred.

If the cases are referred to in the judgment which went up to the Privy Council (First Appeal No. 22 of 1930) whose judgment is reported in I L R (1936) Nag 104,[2] it will be found that it was based, so far as the registration point is concerned, on a long line of authorities. The case that is reported that is, cited in the judgment is 13 N L R 165[3] and there were two unreported decisions doubtless relied on as being the latest decisions before the Judicial Commissioner's Court, First Appeal No. 13 of 1924[4] and Second Appeal No. 34 of 1923[5] which were decided in July and August 1924. If the case relied on by the learned lower appellate Court is referred to, 22 N L R 128,[1] it will be found that that also is based on 13 N L R 165[3] and on earlier decisions referred to in 13 N L R 165[3] and in the two above mentioned unreported appeals. That series laid down the broad proposition that where a document was presented to the registration officer which contained as a subject-matter of the conveyance a subject which the law said must not be transferred the resulting registration was of no effect, a view that the lower appellate Court has adopted, and properly adopted on the law as it stood at the time the learned Judge delivered his judgment which was 22nd January 1936, because it was not until July 1936 that the Privy Council had to consider this matter and reversed the decision which, as we have seen, followed a whole line of authorities above referred to. In our opinion, what the Privy Council decided in that case was this, that where, in point of fact, the registering authority receives a document

> his function was to peruse the instrument and to see whether it purported to make a prohibited transfer, and, if he thought that it did not embody any such transfer, he was bound to admit it to registration.

As their Lordships observe, when he admitted it to registration he did so with jurisdiction. Consequently the resulting registration cannot be regarded as void though at the same time the fact that the document is registered does not in the least cure the defects in the conveyance so that if when you look at that document you find

1. ('27) 14 A I R 1927 Nag 30 : 97 I C 1015 : 22 N L R 128, Chindu v. Rameshwarnath.

2. ('36) 23 A I R 1936 P C 301 : 164 I C 345 : I L R (1936) Nag 104 (P C), Parashram Balaji v. Asaram.
3. ('16) 3 A I R 1916 Nag 22: 42 I C 384: 13 N L R 165, Nilkant v. Ghulya.
4. *Since reported in* ('25) 12 A I R 1925 Nag 125: 82 I C 126, Mt. Kesarbai v. Jamadar.
5. *Since reported in* ('25) 12 A I R 1925 Nag 130: 81 I C 873, Omrao v. Ramdhan.

that it is dealing wholly or partly with a prohibited subject you apply the ordinary law and according to the ordinary law, which includes the statutory provisions as contained in S. 12, you conclude that the conveyance is either good or bad. From that, in our opinion, it follows that this case cannot be disposed of on the registration point, but one must treat this registration as effective and must look at the document and consider its effect. The argument having reached that stage counsel for the respondents finds himself in a very great difficulty because his case throughout has been that this is not a surrender, and it appears to us that it clearly is not for the very good reason that Baji Patel was neither lambardar, cosharer, nor landlord of the patti in question. In other words, he was not a person to whom a surrender can be made. Counsel for the respondents could not take up the position that it was a transfer, an illegal transfer, because if that were the case, then S. 12 would be attracted, and if this is an illegal transfer because of S. 12 S. 13 comes in. Stopping there we may observe that the provision about registration is one which disempowers the registering authority from registering a document which purports to contravene the provisions of S. 12. Either this document did so purport or it did not. If it did not then sub-s. (4) has no application. If it did then the attack that can be levied against the transaction would be the attack that it was contrary to the provisions of S. 12.

In our opinion there is a still further difficulty in the way of the plaintiff. This is a case in which when the story begins we have on the one hand a landlord and on the other hand two tenants. At all material times the attack is by the landlord against a stranger and it is founded on the right of a person entitled to immediate possession to evict a trespasser. The fundamental allegation in any such case is one which raises the right to present possession. But it has been certainly before us the case for the landlord that the tenants never effectively got rid of their tenant rights unless it were by abandonment. If it was a case of abandonment then S. 35, Tenancy Act, is attracted. That section creates a simple, inexpensive machinery highly suitable to this kind of case. It says that where it appears that an occupancy tenant has abandoned his holding, has for one year left the rent in arrear and has left the village the landlord can bring to an end that tenancy by filing a notice in the prescribed way and then he is entitled to enter. In other words, the Act provides a summary, inexpensive procedure for determining the possessory rights of an occupancy tenant. That procedure has admittedly not been followed in this case. We have searched in vain for any other special provision which brings this tenancy to an end. It has been said that it is brought to an end as a consequence of the operation of the law of prescription because Sch. 2 provides that a tenant who is dispossessed after two years loses his right of suit to evict a dispossessor. Founding on that it is said (an argument based on certain observations to be found in I L R (1940), Nag 348[6]) that at the end of the two years there has been, in the eye of the law, a notional transfer of the tenant's rights to the dispossessor, the term "transfer" within the Tenancy Act being wider than in the ordinary law. It is not necessary for the decision of this case to express any view on that broad proposition because if it be accepted it results in this, that there has been a transfer from the tenant to the stranger and that transfer is admittedly in violation of S. 12. If it be not accepted then there has been no transfer from the tenant to the stranger and the tenant is still the tenant. The right of possession is still in the tenant and the lambardar, before he can seek to evict the stranger, must determine the tenancy. If the first view is taken the proper course for the plaintiff to have pursued in this case was to proceed before the revenue authorities. If the second view is taken the right course for the plaintiff to take in this case is to operate under S. 35. In either event the suit as framed should have been dismissed. The result is that the appeal succeeds with costs here and below.

R.K. *Appeal succeeds.*

6. ('40) 27 A I R 1940 Nag 49: 186 I C 731: I L R (1940) Nag 348 (F B), Punjaram Jagoba v. Ramu Chintoo.

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(28) A. I. R. 1941 Nagpur 330

CLARKE J.

Dargah of Saint Miskeenshah Barena Pir, Chhatarpur and others — *Applicants.*

v.

Hardayal Prashad and others — *Non-applicants.*

Civil Revn. Appln. No. 248 of 1940, Decided on 16th December 1940, for revision of order of Court of Addl. Dist. Judge, Jubbulpore, D/- 30th January 1940.

(a) Civil P. C. (1908), O. 33, R. 5 (d)—O. 33, R. 5 (d) contemplates subsisting cause of action not barred by limitation—Point of limitation or other law raised in pauper proceedings not complicated or open to doubt can be made ground of rejecting application under O. 33, R. 5 (d) — Whether point is simple is to be decided by Judge.

Order 33, Rule 5 (d), contemplates a subsisting cause of action which is not barred by limitation. Where the point of limitation or other law which is raised in the pauper proceedings is not complicated or open to doubt it can be made the ground of rejecting the application under O. 33, R. 5 (d). It is for the Judge dealing with the pauper application to decide whether the point raised is simple or difficult. If he considers it to be a simple point and decides it against the pauper it is not for the High Court in revision to say that it is a difficult point and that he should not have decided it : ('34) 21 A I R 1934 Rang 111 and ('32) 19 A I R 1932 Rang 107 (F B), *Rel. on*; ('32) 19 A I R 1932 All 543, *Dissent.; Case law discussed.* [P 333 C 1, 2]

(b) Civil P. C. (1908), O. 33, R. 7—Up to time of orders under R. 7 Court cannot take evidence except as to applicants' pauperism.

Up to the time of passing orders under R. 7 the Court cannot take evidence except as to the pauperism of the applicant. In cases where Court takes evidence before arriving at its decision, its findings can be set aside in revision. [P 334 C 1]

A. Razaque — for Applicants.

D. T. Mangalmurti and C. B. Parakh — for Non-applicants 1 and 2, and 3 to 7, respectively.

Order.—This is an application for revision of an order dismissing the applicants' application for permission to sue as paupers on the ground that their allegations do not disclose a cause of action, i. e., under cl. (d) of O. 33, R. 5. The fact that the applicants are paupers has been found in their favour. The lower Court has given several reasons for holding the view that the allegations do not disclose a cause of action. One is because the claim is barred by limitation and another is because the dealings of their predecessors in title would operate as estoppel against them. The third reason is that they are not shown to have been appointed trustees of the trust, to recover the property of which they seek to bring this action, and unless they are trustees they cannot sue. The fourth reason given is because the action ought to have been brought according to the procedure provided by S. 92, Civil P. C.

The applicants contend that all these contentions are complicated questions of fact and law which ought not to be decided in a summary manner at the time of considering the right of the applicants to sue as paupers but were most proper for consideration after the plaint had been admitted. In support of their contentions they have relied on 41 Mad 620,[1] A I R 1924 Mad 80,[2] 54 ALL 525,[3] A I R 1937 Cal 516,[4] 10 Rang 357,[5] A I R 1926 Mad 135[6] and A I R 1929 Lah 498.[7] Against this view and in support of the lower Court's order the non-applicants have relied on 7 ALL 661,[8] 13 Bom 126,[9] 20 ALL 299,[10] 19 Mad 197[11] and 27 Mad 37.[12] I shall therefore deal with these cases along with certain others which deal with the point.

In 4 Mad 323[13] it was held that the Court should not, in an application to sue in forma pauperis, go into the merits of the claim. This decision was not followed in 19 Mad 197[11] where it was held that on hearing a petition for leave to sue in forma pauperis the Court must decide whether the petitioner has at the date of the petition a subsisting cause of action capable of enforcement and where the cause of action is barred by res judicata or limitation, the petition must fail. In coming to this conclusion the Court followed the Full Bench ruling in 7 ALL 661,[8] with which I shall deal presently after finishing the Madras rulings. In 19 Mad 197[11] it was also held that the Court could take evidence and hear the parties for the purpose of deciding whether the application was subject to any of the prohibitions in S. 407 of the old Civil Procedure Code, corresponding to O. 33, R. 5 of the present Code. It was this latter aspect of the ruling which was overruled by the Full Bench of the Madras High Court in 13 M L J 292.[14] That decision does

1. ('18) 5 A I R 1918 Mad 60: 45 I C 95: 41 Mad 620: 34 M L J 399, Govindasami Pillai v. Municipal Council, Kumbakonam.
2. ('24) 11 A I R 1924 Mad 80: 73 I C 946, Polimati Mungadu v. Nalla Bapadu.
3. ('32) 19 A I R 1932 All 543: 138 I C 396: 54 All 525: 1932 A L J 489, Bhajja v. Muhammad Said Khan.
4. ('37) 24 A I R 1937 Cal 516: 173 I C 305: 41 C W N 1087, Parmeswar v. New Theatres Ltd.
5. ('32) 19 A I R 1932 Rang 107: 139 I C 265: 10 Rang 357 (F B), U Ba Dwe v. Maung Lu Pan.
6. ('26) 13 A I R 1926 Mad 135: 92 I C 415, Bangaruswamy Naicker v. Sundaradoss Thevar.
7. ('29) 16 A I R 1929 Lah 498: 117 I C 95, Allah Wasai v. Ramzan.
8. ('85) 7 All 661: 1885 A W N 156 (F B), Chattarpal Singh v. Raja Ram.
9. ('89) 13 Bom 126, Dulari v. Vallabdas Pragji.
10. ('98) 20 All 299: 1898 A W N 36, Kamrakh Nath v. Sundar Nath.
11. ('96) 19 Mad 197: 5 M L J 193, Vijendra Tirtha Swami v. Sudhindra Tirtha Swami.
12. ('04) 27 Mad 37, Amirtham v. Alwar Manikkam.
13. ('82) 4 Mad 323, Ranganayaka Ammal v. Venkatachellapati Nayudu.
14. ('03) 13 M L J 292 (F B), Rathnam Pillai v. Pappa Pillai.

not purport to interfere with the statement of the law given in the headnote of 19 Mad 197[11] which cannot therefore be considered to have been overruled on that point. In 27 Mad 37[12] the same view was taken as in the headnote of 19 Mad 197.[11] All these cases were under the old Civil Procedure Code. Under the new Code the first Madras case to which I wish to refer is 41 Mad 620[1] relied on by the applicants. This case has been referred to in a large number of later rulings of various High Courts. There it was held that the Court is not justified in holding at the stage contemplated by O. 33, R. 5 an elaborate enquiry into doubtful and complicated questions of law and that O. 33, R. 5 (d) applies only to cases where the allegations of the petitioner clearly on the face of the petition do not show a cause of action. The reason given for this view is that the pauper has no right of appeal if the decision on the question of law is wrong. This ruling was followed in A I R 1919 Mad 218,[15] A I R 1924 Mad 80[2] and 69 M L J 816,[16] whilst A I R 1919 Mad 218[15] was itself followed in A I R 1926 Mad 135.[5] These decisions can be accepted as embodying the Madras view.

Turning next to Allahabad the leading case is the Full Bench decision in 7 ALL 661.[8] The question for determination there was whether the High Court had power to revise an order under S. 407, corresponding to O. 33, R. 5 of the present Code, rejecting an application for permission to sue in forma pauperis. The Court referred to the pronouncement by their Lordships of the Privy Council in 11 Cal 6,[17] in which it was laid down that the test to be adopted in determining the High Court's revisional powers was whether the lower Court had acted illegally or with material irregularity in the exercise of its jurisdiction. If it had not, then it is equally immaterial whether it decided the question rightly or wrongly. They then examined the sections of the Code which deal with pauper applications and held that it was necessary for pauper applicants to make out a good subsisting cause of action capable of enforcement in Court calling for an answer and not barred by the law of limitation or any other law. They then held that the lower Court was acting within its power in deciding the point of limitation in the pauper proceedings and had not therefore exercised its jurisdiction illegally or with material irregularity and hence they held that the High Court had no power to revise the lower Court's order. This ruling was followed in 20 ALL 299.[10]

When the new Civil Procedure Code came into force the effect of the alteration in the language of the corresponding provision was considered in 54 ALL 525,[3] which is the strongest case in favour of the applicants of all that I have looked into. In that case the High Court went to the length of saying that a point of limitation ought not to be gone into during the pauper proceedings since the words "cause of action" in O. 33, R. 5 do not mean or require a claim to be still enforceable under the law of limitation. In that case the Court did not consider itself to be bound by the Full Bench decision in 7 ALL 661,[8] because of the alteration in the wording of the Civil Procedure Code since the date of the earlier decision. Whereas the old Code used the words : "His allegations do not show a right to sue in such Court," the present Code says "where his allegations do not show a cause of action." They did not consider that the alteration of the language was merely intended to give effect to the decision in 7 ALL 661.[8] They agreed with the Madras view that it was unfair to a pauper suitor to deprive him of appeal by deciding a point of limitation in the pauper proceedings, but, whereas the Madras Court think that if the limitation point is simple and straightforward, the Court can decide it in pauper proceedings, the Allahabad High Court has held in this case that the Court cannot consider it at all, since it is difficult to draw a line between cases in which the point of limitation is simple and cases in which it is difficult, because one Judge might consider the point simple which another Judge might consider complicated. They then make a distinction between the existence of a cause of action and the enforcibility of that cause of action. They say that the Limitation Act does no more than make the cause of action unenforceable after a certain time. At page 528 they say :

> There is nothing in the explanation to S. 3 of the said Act (Limitation Act), which enjoins upon the Court a duty to dismiss the application to sue as a pauper merely because in its opinion the suit itself would be barred by time. It merely lays down the date on which the suit is to be deemed to have been instituted.

With respect I am unable to agree with this observation. It is true that the explana-

15. ('19) 6 A I R 1919 Mad 218 : 53 I C 239 : 37 M L J 309, Kalliani Amma v. Achuthan Nair.
16. ('36) 23 A I R 1936 Mad 83 : 161 I C 357 : 69 M L J 816, Dharmana Sooramma v. Gangu Narasamma.
17. ('85) 11 Cal 6 : 11 I A 237 (P C), Amir Hassan Khan v. Sheo Bakhsh Singh.

tion to S. 3 does not enjoin upon a Court a duty to dismiss his application to sue as a pauper because the suit would be barred by limitation, but if we read the explanation along with the section itself, there can be no doubt that that is the intention of the Legislature. The section says that, subject to the provisions of Ss. 4 to 25, every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, and then the explanation makes it clear that in the case of a pauper a suit is instituted when his application for leave to sue as a pauper is made. Accordingly, if we read the section along with the explanation, then the Court must dismiss the application to sue as a pauper if it is made after the period of limitation prescribed for the suit has expired. In the face of this direct provision in the law of limitation, it is useless to my mind to draw inferences from the decision of the Privy Council on other points as the learned Judges have done in quoting certain observations of their Lordships in 21 Cal 8[18] and 33 ALL 356.[19] With great respect therefore I am unable to accept 54 ALL 525[3] as good law. I am fortified in this view by the opinion in 12 Rang 124[20] of Leach J. who has also dissented from 54 ALL 525[3] and who is of the opinion that O. 33, R. 5 (d) contemplates a subsisting cause of action which is not barred by limitation. This was also the view of a Full Bench of the Rangoon High Court in 10 Rang 357[5] in which Page C. J. has said in the course of his judgment :

> The scheme of O. 33 is that before an applicant is granted the privilege of suing in forma pauperis it is incumbent upon him to satisfy the Court that his application is in proper form, that he has a good and subsisting cause of action, and that he is bona fide and in fact a pauper.

In A I R 1937 Cal 516[4] the learned Judge observed :

> Although I do not hold that it is not permissible for the Courts to enter into the question of limitation for the purpose of satisfying (themselves) as to whether the application for leave to sue as a pauper does or does not disclose any existing cause of action, yet the enquiry must be limited to the facts of the case apparent on the face of the plaint and any complicated question of law upon which a difference of opinion is possible should be avoided at this stage.

This is also the view of the Bombay High Court. In 13 Bom 126[9] the learned Judge, after referring to 7 ALL 661,[8] observed :

> I have frequently followed this ruling in hearing pauper petitions, where the facts were clear and the law evident; where, therefore, no injustice was likely to occur from disposing of the case in the inquiry under Chap 26 of the Code (the old Code).

Lahore and Patna High Courts appear to take the view that limitation points ought not to be considered in pauper proceedings at all : *vide* 3 Pat 275,[21] A I R 1924 Lah 659[22] and A I R 1929 Lah 498.[7] The view of the majority of the High Courts appears to be however that provided the point of limitation or other law which is raised in the pauper proceedings is not complicated or open to doubt it can be made the ground of rejecting the application under O. 33, R. 5 (d). This brings me up again the difficulty which was felt in 54 ALL 525[3] as to when a point is to be taken as simple and when difficult. Where is the line to be drawn? In my view it is a matter for the individual Judge who has dealt with the pauper application. If he considers it to be a simple point and decides it against the pauper I do not think that it is for the High Court in revision to say that it is a difficult point and that he should not have decided it.

The scheme of O. 33 is quite clear. Rule 1 allows paupers to sue and defines what is meant by a "pauper," R. 2 lays down what his application should contain; R. 3 states how it is to be presented; R. 4 provides for an examination of the pauper regarding the merits of his claim and about his means. Rule 5 provides that the Court shall reject the application for five reasons, the fourth of which is where his allegations do not show a cause of action Up to this point the rejection of the application does not prevent the applicant from making another application, if he removes the objection, and all that the Court has to go on is the application itself and the examination, if any of the applicant under R. 4. If the Judge decides that the application does not require to be rejected at this stage, he issues notices to the opposite party and the Government under R. 6 and takes evidence as to the pauperism of the applicant, and thereafter under R. 7 either allows or refuses to allow the applicant to sue as a pauper. This refusal is final under R. 15 and the applicant

18. ('94) 21 Cal 8 : 20 I A 183 : 6 Sar 334 (P C), Hari Nath Chatterjee v. Mothurmohun Goswami.
19. ('11) 33 All 356 : 10 I C 477 : 8 A L J 552 : 38 I A 87 (P C), Khunni Lal v. Gobind Krishna Narain.
20. ('34) 21 A I R 1934 Rang 111 : 151 I C 826 : 12 Rang 124, H. Pascal v. Secretary of State.
21. ('25) 12 A I R 1925 Pat 30 : 83 I C 871 : 3 Pat 275 : 6 P L T 209, Muhammad Nasrullah v. Muhammad Shukurullah.
22. ('24) 11 A I R 1924 Lah 659 : 76 I C 40, Mt. Bhagwanti v. Bua Ditta.

cannot apply again to sue as a pauper. Thereafter if he wants to continue the litigation, he must pay the court-fees and proceed as an ordinary litigant. Rule 7 however allows arguments to be advanced on any of the prohibitions contained in R. 5 before the Court passes an order. It is clear that the order in the present case is one under R. 7 because arguments were heard after notice to the opposite party had been issued.

Now it has been frequently pointed out that up to the time of passing orders under R. 7 the Court cannot take evidence except as to the pauperism of the applicant, and in those cases, where Courts have taken evidence before arriving at their decision, their findings have been set aside in revision. In the case before me the lower Court has been careful to confine itself to the contents of the application itself and arguments of counsel on either side were heard. The Court then proceeded to pass the order under revision. It considered the question of limitation to be a simple one and it has decided it against the applicants. I am therefore unable to see how the learned Judge can be considered to have exercised his jurisdiction illegally or with material irregularity. It is not necessary to consider whether the Court has exceeded its jurisdiction in deciding the other points, which I have referred to at the commencement of this order, since, if the point of limitation is decided against the applicants, the order rejecting the pauper application must stand. I hold therefore that I am precluded from interfering in revision. The application therefore fails and is dismissed with costs. I allow Rs. 25 as counsel's fee.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 334

STONE C. J. AND VIVIAN BOSE J.

Raje Vinayakrao Raje Janardhanrao Nemiwant — Plaintiff — Appellant

v.

Raje Shriniwasrao Raje Janardhanrao Nemiwant — Defendant — Respondent.

Second Appeal No. 259 of 1938, and Civil Revn. No. 870 of 1937, Decided on 16th December 1940, from appellate decree of Dist. Judge, Akola, D/- 11th March 1938.

(a) Berar Inam Rules, R. 3 — Estate is restricted though not life estate—After collateral heirs of two removes, estate is disallowed in absence of special orders.

Rule 3 declares that the estate that is certified as having been granted is a restricted estate though it is larger than a life estate. It has to be continued after the death of the first certificate-holder unto his widow, lineal heirs, undivided brothers, etc. When one comes to collateral heirs of two removes one reaches the end of the relationships to which this estate may pass and further degrees of relationship are disallowed except under special orders. That makes the estate a restricted tenure. The tenure is further restricted and differentiated from a fee simple tenure in that on each devolution a sum of money, called legacy duty or succession fee, has to be paid, the amount depending on the nearness of the relationship : 3 Bom 186 (PC); ('18) 5 A I R 1918 P C 203; ('26) 13 A I R 1926 Mad 1167 and ('17) 4 A I R 1917 P C 190, *Ref.*; 23 All 194 (P C); ('26) 13 A I R 1926 Oudh 561; 17 Bom 431 (P C); ('25) 12 A I R 1925 Bom 197; 6 N L R 72; ('16) 3 A I R 1916 Nag 55 and ('40) 27 A I R 1940 Nag 108, *Disting.* [P 335 C 1, 2]

(b) Berar Inam Rules, R. 3—Hyderabad Jagir is not personal but continues to relations mentioned in R. 3—Each holder is not grantee but holds only certificate—Certificate should show proper persons — If one of two persons is through mistake left out it should be corrected and both should be entitled to jagir.

A Hyderabad jagir is not personal to the grantee but continues to his descendants and R. 3 limits who those descendants are and declares that any one outside the degree of relationship above mentioned will not take unless special orders are passed. Each holder does not hold only for life and on his death there is no new grant but each successive holder is granted a certificate. In those certificates there should be put the proper persons i. e., lineal descendants of the original grantee. If the name of one of two persons entitled has apparently been left out the matter should be put right by issuing certificates to both and both would be equally entitled to the estate subject to R. 3 : ('25) 12 A I R 1925 P C 184, *Rel. on.* [P 336 C 2; P 337 C 1]

M. B. Kinkhede, V. K. Rajwade and A. R. Kulkarni—for Appellant.

M. R. Bobde—for Respondent.

Judgment. — This raises a short point under the Berar Inam Rules. The point appeared to us at the very threshold of the case to be one simple and susceptible of only one answer, and accordingly we stopped counsel for the appellant after he had done little more than develop what the point was. In order to understand it and realize why, although we are disagreeing with the lower Courts, we still regard the point as a simple one it is necessary to state a few facts. The plaintiff sues his brother, the defendant, for the payment of a sum of money which represents what he says is his share in the income of certain villages in Berar. These brothers are the sons of the great-grandson of Raja Govind Narayan Bahadur. He was granted sanads in respect of these villages and at the time of the settlement in Berar these sanads were considered by the settlement officer who reported in the usual way.

Finally the matter came before the Governor-General in Council. The relevant part of the resulting decision is contained in a quotation to be found in the order of Mr. Parmanand who was the Record of Rights Officer in Amraoti in 1937 and who enquired into this case for revenue purposes. It is to be found at p. 159 of the paper book. It is not disputed that it is correct. It runs as follows :

> After full consideration of the circumstances represented, the Governor-General in Council concurs with your opinion that the sunnuds produced by the petitioners having been pronounced valid, the further disposal of their claims should in the case of inams A, B, D, E, be governed by R. 3, Inam Rules, and in the case of inam C by R. 4, the order imposing one-fourth assessment being cancelled.

That being the state in which the matter was left by the highest authority in 1877 it is the plaintiff's case that these villages have been granted by sanads before the cession of Berar in 1853, that the British authorities subsequently examined into the rights of the grantee under the sanads, pronounced the sanads valid and the holder under the sanads entitled to a certificate. It is, therefore, said that the certificate, if it does not define the succession, must be treated as recording that the succession is as stated in R. 3, Inam Rules, or R. 4, Inam Rules, as the case may be, and that so far as R. 3 is concerned, both plaintiff and defendant fall within the class of lineal heirs and that so far as R. 4 is concerned both are equally successors. Rule 3 is as follows :

> Personal jagirs to be continued, subject to a legacy duty or succession fees, graduated on a scale according to the degree of relationship of heir as follows :
>
> Widows, lineal heirs, or undivided brothers 2 per cent., on the real value of the property estimated at 10 years' annual rental.
>
> Heirs by adoption ... 3 per cent.
> Collateral heirs of one remove ... 5 per cent.
> ,, ,, two removes ... 8 per cent.
>
> And further degrees of relationship disallowed except under special orders.

Rule 4 provides for the continuation of the estate to the grantee and his successors. We construe R. 3 as declaring that the estate that is certified as having been granted is a restricted estate, but that it is larger than a life estate, and has to be continued, after the death of the first certificate-holder (who in turn is not the original grantee but the person enjoying the estate at the time of the inquiry into the original sanad or grant), unto his widow, lineal heirs, undivided brothers, etc. When one comes to collateral heirs of two removes one reaches the end of the relationships to which this estate may pass and, as the rule states, further degrees of relationship are disallowed except under special orders. That makes this a restricted tenure, and the tenure is further restricted and differentiated from a fee simple tenure in that on each devolution a sum of money, called legacy duty or succession fee, has to be paid, the amount depending on the nearness of the relationship. There are also in this particular grant imported certain conditions as to loyalty and good behaviour, and the grant is terminable on the pleasure of the British Government as appears from Mr. Parmanand's report at p. 161 of the paper book. None of those conditions affects the present case.

On the other hand it was strenuously urged that rule 3 gives a life estate only. That argument was founded on a number of decisions, three of them of the Judicial Committee, which it is said show that a jagir means a grant for life or lives for services and when you find a personal jagir you find a grant to a person for life even though there are words within the grant which would suggest a larger estate. Those cases are 3 Bom 186,[1] 46 Cal 683[2] at p. 692, 50 Mad 10[3] at p. 18 and 22 C W N 457.[4] We have not examined those cases for this reason: There is a broad distinction between jagirs originating in the Hyderabad State and other jagirs for as is observed in the letter from the Government of India Foreign Department No. 25-R, dated 23rd February 1877 :

> The Governor-General in Council also accepts the view that these inams are held in accordance with the custom of the Hyderabad State, which permits the continuance of such jagheers to posterity, notwithstanding the absence of specific provision on the point, but at the same time reserves to the state the right of resuming such grants at pleasure.

This also distinguishes such cases as 23 ALL 194[5] and 2 Luck 335.[6] In such matters Government has the right to determine the tenure so far as we can see although

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1. ('78) 3 Bom 186 : 6 I A 54 : 3 Sar 889 (P C), Gulabdas Jugjivandas v. The Collector of Surat.
2. ('18) 5 A I R 1918 P C 203 : 50 I C 1 : 46 Cal 683 : 46 I A 88 (P C), Ram Narayan Singh v. Ram Saran Lal.
3. ('26) 13 A I R 1926 Mad 1167 : 98 I C 291 : 50 Mad 10 : 52 M L J 259, Ramasami Kavundan v. Tirupathi Kavundan.
4. ('17) 4 AIR 1917 P C 190 : 43 I C 806 : 41 Mad 296 : 45 I A 1 : 22 C W N 457 (P C), Sethuramaswamiar v. Sri Meruswamiar.
5. ('01) 23 All 194 : 28 I A 1 : 7 Sar 804 (PC), Rameshar Bakhsh Singh v. Arjun Singh.
6. ('26) 13 AIR 1926 Oudh 561 : 97 I C 897 : 2 Luck 335 : 3 O W N Sup 102, Ahmad Azim v. Safi Jan.

that is a matter that is not before us. Accordingly cases such as 17 Bom 431[7] and 49 Bom 126[8] have, in our opinion, no bearing on the present case; nor have cases such as 6 N L R 72[9] and 12 N L R 150[10] which were quoted to show that estates granted under R. 3 are of a restricted nature. See also ILR (1940) Nag 89.[11] No one doubts that these are of a restricted nature. The question is of the nature of the restriction.

It was further argued that R. 3 relates to the position of the original certificate-holder and that when it goes on to refer to such persons as widows, lineal heirs or undivided brothers it is concerned with the widow, lineal heir, or undivided brother of the person who at the time of the inquiry was enjoying the estate. It was not put exactly that way, it was said that one has to consider the widow, etc. of the original grantee. But the original grantee, in many of these cases, held under a grant centuries before the inquiry. In this particular case, if we accept the statement made in Mr. Parmanand's report which is to be found at p. 157 of the paper book and which is quoted from the remarks of the inam investigating officer, the particular grants in this case were two, one dated 1793 and the other dated 1811. These grants were to Raja Govind Narayan Bahadur and it is accordingly said that he was the first grantee. Raja Govind Narayan Bahadur had two sons Janardan and Harihar. It is said that there are other villages contained in other certificates in favour of Janardan. It is unnecessary however to go into that matter as at the time of the inquiry relating to the villages with which we are concerned Janardan was dead and accordingly we find Harihar granted the certificate. It is said that the authorities who made the inquiry and the authorities who concurred in the report of that officer and the Government of India when applying R. 3 were in effect saying:

"This is a grant to Raja Govind which should be continued to his, inter alia, lineal heirs. His lineal heir is Harihar. Therefore we continue it to Harihar."

It is also said that R. 3 stops there and prevents the title going on after Haribar's death to Kesho, his son, and that this list of persons—widows, lineal heirs, undivided brothers, so forth — are merely put in to show how much ought to be paid on the death of a grantee. In our opinion, as was indicated in I L R (1940) Nag 244[12], the grant in such cases is made for the benefit of the grantee's family within the restrictions indicated in Rule 3. We are dealing with a Hyderabad jagir. By custom that jagir is not personal to the grantee but continues to his descendants and R. 3, in our opinion, limits who those descendants are and declares that any one outside the degree of relationship above mentioned will not take unless special orders are passed. That being so the rest directly follows because R. 3 indicates that the property will pass to the lineal heirs of the grantee inter alia. No one else is suggested here and it appears to us plain that Shrinivasa and Vinayak, the defendant and the plaintiff respectively, are alike lineal heirs. Their relationship is as follows :

RAJA GOVIND NARAYAN BAHADUR
|
Haribar
|
Kesho = Kashi
|
Janardhan (adopted)
|
Shrinivasa (defendant) — Vinayak (plaintiff)

It was strenuously urged that the only person here entitled was the defendant because he is the only person shown in the certificate that was granted to the defendant in 1914. That argument proceeds on the basis that each holder holds for life and on his death there is a new grant and that new grant takes the form of a certificate. In our opinion that is not the correct way of describing what happens. The grants in this case, as we have above said, were made by the Nizam of Hyderabad, the one in 1793 and the other in 1811. Thereafter there has been no other grant but there has been a series of certificates. In those certificates there should be put the proper person and that that has not been done in this case has been recognized by the officer who inquired into this matter and whose order is to be found as Ex. P-17 in this case. That order is still under appeal; it is after the institution

7. ('93) 17 Bom 431 : 20 I A 50 : 6 Sar 52 (P C), Sheikh Sultan Sani v. Sheikh Ajmodin.
8. ('25) 12 AIR 1925 Bom 197 : 89 I C 539 : 49 Bom 126 : 26 Bom L R 1173, Secretary of State v. Girjabai.
9. ('10) 6 N L R 72 : 6 I C 821, Krishnaji v. Manwar Ali
10. ('16) 3 AIR 1916 Nag 55 : 36 I C 518 : 12 N L R 150, Krishnaji v. Nilkanth.
11. ('40) 27 AIR 1940 Nag 108 : 186 I C 375 : ILR (1940) Nag 89, Mahadeo Bhagwan v. Haribar Shankar.
12. ('40) 27 A I R 1940 Nag 129 : 194 I C 454 : I L R (1940) Nag 244, Shriram v. Mt. Banyabai.

of this suit and cannot of course have any effect on this suit. We mention it only because it contains a number of extracts from documents that have not been stated to be wrongly extracted and it indicates that Government is minded to put right what would appear to be wrong. That is to say, they intend to grant to both these persons a certificate, as in 21 N L R 117[13] as one of two persons entitled has apparently been left out.

The facts in that case have been condensed in Second Appeal No. 115 of 1937 where a number of tables have been given which show what happened. The person in the position of Govind was there, Muzhar Ali who had two sons, Munawar and Amjad Ali. Munawar had three daughters and Munawar obtained the first certificate. That was, as their Lordships thought, by inadvertance because Amjad Ali was also the son of Mushar Ali and the half brother of Munawar and he was omitted, and the omission was corrected. After the correction they became two certificate-holders and the contest was between a descendant of Munawar and a descendant of Amjad Ali. The Privy Council did not regard either of those two persons as forming the root of title but regarded their father, Muzhar Ali, as the person from whom the lineal heirs should be traced, or as it was in that case, the male descendants. Here what one has to do is to trace the lineal heirs of Raja Govind; and as we have above observed, the plaintiff and the defendant are equal lineal heirs. Accordingly the certificate that has been granted to the defendant alone could only have been granted through some slip and the matter should, in our opinion, be put right as suggested by Mr. Parmanand by granting a certificate to both. With that however, we are not properly concerned our function being to construe the legal position here. That position we regard as plain and results in the conclusion that plaintiff and defendant are equally entitled to the villages subject to R. 3.

It is next necessary to consider the village subject to R. 4. That is an even plainer case because although the term "successors" is not of equal import to the term "lineal heirs" it is of a wider import and no reason has been suggested to us whatsoever why the defendant is any more a successor than the plaintiff excepting the reason that he has been given the certificate. That is no better reason in this case than in the case considered under R. 3. If there is a dispute as to the amount that will have to be further considered. Issue 12 (c) before the trial Court raises the question of the profits as regards the village of Kamardipur. Issue 11 (c) raises the question of the profits of Deodhaba village. The lower Court has found that the profits of the first were Rs. 261-8-9 and the profits of the second Rs. 4511-7-3. So far as we can see from the judgment of the lower appellate Court there was no dispute as to these findings and accordingly the matter stands as though those findings were accepted and the plaintiff will be entitled to a half of that sum and proportionate costs throughout. As however we cut the appellant short before this question was touched upon, should we be wrong in concluding that there is no dispute as to the amount, the matter can be spoken to. It is argued that the plaintiff is entitled to Rs. 2386-8-0 with interest at 4 per cent. from date of appeal to date of payment. There is a revision application. It relates to a sum of money that was payable by a descendant of Janardan, the senior branch, to the certificate-holder of Harihar branch. The plaintiff says that he is entitled, along with his brother, to half that sum which amounts to Rs. 250 per annum. Therefore he is claiming Rs. 125. It is a small cause suit and accordingly comes before us by way of revision. It raises precisely the same point as the major suit and it also succeeds. This judgment disposes of Second Appeal No. 259 of 1938 and Civil Revision No. 870 of 1937.

R.K. *Order accordingly.*

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13. ('25) 12 A I R 1925 P C 184 : 88 I C 347 : 52 Cal 971:52 I A 294 : 21 N L R 117 (PC), Subhan Ali v. Imami Begum.

(28) A. I. R. 1941 Nagpur 337

GRILLE J.

Bejonji K. Bana, Proprietor, Electric Supply Co., Chhindwara and another — *Applicants*

v.

Emperor.

Criminal Revn. Appln. No. 422 of 1940, Decided on 29th January 1941, for revision of order of Addl. Sess. Judge, Chhindwara, D/- 9th September 1940.

Factories Act (1911), S. 5—C. P. Notification dated 17th January 1939, No. 202-2644-VII is intra vires.

The Government Notification No. 202-2644-VII, dated 17th January 1939 is not ultra vires of the Act. [P 338 C 2]

W. Dutt — for Applicants.

W. R. Puranik, Advocate-General — for the Crown.

Order. — The applicants who are respectively the proprietor and the manager of the Electric Supply Company at Chhindwara were prosecuted in respect of various breaches of the Factories Act. They were convicted and appealed. The Additional Sessions Judge, Chhindwara, remanded the case for a retrial on the ground that it had not been established that on any specified day there were more than ten workers in the factory. One of the grounds taken in appeal which had unsuccessfully been urged in the trial and which is the only point urged here in revision was that the Power House in respect of which the prosecution was lodged was not a factory within the meaning of the Act inasmuch the Government Notification No. 202-2644-VII, dated Nagpur 17th January 1939, was ultra vires of the Act. This point was not touched on in the remand order. The definition of a factory in S. 2 (j), Factories Act, runs as follows:

'Factory' means any premises including the precincts thereof whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on.

Section 5, Factories Act, runs:

(1) Notwithstanding anything contained in cl. (j) of S. 2, the Provincial Government may, by notification in the Official Gazette, declare any place wherein a manufacturing process is carried on, whether with or without the aid of power, and wherein on anyone day of the twelve months preceding the notification, ten or more workers were employed, to be a factory for all or any of the purposes of this Act.

(2) A notification under sub-s. (1) may be made in respect of any specified place or class of places.

It is argued that, whether or no it is established that more than ten persons were working in the Power House on any particular day — and this is the point on which the case has been remanded — in any case the number employed did not amount to 20, and that if the contention that the notification purporting to be under S. 5 of the Act is ultra vires is correct, then there is no case against the applicants. The notification in question declares all places in the Central Provinces, wherein manufacturing process is carried on with the aid of power and wherein on any one day of the twelve months preceding the date of the notification ten or more workers were employed, to be factories under the Act. It is contended that the wholesale inclusion of all places worked with power where ten persons are employed renders S. 2 (j), Factories Act, nugatory and that the effect of the notification is to alter completely a clause in the Act itself and that the notification is not in respect of any class or places but is in respect of all places.

This contention cannot be upheld. The notification is not universal but selective inasmuch as S. 5 of the Act gives powers to the Provincial Government to make a declaration by a notification either in respect of places wherein a manufacturing process is carried on with the aid of power or without it. This particular notification is only in respect of places where the process is carried on with the aid of power. Again the notification does not render S. 2 (j) of the Act nugatory since the Act applies to the whole of British India, and a notification by the Provincial Government can only affect places in the Central Provinces. Places where manufacture is carried on with the aid of power is certainly comprised in a class of places, since the Provincial Government has also power to declare a place to be a factory, provided ten or more workers are employed, if the manufacturing process is carried on without the aid of power. It follows, then, that the notification is certainly intra vires of the power given to the Provincial Government by S. 5 (1), Factories Act.

It is then contended that as this is in the nature of a test case, in the event of this point being decided against the applicants the order of remand should nevertheless be cancelled as this was the real point sought to be elucidated. I cannot agree that the question of punishment of admitted breaches should not be considered because the principal ground taken has failed. There has been no suggestion that the remand order should be cancelled and that the fines would nevertheless be paid. Neither has it been urged, although possibly it might have been, that the remand order was an unnecessary one on the point whether it had been established that ten or more workers were engaged on any particular day. The application fails and is dismissed.

R.K. *Application dismissed.*

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(28) A. I. R. 1941 Nagpur 338

POLLOCK J.

In re Nagarmal Jankiram Agarwale — Accused.

Criminal Ref. No. 219 of 1941, Decided on 7th July 1941, referred by Sess. Judge, Akola, in Criminal Revn. No. 15 of 1941.

(a) Public Gambling Act (1867) — Offences under—Criminal Procedure Code applies.

The ordinary provisions of the Criminal Procedure Code will regulate the investigation and trial of offences under the Public Gambling Act : ('23) 10 A I R 1923 Mad 339 ; ('29) 16 AIR 1929 Mad 604 and ('33) 20 A I R 1933 Sind 325, *Expl., and Disting.* [P 339 C 2]

(b) Public Gambling Act (1867), S. 5—Offence under S. 5 is cognizable.

In order that an offence may be a cognizable offence it is not necessary that every police officer should have the power to arrest without warrant. As the District Superintendent of Police has such power under S. 5, the offence is a cognizable offence: 27 Cal 144; ('30) 17 AIR 1930 Bom 49 and ('39) 26 AIR 1939 Nag 95, *Rel. on.* [P 339 C 2]

(c) Criminal trial — Arrest illegal, does not affect question of accused's guilt.

Even if the arrest is illegal, the Court would still have jurisdiction under S. 190, Criminal P. C., to take cognizance of the offence, and the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not : 26 Mad 124 and 31 Cal 557, *Rel. on.* [P 339 C 2]

W. R. Puranik, Advocate-General — for the Crown.

T. B. Pendharkar and W. B. Pendharkar — for Accused.

Order. — This is a reference by the Sessions Judge, Akola, under S. 438, Criminal P. C. The Sub-Inspector of Police in Akola town, on the receipt of information that the accused Nagarmal habitually gambled on cotton futures by the road side, sent a man with marked coins to wager on a difference of figures and after the wager had been made searched the applicant, seized the coins, and arrested him. The accused was then prosecuted on a chalan presented by the City Police of Akola. The trial Court held that in the absence of any warrant under S. 5, Public Gambling Act, the proceedings were irregular and discharged the accused under S. 249, Criminal P. C. Section 5 (2), Criminal P. C., provides that all offences other than under the Penal Code shall be investigated, inquired into, and tried and otherwise dealt with in accordance with the provisions of the Criminal Procedure Code but subject to any enactment for the time being in force, regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences. The Public Gambling Act contains no provisions regulating the investigating, inquiring into, or trying of offences under that Act. Section 5 deals with the power to search and arrest; S. 10 gives power to examine certain persons as witnesses; and S. 13 gives power to arrest without warrant in certain cases. The ordinary provisions of the Criminal Procedure Code will therefore regulate the investigation and trial of such offences and the decisions in AIR 1923 Mad 339,[1] 52 Mad 613[2] and AIR 1933 Sind 325[3] are not in point because they are decisions under Acts of which the provisions are widely different.

Section 4 (f), Criminal P. C., defines "cognizable offence" as one for which a police-officer may arrest without warrant. Under S. 5, Public Gambling Act, the District Superintendent of Police may arrest without warrant. I agree with the view expressed in 27 Cal 144,[4] 54 Bom 146[5] and I L R (1939) Nag 488[6] that in order that an offence may be a cognizable offence it is not necessary that every police officer should have the power to arrest without warrant. The fact that the District Superintendent of Police has such power makes it a cognizable offence, and the procedure adopted by the City Police was therefore correct. Even if the arrest were illegal, the Court would still have jurisdiction under S. 190, Criminal P. C., to take cognizance of the offence, and the question whether the arrest was valid or not would not affect the question whether the accused was guilty or not : *see* 26 Mad 124[7] and 31 Cal 557.[8] I therefore accept the reference, set aside the Magistrate's order under S. 249, Criminal P. C., and direct him to proceed with the case.

R.K. *Reference accepted.*

1. ('23) 10 AIR 1923 Mad 339 : 72 I C 175 : 24 Cr L J 335 : 44 M L J 231, In re Kuppusami.
2. ('29) 16 AIR 1929 Mad 604: 119 I C 174: 30 Cr L J 1011 : 52 Mad 613 : 57 M L J 214, Lazar Fernando v. Amirtham Fernando.
3. ('33) 20 AIR 1933 Sind 325 : 146 I C 419 : 35 Cr L J 129, Emperor v. Mahomed Usman.
4. (1900) 27 Cal 144, Queen-Empress v. Deodhar Singh.
5. ('30) 17 AIR 1930 Bom 49 : 124 I C 106 : 31 Cr L J 633: 54 Bom 146: 31 Bom L R 1349, Emperor v. Ismail Hirji.
6. ('39) 26 AIR 1939 Nag 95 : 184 I C 231 : 40 Cr L J 905: ILR (1939) Nag 488, Maroti v. Emperor.
7. ('03) 26 Mad 124 : 1 Weir 630, Emperor v. Ravalu Kesigadu.
8. ('04) 31 Cal 557 : 7 C W N 661, Emperor v. Madho Dhobi.

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(28) A. I. R. 1941 Nagpur 339

CLARKE J.

Seth Hemraj Singh Ganpatji Bhawsar — Supratdar — Applicant

v.

Anoop Singh Madho Singh Mandloi Gangrade and others—Non-applicants.

Civil Revn. Appln. No. 276 of 1940, Decided on 3rd December 1940, for revision of order of Second Sub-Judge, first class, Khandwa, D/- 29.3.1940.

Practice — Duty of Court—Court must act in interest of suitors in the case and not suitors in some other case.

It is in the interest of the suitors that the Court is to act, that is to say the suitors in the case and not the suitors in some other case. They have their remedy in that case or by a separate suit.

[P 342 C 2]

In a small cause case *A* obtained a decree against *B*, and in execution attached a motor lorry belonging to *B* and made it over to *C* as custodian. *B* then paid up the full decretal amount to *A* and on the same day *C*, without waiting for a release order from the Court, returned the lorry to *B*. Meanwhile one *D* lodged an objection to the attachment of the lorry under O. 21, R. 58, C.P.C., but on the date of hearing he withdrew it as the lorry had been released. While these proceedings were going on two other persons *G* and *I* brought a suit against the same *B* in the Court of the same Judge before whom the first suit had been filed, but in this case the Judge was sitting on the regular side. *G* and *I* applied for an attachment before judgment during the course of which proceedings *D* was ordered to be put in possession of the lorry as a supurtdar. When the matter as to *C*'s liability for his having released the lorry without a release order from the Court, was being argued *D* who was present in Court on that date explained that although he had been appointed supurtdar of the lorry in the case filed by *G* and *I* he had not been placed in possession of it. On this the Judge directed *C* to return the lorry or its value since he ought not to have returned it to *B* without a release order from the Court :

Held that since the parties to the small cause case were satisfied, and the objector *D*, had withdrawn his objection, he was no longer an interested party. The persons interested in the order against the applicant were the parties in another case and the objector *D* in his capacity as custodian in that case and not in his capacity as objector in the small cause case. The order applied against could not be passed. The remedy of the party aggrieved in the suit on the regular side was by an application in that case or by a separate suit : ('19) 6 AIR 1919 Lah 108 and (1871) L R 3 P C 465, *Ref.*; ('24) 11 AIR 1924 Nag 258, *Disting.*; ('34) 21 AIR 1934 All 357, *Expl.*; ('24) 11 AIR 1924 All 64, *Rel. on.*

[P 342 C 1, 2]

R. S. Dabir — for Applicant.

Y. V. Jakatdar and D. G. Deshpande — for Non-applicants 2 and 3, respectively.

Order. — In Civil Suit No. 810 of 1938 of the Court of Small Causes, Khandwa, Seth Hardyal Singh, non-applicant 3, obtained a decree for Rs. 83-12-0 including costs against Anup Singh, non-applicant 1. In execution of this decree he attached a motor lorry belonging to Anup Singh on 20th November 1939, and it was made over to the decree-holder's brother Hemraj Singh, who is the applicant before me, as custodian. On 28th November 1939, Anup Singh paid up the full decretal amount to the decree-holder, and on the same day the applicant, without waiting for a release order from the Court, returned the lorry to Anup Singh. Meanwhile one Balraj, a garage proprietor, from whose garage the lorry was attached during his absence, and who had a claim for Rs. 100 against Anup Singh for repairs done to the lorry, claimed to be entitled to retain the lorry in his custody as security for his repair bill. He lodged an objection to the attachment of the lorry under O. 21, R. 58, Civil P. C., on 27th November 1939. The objection was put down for hearing on 29th January 1940, on which date he withdrew his objection as the lorry had been released. This Balraj is non-applicant 2 before me. While these proceedings were going on two other persons, Goduram and Ibadat Ali, brought a suit on 27th November 1939 against the same Anup Singh in the Court of the second Subordinate Judge, first class, Khandwa. This Court was presided over by the same Judge, before whom the other suit had been filed, but in this suit he was sitting on the regular side, while in the other he was sitting on the Small Cause Court side. This second suit (by Goduram and Ibadat Ali) was Suit No. 170-B of 1939. On 28th November 1939, i. e., on the same day that Anup Singh paid off his decretal debt to Hardyal Singh and recovered possession of his lorry, Goduram and Ibadat Ali applied to the Court to attach before judgment Anup Singh's lorry, and accordingly on the same day the Court ordered that a prohibitory order restraining the defendant from disposing of the lorry should issue, as also a notice to himself as the Small Cause Court Judge and to the applicant Seth Hemraj Singh not to hand over the lorry to Anup Singh without further orders from himself as Judge sitting on the regular side. This order did not reach Hemraj Singh until after he had returned the lorry to Anup Singh. This was brought to the notice of the Second Subordinate Judge first class next day on which he passed the following order :

29-11-39. Mr. De appears for Balraj who wants to file an objection for the attachment of the motor lorry. It was under attachment in Suit No. 810 of 1938 of Small Cause Court. But it has been released. The motor lorry shall be put in possession of Balraj as supurtdar. Balraj shall not take the motor bus outside Khandwa District and the supurtdar says that he shall not run the lorry on hire. A warrant for the attachment of the motor lorry before judgment to issue.

On the same day the learned Judge, sitting on the Small Cause Court side in the other case No. 810 of 1938, passed the following order:

Decree-holder makes an application saying that the decree has been fully satisfied. The execution

case has been dismissed as fully satisfied. The supratdar shall hand over the property to Balraj who agrees to be the supratdar in another case No. 170-B of 1939 of the Court of Second Sub-Judge first class. It shall be treated as released in this case.

On 19th December 1939 the learned Judge in Civil Suit No. 810 of 1938 ordered a notice to issue to Hemraj Singh, custodian to show cause as to why he handed over the attached property to the judgment-debtor without the permission of the Court. Case for 29th January 1940.

On that date the applicant appeared by pleader and explained that he had made over the property to Anup Singh before he knew that any prohibitory order had been issued in respect of the lorry and he disclaimed liability. On the same date Balraj withdrew his objection to the attachment of the lorry in that case. The matter of the applicant's liability was then argued on 31st January 1940. The Court ordered the applicant to adduce formal proof of the receipt which he had filed and which purported to have been passed by Anup Singh in respect of the lorry and fixed 29th March 1940 as the date for proving this document. Balraj was also present in Court on that date and explained that although he had been appointed supratdar of the lorry in the other case filed by Goduram and Ibadat Ali, he had not been placed in possession of it. The Court ordered that that was not a matter with which he was concerned in Suit No. 810 of 1938, but it was a matter which arises in Civil Suit No. 170-B of 1939. Before the next date, 29th March 1940, the learned Judge was transferred and another Judge, Mr. Elahi Buksh took over charge of both Courts. When he came to deal with the case on 29th March 1940, he reconsidered his predecessor's order and directed the applicant to return the lorry or its value Rs. 500 by 12th April 1940 since he ought not to have returned it to Anup Singh without a release order from the Court. It is against this order that the present application for revision has been filed. In the meanwhile Civil Suit No. 170-B of 1939 terminated in an ex parte decree against Anup Singh for Rs. 261-7-0 including costs. From the above statements of the facts it is clear that none of the parties to Civil Suit No. 810 of 1938 is aggrieved by the action of the applicant; the decree-holder has received his money, the judgment-debtor has got back his lorry, and the objector Balraj has withdrawn his objection. Therefore the Court in passing the order of 29th March 1940 was not acting for the benefit of any of the parties to this case; it was acting for the benefit of the plaintiffs Goduram and Ibadat Ali in Civil Suit No. 170-B of 1939 and also for the benefit of Balraj who had been appointed custodian in that case. To the revision application the decree-holder Hardyal Singh and the judgment-debtor Anup Singh and the objector Balraj have been made parties but not the interested decree-holders in Civil Suit No. 170-B of 1939, so that the only party to this application who is interested in opposing it is Balraj. His contention is that, as the applicant had bound himself to produce the lorry or its value Rs. 500, when called upon by the Court to do so, and to obey any further order of the Court in respect thereof, he had no authority to hand it over to Anup Singh without a release order from the Court. He was an agent of the Court under O. 21, R. 43, Civil P. C., and the Court had to take action against its own agent when it received a prohibitory order from the regular Court under O. 21, R. 52. The case in 51 I C 653[1] is relied on. That case lays down that :

A sapurddar of attached property has no warrant or justification in making over the property to the judgment-debtor upon an attachment of the property coming to an end by virtue of O. 21, R. 57, Civil P. C. Inasmuch as the property is made over to his care by the Court, he is responsible to the Court for its production and if he is unable to produce it when called upon to do so, he is liable to pay its value.

But that does not touch the point which I have to decide, that is whether it is the Small Cause Court or the regular Court or neither which should take action against the defaulting custodian. Another case, in which the facts were somewhat similar to the facts before me and which has been relied on by the non-applicant-objector, is A I R 1934 ALL 357,[2] but that case also does not decide that it is the custody Court which should take action against the defaulting custodian. There, as here a motor vehicle was attached in a Small Cause Court suit and was handed over for custody to a custodian and on satisfaction of the decree in the Small Cause Court suit the custodian returned the vehicle to the judgment-debtor without waiting for an order from the Court to do so. The only difference between the facts of the two cases is that in that case notice of the second attachment of the vehicle by the regular Court, in which another suit was

1. ('19) 6 A I R 1919 Lah 108: 51 I C 653: 60 P R 1919: 74 P L R 1919, Darbari Mal v. Kanshi.
2. ('34) 21 A I R 1934 All 357: 149 I C 950: 1934 A L J 1200, Jageshar Prasad v. Mt. Janki.

pending was served on the Amin of the Small Cause Court who had handed over the vehicle to the custodian for custody, whereas in the case before me it was the Small Cause Court itself which was notified by an order under O. 21, R. 52. In that case the Amin did not inform the custodian of the second attachment with the result that the vehicle was handed back to the judgment-debtor. The difference between the two cases is of no importance except that as it was the Amin and not the Court who was notified no question arose of the Small Cause Court proceeding against the defaulting custodian. There the regular Court, which issued the second order of attachment, proceeded against the custodian, and therefore the case supports the applicant rather than the objector.

The third case relied on by the objector is 20 N L R 93.[3] In that case the custodian was the decree-holder. He was ordered to return certain crops, which had been placed in his custody, to the judgment-debtor when the latter deposited the full claim into Court. Instead of doing so he only returned a portion of the crops to the judgment-debtor, who consequently applied to the Court for an order to the custodian decree-holder to pay him the value of the crops withheld. The question was whether the executing Court could make such an order or whether it was necessary for the judgment-debtor to bring a separate suit against the defaulting custodian: it was held that the executing Court could recover the amount from the custodian. That case is easily distinguishable from the case before me because there it was a party to the execution proceedings, in which the property was entrusted to the custodian, that applied for an order against him, whereas in the case before me the parties to the execution proceedings are satisfied, and the objector, having withdrawn his objection, is no longer an interested party. The persons interested in the order against the applicant are the decree-holders in Civil Suit No. 170-B of 1939 and the objector in his capacity as custodian in that case and not in his capacity as objector in Civil Suit No. 810 of 1938. The decision in 20 N L R 93[3] is founded on certain remarks of the Privy Council in (1871) L R 3 P C 465[4] at p. 475 from which the following passages have been quoted at p. 99. The first passage is:

> One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

The second passage is:

> It is the duty of the Court, under S. 144, Civil P. C., 'to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed'. Nor indeed does this duty or jurisdiction arise merely under the said section, it is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

These passages from their Lordships' judgment show that it is in the interest of the suitors that the Court is to act, that is to say the suitors in the case and not the suitors, in some other case, as in the present instance. They have their remedy in that case or by a separate suit, and it is not for me in this revision application to indicate which it is. A case which appears to me to be very similar in its facts to the case before me is A I R 1924 ALL 64.[5] There Jwala Prasad in a suit against one Sewa Singh caused the attachment of certain crops. Sheikh Chhuttan brought a suit against Jwala Prasad and others for a declaration that the crops were not liable to sale under Jwala Prasad's decree but were the property of himself and his tenants. While Sheikh Chhuttan's suit was being tried, the execution of Jwala Prasad's decree was kept pending, and in Sheikh Chhuttan's suit the crops were entrusted to a custodian. When Sheikh Chhuttan was successful in the trial Court, the custodian handed over the crops without any release order from the Court to Sheikh Chhuttan and his tenants, but subsequently Sheikh Chhuttan lost his case in the appellate Court. Jwala Prasad therefore applied that the crops be brought to sale in execution of his decree and a notice was issued to the custodian to produce the property. He objected that he was not the custodian in Jwala Prasad's suit but in Sheikh Chuttan's suit. It was held that:

> His (custodian's) position being substantially that of a receiver under Chapter 40 of the Code the Court might in that suit have called on him to produce the crops or their value. It could not do so in a suit to which he was an entire stranger .... Whatever remedy the respondent (Jwala Prasad)

3. ('24) 11 A I R 1924 Nag 258: 80 I C 49: 20 N L R 93, Ramji v. Ziblaji.
4. (1871) L R 3 P C 465: 40 L J P C 1: 24 L T 111: 19 W R 449: 7 Moo P C (N S) 314, Rodger v. Comptoir D' Escompte de Paris.
5. ('24) 11 A I R 1924 All 64: 73 I C 602, Chhuttan v. Jwala Prasad.

had against the appellants (Sheikh Chhuttan etc.) was either by application in Sheikh Chhuttan's suit, to which the respondent was a party or by a separate suit.

It is clear that the case is slightly different from the case before me but *mutatis mutandis* the reasoning can be applied with full force to the case before me. I agree with the observations there expressed and therefore this application must be allowed. The lower Court's order to the custodian is set aside and the paper in Civil Suit No. 810 of 1938 will be filed. Counsel's fee Rs. 20.

K.S./R.K. *Application allowed.*

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(28) A. I. R. 1941 Nagpur 343

VIVIAN BOSE J.

Mohamad Aminuddin Qayamuddin Musalman — Defendant — Appellant

v.

Mohammad Abdur Rahman Azimuddin and another — Plaintiffs — Respondents.

Second Appeal No. 391 of 1938, Decided on 14th March 1941, from appellate decree of Addl. Dist. Judge, Chanda, D/- 15th January 1938.

(a) Civil P. C. (1908), S. 100 — Adverse possession — It is question of fact and cannot be interfered with if law is properly appreciated — If lower Court has not understood law properly, High Court can consider point.

Whether a right to a property has been lost by reason of adverse possession is a question of fact, and if the law has been appreciated aright in the lower Court and if the necessary evidence has been there, the point cannot be agitated in second appeal. But if the Judge of the lower appellate Court has not understood the law aright, the High Court in second appeal can consider the point.

[P 344 C 1]

(b) Mahomedan law — Cosharers — Brother and sisters taking father's property are co-owners — Brother taking possession of whole — To deprive sisters of their rights, brother must prove ouster — Strong proof is necessary —Actual exclusion to knowledge of sisters must be proved.

Under the Mahomedan law, a brother and his sisters become co-owners in the estate of their father when the latter dies and if one of those co-owners (e. g., the brother) enters upon possession of the whole, the law presumes in such circumstances that he has entered upon possession for and on behalf of all. It is then necessary for him to prove ouster before he can succeed in depriving the others of their interests in the estate. The proof of ouster in these circumstances has to be extremely strong and ordinarily can only be sustained by actual exclusion of rights to the knowledge of the person excluded. Circumstances may exist in which an inference of knowledge can be drawn, or in which the laches or negligence of the co-owners is so great that knowledge will be presumed, but a case of that type would have to be very exceptional. The law does not penalise a co-owner who relies on the honesty of his cosharer and therefore ordinarily the mere fact that he does not take the trouble to assert as many of his rights as he may be entitled to would not justify an inference of ouster : ('37) 24 A I R 1937 All 696, *Dissent.*; ('34) 21 A I R 1934 P C 23; ('35) 22 A I R 1935 P C 36 and ('37) 24 A I R 1937 Lah 890, *Disting.*; ('30) 17 A I R 1930 Cal 466 ; ('27) 14 A I R 1927 All 454 ; ('21) 8 A I R 1921 Cal 647 and ('36) 23 A I R 1936 Nag 282, *Ref.*

[P 344 C 1, 2]

(c) Mahomedan law—Cosharers — Ouster — Sisters taking maintenance from brothers — Partition between males without reference to sisters does not amount to ouster.

In the case of Mahomedan families it is unusual for Mahomedan ladies to insist on their unquestioned rights. They often prefer being maintained by their brothers to taking a separate share for themselves ; the mere partition among the males without reference to them does not mean much in the shape of ousting them from their rights : ('17) 4 A I R 1917 P C 181 and ('33) 20 A I R 1933 Nag 27, *Rel. on.* [P 345 C 2]

(d) Adverse possession—Co-owners—Ouster — Demand and refusal or clear knowledge of ouster is necessary — Omission to pay profits does not amount to ouster.

There cannot be ouster without a demand and a refusal, or without a clear declaration brought home to the knowledge of the cosharers that lesser profits were being paid because the others were being ousted from the remainder of the share. A mere omission to pay profits does not in itself constitute ouster and still less so when something, though not the whole, is paid. [P 345 C 2]

A. Ahmad — for Appellant.

A. Razak — for Respondent 1.

Judgment.—The genealogical tree of the parties is as follows :

AZIMUDDIN (died 1901)
daughter Gulmirbi

Abdul Rahman (plaintiff)	Amirunissa (died on 28-3-34)	= Aminuddin (deft. 1)	Zaibunissa (deft. 2).

The plaintiff sues for joint possession with the defendants to the extent of 1/3rd share in four pies in certain malguzari villages. The plaintiff's case is that his sister Amirunissa owned these four pies. She died on 28th March 1934 leaving her husband, defendant 1 who is the appellant here, Md. Aminuddin, and a sister Zaibunissa who is defendant 2. The extent of the plaintiff's share is admitted by both sides, namely 1/3rd, and so I need not dilate upon that. The dispute centres around the property which the deceased left. According to the defendants, she owned six pies share in these villages and not four, and as the remaining two pies share is in possession of the plaintiff they state that the whole must be brought into hotchpotch before the plaintiff can be given his decree. Whether the

deceased had a six pies share or a four pies depends upon whether the plaintiff had ousted her from possession of a two pies share for a period of 12 years and thus acquired that share for himself by adverse possession. It will be necessary to give some further facts in order to appreciate this point. Azimuddin, the father of the plaintiff and defendant 2, died in the year 1901 leaving shares in three villages. On his death these shares were recorded in the name of the plaintiff. According to the plaintiff a dispute arose in the year 1911 or 1912 between his sisters and himself about this mutation and it was settled by the plaintiff giving Amirunissa four pies share. He states that he did not give her the other two pies though it is admitted that she would have been entitled to the extra two pies as a heir of Azimuddin. The plaintiff states that this is how Amirunissa came to possess only four pies at the time of her death. Whether the deceased lost her right to this extra two pies by reason of the plaintiff's adverse possession is of course a question of fact and had the law been appreciated aright in the lower Court and had the necessary evidence been there, the point could not have been agitated in this Court. But, I am not satisfied that the learned Judge of the lower appellate Court has understood the law aright. The plaintiff and his sisters were co-owners in the estate of their father Azimuddin when the latter died in 1901. One of those co-owners, the plaintiff, entered upon possession of the whole. The law presumes in such circumstances that he has entered upon possession for and on behalf of all. It is then necessary for him to prove ouster before he can succeed in depriving the others of their interests in the estate. The proof of ouster in these circumstances has to be extremely strong and ordinarily can only be sustained by actual exclusion of rights to the knowledge of the person excluded. The learned Judge of the lower appellate Court has cited A I R 1930 Cal 466[1] which decides that. In addition, there is 49 ALL 763[2] at p. 770, also 26 C W N 65.[3] I have also decided this question in I L R (1937) Nag 242.[4]

It may well be (though I say nothing about it) that circumstances may exist in which an inference of knowledge can be drawn, or in which the laches or negligence of the co-owner is so great that knowledge will be presumed, but a case of that type would have to be very exceptional. The law does not penalise a co-owner who relies on the honesty of his cosharer and therefore ordinarily the mere fact that he does not take the trouble to assert as many of his rights as he may be entitled to would not justify an inference of ouster. In A I R 1929 Oudh 337[5] it was held that the mere entry of a name in the mutation register is no indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of the other cosharers was denied. This decision will be referred to when we come to consider EX. D-3. The learned Judge of the lower appellate Court, after referring to the rulings which hold that ouster to the knowledge of the cosharer must be proved, goes on to state that though the rulings cited have so decided, there are Privy Council decisions which modify that and that, according to those decisions, it is not necessary to show that adverse possession was brought home to the knowledge of the true owner. It is enough to show that possession was overt and without any attempt at concealment. The learned Judge relies in particular on A I R 1937 ALL 696[6] which lays down that proposition.

So far as the two Privy Council rulings cited are concerned, namely 61 Cal 262[7] and 14 Pat 327,[8] neither was a case of a co-owner or a cosharer. The whole difference in the law lies there. If this had been an ordinary case of adverse possession against a person who was not a co-owner, then the law as enunciated by the learned Judge would have been unexceptionable. It is true that the Allahabad decision cited lays down that proposition in a case of co-owners, but with the utmost respect (it was a single Judge decision) I am unable to agree. As regards A I R 1937 Lah 890,[9] that lays down that

1. ('30) 17 A I R 1930 Cal 466 : 128 I C 103 : 34 C W N 246, Abdul Wahed v. Mohan Bashi.
2. ('27) 14 A I R 1927 All 454 : 102 I C 66 : 49 All 763 : 25 A L J 413, Harkesh Singh v. Hardevi.
3. ('21) 8 A I R 1921 Cal 647 : 67 I C 31 : 34 C L J 482 : 26 C W N 65, Jagannath Marwari v. Sm. Chandni Bibi.
4. ('36) 23 A I R 1936 Nag 282 : 165 I C 934 : ILR (1937) Nag 242, Krishna Bai v. Parwati Bai.
5. ('29) 16 A I R 1929 Oudh 337 : 115 I C 440 : 6 O W N 536, Bashir Ahmad v. Parshottam.
6. ('37) 24 A I R 1937 All 696 : 171 I C 910 : 1937 A L J 855, Kishen Prasad v. Mt. Shubratan.
7. ('34) 21 A I R 1934 P C 23 : 147 I C 545 : 61 Cal 262 : 61 I A 78 (PC), Secretary of State v. Debendralal Khan.
8. ('35) 22 AIR 1935 PC 36: 153 I C 929: 14 Pat 327 : 62 I A 40 (PC), Shrishchandra v. Baijnath.
9. ('37) 24 A I R 1937 Lah 890 : 175 I C 605 : ILR (1938) Lah 367 : 39 P L R 695, Amar Singh v. Shiv Datt Kaur.

non-participation in rents and profits for a very long time (80 years in that case) may amount to ouster. I have no quarrel with that proposition. The point is that there must be ouster, and ouster in circumstances like the present can only be shown if the exclusion is brought home to the knowledge of the person ousted. That position the learned Judge of the lower appellate Court has not appreciated. It is necessary therefore for me to consider whether the evidence on record is sufficient to establish ouster. The learned counsel for the plaintiff relies strongly on the fact that in the year 1914 mutation was effected in Amirunissa's favour to the extent of four pies only and that this was to the knowledge of both sisters. He states that this proves ouster, especially when coupled with the fact that the sisters were never paid anything more than such share of the profits as would come to four pies. It has been held in the case to which I have referred that mere mutation in itself does not constitute ouster. In the present case that is especially so when we find that the plaintiff represented the sisters before revenue authorities and that he made an express statement which is to be found in Ex. D-3, to the following effect :

> Both these are my sisters. Under the Mahomedan law some share in both the mouzas goes to them. Mutation in respect of both the mouzas be effected in the name of my sisters.

This imports a clear admission that the sisters are cosharers with the plaintiff and that they are entitled to a share according to the Mahomedan law. This share admittedly was 6 pies and not 4 pies. The mere fact that four pies was mutated after this admission would not indicate ouster. It does not show that the plaintiff stated to his sisters that though he represented them before the mutation authorities and though he impliedly admitted that each was entitled to 6 pies, nevertheless because the revenue officer had made a mistake in calculation therefore he intended in future to oust them from the remaining 2 pies. The point which the lower appellate Court has missed is that there was no denial by the plaintiff of their right to the remaining 2 pies. Another point on which the learned counsel relies, and it has also been relied on in the lower appellate Court to some extent, is that a settlement took place in the year 1923-24 and that in that settlement the sisters did not assert their right to 6 pies. Two answers are possible to this. The first is that this suit was filed on 28th August 1936 and that it is not shown on what date in the year 1923-24 the settlement entries were made. Consequently it is not shown that the ouster, if indeed this can constitute ouster (and I do not think so), occurred more than 12 years before suit. The other reply is furnished by the observations of their Lordships of the Privy Council in 45 Cal 450[10] at pp. 464 and 465, observations which have been followed in this Province in 28 N L R 282[11] and in other cases which have not been reported, to the effect that in the case of Mahomedan families it is unusual for Mahomedan ladies to insist on their unquestioned rights, and that they often prefer being maintained by their brothers to taking a separate share for themselves and that the mere fact of partition among the males without reference to them does not mean much in the shape of ousting them from their rights.

The next matter referred to was an imperfect partition in the year 1926-27 in which the sisters, or rather Amirunissa, were ousted, but that is well within 12 years before suit; so also as regards the conduct of the defendant referred to by D. W. 4. He relates to an incident which occurred some seven or eight years before 1937 when he was deposing. The most important person to explain whether the plaintiff had ousted his sisters or not would naturally be the plaintiff himself. He entered the box as P. W. 1 and though he states that he never paid any profits in excess of the 4 pies share to either of his sisters, he admits that there was never any demand for the profits appertaining to the additional 2 pies share and admits that there was never any refusal on his part. There cannot be ouster in these circumstances without a demand and a refusal, or without a clear declaration brought home to the knowledge of the cosharers that lesser profits were being paid because the others were being ousted from the remainder of the share. He states that the reason he did not give his sisters their shares in the fields was because they did not demand it. The cases to which I have referred show that that makes very little difference in the case of these Mahomedan families, and that even in other cases a mere omission to pay profits does not in itself constitute ouster and still

10. ('17) 4 A I R 1917 P C 181 : 43 I C 306 : 45 Cal 450 : 12 S L R 104 : 45 I A 10 (P C), Abdul Hussein Khan v. Mt. Bibi Sona Dero.

11. ('33) 20 A I R 1933 Nag 27 : 140 I C 831 : 28 N L R 282, Muraduddin v. Mt. Umraobi.

less so when something, though not the whole, is paid.

So far as the case of gift in 1911, pleaded by the plaintiff, is concerned, that has not been found in his favour, and in any case even if it had been, his subsequent admission in the mutation proceedings in 1913 (EX. D-3) would nullify the effect of any assertion of a hostile title which he had set up a year or two before. On a consideration of the evidence I am not satisfied that ouster has been established. Under the law Amirunissa would be entitled to 6 pies, and as the remaining 2 pies are in possession of the plaintiff, he must bring them into hotchpotch. The result is that the plaintiff is entitled to 1/3rd of 6 pies. He is already in possession of 2 pies, and as that is 1/3rd of the 6 pies to which he is entitled under the law there is nothing more to decree. The suit was unnecessary. It is accordingly dismissed with costs in all three Courts.

R.K. *Suit dismissed.*

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(28) A. I. R. 1941 Nagpur 346

STONE C. J. AND CLARKE J.

Mithoolal Girdharilal — Plaintiff — Appellant

v.

Babu Jainarayan Bahadurlal and others — Respondents.

First Appeal No. 38 of 1939, Decided on 10th December 1940, from decree of Extra Addl. Dist. Judge, Jubbulpore, D/- 31st January 1939.

(a) Civil P. C. (1908), S. 11—Might and ought — Plea not raised for want of knowledge—Fact with due diligence could have been discovered —Plea is barred by res judicata.

A plea which the plaintiff in the subsequent suit ought to have taken in the previous suit is barred and the fact that he had no knowledge of the fact which he ought to have pleaded is of no avail if with due diligence he could have discovered the fact in the previous suit : 42 C W N 560, *Disting.* [P 349 C 1, 2]

(b) Civil P. C. (1908), S. 11 — Court in previous suit not having pecuniary jurisdiction to try subsequent suit — S. 11, though in terms does not apply, general principle of res judicata applies.

In a previous suit for dissolution of partnership and accounts, the plaintiff placed a tentative valuation of Rs. 5500 upon it, reserving the right to receive more than Rs. 5500 if more were found due to him subject only to payment by him of additional court-fee. In a subsequent suit he valued his suit for jurisdiction at Rs. 2 lakhs :

Held that S. 11 could be applied. [P 349 C 2]

Held further that even if S. 11 did not in term apply, the general principle of res judicata applied : *Case law referred.* [P 349 C 2]

(c) Res judicata — Judgment by consent and facts admitted are as effective as judgment on contest or facts which were in dispute.

A judgment by consent and facts admitted are just as effective for the purposes of res judicata as a judgment passed on contest or facts which were in dispute : 63 Cal 550, *Rel. on.* [P 350 C 2]

(d) Res judicata—Question decided by necessary implication is res judicata.

A question which is decided by necessary implication operates as res judicata : *Case law referred.* [P 350 C 2]

(e) Res judicata — Bar of res judicata cannot be avoided by overvaluing subsequent suit.

A plaintiff cannot escape from the bar of res judicata by overvaluing the subsequent suit so as to put it beyond the pecuniary jurisdiction of the Court which tried the previous suit : 10 C P L R 89 and 10 Cal 697, *Rel. on.* [P 350 C 2; P 351 C 1]

R. N. Padhye and P. Lobo — for Appellant.

M. B. Kinkhede and A. R. Kulkarni, and V. K. Sanghi and M. D. Khandekar — for Respondents 1, 2 and 4, and 3, respectively.

Judgment. — The appellant-plaintiff was for some time prior to 1926 a partner of respondent-defendant 1. In that year they fell out, but instead of bringing an action against defendant 1 for dissolution of partnership and accounts they agreed to submit their dispute to arbitration, and defendants 2 to 4 were appointed arbitrators. On 12th August 1928, the plaintiff gave a notice to the arbitrators cancelling his consent to their arbitrating in his dispute with defendant 1, the reason according to him being that he had discovered that they were not disinterested persons but were partisans of defendant 1, and he then brought an action No. 83 of 1928 against Jainarayan for dissolution of partnership and accounts valuing his suit at Rs. 5500. One of the defences to the suit put forward by the defendant was that the arbitrators had delivered their award on 12th August 1928, that is to say on the same day on which, according to the plaintiff, he had served them with notice of cancellation of the agreement to submit to arbitration, and that that award was binding on the plaintiff. Preliminary issues were framed in the suit as to whether the arbitrators' award was void or binding and the Court held that the award was binding and the plaintiff's suit was consequently dismissed. This decision was upheld in first appeal by the Judicial Commissioner's Court on 16th April 1930. In 1933 the plaintiff applied to the Judicial Commissioner's Court for a review of judgment in that appeal on the ground that he had discovered in May 1933 new and important documentary evidence which proved that the arbitrators were biased in

favour of the defendant. The Court rejected the review application on 25th January 1935.

Then on 28th April 1936 the plaintiff applied for permission to bring the present suit as a pauper, but permission was refused, and his application to the High Court for revision of the order met with a similar fate. Accordingly he paid the necessary court-fee and the suit went to trial. In this suit he alleges that it came to his knowledge for the first time on 8th April 1936 that the arbitrators had never given an award at all and that his previous suit had been founded on an erroneous assumption that there had been an award, that the arbitrators fraudulently conspired with defendant 1 to make the plaintiff believe that they had given an award, when actually they had not done so, and therefore he now wants a bare declaration that no award was given. Such a declaration carries with it as a consequence a conclusion that the partnership between defendant 1 and plaintiff is still continuing. The present suit is valued for purposes of jurisdiction at two laks of rupees, but, as it has been framed as a suit for a declaration only, the plaintiff has paid a court-fee of no more than Rs. 15. After the parties had submitted their pleadings the plaintiff applied to amend his plaint by adding to the relief which he claimed an alternative prayer that if the Court should hold that the arbitrators had given an award then the defendants should be ordered to deliver it up to the plaintiff. On the pleadings the following preliminary issues were accordingly framed:

(i) Whether the decision in Civil Suit No. 83 of 1928 operated as res judicata;

(ii) whether the suit for a mere declaration without consequential relief was maintainable; and

(iii) whether the plaintiff should be allowed to amend his plaint as desired.

On issue 1 the lower Court has found that the suit is not barred by res judicata but that the plaintiff is estopped from reopening the case. On issue 2 it has held that a suit for a bare declaration is not maintainable, and on issue 3 that the amendment cannot be allowed because it is inconsistent with the first relief claimed. By reason of these findings the plaintiff's suit has been dismissed and he has now come before us on appeal. One line of attack has been against the finding that the plaintiff is estopped from reopening the case, and in answer to that the defendant has argued that the finding that the suit is not barred by the doctrine of res judicata is wrong. Accordingly the main point for determination in the appeal is whether the suit is barred by either of the doctrines of res judicata or estoppel. The new fact which, according to the plaintiff, had come to his knowledge on 8th April 1936 is, as stated above, that no award was in fact given by the arbitrators. The other facts found in the previous suit are not disputed. It is obvious therefore that if in fact the arbitrators have given an award, then it is useless for the plaintiff to say that he has since discovered that no award was given. As to the existence of an award this was admitted by the plaintiff in the previous suit. One has only to glance at the judgment in that suit which is Ex. D-1 in the case before us to see that. The second sentence of that judgment is to the effect:

> It has been admitted by both the parties that their disputes were referred to arbitration on 14th August 1926 by a duly executed deed of agreement and that the arbitrators have given their award.

The last paragraph of that judgment also contains the finding:

> The award given by the arbitrators is not void. As the arbitrators have decided all the disputes finally by fixing the date of dissolution of partnership as well as the amount finally due by the defendant to the plaintiff this suit is not maintainable.

It was never suggested in that suit that there was any doubt as to the existence of the award. The admission of the plaintiff as to the existence of that award in that suit is contained in Ex. P-64—the statement by the plaintiff's pleader admitting the defendant's documents. He says:

> The following documents out of those filed by Tulsidas (defendant 3 in the case before us) are admitted.

Item 12 in the list is a postal acknowledgment dated 16th August 1928, and he concluded his statement by saying: "It is admitted that arbitrators sent a copy of award to plaintiff by post." The postal acknowledgment dated 16th August 1928, Ex. D-12, shows that the plaintiff received a registered letter No. 108 from Mr. J. R. Paranjpe, pleader, who is one of the arbitrators and defendant 2 in the case before us, and Ex. D-11 shows that the same letter was posted in Jubbulpore on 13th August 1928, i.e., the day after the award is said to have been given. So it is obvious that the plaintiff received a letter from Mr. Paranjpe on 16th August 1928, and he does not even now dispute that the paper which he received then satisfied him at the time that it was a copy of the award which the arbitrators had given. Unfortunately the paper which the plaintiff then received is not

forthcoming, the explanation being that it had remained with the plaintiff's pleader Mr. Sheo Prasad and could not be found among his effects when he died. Two documents were produced in that case by the defendant as Exs. D-15 and D-14, and it was assumed in that case that, whether they constituted the original award or not, they certainly represented the conclusion to which the arbitrators had come, and as the existence and nature of the award was not in dispute, no question arose as to whether Exs. D-15 and D-14 were the original award or only a copy of it or, as the plaintiff now contends, not even a copy of it but a fictitious document which did not represent the correct findings of the arbitrators, but was sent to the plaintiff fraudulently to make him believe that an award had been given. In his deposition in that suit, a copy of which is before us as Ex. P-56, the plaintiff said :

I do not remember that I received the award by registered post before filing this suit, but I have received the award by registered post.

The only doubt he had was whether he received it before or after the filing of the suit. The plaint was actually filed on 29th August 1928, Ex. P-52. So after he was in possession of the copy of the award he filed the suit. Consequently, he knew the contents of the award and the fact that the award had been given was brought to his notice. Moreover he had one of the foremost pleaders in Jubbulpore to help him and there could be no doubt about the document being a copy of an award, and if it was a copy of the award, there must have been an original award for it to be a copy thereof. Why then has the plaintiff come to the conclusion that Exs. D-15 and D-14 did not represent the real award of the arbitrators and that in point of fact no award ever existed? For this we have to see Ex. P-3. This is an application dated 10th February 1936 by the plaintiff to the arbitrator Tulsidas asking him if he had the original award in his possession, since it had come to the plaintiff's knowledge on 8th February 1936 from Tulsidas's agent that no award had been given, when the plaintiff's notice revoking the submission of the case to arbitration was received by the arbitrators, and that the award produced in Court had been fraudulently prepared. From this it is clear that the award produced in that Court was Exs. D-15 and D-14 and the list of documents filed in that case does not disclose any other document which could have been this award, nor does it show that any document was removed from the record after the case terminated. To this application, Ex. P-3, Tulsidas wrote a reply on the same paper, the reply being dated 8th April 1936 and saying :

On your first application, it has been clearly stated that no papers concerning the above are with me but even then you people are unnecessarily incurring expenses. The original application is being sent back to you again along with the stamp. Kindly do not take the trouble in future; otherwise no heed will be paid now, nor will any papers be sent back. All will be filed in the office. Be it known.

So this is evidently the information which formed the basis of the statement in the present plaint that the plaintiff came to know on 8th April 1936 that no award had in fact ever been given. On 28th April 1936, as already stated, the plaintiff applied to the lower Court for permission to sue as a pauper. That application closed with the prayer that the award dated 12th August 1928 and decree dated 15th August 1929 be set aside. So although in the suit the plaintiff alleges that it came to his knowledge on 8th April 1936 that there was in fact no award, three weeks later on 28th April 1936 he was still admitting the existence of the award and asking that it be set aside. Even on 29th September 1936, when he made an oral statement in the lower Court in support of his application to sue as a pauper, he was still asking the Court to set aside the award of the arbitrators, the ground then put forward being that he had come to know of fraud between May and August 1933 on the part of the arbitrators who were colluding with the defendant, and in the closing passage of that statement, which is at p. 85 of the paper-book, he says :

By the award I was given about 2200 from Jainarayan and this amount was got attached by Jainarayan and Tulsidas and I got nothing out of the money that was said to have been given to me.

So even by 29th September 1936 it had not entered the plaintiff's head to base his suit on the non-existence of any award. Hence it is obvious that when his application to sue as a pauper was dismissed and he was faced with necessity to pay court-fees it occurred to him or his advisers that an improvement might be made in the case by suing for a declaration which would involve an expenditure of only Rs. 15 and basing the revised claim on a plea that no award in fact existed. Even in the plaint, which was eventually presented in the lower Court, there is another admission of the existence of an award since in para. 11, on

page 6 of the paper-book, the plaintiff has said :

That during the arbitration proceedings the plaintiff suspected that defendants 2 and 4 were not acting straight towards him and he therefore gave them notice not to arbitrate but in spite of plaintiff's notices they gave an award. The said award being the result of conspiracy hatched by the defendants against the plaintiff is void in law.

The reason why according to the lower Court the doctrine of res judicata does not apply to this case is that the previous suit was valued at Rs. 5500 while this suit is valued at Rs. 2 lakhs and therefore the Court which tried the first suit was by reason of its pecuniary jurisdiction incompetent to try the present suit, and hence S. 11, Civil P. C., is no bar to the present suit. The respondents say that this is not correct and Expln. 4 to S. 11 applies here because the plaintiff ought to have taken this ground about the non-existence of the award in the previous suit. To this the plaintiff replied that it was impossible for him to have taken the point when he was unaware that the award was not in existence and that Expln. 4 only applies where a person has the necessary knowledge to take the plea. In support of this contention he has referred to 11 M I A 50;[1] 37 I C 119[2] and 42 C W N 560.[3] In 11 M I A 50[1] at p. 73 their Lordships say :

When a plaintiff claims an estate, and the defendant being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, *according to his knowledge*, then to bring forward.

(The italics are ours.)

In 37 I C 119[2] the Punjab Chief Court held:

A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as 'a portion of his claim' which can be 'intentionally relinquished' within the meaning of O. 2, R. 2, Civil P. C.

In that case the learned Judge has followed another Privy Council ruling 15 Cal 800[4] where their Lordships observed that

a right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as 'a portion of his claim.'

In 42 C W N 560[2] it was held that the plaintiff being unaware of the deed of gift, and there being no circumstance which would put the plaintiff on enquiry as to the deed of gift, or which would lead the plaintiff to the discovery thereof at the time he instituted the first suit, the plaintiff was not hit by the rule of constructive res judicata. In that case it was argued, as it has been argued before us, that the "plaintiff might have come to know of the existence of the deed of gift if he had exercised due diligence," that is to say, that the plaintiff might have obtained knowledge of the fact about which he claimed ignorance in the suit if he had shown diligence to ascertain the truth. It was then pointed out that in that case the plaintiff could not with due diligence have discovered the fact which it was said he ought to have pleaded in the first suit. It is this circumstance which distinguishes that case from the case before us because here there was no reason why the plaintiff could not have discovered the fact that there was no award in existence if that was really the case. He received what he believed to be a copy of the award and presumably he read it before he allowed it to disappear into his pleader's archives, whence it never appears to have come out again to the light of day. Whether it was an award or not ought to have been patent on its face, and if it was not an award then he should have instituted an enquiry to find out where was the real award. If it was an award, there is an end to the plaintiff's present contention that there was in point of fact no award. He had the assistance of one of the ablest counsel in Jubbulpore for finding out whether it was an award or not and it is clear from the suit which he filed that both he and his counsel were quite satisfied that it was an award.

Therefore, ignorance of the fact that there was no award will not help the plaintiff in the present case. Accordingly Explanation 4 to S. 11, Civil P. C., will apply unless the lower Court is right in holding that the section cannot apply because of the difference in the pecuniary jurisdiction of the two Courts. As to this we are satisfied that even if S. 11 itself cannot be applied, according to its terms, at any rate the principle can be applied. But we also hold the view that S. 11 can be applied in a suit such as this, for the original suit, being one for dissolution of partnership and accounts, the plaintiff placed a tentative valuation of Rs. 5500 upon it, reserving the right to receive more than Rs. 5500 if more were found due to him subject only to payment by him of additional court-fee. Therefore, in that suit he could have been given a decree even for the two lakhs which he

1. (1866-67) 11 M I A 50 : 10 W R (PC) 1 : 2 Sar 212 (P C), Srimut Rajah Odaya Taver v. Katama Natchiar.
2. ('17) 4 A I R 1917 Lah 19 : 37 I C 119 : 94 P R 1916, Mt. Aishan v. Muhammad Din.
3. ('38) 42 C W N 560, Fakir Chandra v. Ekkari Sarkar.
4. ('88) 15 Cal 800 : 15 I A 106 : 5 Sar 214 (P C), Amanat Bibi v. Imdad Hussain.

is now claiming : 8 C P L R 86[5] and 9 N L R 112.[6] So it was not beyond the jurisdiction of the first Court to give a decree for the claim which is now made in this suit. It might, however, be said that even so the first Court was not competent to try this suit which commenced with a valuation of two lakhs and, therefore, S. 11 is excluded. It is for this reason that we hold that if S. 11 does not in terms bar this suit, at any rate its principle bars it. The Privy Council has held that S. 11 is not exhaustive of the circumstances in which an issue is res judicata : 48 Cal 499[7] in which at p. 508 their Lordships quoted with approval an observation by Sir B. Peacock in 6 ALL 269[8] to the following effect :

> The binding force of such a judgment in such a case as the present depends not upon S. 13 of Act 10 of 1877 (now replaced by S. 11, Civil P. C., 1908), but upon general principles of law. If it were not binding, there would be no end to litigation.

Again in A I R 1930 P C 22[9] their Lordships said :

> The terms of S. 11 are not to be regarded as exhaustive. The binding force of a judgment in probate proceedings depends not upon S. 11, but upon the general principles of law. The rule of res judicata, though it may be traced to an English source, embodies a doctrine in no way opposed to the spirit of the law as is expounded by the learned Hindu commentators. The application of the rule of res judicata, therefore, by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law.

A reference may also be made to A I R 1936 Mad 951[10] where the learned Judges have followed another Privy Council ruling in 29 Cal 707[11] in which Lord Davey observed that :

> The limitations as to pecuniary jurisdiction embodied in S. 13 of the Code of 1882 (and S. 11 of the Code of 1908) are not part of the general principle of res judicata :

See also 10 Lah 528[12] and A I R 1931 Lah 217.[13]

Moreover a judgment by consent and facts admitted are just as effective for the purposes of res judicata as a judgment passed on contest or facts which were in dispute : *vide* 63 Cal 550[14] where at p. 555 we find the following observation :

> On this authority it becomes absolutely clear that the consent order is as effective as an order passed on contest, not only with reference to the conclusions arrived at in the previous suit but also with regard to every step in the process of reasoning on which the said conclusion is founded. When we say "every step in the reasoning" we mean the findings on the essential facts on which the judgment or the ultimate conclusion was founded. In other words the finding which it was necessary to arrive at for the purposes of sustaining the judgment in the particular case will operate as estoppel by judgment.

Similarly a question which is decided by necessary implication operates as res judicata. In the previous suit before the Court could say whether the award was binding or not it had to be presumed that the award existed : *see* 24 C W N 223[15] which follows a Privy Council decision in 18 W R 182[16] in observing that

> it may also be pointed out that where a question is decided by necessary implication, the decision would operate as res judicata.

In 4 Cal 190[17] Sir B. Peacock in delivering the judgment of their Lordships of the Privy Council observed at p. 199 :

> . . . . *nemo debet bis vexari proeadem ca usa*. This law has been laid down by a series of cases in this country with which the profession is familiar. It probably has never been better laid down than in the case, which was referred to, in (1736-55) 3 Atk 626,[18] in which Lord Hardwicke held that where a question was decided in effect, though not in express terms, between parties to the suit, they could not raise the same question as between themselves in any other suit in any other form; and that decision has been followed by a long course of decisions. . . . .

See also 15 Bom 89[19] and A I R 1938 Bom 291.[20] It appears to us that in valuing his claim in this suit at two lakhs, whereas in the previous suit he valued it at Rs. 5500, the plaintiff was over-valuing it in an

5. ('95) 8 C P L R 86, Kalooram v. Ramkishen.
6. ('13) 9 N L R 112 : 20 I C 928, Olpherts v. Arjundass.
7. ('21) 8 A I R 1921 P C 11 : 60 I C 631 : 48 Cal 499 : 48 I A 187 (P C), G. H. Hook v. Administrator-General of Bengal.
8. ('83) 6 All 269 : 11 I A 37 : 4 Sar 489 (P C), Ram Kirpal Shukul v. Rup Kuar.
9. ('30) 17 A I R 1930 P C 22 : 121 I C 200 : 57 I A 24 (P C), Kalipada De v. Dwijapada Das.
10. ('36) 23 A I R 1936 Mad 951 : 166 I C 75 : 71 M L J 619, Durjati Subbayya v. Anantaraju Nagayya.
11. ('02) 29 Cal 707 : 29 I A 196 : 6 C W N 825 : 8 Sar 323 (P C), Gokul Mandar v. Pudmanand Singh.
12. ('28) 15 A I R 1928 Lah 929 : 113 I C 90 : 10 Lah 528 : 30 P L R 620, Sarupa v. Khem Lal.
13. ('31) 18 A I R 1931 Lah 217 : 134 I C 524 : 32 P L R 214, Mustafa Khan v. Abdul Wahib.
14. ('36) 63 Cal 550, Secretary of State v. Ateendranath Das.
15. ('20) 7 A I R 1920 Cal 253 : 54 I C 952 : 24 C W N 223, Apurba Krishna Roy v. Shyama Charan Paramanik.
16. ('72) 18 W R 182: 2 Suther 660: 12 B L R 391 (P C), Pahalwan Singh v. Maharaja Muheswar Buksh Singh Bahadur.
17. ('79) 4 Cal 190 : 3 C L R 31 : 5 I A 149 : 3 Sar 827 (P C), Doorga Persad Singh v. Doorga Kunwari.
18. (1736-55) 3 Atk 626, Gregory v. Molesworth.
19. ('91) 15 Bom 89, Ramkrishna Jagannath v. Vithal Ramji.
20. ('38) 25 A I R 1938 Bom 291: 175 I C 866: 40 Bom L R 359, Jambu Tavanappa v. Gopalkrishnacharya.

endeavour to escape from the bar of res judicata. The bar cannot be eluded by that means: *see* 10 C P L R 89[21] and 10 Cal 697.[22] We hold therefore that this suit is barred by the doctrine of res judicata. This finding is sufficient to dispose of the appeal, but, as the other two preliminary issues which were decided in the lower Court have also been challenged in the memorandum of appeal, it is necessary to say something about them. Of these one relates to the bar of S. 42, Specific Relief Act, and the other to the refusal by the lower Court to permit an amendment of the plaint. Very little has been said on either of these matters before us so that we do not think it necessary to go into the questions very deeply. It is said that the finding of the lower Court about the application of the proviso to S. 42, Specific Relief Act, is wrong because it is not made clear what consequential relief the plaintiff could have asked for in addition to his prayer for a declaration. The learned Judge has disposed of the matter in one short paragraph No. 9 in which he says:

Issue 2. Moreover the suit for mere declaration without a consequential relief is not maintainable under the proviso to S. 42, Specific Relief Act. Numerous consequential reliefs as asked for in the previous suit as well as in the pauper application were available to the plaintiff among others and it shall be against the principle of law to entertain such a suit for a mere declaration without a consequential relief.

One consequential relief for which the plaintiff might have prayed was the one which he obviously hoped would follow from a successful termination of this appeal, namely that he can bring a new action for dissolution of partnership and accounts. We are disposed therefore to agree with the finding of the lower Court on this issue. Even less has been said on the question of the amendment of the plaint, the plaintiff being content with referring us to I L R (1939) Nag 194[23] in which it was held that:

Amendments should readily be allowed unless they prejudice the rights of the opposite party. An amendment of the plaint should not ordinarily be allowed when the application is made at a very late stage and the result of the amendment is to bring on the record a new case which on the date of the amendment is time-barred.

The amendment which the plaintiff seeks to make in his plaint is to add a prayer that if it be held that there was an award the defendants should be called upon to produce it. We do not think that there is any point in such an amendment because Mr. Padhye has conceded before us that if in point of fact there was an award then he is precluded by the judgment in the previous suit from challenging its contents. Accordingly the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

21. ('97) 10 C P L R 89, Chaodhari Dal Chand v. Thakur Sham Singh.
22. ('84) 10 Cal 697, Gopi Nath Chobey v. Bhugwat Pershad.
23. ('38) 25 A I R 1938 Nag 388 : 176 I C 728 : I L R (1939) Nag 194, Lachhamansing v. Mahendralal Choudhari.

(28) A. I. R. 1941 Nagpur 351

VIVIAN BOSE J.

Kesheorao Bapuji Yende — Plaintiff — Applicant

v.

Ganeshrao Shamrao Kunbi and another — Defendants — Non-applicants.

Civil Revn. No. 632 of 1939, Decided on 9th April 1941, for revision of order of Dist. Judge, Wardha, D/- 5th August 1939.

(a) C. P. Tenancy Act (1 of 1920), S. 106 — Suit purporting to be for arrears of rent — Defendant found not to be tenant — Suit must be dismissed.

Where the plaint purports to be by a landlord against an occupancy tenant for arrears of rent and the Court finds that the defendant is not a tenant and that therefore the plaintiff can make no claim for arrears of rent against him, the order of the Court returning the plaint should either be treated as a dismissal of the claim or the first Court should be asked to pass such an order and draw up the usual decree. [P 352 C 1, 2]

(b) C. P. Land Revenue Act (2 of 1917), S. 2 (17) — Ex-proprietor subsequently purchasing share in village though not to same extent as before — He regains proprietary rights in sir and ceases to be occupancy tenant.

When there are a number of cosharers in an undivided village, the proprietary rights are not vested in any one of them but reside in the entire body regarded as a corporate whole. Each cosharer has an undivided though defined interest in the whole. Therefore each is possessed of "the proprietary right" in that sense to the extent of his share. It is not at the time a divided interest though it is a divisible entity. Hence it does not matter how small a portion of the whole an ex-proprietary tenant acquires. The moment he becomes a cosharer again, whether to the same extent or not, he regains his proprietary rights in the *sir* and the land thereupon ceases to be occupancy land : ('41) 28 A I R 1941 Nag 21 (F B), *Ref.* [P 353 C 1]

(c) C. P. Land Revenue Act (2 of 1917), S. 2 (17) — Construction.

Section 49, Tenancy Act, and S. 2 (17), Land Revenue Act, are intended for the benefit of the proprietor of *sir* land and therefore any ambiguity should be resolved in his favour. [P 353 C 1]

D. T. Mangalmurti — for Applicant.

V. V. Kelkar — for Non-applicants.

Order. — The only question with which I am concerned in this revision is whether

the first Court had jurisdiction to try the suit. The suit is by a landlord against his tenant for arrears of rent. Under the provisions of S. 106, C. P. Tenancy Act, no civil Court of original jurisdiction can entertain a suit for arrears of rent unless the presiding Judge of the Court is also a Revenue Officer. The suit was accordingly filed in the Court of a Judge who filled both positions. Both the lower Courts hold that the suit is not in reality one for rent and that therefore the first Court had no jurisdiction to try the claim. The first Court on reaching this conclusion returned the plaint for presentation to the proper Court and this order was upheld in appeal. The revision is against these two orders. I may remark at the outset that the order directing a return of the plaint is wrong in any event. The jurisdiction of the Court is determined by the nature of the claim, and the claim here is for arrears of rent and for nothing else. If the defendant is not a tenant, then no question of returning the plaint for presentation to another Court can arise because no other Court can try the claim set out in this plaint. The nature of the claim cannot change by a return of the plaint. If this suit were to be instituted elsewhere, it would either have to be on a different cause of action on a different plaint or the Court to which it is presented would have to return it because the plaint purports to be by a landlord against an occupancy tenant for arrears of rent.

If therefore the lower Courts are right in their conclusion on the merits of the matter, then the suit should have been dismissed on the ground that the defendant is not a tenant and that therefore the plaintiff can make no claim for arrears of rent against him. The plaintiff would then have been at liberty to pursue such other remedies as he might have on other causes of action in the appropriate Court. But of course if the lower Courts are wrong in their conclusion on the facts, then as the first Court had jurisdiction to try a suit for arrears of rent and as this is such a suit, it should have tried it. All I am concerned to see therefore is whether this is or is not a suit for arrears of rent. In my opinion it is. One has only to look to the plaint to see that. It is impossible on this plaint to contend that the claim is for anything else. Logically therefore the order of the first Court returning the plaint should either be treated as a dismissal of the claim or the first Court should be asked to pass such an order and draw up the usual decree. Then an appeal would lie to the lower appellate Court and from there a second appeal to this Court. I do not however intend to follow this tortuous course because the matter has been treated as one of jurisdiction and the Division Bench to which I referred the case[1] has decided that this Court should exercise its revisional powers. I will therefore deal with the matter along those lines.

The facts are not in dispute, or at any rate not the facts which I need consider. The defendants' predecessor was a 5 as. 4 p. cosharer in the village in suit and owned in addition 200 acres of *sir* land, though whether in exclusive ownership or in severalty is a matter of dispute. That however need not concern us here. It is enough that he also owned the *sir*. In the year 1928 he sold his entire proprietary share (5 as. 4 p.) to the plaintiff and then became an ex-proprietary occupancy tenant of the *sir* under S. 49, C. P. Tenancy Act. Some time later the defendants, who claimed title through this predecessor, purchased a 3.20 pies share in the village and thus became cosharers. The question on those facts is, does the repurchase attract the provisions of S. 2 (17), C. P. Land Revenue Act, so as to re-convert the land to *sir*. The wording of the section unfortunately leaves room for doubt. After defining "*sir*" it continues:

> Provided that the land which is *sir* land under this definition shall . . . cease to be *sir* land when it becomes the subject of a tenancy under [S. 49, C. P. Tenancy Act, 1920], but if, during the continuance of such tenancy, the person in whose favour it has accrued, or his heir upon whom it has devolved, regain the proprietary right in such land . . . such land shall again become *sir* land.

It is not denied that the defendant is a person to whom the benefits of this proviso will apply provided he can be said to have regained "the proprietary right in such land." The whole question turns upon, what these words mean? To what proprietary rights does the word "the" refer? There is nothing either in the section or in the preceding portion of the Act which affords a clue to the meaning. Therefore, I do not think it would be legitimate to infer that the words necessarily refer to that portion of the proprietary rights which had vested in the ex-proprietor immediately before he lost them by transfer. This is the interpretation which the learned counsel for the applicant desired me to place upon the words. There is no reference to any such portion of

1. *Reported in* ('41) 28 A I R 1941 Nag 278 : ILR (1941) Nag 543, Kesheorao Bapuji v. Ganeshrao.

the proprietary rights anywhere in the section. What then does one mean when one speaks generally of "the proprietary rights" in a portion of land ?

In the ordinary way, when there are a number of cosharers in an undivided village, the proprietary rights are not vested in any one of them but reside in the entire body regarded as a corporate whole. It is true the Act introduces a fiction in the case of the lambardar for certain limited purposes but that fiction does not apply here, and this is even clearer after the decision of the Full Bench in I L R (1941) Nag 54.[2] The expression means that each cosharer has an undivided though defined interest in the whole. Therefore each is possessed of "the proprietary right" in that sense, to the extent of his share. It is not at the time a divided interest though it is a divisible entity. If that is the meaning, and that is how I read the Act, then it does not matter how small a portion of the whole an ex-proprietary tenant acquires. The moment he becomes a cosharer again, whether to the same extent or not, he regains his proprietary rights in the *sir* and the land thereupon ceases to be occupancy land.

It will be noticed that S. 49, C. P. Tenancy Act, to which S. 2 (17), Land Revenue Act, refers, says nothing about a loss of proprietary rights but speaks of the loss of a right "to occupy any portion of his *sir* land as a proprietor." Therefore there is nothing in the wording of the section to assist us in the construction of S. 2 (17). In my opinion, these sections are intended for the benefit of the proprietor of *sir* land and therefore any ambiguity should be resolved in his favour. The construction which I place upon the Act does that, and in my opinion, it is the construction which should be adopted. I decide accordingly. The decisions of the lower Courts are accordingly upheld but in place of the order returning the plaint for presentation to the proper Court, (an order which, as I have said, is meaningless because no other Court can entertain this plaint except the one to which it was originally presented). I direct that a decree be now passed dismissing the plaintiff's claim on the ground that the defendant is not a tenant and that therefore the cause of action on which the claim is based has not been established. Costs in all three Courts will be paid by the plaintiff.

R. K. *Suit dismissed.*

2. ('41) 28 A I R 1941 Nag 21 : 192 I C 472 : ILR (1941) Nag 54 (FB), Gopal v. Shamrao.

(28) A. I. R. 1941 Nagpur 353

GRILLE J.

Sheolal Pandu Pardeshi

v.

Yedu Vyankatsing Rajput.

Second Appeal No. 622 of 1938, Decided on 18th July 1941, from appellate decree of Addl. Dist. Judge, Buldana, D/- 8th July 1938.

Berar Land Revenue Code (1928), S. 183 — Pre-emption — Price fixed apparently much below market price—Court has to fix bona fide value — Vendor is entitled to get difference between real value and fixed value from pre-emptor and is entitled to appeal.

The Court is not bound by the price actually paid if that price is below the market value. The price is not fixed in good faith if the price is much below the value of the land and when the reasons for fixing it at a lower value are apparent it is the duty of the Court to examine the transaction and fix a fair consideration for the interest to be pre-empted. If the vendor by reason of having executed a sale deed is to lose the whole of his interest in the property, he is entitled to the fair value of it and there is no reason why he should be put to the inconvenience for having to recover the difference between the price paid and the fair price from the vendee. In such a case the vendor is entitled to prefer an appeal and to receive the difference from the pre-emptor : ('29) 16 A I R 1929 All 780, *Rel. on.* [P 354 C 2; P 355 C 1]

A. L. Halwe — for Appellant.

T. J. Kedar — for Respondent 1.

Judgment.—This appeal arises out of a suit for pre-emption in Berar. It raises an unusual point in that the allegation is that the ostensible price and the price admittedly paid for the field is considerably less than the fair price instead of in excess as is generally the case in suits of this nature. The matter arose in the following way. The vendor was in need of money for a marriage and approached the vendee to raise it by way of a mortgage. The vendee was not inclined to take a mortgage in view of the existence of a Debt Conciliation Board within the jurisdiction and his fear that his debtors might approach the Board to avoid payments. Consequently, it was arranged between the parties that a sale of the field should be taken but that the parties themselves should treat it as a mortgage and that the field should be re-purchased in three years. Consequently, a sale deed was executed and an area of 13 acres and 23 gunthas assessed at Rs. 14.8.0 was sold for Rs. 200. It is not disputed that the price was paid and the pre-emptor brought a suit under the provisions of S. 183, Berar Land Revenue Code, to pre-empt at the price of Rs. 200.

In the trial Court and in the lower appellate Court, where the plaintiff's claim was decreed, it was urged that the transaction was

not in effect a sale but a mortgage and that the plaintiff could not pre-empt. As the sale deed was in very clear terms, a deed of sale and nothing else, and as no clause providing for a re-purchase had been inserted, the Courts held that they were bound in view of the proviso to S. 58 (c), T. P. Act, to hold that the transaction must be deemed to be a sale and not a mortgage. The position that the parties intended that the land should be re-purchased by re-payment of the sum borrowed is conceded and indeed the very low purchase money itself would confirm this. It cannot be supposed that in the year 1937 the value of the land in Berar assessed at Re. 1 an acre could have fallen so low as Rs. 15 or Rs. 16 to an acre. The finding of the trial Court was that the value of the land was Rs. 800 and this finding was not disturbed in the lower appellate Court. On the issue Is plaintiff liable to pay market value as pre-emption price in case it exceeds the consideration of the sale ?

the trial Court said

But I do not think that plaintiff is liable to pay this much amount (Rs. 800) to defendant 1. He is substituted in his place and is not bound to pay more. He is bound under the law to pay the consideration of the sale deed.

The finding that the plaintiff could pre-empt on payment of Rs. 200 was upheld in the lower appellate Court on a consideration that there was no ground for holding that the price was not fixed in good faith and that consequently no question of the real value of the field arose as that has only to be ascertained if there was an allegation that the price stated in the sale was not fixed in good faith. In this second appeal by the vendor two points were raised. First, that the transaction was a mortgage and secondly that the pre-emptor could only purchase at a fair price to be fixed by the Court. The argument that the transaction is a mortgage is not pressed and indeed cannot be pressed but it is claimed that it is the duty of the Court to fix a fair price even if the ostensible price is below the market value. This contention was not really challenged as such by the defendant-respondent who put the matter in another way by claiming that the vendor who alone brought the appeal was not entitled to bring it and that the appeal lay only by the vendee who was impleaded as a respondent and is unrepresented. It was argued that as the vendee was satisfied with the decision that he should receive Rs. 200 from the pre-emptor the matter was concluded and the vendor had no further concern.

Sub-section (4) of S. 182, Berar Land Revenue Code, only provides for the raising of a presumption, when the ostensible price exceeds the market price, that the price was not fixed in good faith. That is to say, it shifts the burden of proof which primarily lay on the pre-emptor to the opposite party. Sub-section (2) of S. 183, the section under which the suit is brought, provides that "in all such cases the Court shall have power to examine the transaction and fix a fair consideration for the interest to be pre-empted." The Court is thus in no way bound by the price actually paid if that price is below the market value, as the trial Court held. To fix a price in good faith when the parties are entering into a contract of sale implies the existence of a belief that the price stated in the sale deed does represent the value of the land. If the price is decidedly above the value, then of course it is not fixed in good faith. But the same is equally true if the price is much below the value of the land and when the reasons as in this case for fixing it at a lower value are apparent. The price fixed was not intended by either party to the sale deed to represent the true value of the land and therefore was not fixed in good faith. It was then the duty of the Court to examine the transaction and fix a fair consideration for the interest, in this case the total interest, to be pre-empted. The contention raised by the respondent that the vendee alone could appeal has no force. The vendee is a money-lender and not an agriculturist and he is only concerned with the recovery of his principal, and in a transaction between a vendor and a vendee, if it is established that only part of the price was actually paid, the pre-emptor would be directed to pay to the vendee only so much of the price which was paid by him and to pay the balance to the vendor. It would be unreasonable to direct that the whole amount should be paid to the vendee and that the vendor should have to recover from him. This very equitable principle has been followed in A I R 1929 ALL 780.[1] The same principle would apply here. If the vendor by reason of having executed a sale deed is to lose the whole of his interest in the property, he is entitled to the fair value of it and there is no reason why he should be put to the inconvenience of having to recover the difference between the price paid and the fair price from the vendee. In the

1. ('29) 16 AIR 1929 All 780 : 118 I C 229, Abdus Samad v. Abdur Rauf.

circumstances the vendor is entitled to prefer an appeal and to receive the difference.

It is then contended on behalf of the respondent that if the pre-emptor is asked to pay the fair consideration, the case should go back as the matter of market value has not been properly considered in the Courts below. The parties preferred such evidence as to the value of the land as they considered necessary, and on that evidence, a decision has been reached and I can see no reason to interfere with this decision. The result is that the appeal succeeds on the only point which is pressed. The decree of the Courts below is varied to the extent that the price to be paid by the vendor will be Rs. 800, Rs. 200 of which is to be paid to the vendee, defendant 1, and Rs. 600 to the appellant, defendant 2. These sums must be paid on or before 15th September 1941 and in default the plaintiff's suit will be dismissed. In the circumstances of the case I make no order as to costs in this Court.

R.K. *Appeal partly allowed.*

*** (28) A. I. R. 1941 Nagpur 355**

STONE C. J. AND VIVIAN BOSE J.

Kesheorao Gopalrao Buty and others — Plaintiffs — Applicants

v.

Narayan Ganpat Teli and others — Defendants — Non-applicants.

Civil Revn. Appln. No. 536 of 1940, Decided on 18th August 1941, for revision of order of Dist. Judge, Amraoti, D/- 23rd July 1940.

*** Provincial Insolvency Act (1920), S. 38 — Proposal not duly accepted under S. 38 (2) — Still under exceptional circumstances, Court can approve proposal under S. 38 (7).**

When a proposal for a composition has not been duly accepted by the creditors under S. 38 (2), it is open to the Court to approve the proposal under S. 38 (7). But an Insolvency Court could only reasonably approve a proposal that had been by the creditors refused in very extraordinary circumstances involving very unusual behaviour on the part of the creditors refusing, or circumstances such as where the proposal was refused by numbers while the proposal was accepted by a minority representing far more in value that the creditors who refused. Some sort of exceptional circumstance would be necessary before a Court could properly approve a proposal that the creditors had refused.

[P 357 C 1]

M. R. Indurkar — for Applicants.

P. Lobo and N. B. Chandurkar — for Non-applicant No. 1.

Order. — This matter comes before the Court on a reference by the learned Judge sitting in insolvency appellate jurisdiction and is as follows :

When a proposal for a composition has not been duly accepted by the creditors under S. 38 (2), Provincial Insolvency Act, is it open to the Court to approve the proposal under S. 38 (7)?

As the learned Judge remarks, the case law on the subject is scanty, the two cases directly in point being 58 ALL 655[1] where a Bench of the Allahabad High Court held that S. 38 (7) is not attracted unless there has been an acceptance of the proposal, and 30 I C 694[2] where there is a bald statement that if the creditors do not agree that is the end of the matter—a conclusion arrived at apparently from a consideration of the English law. The learned Judges in the first case appear to have arrived at that conclusion because they read "the proposal" in S. 38 (7) as meaning "the proposed composition," and they came to the conclusion that by "proposed composition" meant "agreed composition;" and accordingly if there is no agreement then there is no agreed composition for the Court to consider. The learned referring Judge found difficulty in accepting that view which appeared to him to give to the word "proposal" one meaning at the beginning of the section and in the middle of the section and another meaning at the end of the section. The matter has been glanced at we are told, in a number of other cases, that is to say 54 Mad 823,[3] 25 C W N 137: 61 I C 904[4] and 24 A L J 441.[5] If those cases are referred to, however they will be seen to be raising different points except that in 24 A L J 441[5] there are some observations as to the power of a Judge to act under Section 38 (7) which lend colour to the position taken up by the non-applicants. There are inter alia, the following observations, at page 451, of Boys J.:

. . . . . I am unable to find in the terms of S. 38 any limitation whatsoever of the nature of the proposal which the Judge may entertain, subject only to this that he shall consider it reasonable and to the general benefit of the creditors. The reason for this is not far to seek. The circumstances attending each insolvency may be infinitely varying in their details and an infinite variety of schemes of arrangement may be called for according to the nature of those particular circumstances. Further, if a Judge does not consider a proposal fit to be approved he need not approve it.

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1. ('36) 23 A I R 1936 All 102 : 160 I C 994 : 58 All 655 : 1936 A L J 44, Shankar Lal v. Ali Ahmad.
2. ('15) 2 A I R 1915 Oudh 173 : 30 I C 694 : 18 O C 125, Shafiq-uz-zaman v. Deputy Commissioner, Barabanki.
3. ('31) 18 A I R 1931 Mad 344 : 132 I C 134 : 54 Mad 823 : 61 M L J 173, Sevugan Chettiar v. Murugappa Chettiar.
4. ('21) 8 A I R 1921 Cal 376 : 61 I C 904 : 25 C W N 137, Behary Lal v. Harsukh Das.
5. ('26) 13 A I R 1926 All 361 : 97 I C 556 : 24 A L J 441, Ganga Sahai v. Mukarram Ali Khan.

Whether in that case the proposal had ever been before the creditors is not clear, but apparently it was not. 54 Mad 823[3] is obviously not in point because in that case the majority in number and three-fourths in value of the creditors had accepted the proposal.

Section 38, Provincial Insolvency Act, is similar in its general outline to S. 16, English Bankruptcy Act. It is, however, shorter and leaves out the following words which appear in S. 16 (5), English Bankruptcy Act —"The debtor of the Official Receiver may after the proposal is accepted by the creditors, apply to the Court to approve it . . ." In other words, the English Bankruptcy Act provides the following machinery : (1) proposal by the debtor, (2) examination of the proposal by the creditors, (3) acceptance or rejection by the creditors, and (4) if and only if, acceptance by the creditors, application to the Court. As Lord Esher, M.R., observed in (1886) 17 Q B D 244[6] at pp. 250, 251 speaking of the earlier English Bankruptcy Act :

> In my opinion this Act was passed because it had been proved to the satisfaction of the Legislature that a majority of creditors, however large, was not careful, and was not to be trusted : that on the contrary, the creditors were generally utterly careless, that they wrote off their debts as bad, and agreed to terms which might give some possibility—an evanescent chance—of their getting something out of the wreck. It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the Court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing a majority of creditors from dealing thus recklessly, not only with their own property, but with that of the minority, and of enforcing, so far as the Legislature could, a more careful and moral conduct on the part of the debtors.

Accordingly, even granted an acceptance by the creditors of the proposal, the Court is given a power to disapprove. On the contrary in such a case it may approve the composition, and when it approves then certain consequences follow. In India the chain of events is as follows : (1) proposal by the debtor, (2) consideration of the proposal by the creditors, (3) acceptance or rejection by the creditors and (4) application to the Court. The Court thus comes into the story, so far as one can see, even though the creditors have refused the proposal. It is, in our opinion, impossible to read the words in S. 38 (7) "may either approve or refuse to approve the proposal" as follows : "may either approve or refuse to approve the accepted proposal." The language used in that section of the Provincial Insolvency Act copies in a number of its provisions so closely the English Act that it is impossible that the draftsman of this Act had not in front of him the English Act. He has deliberately left out—and we must assume that the Legislature with equal deliberation omitted—the words which cause the Court to exercise its powers relative to a proposal for composition or scheme of arrangement only after it has been accepted by the creditors. It is not a little matter ; it is fundamental. We can only imagine that they have been left out because in India it was thought desirable to give the Court wider powers than in England.

At the same time there can, in our opinion, be no doubt at all that S. 38 is primarily dealing with proposals made by a debtor intended by him to lead to a settlement with his creditors as a matter of agreement. That is the general underlying notion, and in order to guard against the evils mentioned by Lord Esher the Court is given a power to stop agreement resulting in a settlement if it is desirable in the opinion of the Court in the interests of the general body of creditors or of public morality so to do. But the Indian Act seems to us also to envisage a possibility that public morality and the interests of the general body of creditors may both require that the proposal be accepted and may at the same time envisage that some malicious creditor or creditors out of sheer spite or some other oblique motive might prevent a settlement desirable in the interests of the general body of creditors. Accordingly the Legislature has armed the Court with power to accept the proposal even though the creditors have not accepted it.

We put a case : A very heavily indebted debtor with five creditors. To one he owes three lakhs ; to one he owes Rs. 20,000 ; and to the other three he owes Rs. 5000. The three put their heads together and decide to prevent this composition for reasons that are entirely unconnected with the fair settlement of the insolvency, and consequently prevent the two whose debts enormously exceed theirs in amount from agreeing to a composition. It might be that in some rather exceptional case like that it would be the duty of the Court to approve the proposal even though the creditors had refused

6. (1886) 17 Q B D 244 : 55 L J Q B 244 : 34 W R 493 : 3 Morrell 90, Ex parte Reed.

to accept it because it will be noted that S. 38 (2) requires that the acceptance should be not only by three-fourths in value but also by a majority in number of the creditors. In the case we put the majority, three, represent only a tiny part of the value but are able, for oblique motives, to defeat a proposal desired by those who have by far a larger liability at stake.

That of course is only a possible reason for the Indian Legislature leaving out these words "may, after the proposal is accepted by the creditors, apply to the Court." As a matter of simple construction we follow the golden rule that a statute is given its grammatical meaning bearing in mind the general purpose of the part and the whole of the statute. In this case the section starts with a proposal which clearly means the proposal made by the debtor. It ends with a proposal which, in our opinion, means the proposal made by the debtor. The fact that this return to the term "proposal" is deliberate is strengthened by the fact that in sub-s. (6) the Act speaks of composition or scheme. Had the Legislature in sub-s. (7) by "proposal" meant "either composition or scheme accepted or proposal accepted," seeing that it had spoken of the proposal being accepted in sub-s. (2), nothing would have been easier than to say "the Court may approve or refuse to approve the accepted proposal.

At the same time we make the observation that, in our opinion, an insolvency Court could only reasonably approve a proposal that had been by the creditors refused in very extraordinary circumstances involving very unusual behaviour on the part of the creditors refusing, or circumstances such as we have indicated above, that is to say, where the proposal was refused by numbers while the proposal was accepted by a minority representing far more in value than the creditors who refused. Some sort of exceptional circumstance would, in our opinion, be necessary before a Court could properly approve a proposal that the creditors had refused. In the light of the above, we answer the question as follows : Yes.

The matter will now go back to the referring Judge for disposal.

R.K. *Reference answered.*

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(28) A. I. R. 1941 Nagpur 357

STONE C. J. AND VIVIAN BOSE J.

Seth Narainbhai Ichharam Kurmi and another —Defendants 2 and 4 — Appellants

v.

Narbada Prasad Sheosahai Pande, Plaintiff and others — Respondents.

Second Appeal No. 454 of 1937, Decided on 17th February 1941, from appellate decree of Addl. Dist. Judge, Jubbulpore, D/- 12th April 1937.

(a) Specific Relief Act (1877), S. 42—Suit by plaintiff for declaration that he was owner — Fact of his being in possession is not enough— He must show subsisting title.

In a suit for a declaration that the plaintiff was the owner of certain properties, the fact that the plaintiff is in possession is not in itself enough. He must also show a subsisting title. [P 359 C 1]

(b) Adverse possession — Legal nature of possession explained—Possession and occupation are distinct.

The concept of possession as understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely the *animus possidendi*, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession in law does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. Although physical occupation is ordinarily the best and most conclusive proof of possession in this sense, the two are not the same. Though there must always be physical ouster from these rights, that does not necessarily import physical ouster from occupation especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum necessary naturally varies in each case. [P 360 C 1]

(c) Adverse possession — Minor — Minority does not prevent ouster and stop running of adverse possession — Minor only gets another three years after attaining majority if time expires before three years — Occupation by minor is not equivalent to possession—Question to be considered is whether legal rights of ownership were exercised on his behalf by others — If so whether minor was in occupation becomes immaterial—Stranger entering on land and physically ousting minor from occupation as well as possession and setting up adverse title in himself — Time runs against minor from that moment — *S* bequeathing property to plaintiff and dying in 1917—Plaintiff minor in 1917 and living with *S's* widow—Widow asserting hostile title and obtaining mutation of all *S's* properties in her own name on 4th January 1918 and continuing in hostile possession till 1932—Plaintiff alleging to have been kept out of knowledge of will by fraud till 1928 — Plaintiff turned out by widow in 1921, becoming major in 1922 and regaining possession as owner in 1932 — Plaintiff held lost his title under S. 28, Limitation Act, 12 years after 4th January 1918 unless he could avail himself of S. 18, Limitation Act.

Minority does not prevent ouster and does not stop the commencement or running of adverse possession. The only privilege which a minor gets is another three years after attaining majority, if the time expires before the three years. Occupation by a minor is not equivalent to possession by him. Strictly speaking, there can be no such thing as possession by a minor qua minor because he is incapable of having *animus possidendi* and of exercising legal rights of ownership. They are exercised on his behalf by others and the question always is whether they were so exercised or not. If they were, then whether the minor was in occupation or not would be immaterial. So also if there is nobody on the property, the law will then impute possession to the rightful owner. But that is a rule which applies universally and is not special to minors. But if a stranger enters on the land and physically ousts the minor from occupation as well as from possession and sets up an adverse title in himself, then time begins to run against the minor from that moment: ('22) 9 AIR 1922 Mad 12, *Rel. on*; ('39) 26 A I R 1939 Nag 7; ('39) 26 A I R 1939 All 257; ('38) 25 AIR 1938 Nag 89; ('28) 15 AIR 1928 Mad 1113 and 35 Bom 79, *Disting.* [P 360 C 2; P 362 C 2; P 363 C 1]

The position is all the stronger when the person entering into possession is the heir at law: ('41) 28 A I R 1941 Sind 50, *Rel. on.* [P 363 C 1]

One S died on 1st January 1917 leaving behind his widow. Before his death he executed a will on which the plaintiff founded his title, stating that he was fraudulently kept from knowledge of the will by the widow and that he did not come to know about its existence until the year 1928. When S died the plaintiff was living with the widow and was a minor, being then about 14 years of age. The widow was in possession and managed the estate and immediately set up title in herself and applied for mutation in her name. This was granted on 4th January 1918. The plaintiff however was turned out of the house by the widow in 1921 and did not regain possession as owner until 1932. The plaintiff became major in 1922 and the widow from 4th January 1918 thus continued in hostile and adverse possession till 1932:

Held that under S. 28 the plaintiff lost his title after the expiry of 12 years from 4th January 1918 and therefore had no title in 1932 when he regained possession unless the plaintiff could avail himself of S. 18, Limitation Act. [P 361 C 1]

(d) Specific Relief Act (1877), S. 42—Suit by plaintiff seeking declaration that he is owner of certain property — Plaintiff acting fraudulently —Relief cannot be granted.

A plaintiff seeking a declaration that he is the owner of certain property cannot be granted the equitable relief when he is shown to have acted fraudulently. [P 361 C 2]

(e) Hindu law — Adoption — Dharmputra is not recognized son under Hindu law — His proper guardian is his natural father and not widow of adoptive father.

A "dharmaputra" is not a recognized son under the Hindu law. His proper guardian would be his natural father and not the widow of his adoptive father. [P 362 C 2]

M. R. Bobde and K. C. Jain — for Appellants.

R. N. Padhye and V. K. Sanghi — for Respondent 1.

Judgment. — The plaintiff sues for a declaration that he is the owner of the property in suit consisting of two houses. He states that the cloud on his title is a claim by defendants 2, 3 and 4 against defendant 1, Budhabai in which they have attached this property as hers and brought it to sale. The facts are as follows: One Sheosahai died on 1st January 1917, leaving behind a widow, defendant 1, Budhabai. Before his death he executed a document, Ex. P-4, dated 24th June 1911, called a tabniyatnama on which the plaintiff now founds his title. The plaintiff states that he was fraudulently kept from knowledge of this document by Budhabai and that he did not come to know about its existence until the year 1928. But of that later. When Sheosahai died the plaintiff was living with Budhabai and was a minor, being then about 14 years of age. Budhabai was in possession and managed the estate along with an agent Shankerlal. She immediately set up title in herself and applied for mutation in her name. This was granted on 4th January 1918. Thereafter the plaintiff instituted an application for probate on the basis of a will which purported to leave all the property to the plaintiff reserving only a right of maintenance for Budhabai. This suit was instituted in the year 1920, but it was held that the will was a forgery and the suit was accordingly dismissed in the following year. The plaintiff states that he was thereupon (1921) turned out of the house by Budhabai and that he did not regain possession until 1932.

The plaintiff had evidently become involved in debts by this time and he states that he was obliged to apply to the insolvency Court for adjudication as an insolvent. The application was made in the year 1922 but the plaintiff was discharged in the year 1928. During this time however Budhabai began running up debts and was sued by her creditors. One set of creditors filed Civil Suit No. 30 of 1926 against her and another set Civil Suit No. 35 of 1929. The houses in suit were put up to sale and auctioned in the year 1929. Then the plaintiff instituted a suit as a pauper claiming these properties. It was held however that he was not a pauper, but it appears that the auction sale had by then been set aside on a technical ground, and the plaintiff states that Budhabai, seeing that he had an unchallengeable title under the tabniyatnama (Ex. P-4), let him into possession in 1932. It was therefore unnecessary for him to proceed with the suit. A couple of years later these houses were again put up to sale in execution of the decrees obtained against Budhabai and they

were sold on 3rd May 1934 and purchased by defendant 4. The sale was confirmed on 19th January 1935. Therefore the plaintiff files the present suit for a declaration that he is the owner. The suit was launched on 24th July 1935.

In so far as the plaintiff's title is founded on Ex. P-4, an interesting question of interpretation arises on which it is possible to take two views. The first Court, taking one view, held that the document did not amount to a will, and, as no adoption could be effected by the mere execution of a document, it held that the deed was ineffective to pass title. The lower appellate Court took the other view and held that the document amounted to a will in the plaintiff's favour. A number of cases were cited in argument in support of these two interpretations. On the one side were cited 28 ALL 488[1] at p. 495, 23 Bom 271,[2] confirming 12 Bom 185[3] at page 200, 11 Cal 463[4] at p. 483 and 16 Mad 355[5] at p. 359. On the other side were cited 54 Mad 440,[6] 24 Mad 214[7] and 3 I A 253.[8] None of these cases is exactly in point and an elaborate analysis of them would be necessary to distinguish and reconcile them. We do not think it will be either profitable or necessary to enter upon such a task in this case because of the view we take of another point, a point which is enough to dispose of the appeal. That point is whether the plaintiff had a subsisting title at the date of the suit. He is in possession, but possession in itself is not enough to entitle him to the declaration he seeks. He must also show title. For this purpose we will have to assume so far as this appeal is concerned, because we do not intend to decide the point here, that Ex. P-4 operated as a will and gave the plaintiff title on Sheosahai's death, that is to say, in 1917. The question then is whether he ever lost this title and if so, did he regain this, or another title, before suit?

The facts set out in the plaint are as follows. The plaintiff states that Sheosahai brought him up as a son and that he lived with Sheosahai while the latter was alive and continued to live in his house with Sheosahai's widow Budhabai after Sheosahai's death. But at the time of Sheosahai's death, although Budhabai outwardly exhibited signs of motherly affection towards him she was

> engaged in a bitter secret plot against the plaintiff, to oust him from all the property bequeathed to the plaintiff by the deceased Sheosahai Pande . . . and they aimed that Budhabai would continue undisturbed in possession of the whole property as an heir of Sheosahai and after her death Shankarlal (with whom she was plotting) who had begun to declare himself as the nearest reversioner would be entitled to the same.

The plaint then continues that in pursuance of this plot to oust the plaintiff Budhabai obtained a succession certificate in her name on 4th January 1918 and got most of the documents which stood in Sheosahai's name renewed in her own; in other words, she assumed complete management, control and ownership of Sheosahai's estate. But in spite of this the plaintiff continued to reside with her, along with his brothers and his sister, and the social relations between them appear to have remained unchanged. All this time however Budhabai fraudulently suppressed the tabniyatnama, (indeed she is said to have burnt it), and fraudulently kept the existence, execution and registration of it from the knowledge of the plaintiff. When the plaintiff attained "years of discretion" he discovered that Sheosahai had accepted him as a son and so he began to make enquiries. Budhabai and Shankerlal were afraid that he might stumble across knowledge of the fact that the tabniyatnama had been executed and that it had been registered, and they were afraid that the plaintiff might go to the Sub-Registrar's office and discover the fraud. Therefore they hit upon the extraordinary expedient of forging a will in the plaintiff's favour and placing this extraordinary document in his possession, or rather of making sure that it would fall into his hands, hoping thereby that he would be induced to seek for probate. But they took care to make the forgery so obvious and clumsy that they knew no Court would uphold it. The ruse succeeded. The gullible plaintiff applied for probate in 1920 and his application was dismissed, as anticipated, in the following year. He was then a minor, only 16 years of age (the first Court gives the date of his birth as 26th September 1904), but he gave his age as 19 and petitioned as a major. He says

1. ('06) 28 All 488 : 33 I A 97 : 3 A L J 415 (P C), Lali v. Murlidhar.
2. ('99) 23 Bom 271 (P C), Karamsi Madhowji v. Karsandas Natha.
3. ('88) 12 Bom 185, Karsandas Natha v. Ladkavahu.
4. ('85) 11 Cal 463 : 12 I A 72 : 4 Sar 610 (P C), Fanindra Deb v. Rajeshwar Das.
5. ('93) 16 Mad 355, Abbu v. Kuppammal.
6. ('31) 18 A I R 1931 P C 109 : 131 I C 318 : 54 Mad 440 : 58 I A 148 (P C), Krishna Rao v. Sundara Siva Rao.
7. ('01) 24 Mad 214 : 27 I A 162 : 7 Sar 782 (P C), Subbarayar v. Subbammal.
8. ('77) 3 I A 253 : 26 W R 91:3 Sar 653:3 Suther 338 (P C), Nidhoomoni Debya v. Saroda Pershad.

that "the ladies" told him that that was his age.

As soon as he lost his probate case on the will, Budhabai is said to have actually turned him out of the houses in suit (see para. 9 of the plaintiff's rejoinder dated 30th September 1935). The plaintiff then became resigned to his fate, and being unable to meet his debts had recourse to the Insolvency Court. He was adjudicated in 1922 and remained an insolvent till 1928 in which year he was discharged. The learned counsel for the plaintiff argued that these facts disclose that his client never lost title to the estate and that the title is still in him. He said that the estate vested in the plaintiff on Sheosahai's death because of the will (tabniyatnama) Ex. P-4. The plaintiff lived in the houses in suit down to 1921 and then again from 1932 and therefore he was in possession of the property between 1917 and 1921 and consequently however much Budhabai may have set up a title in herself it had no effect on the plaintiff's rights because he was not ousted from the property.

This is an argument we are unable to accept. It confuses bare occupation with possession. The two are very different. The concept of possession, at any rate as it is understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely the *animus possidendi*, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession of which the law speaks does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. It is true that physical occupation is ordinarily the best and most conclusive proof of possession in this sense but the two are not the same. It is also true that there must always be physical ouster from these rights but that does not necessarily import physical ouster from occupation especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum naturally varies in each case. The plaintiff states in his plaint that he knew nothing about his rights till 1928. He was fraudulently kept in ignorance of them. On the other hand he knew that Budhabai had set up a title in herself and he, being taken in by her, believed that she was the rightful owner. How then could he have had the intention, desire, and determination, to exercise these rights which make up possession in law when he was convinced that he did not possess them? How could he have been seized of the mental element which is necessary to complete the legal concept of possession, that is to say, how could he have possessed the necessary *animus possidendi*? Of course he was a minor during a part of this time but he attained majority in 1922 (29th June 1922 to be exact) and he says that he was kept in ignorance of his rights for another six years. Also, in any case, even minors have guardians who can act for them and exercise rights on their behalf. The plaintiff's father was his guardian but he did not raise a finger, presumably because (on the plaintiff's case) he was also deceived. But more of that later. At the moment it is enough to say, though this is denied and will have to be developed further in a minute, that minority does not prevent ouster and does not stop the commencement or running of adverse possession. The only privilege which a minor gets is another three years after attaining majority, if the time expires before the three years.

On the facts given, and for the moment we are accepting at their face value the facts set forth in the plaint, the plaintiff never entered into possession till 1932, and Budhabai set out her title as an heir, asserted this hostile title and entered into effective possession of the property from the moment of Sheosahai's death, and in any event from 4th January 1918. Thereafter, she continued in continuous hostile and adverse possession till 1932. As regards the plaintiff's exclusion from possession till 1932, this is what the plaintiff says in paras. 13 and 14 of the plaint:

> That the plaintiff thereafter (that is to say after discovering the existence of the registration copy of the tabniyatnama) filed a suit before the Additional District Judge, Jubbulpore, in forma pauperis to get back the estate of Seosahai.

It is clear therefore that according to the plaintiff he had not up to this time got back the estate even though he was still living with Budhabai, and, so far as his social relations with her were concerned, was on the same terms with her as he had been from the moment of Sheosahai's death. The plaint continues, after setting out that the pauper application was dismissed:

> That after the dismissal of the pauper application the plaintiff with his personal attempt *(Sic)* in or about 1932 got possession of the residuary property of Sheosahai on which he could lay his hands, and is in possession since then of houses Nos. 439 and 439/1 . . . . . as owner.

These are the houses in suit, so it is quite clear on his own allegations that he did not enter into possession as owner till 1932. Budhabai's adverse possession therefore lasted from 1918 (at the latest) till 1932. The 12 years expired in 1930, and so at the end of that 12 years the plaintiff's title determined under S. 28, Limitation Act. It follows he had no title in 1932 and so had either to prescribe for one afresh or to obtain a conveyance from Budhabai in whom the title vested. He had done neither up to the date of the suit, and so on the facts set out in the plaint itself this suit is bound to fail unless the plaintiff can avail himself of S. 18, Limitation Act. We may mention that the plaintiff's minority will not avail him because he attained majority in 1922 and the three years rule would only carry him as far as 1925. But as the 12 years did not expire till 1930 he had limitation till then. It was argued that the plaintiff at any rate regained possession during the years 1920 to 1921 while he was fighting the probate case. He was in occupation, as he lived with Budhabai as before, and as he asserted a title to the property it must be presumed that he regained possession because the law will always presume in favour of the rightful owner and will always assume that possession resides in the person having title. This might have been so but for the plaintiff's own evidence which excludes any such possibility. In the first place he does not state that the character of his occupation changed in any way. The plaintiff and Budhabai only lived in a part of one of the houses. The rest was in the possession of tenants and they continued to attorn to Budhabai. The documents which she had had altered into her name remained as before and she continued to assert her own title and exercise every act of ownership. And to cap all, the plaintiff states in the witness box as P. W. 2:

> The suit relates to two houses Nos. 439 and 439/1 at Galgalatal. They have been in my possession from 1932. Before that they were in possession of Mt. Budhabai.

That finally disposes of any doubt as to where possession lay up till 1932. We are also influenced by another fact. The plaintiff found it necessary to set up an elaborate case of fraud. This was necessary in order to enable him to obtain the benefit of S. 18, Limitation Act. It is obvious on the conclusions which we have reached above that the plaintiff lost title to the property by 4th January 1930 and that he had not regained it by 7th February 1935 when the suit was filed. But if he was fraudulently kept out of knowledge of his rights by Budhabai who was ousting him limitation would not commence to run against him until he discovered the fraud, because of S. 18, Limitation Act. The plaintiff states that he discovered the fraud in 1928. In that event he would have had 12 years from 1928 in which to sue Budhabai for possession, that is to say, the title would still be in him during that time. But, according to the plaintiff, Budhabai saw the futility of opposition and voluntarily surrendered possession in 1932, or rather raised no opposition when he turned her out in that year, and so the plaintiff was saved the necessity of suing. And as he regained possession while the title still resided in him and continued to be in possession till the date of this suit, he is able to show a good title and is thus entitled to his declaration. That contention would of course be sound if the facts pleaded are correct. But, before we examine the facts, we desire to observe that this elaborate plea is wholly unnecessary unless the plaintiff had in fact been ousted from possession from 1918 till 1932. The fact that the plaintiff found it necessary to ground his case on these assertions (the fraud was not set up in the plaint as an alternative case, but as the main and only case) indicates that he would have lost title had it not been for the fraud.

But as regards this case of fraud, we are wholly unable to believe it. In order to succeed, the plaintiff has to establish that he was totally ignorant about the Tabniyatnama and its registration till 1928. What are the facts? (After going through the facts their Lordships proceeded). On these facts the plaintiff is out of Court. Apart from all else no equitable relief such as this would be granted when the plaintiff is shown to have acted fraudulently. However, we need not decide the case on that point because our conclusion is that the plaintiff had no subsisting title at the date of suit. The questions we have examined at such length are questions of fact, and this is a second appeal. Had there been findings on these facts by the lower appellate Court we would have had no power to go behind them. But we are not able to discover any such findings. The first Court appears to have reached a somewhat muddled conclusion on the question of fraud as set up by the plaintiff because it answered issue 5 (a) by stating that the plaintiff had been kept out of the knowledge of his right to institute the suit by

the fraud of defendant 1 and her representatives, defendants 2 to 4. Nevertheless, it held on issue 6 that defendant 4 was a bona fide purchaser for value. It may be we are doing the learned Judge an injustice because the first of those findings is not to be found in the body of the judgment, and it is possible that "defendant 4" is a slip for "defendant 3," but as the judgment stands that is how it reads. There is no finding about the plaintiff's possession before 1932. As regards that, the first Court has assumed, as indeed it was bound to assume on the pleadings, that the plaintiff would be out of Court unless he could avail himself of S. 18, Limitation Act. The lower appellate Court gives no finding on the question of fraud and only considers the legal position which would result if fraud were assumed to exist. It gives no finding on the question of possession either but assumes that the plaintiff would be out of Court unless he could avail himself of S. 18 because, to use the language of the learned Judge, "the ordinary period of 12 years for bringing his suit for possession of property expired in 1929." That of course assumes that the plaintiff was out of possession from 1917 which is the year of Sheosahai's death. But we are unable to treat these assumptions as findings.

It was argued that the fact of fraud was not challenged by defendant 4 in the lower appellate Court. Two of the pleaders who had appeared there also appeared before us, one on each side. One thought doubtless with the clearest bona fides that the finding had not been challenged and the other, who appeared for defendant 4 along with Mr. K. B. Gupta, a very senior and experienced lawyer who is now dead, was clear that it had been. Mr. Bobde who was in possession of Mr. Gupta's notes stated that they appeared to show that the point had been taken. We can hardly believe that it was not, especially with such a careful and experienced lawyer as Mr. K. B. Gupta in charge, because unless it was taken the plaintiff would be found to succeed and there would have been no point in opposing the appeal at all. We feel we are justified in the circumstances in going into the facts. That leaves outstanding a question of law which was taken for the first time before us in second appeal. The learned counsel for the plaintiff-respondent argued that adverse possession can never run against a minor till he comes of age and that he has 12 years from that date because whoever enters upon a minors's property will be considered to have entered in a fiduciary capacity, either as a guardian or a bailiff, and will not be allowed to say that he entered in his own right. The following cases were relied on: 1938 N L J 418,[9] I L R (1939) ALL 454,[10] A I R 1938 Nag 89[11] at p. 91, 35 Bom 79[12] at p. 89 and A I R 1928 Mad 1113.[13] It was also argued, though somewhat feebly, that Budhabai was in fact the de facto if not the legal guardian of the plaintiff because of EX. P-4.

As to this we are clear that Budhabai was not the plaintiff's guardian either de facto or de jure. The plaintiff at best is a legatee under a will. That would not make Budhabai either his mother or his guardian. A "dharmaputra," (which is the status the plaintiff acquired under the tabniyatnama) is not a recognised son under the Hindu law. His proper guardian would be his natural father. As to her being a de facto guardian, we do not think she was that either even though the plaintiff lived with her and was maintained by her till 1921. Budhabai set up a title to the estate and entered upon it in her own right as heir from the very beginning according to the plaintiff's own story. She never purported to act on his behalf or in his interests. Also, although the plaintiff lived with her so did the plaintiff's mother till she died in 1918 or 1919, and the plaintiff's father continued to visit them and took charge of the important forged will. Budhabai says that she handed it over to the plaintiff's mother who in turn gave it to her husband, the plaintiff's father, and he gave it to the plaintiff. We do not think there is anything in this argument. As regards the legal position we do not think the rulings quoted decide the position for which the plaintiff's learned counsel contends. This very contention was fully considered in 45 Mad 361[14] at pp. 364 to 369 and was negatived. We agree. The fallacy underlying the argument of the learned counsel for the plaintiff is in assuming that occupation by a minor is equivalent to possession by him. Strictly speaking there can

9. ('39) 26 A I R 1939 Nag 7 : 181 I C 203 : 1938 N L J 418, Maherban v. Usufkhan.
10. ('39) 26 A I R 1939 All 257 : 181 I C 945 : I L R (1939) All 454: 1939 A L J 94, Aziz Uddin v. Maqbul Husain.
11. ('38) 25 A I R 1938 Nag 89 : 173 I C 103, Ramji v. Madki.
12. ('11) 35 Bom 79: 8 I C 639: 12 Bom L R 956, Vasudeo Atmaram v. Eknath Balakrishna.
13. ('28) 15 A I R 1928 Mad 1113: 117 I C 113: 51 Mad 977 : 55 M L J 733, Mahalakshmamma v. Suryanarayana.
14. ('22) 9 AIR 1922 Mad 12: 70 I C 678: 45 Mad 361: 42 M L J 262, Seetaramaraju v. Subbaraju.

be no such thing as possession by a minor qua minor because he is incapable of having an *animus possidendi* and of exercising legal rights of ownership. They are exercised on his behalf by others and the question always is whether they were so exercised or not. If they were, then whether the minor was in occupation or not would not matter. He might be at the other end of the world, at school or with friends, but so long as somebody is exercising rights over his property on his behalf "possession" in this sense will be imputed to him. So also if there is nobody on the property, the law will then impute possession to the rightful owner. But that is a rule which applies universally and is not special to minors.

But if a stranger enters on the land and physically ousts the minor from occupation as well as from possession and sets up an adverse title in himself, then we have no doubt that time begins to run against the minor from that moment. Whether the person so entering will be allowed to set up these rights is another matter. If he enters in a fiduciary capacity such as a guardian or an agent, of course he will not. But if he is a stranger, then we are clear he can, and the cases cited in the ruling we have referred to so hold, as does the ruling itself. The position is all the stronger when the person entering into possession is the heir at law: *see* as to this, I L R (1940) Kar 534[15] at pp. 566 and 567. The next step is when the minor though allowed to occupy a part of the property is effectively ousted from "possession". But before considering that, consider the question of an adult in similar circumstances. If nothing is known, nor if the facts are doubtful, then of course the law will imply that of the two in simultaneous occupation "possession" is with the one in whom the title resides. But if it is shown beyond doubt that he is ousted from all effective "possession" and is permitted to remain in occupation as a bare licensee and he accepts that position, then of course the usual presumption will not apply. Is there any difference when the person ousted is a minor? We think not because in that a minor cannot in himself possess the *animus possidendi* his physical presence on a part of the premises is neither here nor there, and the sole questions then are: (1) Was he in fact ousted, and (2) Will the person ousting him be permitted to show that he did so. The ouster in such a case would be effected by turning the guardian of the minor out of effective possession and control of the property. Not only would it be ridiculous to assert that a young child who is permitted to occupy a room in a house along with his little brothers and sisters on sufferance is in effective possession in the circumstances we have described but it would lead to undesirable social consequences. Nobody would be safe in extending hospitality and showing kindness to any child who had even the remotest pretension to one's estate if that were the law, lest it should hereafter transpire that one's own title was shaky and that the real title resided in the child.

As to the cases cited, 1938 N L J 418[9] is not in point. Only the general observation that dispossession imports ouster, "an actual driving out from possession against the will of the person in possession" is relevant. That can be accepted, but the question whether this can be effected in circumstances like the present was not considered because the case had nothing to do with minors. So also I L R (1939) ALL 454.[10] No minor was involved there, and what was decided, was that when no one is in possession the possession of the rightful owner is deemed to continue. But here Budhabai was in possession and she was the heir at law. A I R 1938 Nag 89[11] and A I R 1928 Mad 1113[13] were both cases of guardians and so are not in point here. In 35 Bom 79[12] the distinguishing feature is that the person entering into possession did not set up a title adverse to the minors till 1891 and this was after the minors had attained majority (see p. 89 of the report). We quite agree that if the person entering upon possession does not set up his or her title, it will be presumed that the possession was on behalf of the minors because the law will never presume a wrongful act. The position is very different when there is a wrongful assertion of title and ouster, as here.

As to whether Budhabai should be allowed to assert a hostile title we have already pointed out that she did not occupy a fiduciary capacity vis-a-vis the plaintiff and that his own parents, both father and mother, were alive when Budhabai ousted him and that they knew all about it. She was the heir at law and had in our opinion every right to assert her own title. There is no estoppel and none has been pleaded. The point was taken here for the first time. The appeal succeeds. The decree of the

15. ('41) 28 A I R 1941 Sind 50 : 194 I C 137 : I L R (1940) Kar 534, Khemchand Dayaram v. Dayaram Jessomal.

lower appellate Court is set aside and that of the first Court restored. The plaintiff-respondent and defendant 1 will pay the costs of the appellants (defendants 2 and 4) here and in the lower appellate Court. Defendant 3 who has not appealed will bear his own costs in this and the lower appellate Court. We direct defendant 1 to pay the appellants' costs because she has resisted their right to execution of decrees passed against her and has been as much interested in fighting this litigation as the plaintiff himself. There will however be only one set of costs in these two Courts. Costs in the first Court will be as decreed by that Court.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Nagpur 364

NIYOGI AND CLARKE JJ.

Cawashah Bomanji Parakh

v.

Prafulla Nath Rudra.

Second Appeal No. 516 of 1938, Decided on 5th February 1941, from appellate decree of Third Additional District Judge, Nagpur, D/- 29-4-1938.

(a) Specific Relief Act (1877), S. 56 (k)—Suit for injunction restraining building of house—Plaintiff must show special damage or injury—Mere fact that Municipal Committee acted beyond its powers in granting sanction for construction of building does not by itself entitle plaintiff to sue.

In a suit for injunction restraining the building of a house it is incumbent on the plaintiff under S. 56 (k) to show some special damage or injury. The mere fact that the Municipal Committee acted beyond its powers in granting the sanction for construction of the house is not by itself sufficient to entitle the plaintiff to sue: (1858) 121 R R 80; 1 Bom 132; 22 Bom 646 and 6 N L R 53, *Rel. on.* [P 366 C 1, 2]

(b) Tort—Nuisance—Whether act complained of amounts to nuisance—Test—Criterion is ordinary physical comfort of human existence according to plain, sober and simple notions and not according to elegant and dainty modes and habits of living—Discomfort or inconvenience must be substantial to warrant legal interference.

To determine whether an act complained of as a nuisance is strictly so or not is to be judged by the ordinary standards of persons residing in the neighbourhood and the criterion would be the ordinary physical comfort of human existence according to plain, sober and simple notions obtaining amongst people and not according to the elegant and dainty modes and habits of living. It is not the standard of a petulant, cynical, hypersensitive or fastidious person that would furnish a guide but that of a person who expects to enjoy the ordinary comforts of a decent and healthy life in the local area where he resides. The inconvenience or discomfort must be of a substantial character to warrant legal interference: *Case law relied on.* [P 366 C 2]

(c) Jurisdiction — Lack of jurisdiction must be distinguished from wrong exercise of jurisdiction — Act done without power is null and void—Act done in erroneous exercise of jurisdiction is voidable — Statutory body must act strictly within statutory powers — Civil Court cannot rectify wrong decision of statutory body.

A statutory body like a municipality acting under a statute must keep strictly within its statutory powers: ('32) 19 A I R 1932 Bom 259, *Rel. on.* [P 367 C 1]

The lack of jurisdiction must be distinguished from the wrong exercise of jurisdiction. While an act done without any power to do so is null and void, an act done in erroneous exercise of that jurisdiction is voidable: that is rectifiable by a superior authority. Where the decision of the statutory body is wrong as distinguished from being beyond its power, the civil Court cannot rectify the wrong: ('21) 8 A I R 1921 Cal 34 (F B) and 25 Bom 337 (P C), *Rel. on.* [P 367 C 1]

(d) C. P. Municipalities Act (2 of 1922), Ss. 97 and 98—Building bye-laws under, framed by Nagpur Civil Station Sub-Committee, bye-law 10 and bye-law 10, proviso 1—Construction of proviso 1 — Word "area" in proviso 1 refers to plots and not to bungalow area—Sub-Committee by resolution making bye-law 10 (a) and (b) applicable to bungalow area excepting basti area and new settlements and bye-law 10, proviso 1 to settlements other than bungalow area — Resolution held ultra vires as altering bye-law 10.

Proviso 1 to bye-law 10 does not *proprio vigore* come into operation so as to make it obligatory on the Sub-Committee to grant permission to erect building on plots less than one acre, but it confers discretion on it to be exercised in each case on merits. The word 'area' in proviso 1 has reference to the plot and not to that part of the Civil Station which is popularly known as a 'bungalow area.' The plain meaning of proviso 1 is that if the committee decides to give permission to erect bungalows in plots less than one acre it should do so on the conditions laid down in that proviso, but it makes it clear that the committee has no power to permit a building on any plot less than 50′ x 50″.

[P 367 C 2; P 368 C 1]

The Civil Station Sub-Committee by a resolution declared generally that bye-law 10 (a) and (b) applied to the whole of the Civil Station area, that is bungalow area, excepting the basti area and new settlements and that proviso 1 to bye-law 10 would apply to the settlements other than the bungalow area:

Held that in so far as the resolution was intended to be operative and not merely interpretive it was ultra vires and of no effect since its effect was to alter the bye-law. It was open to the Sub-Committee to frame a new bye-law on the lines of the resolution but that could be done only by the procedure prescribed in the C. P. Municipalities Act. [P 368 C 1, 2]

(e) Interpretation of statutes — Law enacted —Same word is used in same sense.

It is a well known rule of construction of laws that the Legislature uses the same word in the same sense when it enacts a law. [P 368 C 1]

(f) C. P. Municipalities Act (2 of 1922), Ss. 97 and 98—Building bye-laws under, framed by Nagpur Civil Station Sub-Committee,

bye-law 10 — Sub-Committee by resolution interpreting bye-law—Resolution is not absolutely binding on subsequent meeting of Sub-Committee.

The acts of one meeting are not absolutely binding on a subsequent meeting. A resolution by the Sub-Committee interpreting a bye-law in a particular way is not absolutely binding on the subsequent meetings of the Sub-Committee.

[P 368 C 1]

M. Y. Shareef and R. S. Dabir—for Appellants.

J. Sen, R. N. Padhye and W. C. Dutt — for Respondent 1.

Judgment. — This is plaintiffs' appeal from the reversing judgment of the third Additional District Judge, Nagpur, in Civil Appeal No. 5-A of 1938 delivered on 29th April 1938. The suit out of which this appeal arises was instituted by the appellants for permanent injunction restraining the Municipal Committee, Nagpur, respondent 2, and P. N. Rudra, respondent 1, from building a house on a plot of land situated in Circle No. 19A known as civil station. The plot in question originally measured 76′ × 300′ and is adjacent to the house of the appellants. That plot was advertised for sale in the Daily News of 5th June 1935, by the owner named Chachondia Appellant 1, who then happened to be the President of the Civil Station Sub-Committee, a body subordinate to the Municipal Committee Nagpur, published a warning in that newspaper on 11th June 1935, to the effect that the owner of the plot would not be permitted to erect any building on it as such erection was contrary to the building bye-laws of the Civil Station Sub-Committee which made it obligatory that there should be at least 80′ distance between two bungalows which was not possible in the case of a building if erected on this plot. A similar caution was conveyed by the Secretary Civil Station Sub-Committee to Chachondia by a letter dated 10th June 1935. On 15th July 1935, Chachondia's advertisement published in the Daily News of 7th June 1935 was considered at a meeting of the Civil Station Sub-Committee and it was resolved that no building would be allowed to be constructed unless 80′ distance was left between two buildings as provided by the bye-laws. It further resolved that the building bye-laws 10 (a) and 10 (b) should apply to the bungalow area of the civil station and not to the basti areas and new settlements, and discretionary authority was conferred on the President to decide each case that would come up for consideration on its own merits. The proviso 1 appended to bye-law 10 of the building bye-laws of the Civil Station Sub-Committee was declared to apply to all the settlements other than the bungalow area. It is pertinent to observe that nowhere in the bye-laws of the Civil Station Sub-Committee is there any specific area defined as the bungalow area. Respondent 1, P. N. Rudra purchased the plot of land measuring 76′ × 300′ from Chachondia on 27th May 1937 and some more land from Chorghade, the owner of the adjacent land on the side remote from the appellants' land. On 22nd March 1937 he applied to the Civil Station Sub-Committee for permission to build a house on the site. On that application Rao Sahib Lala Jai Narain, who was the Vice-President, inspected the site and made a report to the Sub-Committee on 30th April 1937 that there was no objection to permission being granted subject to certain conditions in respect of the outhouses and the latrine. On that report the Civil Station Sub-Committee sanctioned the erection of a building by a resolution dated 5th May 1937. There was also some correspondence between appellant 1 and respondent 1 and the matter came before the Municipal Committee, Nagpur, which refused to interfere with the internal administration of the Civil Station Sub-Committee.

Respondent 1 in accordance with the permission granted by the Civil Station Sub-Committee commenced construction of his house when the appellants instituted their suit. The main allegation in the plaint is that under the building bye-laws in force no permission to erect a building could validly be given by the Civil Station Sub-Committee unless (1) the area of the plot built upon is not less than an acre, (2) the bungalow is centrally situated, (3) that it should be at least 80′ away from the main building on the adjacent land, and (4) the facing of the building, its conservancy arrangements and the position of the outhouses are in conformity with the existing arrangement of the buildings in that part of the civil station. It was averred that respondent 1 contravened the bye-laws in not conforming to the conditions laid down therein with the consequence that there was a likelihood of congestion and a consequent insanitation and difficulty of drainage and diminution of light and ventilation and that the plaintiffs being in close proximity were affected by respondent 1's violation of the bye-laws. The sanction granted by the Civil Station Sub-Committee in these circumstances was contended to be ultra vires of that body. The plaintiffs' contentions prevailed in the trial Court but failed in the lower appellate

Court. That Court held that the building which respondent 1 intended to erect was not contrary to the bye-laws and that the permission granted by the Civil Station Sub-Committee for the erection of the building was not ultra vires. It also found that the building was not calculated to cause any discomfort, inconvenience or injury to the plaintiffs or their property. Upon this appeal the main points for determination are (1) whether the sanction accorded by the sub-committee to erect a building was contrary to the bye-laws and (2) whether the building if allowed to be constructed according to the sanction is likely to cause a nuisance to the plaintiffs.

As the appellants asked for an injunction restraining the building of the house it was incumbent on them under S. 56 (k), Specific Relief Act, to show that they had some personal interest in the matter. The mere fact that the Civil Station Sub-Committee acted beyond its powers in granting the sanction to the building would not by itself be sufficient to entitle the plaintiffs to sue. In (1858) 121 R R 80[1] it was pointed out that the mere fact that there was a violation of an Act of Parliament could not give a right to an injunction unless it was proved that the violation of law had occasioned damage or was likely to produce damage which could not otherwise be redressed. In 1 Bom 132,[2] Green J., in his observations at p. 142 made it clear that it is only when an act of any corporation or public company which is in excess of their powers is calculated to be injurious to the rights of the property of an individual that he would have the right to protection of the Court by injunction. In 22 Bom 646,[3] an individual ratepayer was held entitled to an injunction against the company in respect of the application of its funds for the reason that the individual ratepayer had an interest in the funds. That the cause of action arises from an injury resulting to the plaintiff and not merely the capricious or perverse exercise of discretion by a corporation was pointed out also in 6 N L R 53[4] at p. 64. It is obvious therefore that the appellants' case could succeed only on proof of some special damage or injury occasioned to them by reason of the permission granted by the Civil Station Sub-Committee, assuming that it was contrary to the bye-laws and therefore ultra vires. On that point we see no reason to differ from the lower appellate Court's finding. The building proposed to be constructed is in the middle of the plot. It cannot therefore be said that it is not centrally situated. As regards the orientation of the building and the general conservancy arrangements proposed to be made no serious objection was taken in the lower appellate Court. It is only suggested here that in the absence of any public drain there would be the fear of the waste water running underground, but that is a complaint of a general nature. The party proposing to erect building may well in his own interest take such precautions as his neighbours do to prevent nuisance. Nor can there be any grave objection to the position of the out-houses which are admittedly 130′ away from the appellants' bungalow. Any slight inconvenience or discomfort that is likely to be caused is capable of being remedied by common agreement.

To determine whether an act which is complained of as being a nuisance is strictly so or not is to be judged by the ordinary standards of persons residing in the neighbourhood and the criterion would be the ordinary physical comfort of human existence according to plain, sober and simple notions obtaining amongst people and not according to the elegant and dainty modes and habits of living as pointed out in (1930) 1 Ch 138[5] at p. 165; *see also* A I R 1936 Mad 905.[6] It is not the standard of a petulant, cynical, hypersensitive or fastidious person that would furnish a guide but that of a person who expects to enjoy the ordinary comforts of a decent and healthy life in the local area where he resides. It is possible that some inconvenience or discomfort may be caused but it must be a substantial character to warrant legal interference : *see* 42 Cal 46,[7] 15 Lah 320,[8] 55 ALL 711[9] and 11

1. (1858) 121 R R 80 : 3 De G & J 212 : 28 L J Ch 153 : 5 Jur (N S) 25, Ware v. Regents Canal Company.
2. ('75-77) 1 Bom 132, Shephered v. Trustees of Port Bombay.
3. ('98) 22 Bom 646, Vaman v. Municipality of Sholapur.
4. ('10) 6 N L R 53 : 6 I C 431, Ramdularay v. Chhindwara Municipality.
5. (1930) 1 Ch 138 : 99 L J Ch 84 : 142 L T 198 : 94 J P 23 : 27 L G R 752, Vanderpant v. Mayfair Hotel Company.
6. ('36) 23 A I R 1936 Mad 905 : 165 I C 180 : I L R (1937) Mad 51 : 71 M L J 400, Shaikh Ismail v. Venkatanarasimhulu.
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9. ('33) 20 A I R 1933 All 492 : 145 I C 530 : 55 All 711 : 1933 A L J 1006, Mt. Panna v. Ram Saran.

N L R 132.[10] On the facts of this case we are not convinced that there is likelihood of any material interference with the health or comfort of the appellants so as to furnish them with a cause of action.

That really concludes the appeal but inasmuch as the point as to the permission granted by the Civil Station Sub-Committee being ultra vires was argued at length and is of general importance we now proceed to consider it. We are in respectful agreement with the observations made in 56 Bom 135[11] at p. 147, that a statutory body like a municipality acting under a statute must keep strictly within its statutory powers. The validity of the permission granted by the Civil Station Sub-Committee is challenged on two grounds : (1) that it is repugnant to the bye-law 10 of the building bye-laws framed under Ss. 97 and 98, and (2) that it was contrary to the resolution passed by that body on 15th July 1935. In the first instance it must be observed that the Sub-Committee is the only authority within the area which has the power to sanction erection of buildings. In exercising that power it merely performs the duty laid upon it by law. As pointed out in 48 Cal 138,[12] the lack of jurisdiction must be distinguished from the wrong exercise of jurisdiction. While an act done without any power to do so is null and void, an act done in erroneous exercise of that jurisdiction is one that is voidable, that is, rectifiable by a superior authority. As observed by their Lordships of the Privy Council in 25 Bom 337,[13] a Court has jurisdiction to decide wrong as well as right. If the decision of the Municipal Committee was wrong as distinguished from being beyond their power the question would arise whether the civil Court could rectify the wrong. Bye-law 10 of the building bye-laws is as follows :

Ventilation (bungalows)

10 (a) The total built-up area in any plot shall not exceed one-third the area of the plot.

(b) In the case of plots which shall be specified to have an area not less than one acre, no main building shall be erected within 40′ from the boundary ditch of the road or 80′ from any other main building belonging to another bungalow.

Proviso 1—Provided that the following bye-laws apply to the area when so decided by the committee.

(1) If a plot of land on which the building sought to be erected measures not more than 200′ × 200′ and not less than 90′ × 90′ no building shall be erected within 20′ from the limits of the plot on which the building is sought to be erected.

The two succeeding rules lay down the distance of the open space to be left between the main building and the limits of the plot in regard to plots of lesser area. Rule 4 which follows says, no building shall be permitted on a plot of land measuring less than 50′ × 50′. Then there is a proviso No. 2, which lays down that in the basti area no building shall be erected on more than half the area of the plot without the special permission of the committee. The bye-laws are not artistically drafted and they do not contain any provision to help one to construe the material words or expressions occurring therein. From the heading of the bye-law 10 it would appear as if that bye-law was applicable only to bungalows, but proviso 2 refers also to bastis as if bye-law No. 10 was applicable to that area. The expression 'bungalow area' is nowhere defined, but it may be assumed for the purpose of discussion that by-law 10 refers to bungalows. Those who are familiar with the sizes of the plots on which the bungalows in the Civil Station area stand may well be able to recall that ordinarily the sizes of the plots substantially exceed an acre. The bye-law 10 leaves them out of consideration and concerns itself with building plots not less than one acre and those less than one acre of varying dimensions. Plots not less than one acre would be but few and bye-law 10 (b) lays down the rule as to the length of the open space that should be left between two main buildings. Plots less than one acre are exceptional within the so-called bungalow area. Proviso 1 is designed to meet such cases. The proviso does not *proprio vigore* come into operation so as to make it obligatory on the sub-committee to grant permission to erect buildings on plots less than one acre, but it confers discretion on it to be exercised in each case on merits.

There has been obviously difference of opinion as to the meaning of the word 'area' occurring in proviso 1. While one view is that it means 'bungalow area,' the other is that it means the area of the plot on which a building is proposed to be erected. In our opinion there is in bye-law 10 itself an indication as to the meaning of the word 'area.' The word 'area' occurs in parts (a)

10. ('15) 2 A I R 1915 Nag 79 : 31 I C 62 : 11 N L R 132, Municipal Committee of Saugor v. Nilkanth.
11. ('32) 19 A I R 1932 Bom 259 : 137 I C 545 : 56 Bom 135 : 34 Bom L R 143, Chaganlal Sakerlal v. Thana Municipality.
12. ('21) 8 A I R 1921 Cal 34 : 58 I C 806 : 48 Cal 138 : 31 C L J 482 : 24 C W N 723 (FB), Hriday Nath Roy v. Ram Chandra Barna.
13. ('01) 25 Bom 337 : 27 I A 216 : 2 Bom L R 927 : 7 Sar 739 (P C), Malkarjun v. Narhari.

and (b) of bye-law 10. In both of them the word 'area' is used in connexion with plots. It is a well-known rule of construction of laws that the legislature uses the same word in the same sense when it enacts a law. Following that rule it would be fair that the word 'area' occurring in proviso 1 has reference to the plot and not to that part of the Civil Station which is popularly known as a 'bungalow area.' The plain meaning is that if the committee decides to give permission to erect bunglows in plots less than one acre it should do so on the conditions laid down in that proviso, but it makes it clear that the committee has no power to permit a building on any plot less than 50′ × 50′. It must therefore follow that the sub-committee had power to grant permission to build on the plot under consideration which is less than one acre. Nor has there been any breach of the conditions laid down in proviso as the main building in the present case is more than 40′ away from the road. The Municipal Committee had indubitable power to sanction construction of the building and it did not commit any irregularity in the exercise of it.

The next question is whether the permission was illegal because it contravened its resolution dated 15th July 1935. That resolution declared generally that bye-law 10 (a) and (b) applied to the whole of the Civil Station area, that is bungalow area, excepting the basti area and the new settlements and that proviso 1 to bye-law 10 would apply to the settlements other than the bungalow area. Now the resolution was either interpretive or operative. If it simply interpreted bye-law 10, that interpretation was not absolutely binding on the subsequent meetings of the Civil Station Sub-Committee, as it is well-known that the acts of one meeting are not absolutely binding on a subsequent meeting: see Crew on Law of Meetings, p. 47. At the meeting at which the permission was given, it was open to any member to raise a point of order and seek a ruling from the chairman. Inasmuch as no one raised a point of order it must be held that no member endorsed the interpretation put upon bye-law 10 in resolution passed on 15th July 1935. If, on the other hand, the resolution was intended to be operative that was ultra vires and of no effect. There is nothing in proviso 1 to restrict the scope of the bye-laws which follow that proviso. Whereas the resolution sought to limit bye-law 10 (a) and (b) to the bungalow area proviso 1 to that bye-law refers to the settlements other than the bungalow area. In so curtailing the scope of the bye-law which in its plain terms was, subject to the discretion of the committee, made applicable to the whole of the Civil Station area including the bungalow area, its effect was to alter the bye-law. No doubt it was open to the sub-committee to frame a new bye-law on the lines of the resolution but that could be done only by the procedure prescribed in the C. P. Municipalities Act. That resolution therefore could not impair or otherwise affect the powers of the Civil Station Sub-Committee to consider respondent 1's application for permission to build on his plot on its own merits and decide it one way or the other.

From the foregoing discussion it is evident that the act of the Civil Station Sub-Committee in granting the permission was within the scope of its authority. If so, has the civil Court any power to interfere with the discretion rightly or wrongly exercised by that body? It is a well-known principle that a lawful act cannot prejudice any one *(actus legis nemini est damnosus)*. If the Municipal Committee was within its rights in granting the sanction, its acts being a lawful act cannot be interfered with although it may be prejudicial to any individual. The law has conferred discretionary authority on the Municipal Committee. If this Court were to interfere with the exercise of its discretion as exercised it would be substituting its own discretion for the discretion of the sub-committee and the result would be to nullify the law which confers on the Municipal Committee alone the power to exercise its discretion. The law does not intend the civil Courts to usurp the powers granted to local bodies or other corporations but only to see that those who are vested with the authority do not exceed its limits. The appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

END

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A. I. R. 1940 Oudh=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
120FB	16	Luck	1	364	16	Luck	42	404 *con*	1941	O L R	294	432	16	Luck	58
209	1941	O L R	333	367	16	Luck	65		193	I C	214	433	16	Luck	105
	193	I C	770	385	16	Luck	36	405	16	Luck	79	435	16	Luck	110
	42	Cr L J	483	387	16	Luck	27	409	16	Luck	191	437	16	Luck	168
289FB	16	Luck	123	394	16	Luck	72	411	16	Luck	209	440	16	Luck	188
304	16	Luck	70	401	16	Luck	44	413	16	Luck	55	441	16	Luck	184
312	16	Luck	91	404	16	Luck	24	419	16	Luck	51	443	16	Luck	357
360	16	Luck	76												

A. I. R. 1941 Oudh=Other Journals

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
1	1940	O W N	875	22 *con*	1940	O L R	605	49 *con*	192	I C	803	74 *con*	16	Luck	280
	1940	AWRCC	393		190	I C	435	52	1940	O W N	834	77	1940	O W N	999
	1940	O L R	628		1940	S I T R	607		1940	O L R	587		1940	O L R	688
	190	I C	721		16	Luck	159		1940	AWRCC	388		191	I C	166
	16	Luck	203	25	1940	O W N	749		190	I C	390		1940	AWRCC	428
3	1940	O W N	819		1940	AWRCC	342		16	Luck	173		16	Luck	230
	1940	O L R	561		1940	O L R	529	56	1940	O W N	807	80	1940	O W N	1126
	190	I C	259		190	I C	132		1940	AWRCC	366		1940	O L R	732
	1940	AWRCC	381		16	Luck	93		1940	O L R	568		191	I C	415
	41	Cr L J	881	27	1940	O W N	847		190	I C	334		1940	AWRCC	455
	16	Luck	194		1940	O L R	637		16	Luck	113		16	Luck	287
7	1940	O W N	757		190	I C	834	60	1940	O W N	862	81	1940	O W N	1123
	1940	AWRCC	373		1940	AWRCC	430		1940	O L R	633		1941	O L R	27
	1940	O L R	565		16	Luck	145		1940	AWRCC	412		191	I C	762
	190	I C	266	30	1940	O W N	797		190	I C	814		1940	AWRCC	476
	41	Cr L J	891		1940	AWRCC	345		16	Luck	153		16	Luck	529
10	1940	O W N	804		1940	O L R	539	62	1940	O W N	813	83	1940	O W N	1050
	1940	AWRCC	362		190	I C	197		1940	O L R	550		1941	O L R	31
	1940	O L R	544	33	1940	O W N	965		190	I C	215		191	I C	753
	190	I C	209		1940	O L R	648		1940	AWRCC	363		1940	AWRCC	466
12	1940	O W N	918		190	I C	887	65	1940	O W N	888		16	Luck	492
	1940	AWRCC	443		1940	AWRCC	440		1940	O L R	664	84	1940	O W N	1205
	1940	O L R	661		42	Cr L J	40		1940	AWRCC	420		1941	O L R	13
	190	I C	782	41	1940	O W N	753		190	I C	797		191	I C	716
14	1940	O L R	355		1940	O L R	524	66	1940	OWN	1010		1940	AWRCC	481
	188	I C	408		190	I C	85		1940	O L R	695	87	1940	O W N	1194
	1940	O W N	491		1940	AWRCC	402		191	I C	185		1941	O L R	21
	41	Cr L J	584		16	Luck	99		1940	AWRCC	429		191	I C	729
	1940	AWRCC	238	43	1940	O W N	1007		16	Luck	252		1940	AWRCC	474
	16	Luck	61		1940	AWRCC	431	67	1940	O W N	1197	89	1940	O W N	1077
16	1940	O L R	213		1940	O L R	683		1941	O L R	17		1940	O L R	704
	1940	O W N	411		191	I C	150		191	I C	726		191	I C	215
	187	I C	549		16	Luck	256		1941	AWRCC	7		1940	AWRCC	446
	1940	AWRCC	200	45	1940	O W N	990		42	Cr L J	221	91	1940	O W N	1086
	15	Luck	580		1940	O L R	685		16	Luck	506		1940	AWRCC	457
18	1940	O W N	828		191	I C	157	70	1940	O W N	1014		16	Luck	294
	1940	O L R	578		1940	AWRCC	458		1940	O L R	674		192	I C	332
	1940	AWRCC	385		16	Luck	223		191	I C	142		1941	O L R	115
	190	I C	848	48	1940	O W N	1004		1940	AWRCC	463	93	1940	O W N	1202
20	1940	O L R	521		1940	O L R	676	72	1940	O W N	1052		1941	O L R	25
	1940	AWRCC	370		191	I C	146		1940	AWRCC	467		191	I C	757
	190	I C	71		1941	AWRCC	8		192	I C	379		1940	AWRCC	472
	1940	O W N	923		42	Cr L J	85		1941	O L R	118		16	Luck	495
	41	Cr L J	816		16	Luck	237	74	1940	O W N	1081	95	1940	O W N	1057
	16	Luck	353	49	1940	O W N	741		1940	O L R	711		1941	O L R	29
22	1940	O W N	853		1940	AWRCC	348		191	I C	220		191	I C	742
	1940	AWRCC	398		1941	O L R	223		1940	AWRCC	451		1940	AWRCC	448

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98	1940 O W N 1018
	1940 O L R 640
	190 I C 805
	42 Cr L J 35
	1940 AWRCC 441
	16 Luck 260
100	1940 O W N 1185
	1941 O L R 20
	191 I C 732
	1941 AWRCC 1
	16 Luck 398
101	1940 O W N 1118
	1940 O L R 751
	191 I C 227
	1940 AWRCC 444
103	1940 O W N 1190
	1941 O L R 23
	191 I C 736
	1940 AWRCC 479
105	1940 O W N 1303
	1941 O L R 59
	1941 AWRCC 15
	192 I C 86
111	1940 O W N 988
	1940 O L R 710
	191 I C 305
	1940 AWRCC 462
113	1940 O W N 1188
	1941 O L R 16
	191 I C 722
	1940 AWRCC 470
114	1940 O W N 1142
	1940 O L R 760
	191 I C 448
	1940 AWRCC 471
	16 Luck 369
119	1940 O W N 1223
	1941 O L R 98
	192 I C 264
	1941 AWRRev 54
	16 Luck 533
121	1940 O W N 1219
	1941 O L R 6
	191 I C 784
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	16 Luck 500
123	1940 O W N 982
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	1940 AWRCC 425
	16 Luck 484
126	1940 O W N 1022
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	191 I C 178
	1940 AWRCC 433
	16 Luck 241
130	1940 O L R 734
	191 I C 466
	1941 O W N 133
	42 Cr L J 165
	1941 AWRCC 59
146	1940 O W N 909
	1940 O L R 657
	190 I C 775
	1940 AWRCC 421
	16 Luck 213
150	1940 O W N 1092
	1940 O L R 725
	191 I C 402
	1940 AWRCC 461
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155	1940 O W N 1155
	1940 O L R 753
	191 I C 234
	1940 AWRCC 478
	16 Luck 382
161	1940 O W N 1212
	191 I C 708
	1941 AWRCC 3
	1941 O L R 9
	16 Luck 402
165	1940 O W N 1237
	1941 O L R 38
	191 I C 825
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169	1940 O W N 1253
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172	1940 O W N 1318
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	191 I C 885
178	1940 O W N 1336
	1941 O L R 65
	1941 AWRCC 33
	192 I C 96
182	1940 O W N 1257
	1940 O L R 765
	1941 AWRCC 9
	191 I C 638
	42 Cr L J 190
185	1940 O W N 1330
	1941 O L R 52
	192 I C 63
	1941 AWRCC 29
189	1940 O W N 1344
	1941 O L R 93
	192 I C 259
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193	192 I C 434
	1941 O L R 152
	1940 O W N 1293
	1941 AWRRev 8
	16 Luck 538
198	1940 O W N 1352
	192 I C 420
	1941 AWRRev 13
	1941 O L R 179
203	1940 O W N 1249
	192 I C 327
	1941 AWRCC 13
	1941 O L R 113
205	1941 O W N 56
	1941 O L R 210
	192 I C 619
	1941 AWRCC 46
210	1941 O W N 361
FB	1941 O L R 280
	193 I C 481
	1941 AWRCC 108
	16 Luck 464
217	1941 O L R 221
	192 I C 717
	1941 O W N 32
	1941 AWRCC 52
219	1941 O W N 418
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	193 I C 1
	1941 AWRRev 233
	16 Luck 515
223	1941 O W N 112

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223 *con*	1941 O L R 236
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225	1941 O W N 113
	1941 O L R 215
	192 I C 708
	1941 AWRRev 73
226	1941 O W N 204
	1941 O L R 217
	192 I C 712
	1941 AWRCC 54
230	1941 O W N 214
	1941 O L R 194
	192 I C 643
	1941 AWRCC 58
	16 Luck 302
242	1941 O W N 103
	1941 O L R 105
	192 I C 300
	1941 AWRRev 67
	16 Luck 566
245	1941 O W N 130
	1941 O L R 233
	192 I C 778
	1941 AWRCC 63
247	1941 O W N 352
	1941 O L R 267
	193 I C 295
	1941 AWRCC 106
	16 Luck 638
249	1941 O W N 261
	1941 O L R 258
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250	1941 O W N 351
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	193 I C 340
	1941 AWRCC 105
	16 Luck 644
	42 Cr L J 406
251	1941 O W N 1
	1941 O L R 100
	192 I C 269
	1941 AWRCC 44
	16 Luck 697
252	1941 O W N 242
	1941 O L R 253
	193 I C 59
	1941 AWRRev 143
	16 Luck 429
254	1941 O W N 108
	1941 O L R 245
	192 I C 885
	1941 AWRCC 70
	16 Luck 701
257	1941 O W N 262
	1941 O L R 256
	193 I C 150
	1941 AWRRev 162
259	1941 O L R 57
	1941 O W N 22
	1941 AWRRev 75
	192 I C 75
260	1941 O W N 118
	1941 O L R 237
	192 I C 856
	1941 AWRCC 86
	1941-9 I T R 215
	16 Luck 599
263	1941 O W N 245
	1941 AWRRev 156

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263 *con*	194 I C 16
	1941 O L R 405
266	1941 O W N 193
	1941 O L R 251
	193 I C 50
	42 Cr L J 350
	1941 AWRCC 73
267	1941 O W N 82
	1941 O L R 232
	192 I C 774
	42 Cr L J 321
	1941 AWRCC 69
268	1941 O W N 193
	1941 O L R 250
	193 I C 47
	42 Cr L J 349
	1941 AWRCC 78
269	1941 O W N 355
	1941 O L R 277
	193 I C 354
	1941 AWRRev 217
	16 Luck 653
271	1941 O L R 55
	1941 O W N 54
	192 I C 70
	42 Cr L J 241
	1941 AWRCC 90
273	1941 O W N 656
FB	1941 AWRRev 392
	194 I C 387
	1941 O L R 455
	16 Luck 443
276	1941 O W N 111
	1941 O L R 231
	192 I C 840
	1941 AWRCC 92
	16 Luck 512
277	1941 O W N 115
	1941 O L R 247
	193 I C 38
	1941 AWRCC 66
279	1941 O W N 68
	1941 O L R 188
	192 I C 609
	1941-9 I T R 325
	16 Luck 579
284	1941 O W N 249
	1941 O L R 259
	193 I C 161
	1941 AWRCC 98
	16 Luck 615
288	1941 O W N 208
	1941 O L R 240
	192 I C 873
	1941 AWRCC 93
	16 Luck 341
293	1941 O W N 653
FB	1941 O L R 438
	1941 AWRCC 163
	194 I C 227
	16 Luck 454
297	1941 O W N 126
	1941 O L R 102
	192 I C 272
	1941 AWRRev 70
	16 Luck 591
299	1941 O W N 632
	1941 AWRRev 369
	16 Luck 784
	197 I C 812
301	1941 O W N 258

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301 *con*	1941 AWRRev	164	353 *con*	16 Luck	414	405	1941 O W N	783	457 *con*	194 I C	588
	1941 O L R	527	355	1941 O W N	63		1941 O L R	486		1941 AWRCC	222
	194 I C	849		192 I C	545		194 I C	445		16 Luck	832
	16 Luck	435		1941 O L R	185		1941 AWRRev	526	466	1941 O W N	778
304	1941 O W N	479		1941-4 FLJHC	75	407	1941 O W N	562		1941 AWRRev	531
	1941 O L R	271		1941 AWRCC	82		1941 O L R	311		197 I C	864
	193 I C	300		16 Luck	421		193 I C	639	468	1941 O W N	623
	1941 AWRRev	280	359	1941 O W N	722		1941 AWRCC	134		194 I C	394
305	1941 O W N	122		1941 O L R	441		16 Luck	737		1941 O L R	459
	1941 O L R	263		194 I C	236	409	1941 O W N	634		1941 AWRRev	362
	193 I C	290		1941 AWRCC	188		1941 O L R	432		16 Luck	626
	1941 AWRCC	74		42 Cr L J	539		194 I C	214	472	1941 O W N	720
	16 Luck	607	367	1941 O W N	678		42 Cr L J	536		1941 AWRCC	185
308	1941 O W N	587		1941 O L R	448		1941 AWRCC	159		16 Luck	693
	1941 O L R	341		194 I C	354	412	1941 O W N	555		1941 O L R	858
	193 I C	776		1941 AWRCC	170		1941 O L R	313		197 I C	239
	1941 AWRCC	155	369	1941 O W N	412		193 I C	654		43 Cr L J	137
310	1941 O W N	480		1941 O L R	306		1941 AWRCC	136	474	1941 O W N	780
	1941 O L R	290		193 I C	611	415	1941 O W N	615		1941 O L R	467
	193 I C	516		1941 AWRRev	243		1941 O L R	356		194 I C	410
	42 Cr L J	429	374	1941 O W N	638		193 I C	686		1941 AWRCC	238
	1941 AWRCC	118		1941 O L R	484		1941 AWRRev	367	476	1941 O L R	435
	16 Luck	674		194 I C	437	417	1941 O W N	558		194 I C	222
315	1941 O W N	404		1941 AWRRev	385		1941 O L R	371		42 Cr L J	530
	1941 O L R	297		16 Luck	573		193 I C	892		1941 O W N	1262
	193 I C	524	376	1941 O W N	527		1941 AWRRev	310		1941 AWRCC	367
	1941 AWRCC	236		1941 O L R	419	420	1941 O W N	832	479	1941 O W N	760
	16 Luck	658		194 I C	168		1941 O L R	519		1941 O L R	469
321	1941 O W N	357		1941 AWRRev	300		194 I C	662		194 I C	417
	1941 O L R	303		16 Luck	727		1941 AWRRev	583		1941 AWRCC	196
	193 I C	627	380	1941 O W N	687	422	1941 O W N	661		16 Luck	789
	42 Cr L J	457		1941 O L R	463		1941 O L R	584	485	1941 O L R	523
	1941 AWRRev	219		194 I C	405		1941 AWRCC	175		194 I C	744
	16 Luck	646		1941 AWRRev	430		195 I C	402		1941 O W N	861
324	1941 O W N	265	383	1941 O W N	718		16 Luck	742		1941 AWRCC	256
	1941 O L R	489		1941 O L R	423	429	1941 O W N	648	487	1941 O L R	493
	194 I C	533		194 I C	175		1941 O L R	428		194 I C	557
	1941 AWRRev	151		1941 AWRCC	183		194 I C	161		1941 O W N	852
328	1941 O W N	272		16 Luck	765		1941 AWRRev	395		42 Cr L J	595
	1941 O L R	400	385	1941 O W N	602	433	1941 O W N	669		1941 AWRCC	211
	194 I C	8		1941 O L R	367		1941 O L R	534	492	1941 O W N	829
	1941 AWRRev	145		193 I C	687		194 I C	855		1941 O L R	572
331	1941 O W N	577		42 Cr L J	501		1941 AWRRev	408		195 I C	326
	1941 O L R	384		1941 AWRCC	151		16 Luck	778		1941 AWRCC	220
	194 I C	61	388	1941 O W N	590	436	1941 O W N	537		16 Luck	769
	1941 AWRCC	139		1941 O L R	364		1941 O L R	374	495	1941 O W N	872
	16 Luck	708		193 I C	681		194 I C	50		1941 O L R	553
336	1941 O W N	487		42 Cr L J	478		1941 AWRRev	289		195 I C	224
	1941 O L R	296		1941 AWRCC	148	442	1941 O W N	509		1941 AWRCC	258
	193 I C	568	391	1941 O W N	522		1941 O L R	392	497	1941 O W N	819
	1941 AWRCC	126		1941 O L R	315		194 I C	73		1941 O L R	488
337	1941 O W N	25		193 I C	689		1941 AWRRev	296		194 I C	543
	1941 O L R	75		1941 AWRRev	285		16 Luck	686		1941 AWRRev	533
	192 I C	131	395	1941 O W N	618	445	1941 O W N	757		16 Luck	775
	1941 AWRCC	37		1941 O L R	361		1941 AWRCC	203	498	1941 O W N	768
	16 Luck	551		193 I C	675		1941-2 I T R	286		1941 O L R	512
341	1941 O W N	643		1941 AWRRev	372		16 Luck	805		194 I C	615
	1941 O L R	425	399	1941 O L R	417		198 I C	192		1941 AWRRev	518
	194 I C	195		194 I C	158	447	1941 O W N	789		16 Luck	812
	1941 AWRCC	166		42 Cr L J	524		1941 O L R	475	505	1941 O W N	833
344	1941 O W N	474		1941 O W N	683		194 I C	425		1941 O L R	510
	1941 O L R	319		1941 AWRCC	172		1941 AWRRev	534		194 I C	605
	193 I C	727		16 Luck	758	449	1941 O W N	823		1941 AWRCC	234
	1941 AWRRev	281	402	1941 O L R	415		1941 O L R	579	507	1941 O W N	820
348	1941 O W N	532		194 I C	22		195 I C	381		1941 O L R	558
	1941 O L R	395		1941 AWRRev	542		1941 AWRRev	537		195 I C	242
	194 I C	87		1941 O W N	1408	454	1941 O W N	843		1941 AWRRev	581
	1941 AWRCC	129	403	1941 O W N	752		1941 O L R	515	509	1941 O L R	521
353	1941 O L R	49		1941 O L R	508		195 I C	168		194 I C	740
	1941 O W N	18		194 I C	600		1941 AWRRev	604		1941 O W N	867
	192 I C	53		1941 AWRCC	186	457	1941 O W N	801		42 Cr L J	617
	1941 AWRCC	60					1941 O L R	499		1941 AWRCC	241

AIR	Other Journals
510	1941 O W N 869
	1941 O L R 591
	195 I C 488
	1941 AWRCC 243
	42 Cr L J 746
512	1941 O W N 488
	1941 AWRCC 127
515	42 Cr L J 710
	1941 O W N 848
	1941 O L R 556
	195 I C 236
	1941 AWRCC 247
517	1941 O W N 981
	1941 O L R 609
	1941 AWRCC 265
	42 Cr L J 758
	195 I C 630
525	1941 O L R 550
	195 I C 163
	1941 AWRRev 627
	1941 O W N 944
	42 Cr L J 708
526	1941 O W N 979
	1941 O L R 618
	195 I C 784
	1941 AWRRev 661
529	1941 O W N 906
	1941 AWRCC 274
	1941 O L R 764
	196 I C 787
559	1941 O W N 961
	195 I C 605

AIR	Other Journals
559 *con*	1941 O L R 607
	1941 AWRRev 655
561	1941 O W N 754
	1941 O L R 525
	194 I C 755
	1941 AWRCC 205
563	1941 O W N 953
	1941 O L R 595
	195 I C 493
	42 Cr L J 749
	1941 AWRCC 279
566	1941 O W N 948
	1941 AWRRev 647
	198 I C 21
567	1941 O W N 874
	1941 O L R 574
	195 I C 371
	42 Cr L J 728
	1941 AWRCC 260
572	1941 O W N 864
	1941 O L R 542
	195 I C 112
	1941 AWRCC 235
575	1941 O W N 889
	1941 O L R 532
	194 I C 872
	42 Cr L J 633
	1941 AWRCC 245
577	1941 O L R 590
	1941 O W N 969
	195 I C 411
	1941 AWRRev 644

AIR	Other Journals
578	1941 O W N 963
	1941 O L R 593
	195 I C 498
	1941 AWRRev 645
580	1941 O W N 998
	1941 O L R 620
	195 I C 761
	1941 AWRRev 694
582	1941 O W N 994
	195 I C 828
	1941 O L R 626
	1941 AWRRev 757
585	1941 O L R 530
	194 I C 859
	1941 AWRRev 529
	1941 O W N 1410
587	1941 O W N 965
	195 I C 610
	1941 AWRCC 275
	1941 O L R 601
590	1941 O W N 957
	1941 O L R 598
	195 I C 615
	1941 AWRRev 629
593	1941 O W N 891
	1941 O L R 563
	195 I C 253
	1941 AWRCC 251
598	1941 O W N 1077
	1941 O L R 695
	196 I C 496
	1941 AWRCC 329
599	1941 O W N 1034

AIR	Other Journals
599 *con*	1941 O L R 670
	196 I C 819
	1941 AWRCC 303
	42 Cr L J 845
609	1941 O W N 1049
	196 I C 172
	1941 O L R 652
	1941 AWRRev 817
611	1941 O W N 1021
	1941 O L R 630
	195 I C 880
	1941 AWRRev 760
615	1941 O W N 1014
	1941 O L R 645
	196 I C 99
	1941 AWRRev 771
618	1941 O W N 1061
	196 I C 166
	1941 O L R 649
	1941 AWRCC 287
	42 Cr L J 818
621	1941 O W N 1032
	1941 O L R 648
	196 I C 169
	1941 AWRRev 777
622	1941 O W N 1095
	1941 O L R 685
	196 I C 441
	1941 AWRRev 865
623	1941 O W N 1100
	1941 O L R 684
	196 I C 432
	1941 AWRRev 873

OTHER JOURNALS = ALL INDIA REPORTER

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ILR	AIR		
1	1940	O	120
24	"	"	404
27	"	"	387
36	"	"	385
42	"	"	364
44	"	"	401
51	"	"	419
55	"	"	413
58	"	"	432
61	1941	"	14
65	1940	"	367
70	"	"	304
72	"	"	394
76	"	"	360
79	"	"	405
91	"	"	312
93	1941	"	25
99	"	"	41
105	1940	"	433
110	"	"	435
113	1941	"	56
123	1940	O	289
145	1941	"	27
153	"	"	60
159	"	"	22
168	1940	"	437
173	1941	"	52
184	1940	"	441
188	"	"	440
191	"	"	409
194	1941	"	3
203	"	"	1
209	1940	"	411
213	1941	"	146
223	"	"	45
230	"	"	77
237	"	"	48
241	"	"	126
252	"	"	66
256	"	"	43
260	"	"	98
266	1941	O	150
280	"	"	74
287	"	"	80
294	"	"	91
302	"	"	230
341	"	"	288
353	"	"	20
357	1940	"	448
369	1941	"	114
382	"	"	155
398	"	"	100
402	"	"	161
414	"	"	353
421	"	"	355
429	"	"	252
435	"	"	301
443	"	"	273
454	"	"	293
464	"	"	210
484	"	"	123
492	"	"	83
495	1941	O	93
500	"	"	121
506	"	"	67
512	"	"	276
515	"	"	219
529	"	"	81
533	"	"	119
538	"	"	193
551	"	"	337
566	"	"	242
573	"	"	374
579	"	"	279
591	"	"	297
599	"	"	260
607	"	"	305
615	"	"	284
626	"	"	468
638	"	"	247
644	"	"	250
646	"	"	321
653	1941	O	269
658	"	"	315
674	"	"	310
686	"	"	442
693	"	"	472
697	"	"	251
701	"	"	254
708	"	"	331
727	"	"	376
737	"	"	407
742	"	"	422
758	"	"	399
765	"	"	383
769	"	"	492
775	"	"	497
778	"	"	433
784	"	"	299
789	"	"	479
805	"	"	445
812	"	"	498
832	"	"	457

1941 Oudh Law Reports = All India Reporter

OLR	AIR		
1	1940	PC	225
6	1941	O	121
9	"	"	161
13	"	"	84
16	1941	O	113
17	"	"	67
20	"	"	100
21	"	"	87
23	1941	O	103
25	"	"	93
27	"	"	81
29	"	"	95
31	1941	O	83
32	"	"	169
35	1940	PC	219
38	1941	O	165
42	1940	PC	230
49	1941	O	353
52	"	"	185
55	"	"	271

OLR	AIR			OLR	AIR			OLR	AIR			OLR	AIR			OLR	AIR		
57	1941	O	259	277	1941	O	269	455	1941	O	273	615	1942	O	29	744	1942	O	79
59	"	"	105	280	"	"	210	459	"	"	468	617	1941	PC	62	746	1941	PC	103
65	"	"	178	290	"	"	310	463	"	"	380	618	"	O	526	749	1942	O	9
69	"	"	172	294	1940	"	404	467	"	"	474	620	"	"	580	752	"	"	21
75	"	"	337	296	1941	"	336	469	"	"	479	625	1942	"	14	753	1941	PC	109
82	"	FC	5	297	"	"	315	475	"	"	447	626	1941	"	582	758	1942	O	67
93	"	O	189	303	"	"	321	477	"	FC	72	629	"	PC	55	760	"	"	56
98	"	"	119	306	"	"	369	484	"	O	374	630	"	O	611	762	"	"	57
100	"	"	251	311	"	"	407	486	"	"	405	635	"	PC	56	764	1941	"	529
102	"	"	297	313	"	"	412	488	"	"	497	641	"	"	64	793	1942	"	80
105	"	"	242	315	"	"	391	489	"	"	324	645	"	O	615	795	"	"	82
108	"	PC	1	319	"	"	344	493	"	"	487	648	"	"	621	798	1941	PC	120
113	"	O	203	323	"	PC	11	499	"	"	457	649	"	"	618	805	"	"	132
115	"	"	91	329	"	"	16	508	"	"	403	652	"	"	609	807	"	"	130
118	"	"	72	333	1940	O	209	510	"	"	505	654	1942	"	19	809	1942	"	1
121	"	FC	16	336	1941	PC	6	512	"	"	498	657	"	"	45	811	"	O	84
152	"	O	193	341	"	O	308	519	"	"	420	660	"	"	93	814	1941	PC	101
157	"	FC	47	343	"	PC	21	521	"	"	509	664	"	"	75	817	1942	O	106
179	"	O	198	356	"	O	415	523	"	"	485	665	"	"	100	819	1941	PC	75
185	"	"	355	361	"	"	395	525	"	"	561	669	"	"	29	829	1942	O	60
188	"	"	279	364	"	"	388	527	"	"	301	670	1941	"	599	839	"	"	145
194	"	"	230	367	"	"	385	530	"	"	585	674	"	A	333	841	"	"	139
210	"	"	205	371	"	"	417	532	"	"	575	675	1942	O	12	842	"	"	172
215	"	"	225	374	"	"	436	534	"	"	433	677	"	"	48	844	"	"	217
217	"	"	226	381	"	PC	43	542	"	"	572	679	"	"	22	846	1941	PC	99
221	"	"	217	382	"	"	34	545	"	"	454	681	"	"	70	848	1942	O	1
223	"	"	49	384	"	O	331	548	"	PC	48	684	1941	"	623	857	"	"	112
226	1940	PC	153	392	"	"	442	550	"	O	525	685	"	"	622	858	1941	"	472
231	1941	O	276	395	"	"	348	552	"	PC	47	689	1942	"	39	859	"	PC	106
232	"	"	267	400	"	"	328	553	"	O	495	695	1941	"	598	862	1942	O	89
233	"	"	245	405	"	"	263	556	"	"	515	696	1942	"	76	866	"	"	155
236	"	"	223	408	"	PC	38	558	"	"	507	699	"	"	161	871	"	"	163
237	"	"	260	413	"	"	36	560	"	PC	45	701	"	"	39	877	"	"	183
240	"	"	288	415	"	O	402	563	"	O	593	707	"	"	16	880	"	"	174
245	"	"	254	417	"	"	399	568	"	PC	51	710	1941	PC	98	883	1941	PC	114
247	"	"	277	419	"	"	376	572	"	O	492	712	"	"	88	889	"	"	68
250	"	"	268	423	"	"	383	574	"	"	567	714	"	"	33	896	1942	O	104
251	"	"	266	425	"	"	341	579	"	"	449	715	"	"	95	897	"	"	128
253	"	"	252	428	"	"	429	584	"	"	422	719	1942	O	58	899	"	"	177
256	"	"	257	432	"	"	409	590	"	"	577	721	1941	PC	90	901	"	"	197
258	"	"	249	435	"	"	476	591	"	"	510	725	1942	O	55	903	"	"	205
259	"	"	284	438	"	"	293	593	"	"	578	726	1941	PC	85	905	"	"	189
263	"	"	305	441	"	"	359	595	"	"	563	730	1942	O	73	911	"	"	108
267	"	"	247	448	"	"	367	598	"	"	590	734	"	"	50	912	"	"	179
269	"	"	250	451	"	FC	70	601	"	"	587	738	"	"	25	914	1941	PC	128
271	"	"	304	454	"	"	69	607	"	"	559	742	"	"	87	916	1942	O	143
272	"	"	219					609	"	"	517								

1941 Oudh Weekly Notes = All India Reporter

OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR			OWN	AIR		
1	1941	O	251	103	1941	O	242	237	1941	A	143	350	1941	A	131	480	1941	O	310
3	"	PC	6	106	"	A	178	238	"	"	134	351	"	"	250	487	"	"	336
8	"	A	61	108	"	O	254	239	"	"	160	352	"	"	247	488	"	"	512
16	1940	M	942	111	"	"	276	242	"	O	252	355	"	"	269	502	"	A	277
18	1941	O	353	112	"	"	223	245	"	"	263	357	"	"	321	509	"	O	442
22	"	"	259	113	"	"	225	249	"	"	284	361	"	"	210	513	1940	PC	204
25	"	"	337	115	"	"	277	258	"	"	301	372	"	FC	5	522	1941	"	391
32	"	"	217	118	"	"	260	261	"	"	249	386	"	A	68	527	"	"	376
35	"	FC	1	122	"	"	305	262	"	"	257	388	"	"	56	532	"	"	348
37	1940	PC	101	126	"	"	297	265	"	"	324	393	"	"	101	537	"	"	436
43	"	"	176	130	"	"	245	272	"	"	328	404	"	O	315	546b	"	A	215
48	1941	A	140	133	"	"	130	278	1940	A	511	412	"	"	369	548	"	"	278
52	"	"	157	193a	"	"	266	282	1941	"	152	418	"	"	219	550	"	"	212
53	"	M	63	193b	"	"	268	283	"	"	181	425	"	FC	47	555	"	O	412
54	"	O	271	199	"	A	153	291	"	"	173	452	"	A	193	558	"	"	417
56	"	"	205	200	"	"	154	293	"	"	132	453	"	"	207	562	"	"	407
63	"	"	355	203	"	M	230	295	"	"	179	455	"	"	211	565	"	PC	11
68	"	"	279	204	"	O	226	297	"	FC	16	457	"	"	209	572	"	"	16
74	1940	PC	183	208	"	"	288	337	"	A	145	464	"	"	194	577	"	O	331
79	1941	M	86	214	"	"	230	343	"	"	92	474	"	O	344	587	"	"	308
82	"	O	267	284	"	A	164	344	"	"	158	479	"	"	304	590	"	"	388
84	"	A	73																

OWN		AIR		OWN		AIR		OWN		AIR		OWN		AIR		OWN		AIR	
599	1941	A	224	789	1941	O	447	970	1941	PC	56	1115	1942	O	16	1279	1942	O	197
602	"	O	385	794	"	A	330	977	1942	O	29	1119	"	"	76	1282	"	"	125
606	"	A	301	798	"	FC	69	979	1941	"	526	1122	"	"	55	1285	"	"	143
615	"	O	415	799	"	"	70	981	"	"	517	1124	"	"	73	1290	"	"	130
618	"	"	395	801	"	O	457	992	1942	"	14	1126	"	"	9	1298	"	"	201
623	"	"	468	815	"	L	149	994	1941	"	582	1130	"	"	50	1300	"	"	104
628	"	A	219	819	"	O	497	998	"	"	580	1136	"	"	79	1302	"	"	108
632	"	O	299	820	"	"	507	1002	"	PC	38	1138	"	"	1	1304	"	"	128
634	"	"	409	823	"	"	449	1010b	"	A	338	1149	"	"	56	1306	"	"	117
638	"	"	374	829	"	"	492	1014	"	O	615	1151	1941	PC	120	1309	"	"	122
643	"	"	341	832	"	"	420	1017	1942	"	45	1160	1942	O	21	1318	"	"	219
648	"	"	429	833	"	"	505	1021	1941	"	611	1163	"	"	67	1316	"	"	115
653	"	"	293	838	"	A	335	1027	1942	"	19	1166	"	"	60	1320	"	"	151
656	"	"	273	839	"	"	309	1030	1941	PC	47	1175	"	"	57	1325	"	"	141
661	"	"	422	841	"	"	280	1032	"	O	621	1177	"	"	106	1328	"	"	120
669	"	"	433	843	"	O	454	1034	"	"	599	1179	"	"	145	1331	"	"	147
676	"	A	217	848b	"	"	515	1044	1942	"	24	1182	"	"	82	1334	"	"	110
678	"	O	367	852	"	"	487	1045	"	"	75	1186	"	"	84	1335	"	"	169
683	"	"	399	861	"	"	485	1047	"	"	48	1190	"	"	97	1340	"	"	180
687	"	"	380	864	"	"	572	1049	1941	"	609	1195	"	"	155	1345	1941	PC	62
701	"	A	293	867	"	"	509	1052	1942	"	22	1202	"	"	217	1347	"	"	48
704	"	"	298	869	"	"	510	1054	"	"	12	1205	"	"	31	1350	1942	O	208
707	"	"	281	872	"	"	495	1057	"	"	70	1208	"	"	89	1351	"	"	186
718	"	O	383	874	"	"	567	1061a	"	"	29	1218	"	"	80	1355	"	"	209
720	"	"	472	880	"	FC	72	1061b	1941	"	618	1220	"	"	172	1357	"	"	202
722	"	"	359	889	"	O	575	1065	1942	"	93	1225	"	"	112	1359	"	"	216
731	"	A	290	891	"	"	593	1070	1941	PC	55	1227	"	"	183	1361	"	"	210
734	1940	PC	215	898	"	A	321	1072	1942	O	100	1232	"	"	139	1365	"	"	214
739	"	"	75	906	"	O	529	1077	1941	"	598	1234	"	"	174	1367	1941	PC	130
747	1941	A	806	944	"	"	525	1079	1942	"	83	1237	"	"	179	1369	1942	O	221
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752	"	O	403	948	"	O	566	1095	1941	"	622	1246	"	"	193	1378	"	"	203
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768	"	"	498	961	"	"	559	1109	"	"	87	1266	"	"	177	1395	1942	O	231
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IN

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THE
ALL INDIA REPORTER
1941
Oudh Chief Court

A. I. R. 1941 Oudh 1

THOMAS C. J. AND BENNETT J.

Daulat Ram — Plaintiff — Appellant

v.

Raghubir Sahai and others — Defendants — Respondents.

Second Appeal No. 279 of 1937, Decided on 20th August 1940, against decree of Dist. Judge, Hardoi, D/- 31st March 1937.

(a) Mortgage — Mortgage deed providing for immediate possession of part of mortgaged property to be given to mortgagee — Remaining mortgaged property in possession of tenants to be delivered subsequently on fixed date — Mortgagor undertaking to pay annual rent payable by tenants in respect of aforesaid property from execution of mortgage deed until delivery — Possession not delivered as per agreement—Suit by mortgagee for possession and damages—Claim held was governed by Art. 116 and not by Art. 109, Limitation Act, and that breach of contract occurred once for all when possession was not delivered on fixed date.

A mortgage deed provided for immediate possession of part of the mortgaged property to be given to the mortgagee, and in respect of the remaining property, which was at the time in the possession of tenants, the mortgagors contracted to deliver possession on 1st July 1928. The mortgagors undertook to pay to the mortgagee the annual rent payable by the tenants for the period between the execution of the mortgage deed and delivery of possession in July 1928. As possession was not given in accordance with the agreement the mortgagee sued the mortgagors in 1936 for possession of property mortgaged to him and also for damages or compensation for non-delivery of possession on the basis of a breach of contract :

Held that the claim was governed by Art. 116 and not by Art. 109. The breach of contract occurred once for all when possession was not delivered on 1st July 1928 and therefore the claim was barred by limitation. The mortgage deed did not contain any implied agreement that the mortgagors should continue to pay rent to the mortgagee if possession was not given and therefore it could not be said that a breach of contract occurred in each year subsequent to 1928 by reason of the fact that such payment was not made by them : A I R 1915 All 393; 4 A L J 249 and AIR 1917 Mad 465, *Rel. on.* [P 2 C 2; P 3 C 1, 2]

(b) Limitation Act (1908), S. 3 — Decree awarding damages—Appeal against only part of decretal amount — Claim to damages found time-barred and appeal allowed — Court can dismiss entire claim and set aside decree as a whole—Court should however require appellant to pay court-fee on entire decretal amount in such case.

Where in an appeal against a decree awarding damages the defendant-appellant does not challenge a part of the decretal amount the Court while allowing the appeal on the ground that the claim to damages was barred by limitation has power to dismiss the entire claim of the plaintiff and set aside the entire decree. The Court should, however, in such a case require the appellant to pay court-fee on the whole decretal amount. [P 3 C 2]

Hyder Husain and H. H. Zaidi—for Appellant.

L. S. Misra (for Respondent No. 1) *and H. D. Srivastava* — for Respondents.

Judgment.—This is a second civil appeal against the judgment and decree passed by the learned District Judge of Hardoi on 31st March 1937, setting aside the decree of the learned Civil Judge of Hardoi, dated 25th September 1936. The suit was brought by a mortgagee for possession of property mortgaged to him on 3rd September 1927 and also for damages or compensation for non-delivery of possession. According to the plaint the mortgage deed provided for immediate possession of part of the mortgaged property to be given to the mortgagee, and in respect of the remaining property, which was at the time in the possession of tenants, the mortgagors contracted to deliver possession on 1st July 1928. They had obtained a decree for arrears of rent against the tenants under S. 61, Oudh Rent Act, and they engaged to secure their ejectment by the end of June 1928. The annual rent payable by these tenants was Rs. 131-1-6, and the mortgagors

undertook to pay this amount to the mortgagee for the period between the execution of the mortgage deed and delivery of possession in July 1928. As possession was not given to the mortgagee in accordance with this agreement, he sued the mortgagors and their representatives in 1936 on the basis of a breach of contract. It was stated in the plaint that the cause of action for recovery of possession accrued on 1st July 1928, when possession was not given in accordance with the terms of the mortgage deed, and for recovery of compensation on 1st July 1931. It was also said in the plaint that the suit for the years 1929-1930 was beyond limitation and therefore the plaintiff claimed for six years only, namely from 1931. He claimed at the rate of Rs. 131-1-6 which he would have been entitled to obtain from the tenants if he had secured possession. The defendants admitted the mortgage, but pleaded that when in June 1928 they recovered possession of the plots in suit from the then tenants, the plots were given with the concurrence of the plaintiff to other tenants on a rental of Rs. 294. It was agreed that the plaintiff should realize rent from these tenants to the extent of Rs. 131-1-6, the balance being realized on behalf of the defendants. This, it was said, had since been done.

The trial Court found that the plaintiff had not been put in possession of this portion of the mortgaged property and that the plots in suit had not been re-let to tenants with his consent. This finding is not now in question. The trial Court then considered the question of limitation. The plaintiff's contention was that Art. 116, Limitation Act, applied to the case, while the defendants' contention was that the Article applicable was Art. 109. Art. 116 provides a period of six years in a suit brought for compensation for the breach of a contract in writing registered, while Art. 109 provides for a period of three years in a suit for the profits of immovable property belonging to the plaintiff which have been wrongfully received by the defendant. The trial Court held that Art. 116 applied and awarded the plaintiff a decree both for possession and for a sum of Rs. 941-12-6. There was no suggestion in that Court that the suit was barred by limitation even if Art. 116 applied. The defendants appealed to the District Judge in regard to the amount awarded. They disputed the finding of the trial Court that the suit for recovery of six years' rent was within time, and contended that the suit should have been regarded not as a suit for compensation, but rather as a suit for mesne profits, that is to say, we understand, they contended that Art. 109, Limitation Act, was applicable, and not Art. 116, though they did not expressly refer in their grounds of appeal to either Article. But although the defendants would appear from their grounds of appeal to have challenged the finding of the trial Court on this point as a whole, they confined the valuation of their appeal "for purposes of jurisdiction" to a sum of Rs. 650 from which it would appear that they did not contest the decree to the extent of Rs. 291-12-6.

The learned District Judge concurred with the learned Civil Judge in his finding as to the applicability of Art. 116, but was of opinion that even so the suit for damages or compensation was barred by limitation, although, as in the trial Court, this was not argued by counsel. The District Judge pointed out that the breach of contract occurred on 1st July 1928, when the mortgagors failed to deliver possession of the property in accordance with the contract. He referred to several rulings to support his view that there was not a continuing or successive breach of contract as was contended before him. The mortgagors had not, he said, expressly or impliedly contracted to pay the amount of Rs. 131-1-6 annually, and the breach of contract happened once for all when possession was not delivered on 1st July 1928. The learned District Judge accordingly allowed the appeal and set aside the decree of the Civil Judge in regard to the award of Rs. 941-12-6. He did not apparently take into consideration the fact that the appellants in his Court had valued their appeal at Rs. 650 only. Nor did he in allowing the appeal and dismissing the suit altogether require those appellants to pay the deficiency in the court-fee. This deficiency has been made good in this Court.

In the present appeal the plaintiff, Daulat Ram, has contested the view taken by the District Judge that the suit was barred by limitation, and his learned counsel has argued that there was an implied contract on the part of the mortgagors to continue payment of rent at the rate of Rs. 131-1-6 per annum unless and until possession of the property was delivered by them to the mortgagee. This he asks us to infer from the fact that they paid at this rate for the first year, that is to say, up to the end of June 1928. On a consideration of the mortgage deed, we are unable to take this view. There can be no doubt that neither party

contemplated the possibility of possession not being given on 1st July 1928. Under the mortgage deed as it stands the mortgagee was to realise the rent from 1st July 1928, and not from the mortgagors. There is no suggestion whatever in the mortgage deed that the amount should be paid by the mortgagors in respect of any period subsequent to 30th June 1928. There can be no doubt that the mortgagee could have recovered damages or compensation from the mortgagors at this rate on a suit brought within six years from 1st July 1928, when the breach of contract occurred. But as we cannot agree with the appellant's learned counsel that there was any implied agreement that the mortgagors should continue to pay rent to the mortgagee if possession was not given, we cannot hold that a breach of contract occurred in each year subsequent to 1928 by reason of the fact that such payment was not made by them. We have considered the rulings referred to by the lower Court. It has been argued on behalf of the appellant that they are not applicable to the facts of the present case. No doubt there are some differences in regard to the facts, but we think that nevertheless, they are applicable.

In 31 I C 804,[1] the Allahabad High Court held that where a usufructuary mortgagee sued for possession of the mortgaged property within six years of the date from which he was to have received possession and also claimed mesne profits for the same period on the allegation that the mortgagor had never given him possession in accordance with the terms of the deed, the claim was in substance one for compensation for breach of a contract in writing registered and was governed by Art. 116, and not by Art. 109, Limitation Act. In 4 A L J 249[2] the mortgagee was kept out of possession of a portion of the property. A suit brought by him for possession was dismissed. Subsequently he brought a suit more than six years after the date of the mortgage to recover compensation for non-delivery of possession and for costs incurred in the first suit. It was held by the Allahabad High Court that the suit was one to recover damages for breach of contract to which Art. 116 was applicable, and the suit having been brought more than six years after the date of the mortgage was barred. In 40 MAD 910[3] the plaintiff had obtained from the Collector of Godavari District, acting as agent to the Government a lease in writing registered of a piece of land of a certain area. He obtained only a portion of this area and unsuccessfully demanded possession of the rest. He sued for damages for non-delivery of possession of this latter area. It was held by the Madras High Court that the cause of action for breach of the covenant to give possession occurred at the inception of the lease, and that as more than six years had elapsed from that date, the suit was barred under Art. 116, Limitation Act. It was also held that breach of a covenant to give possession is not a continuing breach.

It appears to us therefore that the learned District Judge correctly held that although Art. 116 and not Art. 109, Limitation Act, was applicable, nevertheless the suit was time-barred. It has been urged that the District Judge should not have set aside the decree of the trial Court altogether, as the valuation of the appeal in his Court was only Rs. 650. In view of the provisions of S.3, Limitation Act, we are not prepared to hold that the order passed by the District Judge was not justified, though he should certainly have required the appellants in his Court to pay court-fee on the whole decretal amount. We may also observe that this point has not been raised in the grounds of appeal against the District Judge's order. We accordingly dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

1. ('15) 2 A I R 1915 All 393 : 31 I C 804, Nirbhai Sinha v. Tulsi Ram.
2. ('07) 4 A L J 249 : 1907 A W N 108, Madan Lal v. Reoti Singh.
3. ('17) 4 A I R 1917 Mad 465 : 35 I C 254 : 40 Mad 910 : 30 M L J 575, Secy. of State v. Venkayya.

A. I. R. 1941 Oudh 3

ZIAUL HASAN AND BENNETT JJ.

Emperor

v.

Raghunath — Accused.

Criminal Appeal No. 221 of 1940, Decided on 16th August 1940, against order of Special Magistrate, 1st Class, Barabanki.

(a) Penal Code (1860), S. 420 — Contract not enforceable in Civil Court—Still criminal prosecution can be based thereon.

A criminal prosecution for cheating can be based on a contract which cannot be enforced in a Civil Court : A I R 1933 Rang 199 and A I R 1917 L B 105, *Rel. on ;* 15 I C 793, *Expl.* [P 6 C 1]

(b) Penal Code (1860), Ss. 420 and 511 — Accused giving out that he could double currency notes — Police officer disguised as Seth to secure accused's conviction giving certain currency notes to accused for doubling — After performing so-

called process of doubling accused keeping packet of notes for final stage in presence of police officer — When final stage was supposed to be complete accused handing over packet containing some books to police officer and hiding packet of currency notes under his buttocks—Police officer detecting deception and arresting accused—Accused held guilty of attempt to cheat though not of cheating—Fact that police officer was forewarned and not cheated did not affect accused's guilt.

The accused gave out that he could double any Government currency notes given to him. A police officer disguised as a Seth in order to secure the conviction of the accused gave him certain currency notes to be doubled. The accused performed the so-called processes of doubling before the police officer and kept the packet for the final stage of doubling in an almirah. After the lapse of the fixed time the accused took out the packet of notes in the presence of the police officer and handed over a packet of same size containing some books to the police officer and hiding the packet of currency notes under his buttocks. Detecting the deception, the police officer arrested the accused :

Held that since the police officer did not hand over the notes because he was deceived but merely because he wanted to secure the accused's conviction, the offence of cheating was not actually committed, but the accused clearly went beyond the stage of preparation when he tried to induce the police officer to hand over notes to him on the assurance that he could double them and was guilty of the offence of attempt to cheat inasmuch as under S. 511 it was not necessary that the accused should have completed every stage in the actual offence except the final stage : 15 Bom L R 568 and 15 All 173, *Rel. on* ; A I R 1926 Pat 267, *Disting.* [P 6 C 2]

The fact that the police officer was forewarned and had knowledge of the accused's intentions and therefore was not cheated did not affect the guilt of the accused : 16 Cal 310 and A I R 1928 Lah 551, *Rel. on.* [P 7 C 1]

Government Advocate — for the Crown.

N. Banerji — for Respondent (Accused).

Judgment. — This is an appeal by the Local Government against the acquittal of a man, named Raghunath alias Ram Singh on a charge under S. 420 read with S. 511, I.P.C. Raghunath alias Ram Singh was prosecuted with another man named Sagar under Ss. 420/511/109, I. P. C., in the Court of a Special Magistrate of the first class. Sagar was discharged, while Raghunath was charged under S. 420 read with S. 511 and acquitted. The charge against Raghunath was as follows :

That you on the 18th and night between 19th and 20th September 1939 at Nawabganj P. S. Kotwali attempted to commit cheating and in such attempt did a certain act towards the commission of the said offence, i. e., you misrepresented to Thakur Jagmohan Singh that you could manufacture notes and double them in number and you put up a farce show of the process of multiplying notes and removed the bundle and thereby committed an offence punishable under Ss. 420/511, I. P. C.

The facts of the case are hardly in dispute. The allegations of the prosecution were denied altogether by the accused, but the Magistrate acquitted him purely on the ground that the facts alleged did not constitute the offence charged, and the learned counsel for the accused has argued in this Court only on the legal aspect of the case without attempting to dispute the facts. According to the prosecution story a Sub-Inspector of police named Thakur Jagmohan Singh received information on 18th September 1939, that two persons who were staying at a dharmshala at Nawabganj near Barabanki were giving out that they could double Government currency notes. The Sub-Inspector visited the dharmshala in the guise of a Seth and had a talk with Raghunath who told him that he could double any Government currency note given to him, and would be prepared to share with Thakur Jagmohan Singh the profits received from such notes. It was arranged that Thakur Jagmohan Singh should bring notes for this purpose the following night, that is the night of 19th September. In pursuance of this arrangement Thakur Jagmohan Singh took ten ten-rupee notes and ten five-rupee notes to the dharamshala on the night of 19th September after arranging that other police officers should also come to the place and wait within call. Thakur Jagmohan Singh went to the third storey of the dharamshala where Raghunath and Sagar were, and the other police officers waited in a room on the ground floor.

The notes brought by Thakur Jagmohan Singh were handed over by him to Raghunath. Pieces of paper were cut by Sagar to their size and the notes and these pieces of paper were placed under a glass tied together and wrapped in an angocha on which some powder was put. An angethi was then lighted and Sagar was directed by Raghunath to warm the packet on it. Sagar was then told by Raghunath to keep the packet so that it might get cool, and this process was continued for some time, the packet being warmed at intervals of half an hour. Eventually, Raghunath said that they should place the packet in an almirah and go to bed : it would be taken out at 4-30 A. M. when the notes would be ready. The Sub-Inspector did not agree to this and said that he would remain awake, that is presumably until the process of doubling the notes was completed. About 4 A.M. Raghunath took up the packet and untied the angocha, doing this by the light of a torch. While he was so engaged however he managed to substitute another packet for the packet of notes and

concealed the latter packet under his buttocks. The Sub-Inspector detected what had been done, caught hold of Raghunath's hands and shouted to the police officers below to come up. A man named Raghubar, manager of the dharamshala, who had originally given information to the Sub-Inspector, was the first to arrive and after him came the Circle Inspector and other police officials. Thakur Jagmohan Singh asked the accused Raghunath where he had put the original packet and Raghunath pointing to the packet which had been substituted for it and which was lying before him said that that was the packet. This packet was opened and was found to contain seven copies of a book. Under the right side buttock of Raghunath was found the packet containing the notes. It was in the same condition as when originally tied up by Raghunath. The evidence of Thakur Jagmohan Singh was corroborated by the evidence of Thakur Sat Narain Singh, Circle Inspector, and by the evidence of the manager of the dharamshala, Raghubar. Learned counsel for the accused Raghunath, has referred to certain statements made by Raghubar, which he argues, throw some doubt on the facts. As translated the passage in the evidence of this witness to which we have been referred reads as follows:

> Having reached the last step of the stair-case I saw that Raghunath accused had stood up and Ex. 13 fell in front of right leg from the right thigh. The Daroghaji was holding his both hands and asking him where his bundle was to which the accused had said "it is lying in front." In the meantime the Sub-Inspector arrived (presumably meaning the Circle Inspector). Packet Ex. 13 was lying under the buttock of the accused Raghunath. When it was opened it was found to contain seven books. . . . . Packet Ex. 6 when opened was found to contain 10 notes of Rs. 10 each and 10 notes of Rs. 5 each and blank papers after each note.

The packet containing the notes was actually Ex. 8 and the packet which was alleged to have been substituted for it Ex. 13. It is quite clear, we think, that some mistake must have been made in recording the evidence of Raghubar because he has made quite different statements about Ex. 13, namely, that when Raghunath stood up Ex. 13 fell in front of his right leg, and that the same exhibit was lying under Raghunath's buttock. The witness could not have seen what was lying under Raghunath's buttock before he stood up, for he says that after he had run up the stairs and had reached the last step of the stair-case he saw Raghunath standing up. We find that in one place in the original record some other exhibit was at first referred to and then deleted and Ex. 13 substituted for it. The evidence of this witness seems to have been carelessly recorded. This is the only point in the case which can be urged on behalf of the accused so far as the facts are concerned. As we have said, the accused denied entirely the allegations against him. He denied telling Thakur Jagmohan Singh that he could counterfeit notes: he denied that Thakur Jagmohan Singh had come to him on 19th September and given him notes to the value of Rs. 150/- for this purpose and he entirely denied what according to the evidence, subsequently occurred. He also denied that he was arrested by the police that night, saying that he was arrested about 11 or 12 in the day time. He produced no defence evidence and we can find no reason to doubt the truth of the prosecution story.

The Special Magistrate acquitted the accused because he was of opinion that there had merely been preparation for the commission of the crime and that the stage of an attempt had not been reached. He also observed that Thakur Jagmohan Singh had not been deceived and had not parted with the notes under any inducement which was fraudulent because he was fully aware that the accused could not make genuine notes. At the same time he gave the currency notes to be doubled and entered into an illegal contract. The Magistrate was of opinion that as such a contract was opposed to public policy it was void and could not be enforced in the Civil Courts, criminal proceedings could not be taken on the basis of it. The Magistrate also observed that if the accused after replacing the genuine bundle had handed over the other bundle containing the books to Thakur Jagmohan Singh and asked him to wait for him and proceeded to depart from the place with the genuine bundle and if he had then been arrested the stage of preparation would have ended and the stage of attempt would have come into play. We have heard learned counsel on the legal aspect of the case at length and are clearly of opinion that the Special Magistrate misdirected himself. In support of his view that criminal proceedings could not be taken on the basis of a contract which could not be enforced in the civil Courts, the Magistrate referred to a Bombay case, 13 CR L J 521.[1] It is certainly true that the judgment in this case lends some colour to the view taken by the Magistrate, but the judgment in the case is very brief and it

1. ('12) 14 Bom L R 503: 15 I C 793: 13 Cr L J 521, Emperor v. Jani Hira.

has subsequently been dissented from. There was also some doubt in that case whether there had actually been an attempt to cheat. The accused had agreed to let her daughter on hire to a person for concubinage and subsequently refused to do so or to return a sum of money advanced to her. The Sessions Judge who referred the case thought it probable that she originally intended to let the complainant have her daughter and only changed her mind later. The Bombay High Court agreed that for the reasons stated by the Sessions Judge the case was not one for the criminal Court. They observed that the accused and the complainant had entered into a contract which was clearly void for immorality. The complainant would not be entitled to obtain any relief from a civil Court for its breach, but that was no reason why he should be allowed to prosecute the accused on a charge of cheating. We cannot read into this judgment the general principle stated in the headnote to it that a party should not be allowed to prosecute on a charge of cheating when he would not be entitled to obtain from a civil Court any relief for breach of the contract. Apart from this, as we have said, the suggestion that a criminal prosecution must fail if it is based upon a contract which could not be enforced in a civil Court has been expressly repelled in two later cases, namely, A I R 1917 L B 105[2] and A I R 1933 Rang 199.[3] We see no reason to dissent from this later view. With regard to the observation of the Magistrate that there could not be an attempt to cheat Thakur Jagmohan Singh because he did not hand over the money under any deception, we need only refer to two cases in which it has been held that a man may be guilty of an attempt to cheat, although the person he attempts to cheat is forewarned and is, therefore, not cheated. This was laid down in 16 CAL 310[4] and 10 LAH 253.[5]

Learned counsel for Raghunath has taken up two positions in his arguments on his client's behalf. He has argued first of all that there may have been an attempt to deceive the Sub-Inspector at one stage of the transaction but that that stage passed when the notes were actually handed over by him, and that, therefore, if the Sub-Inspector had handed over the notes because he was deceived the offence would have been complete. Since, however, the Sub-Inspector did not hand over the notes because he was deceived but merely because he wanted to secure the accused's conviction, the offence of cheating was not actually committed. With the latter part of this argument we see no reason to disagree, but we are unable to accept the argument that if there was in the first instance an attempt to deceive, the legal position in regard to the accused's guilt changed when the notes were actually handed over. If the accused was at one stage guilty of an attempt to cheat Thakur Jagmohan Singh, nothing that transpired subsequently could affect his guilt.

Secondly, learned counsel has tried to support the view taken by the Magistrate that the case had not proceeded beyond the stage of preparation. He has referred to a case of the Patna High Court, 27 Cr L J 609,[6] in which it was held that the mere taking of thumb impressions on a blank piece of paper may be a preparation to cheat, but unless something is written on it, it cannot amount to cheating or attempt to cheat. We cannot see any similarity at all between that case and the case under consideration. There would have been similarity if the accused in the present case had merely got everything ready in the dharamshala for the purpose of cheating the Sub-Inspector or anybody else who wanted to have their notes doubled. Clearly he went beyond the stage of preparation when he tried to induce a person to hand over notes to him on the assurance that he could double them.

Section 511, I. P. C., provides punishment for the offence of attempting to commit an offence punishable by that Code with transportation or imprisonment, or to cause such an offence to be committed, when in such attempt the person accused does any act towards the commission of the offence. We have therefore to see whether the accused in the present case did any act towards the commission of the offence of cheating. We have no doubt whatever that he did. It is not necessary that the accused should complete every stage in the actual offence except the final stage. In 15 Bom L R 568[7] the accused had contracted to deliver a

2. ('17) 4 AIR 1917 L B 105 : 38 I C 746 : 18 Cr L J 362, Meera v. Emperor.
3. ('33) 20 AIR 1933 Rang 199 : 146 I C 240 : 34 Cr L J 1255, Yacoob v. Emperor.
4. ('89) 16 Cal 310, Government of Bengal v. Umesh Chunder Mitter.
5. ('28) 15 AIR 1928 Lah 551 : 110 I C 812 : 10 Lah 253 : 30 P L R 405 : 29 Cr L J 780, Emperor v. Shib Charan.
6. ('26) 13 AIR 1926 Pat 267 : 94 I C 353 : 27 Cr L J 609, Sheo Prasad v. Emperor.
7. ('13) 15 Bom L R 568 : 20 I C 593 : 14 Cr L J 433, Emperor v. Mansing.

certain quantity of good cotton to the complainants, but delivered instead a quantity of bad cotton, that is to say, cotton heavily adulterated with rubbish in such a manner that the fraud would be likely to escape ordinary inspection. The complainant's agent suspected the character of the goods and declined to accept them. The accused were convicted of attempting to cheat, but on appeal were acquitted by the Sessions Judge on the ground that the acts did not amount to an attempt to cheat, but only to a preparation for cheating. The Bombay High Court set aside the acquittal, holding that there was a complete case of an attempt to cheat. The only reason why the offence stopped short at an attempt and did not proceed to the cheating itself was because the party who was sought to be cheated was cautious and not confiding. An overt act was begun by the accused which would have led to the finished offence but for an interruption arising independently of the will of the accused.

The Allahabad High Court also in 15 ALL 173[8] held that S. 511 was not meant to cover only the penultimate act towards the completion of an offence and not acts precedent, if those acts are done in the course of the attempt to commit the offence, are done with the intent to commit it, and done towards its commission. There can be no doubt in our opinion that Raghunath went far beyond the stage of preparation indeed but for the fact that the Sub-Inspector had not actually been deceived the offence would have been complete. We can see no reason why in these circumstances Raghunath should not be convicted under S. 420 read with S. 511, I. P. C. We have shown that the question of the accused's guilt is not affected by the knowledge of the Sub-Inspector in regard to the accused's intentions. The accused was not aware of the Sub-Inspectors's knowledge and there can be no doubt that he did attempt to cheat the Sub-Inspector by dishonestly deceiving him and inducing him under such deception to hand over the notes to him. We accordingly allow this appeal, set aside the order of acquittal and convict Raghunath alias Ram Singh of the offence charged under S. 420 read with S. 511, I. P. C.

Raghunath admitted that he had been previously convicted of an offence under S. 420, I. P. C., in 1937 and sentenced to one year's rigorous imprisonment. He is therefore liable to enhanced punishment under S. 75. We consider that a deterrent sentence is called for in the present case. We accordingly sentence him to undergo three years' rigorous imprisonment.

G.N./R.K. *Appeal allowed.*

8. ('93) 15 All 173 : 1893 A W N 71, In the matter of R. MacCrea.

A. I. R. 1941 Oudh 7

ZIAUL HASAN AND YORKE JJ.

Chandrika Prasad — Complainant

Applicant

v.

S. Mohd. Jafar — Opposite Party.

Criminal Reference No. 8 of 1940, Decided on 8th August 1940, made by Addl. Sess. Judge, Kheri.

Criminal P. C. (1898), S. 439—Acquittal—Revision against, cannot be treated as appeal—High Court will interfere only in exceptional matters where Magistrate fails to exercise impartial judicial mind in considering evidence or leaves evidence entirely out of consideration or relies on evidence not on record—High Court is, however, not bound to accept findings of fact of lower Court — But it will exercise revisional powers very sparingly and only when there has been miscarriage of justice or perverse and unreasonable decision — Order of acquittal sought to be set aside and re-trial prayed on ground that High Court should take different view of evidence—Held that High Court would have given very short shrift to complainant's application but inasmuch as it was reference by Additional Sessions Judge, High Court was prepared to go into evidence.

The High Court will not on an application in revision against an acquittal treat the case before it as a case of appeal. It will not be prepared to interfere in revision unless there are exceptional matters compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record. The High Court, however, is not bound to accept loyally the findings of facts of the trial Court or the lower Appellate Court, as the case may be, but at the same time the power to interfere is one to be exercised most sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable decision. [P 10 C 1]

Where the High Court was asked to set aside in revision the order of acquittal and direct a re-trial merely on the ground that it should take a different view of the evidence from that which had been taken by the Magistrate who tried the case and had the witnesses before him :

Held that had the matter come to the High Court directly upon an application by the complainant, it would have given it a very short shrift, but in view of the reference having been made to the Court by the Additional Sessions Judge it was prepared to go into the evidence at some length : *Case law reviewed.* [P 10 C 1, 2]

Dr. J. N. Misra—for Appellant.

Nasirullah Beg—for Opposite Party.

Order.—This is a reference made by the Additional Sessions Judge of Kheri under S. 438, Criminal P. C., recommending that this Court should set aside an acquittal by a Magistrate on charges of embezzlement and convict and punish the accused in respect of one of those charges. The recommendation is obviously mistaken in one respect in view of the provisions of sub-s. (4) of S. 439, Criminal P. C., which provides that
nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

The recommendation which the learned Additional Sessions Judge should have made, and which we treat him as having made, is that his Court should set aside the order of acquittal and direct that the accused be tried by some other Court on the charge in respect of which the recommendation is made. The case out of which this application has arisen was a private prosecution by a servant of the Isanagar estate under the direction of the taluqdar the Raja of Isanagar, of the opposite party Syed Mohammad Jafar on three charges of embezzlement, (1) in respect of a sum of Rs. 273-6-0 said to have been drawn by the accused for payment by money-order to one Mt. Adya Bai, a guzaradar, (2) in respect of Rs. 321-8-0 and Rs. 70-6-0 said to have been drawn for payment to the Newal Kishore Press and (3) in respect of a sum of Rs. 140 drawn for payment to the complainant Chandrika Prasad, of which it was said that Rs. 40 had been embezzled. The learned Magistrate who tried the case very carefully and discussed the questions which had to be decided at some length acquitted the opposite party in respect of all three charges. The learned Additional Sessions Judge on an application in revision on behalf of the complainant against this order of acquittal has discussed all three charges but has made no recommendation with regard to charges Nos. 2 and 3. In regard to charge No. 1 he is of opinion that the charge could not be maintained in respect of Rs. 30 out of this sum of Rs. 273-6-0 but he considered that the charge was established in respect of Rs. 243, and he has accordingly made a reference to this Court.

The first question which has been raised before us and which has to be considered is the question of the jurisdiction of this Court to interfere in revision with a judgment of acquittal and order a retrial. Learned counsel for the opposite party Syed Mohammad Jafar contends that even if it cannot be said that a High Court has not got jurisdiction to order a retrial on a case coming before it under S. 439, Criminal P. C., whether the application of a private party or a reference by a District Magistrate or Sessions Judge, nevertheless to set aside an acquittal and direct a retrial is practically tantamount to expressing the opinion that the evidence on the record justifies a conviction and directing the Court below to reconsider that evidence in the light of the opinion expressed by this Court. He would therefore maintain that such an order really comes within the condemnation of sub-s. (4) of S. 439. In this connexion he has referred to several cases. In A I R 1929 RANG 321[1] it was held that
the High Court interfering in revision may set aside an order of acquittal and direct a retrial owing to non-recording of evidence or improper recording of inadmissible evidence but where there is no question of evidence having been erroneously omitted or of evidence having been erroneously recorded and the High Court is asked to hold that on the evidence the accused ought not to have been acquitted no order directing a retrial can be made.

A similar view was taken by Sir Louis Stuart in a case of this Court, *Kalka Prasad* v. *Niranjan Singh*[2] in 1926 when he held that
it is ordinarily not open to a private person to have an acquittal set aside in revision and it is doubtful whether it is open to a High Court in revision to set aside an acquittal and direct a retrial.

That case was not reported at the time but was quoted before a Bench of this Court in 1931 and was then reported in 8 O W N 1336.[2] The decision of the Bench before which this case appears to have come is reported as 8 O W N 1333[3] in which a different view was taken, namely that
in a case of acquittal it is within the competency of the High Court to entertain an application for revision at the instance of a private complainant despite the fact that Government has declined to institute an appeal and to interfere, should it see fit, in the matter to the extent of setting aside the order of acquittal and directing a retrial.

The Bombay High Court has not followed the view taken by Sir Louis Stuart in the case referred to above but has held in 53 Bom 564[4] that
the High Court has jurisdiction to entertain applications in revision against orders of acquittal under S. 439, Criminal P. C., although as a matter of practice and policy it will not interfere with

1. ('29) 16 A I R 1929 Rang 321 : 120 I C 912 : 7 Rang 538 : 31 Cr L J 186, Ma Nyen v. Maung Chit Hpu.
2. ('26) 8 O W N 1336.
3. ('32) 19 A I R 1932 Oudh 31 : 136 I C 249 : 8 O W N 1333 : 33 Cr L J 280, Giridhariji Singh v. Jitendra Mohan Singh.
4. ('29) 16 A I R 1929 Bom 306 : 119 I C 643 : 30 Cr L J 1062 : 53 Bom 564 : 31 Bom L R 529, Emperor v. Rameshwar Ramnath.

such orders at the instance of a party other than the Local Government except on some very broad ground of the requirements of public justice.

In three cases of this Court decided by Nanavutty J., and reported in 11 O W N 717,[5] 11 O W N 718[6] and 11 O W N 719[7] the view was expressed that an application in revision or a reference made on such an application must be founded on an acceptance of the findings of fact of the trial Court, that is such an application or reference can only be made on a point of law. We are not satisfied that this is a sound view and in fact it is not supported by any other authority. The learned Additional Sessions Judge himself referred to a number of cases reported in 10 O W N. In 10 O W N 345[8] it was held by Raza J. that

the High Court has jurisdiction under S.439, Criminal P. C., to entertain an application in revision of an order of acquittal when the Crown has preferred no appeal; but the High Court would not move in such a case, unless there is some glaring defect either in the procedure or in the view of the evidence taken by the Court below.

Further on it is said that

the Court as a rule will not go into the evidence save in exceptional cases, as where the judgment of the facts is manifestly wrong and grossly and palpably unjust; otherwise, though there is no right of appeal, an appeal might in effect be admitted in every case in the guise of an application for revision.

There is a great deal of force in these remarks. Again in another case 10 O W N 788[9] the same learned Judge held that the High Court would refuse to consider questions of fact in revision where it could not be said that the findings of the Sessions Judge are perverse, illegal or unwarranted. Again the same learned Judge in 10 O W N 999[10] held that

in Oudh it is a well-established practice that the Court is loath to interfere in cases of acquittal and the power of interference is exercised if it is proved without any doubt, not only that the accused person is guilty, but that he has been acquitted on unreasonable grounds.

Another learned Judge of this Court in 10 O W N 1037[11] held that

the High Court will not, except perhaps in very special circumstances interfere on an application for revision by a private person with an order of acquittal.

Learned counsel for the opposite party has relied finally on the case in A I R 1933 NAG 259[12] in which it was held that

when the Local Government has not preferred an appeal under S.417, the High Court ought not to interfere in revision on a reference under S.438 by the District Magistrate, where it cannot do so without practically hearing the case on the evidence.

With respect we are of opinion that there is a great deal to be said for this view. Dr. Misra supporting the reference has referred to a number of cases in which it has been held that the Court has a power to interfere, but we do not think that these cases really take the matter very much further. He referred among other cases to 19 A L J 589[13] in which it was held that

the jurisdiction of the High Court to revise an order of acquittal and direct a retrial should be exercised only in exceptional cases and with caution. It should only be done in cases where the alleged offence is of a serious character and a Judge comes to the opinion that there has been a miscarriage of justice where for instance the lower Court has misquoted the evidence, or where having evidence before it which prima facie is reasonable and credible the Judge of that Court gives no grounds whatever for rejecting it and does not satisfactorily review it.

Similarly in, what is perhaps the most recent case of this Court quoted to us, 1937 O W N 281,[14] it was held by one of the members of the present Bench that

ordinarily the High Court will not interfere with an order of acquittal, especially in a case under S.323, Penal Code, but it will interfere when the trial Magistrate has acquitted the accused owing to a wrong view of the law.

Another case of the same kind is the case of 53 CAL 471[15] the headnote in which runs:

Where the Magistrate acquitted the accused, on a charge of rioting with the common object of taking possession of the complainant's land and assaulting his durwans, without coming to a finding on the question of possession:

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5. ('34) 21 A I R 1934 Oudh 276 : 155 I C 724 : 36 Cr L J 842 : 11 O W N 717, Emperor v. B. A. Peters.
6. ('34) 21 A I R 1934 Oudh 278 : 155 I C 726 : 36 Cr L J 828 : 11 O W N 718, Dulare v. Mt. Sundaria.
7. ('34) 21 A I R 1934 Oudh 280 : 149 I C 364 : 35 Cr L J 951 : 11 O W N 719, Bhola Prasad v. Mt. Ram Dulary.
8. ('33) 20 A I R 1933 Oudh 257 : 143 I C 852 : 34 Cr L J 661 : 10 O W N 345, Rama Murti v. Indra Bahadur.
9. ('33) 20 A I R 1933 Oudh 279 : 144 I C 262 : 34 Cr L J 748 : 10 O W N 788, Emperor v. Mohammad Idris.
10. ('33) 10 O W N 999 : 146 I C 523 : 35 Cr L J 416, Mendhai Lal v. Beni Madho.
11. ('33) 20 A I R 1933 Oudh 430 : 146 I C 638 : 35 Cr L J 128 : 10 O W N 1037, Banke Lal v. Maiku.
12. ('33) 20 A I R 1933 Nag 259 : 146 I C 332 : 35 Cr L J 28 : 29 N L R 365, Emperor v. Ganpat Asaraji.
13. ('21) 8 A I R 1921 All 266 : 61 I C 161 : 22 Cr L J 337 : 19 A L J 589, Nand Ram v. Khazan.
14. ('37) 24 A I R 1937 Oudh 283 : 166 I C 987 : 1937 O W N 281 : 38 Cr L J 329, Ram Dayal v. Mata Din.
15. ('26) 13 A I R 1926 Cal 945 : 96 I C 527 : 27 Cr L J 975 : 53 Cal 471, Surendra Nath v. Janaki Nath.

Held, that the judgment was not a satisfactory one, as the Magistrate should have arrived at a proper decision on the point and that the order of acquittal must be set aside and a retrial ordered.

In that case the Magistrate had failed to come to a decision on a point which went to the root of the whole case, and therefore a retrial was ordered. We have been referred to two other cases of the Calcutta High Court. In 18 C W N 1244[16] the trying Magistrate had completely failed to take into consideration a portion of the evidence and it was held that he had failed to deal with the case before him with judicial care and impartiality. Hence the order of acquittal was set aside and retrial ordered. Similarly in A I R 1938 CAL 613[17] it was held that

the High Court has power to interfere in revision with an appellate judgment of acquittal, and that power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the appellate Court not having brought a judicial mind to bear upon the evidence.

The upshot of the whole matter would seem to be this that this Court will not on an application in revision against an acquittal treat the case before it as a case of appeal. It will not be prepared to interfere unless there are exceptional matters compelling it to do so, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record. It is going too far to say that the High Court must accept loyally the findings of facts of the trial Court or the lower appellate Court, as the case may be, but at the same time it is obvious that the power to interfere is one to be exercised most sparingly and only when there appears to have been a miscarriage of justice or a perverse and unreasonable decision. We are of opinion that in the present case what we are being asked to do really is to set aside the order of acquittal and direct a retrial merely on the ground that we should take a different view of the evidence from that which has been taken by the learned Magistrate who tried the case and had the witnesses before him. Had this matter come to us directly upon an application to this Court by the present applicant Chandrika Prasad we should have given it a very short shrift, but in view of the reference made to us by the learned Additional Sessions Judge we have gone into the evidence at some length.

Turning now to the merits of the case we think that the very first comment which must necessarily be made is that the very length of the argument by which it has been necessary for learned counsel supporting the reference to endeavour to convince us that the opposite party has been wrongly acquitted is itself an indication that all that we are being asked to do is to take a different view of the facts merely because a different view of the facts is possible and not because that different view of the facts is so convincingly the right view that we must necessarily accept it. [The rest of the judgment is not material for the report.]

G.N./R.K. *Reference rejected.*

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16. ('15) 2 A I R 1915 Cal 235 : 26 I C 170 : 15 Cr L J 722 : 18 C W N 1244, Basu v. Raika Singh.

17. ('38) 25 A I R 1938 Cal 613 : 178 I C 56 : 39 Cr L J 988 : 67 C L J 571 : 43 C W N 25, Satish Chandra v. Chinta Haran.

A. I. R. 1941 Oudh 10

YORKE J.

Sukhram Das Debi Dutt — *Defendant* — Applicant

v.

Ram Krishna — *Plaintiff* — Opposite Party.

Civil Appln. No. 76 of 1939, Decided on 2nd August 1940, to revise order of First Addl. Judge, Small Cause Court, Lucknow, D/- 24th August 1939.

(a) Master and Servant—Contract of service is terminable by reasonable notice in absence of express agreement or custom—Fifteen days' notice is reasonable for ordinary clerk.

In the absence of an express agreement or established custom to the contrary, a contract of service is terminable by reasonable notice. Fifteen days' notice is a reasonable notice for an ordinary clerk employed on Rs. 15 per mensem : A I R 1925 Lah 186; 168 I C 697; A I R 1916 L B 112 and A I R 1920 L B 105, *Rel. on;* 35 All 132 , *held obiter and not approved.* [P 11 C 2]

(b) Master and Servant — Pleadings — Suit by servant claiming himself entitled to one month's notice — Servant found entitled only to fifteen days' notice—Master can take advantage of aforesaid finding even though he did not raise that point specifically.

Once it is held that the servant is only entitled to reasonable notice and that reasonable notice is only 15 days, the master is entitled to take advantage of the same even if he did not specifically raise the point in the suit by the servant claiming to be entitled to one month's notice and therefore to one month's salary in lieu thereof. [P 11 C 2]

Har Govind Dayal Srivastava — for Applicant.

A. P. Singh — for Opposite Party.

Order. — This is an application under S. 25, Provincial Small Cause Courts Act, against a judgment of the Additional Judge

of the Small Cause Court of Lucknow. The facts are simple and for the purpose of this application are not in dispute. The plaintiff Ram Krishna was a clerk of the present applicants on Rs. 15 per month. It has been found by the lower Court that on 1st June 1939, the defendants-applicants asked the plaintiff to work in future on a reduced pay of Rs. 13 per mensem. He refused to do so and was turned out by the present applicants. The applicants further did not pay to the plaintiff his salary for the month of May or anything in lieu of notice for his dismissal on 1st June. In fact their contention was that it was the plaintiff who walked out, and not they who dismissed him. The learned Additional Judge of the Small Cause Court decreed the plaintiff's claim for Rs. 15 as pay for the month of May and for Rs. 15 one month's pay of June in lieu of notice.

The sole question which is raised in this application is whether the lower Court was right in giving a decree for one month's pay in lieu of notice. The learned Additional Judge of the Small Cause Court appears to have taken it for granted that the plaintiff was entitled to one month's pay in lieu of notice and has not discussed the question at all. It may be said at once that there is no decision of this Court on the point at issue. On behalf of the plaintiff some reliance has been placed on 35 ALL 132[1] at page 133 where it was remarked that

> the question is one between master and servant. The plaintiff was engaged on a monthly salary, and he would therefore have been in the absence of a contract to the contrary, entitled to one month's notice before dismissal. Equally his master was entitled to one month's notice before he left service.

This remark was made obiter and was not necessary for the decision of the particular question, which was before the Court in that case. The learned Judge went on to refer to Smith's Law of Master and Servant to which I have therefore made a reference. In Edn. 7 of that commentary at page 40 it is stated :

> In the absence of any definite agreement and of any custom in the trade or calling, the contract of service will be terminable by a reasonable notice.

The learned author goes on to show that very varied periods of notice have been held to be reasonable for different kinds of service. Bank clerks and clerks in the city of London have been held entitled to three months' notice but a clerk to a telegraphic company was held to be entitled to one month's notice. My attention has been drawn on behalf of the applicants to the case in A I R 1925 LAH 186[2] in which it was held that

> the ordinary rule of law is that in the absence of any express agreement or established custom to the contrary the contract of service is terminable by reasonable notice. A servant paid by the month is not entitled to one month's notice.

The plaintiff in that case was employed as a monthly servant in an ice factory on a salary of Rs. 60 per mensem. There is nothing to show whether he was a mechanic or a clerk but he was at any rate a man of considerable status and not a mere menial. In that case there is a reference to two Burma cases. In the former of these 8 L B R 420[3] it was held that in the case of a clerk hired by the month, 15 days' notice was sufficient. In the other case 13 BUR L T 168[4] it was held that there was no authority for holding that a servant paid by the month was entitled to a month's notice. The view taken in A I R 1925 LAH 186[2] was followed by another Single Judge of the same High Court in 168 I C 697[5] in which the view taken was that

> in the absence of an express agreement or established custom to the contrary, a contract of service is terminable by reasonable notice, and there is no authority for holding that a servant hired by the month is entitled to one month's notice. Ordinarily 15 days' notice would be sufficient in such circumstances.

The plaintiff in this particular case was a clerk of a trust employed on a salary of Rs. 50 per mensem. It seems to me clear that so far as reported cases of this country go there is no doubt that 15 days' notice is to be taken as reasonable notice for an ordinary clerk employed on Rs. 15 per mensem.

The only other point raised on behalf of the plaintiff opposite party is that this point was not specifically taken either in the answer to the notices served on the defendants by the plaintiff or in the oral pleadings on which the issues were framed. It does not appear to me that that is a sufficient reason for not allowing the present application once it is held that the plaintiff is only entitled to reasonable notice and that reasonable notice is only 15 days. I accordingly allow this application and modify the order of the Judge of the Small Cause Court and direct that the suit be decreed for Rs. 22-8-0 instead of Rupees 30 with propor-

1. ('13) 35 All 132 : 18 I C 699 : 11 A L J 104, Rally Brothers v. Ambika Prasad.
2. ('25) 12 AIR 1925 Lah 186 : 78 I C 763, Ganga Ram v. Duni Chand.
3. ('16) 3 A I R 1916 L B 112 : 33 I C 981 : 8 L B R 420, M. E. Moola v. K. C. Bose.
4. ('20) 7 A I R 1920 L B 105 : 63 I C 982 : 13 Bur L T 168, David v. Superintendent, St. Anthony High School.
5. ('36) 168 I C 697 : 39 P L R 501, Rala Ram v. Baij Nath Joshi.

tionate costs of the trial Court. The plaintiff opposite party was certainly not in any way to blame for the fact that the learned Judge did not consider the question of what was or was not reasonable notice, and I therefore make no order as to costs of this Court.

G.N./R.K. *Application allowed.*

A. I. R. 1941 Oudh 12

YORKE J.

Maharaja Pande — Defendant — Appellant

v.

Kali Din Pande — Plaintiff — Respondent.

Second Appeal No. 116 of 1937, Decided on 30th August 1940, against order of Addl. Civil Judge, Fyzabad, D/- 30th November 1936.

Deed — Construction — Deed purporting to be perpetual lease of under-proprietary rights held out and out sale.

In determining the question whether a document is really a lease or a sale the Court should ascertain the real nature of the transaction after stripping it of the disguises by which the true nature is sought to be concealed. [P 14 C 1]

The vendor purported to execute a perpetual lease in respect of under-proprietary rights but in the very preamble of the deed it was stated that the vendor wanted to sell the property in suit to pay off his debts, that is to say what the vendor really wanted was a sum of money in cash. He did not want to execute a document in any way to bring in an annual return. The preamble went on to recite that no one was ready or willing to purchase the property for fear of pre-emption, and it was only after great difficulty that the vendor was able to bring round the vendee to accept a perpetual lease of the property. The deed provided that the lessee was to enjoy generation after generation only the usufruct of the land. The rights given by the lease were only the ordinary rights given to a thekadar of ejecting tenants, enhancing rents and so on. On the other hand there were some provisions definitely limiting the rights of the lessee. The lessee was not entitled to turn cultivated land into parti, that is fallow land but no penalty was provided in case the lessee transgressed this condition. All that was reserved by way of rent to the lessor was Rs. 2 per annum, and as no right of re-entry was reserved, the only right which the lessor had in respect of this amount was to sue for it. The lessor had no right to an enhancement of the nominal rent of Rs. 2 which was entirely out of proportion to the amount of the cash payment which was called 'nazrana' in order to give the document the appearance of a lease. Although the document did not in express terms confer a right of transfer on the lessee, the rights conferred were heritable :

Held that inasmuch as the lease in question was not one for agricultural purposes but of zamindari rights the lessee's rights were transferable under the provisions of the Transfer of Property Act and since the lessee was to pay the under-proprietary rent direct to the superior proprietor, it was apparent that the lessee was to take the place of the lessor under-proprietor entirely. Therefore in view of all the facts, the document was really a sale deed transferring the under-proprietary rights of the lessor completely to the lessee: A I R 1933 Oudh 329, *Rel. on;* A I R 1934 Oudh 145; 21 I C 69 and 10 O C 348, *Ref.* [P 13 C 2]

Hyder Husain, Sri Rama and H. H. Zaidi— for Appellant.

M. Wasim — for Respondent.

Judgment. — This is a second appeal by the vendee in a pre-emption suit. The plaintiff-respondent had instituted a suit for pre-emption in respect of a registered deed, dated 15th May 1935, whereby the vendor purported to execute a perpetual lease in respect of under-proprietary rights in favour of the present appellant. The trial Court of the Munsif dismissed the plaintiff's suit holding that the deed of perpetual lease was genuinely a lease and that although it had been executed with the object of evading pre-emption, none the less it was not a mere disguise but a device successfully adopted. The learned Additional Civil Judge of Fyzabad has held on the contrary that the document in question is an out and out sale deed disguised in the garb of a perpetual lease and has accordingly decreed the plaintiff's claim for pre-emption on payment of Rupees 1300 within two months from the date of the decree. It is against this decree that the present second appeal is filed and only one point arises, namely whether the document in question is a sale deed disguised as a perpetual lease or whether it is really, as held by the Munsif, a perpetual lease.

Learned counsel for the vendee appellant contending that the document is a genuine lease, points out first of all that the document is styled a perpetual lease, and prima facie therefore it is to be taken as a lease. There might possibly have been some small amount of weight to be given to this argument had it not been for the fact that in the very preamble of the deed it is stated that the vendor wanted to sell the property in suit to pay off his debts, that is to say what the vendor really wanted was a sum of money in cash. He did not want to execute a document in any way to bring in an annual return. The preamble went on to recite that no one was ready or willing to purchase the property for fear of pre-emption, and it was only after great difficulty that the vendor was able to bring round the vendee defendant 1 to accept a perpetual lease of the property. The second point he makes is that the deed provides that the lessee is to enjoy generation after generation

only the usufruct of the land. The document in fact does not purport to transfer the land in itself but only its usufruct. Thirdly, the rights given by the lease are only the ordinary rights given to a thekadar of ejecting tenants, enhancing rents and so on. On the other hand, there are some provisions definitely limiting the rights of the lessee. The lessee is not entitled to turn cultivated land into parti, that is fallow land. The comment on this by the lower Appellate Court is that this clause is apparently redundant because there is no penalty provided in case the lessee transgresses this condition. The next point on which reliance is placed is that under this document an annual rent of Rs. 17-14-0, including nazrana is reserved to the lessor. Prima facie this looks like a substantial amount of rent, but in fact Rs. 15-14-0 is the amount of the under-proprietary rent due from the lessor to the superior proprietor and this the lessee is directed to pay direct to the superior proprietor. All that is reserved by way of rent to the lessor is Rs. 2 per annum, and as no right of re-entry is reserved, the only right which the lessor would have in respect of this amount would be to sue for it, if indeed it could ever be thought worth while to institute a suit once in every three years to recover the sum of Rs. 6. Then again it is pointed out that there is a provision for enhancement of rent but the lower Appellate Court has rightly remarked that this is limited to enhancement of the under-proprietary rent, the benefit of which will go not to the lessor but to the superior proprietor. The lessor has no right to an enhancement of the nominal rent of Rs. 2. It will be noted that in so far as there are provisions which suggest that this document is a lease, those provisions which might seem to be of some value for the purpose are all defective in one way or another.

On the other hand in support of the view that this document is really a sale deed we have first the recital in the preamble which as I have already noted, shows that what the vendor had wanted to do was to effect an out and out sale in order to get a sum of money. Secondly we have the very important fact that no right of re-entry is reserved to the vendor. Thirdly we have the fact that the rent reserved is quite nominal and entirely out of proportion to the amount of the cash payment which is called 'nazrana' as it must necessarily be called in order to give the document the appearance of a lease. Fourthly, although the document does not in express terms confer a right of transfer on the lessee, the rights conferred are heritable. It is stated that full rights are given to the lessee, his heirs and "kaim mukaman" that is representatives, which must apparently mean transferees. Fifthly, the lessee has full rights to deal with the property. Sixthly, this is not a lease for agricultural purposes but a lease of zamindari rights and therefore under the provisions of the Transfer of Property Act it necessarily follows that the rights of the lessee are transferable. Lastly, since the lessee is to pay the under-proprietary rent direct to the superior proprietor, it is apparent that the lessee is to take the place of the lessor under-proprietor entirely. In my opinion, when all these facts are taken into consideration it is difficult to resist the inference that this document is really a sale deed transferring the under-proprietary rights of the lessor completely to the lessee. Learned counsel for the appellant has taken me through a whole series of rulings, relating with only a few exceptions, to transfers of proprietary or under-proprietary rights in which the right of pre-emption was sought to be exercised, but I do not think it is necessary to refer to more than a very few of these cases. In 10 O C 348[1] it was held that

> no right of pre-emption can be claimed in respect of perpetual lease of under-proprietary rights as such a lease is not a sale within the meaning of the Oudh Laws Act.

The Oudh Laws Act, of course, provides for a right of pre-emption in respect only of sales and foreclosures. In this case the consideration for the lease executed by the pukhtadars or under-proprietors was Rs. 700 and a sum of Rs. 18-13-0 reserved as annual rent. No right of re-entry was reserved by the lessor. The two Courts below had held that the transaction evidenced by the deed was neither a sale nor equivalent to a sale. The learned Additional Judicial Commissioner remarked: "The document in suit purports to be a perpetual lease, and I am not prepared to hold it as other than a perpetual lease," while the Judicial Commissioner said that he agreed that the patta in question evidenced a lease and not a sale. In that case it appears that the under-proprietor continued to be still liable to the superior proprietor for the rent due upon the holding in the occupation of the lessee. I should be inclined to suppose that the real rent reserved was something very minute. So far as it goes this case is helpful to the appellant but it is clear that the learned Judges

1. ('07) 10 O C 348, Babu Baldeo Prasad v. Ali Husain.

were inclined to the view which formerly held the field in Oudh, that when a document purports to be a lease it must ordinarily be construed as a lease. Learned counsel for the respondent has referred me to 21 I C 69[2] as the first case in which the Court of the Judicial Commissioner discussed and considered the difference between a device and a mask, and held that

it would be contrary to public policy to allow a mask to conceal or shroud the real nature of a transaction or to permit a party to hoodwink the public and defraud the Court by putting on a false disguise.

That was, of course, a case where the property was nominally mortgaged and not lease but the underlying principle is the same, namely that what the Court has to ascertain is the real nature of the transaction after stripping it of the disguises by which the true nature is sought to be concealed. The next case relied upon by learned counsel for the appellant is 11 O W N 430[3] in which it was held that the grant of transferable rights does not make the perpetual lessee of an under-proprietor into an under-proprietor himself. The question, however, in that case was not whether the transfer in favour of the so-called lessee could be pre-empted but whether a perpetual lessee was an under-proprietor so as to be able to pre-empt a transfer of under-proprietary rights by an under-proprietor. In so far as the Bench of this Court accepted the possibility of the creation of rights of a perpetual lessee of an under-proprietor, that is a status something like that of a sub-under-proprietor, this case might be considered helpful to the appellant. On the other hand there is a well-known decision of their Lordships of the Privy Council in which it has been held that there are only three classes of holders of land in a village in Oudh, that is proprietors, under-proprietors and tenants. As the rights of tenants are rights under the Oudh Rent Act and are not transferable rights, it would follow that if a document by appearance creates a status unknown to law, the Courts in construing that document must prima facie construe it as creating the rights most akin to those nominally created. In the present case it is obvious that there is practically no resemblance between the rights conferred on the lessee by this document and the rights of a tenant, whereas on the other hand the document appears to confer on the transferee practically the whole of the rights of which the transferor was possessed. On the other hand a reference has been made to 10 O W N 613[4] in which a Single Judge of this Court held in a case very similar to the present case, a case of transfer by an under-proprietor under a so-called perpetual lease, that the document was really a sale deed giving rise to a right of pre-emption. The learned Judge laid down that :

It is open to a person to circumvent the law of pre-emption by cloaking a transaction into which he enters in such a way that the transaction cannot legally be held to be an out and out sale. In trying to achieve this object all devices are permissible, but, at the same time, it is open to the Court to scrutinise all such devices very closely and to see if the transaction into which the parties have entered does really amount to a sale or not. If it does not amount to a sale in law then the device succeeds and the right of pre-emption is defeated. If, on the other hand, it does not amount to a sale, the device falls and the right of pre-emption is not circumvented. Where the executant of a perpetual lease has not reserved to himself any right of re-entry and has not reserved to himself any interest whatsoever in the land which he ostensibly leases and a close scrutiny of the deed shows that the executant has no real interest left in the plots leased, notwithstanding the fact that the word used in the deed is 'nazrana' and not price, the device does not succeed in taking the transaction out of the category of a sale.

In that case the amount of "nazrana" was Rs. 300. The lease was heritable, the amount of rent reserved to the lessor was less than Rs. 2, the lessee was given the right to plant groves and build wells and no right reserved to the lessor to enhance the nominal rent. No two cases are ever quite on all fours but there is the closest parallelism between that case and the present one. In my opinion the learned Civil Judge has rightly held that the document executed by the lessor was not really a lease at all but an out and out sale deed in favour of the lessee which gave rise to a right of pre-emption. The plaintiff's suit for pre-emption was rightly decreed by the lower Appellate Court. There is no force whatever in this appeal which fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

2. ('13) 21 I C 69, Baldeo Singh v. Puttu Lal.

3. ('34) 21 AIR 1934 Oudh 145 : 149 I C 550 : 9 Luck 670 : 11 O W N 430, Bindeshwari Prasad v. Krishna Murari.

4. ('33) 20 AIR 1933 Oudh 329 : 148 I C 887 : 10 O W N 613, Ram Anand v. Ram Das.

A. I. R. 1941 Oudh 14

THOMAS C. J. AND RADHA KRISHNA J.

L. Radha Krishna — Applicant

v.

Raja Ram and others — Opposite Party.

Criminal Misc. Appln. No. 5 of 1940, Decided on 25th April 1940, for taking action under Contempt of Courts Act.

Contempt of Court—Delivering speech at meeting tending to influence result of pending trial is contempt of Court.

The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial whether civil or criminal, or to deliver a speech at a meeting.

Where during the pendency of a criminal case the opposite parties call a public meeting and deliver speeches the object of which is to influence the decision of the criminal Court, prevent witnesses from giving evidence and to bring pressure on the complainant to withdraw his complaint, the opposite parties are guilty of contempt of Court: (1873) 9 Q B 219, *Rel. on.* [P 15 C 2; P 16 C 1]

Shankar Sahai—for Applicant.

S. P. Avasthi and S. P. Avasthi for Jagat Narain—for Opposite Party Nos. 1 to 5, 7 and 8 and No. 6, respectively.

Order. — Lala Radha Krishna filed a complaint against Bansidhar and four others under Ss. 447 and 426, I. P. C., which is pending before a Bench of Honorary Magistrates at Lucknow. Lala Radha Krishna on 23rd November 1939, presented an application before the Bench concerned, asking that the eight persons named in the application be committed for contempt of Court and he prayed that his application be forwarded to this Court through the District Magistrate for action under the Contempt of Courts Act. The District Magistrate on 9th January 1940, forwarded Lala Radha Krishna's application to this Court and a notice was issued against (1) Raja Ram, (2) Bansidhar, (3) Misri Lal Pradhan, (4) Pt. Rajaram Pradhan, (5) Moolchand Sharma, (6) Narain Pershad Vaidya, (7) Bharat Pershad Shukla and (8) Satya Kumar to show cause why action should not be taken against them for contempt of Court. All the eight persons have tendered apology in the following terms :

That whatever the petitioners did or said in the meeting held on 14th November 1939 was done in absolute ignorance and with no intention to commit any contempt of Court.

That the abovenamed petitioners are genuinely sorry for their action at the meeting held on 14th November 1939, and they further express their regret for the same.

That they further tender their unqualified apology for whatever they said or did in the said meeting.

That they throw themselves at your Lordships mercy, and assure your Lordships that they will never act like this in future.

It appears that while the case was proceeding in the Court of the Bench Magistrates the opposite parties called a meeting and protested against the action of Lala Radha Krishna for filing the complaint under Ss. 447 and 426, I. P. C. The opposite parties got a leaflet printed and freely distributed it. We quote a few passages from the leaflet :

The worshippers of Shiva wake up.
Case against Hindu office-bearers.

A BIG MEETING OF THE HINDUS.

May it be known to all Hindu Brethren the deeds of Messrs. Lala Radha Krishna Sri Krishna Agarwal of Chowk Lucknow; they did not content themselves only with putting obstacles in the way of demarcating and making the tank of Shree Mahabirjee but they gave an exhibition of their religious faith on the temple of Mahadeoji situate on Kursi Road, Mahabirganj (Aliganj), Lucknow and the said Lala Sahebs gave a proof of their truth and religiousness by filing a criminal case against some devotees because some flower plants were planted adjacent to the temple of Shivajee . . . . . Hence to oppose this it has been decided to hold a meeting on 14th November 1939 . . . at 5-30 p. m., near the temple of Mahabirjee on the same temple of Shivajee. Consequently the Hindu public is requested to give a proof of their devotion to Lord Shiva, pure through body and mind and money, by attending the meeting at the appointed time and to safeguard Hinduism. *Note :* All the Hindu and Aryasamajist associations are requested to co-operate in this by taking part in the meeting in the largest number possible.

Maya Publishing House, Lucknow.

It is admitted before us that the said leaflet was printed at the Maya Publishing House by Pt. Moolchand Sharma and it was distributed by Raja Ram Pradhan and several others. A meeting was held on the date fixed under the presidentship of Pt. Narain Pershed Vaidya and it was attended by a large number of people and speeches were made. The learned counsel on behalf of the applicant informed us that one Ram Charan Lal patwari was examined on his behalf in the Court of the Bench Magistrates and at this meeting a resolution was passed against him for giving evidence in favour of the applicant. It was urged that the intention of the opposite parties in calling this public meeting was to create agitation against the applicant by misstating facts and by rousing the religious susceptibilities of the Hindus at large and that open threats were uttered against the applicant at the meeting. This was all done in order to influence the decision of the criminal case pending in the Court of the Bench of Honorary Magistrates. In view of the fact that the opposite parties have tendered an unqualified apology we have not thought it fit to ask the applicant to produce oral evidence in order to substantiate certain questions of fact.

The question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it

tends to interfere with the due course of justice, and on the same principle it is a contempt of Court to make a speech tending to influence the result of a pending trial whether civil or criminal, or to deliver a speech at a meeting. In (1873) 9 Q B 219,[1] it was held that it is contempt of Court to address public meetings, alleging that the defendant is not guilty, and that there is a conspiracy against the defendant, and that he cannot have a fair trial. The criminal case, as we have said, was pending, and there is no doubt in our mind that the object of the opposite parties in calling this public meeting was to influence the decision of the criminal Court; prevent witnesses from giving evidence and to bring pressure on the complainant to withdraw his complaint. We therefore convict the opposite parties for contempt of Court in respect of the Court of the Bench of Honorary Magistrates at Lucknow. The question for consideration is whether we should act under the proviso 1 to S. 3, Contempt of Courts Act, which provides that

> the accused may be discharged on the punishment awarded, may be remitted on apology being made to the satisfaction of the Court

or whether we should compel the opposite parties to purge their contempt by payment of a fine or undergoing of a sentence of imprisonment. After carefully considering the facts and circumstances of the case we convict (1) Raja Ram, (2) Bansidhar, (3) Misri Lal Pradhan, (4) Pt. Rajaram Pradhan, (5) Moolchand Sharma, (6) Narain Pershad Vaidya, (7) Bharat Pershad and (8) Satya Kumar for the contempt of Court with respect to the Court of the Bench of Honorary Magistrates of Lucknow, but discharge them as they have tendered an unqualified apology and given an assurance that in future they will not commit such an offence. But we think it is a fit case in which the opposite parties should be made to pay the costs which have been incurred by the applicant in this Court. The learned counsel for the applicant has filed a certificate for Rs. 50 and there are some miscellaneous expenses. We therefore order that each of the opposite parties will pay to the applicant Rs. 10 within two weeks.

G.N./R.K. *Order accordingly.*

1. (1873) 9 Q B 219 : 28 L T 222 : 12 Cox C C 371, Reg. v. Catro.

A. I. R. 1941 Oudh 16

THOMAS C. J. AND ZIAUL HASAN J.

B. Jagadish Bahadur—Applicant

v.

Mahadeo Prasad — Opposite Party.

Misc. Appln. No. 402 of 1939, Decided on 1st March 1940.

(a) Civil P. C. (1908), O. 22, Rr. 12 and 8 — R. 12 does not exempt pending appeals arising out of execution proceedings from operation of R. 8.

O. 22, R. 12 does not exempt pending appeals from the operation of R. 8 of that Order though the appeals arise out of execution proceedings. An appeal stands on a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also Rr. 3, 4 and 8 would never apply: A I R 1934 Oudh 337, *Rel. on;* A I R 1933 All 388 ; A I R 1928 Mad 772 and A I R 1923 Lah 560, *Approved;* A I R 1929 Pat 565 (F B), *Not approved.* [P 17 C 2]

(b) Civil P. C. (1908), O. 22, R. 9—Mere ignorance of respondent's death is not sufficient cause.

Mere ignorance of the death of a respondent is not a sufficient cause within the meaning of O. 22, R. 9 : 1940 O W N 219, *Rel. on.* [P 17 C 2]

Hargovid Dayal — for Applicant.

H. D. Chandra — for Opposite party No. 2 to 4.

Order.—This application for substitution arises in an execution of decree appeal. It came up for hearing before a learned Judge of this Court who has, under S. 14 (2), Oudh Courts Act, referred it to a Bench for decision, as in the opinion of the learned Judge there was a divergence of opinion in different High Courts and that there was no decision of this Court in respect of the point involved in the application. It is now admitted by the learned counsel on behalf of the applicant that Mahadeo Prasad, respondent 1 died on 14th January 1939, and this application for substitution was presented on 12th July 1939, that is beyond ninety days, but on the first day on which this Court reopened after the long vacation. The application was made under O. 22, R. 4 for substitution of the names of the two sons of Mahadeo Prasad deceased, and it was urged that he had died on 28th May 1939. The application was opposed by the respondents 2 to 4 on the ground that Mahadeo Prasad had died on 14th January 1939, and the application therefore was barred by time. The parties were given an opportunity to prove the date of the death of Mahadeo Prasad. The applicant then put in an application admitting the date of the death of Mahadeo Prasad to be 14th January 1939, and prayed that the former application of 12th July 1939, be treated as an application under O. 22, R. 9, Civil P. C., for setting aside the abatement.

In this application the sufficient cause shown for setting aside the order of abatement is that the deceased lived 34 miles away in a village. The applicant is a lawyer practising at Gonda. The contention on behalf of the applicant is that an appeal or an order arising out of an order in the course of proceedings in execution of the decree does not abate on the death of the respondent in cases where an appellant fails to apply to make the legal representative of the deceased respondent a party to the appeal within the time prescribed by law because the appeals in proceedings relating to execution of a decree are mere continuation of execution proceedings and therefore R. 12 of O. 22 is applicable to such appeals. In support of this contention the learned counsel has relied on a Full Bench decision of the Patna High Court reported in 9 PAT 372.[1] It is true that the above decision supports the contention of the learned counsel on behalf of the applicant, but this view was not followed by the Allahabad High Court in 55 ALL 509,[2] in which it was held that O. 22, R. 12, Civil P. C., does not exempt pending appeals from the operation of R. 8 of that Order, even though the appeals arise out of execution proceedings. An appeal stands on quite a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also Rr. 3, 4 and 8 would never apply.

The case reported in 9 PAT 372[1] was referred to before the learned Judges of the Allahabad High Court but they preferred to follow the decision of the Madras High Court in 51 MAD 858.[3] In the Lahore High Court in 74 I C 577,[4] a learned Judge held the opinion that Rr. 3 and 4 of O. 22, Civil P. C., had no application to appeals arising out of execution proceedings by virtue of the provisions of R. 12 of that order. There is a Bench decision of this Court which was not brought to the notice of the learned Judge of this Court who has made this reference. It is reported in 11 O W N 917,[5] in which it was held that

if during the pendency of an appeal by the judgment-debtor arising out of execution of a decree for mesne profits and cash, the decree-holder respondent who happens to be a tenant for life dies, an application by the appellant judgment-debtor, who happens to be the remainder-man, stating that the rights of the deceased in the decree had come to vest in him and that another person who claimed to be a legal representative of the deceased was not such representative, is maintainable. The provisions of O. 22, R. 5, Civil P. C., impose an obligation on the Court to determine whether the applicant or the opposite party is the legal representative of the deceased and the proceedings in appeal from any decree or order in proceedings in execution are not proceedings in execution so as to exclude application of R. 4 by R. 12 of O. 22, Civil P. C., they being proceedings in appeal and R. 11 making the whole of O. 22 applicable to appeals.

This view is in accordance with the view taken by the Allahabad High Court in 55 ALL 509.[2] We are of opinion that the law laid down in 11 O W N 917[5] is correct and therefore hold that O. 22, R. 12, Civil P. C., does not exempt pending appeals from the operation of R. 8 of that order, though the appeals arise out of execution proceedings. In our opinion an appeal stands on a different footing, in this respect, from an application for execution. Rule 12 does not contemplate that if an appeal has been preferred from an order in execution then also Rr. 3, 4 and 8 would never apply.

The next point urged on behalf of the applicant is that as the applicant lived about thirty-four miles away from the village in which Mahadeo Prasad deceased lived, he could not come to know of his death and the delay was due to his ignorance of the death of Mahadeo Prasad. This in the opinion of the learned counsel was the sufficient cause for not applying to bring the legal representatives of the deceased on record within the prescribed period of limitation. On behalf of the opposite party it is urged that the applicant is a permanent resident of village Achalpur and the deceased was also a resident of the same village as the mortgage deed dated 30th June 1922 would show in which the residence is given as Achalpur. The residence of the deceased in the plaint is different. Whether the deceased was a resident of village Achalpur or not, we do not attach much importance, because in our opinion mere ignorance of the death of a respondent is not a sufficient cause within the meaning of O. 22, R. 9. In 1940 O W N 219[6] it was held that

1. ('29) 16 A I R 1929 Pat 565 : 122 I C 148 : 9 Pat 372 : 10 P L T 763 (FB), Mohammad Taki v. Fateh Bahadur Singh.
2. ('33) 20 A I R 1933 All 388 : 144 I C 391 : 55 All 509 : 1933 A L J 706, Chhanga Mal v. Ram Dularey.
3. ('28) 15 AIR 1928 Mad 772 : 110 I C 662 : 51 Mad 858 : 55 M L J 497, Avadai Ammal v. Krishnan Chetti.
4. ('23) 10 AIR 1923 Lah 560 : 74 I C 577, Mir Khan v. Sharfu.
5. ('34) 21 AIR 1934 Oudh 337 : 150 I C 425 : 11 O W N 917, Hari Saran v. Har Kishen.
6. ('40) 1940 O W N 219, Bhagwan Din v. Muru.

the procedure provided for the disposal of suits and appeals demands an active prosecution and great vigilance on the part of the parties to a litigation and the appellant in the prosecution of his appeal is under an obligation to keep himself informed as to the existence of his opponent. Mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate.

The applicant has failed to satisfy us that there was sufficient cause for not filing the application within the period of limitation. We therefore reject the application with costs, and refuse to set aside the abatement. It is conceded by the learned counsel on behalf of the applicant that the whole appeal has abated. We therefore dismiss the appeal. No order as to costs.

G.N./R.K. *Application rejected.*

A. I. R. 1941 Oudh 18

ZIAUL HASAN J.

Maha Prasad—Defendant—Appellant.

v.

Dukh Haran Nath, Plaintiff and another, defendant — Respondents.

Second Appeal No. 236 of 1937, Decided on 8th August 1940, against order of Civil Judge, Gonda, D/- 13th March 1937.

(a) Oudh Laws Act (18 of 1876) as amended by Act 15 of 1939 — Amending Act has no retrospective effect.

The Oudh Laws Act as amended in 1939 by Local Act 15 of that year has no retrospective effect. [P 19 C 1]

(b) Oudh Laws Act (18 of 1876), S. 6—Pre-emption of part of property sold can be allowed if pre-emptor pays entire sale price.

It is true that pre-emption of part of the property by apportionment of the sale consideration cannot be allowed under the Oudh Laws Act but if a pre-emptor should choose to pay the entire sale price, his claim for pre-emption of part of the property might be brought under the provisions of the Oudh Laws Act: A I R 1934 P C 153, *Expl.* [P 19 C 2]

L. S. Misra — for Appellant.

H. D. Chandra — for Respondent 1.

Judgment. — This second appeal against a decree of the learned Civil Judge of Gonda raises an interesting question of the law of pre-emption as applicable to this province. On 17th July 1935 Munna and others sold a three pies share in village Dubawal and two groves in village Dalpatpur to Maha Prasad, the present appellant, for an ostensible consideration of Rs. 800. Two rival suits for pre-emption were brought, one by Dukh Haran Nath, respondent 1, and the other by Mathura Prasad, respondent 2. Both the plaintiffs alleged that the sale consideration as entered in the sale deed was fictitious and that the real sale consideration was Rs. 260. The vendee's defence in each case was that the plaintiff not being a cosharer in the village of Dalpatpur was not entitled to sue for pre-emption of the Dubawal property only. The learned Munsif in whose Court the suits were filed, held that the ostensible sale consideration was fictitious and that Rs. 335 was the market value of the property sold. As between the rival pre-emptors he held that Dukh Haran Nath's right was superior to Mathura Prasad's. Both the suits were however dismissed on the ground that only part of the property sold could not be pre-empted. Mathura Prasad submitted to the decree of the trial Court but Dukh Haran Nath appealed against it. In appeal before the learned Civil Judge, Dukh Haran Nath offered to pay the entire sum of Rs. 335 which had been held by the trial Court to be the market value of both properties sold, for the Dubawal property and on this offer the learned Civil Judge decreed Dukh Haran Nath's suit on condition of payment of that amount. The vendee brings this appeal and contends that pre-emption of part only of the property sold should not have been allowed in any case.

The point so far as I am aware, never arose in any case before and therefore I heard the learned counsel for the parties in this case at length but in spite of the able arguments put forward on behalf of the appellant, I am unable to hold that the decree of the learned Civil Judge is illegal or improper. The learned counsel for the appellant relies on the cases in 1939 O W N 736,[1] 1938 O A 1[2] and 11 O W N 843.[3] In the first of these cases a suit for pre-emption was dismissed by reason of the fact that past mesne profits were sold along with immovable property and relying on the decision of their Lordships of the Judicial Committee in 11 O W N 843[3] it was held that past mesne profits are not pre-emptable under the Oudh Laws Act. The second case also rests on the decision of their Lordships of the Judicial Committee in 11 O W N 843[3] and in it a suit for pre-emption was dismissed on the ground that no apportionment of price could be made under the Oudh Laws Act for the pre-empted portion of the property sold.

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1. ('39) 26 A I R 1939 Oudh 233 : 183 I C 604 : 14 Luck 678 : 1939 O W N 736, Abdul Hafiz v. Manohar Lal.
2. ('38) 25 A I R 1938 Oudh 37 : 171 I C 987 : 13 Luck 672 : 1937 O W N 1202 : 1938 O A 1, Baij nath v. Mahabir Prasad.
3. ('34) 21 A I R 1934 P C 153 : 151 I C 74 : 61 I A 235 : 9 Luck 407 : 11 O W N 843 (P C), Birendra Bikram Singh v. Brij Mohan Pande.

The facts in 11 O W N 843[3] were that 163 villages forming an entire taluqdari mohal were sold by one sale deed for a consideration of Rs. 5,50,000. Two suits for pre-emption were brought each in respect of one of the villages sold and each plaintiff offered to pay a proportionate amount of the sale consideration. Their Lordships of the Judicial Committee after considering the provisions of the Oudh Laws Act relating to pre-emption came to the conclusion that there in no provision in the Act for tendering part of the price by a pre-emptor or for pre-empting part of the property proposed to be sold. It was because of this pronouncement of their Lordships of the Judicial Committee that the Oudh Laws Act was amended in 1939 by Local Act 15 of that year by which provision has been made for pre-emption of part only of the property sold or foreclosed on payment of a proportionate amount of the sale price or amount due on the mortgage. It was however conceded on behalf of the respondent that the present case is not governed by the Amending Act of 1939 as it has no retrospective effect. I have therefore to see whether the decree of the learned Judge of the lower Appellate Court goes against the decision of their Lordships of the Judicial Committee.

After having given anxious consideration to the point, I have come to the conclusion that the decision of the learned Judge of the Court below is not against the pronouncement of their Lordships. As stated above, their Lordhips were considering a case in which two pre-emptors were claiming to pre-empt two villages out of 163 sold by a single transaction and were offering to pay a proportionate amount of the sale consideration and what their Lordships held was that such a suit is not contemplated by chap. II, Part 3, Oudh Laws Act, dealing with pre-emption. The case of a pre-emptor who was offering to pay the entire sale consideration for only part of the property sold was not before their Lordships and was not considered by them. In my opinion it cannot be said that their Lordships meant to lay down that pre-emption of a part of the property sold cannot be allowed in any case whatever. Their Lordships' pronouncement was to my mind no more than that pre-emption of part of the property by apportionment of the sale consideration cannot be allowed under the Oudh Laws Act. This seems to be clear from the following remark of their Lordships :

> These considerations in their Lordships opinion are conclusive as showing that the claims of the plaintiffs as stated in their plaints are not within the abovementioned Act and are therefore not maintainable.

The claims of the plaintiffs in that case as stated in their plaints were for pre-emption of parts of the property by payment of proportionate amounts of the sale consideration. In the present case the plaintiff-pre-emptor does not want an apportionment of the sale price but offers to pay the entire sale consideration for that part of the property only to which he has a right of pre-emption. The following passage from their Lordships judgment, in fact, seems to me to show that if a pre-emptor should choose to pay the entire sale price, his claim for pre-emption of part of the property might be brought under the provisions of the Oudh Laws Act :

> The plaintiffs in each suit claimed to pre-empt one of the said villages only. It would be absurd to suggest that they would be bound to tender the whole of the price, viz. Rs. 5,50,000 which was the price at which the vendor was willing to sell, and yet there is no provision in the Act which would enable the plaintiffs to tender the amounts at which the plaintiffs valued the two villages respectively as stated in their plaints or any amount other than the said Rs. 5,50,000.

This shows, to my mind, that in their Lordships opinion if each of the plaintiffs had offered to pay Rs. 5,50,000 (incredible as it may appear on the face of it) for the village pre-empted by him, his suit could possibly have been brought under the provisions of the Act. I am therefore of opinion that 11 O W N 843[3] is no bar to allowing respondent 1 to pre-empt the Dubawal property only on payment of the amount that has been found to be the value of both the properties sold. There is yet another aspect of the matter and that is that to decree Dukh Haran Nath's suit on payment of the entire amount would not only be equitable but also in consonance with the spirit of the law of pre-emption and the practice followed in this province before 11 O W N 843[3] was decided by their Lordships of the Privy Council. In 1938 O A 1,[2] referred to above, the learned Judges who decided the case referring to the provisions of the Oudh Laws Act as they stood before the recent amendment remarked :

> We venture to think that the Legislature in enacting these provisions did not take into consideration the case of a composite sale deed like the one before us in which several distinct properties are sold together for a lump price. The view which has hitherto prevailed in this province that in such a case if the plaintiff is entitled to pre-empt only part of the property sold, he should be given a decree for pre-emption of that part on payment

of the proportionate price, is no doubt a most equitable one. We are conscious that the effect of our decision in the present case would be to debar many persons from exercising their right of pre-emption, or even, as the learned counsel for the appellant put it, practically to nullify the right of pre-emption in those cases in which several properties are sold together, yet we think that this consideration cannot afford any justification for our circumventing the provisions of the statute as authoritatively construed by their Lordships of the Judicial Committee.

That the policy of the Legislature has been to deal with claims for pre-emption liberally appears from the facts that they amended the law of pre-emption so as to clearly provide for pre-emption of part of the property sold and this policy is undoubtedly in consonance with the principle underlying the law of pre-emption, namely, to exclude strangers so far as possible. I am therefore of opinion that the decree of the learned Judge of the Court below is just and proper. The appeal is therefore dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 19

ZIAUL HASAN J.

Beni Madho and another — *Accused* — Applicants

v.

Emperor through Basant Rai — *Complainant* — Opposite Party.

Criminal Refs. Nos. 18 and 19 of 1940 Decided on 23rd May 1940 made by Civil and Sessions Judge, Lucknow.

(a) Criminal P. C. (1898), Ss. 540 and 342— It is not proper to examine witnesses under S. 540 after case is finished and without examining accused again under S. 342.

No doubt the provisions of S. 540 are very wide and a witness can be summoned and examined by the Court at any stage of an enquiry or trial, still it is not proper to examine witnesses under that section after the parties have closed their evidence and the case is practically finished and without examining the accused again under S. 342. The first portion of S. 342 (1) empowers the Court to examine the accused at any stage of an inquiry or trial for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and where the witnesses under S. 540 are examined at the end of the case, the Magistrate should record the statements of the accused again after examining those witnesses : A I R 1923 Cal 690, *Rel. on.* [P 20 C 2; P 21 C 1]

(b) Criminal P. C. (1898), S. 537 — Use of evidence not part of record is by itself proof of prejudice to accused — Use of evidence produced in other case is illegality not curable by S. 537.

The very use of evidence which is not part of the record is by itself proof of prejudice to the accused and the use in a case of evidence produced in another case is not a mere irregularity curable under S. 537 but an illegality : A I R 1940 Cal 59; A I R 1933 Mad 367 and A I R 1938 Oudh 249, *Rel. on.* [P 21 C 2]

H. G. Walford and I. N. Masaldan — for Applicants (Petitioners).

R. F. Bahadurji, G. G. Chatterji, Gaya Pershad Shukla and S. Ahtisham Ali — for Basant Rai.

Order.—These are two references by the learned Civil and Sessions Judge of Lucknow recommending that the orders of conviction passed by a Special Magistrate in two cases tried by him be set aside.

A complaint under Ss. 147 and 323, Penal Code, was filed by Panna Lal and Jugal Kishore against Beni Madho and eight others and this case was registered as No. 116. Another complaint under S.323, Penal Code was filed by Basant Rai against the same Beni Madho and Parshotam Das and this case was No. 118. Two cross-complaints were filed by two of the accused in case No. 116 against Panna Lal, Jugal Kishore and a third person. One of these was filed by Kalyan Das under Ss. 504 and 506, Penal Code and in this case one Bithal Das was co-accused with Panna Lal and Jugal Kishore. The other was filed by Nand Kishore under S. 323 and the third accused in this case besides Panna Lal and Jugal Kishore was one Kandhai Lal. All these four cases were tried by a learned Special Magistrate who acquitted the accused in Kalyan Das and Nand Kishore's complaints but convicted the accused in cases nos. 116 and 118. In the former the accused were sentenced to a fine of Rs. 50 each and in the latter to a fine of Rs. 20 each. The learned Civil and Sessions Judge has referred cases Nos. 116 and 118 to this Court on the ground of certain alleged illegalities by the learned Magistrate in the course of the trials.

I have heard the learned counsel for both parties and I am of opinion that the references should be accepted. In the first place the learned Magistrate examined two witnesses, Ram Das and Lachhman Prasad under S. 540, Criminal P. C., after the parties had closed their evidence, arguments had been heard and a date fixed for the pronouncement of judgment. No doubt the provisions of S. 540 are very wide and a witness can be summoned and examined by the Court at any stage of an enquiry or trial, still it is not proper to examine witnesses under that section after a case is practically finished and without examining the accused again under S. 342, Criminal P. C. It was argued on behalf of the complainants that S. 342 (1) makes it obligatory on the Court to examine

the accused only once, namely after the witnesses for the prosecution have been examined and before the accused is called on for his defence and that it was not necessary for the Magistrate to examine the accused in these cases again after he had examined the witnesses under S. 540. This is no doubt true but the first portion of S. 342 (1) gives the Court power to examine the accused at any stage of an inquiry or trial for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him and as the witnesses under S. 540 were examined at the end of the case, the learned Magistrate would have exercised a proper discretion if he had recorded the statements of the accused again after examining those witnesses. The Calcutta case in A I R 1923 CAL 690[1] was very similar to the present cases. There also after both sides had closed their cases and after arguments had been heard and a date fixed for delivery of judgment, two witnesses who were named by the prosecution were examined before the Magistrate. It was held by a Bench of the Calcutta High Court that the procedure adopted by the Magistrate was entirely unjustifiable and the sentences were set aside.

In the cases before me not only did the learned Special Magistrate examine under S. 540 the witnesses who had been named by the prosecution after the close of the cases without putting any questions to the accused after their examination but he committed some other illegalities also. The witnesses mentioned above were examined in Case No. 116 but their evidence was considered in Case No. 118 also. Lachhman Prasad's evidence appears not to have helped the case of either party but the learned Magistrate has fully relied on the evidence of Ram Das in Case No. 118 and says, "I have no reason to disbelieve Ram Das witness." Then in Case No. 116 he has utilized the evidence of one Damodar Das who was not examined in the case at all but was a witness for the defence in one of the cross-cases. Lastly in Case No. 118 he has also relied on the allegations contained in the cross-complaint without a copy of that complaint having been brought on the record of the case and proved. At one place he says:

> When I look into the complaint of Nand Kishore in the connected case I find the complainant not only admitted to be present at the spot but also accused of having actually threatened and abused the complainants' party . . . . After this allegation in the complaint filed by the accused in another case how can it be believed that Basant Rai has filed a false complaint to save his son-in-law.

At another place he says:

> Even if I do not take into consideration the police report, the medical certificate, the extra-judicial confession to Girdhari Lal and the statements of Panna Lal and Bishambhar Nath, how can I ignore the statement of Ram Das and their own allegations against the complainant in their own complaint by the accused which mentions in unambiguous terms that the complainant Basant Rai did take part in the quarrel if not by beating at least by threatening and abusing the accused.

All this shows that the learned Magistrate was influenced in the case to a great extent by the evidence which was no part of the case before him. It was argued that no prejudice is shown to have been caused to the accused by the procedure adopted by the learned Magistrate and that that procedure only showed an irregularity that can be covered by S. 537, Criminal P. C. I cannot however accept this argument. In the first place, the very use of evidence which is not part of the record is by itself proof of prejudice to the accused and in the second place, it has been held by various High Courts that the use in a case of evidence produced in another case is not a mere irregularity but an illegality, *vide*, e.g., the cases in 41 CR L J 247,[2] 34 CR L J 175[3] and 1938 O W N 958.[4] I am therefore definitely of opinion that the judgment of the learned Special Magistrate in both the cases must be set aside. The question however is whether or not the cases should be re-tried. The learned counsel for the accused urges that as the parties are related to each other, the complaints were trivial and the cases have been going on for several months, no retrial should be ordered. On the other hand I take into consideration the facts that the complainants are very keen in opposing the references made by the learned Civil and Sessions Judge and that the illegalities committed by the learned Magistrate in the course of the trial do not necessarily show that his final order was wrong. I therefore accept the references in both the cases, set aside the orders of conviction and order that the cases be retried by a Magistrate

1. ('23) 10 AIR 1923 Cal 690 : 75 I C 541 : 24 Cr L J 957 : 37 C L J 415 : 27 C W N 675, Natabar Ghose v. Adya Nath.

2. ('40) 27 A I R 1940 Cal 59 : 186 I C 67 : 41 Cr L J 247, Mrs. W. Waugh v. Emperor.

3. ('38) 20 AIR 1933 Mad 367 : 141 I C 539 : 34 Cr L J 175 : 56 Mad 159 : 64 M L J 150 (FB), In re Mounagurusami Naicker.

4. ('38) 25 AIR 1938 Oudh 249 : 177 I C 559 : 39 Cr L J 929 : 1938 O W N 958, Sarju v. Emperor.

other than Mr. Bhagwan Charan, Special Magistrate.

G.N./R.K. *References accepted.*

A. I. R. 1941 Oudh 22

ZIAUL HASAN AND BENNETT JJ.

Commissioner of Income-tax, C. P. and U. P. — Applicant

v.

Shrimati Rani Rudh Kumari — Opposite Party.

Civil Reference No. 2 of 1939, Decided on 19th August 1940, made by Commissioner, Income-tax, Central and United Provinces, Lucknow.

Income-tax Act (1922), S. 14 (1)—Widow bequeathing her entire estate to daughter's son's son and fixed maintenance allowance to his widowed mother — After testatrix's death Court of Wards in charge of estate paying maintenance allowance to widowed mother'— Allowance held fell within purview of S. 14 (1) and was exempt from taxation.

A widow bequeathed her entire estate by a will to her daughter's son's son and fixed a maintenance allowance to his widowed mother. After the death of the testatrix the widowed mother did not draw the amount to which she was entitled under the will. She was granted a fixed monthly maintenance allowance by the Court of Wards which was managing her son's estate:

Held that the widowed mother must be deemed to be a member of an undivided Hindu family with her son irrespective of the source from which the son derived his estate or even of whether or not the son had any property and that by virtue of her right to receive maintenance from the son and his estate, the mother came within the purveiw of S. 14 (1) and the maintenance received by her was not assessable. The existence of a will in the mother's favour was of no consequence and could not deprive the mother of her rights under the law : A I R 1932 Mad 733 and 6 I T R 157, *Rel. on*; A I R 1933 P C 145, *Expl.* [P 23 C 2; P 24 C 1]

Ram Prasad Varma — for Applicant.

H. D. Chandra — for Opposite Party.

Ziaul Hasan J.—This is a reference by the Commissioner of Income-tax, Central and United Provinces, under S. 66 (2), Income-tax Act, and the question referred to us is whether the maintenance allowance of Rs. 30,000 received by Rani Rudh Kumari in 1936-37 was, in the circumstances to be mentioned shortly, received by her as a member of a Hindu undivided family within the meaning of S. 14 of the Act. In 1873 Raja Sheo Baksh Singh, the then owner of the taluqdari estates of Nabinagar and Katesar, executed a will providing that in the absence of any male issue, his junior Rani Pirthipal Kuar would after his death be the owner of the entire estate. No male issue was born to the Raja and accordingly on his death Rani Pirthipal Kuar came into possession of the entire estate left by him. On 25th August 1928, Rani Pirthipal Kuar herself made a will by which her daughter's son's son, Partab Bhan Prakash Singh, was to be the sole owner of the taluqa and of all the moveable and immovable properties owned by the testatrix at the time of her death. By the same will the Rani directed that on her death, a guzara of Rs. 3500 per mensem or more which she herself might be getting at the time of her death be given to Rudh Kumari mother of Partab Bhan Prakash Singh and widow of Kunwar Partab Bahadur Singh daughter's son of the testatrix. It was also provided that the guzara will be a charge on the entire estate. Rani Pirthipal Kuar died in 1932 and the Court of Wards, who had taken over management of the estate soon after the death of Raja Sheo Baksh Singh, began to pay guzara to the applicant Thakurain Rudh Kumari after the death of the Rani Pirthipal Kuar.

In the assessment year 1937-38, the Income-tax Officer, Sitapur, on receiving information from the Court of Wards that the applicant had received in the previous year a maintenance allowance of Rs. 30,000, issued a notice under S. 22 (2), Income-tax Act, calling upon the applicant to file her return of income for the year 1936-37. The return for the year was filed by the applicant but the maintenance allowance received by her was not shown in it. On this, notices under Ss. 22 (4) and 23 (2) of the Act were issued but it was contended by the applicant that the money received by her from the Court of Wards was not assessable in her hands. The Income-tax Officer did not accept this contention and made an assessment on an income of Rs. 30,387 which included income from property and dividends. The applicant appealed to the Assistant Commissioner who agreed with the Income-tax Officer and dismissed the appeal on 30th July 1937. The applicant then applied to the Commissioner of Income-tax for a reference being made to this Court and hence the present reference. Section 14 (1), Income-tax Act under which exemption is claimed by Thakurain Rudh Kumari runs as follows:

> The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

It will be seen that to come under this sub-section the applicant must prove two things, (1) that she is a member of a Hindu undivided family, and (2) that she received

the sum of Rs. 30,000 in the year in question as a member of a Hindu undivided family. The learned counsel for the Income-tax Department contests the applicant's claim on both these points. In support of his contention that the applicant is not a member of an undivided family, the learned counsel has relied on para. 223 (5) of Sir D. F. Mulla's Principles of Hindu Law, 9th Edn. in which it is stated that in Allahabad the property obtained by a Hindu by gift or will from his father has been held to be his self-acquired property and that in Oudh it has been held that in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that such property is self-acquired. It is argued by the learned counsel that since Kunwar Partab Bhan Prakash Singh acquired the estate by the will of Rani Pirthipal Kuar, the present applicant had no vested interest in it. It appears to me, however, that the argument proceeds on a confusion between an undivided Hindu family and a Hindu coparcenary body. Mulla in para. 212 of his book says:

> A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters . . . The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may nevertheless be joint.

Again in para. 213 it is said:

> A Hindu coparcenary is a much narrower body than the joint family. It includes only those persons who acquire by birth an interest in the joint or coparcenary property . . . .

The distinction is in fact recognized by more than one High Court in India. In 56 Mad 1[1] it was held that there can be a joint family with a single male member provided there are widows of deceased coparceners or other persons entitled to maintenance from him, and in 6 I T R 157,[2] their Lordships of the Allahabad High Court said:

> Ordinarily a married daughter is not a member of the family of her father or mother, nor can the daughter's son be said to be such a member, but it is said that the expression 'undivided Hindu family' used in S. 14 differs from what is called a Hindu coparcenary body which is a much narrower body and which includes those male members who took by birth an interest in the coparcenary property. This may be conceded and is indeed supported by authority,—see the case in 56 Mad 1[1] and the case in 59 Bom 618.[3] In the latter case Rangnekar J., observed: 'under the Hindu law, an undivided family is composed of (a) males and (b) females. The males are (1) those that are lineally connected in the male line, (2) collaterals, (3) relations by adoption and (4) poor dependents . . . .'

The learned Judges go on to say:

> Only those members of a Hindu undivided family can claim exemption under S. 14 (1) of the Act who either on partition would be entitled to demand a share or are entitled to maintenance under the Hindu law and who therefore might be said to have an interest in the joint income of the family.

Mayne also in his book on Hindu law (Edn. 10 page 339) says:

> The whole body of such a family consisting of males and females . . . . some of the members of which are coparceners, that is, persons who on partition would be entitled to demand a share while others are only entitled to maintenance.

It will thus be seen that the question of the source from which Kunwar Partab Bhan Prakash Singh derived his estate has no bearing on the point before us and that irrespective of that source or even of whether or not the applicant's son has any property, the applicant should be deemed to be a member of an undivided family with Partab Bhan Prakash Singh. The next question is whether or not the applicant received the amount in question as a member of an undivided Hindu family. On this point the learned counsel for the department laid much stress on the will of Rani Pirthipal Kuar and argued that the applicant received the money not as a member of an undivided family but on the basis of the will. After giving my best consideration to the learned counsel's argument, I do not see that the existence of the will in favour of the applicant makes any difference. In para. 548 of his book Sir D. F. Mulla says:

> A son is under a personal obligation to maintain his aged father. He is also under a similar obligation to maintain his aged mother and he is bound to maintain her, whether or not he has inherited property from his father.

In fact it was not denied by the learned counsel for the department that as the mother of Kunwar Partab Bhan Prakash Singh, the applicant is entitled under the Hindu law to receive maintenance from him. It follows, therefore, from the rulings cited above that by virtue of her right to receive maintenance from the ward of the Court and his estate, the applicant comes under S. 14 (1) of the Act, and the maintenance received by her is not assessable. This being so the existence of a will in the

1. ('32) 19 A I R 1932 Mad 733 : 140 I C 17 : 56 Mad 1 : 63 M L J 542 (S B), Vedathanni v. Commr. of Income-tax, Madras.
2. ('38) 6 I T R 157, Kedar Narain Singha v. Commissioner of Income-tax C. P. & U. P.
3. ('35) 22 A I R 1935 Bom 412 : 159 I C 424 : 59 Bom 618 : 37 Bom L R 692, Commissioner of Income-tax Bombay v. Laksmi Narayan.

applicant's favour is to my mind of no consequence. Indeed, I can think of no reason why the will of Rani Pirthipal Kuar should deprive the applicant of her rights under the law. Further, the very fact that instead of Rs. 3500 a month to which the lady was entitled under the will, she is receiving only Rs. 2500 a month shows that the guzara is received by her not under the will but as mother of the proprietor of the estate. The amount was presumably fixed by the Court of Wards with regard to the extent of the estate and the status of the proprietor. The learned counsel for the department has referred us to the case in A I R 1933 P C 145,[4] but I do not see how the decision in that case helps him. In that case their Lordships of the Judicial Committee were dealing with the case of an assessee who paid guzara to his step-mother under a Court's decree and the question before their Lordships was whether or not the amount paid to the step-mother out of the estate was or was not liable to income-tax. The question whether the assessee's step-mother is liable under the Act to assessment in respect of payments received by her was not decided but left open by their Lordships. I may, however, point out that the judgment shows that the Commissioner of Income-tax, Bengal, himself cancelled the assessment on the step-mother on the ground that the payments made to her were in virtue of her right of maintenance as a member of a Hindu undivided family. It will be interesting to see what are the rights of a step-mother in regard to receiving maintenance from her step-son. Mulla in para. 544 of his book says:

> An heir is legally bound to provide out of the estate which descends to him maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited subject to the obligation to provide for such maintenance.

And in illustration (b) to para. 544 it is said :

> A step-son is under no personal obligation to maintain his step-mother ; but if he inherits his father's estate he is bound to maintain her out of the estate, she being a person whom his father was legally bound to maintain as his wife.

It appears to me, therefore, that if the maintenance received by a step-mother was entitled to exemption as that of a member of a Hindu undivided family, the maintenance of a mother, whom the proprietor of an estate is personally bound to maintain under the Hindu law, is much more so entitled. I would, therefore, answer the reference in the affirmative and in favour of Thakurain Rudh Kumari.

Bennett J.—I concur in the answer given to the reference by my learned brother, but I wish to make it clear that I do so only because the facts stated in the reference justify the presumption that the amount received by Thakurain Rudh Kumari in the year 1937-38 was received by her as maintenance in virtue of her position in the family as the mother of the proprietor of the estate and is not referable to the will of Rani Pirthipal Kunwar. In her will dated 25th August 1928 Rani Pirthipal Kunwar stated that she herself received Rupees 3500 a month as guzara from the Court of Wards and that this amount would probably be increased in future. She also received sir and sawai as guzara. She bequeathed by her will the same amount to Thakurain Rudh Kumari, that is to say, whatever amount she herself would be getting at the time of her death. She died in 1932. There is nothing to show what amount she herself was receiving between the years 1928-32, but presumably it was some amount in excess of Rs. 3500 per mensem. There can be no doubt in my opinion that if Thakurain Rudh Kumari received a similar amount after the death of Rani Pirthvipal Kunwar it would be necessary to presume that that amount was received by her as guzara under the will and that following the decisions of various Courts it would be necessary to hold that this guzara was not exempted under S. 14 (1), Income-tax Act, because it was a charge on the entire estate and would not be taken from the income received by her son. I would refer in this connexion to the Privy Council case in A I R 1933 P C 145.[4] In this case a decree of the Court charged the assessee's whole resources with a specific payment to his step-mother and it was held by their Lordships that to that extent his income was diverted from him and directed to his step-mother and, therefore, could not be considered his income. It was not a case of the application by the assessee of part of his income in a particular way ; it was rather the allocation of a sum out of his revenue before it became income in his hands. That, in my opinion, would be the position in the present case if the amount drawn by Thakurain Rudh Kumari in the year 1937-38 was referable to the will.

In fact, however, Thakurain Rudh Kumari did not draw the amount to which she was entitled under the will. She was granted

4. ('33) 20 A I R 1933 P C 145 : 143 I C 145 : 60 I A 196 : 60 Cal 1029 (P C), Bejoy Singh v. Commissioner of Income-tax.

maintenance allowance at the rate of Rupees 2500 a month by the Court of Wards which was managing her son's estate. Under the will she would have been entitled to a considerably larger amount and it must be taken therefore that she waived her rights under the will and agreed to receive only such amount as the Court of Wards considered that she was entitled to by way of maintenance. As my learned brother has observed the amount was presumably fixed by the Court of Wards with regard to the extent of the estate and the status of the proprietor. So far as can be seen from the facts stated in the reference the will has been entirely ignored and on this view I consider that it would not be justifiable to assess Thakurain Rudh Kumari to income-tax in respect of the amount received by her, this amount not having been received by her, under the will, but allowed to her as maintenance in virtue of her position as the mother of the proprietor.

G.N./R.K. *Answered in affirmative.*

A. I. R. 1941 Oudh 25

BENNETT J.

Fakir Mohammad Khan — Defendant — Appellant.

v.

Hasan Khan, plaintiff and another, defendant — Respondents.

Second Appeal No. 426 of 1937, Decided on 25th July 1940, against decree of Addl. Civil Judge, Unao, D/- 15th September 1937.

(a) Mahomedan Law—Will—Will leaving life-interest to testator's widow with remainder to another heir is permissible.

Under the Mahomedan law it is permissible for a Mahomedan to execute a will leaving a life interest only to his widow with remainder to another heir or to a stranger: *Case law referred.* [P 25 C 2; P 26 C 1, 2]

(b) Mahomedan Law—Will—Bequest of more than one-third of whole property to stranger — Consent of heirs may be signified by conduct.

Where a Mahomedan, by his will bequeaths more than one-third of his whole property to a stranger the consent of his heirs to such bequest need not be express: it may be signified by conduct: 26 Bom 497, *Rel. on.* [P 27 C 1]

Iqbal Ali — for Appellant.

R. B. Lal — for Respondent 1.

Judgment.—This is a defendant's appeal against the judgment and decree passed by the learned Additional Civil Judge, Unao, on 15th September 1937 allowing an appeal from a judgment and decree of the Munsif, South Unao. The suit was brought by one Hasan Khan for a declaration of title in certain property left by his father-in-law Abdul Ghani, this property consisting of four groves. The plaintiff based his case on a will executed by Abdul Ghani on 16th April 1908. This will was registered. By it Abdul Ghani bequeathed a life-interest to his widow, Mt. Faizan, with no power of alienation, and with remainder on her death to their daughter, Mt. Aziman, and the latter's husband, the plaintiff Hasan Khan. When this will was executed Abdul Ghani had, so far as appears from the record, only one other heir, namely his sister, Mt. Bashiran. Abdul Ghani appears to have died not long after the execution of the will and his sister is said to have died within an hour of his death. Subsequently Mt. Aziman died. The widow, Mt. Faizan, was alive when the suit was instituted and consequently the plaintiff asked merely for a declaratory decree. Mt. Faizan died during the pendency of the suit and the plaint was then amended to ask for the consequential relief of possession also. On 2nd February 1936 the widow, Mt. Faizan, executed a deed of gift in favour of some relative on her side of the family, namely defendant 1, Faqir Mohammad Khan. The suit was brought against him, and Mt. Safilan, daughter of the plaintiff, was also impleaded.

The Munsif dismissed the suit. He held that a life-interest could not be conferred under a will by a Sunni Mahomedan and that therefore Mt. Faizan obtained a complete title under the will, if she obtained anything at all. But he held that the will was invalid because the consent of other heirs had not been proved. On this view he concluded that the possession of Mt. Faizan could not be referred to a lawful title. He dismissed the suit because if the will was held valid it must at the same time be held that Mt. Faizan took the whole of the property under it and therefore the plaintiff took nothing: if it was held invalid, although Mt. Faizan had no power to execute the deed of gift in favour of defendant 1, the plaintiff could claim no title in the property on the basis of it. The lower Appellate Court held that the will was valid and that under its terms Mt. Faizan was entitled only to a life-interest and therefore had no power to execute the deed of gift. The learned Civil Judge accordingly decreed the suit on the basis of the will by which the property was left to Mt. Aziman and her husband after the death of Mt. Faizan. The first question which has been agitated in this Court is whether under Mahomedan law it is permissible for a

Mahomedan to execute a will leaving a life-interest only to his widow with remainder to another heir or to a stranger.

The lower Appellate Court in support of the view taken by it that it was so permissible has referred to a number of authorities and in particular to 2 O W N 83,[1] 6 O W N 483,[2] and 8 O W N 349[3] at p. 442. The first case cited was a case of the Judicial Commissioner's Court and related to a gift and not to a will. There was a difference of opinion on the point between the two Additional Judicial Commissioners who decided the case, but the view of Wazir Hasan, A. J. C., that a gift conferring a life-estate by a husband on a wife was permissible has been since adopted by this Court. There was an appeal in this case to the Privy Council. As I read that judgment their Lordships did not expressly concur in the view taken by Wazir Hasan, A. J. C., because it was in their opinion unnecessary to decide the point in that case. They merely concurred in the conclusion arrived at by Wazir Hasan, A. J. C., on the construction of the document then under consideration, namely that under it one Mt. Waziran acquired merely a life-interest in the property together with a power of alienation over one-third of the property. Referring to the argument that under the Mahomedan law applicable to the case there could not be a transfer of any interest in property by way of gift inter vivos except an absolute interest, their Lordships said:

> In their Lordships' opinion it is not necessary to express any opinion on the last mentioned argument, because in view of the construction of the deed which their Lordships have adopted, the plaintiff-appellant is on the horns of a dilemma. If the interest acquired by Mt. Waziran was of a life-estate only, and if such an interest can be acquired under the Mahomedan law, by way of a gift, that interest came to an end on the death of Mt. Waziran, and the plaintiff claiming as her heir has no title to the property. On the other hand if, as argued on behalf of the plaintiff, under the Hanafi law such a limited interest as a life-estate could not be transferred to Mt. Waziran by way of gift inter vivos, then Mt. Waziran acquired no interest in the property under the deed of 17th January 1905 and the plaintiff claiming as her heir can have no title to the property.

The last case cited above was a case of a will and not of a gift. Nanavutty J. appears to have taken the view that the question had been definitely settled by their Lordships of the Privy Council in the case cited above. He observed:

> It was held by their Lordships of the Privy Council in 6 O W N 483[2] that a Sunni Mahomedan could validly make a gift of a life estate together with a power to alienate to a third party.

He proceeded to say that the view taken by Wazir Hasan C. J., had found favour with their Lordships of the Privy Council, and it was now settled law that a Sunni Mahomedan like a Shia Mahomedan could also create a life-estate by the terms of his will if he be so minded. Other authorities to which I have been referred in support of this view are 57 Bom 737[4] and A I R 1936 Nag 113.[5] In the first case (at p. 777) reference was made to the case in 2 O W N 83[1] by the learned Chief Justice of the Bombay High Court. He observed that the Judge from whose decision the appeal before him was being heard was of opinion that a life-interest was void under the Mahomedan law, but he did not agree with that opinion. He also observed that the principle propounded in the Privy Council case in 6 O W N 483[2] was in his opinion as much applicable to a will as to a deed inter vivos. In the Nagpur case[5] it was held by a Bench that a life interest is not unknown to Mahomedan law and that a bequest of property to *A* for his life and after his death to *B* confers a like estate only upon *A*. Learned counsel for the appellant has referred me to a case of the Allahabad High Court, A I R 1922 ALL 205,[6] in which the Allahabad High Court held that a provision in a gift that the donee shall have no right of transfer is void under the Mahomedan law and the donee takes an absolute estate. But there is no reason why I should not follow the previous ruling of this Court, supported as it is by the Bombay and Nagpur Courts. The next question for consideration is whether the will, by which the whole property was left after the death of the widow to the daughter and her husband jointly, is valid, having regard to the provisions of Mahomedan law that a bequest to an heir is invalid unless the other heirs consent to the bequest after the death of the testator, and that a bequest of more than one-third of

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1. ('25) 12 A I R 1925 Oudh 568 : 87 I C 445 : 28 O C 265 : 2 O W N 83, Amjad Khan v. Ashraf Khan.
2. ('29) 16 A I R 1929 P C 149 : 116 I C 405 : 4 Luck 305 : 56 I A 213 : 6 O W N 483 (P C), Amjad Khan v. Ashraf Khan.
3. ('31) 18 A I R 1931 Oudh 177 : 136 I C 642 : 8 O W N 349, Mohammad Azim Khan v. Mohammad Saadat Ali Khan.
4. ('33) 20 A I R 1933 Bom 324 : 148 I C 82 : 57 Bom 737 : 35 Bom L R 643, Rasool Bibi v. Usuf Ajam.
5. ('36) 23 A I R 1936 Nag 113 : 161 I C 719 : 31 N L R Sup 160, Mt. Subhanbi v. Mt. Umraobi.
6. ('22) 9 AIR 1922 All 205 : 70 IC 84 : 44 All 633 : 20 A L J 466, Babu Lal v. Ghansham Das.

the property to a non-heir is void without the consent of the heirs. As I have mentioned there is nothing in this case which suggests that there were any other heirs except those members of the family already referred to. The lower Appellate Court relied on the case in 26 BOM 497.[7] In this case it was held by the Bombay High Court that

where a Mahomedan, by his will bequeaths more than one-third of his whole property to a stranger the consent of his heirs to such bequest need not be express: it may be signified by conduct.

As the will was registered it may be presumed that all the parties concerned had knowledge of it, though this has been disputed by learned counsel for the appellant, and the conduct of the widow and daughter would appear to indicate consent to it. The main difficulty relates to the sister, Mt. Bashiran, who died very shortly after her brother Abdul Ghani. It is not shown that she left any heirs, but if she did — as has been suggested by the learned counsel for the appellant—then their consent may be presumed as the bequest was not challenged by any of them during the long period that elapsed between the death of Abdul Ghani and the institution of the suit. The Additional Civil Judge also observed that as none of the parties to the suit is claiming as an heir of Abdul Ghani's sister therefore none of them is entitled to challenge the will on the ground that the will excluded her. He thought that the fact that the sister was alive for about an hour after the testator's death was immaterial when none of the parties to the suit claimed through her, and it not being proved or even expressly alleged that she left any heirs, the only persons who could challenge the will on this ground were the two legatees under it. I agree. I can find no reason to dissent from the view taken by the lower Appellate Court that the will of Abdul Ghani is valid and effective in favour of Mt. Aziman and the plaintiff and that his wife Mt. Aziman being dead, the plaintiff is entitled to the property, the deed of gift executed by Mt. Faizan being invalid. I accordingly dismiss this appeal with cost.

D.S./R.K. *Appeal dismissed.*

7. ('02) 26 Bom 497 : 4 Bom L R 182, Daulat Ram v. Abdul Kayum.

A. I. R. 1941 Oudh 27

ZIAUL HASAN AND YORKE JJ.

Partab Bahadur and others

v.

Rana Uma Nath Bux Singh.

Second Appeal No. 105 of 1937, Decided on 9th August 1940.

Oudh Rent Act (22 of 1886), Ss. 3 (10) and 20—Muafidar is tenant within meaning of S. 3 (10)—Principles of tenancy land apply to muafi holding in matters of succession — Principles of Hindu joint family property do not apply — Surrender of holding by muafidar is valid under S. 20 and is binding on sons.

A muafidar is a tenant within the meaning of S. 3 (10). A tenant as defined in S. 3 (10) means any person, not being an under-proprietor, who is liable to pay rent. The question whether he actually does or does not pay rent is not conclusive and the term "liable to pay rent" includes persons who do not at present pay rent but may be liable to pay rent if and when it is assessed upon them. In matters of succession a muafi holding is governed by the principles of tenancy land and not by the principles of Hindu joint family property. Consequently a surrender of his holding by the muafidar is perfectly valid under S. 20 and is binding on his sons: *10 O C 235 and 11 O C 292, Rel. on.* [P 29 C 1; P 30 C 1]

S. N. Srivastava — for Appellants.

M. Wasim and L. S. Misra — for Respondent 1.

Judgment. — This is a plaintiff's second appeal from the decree of the Civil Judge of Rae Bareli dismissing the plaintiffs' appeal with costs. The present appeal arises out of the following facts. On 10th June 1881 a grant of 101 plots of land measuring 123 bighas odd in village Ambara Pachchum in the Rae Bareli District was executed by Rana Sir Shankar Bakhsh Singh, taluqdar of Khajurgaon in favour of one Bhairon Prasad, a Pragwal of Allahabad. A short pedigree of Bhairon Prasad's family will be useful:

BHAIRON PRASAD
|
Masuria Din
|
Gauri Shankar
(defendant-respondent 2)
|
Pratab Bahadur (plaintiff 1) | Gobind Lal (plaintiff 2) | Ganesh Prasad (plaintiff 3)

By this deed the plots were given to Bhairon Prasad rent free with a right of inheritance but no right of transfer. The present plaintiffs sued to recover these plots from the possession of defendant 1, Rana Uma Nath Bakhsh Singh on the allegation that the plots on the death of Bhairon Prasad became the property of his son Masuria Din, and on his death the property of their own father Gauri Shanker. It was alleged that they were now joint family property of Gauri Shankar and his sons the plaintiffs. It was further pleaded that in 1930 when the plaintiffs were all of them minors, considerably younger even than at the date of the present suit, they had separated from their father. The separation had been carried out by

means of an agreement to refer the alleged dispute between them and their father to arbitration dated 15th September 1930, which was followed by an award of the arbitrator dated only 10 days later, that is 25th September 1930. From that date it was contended that the present plaintiffs separated from their father. The cause of action for the present suit was stated to be the relinquishment of the whole of these plots by Gauri Shankar in favour of defendant 1 dated 24th February 1935. Hence the present suit was instituted on 31st August of the same year. It may be noted here that this relinquishment by Gauri Shankar was for a consideration of Rs. 1100, the money being said to be required for the payment of Gauri Shankar's debt and also for carrying out the marriage of one of his sons. The learned Munsif who tried the suit framed five issues:

1. What rights were gifted under Ex. 29 to Bhairon Prasad in the property in suit?

2. Did the property in suit constitute the joint family property of Gauri Shankar and his sons the plaintiffs?

3. (a) Did there take place any partition in 1930 amongst the plaintiffs and defendant 2 as alleged? (b) Was it fictitious and collusive? If so, its effect?

4. (a) Is Ex. A-1 (the relinquishment deed) fictitious and invalid as alleged by the plaintiffs? (b) Is the deed of relinquishment Ex. A-1 for legal necessity and antecedent debt? (c) Is it binding upon the plaintiffs even after the partition is proved as alleged?

5. Is defendant 1 protected under S. 41, T. P. Act, from the plaintiffs' assailing Ex. A-1?

On issue 1 the learned Munsif held that Ex. 29 was to be interpreted as creating a muafi in favour of Bhairon Prasad. He went on to hold that this grant could not be said to have been made to the joint family, but it was made to Bhairon Prasad in perpetuity and was heritable and non-transferable, which only means that Bhairon Prasad's successors could inherit the muafi rights created in favour of Bhairon Prasad and not that those rights were enjoyed jointly by them along with the grantee. The learned Munsif referred to two cases of this Court, 10 O C 235[1] and 11 O C 292,[2] as showing that a relinquishment by the father without the consent of his sons living jointly with him, cannot be questioned by the sons who cannot be deemed to be co-tenants with him. He noted that those cases related to occupancy tenancy but he considered that the principle underlying them governed the facts of the present case. Issue 2 was therefore decided against the plaintiffs. On issue 3 (a) he held that the alleged partition was nominal and fictitious. On issue 4 (a) he held that the deed of relinquishment was neither fictitious nor invalid. On issue 4 (b) he held that it was for legal necessity and on issue 4 (c) that there was no force in the plea raised in that issue. On issue 5 he held that S. 41, T. P. Act, had no application. On the case going to the lower Appellate Court the learned Civil Judge agreed with the trial Court in holding that the rules of survivorship had no application to the muafi holding in question. He was inclined to feel doubt about the correctness of this view but felt himself constrained to accept it in view of the case reported in 11 O C 292,[2] and in consequence of that finding he held that the relinquishment by Gauri Shankar alone was valid and binding on the plaintiffs. Despite the fact that on this finding some of the other issues did not really arise, he held on issue 3 that the partition was not fictitious and that there was severance of the status from joint tenancy to tenancy in common on 15th September 1930. Incidentally this finding is clearly absurd because the question was not of severance of the status of a joint tenancy but severance of the status of a joint family. On issue 4 (b) he held that the evidence was quite insufficient to prove legal necessity for the deed of relinquishment. He considered that the consideration was grossly inadequate and that the transfer would not have been binding on the plaintiffs.

In second appeal really there is only one question which arises, though learned counsel for the respondent has given some attention to the findings on the questions of severance of status and of legal necessity. It will be sufficient on these two latter points for us to say that their decision is not necessary for the decision of the present appeal, and that if these points had really required decision, we should have had considerable difficulty in agreeing with the learned Civil Judge on the question of the genuineness of the alleged partition. The case for the appellants which is argued before us is that the muafi rights of Bhairon Prasad in the hands of Gauri Shankar his grandson were joint family property in which the plaintiffs became coparceners and cosharers by birth. It is contended on the one hand that even if there was no partition, none the less Gauri Shankar as only one member of the coparcenary body, even if he was the manager, was not competent

1. ('07) 10 O C 235, Binda Prasad v. Rajendra Prasad.
2. ('08) 11 O C 292, Sarabjit Singh v. Mohan Singh.

to relinquish the property. Alternatively it is contended that accepting the finding of the learned Civil Judge that the family ceased in 1930 to be a joint family, the members of the family, having previously been joint tenants of this holding, thereupon became co-tenants and accordingly the share of Gauri Shankar became one-fourth of the property only and the relinquishment by him was ineffective as regards the remaining three-fourths.

The first question obviously is whether the incidents of Hindu joint family property have any application to the property in suit. Learned counsel for the appellants contends that as this is not tenancy but muafi land, the only means whereby the landlord is entitled to get rid of the muafidars is by a suit for resumption under Chap. 7A, Oudh Rent Act. Section 20, Oudh Rent Act, relating to the relinquishment, he contends, has no application to a muafidar who, he says, does not fall within the definition of "tenant" in S. 3 (10) of the Act. We are unable to accept the view that a muafidar is not a tenant within the meaning of S. 3 (10) of the Act. The scheme of the Oudh Rent Act contemplates only three classes of persons having an interest in and entitled to hold land in the province of Oudh: *vide* the decision of their Lordships of the Privy Council in 21 O C 180[3] at p. 186. These three classes are "proprietor," "under-proprietor" and "tenant." A tenant as defined in S. 3(10) means any person, not being an under-proprietor, who is liable to pay rent. In our opinion the question whether he actually does or does not pay rent is not conclusive and the term "liable to pay rent" includes persons who do not at present pay rent but may be liable to pay rent if and when it is assessed upon them. It follows that Bhairon Prasad and his successors being tenants within the meaning of S. 3 (10) of the Act the provisions of the Act contained in S. 20 relating to relinquishment were applicable to them.

Coming now to the next question as to the application of the incidents of a Hindu joint family to tenancy land (and indeed to the land in question even if it had not been held to be tenancy land) the Oudh Rent Act contains no provision in regard to succession to a holding, but just as in the present case the grant was described as heritable and not transferable, so also in Ss. 48 and 22 there are clear indications that the Act contemplates in every case a successor to a tenant who is regarded or may be regarded as the representative or representatives of the last tenant. It does not contemplate succession by survivorship or possession of the holding by a joint family with the necessary result that any male child born in that family would have to be entered in the papers as a tenant of the holding. Section 22 relates to a tenant's right to compensation for improvements and provides that

> if a tenant having a right of occupancy . . . or a statutory tenant or a person from whom he has inherited has made any such improvement on his holding as is hereinafter in this chapter mentioned and which he is entitled to make neither he nor his representative shall be ejected from the holding unless and until he or his representative as the case may be, has received compensation for the improvements.

Similarly, in S. 48 relating to statutory tenants it is provided that

> when a statutory tenant dies, his heir shall be entitled to retain occupation of the holding at the rent payable by the deceased for a period of five years from the date of the tenant's death, and to receive compensation under the provisions of this Act for improvements, if any, made on the holding by his predecessor-in-interest.

Sub-s. (2) of the same section speaks of a collateral relative as not being entitled to be deemed to be an heir of the deceased. It is not disputed that it has always been held by the Board of Revenue that tenancy in Oudh, as well as in Agra, devolves by succession to heirs and cannot be the property of a joint family so as to pass by survivorship in the same manner that zamindari property would pass: *vide* for example the remarks in the body of the judgment in S. D. No. 5 of 1925.[4] The same view by inference necessarily follows from the decisions of the Judicial Commissioner's Court in 10 O C 235[1] and 11 O C 292[2] referred to earlier. In 10 O C 235[1] at p. 237, the learned Judicial Commissioner remarked:

> It is not suggested that the plaintiff and his brothers (that is the sons of the recorded tenant) had any right to control their father in his dealings with the occupancy holding.

In 11 O C 292[2] similarly the plaintiffs were sons in a joint Hindu family and it was held by the learned Additional Judicial Commissioner that: "Hindu sons living jointly with their father (an occupancy tenant) are not the co-tenants of his holding. Held further, that the relinquishment of his holding made by the father without the consent of his sons is perfectly valid."

3. ('18) 5 A I R 1918 P C 77 : 47 I C 424 : 21 O C 180 (P C), Sripat Singh v. Basant Singh.

4. S. D. No. 5 of 1925, Mahant Dharam Das v. Mt. Phula Kunwar.

If in the case of a tenancy holding the incidents of a joint family property do not arise and sons by virtue of birth are not entitled to be considered to be cosharers in the holding but can only succeed to the holding on the death of their father, it seems to us to make no difference whether there has or has not been a partition in the family. The partition cannot give the sons any right to interfere in anything done by their father in connexion with that holding which they could not have done while the status of the joint family subsisted. In our opinion the two Courts below have rightly held that the principles of tenancy land are applicable to the holding in suit and that the principles of Hindu joint family property are not applicable to the holding in suit. For his lifetime Gauri Shankar was the tenant of the holding and was entitled under the provisions of S. 20 to relinquish that holding which in the present case he has done for good consideration. The plaintiffs' suit for recovery of the property was rightly dismissed and the lower Appellate Court rightly dismissed the plaintiffs' appeal. There is no force whatever in the present appeal which therefore fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 30

YORKE J.

B. Shiva Charan Lal — Plaintiff
— Applicant

v.

Behari Lal and another — Defendants
— Opposite Party.

Civil Revn. Appln. No. 82 of 1939, Decided on 2nd August 1940, for revision of order of First Addl. Judge, Small Cause Court, Lucknow, D/- 10th July 1939.

(a) Court-fees Act (1870), S. 6 (2)—Court has discretion to grant extension of time to make good deficient court-fee.

A Court has a discretion to grant extension of time for the making good of a deficiency in court-fee. [P 31 C 2]

(b) Civil P. C. (1908), O. 7, R. 9 — Order "register" on plaint is not order of admission necessitating Court to grant time for payment of deficient court-fee.

The order "register" passed on a plaint does not in any sense amount to an order of admission necessitating that the Court should give time to make good any deficiency in court-fee. [P 31 C 1,2]

(c) Civil P. C. (1908), S. 149 and O. 7, R. 11 — S. 149 and not O. 7, R. 11 enables Court to grant time for making good deficient court-fee—Under S. 149 Court has judicial discretion to grant time — O. 7, R. 11 does not compel Court to give time—Application showing no reason for grant of time but merely stating that applicant had not got amount of necessary court-fee without offering explanation—Refusal to grant time held justified — In circumstances of case trial Court directed to reconsider aforesaid application.

The provision in the Code which really enables a Court to grant time for making good a deficiency in court-fee stamp on the plaint is not O. 7, R. 11 but S. 149. O. 7, R. 11 does not enforce upon a Court the giving of time to make good a deficiency in court-fee stamp. The Court has a discretion under S. 149 which it may or may not exercise, subject to the proviso that it shall decide the question in a judicial manner. Where the Court thinks that the failure is bona fide and not due to negligence on the part of the plaintiff, it will doubtless make an order under S. 149 granting time. [P 31 C 2; P 32 C 2]

The application to the Court to grant time showed no reason for the grant of time but merely stated that the applicant had not got the amount of court-fees necessary without offering any explanation:

Held that it could not be said that the Court failed to exercise its discretion in a judicial manner in refusing to grant time. [P 31 C 2; P 32 C 2]

Held further that in all the circumstances of the case the Court might well have called upon the applicant at least to explain why he was failing to pay the whole of the court-fee along with the filing of the plaint and therefore it was desirable that the application for the grant of time for making good the deficiency should be reconsidered by the Court on its merits. [P 32 C 2]

J. N. Tandon — for Applicant.

Raj Kumar Srivastava — for Opposite Party.

Order. — This is an application under S. 25, Provincial Small Cause Courts Act, by one Shiva Charan Lal, plaintiff. The circumstances out of which this application has arisen are that the applicant on the reopening of the Civil Courts on 10th July 1939, filed a plaint in the Court of the Judge of Small Causes in Lucknow, founded on a promissary note dated 6th July 1936. Limitation for this suit expired on 6th July 1939, and the plaint had to be filed on the opening day. On that date the applicant filed his plaint affixing to it only a court-fee stamp of 12 annas and stated as follows: "*Is waqt court-fees maujud nahin hain is wajah se barah anna ka ticket lagakar dakhil kiya jata hai.*" He goes on to say that he will file the remaining court-fee within one week. The order of the Court shows that the ordinary office entry was made, "Register" but the other words in this routine stamped order, namely "and issue summonses" were scored out and the Court passed the following order: "No reason shown why extension of time for

court-fee should be made. Rejected as insufficiently stamped." It is quite clear that the learned Judge of the Small Cause Court interpreted the statement in the plaint "*is waqt court-fees maujud nahin hain*" as meaning that the plaintiff was not in possession of the necessary amount of court-fees and was therefore asking for time to make good the deficiency, but without stating any reason for his failure to stamp his plaint with the full amount of court-fees.

On the present application two points are raised. First it is said that the real fact of the matter was that owing to a rush of cases the stamp vendors' stock of court-fee stamps had been exhausted. The second point urged is that as a matter of law the learned Judge was bound to give the plaintiff time to make good the deficiency, and unless and until he did so, he was not entitled to reject the plaint. As regards the first point an affidavit is now filed to the effect that the stock of court-fee stamps had run out. It may be that that is a fact but that is not the reason which the applicant gave for failure to stamp his plaint sufficiently and in my opinion so far as the merits of the order go, the Judge of the Small Cause Court was fully entitled to say that as no reason was given for extension of time there was no reason for him to grant such an extension. As regards the second point learned counsel points first of all to S. 6 (2), Court-fees Act, as amended up to 1938. That clause or sub-section provides that :

> Notwithstanding the provisions of sub-s. (1), a Court may receive a plaint or memorandum of appeal in respect of which an insufficient fee has been paid, but no such plaint or memorandum of appeal shall be acted upon unless the plaintiff or the appellant as the case may be, makes good the deficiency in court-fee within such time as may from time to time be fixed by the Court.

There is no dispute that a Court has a discretion to grant extensions of time for the making good of a deficiency in court-fee. Learned counsel goes on to refer to the provisions of O. 7 R. 11, Civil P. C. Order 7 deals entirely with the filing of plaints in suits and an examination of that order indicates that on the filing of a plaint, a Court having registered the plaint, may either under O. 7 R. 10 return it for presentation to the proper Court or under R. 11 reject it, or if it does not reject, proceed to act upon it, that is to say may admit it, in which case the provisions of R. 9 come into effect. The order "register," as it seems to me, does not in any sense amount to an order of admission necessitating that the Court should give time to make good any deficiency. The question is whether clause (c) of R. 11 makes it incumbent on a Court to grant time for making good any deficiency in court-fee stamp or only prescribes rejection where a plaint is insufficiently stamped, and the plaintiff after having been given time (that is assuming that the Court was prepared to give time) has failed to make good the deficiency. There can be no doubt that the provision in the Code which really enables a Court to grant time for making good a deficiency in court-fee stamp on the plaint is not R. 11 of O. 7 but S. 149. That section provides :

> Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court-fees has not been paid, the Court may, in its discretion, at any time, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.

It is clear that this section gives the Court a discretion either to grant time or to refuse to grant time according to the circumstances of the case. Where the Court thinks that the failure is bona fide and not due to negligence on the part of the plaintiff, it will doubtless make an order under S. 149 granting time; where however the application to the Court to grant time shows no reason for the grant of time but merely states that the applicant has not got the amount of court-fees necessary without offering any explanation, the Court would naturally refuse to make an order granting time. Learned Counsel has referred to several cases on which he relies for the proposition that O. 7, R. 11 (c) is in a sense mandatory and compels a Court to grant time. In A I R 1927 OUDH 507[1] it was held that Courts and rules of procedure regulating their conduct are intended for facilitating justice and not for impeding it, and that the refusal to take the deficit court-fee on the ground of one day's delay in producing it was an abuse of the powers of the Court. That was however rather a peculiar case in which the Court had held that instead of a court-fee of Rs. 10 the plaintiff must pay a court-fee of Rs. 435 and gave time for the payment of that amount. On the last day the plaintiff produced Rs. 200 and was ready to pay it, but asked for more time for the balance. The application and

1. ('27) 14 AIR 1927 Oudh 507 : 104 I C 527, Kamakhya Dat Ram v. Shyam Lal.

the offer of Rs. 200 was rejected and the case ordered to be put up on the following day. On that day the plaintiff came forward with the whole amount of the deficiency but the Court refused to accept it and rejected the plaint. It is obvious there is not much in common between that case and the present one.

In A I R 1930 OUDH 104[2] it was held that a Court which decides that a court-fee paid is insufficient ought to allow the party reasonable time within which the deficiency can be made up. The suit or appeal should not be dismissed without such opportunity being given. The principles laid down in that case again are not applicable to the present case. In A I R 1928 LAH 274[3] the circumstances were that on the date for filing a suit there were a number of suits of the same kind (more or less the same situation that we have here) and the supply of court-fee stamps with the stamp vendors was exhausted. The Court directed the stamps to be paid the following day but thereafter the plaintiff fell ill and the suit was dismissed for default seven days after it was originally filed. It was held that there was sufficient cause for the plaintiff not paying the court-fee on the plaint on the original day and that the Court was fully justified under the circumstances in allowing the plaintiff to pay such fee before the time ultimately fixed by it, and the court-fee having been so paid the plaint must be deemed to have been presented on the original date. It does not seem to me that this case is very helpful. Learned counsel for the opposite party has referred to a Full Bench case of the Lahore High Court, A I R 1938 LAH 361,[4] in which it was held that

> it is not incumbent upon a Court of justice to allow the plaintiff an opportunity to make good the deficiency under O. 7, R. 11. O. 7, R. 11 is not an enabling provision and has nothing to do with the power of a Court to have the deficiency made up. It is on the other hand a disabling provision, enjoining the Court to reject a plaint if deficiency is not made good as ordered by the Court. The authority to issue the order lies in S. 149, and the penalty for default in R. 11 of O. 7. Whether the Court condones a mala fide mistake and grants time or it does not condone bona fide one and does not grant time, the wording of S. 149 does not stand in its way.

It was further held that

> the discretion conferred on the Court by S. 149 is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive mala fides or reasons of a similar kind. The question of bona fides in this connexion should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act.

In the body of the judgment this last remark is amplified and it is stated that

> a thing should be presumed to be done bona fide if it is done honestly, whether it is done negligently or not, for the purposes of judging whether this discretion under S. 149 should or should not be exercised in favour of the litigant.

It seems to me, with great respect, that there can be no doubt of the correctness of the view expressed in this ruling, and that there is no doubt that O. 7 R. 11 does not enforce upon a Court the giving of time to make good a deficiency in court-fee stamp. The Court has a discretion under S. 149 which it may or may not exercise, subject to the proviso that it shall decide the question in a judicial manner. It would be hard to say that in the present case the Court failed to exercise its discretion in a judicial manner, and on the merits I am in no way prepared to say that the order of the learned Judge of the Small Cause Court is a wrong order. On the other hand in the circumstances of the case as they are said to be and even in the circumstances of the case as they appear from the statement in the plaint I think the learned Judge might well have called upon the plaintiff at least to explain why he was failing to pay the whole of the court-fee along with the filing of the plaint. In consideration of this fact only and because I think it is rather a hard case, I set aside the order of the learned Judge and direct that the record should be returned to him with a direction to consider the application for the grant of time for making good the deficiency on its merits. As this application has been necessitated by the fault of the applicant himself I direct that whatever costs may have been incurred by the opposite party to this application shall be borne by the applicant.

G.N./R.K. *Order accordingly.*

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2. ('30) 17 A I R 1930 Oudh 104 : 124 I C 420 : 5 Luck 474: 6 O W N 1105, Deoraj v. Kunj Behari.
3. ('28) 15 A I R 1928 Lah 274 : 115 I C 757, Muhammad Shafi Muhammad Ayub v. Delhi House of Multan.
4. ('38) 25 A I R 1938 Lah 361 : 175 I C 699 : 40 P L R 413 (F B), Jagat Ram v. Misar Kharaiti Ram.

A. I. R. 1941 Oudh 33

THOMAS C. J.

Vishambhar Dayal Tripathi
Appellant

v.

Emperor.

Criminal Appeals Nos. 450 and 482 of 1940, Decided on 20th September 1940, against order of the Dist. Magistrate, Unao, D/- 25th May 1940.

(a) Criminal P. C. (1898), S. 235 — Accused can be convicted in one trial under Ss. 124-A and 153-A I. P. C. — Separate trial is not illegal when accused is not prejudiced thereby.

An accused can be convicted in one trial under both Ss. 124-A and 153-A, I.P.C., by virtue of S. 235, Criminal P. C. Separate trials under aforesaid sections therefore are not necessary. Nevertheless, separate trial cannot be said to be illegal when the accused has not in any way been prejudiced thereby. [P 36 C 2]

(b) Criminal P. C. (1898), S. 257 — Court is not bound to summon all witnesses cited by accused — It can refuse to summon witnesses on ground of their being called for vexation, delay or defeating ends of justice — Court refusing to summon witnesses on ground of their being called to delay case — Accused as protest giving up those witnesses — Accused cannot subsequently contend that Court wrongly refused to summon his witnesses.

A Court is not bound to summon all the witnesses cited by an accused person under S. 257 ; it has power to refuse to summon all the witnesses on the ground that the application is made for the purpose of vexation or delay or for defeating the ends of justice. Where the Court refuses to summon the witnesses on the ground of their being called to delay the case and the accused by way of protest gives up those witnesses, it is not open to him to contend subsequently that the Court wrongly refused to summon his witnesses. But if he insists on his witnesses being summoned and the Court refuses to do so, it is then open to him to argue in appeal that the Magistrate wrongly refused to summon his witnesses. [P 36 C 1, 2]

(c) Penal Code (1860), S. 124-A — Seditious speech—Court is concerned with construction of speech and not its effect on mind of people — Speech should be taken as a whole and not in pieces.

In cases under S. 124-A, the Court is concerned with the construction of a speech and not its effect on the mind of the people and for that purpose the speech should be taken as a whole and not just in pieces. [P 39 C 1]

(d) Penal Code (1860), S. 124-A—Criticism of administrative machinery or act of Government is not sedition — Intention is an important factor in such cases—But where limits of fair criticism are exceeded and object of attacking Government is to create disaffection, speech amounts to sedition.

It is not sedition to criticise or comment upon administrative machinery or the officers of Government or an act or measure of the Government and freely express one's opinion thereon. One may express condemnation but so long as he confines himself to that he will be protected ; but if he exceeds the limits of fair criticism and attacks the Government with the object of creating disaffection, he must pay the penalty for it. The question of intention is always an important factor in such cases. [P 39 C 2 ; P 40 C 2]

Consequently, a contemptuous statement that the power of the Government is like a hollow tree which will fall down by one push and the country will be relieved of its yoke, or a statement that the power of the Government can be snatched by the people any time and the police force is ready to prove its disloyalty to the British Government and join the Congress, or calling the British Government and the zamindars thieves and robbers in alliance with each other and suggesting that the poverty of the masses cannot be removed until the British Government and the zamindari system is removed and the Government of tenants and labourers is established amounts to sedition. [P 39 C 1, 2]

(e) Penal Code (1860), S. 124-A — Notes of speech taken by police officer being admissible in evidence conviction can be based thereon.

The notes of a speech taken down by a police officer are admissible in evidence and a person can be convicted on those notes if they are seditious. [P 40 C 2]

(f) Penal Code (1860), S. 153-A—In estimating effect of speech Court should look at speech as a whole and not particular sentence or phrase —Speaker cannot contend that he did not intend his language to bear meaning which it naturally does.

In estimating the effect of a speech the Court should look at the speech as a whole and not pay undue regard to any particular sentence or phrase. It is not open to the speaker to say that he did not intend his language to bear the meaning which it naturally does bear. [P 41 C 2]

(g) Penal Code (1860), S. 153-A—Division of "classes" in S. 153-A need not necessarily be on racial or religious grounds — Any definite and ascertainable class comes under S. 153-A—Phrase "capitalists" is not class within meaning of S. 153-A — Words "taluqdars," "zamindars" and "money-lenders" in speech held referred to classes within meaning of S. 153-A.

Section 153-A does not contemplate the division of classes necessarily on racial or religious grounds. Any definite and ascertainable "class" of His Majesty's subjects comes within the purview of the section, although the "classes" may not be divided on racial or religious grounds. The word "capitalists" is rather a vague phrase to denote a definite and ascertainable "class" so as to come under S. 153-A. But where a person compares the taluqdars and the zamindars as a class and the moneylenders and the Government officials with tenants and states that the Government officials do not sympathise with their aims and excites the tenants to organise themselves as their Raj was coming in which the taluqdars and zamindars will have no share and that the taluqdars have deceived and betrayed the country into the hands of the British Government, it is covered by S. 153-A, as it attempts to promote feelings of enmity or hatred between different "classes" of His Majesty's subjects. [P 41 C 1, 2]

H. N. Misra and C. P. Lal — for Appellant.
Assist. Government Advocate — for the Crown.

Judgment.—The appellant, Vishambhar Dayal Tripathi, has been convicted by the District Magistrate of Unao for making seditious speeches within the meaning of S. 124A, Penal Code, and sentenced to 18 months' rigorous imprisonment in respect of the first speech and nine months' rigorous imprisonment each in respect of the second and third speeches, the sentences to run consecutively. The first speech was made on 1st September 1939, at Hasanganj. The second speech was made on 3rd September 1939 at Sohanlal Ka Dharamshala, Unao, and the third speech on 29th September 1939, at the same place. The charge-sheet contains seven objectionable passages in respect of the first speech, one passage from the second speech and two passages from the third speech: *vide* Appendix 1 to the charge-sheet under S. 124A. I may mention here that the accused has also been convicted under S. 153A, Penal Code, in respect of the same three speeches and sentenced to a total period of three years, but the sentences under this section and those under S. 124A have been made to run concurrently. The two trials were separate and therefore the accused had to file a separate appeal under S. 153A in the Court of the Sessions Judge at Unao to whom the appeal lay. The appeal under S. 124A was filed in this Court, and at the request of the Sessions Judge, as both appeals were connected and the facts common, I transferred that appeal to this Court. I may also mention that there was no need for a separate trial under S. 153A, Penal Code. The accused could have been convicted under S. 153A in the trial under S. 124A, Penal Code. The provisions of S. 235, Criminal P. C., are quite clear and I do not understand why the trials were held separately. It may be on account of extra precaution and to avoid any objection in appeal on the ground of misjoinder of charges. There was only one complaint filed under both the sections and only one sanction was obtained for the prosecution of the accused from the Government. This judgment will also dispose of Criminal Appeal No. 482 of 1940, under S. 153A, Penal Code.

The accused is an M.A., LL.B., a member of the Legislative Assembly and a member of a party known as the Forward Block. He is also Chairman of the Municipal Board of Unao and I understand is a leading citizen of that district. The Local Government sanctioned the accused's prosecution by an order dated 11th November 1939, and he was arrested on 12th November 1939, and has remained in jail custody throughout the trial because he refused to give an undertaking to refrain from making further political speeches during the pendency of the trial. The Superintendent of Police has been examined as a witness in the case to prove the complaint filed by him and the sanction of the Government.

The first speech was made, as I have said, on 1st September 1939, at Hasanganj. The evidence shows that it started about 2-30 P. M. and lasted for about two and a half hours, and the number of persons who attended the meeting was (the witnesses differ) from 200 to 500. We may take it that there were about 350 persons present at the meeting. It is at times difficult to judge the exact number of persons present at a meeting. The audience was almost entirely villagers. Two other persons besides the accused addressed the meeting. The speech (EX. 1) was recorded in Urdu longhand by Sub-Inspector, Mohib Ali Khan of the District Intelligence Staff (P.W. 2). At the conclusion of the meeting he got Mukhtar Husain (P.W. 7) and Chhote Singh to attest the speech which he had taken down. His evidence shows that he had read his notes of the speech to these witnesses and that after verifying from them that they represented more or less what the accused had actually said he obtained their signatures on each page of his notes on the spot. Chhote Singh has not been examined in the case. The second meeting was held at Sohanlal Ka Dharamshala, Unao, on 3rd September 1939. It started about 7-30 P. M. and continued till about 10 P. M. It is alleged that there were 200 persons present, who were residents of Unao. The notes of this speech (EX. 2) were also taken down in the Urdu longhand by the same Sub-Inspector, Mohib Ali Khan (P.W. 2) and signed by one Chhuttan (P.W. 6).

The third meeting was held on 29th september 1939, in the evening in Sohanlal Ka Dharamshala and from the evidence of P. W. 3, Sub-Inspector, Manohar Lal Misra, who recorded the notes of this meeting, it appears that the accused spoke for about an hour which he noted in EX. 3. From the evidence of P. W. 4, it appears that the meeting began at 6 or 6-30 P. M. and lasted till 8 or 8-30 P. M., and was attended by about 250 persons. There were two or three other speakers who addressed the meeting before the accused. After the meeting was over the Sub-Inspector obtained the signatures of Rasul Ahmad and Chhotey Singh (P. Ws. 4

and 5) and Tajuddin, who has not been examined.

It has not been satisfactorily proved when all the three notes of the speeches recorded by the two Sub-Inspectors were sent to the Superintendent of Police but from the statement of the Superintendent of Police (P. W. 1) it appears that as a general rule such notes are received by him within two days. No register is maintained in which receipts of such notes are entered. The prosecution have examined eight witnesses, the Superintendent of Police (P. W. 1), the two Sub-Inspectors Mohib Ali Khan and Manohar Lal Misra (P. Ws. 2 and 3), Chhotey Singh (P. W. 5), Chhuttan (P. W. 6), Mukhtar Husain (P. W. 7) and Amir Haider (P. W. 8). The statement of the Superintendent of Police is more or less formal. P. Ws. 2 and 3, the most important witnesses, are the two Sub-Inspectors who took down the notes in longhand and they prove the contents of the notes in Urdu in Exs. 1, 2 and 3. Rasul Ahmad (P. W. 4) and Chhotey Singh (P. W. 5) prove their presence at the meeting on 29th September 1939, and prove Ex. 3 as marginal witnesses. Chhutan (P. W. 6) proves Ex. 2 and that he was present at the meeting on 3rd September 1939. Mukhtar Husain (P. W 7) proves his presence at the meeting of 1st September 1939, and his signature on Ex. 1 as a marginal witness. Amir Haider (P. W. 8) is a C. I. D. shorthand reporter posted at Cawnpore. His statement is to the effect that the accused was in the habit of advocating violence in his public speeches. He proves his shorthand notes of the accused's speeches made on 4th June 1939, at Rasulpur and on 14th May 1939 at Makur. These speeches were put in to show that the accused was in the habit of making such speeches. The accused in his statement admitted that he had delivered speeches on 1st, 3rd and 29th September 1939, but stated that the reports of the speeches written in longhand were incorrect and at places materially different from the actual speeches. When asked by the Court whether he wanted to make a further statement he stated as follows :

I will file a detailed written statement at a later stage but at this stage I wish to state the following. The aim of the Indian National Congress has been the attainment of complete independence (purna swarajya) for the last ten years which means nothing less than the liquidation of the British Imperialism in India and its replacement by a Government of the masses. As a Congressman I have always advocated this view and have worked towards that end. The methods that the Congress adopts from time to time in order to achieve this end are peaceful and legitimate . . . . . I have scrupulously advocated the Congress viewpoint. If this is sedition I plead guilty to the charge.

He filed a long written statement, which consists of five typed pages. In one of the paragraphs he stated that :

In my oral statement I have already said that the reports of my speeches are incorrect, short and misleading. But even these reports, such as they are, contain nothing which may be against the above policy . . . . . I have always advocated the liquidation of British Imperialism in India and the abolition of all vested interests including the zemindari system. I believe that no Government in the world has done a greater harm to humanity than the British Imperialism, and it must be ended if the world is to live in peace . . . . . If the propaganda for the replacement of the British Government as representing the British Imperialism in India by a Government of the masses and the adoption of measures beneficial for peasents including the abolition of zemindari system through non-violent mass action is sedition and class hatred, I must confess with pride that I am guilty of both these charges. This has become the very breath of my life, and I cannot live without it even for a moment . . . . . .

As regards the reports of my speeches, they stand self-condemned. If the prosecution story is to be believed, the speed of my speeches recorded in longhand comes up to about 20 words per minute which is simply ridiculous. The shorthand reporter has however admitted that my speed is about 100 words per minute. Although my speed is much faster, yet, if it is assumed to be only 100 words per minute it will mean that only one fifth of my actual speeches has been recorded. The real fact is that the reports produced before the Court are not original notes, but they have been manufactured at leisure in a manner which suited the whims of the reporters who have always been interested in making false reports against Congressmen . . .

This is the main defence of the accused. Before dealing with the appeal on the merits, I may dispose of one grievance which was made by the learned counsel of the accused, namely that the learned District Magistrate refused to summon all the defence witnesses, whom the accused wished to examine. The accused had filed a list containing the names of 20 witnesses including Shri Subhas Chandra Bose of Calcutta, Swami Sahjanand of Patna, Mr. Rafi Ahmad Kidwai and Mr. Vernede (District Magistrate) and others. The prosecution opposed the summoning of these witnesses on the ground that their evidence was not material and the intention of the accused was to delay the proceedings and the learned District Magistrate refused to summon all the witnesses. On 10th April 1940, the accused applied to stay the proceedings as he wanted to apply for transfer of the case. The Court granted him time till 23rd April. There can be no doubt that the time granted was sufficient, but no application was presented in

this Court until 3rd May 1940. The two main grounds for the transfer of the case before me were : (1) that the District Magistrate disallowed the prayer of the accused to dictate his speech to the two Sub-Inspectors who had written the notes of the speeches and (2) that the District Magistrate had refused to summon all the defence witnesses. I rejected the applications summarily on 3rd May 1940 and stated that

in my opinion the points which have been raised in these applications are not grounds for transfer, but they may be grounds for consideration by an appellate Court in case the applicant is convicted.

Before I dismissed the applications I asked the counsel who had presented them how the evidence of these gentlemen was material in the case where the sole question was whether a particular speech was or was not made and if made, whether it was seditious. The learned counsel at that time could not give any reply. In fact he stated that he did not know what their evidence was. On 2nd May 1940, when the case was taken up to examine the defence witnesses an application was presented before the District Magistrate to adjourn the case but it was rejected on the ground that the accused was given sufficient time to move an application for transfer in the Chief Court and as no order for stay of proceedings was received there was no reason why the evidence of those defence witnesses who were present should not be recorded. The accused's counsel then made the following note under the order passed by the District Magistrate : "Under the circumstances the only alternative left is to discharge the witnesses present to-day." There was no justification for this note if the accused really wanted to examine these witnesses in defence. They were present and he should have examined them and with regard to the other witnesses who had not been summoned, he should have insisted on their being summoned. The case was then adjourned from 2nd May to 4th May 1940 when on that date the accused filed an application in which he stated that :

I have lost all confidence in the Court and have reasons to apprehend that no justice will be done in the case. It is therefore of no use at this stage to defend the case any further, and I leave the Court to have its own way. I shall only file a written-statement on the next date.

The Court passed the following order :

Since the accused does not now wish to examine the defence witnesses who are being or who have been summoned and has discharged them, the case is adjourned to 7th May 1940, for filing of written-statement by the accused.

A Court is not bound to summon all the witnesses cited by an accused person and under the provisions of S. 257, Criminal P. C., it has power to refuse to summon all the witnesses on the ground that the application is made for the purpose of vexation or delay or for defeating the ends of justice. The Court refused to summon Shri Subhas Chandra Bose and others on the ground that the accused had summoned them for the purpose of delaying the case. I am of opinion that the accused at this stage cannot make a grievance of this because he himself gave up those witnesses. If he had insisted on their being summoned and the Court refused to do so, it would then have been open to the accused to argue in this Court that the District Magistrate wrongly refused to summon his witnesses. I, therefore, overrule this objection.

It was next argued that the two charges should not have been split up but tried together and the accused if found guilty could have been convicted under Ss. 124A and 153A, I. P. C. I think this is a sound argument. As I said in the beginning, in my opinion there should not have been two separate trials, and in one trial the accused could have been convicted under both the sections, but by this procedure the accused has not in any way been prejudiced, and therefore the trial cannot be said to be illegal. Moreover the sentences passed under both the sections have been made to run concurrently.

Now coming to the merits of the case, the most important point for consideration is whether the notes taken down by the police officers truly represent what the accused said at the meetings. The accused prayed for a test of the reporter's speed in recording a dictated passage in Court. The Court did not allow the accused to dictate the passage but got a senior Deputy Collector, Mr. Jagdamba Prasad, to read the two set passages to both the Sub-Inspectors at once. The accused chose the passages, which are Ex. C, a copy of the longhand report of the accused's alleged speech of 3rd September, (Ex. 2), and the other a portion of the speech made by the accused in the Legislative Assembly on 7th September 1937, which is printed from the proceedings of the Legislative Assembly. The speech deals with the new Tenancy Act. Ex. C contains 1144 words and according to the judgment of the learned District Magistrate I find that the time taken in dictation was 16½ minutes and the rate at which it was dictated was 69 words per minute. The other speech

(EX. D) contains 1159 words and the time taken in dictation was 14 minutes and 20 seconds. The speed approximately was 80 words per minute. The result of the test was that P. W. 2, Sub-Inspector Mohib Ali, Khan, committed 145 mistakes and wrote three sentences down all wrong out of the dictated passage (EX. C). In EX. D he made 191 mistakes and omitted ten small passages. P. W. 3, Manohar Lal Misra, made 220 mistakes and either omitted or so badly wrote that at least 30 sentences out of the dictated speech (EX. C) were not recognisable and added 14 small passages which did not occur in the original. In the Assembly speech P. W. 3 made 194 mistakes in words and wrongly wrote approximately half the total number of words dictated. On 9th February 1940, both the witnesses were made to write out a fair copy of what they thought they had written down in dictations (EXS. A, B, E and F). These copies are marked EXS. A-1, B-1, E-1 and F-1. The witnesses then were asked to correct their dictations from the original EXS. C and D. With regard to this the finding of the learned District Magistrate is as follows:

> Commonsense and common knowledge even without the help of a test can reasonably be applied to the same claim to show it to be exaggerated. The test has proved conclusively what was a reasonable supposition, *viz.*, that a longhand reporter in Urdu cannot be expected to record a whole speech correctly at more than 60 words per minute and even then only by omitting nuqtas, markaz, madds and signs for "he" and writing somewhat illegibly, and probably at not more than 45 to 50 words per minute if he wishes to include these signs and also write fairly legibly. At any speed in excess of 60 words per minute he is bound to leave out portions and can only decrease the omissions by an increase in illegibility . . . . . There is no evidence on record to prove the speed at which the accused ordinarily speaks in public meetings, but from an admission of P. W. 8, who is a shorthand reporter . . . . . it appears that the accused's rate of speech is approximately 100 words per minute . . . . Even allowing for interruptions it is obvious that neither P. W. 2 nor P. W. 3 could possibly record cent per cent with accuracy everything that the accused said at these meetings.

It was suggested on behalf of the accused that P. W. 2 had a personal grudge against the accused, that at the time of the Assembly election in 1937, the witness was station officer of Bangarmau and attempted to prejudice the chance of the accused. The finding of the District Magistrate is that

> the witness (P. W. 2) and the accused were not on good terms while the former was in Bangarmau police circle and it is also reasonable to presume that he was transferred from that circle because he was not persona grata to the Congress and these differences were undesirable in the interest of good administration in his circle. It may be admitted therefore that this witness owed some grudge to the accused.

In view of the above findings of the learned District Magistrate it is urged on behalf of the accused that P. WS. 2 and 3 were unable to record the verbatim speeches and the witnesses made notes here and there and then wrote up at their leisure full speeches the next day, and the alleged seditious portions were invented by the witnesses out of their own heads. I do not agree with this contention. P. W. 2 is a Mahomedan and EX. 1 shows that it contains a large number of hindi and sanskrit words. The first meeting was attended by villagers and I do not think the accused could have spoken more than 70 or 80 words per minute. Allowing for the interruptions I am of opinion that the two witnesses could have written down a large number of extracts correctly. I do not think that they were actuated with malice towards the accused and falsely invented words which the accused did not utter. I am supported in these observations by the internal evidence in the case. Exhibits 1 and 2 when read carefully give one the impression of their being genuine. I think it is too much to say that the whole thing has been invented and is the outcome of the ingenuity of the police officers. From the judgment of the District Magistrate, it appears that he did not think that Mohib Ali Khan was particularly an intelligent or imaginative witness. If this impression of the learned Magistrate is correct, then he could not deliberately make up a false speech in this form. It is true that there are omissions and mistakes in the speeches as the test shows, but I am not prepared to hold that EXS. 1 and 2 are not genuine. I may quote a few passages from the speech (EX. 1), which gave me the impression of the speech being genuine. The translation supplied by the office is not very good but I do not wish to alter it.

> Now-a-days we have people of two different views in our country. Our party says that the fight of freedom is the fight of the agriculturists and the labourers and the Swaraj campaign should be carried on at an accelerated speed. They also say that this is an opportune time. The war is about to break out in Europe and when the English people are involved in it, they will grow very weak and so time has now come when we should expedite our Swaraj campaign with full strength . . . The other party holds the view that we should not fight for Swaraj in any way . . . . Fifteen days back, the Committee held the largest sitting at Calcutta where it was resolved that we have passed many days in sitting silent and enough time has been wasted by us after ministerships. Now time has come up when we should accelerate the fight

and should inform the people about it and should prepare them for it. The Swaraj campaign is soon going to be launched in this country and it has been decided that from 31st August 1939 to 6th September 1939, be observed as National Struggle Week and the speed of the war of freedom of this country be expedited .... Yesterday was the date fixed for the release of the political prisoners. We must all be aware that there are about 100 political prisoners in Bengal .. To-day is a very important day. Why is the date so important? Our country has money-lenders, zamindars, shop-keepers and officials as well. Why then we are going to observe tenants' day only and not of others ..... Thus 96 or 97 per cent. of our population is either tenant or labour class. The remaining three or four per cent. of the population which includes big money-lenders, and Government officials cannot be said to belong to labour class. It is they who are mostly benefited by the British Government and do not want to take any part in the fight for Swaraj because they shall be losers. If Swaraj is obtained and a revolution occurs, the result will be that those who are making money at the cost of others and are living a luxurious life shall be losers in all respects and it is for this reason that they do not like a change of the Government ..... Great persons wish that the British Government might continue so that they could go on with plunder. If this Government collapses, it shall be replaced by the Government of tenants who are 96 per cent. and then you can clearly foresee their losses in Swaraj. The taluqdars, the money-lenders, the zamindars and the Government officials do not sympathise with our aims ..... Now the British Government is nearing its end and as to what will be the conditions of these big people, I want to tell them that they should at once leave and go away from our country ..... A good opportunity is at hand. The manner in which the Government is being carried out in these days shows how the blood of the poor is being sucked peacefully without any war. The war is inevitable and you have a good opportunity. The English people have grown weak now. If you read papers you might have realized that the British Government has become hollow from inside and like a hollow tree which falls under its own weight ... In the last German War a good many people had sold their heads for 10 or 15 rupees. This time the mistake should not be committed again, so that nobody should recruit or enlist himself for greed of money or to sacrifice his life in a foreign land ... The modern war is a war of aeroplanes and poisonous gases, and the forces can be destroyed, wherever they may be, with the help of aeroplanes. The war by the use of gas is very dangerous and if anybody goes he goes there to lose his life. We should be ready to give our lives for the sake of our country and not for the British Imperialism. So you should make up your minds not to send anybody of your village to war. If some one goes his family should be boycotted. You should make an organization from village to village so that nobody may fall a victim to greed.

The second thing which you should do is to see that not a single farthing is subscribed towards War Fund ... We should join the Congress .... It had 45 lakhs of members last year. There was never any such large body or organization in the world as the Congress. It is the strongest body in the world to-day. There is no society or sabha like it in any country, such as America, Russia or England .... If the members numbered 45 lakhs last year, I expect them to be in greater number this year .....

I can go on quoting passages after passages from these speeches, which will show that they cannot be the outcome of the brain of the persons who took down these speeches but were actually delivered by the speaker. Mohib Ali Khan (P. W. 2) swears that Exs. 1 and 2 were written by him and they were the original longhand notes taken down at the time when the speeches were being delivered. He further states that he had obtained the signatures of the witnesses on the spot after reading the notes and verified their correctness. Pandit Manohar Lal Misra (P. W. 3) swears that the notes (Ex. 3) were taken down by him when the speech was being made. These two witnesses are corroborated by the witnesses who attested the speeches, but it must be stated that the learned District Magistrate has not fully relied on these witnesses. Rasul Ahmad, (P. W. 4) is a clerk of a vakil and the learned District Magistrate remarks that he is not impressed by his parrot-like repetition of large portions of the speech practically in the words of Ex. 3. I am satisfied from his evidence that he attended the meeting and signed Ex. 3 as a marginal witness. Chhote Singh, (P. W. 5) is a small zamindar. He attended the meeting of 29th September 1939. He corroborates the statements of P. Ws. 3 and 4. The witness admitted that when he heard the speech of the accused (Ex. 3), he felt resentment against the British Government.

P. W. 6, Chhuttan, is a tailor by profession. The learned District Magistrate has not placed much reliance on his evidence and I therefore ignore it from consideration, though I am satisfied that he was present at the meeting and that he signed Ex. 2 as a marginal witness. Mukhtar Husain, (P. W. 7) proves Ex. 1. He was present at the Hasanganj meeting and there is no reason to reject his testimony. Amir Haider, (P. W. 8) was produced to prove Exs. 6 and 8 which are speeches made by the accused on different occasions, and as they do not form part of the charge I refrain from making any observations. The accused has not specifically denied that he made the speeches found in Exs. 1 and 2, and his learned counsel in arguments has simply stated that they are not correct. He has not pointed out what the additions are but has made general observations. Therefore after considering the evidence for the prosecution, and in spite of mutilated sentences

and mistakes which occur here and there, I am of opinion that the speeches were not invented by the police officers but actually delivered. I am prepared to concede that the speeches are not the full speeches, which were delivered by the accused but they are brief notes. I therefore hold that Exs. 1, 2 and 3 are genuine documents.

The next question for decision is whether any passages in Exs. 1, 2 and 3 amount to sedition. As I have said, in the charge sheet there are seven objectionable passages in respect of the first speech (Ex. 1). Before I deal with each passage, I may mention that in such cases we have not to see the effect on the mind of the people but we are concerned with the construction of the speech, and the speech has to be taken as a whole and not just in pieces. The first passage is as follows:

> As you know the taluqdars, the moneylenders, the zemindars and Government officials do not sympathise with us.

This passage by itself cannot in my opinion amount to sedition. The second passage is as follows:

> Preparations are being made for war and it is possible that it might have broken out or may break out in 15 or 20 days. In any case the war is imminent in which the English people will be on one side and others on the other side. The manner in which the Government is being carried on in these days shows how the blood of the poor is being sucked peacefully without any war. The war is inevitable and you have a good opportunity. The English people have grown weak. If you read papers you must have realised that the British Government has become hollow from inside and is like a hollow tree which falls under its own weight. It was regarded as strong Government 20, 30 years ago. The world now knows that the British Government is likely to perish with the slightest shock and our country shall be relieved of its yoke.

It is not necessary to discuss this passage as the learned counsel has frankly, and in my opinion rightly, conceded that this passage is seditious. The accused contemptuously states that the power of the Government is like a hollow tree which will fall down by one push and the country will be relieved of its yoke. The third passage is highly seditious. As the learned counsel on behalf of the accused agrees with me, it is therefore not necessary to quote the whole passage and discuss it at length, but I may mention one or two objectionable passages. The accused states that the total strength of the British Government in Unao is now represented by 13 police stations, containing in all 15 or 20 constables in each thana, while the population is about 9 lakhs. The accused adds that this power can be snatched by the people any time they want to do so. He states that the police force is ready to prove its disloyalty to the British Government and join the Congress. This clearly shows that the accused attempted to excite disaffection amongst and towards the police force and also preached hatred against the British Government. The fourth passage is as follows:

> The Congress Government no doubt is at the top, but the highest to the lowest, such as patwaris, kanungoes, tahsildars, Deputy Commissioner and the Chief Secretary who are members of the old machinery, are grinding us like stones. The laws are passed by the higher authorities but they lose their force before they reach the hands of the lower authorities. All the Courts of Deputy Commissioners, Deputy Collectors are presided over by the zamindars. They do not want to see the Government of the tenants.

The intention of the speaker was to show that though the Congress Ministry was in power yet the whole administrative machinery was worked on behalf of the British Government. It is true that it is not sedition to criticise administrative machinery or the officers of Government, but in my opinion the speaker in this passage exceeds the limits of fair criticism and his object in attacking the British Government was to create disaffection. The fifth passage is as follows:

> So long as the British Government exists, the zamindari system shall continue. The Government is conferring the titles of Rae Bahadur and it always sides with the zamindars. As soon as the revolution occurs, the Government shall collapse and its place shall be taken by another Government. The British Government always sides with the zamindars, who help the British Government. In this way these two thieves belong to the same stock and we have to finish them both at one and the same time, and then our four demands (which he has enumerated in his speech) will be fulfilled.

He calls the British Government and the zamindars thieves and robbers who are in alliance with each other, and, according to this speaker the poverty of the masses cannot be removed until the British Government and zamindari system is removed. The learned counsel frankly conceded that this could not be called legitimate criticism of the Government and in my opinion this amounts to sedition. The sixth passage is as follows: "The British Government is an enemy of the tenants and the labourers." This passage when read with other passages clearly amounts to sedition. The seventh passage is as follows:

> When the tenants and labourers will be putting forth a common front and the war will break out in Europe and the British Government will be weakened, then it will be a good opportunity for the tenants and the labourers to unite together and release our country from the yoke of the British Government and establish their own Government

i. e., the Government of the tenants and the labourers.

The speaker states that when the war breaks out and the British Government is involved in it, its power will be weakened and then it will be most opportune for the tenants and labourers to make a joint attack on the British Government and seize its power. The speaker then suggests the establishment of the Government of tenants and labourers. This also in my opinion amounts to sedition. The following passage forms charge in respect of the speech (EX. 2):

I wish to say one thing more, *i. e.*, the British Government will become weak by entering into the war. It will be exterminated and it will be an opportune moment to give it a push and overthrow it and establish our own Government. The British Government is only a bugbear. What power have the British people ? There are 13 police stations in the district and each police station has 15 to 20 constables. Such time will come when the constables will also prove disloyal to the Britishers. Many of them are poor and carry on cultivation and know what harm is caused by the British Government. They will help us and even if they want to help the British Government they can do nothing. There are only 13 police stations and each police station has got 14 or 15 constables, and each police station has about 30,000 people under its jurisdiction. If 100 people reach the police station then the constables will surrender it to the people. Where is then the British Government? If the bugbear is removed the British Government will be at an end. It is not difficult and we can accomplish it very soon.

This very idea is conveyed in one of the passages in the speech (EX. 1)—I hold it to be seditious. The passages in this speech are as follows : I quote the passages in Urdu. My object in doing so is to show the Sanskrit words which have been used by the speaker and they could not have been introduced by the police officer.

(1) Larai ke sambandh men mera hamesha spast bichar raha hai. Maine pichhle mahine men kai sabhaen huin jis men spast bichar rakhe the woh yah hain ke larai ke samai men jab British hukumat kamzor ho to andolan barhawen yah mauka aisa hai ke jab hamara biswas hai ke apne desh men apna raj kaim kar sakte hain aur angrezi raj khatam kar den agar is mauka par chukte hain to mulk bahut dinon ke liye pichhar jawega. (2) Ham chahate hain ke hamara zila kisi kisim ki madad angrezon ko larai me na de aur is angrezi hukumat ke khilaf andolan karen.

The first passage represents what the accused said in his first speech (EX. 1) and in the second passage the accused wishes that no one in the district should give any help or assistance to the British Government in the war, but on the other hand it is suggested that a regular agitation should be started against the British Government. If the context in which this passage occurs is taken, there can be no doubt that it amounts to sedition. To sum up therefore I hold that the accused made the speeches which form the basis of the charges and they amount to sedition. There can be no doubt that the intention of the accused was to bring into hatred and contempt the British Government and to excite disaffection towards His Majesty and the Government established by law in British India. It has not been argued but I must point out that notes of a speech are admissible in evidence and a person can be convicted on those notes if they are seditious. A man may criticise or comment upon any measure or act of the Government and freely express his opinion upon it. He may express condemnation but so long as he confines himself to that, he will be protected; but if he goes beyond that he must pay the penalty for it. The question of intention is always an important factor in such cases, and in the present case there can be no doubt that the accused intended to excite in the minds of his hearers feelings of hatred, contempt and disaffection towards His Majesty and the Government established by law in British India. I am therefore of opinion that the language of the speeches clearly constitutes an offence under S. 124-A, Penal Code, and the accused has rightly been convicted.

Coming to the question of sentence, as I have said, he has been sentenced to eighteen months' rigorous imprisonment in respect of the first speech (EX. 1), nine months' rigorous imprisonment in respect of the second speech (EX. 2) and nine months' rigorous imprisonment in respect of the third speech (EX. 3), the sentences to run consecutively. Thus the total sentence is three years. The accused was arrested on 12th November 1939 and remained in jail custody throughout the trial. The judgment was delivered by the District Magistrate on 25th May 1940. I therefore make the sentences of nine months each in respect of the two speeches (EXS. 2 and 3) concurrent with the sentence passed in respect of the first speech, which means that the accused will serve eighteen months' rigorous imprisonment. With this modification the appeal is dismissed. With regard to the conviction under S. 153A, Penal Code, I have already mentioned that the accused has been sentenced in respect of the same three speeches (EXS. 1, 2 and 3) to a total period of three years and this sentence has been made to run concurrently with the sentence under S. 124A, Penal Code. There are five passages from the speech (EX. 1) of 1st September 1939, two passages from the

speech (Ex. 2) of 3rd September 1939 and two passages from the third speech of 29th September 1939. These passages are found in Appx. I to the charge-sheet and it is not necessary to quote them here in extenso. I have already held in the case under S. 124-A that the accused made the speeches and the notes taken down by the police-officers were correct notes.

The only question for decision in this appeal is to see what portions of the speeches amount to the promotion of class-hatred. The word "classes" in S. 153A, Penal Code, has not been defined anywhere, and the contention of the learned counsel on behalf of the appellant is that "capitalists" are not a class of His Majesty's subjects. He urges that S. 153A was designed to prevent people from promoting feelings of hatred between "classes" of the community divided either by race or religion. His contention is that I should construe this section as not exceeding beyond that. I regret I am unable to agree with this contention. The section cannot be limited in this way. I am of opinion that any definite and ascertainable "class" of His Majesty's subjects will come within the section, although the "classes" may not be divided on racial or religious grounds. I think the learned counsel is right when he says that "capitalists" are not a "class". When discussing "capitalists" and labour people, "capitalist" may mean a person with a considerable amount of property invested in industry, and "capitalist" in the literal sense of the word means any one who possesses an accumulated wealth. It is impossible to say what amount of capital would bring a man within the "class". He may be a "capitalist" in one place and not in another. I think the word "capitalists" is rather a vague phrase to denote a definite and ascertainable "class" so as to come under S. 153A, Penal Code. But where a person compares the taluqdars and the zamindars as a class and the money-lenders and the Government officials with tenants and states that the Government officials do not sympathise with their aims and excites the tenants to organise themselves as their Raj was coming in which the taluqdars and zamindars will have no share and that the taluqdars have deceived and betrayed the country into the hands of the British Government, as is the case here, I am of opinion that it is covered by the provisions of S. 153A, Penal Code, as it attempts to promote feelings of enmity or hatred between different 'classes' of His Majesty's subjects. The language used by the accused in the speeches is violent. In estimating the effect of a speech the Court should look at any speech as a whole and not pay undue regard to any particular sentence or phrase, and looking at the first passage in the charge-sheet of the speech (Ex. 1) as a whole I have to gather from the language used what the intention of the speaker was. It was urged by the learned counsel that the accused's intention was not to bring about any such hatred. In my opinion it is not open to the speaker to say that he did not intend his language to bear the meaning which it naturally does bear. I therefore agree with the learned District Magistrate that the passages quoted by him in the charge-sheet amount to an offence under S. 153A, Penal Code. I therefore uphold the conviction under S. 153A, Penal Code, and as the sentences are concurrent it is not necessary to discuss each passage of the charge-sheet.

With regard to the question of sentences I have made the sentences in S. 124A case in respect of the second and third speeches, namely nine months' rigorous imprisonment each concurrent. I therefore in this case also make a similar order that the sentences of nine months each in respect of the second and third speeches will be concurrent with that of the sentence passed with regard to the first speech. In other words, the accused is sentenced to eighteen months' rigorous imprisonment under this section, and this sentence will run concurrently with the sentence under S. 124A, Penal Code, as was ordered by the learned District Magistrate. With this modification the appeals are dimissed.

G.N./R.K. *Appeals dismissed.*

A. I. R. 1941 Oudh 41

ZIAUL HASAN AND BENNETT JJ.

Tauqir Ali — Plaintiff — Applicant

v.

Ram Ratan Singh and others — Defendants — Opposite Party.

Civil Revn. Appln. No. 98 of 1937, Decided on 29th July 1940, from order of Dist. Judge, Bara Banki, D/- 10th July 1937.

(a) Registration Act (1908), S. 49 — Agreement of sale not registered at place where it is necessary to register sale deed — Agreement though registered must be deemed to be unregistered for purpose of affecting title to immovable property.

A registered agreement for sale of immovable property must be considered as unregistered for the purpose of affecting title to immovable property when it was not registered at the registration office where it was necessary to register the sale deed in respect of that property. [P 42 C 2]

(b) Transfer of Property Act (1882), S. 53A — Payment of consideration and mutation constitute acts in furtherance of contract of sale.

The payment of consideration and steps taken to effect mutation constitute acts in furtherance of a contract of sale. [P 43 C 1]

(c) Transfer of Property Act (1882), S. 53A — Whether S. 53A is retrospective (Quere).

It is a matter of doubt whether S. 53A is retrospective. [P 43 C 1]

(d) Registration Act (1908), S. 49, Proviso — Adverse possession — Sale deed invalid for want of registration is admissible to determine nature of possession.

A purchaser taking possession under a sale deed which is invalid for want of registration and holding it for more than twelve years can acquire title by adverse possession, and the sale deed, though invalid, can be referred to in order to determine the nature of his possession. [P 43 C 1, 2]

Ali Zaheer — for Applicant.

Ghulam Hasan and B. K. Dhaon — for Opposite Party.

Order. — This case has been referred to a Bench under S. 11 (2), Oudh Courts Act. The case arises out of an application under S. 12, U. P. Agriculturists' Relief Act, for redemption of a mortgage executed in the year 1866. The defence was that the mortgage of that year had been extinguished in the year 1869 on the sale of the property mortgaged by the mortgagor to the mortgagee and that the mortgagee and his successors had been in possession of the property since the sale as proprietors. The trial Court dismissed the suit on its findings on issues 1 and 4, which were :

(1) Whether the plaintiff retains the rights of the mortgagor? If so, is he entitled to redeem the property?

(4) Whether the defendants have acquired the proprietary rights of the share in dispute by adverse possession?

It appears that on 25th November 1869, an agreement was executed between the mortgagor and the mortgagee for sale of the property. This agreement was registered. On the same date, a sale deed by which the agreement was put into effect was executed, but this sale deed was not registered as it could not have been validly registered at the registration office where the agreement was registered. The trial Court held that the unregistered sale deed was invalid and inadmissible in evidence and no title could pass by it to the vendee. A mutation order in favour of the vendee had however been passed in 1871, giving effect to it and subsequent mutation orders had been passed in favour of the mortgagee's descendants, showing that they have throughout since 1871 been recorded as proprietors of the property. Since then, the names of the mortgagor and his descendants have not appeared as mortgagors. The trial Court concluded that the mortgage deed had been extinguished and that the character of possession from the date of the execution of the sale deed and the registered agreement had changed and become adverse to the mortgagor. The District Judge in appeal upheld the judgment of the trial Court dismissing the suit. He considered the effect of the proviso to S. 49, Registration Act, it being contended before him that in view of this proviso neither the sale deed nor the agreement could be produced in evidence for any such purpose as was contemplated in the case. Under the proviso an unregistered document affecting immovable property and required by the Registration Act or the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance, or as evidence of part performance of a contract for the purposes of S. 53A, T. P. Act, or as evidence of any collateral transaction not required to be effected by registered instrument. The District Judge thought that the agreement could be used as evidence to indicate the changed nature of the possession enjoyed by the transferee. It was presumably argued before him, as it was argued before us, that although the agreement was registered, yet for the purpose of affecting title to immovable property it must be considered as unregistered, since it was not registered at the registration office where it was necessary to register the sale deed. The District Judge appears to have accepted this argument as he considered the effect of the agreement on the assumption that it was not registered. In this we think that he was right.

Against this appellate judgment, an application in revision under S. 115, Civil P. C., was made in this Court and after hearing counsel for the applicant a learned Judge of this Court referred the case to a Bench. It has been contended on behalf of the opposite party that no application under S. 115, Civil P. C., lies, because, no question of jurisdiction enters into the matter and there has been no illegality or irregularity committed. We are inclined to agree. We have however heard learned counsel for the applicant on the merits as the case was referred to a Bench on the merits. He has contended that S. 53A, T. P. Act, is not applicable because it would not apply retrospectively to documents executed before 1st April 1930, and because no act was, he argues, done by the transferee in furtherance of the

contract. On this last point we consider that the payment of consideration and the steps taken to effect mutation constitute acts in furtherance of the contract. As regards the question whether S. 53A has retrospective effect there has been some conflict of opinion between the High Courts. It was held by this Court in 1936 O W N 514[1] that it was not intended that retrospective effect should be given to this section. Learned counsel for the opposite party referred us to a later Full Bench ruling of this Court and argued that this ruling tends to throw doubt on the earlier ruling. In this case, 1938 O W N 401,[2] it was held that the provisions of the amended S. 92, T. P. Act, have retrospective effect, except in regard to acts done before 1st April 1930, in any proceeding pending in any Court on that date. The earlier ruling was referred to in the later case and one of the judgments in this later case lends some support to the suggestion that it is still a matter of doubt whether S. 53A has retrospective effect.

If S. 53A is applicable, there can, in our opinion, be no doubt that the decision of the lower Courts was right, but even if it be considered not applicable, we see no reason to dissent from the view taken by the lower Courts. In a case decided by the late Court of the Judicial Commissioner of Oudh, 25 O C 115,[3] it was held that though an unregistered compromise deed could not confer rights in immovable property in view of the provisions of Ss. 17 and 49, Registration Act, yet the effect of the compromise was that both parties, the mortgagor as well as the mortgagee, treated the mortgagee rights as having come to an end and the mortgagee as holding under-proprietary rights. In A I R 1926 Oudh 145,[4] this Court held that an agreement to relinquish the equity of redemption in favour of the mortgagee, though not binding, if not properly evidenced by document, will start adverse possession against the mortgagors; and in another case of this Court, A I R 1926 Oudh 500,[5] it was held that a purchaser taking possession under an invalid sale deed and holding it for more than twelve years can acquire title by prescription, and the sale deed, though invalid, can be referred to in order to determine the nature of his possession. In our opinion there is sufficient evidence in the present case, apart from the sale deed and agreement, to show that the nature of the transferee's possession had changed from that of a mortgagee to that of a vendee, and we consider therefore that the dismissal of the application under S. 12, U. P. Agriculturists' Relief Act, was justified. We accordingly dismiss this revision application with costs.

G.N./R.K. *Application dismissed.*

1. ('36) 23 A I R 1936 Oudh 306 : 162 I C 712 : 1936 O W N 514 : 12 Luck 241, Ramji Lal v. Secy. of State.
2. ('38) 25 A I R 1938 Oudh 127 : 174 I C 714 : 13 Luck 761 : 1938 O W N 401 (F B), Kundan Lal v. Faquir Bakhsh.
3. ('22) 9 A I R 1922 Oudh 7 : 67 I C 572 : 25 O C 115, Bijai Partab Singh v. Raghuraj Singh.
4. ('26) 13 A I R 1926 Oudh 145 : 90 I C 736, Ibad Ali v. Dwarka.
5. ('26) 13 A I R 1926 Oudh 500 : 95 I C 438, Ram Udit Upadhiya v. Bhagwat Prashad.

A. I. R. 1941 Oudh 43

GHULAM HASAN J.

Inderpal Singh — Defendant — Applicant

v.

Bhagwati Singh — Plaintiff — Opposite Party.

Civil Revn. Appln. No. 120 of 1938, Decided on 21st September 1940, from order of Civil Judge, Partabgarh, D/- 30th May 1938.

Civil P. C. (1908), O. 1, R. 10 — Court has ample power to correct bona fide error—Plaintiff wrongly described as minor—Immediately, on discovering error, counsel asking Court to correct it —Mistake bona fide—Court should order amendment and not dismiss suit—S. 22, Limitation Act, does not apply to such case.

Under O. 1, R. 10, the Court has got ample power to correct an error if it is satisfied that the mistake is a bona fide one. Where the plaintiff's counsel immediately asks the Court to correct the error as soon as it is discovered by him that the plaintiff has been wrongly described as a minor in the plaint, the mistake must be deemed to have been made in good faith. The Court should in such a case order amendment of the plaint and not dismiss the suit : A I R 1924 All 54, *Disting.; Case law relied on.* [P 44 C 1 ; P 45 C 1]

Section 22, Limitation Act, has no application to such a case inasmuch as no new plaintiff is added after the institution of the suit. [P 45 C 1]

Ganesh Prasad — for Applicant.

B. K. Dhaon — for Opposite Party.

Order — This is an application under S. 115, Civil P. C., and arises out of the following facts. The plaintiff-respondent filed a suit for recovery of a certain sum of money which was decreed. The suit was filed on the last day of limitation. The plaintiff was described in the plaint as 15 years old and the suit was filed by him through his father acting as the next friend. The defendant denied that the plaintiff was a minor and urged that the plaint was not properly presented as the plaintiff was a

major. On 27th October 1937, the Honorary Munsif who decided the case recorded the statements of the counsel for parties. The defendant's counsel urged that the suit was liable to dismissal because the plaintiff was a major at the time of the institution of the suit and ought to have filed the suit as such and not through his next friend. The plaintiff's counsel replied that the plaintiff was by mistake entered as minor instead of major and the mistake was discovered after the suit had been filed. The plaintiff's counsel prayed that the mistake may be corrected as the plaintiff was already on the record and no new plaintiff was being added. After recording the statements of the counsel for parties, the Court did not record any order until 2nd November 1937, when it passed the following order which may be translated thus :

There seems to be no reason why the plaintiff should be harassed without any reason and as under O. 1, R. 10, Civil P. C., the amendment asked for can be made by the Court, it is therefore ordered that the plaint be amended.

The suit then proceeded to trial on the merits and as has been already stated it was decreed. The defendant filed an appeal and challenged the power of the Court to allow the amendment and contended that the suit should have been dismissed as time-barred as it had been filed on the last day of limitation. The lower appellate Court relying on the authority of certain decisions upheld the order of the trial Court and dismissed the appeal. Aggrieved by the said decision the defendant has preferred the present application in revision. I have heard the learned counsel on both sides at some length and I am of opinion that there is no substance in the plea raised on behalf of the defendant. Under O. 1, R. 10, Civil P. C., the Court has got ample power to correct the error if it is satisfied that the mistake is a bona fide one. That the mistake was made in good faith is amply demonstrated by the fact that the plaintiff's counsel immediately asked the Court to correct the error as soon as it was discovered by him that the plaintiff had been wrongly described as a minor in the plaint. The defendant's learned counsel points out that before filing the suit the plaintiff had sent the defendant a notice and this notice was not sent through his next friend. The learned counsel wants me to draw the inference that the notice must be presumed to have been sent by the plaintiff as a major and consequently there could be no reason for him to describe himself as a minor at the time of filing the plaint. I have seen the notice in question. It is addressed by the plaintiff personally but it does not describe whether he was a major or a minor. In any case it seems to me that the fact that the notice was not sent through the next friend does not prove that the plaintiff was actuated by any bad faith in describing himself as a minor. There could be no motive on the part of the plaintiff for deliberately misdescribing himself as a minor when he clearly knew that the suit was being filed on the last day of limitation. It must, therefore, be held that the lower Court was quite justified in ordering the amendment in the plaint. It has been held by a Bench of the Calcutta High Court in 21 Cal 866,[1] that

when a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff was not at the date of the institution of the suit in fact a minor, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended and if it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

In 5 O C 355[2] it was held that where it was found that the plaintiff was not a minor and the suit was instituted with his knowledge and under his authority, the plaint could be amended by the Court. This case was followed in 7 O C 234,[3] by Mr. Chamier the then Additional Judicial Commissioner. He held that where the plaintiff described as a minor was cognisant of and approved of the institution of the suit and went with the next friend to instruct the pleader who drew up the plaint and it was proved that he was not a minor it was a mere irregularity which could be cured by amendment of the plaint and removal of the name of the next friend and the suit could not be dismissed on that ground. At p. 236 of the report he went so far as to observe that

even if the plaintiff is not shown to have authorised the institution of the suit the mistake does not amount to anything more than an irregularity.

Similar view has been expressed in A I R 1918 Mad 916,[4] A I R 1926 Nag 40,[5] A I R 1926 Lah 82[6] and A I R 1932 Lah 322.[7] On behalf

1. ('94) 21 Cal 866, Taqui Jan v. Obaidulla.
2. ('02) 5 O C 355, Bhulai v. Sheo Balak.
3. ('04) 7 O C 234, Gajraj Singh v. Raghubar.
4. ('18) 5 AIR 1918 Mad 916 : 41 I C 510 : 40 Mad 743, Shanmuga Chetty v. C. K. Narayana Aiyar.
5. ('26) 13 AIR 1926 Nag 40 : 88 I C 235, Datta v. Bhaoosingh.
6. ('26) 13 AIR 1926 Lah 82 : 89 I C 363, Amritsaria v. Gamun.
7. ('32) 19 AIR 1932 Lah 322 : 136 I C 710 : 33 P L R 263, Ghasi v. Manga.

of the applicant reliance has been placed on 45 ALL 701[8] in support of the contention that the suit should have been dismissed. The facts of that case are distinguishable. It appears that although a petition was presented on behalf of the plaintiff of that case after attaining majority to the Court to be allowed to prosecute the suit in his own name and not through his next friend the Court never disposed of that application and the suit went on to trial under a defective plaint. No question arose in that case whether the Court had or had not the power to allow amendment of the plaint if asked to do so by the plaintiff. I am, therefore, of opinion that there is a consensus of authority in support of the view that the Court in such circumstances should order amendment of the plaint and not dismiss the suit. Section 22, Limitation Act, has no application to the present case inasmuch as no new plaintiff was added after the institution of the suit. On the other hand, the plaintiff was already on the record and continued to remain on the record and the only effect of the prayer for amendment was that his age was corrected by the order of the Court and he was allowed to sue without the intervention of the next friend. In the result the appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

8. ('24) 11 AIR 1924 All 54 : 77 IC 30 : 45 All 701 : 21 A L J 626, Ruhul Amin v. Shankar Lal.

A. I. R. 1941 Oudh 46

YORKE J.

Raja Saiyed Mohammad Mehdi — *Plaintiff* — Appellant

v.

Jagat Sing and another — *Defendants* — Respondents.

Second Appeal No. 328 of 1937, Decided on 10th September 1940, against order of Civil Judge, Fyzabad, D/- 18th May 1937.

(a) Practice — Appeal — Even appellate Court must consider real substance of plaintiff's claim.

In all cases it is the duty of the Court of appeal, just as much as it is the duty of the trial Court, to consider the real substance of the plaintiff's claim. [P 47 C 1]

(b) Adverse possession — Waste land — Suit by taluqdar for possession of jungle and waste land and removal of structures, ditches and newly planted trees constituting trespass—Possession of taluqdar in jungle and waste land and tanks in his village is presumed — Onus is on trespasser to prove adverse possession—Suit falls under Art. 144 and not Art. 120, Limitation Act — Time runs from date of knowledge of encroachment.

The possession of a taluqdar is to be presumed in waste, and jungle land, and tanks situated in the village of which he is the proprietor : 8 O C 177 and A I R 1926 Oudh 393, *Rel. on.* [P 47 C 1]

Consequently in a suit by the taluqdar for the recovery of possession by removal of the structures, ditches, and newly planted trees, which constitute an interference or trespass upon his possession and therefore cast a cloud upon his title, the burden is ordinarily upon the trespasser to establish that he has perfected a title by adverse possession. Such a suit is however governed by Article 144 and not by Art. 120, Limitation Act. The right to sue in such cases accrues only when the encroachment comes within the knowledge of the plaintiff : A I R 1924 All 443, *Rel. on;* 10 All 634, *Disting.*; A I R 1922 Oudh 47, *Approved.* [P 46 C 2; P 47 C 1; P 48 C 1]

M. Wasim and Ali Hasan — for Appellant.

Hyder Husain — for Respondents.

Judgment. — This is a second appeal by Raja Saiyid Mohammad Mehdi plaintiff whose suit for the recovery of possession of certain plots by uprooting of newly planted trees and demolition of structures was decreed by the Munsif of Akbarpur but dismissed on appeal by the civil Judge of Fyzabad. The plaintiff is the taluqdar of the Pirpur estate and superior proprietor of village Kusum Khore. In the plaint he sued for demolition of "Gulor", that is to say a building in which cane is crushed and the juice boiled, on Plot No. 75/3, demolition of a ditch surrounding Plots Nos. 75/3, 75/4, 75/1, 87/1, 87/2, and 90/3 and removal of thatch structures on Plots Nos. 75/3 and 75/4. Secondly, he sought a decree for the uprooting of 59 newly planted trees on plots Nos. 75/3, 75/4, 87/1 and 87/2. Thirdly, he claimed a declaration that old trees and trees of spontaneous growth on Plots Nos. 75/3, 75/4, 87/1, 87/2 and 90/3 were owned by him and that the defendants had no concern with them. In the body of the plaint he gave details of the acts of the defendants by which they had made these constructions, planted these trees and so on, and in the plaint he said that by these acts there was a danger of his title being jeopardised, and he further asked for any relief to which he might be held entitled. The suit related to plots with an area of 13 bighas described in the first regular settlement as "parti kadim" and in the second settlement subdivided into a number of plots described as jungle, and banjar or waste. In their written statement, the defendants alleged that they had acquired title by adverse possession which had begun by petty encroachments 32 years ago, and had matured into proprietary rights 20 years prior to the date of suit. It was said that the plots in suit were near the defendant's house. In oral

pleadings some points were slightly cleared up and it was stated on behalf of the plaintiff that the plaintiff is in possession over old trees, and if he is found out of possession, decree for possession be given. How this suit was understood by the parties is made very clear by the issues which were framed in the suit. Those issues were as follows :

1. Is the plaintiff the owner of the property in suit as alleged ?

2. (a) Have the defendants planted new trees and encroached upon the plaintiff's land as alleged ? If so, is the plaintiff entitled to possession of the land in suit by removal thereof ? If not, to what effect ?

(b) Have the defendants perfected their title to the property and the land in suit by adverse possession for more than 12 years as pleaded ? Its effect ?

3. Is the plaintiff's suit for removal of the encroachment in question and the trees and the bamboo clumps in suit barred by time as pleaded ?

4. Is the plaintiff's claim to the property in suit barred by principles of estoppel by acquiescence as pleaded ? Its effect ?

5. Is the plaintiff in possession of the old trees and entitled to the declaration prayed for in relief C ? If not, to what effect ?

It is impossible in the face of these issues to suppose that the parties thought themselves to be litigating on anything other than a claim to recover possession of property encroached upon by the defendants. In the trial Court, all the issues were decided in favour of the plaintiff and the plaintiff's claim was decreed in full. In the grounds of appeal before the lower Court a large number of points were taken, there being no less than 15 grounds of appeal, relating to every point which had been in issue in the trial Court. Ground 3 of these grounds of appeal again makes it very clear how the suit was regarded in the trial Court. This ground runs as follows :

Because the learned lower Court is wrong in holding that Art. 142, Limitation Act, does not apply to the facts of the case.

That is to say the pleading was that this was not a suit in which the plaintiff could rely upon his title and put the defendants to proof of 12 years' adverse possession, but a suit in which the plaintiff was pleading dispossession and had to establish that dispossession had taken place within 12 years so as to give him a right to recover possession. The learned civil Judge noted at the very beginning of his judgment that in spite of having put in this long list of grounds of appeal, the appellants had pressed the grounds of appeal relating to issues 3 and 5 only. It follows that the defendants had given up all their grounds of appeal which related to Issues 1 and 2 and the only question which really arose was whether the plaintiff's suit was within limitation. The learned civil Judge proceeded to hold that the suit was not a suit for recovery of possession, but a suit for which no particular article was to be found in the Limitation Act and which must therefore be governed by the residuary Art. 120 which gives a period of limitation of six years from the date at which the right to sue accrues. He went on to strain every point in favour of the appellants so as to hold that the trees had been planted, the ditch dug and the buildings or structures put up more than six years prior to the date of suit, and thereupon to hold that the suit was barred by limitation. He did not really consider the question whether the mere date of planting of the trees or erection of a thatched structure must necessarily be the date on which the right to sue accrued, but took that for granted, whereas in fact there is little doubt that as a proposition of law that proposition is incorrect and the right to sue in such cases accrues only when the encroachment comes within the knowledge of the plaintiff, a point on which he came to no finding of any sort. In support of the view which he took of the applicability of Art. 120, Limitation Act, the learned civil Judge relied on 6 O L J 329[1] in which it was held, relying on 10 ALL 634[2] that

a suit of a landlord for removal of trees newly planted by a person who had no right to plant the same is governed by Art. 120, Sch. 1, Limitation Act.

In the Allahabad case it was similarly held by a single Judge of that Court that a suit by a zamindar for removal of trees planted in certain waste land of his village by persons who had no right to plant them is governed by Art. 120, Sch. 1, Limitation Act, and not by Art. 32, and where a defendant having a right to use property for a specified purpose perverts it to other purposes, and a suit had to be instituted for any relief in respect of any injurious consequences arising from such perversion, such a suit will be governed by Art. 32. The learned civil Judge was evidently unaware of the fact that 10 ALL 634[2] was later distinguished by a Bench of the Allahabad High Court in 46 ALL 52[3] where it was held, up-

1. ('19) 6 A I R 1919 Oudh 393 : 52 I C 858 : 6 O L J 329, Badal v. Nageshwar Bakhsh Singh.
2. ('88) 10 All 634: 1888 A W N 257, Masharaf Ali v. Iftkhar Husain.
3. ('24) 11 A I R 1924 All 443: 75 I C 266 : 46 All 52, Muhammad Shafi v. Bindeshri Saran Singh.

holding in Letters Patent appeal the judgment of a single Judge of the Court, that the planting of trees on land belonging to another is an act of active trespass, and the owner of the land can sue for removal of the trees so planted and for recovery of possession of the land at any time within 12 years. In the Bench judgment in that case it was pointed out that the real question in 10 ALL 634[3] was whether the limitation applicable was that prescribed by Art. 32. As was remarked by the learned single Judge this (46 ALL 52[3]) case was in his opinion an action for trespass and possession of land, and he pointed out that the defendants set up title and claimed adverse possession exactly as they have done in the present case. I have been referred also to a later case of the Court of the Judicial Commissioner, 9 O L J,17,[4] in which it was held that a suit for possession of land coupled with an ancillary prayer for the removal of the trees planted on it is governed by Art. 142, Limitation Act. It does not really make very much difference in a way in the present case whether it was governed by Art. 142 or Art. 144 since there was no doubt whatever that the real question was whether the defendants had perfected their title by adverse possession extending beyond twelve years.

It appears to me that in all cases it is the duty of the Court of appeal, just as much as it is the duty of the trial Court, to consider what the real substance is of the plaintiff's claim, and there can be no doubt that in the present claim the real substance was the recovery of possession by removal of those structures, ditches, and newly planted trees, which constituted an interference or trespass upon the plaintiff's possession and therefore cast a cloud upon his title. In the present case there could be no doubt that the plaintiff is the taluqdar and landholder of the village in suit, and there is no sort of doubt about the rule of law in force in Oudh as laid down in numerous cases, for example 8 O C 177[5] and 1 Luck 469,[6] that the possession of the taluqdar is to be presumed in waste, and jungle land, and tanks situated in the village of which he is the proprietor. It follows that in the case of acts which constitute a trespass upon that possession, the burden is ordinarily upon the trespasser to establish that he has perfected a title by adverse possession. On behalf of the respondents learned counsel has scarcely made any attempt to defend the application of Art. 120, Limitation Act. He contented himself with arguing that if it be held that the article of the Limitation Act applicable to the suit is Art. 144, then the case must go back to the lower appellate Court for a finding as to whether the defendants have perfected their title by 12 years' adverse possession. He bases this contention on the argument that the lower appellate Court has not come to any finding of fact. On behalf of the appellant it is, however, in my opinion rightly contended that in as much as learned counsel for the defendants in the lower appellate Court gave up all issues except issues 3 and 5, he thereby conceded the correctness of the finding of fact which finds a place in issue 2 (b). It follows that there is no necessity to send the case back to the lower appellate Court for a finding of fact on the point raised in issue 2 (b). The finding of fact is final between the parties already, namely that the defendants have not perfected their title by adverse possession going beyond 12 years.

In filing his present appeal the plaintiff filed with it an application under S. 151 and O. 6, R. 17 to amend his plaint so as to make it clear, if it was not already clear, that his suit was a suit for the recovery of possession in so far as he might be held to be out of possession by reason of the acts of the defendants. This application has been contested on behalf of the respondents by learned counsel who has referred to the notes in Mulla's Civil Procedure Code under O. 6, R. 17 where it is said that delay is itself a sufficient reason for refusing leave to amend, and it is pointed out that this application has only been filed on the date of hearing of appeal. Learned counsel for the appellant points out that in his grounds of appeal he foreshadowed his intention to make this application, and he shows from the application itself that it was prepared for an earlier hearing. He therefore argues that there can be no question of delay, and in fact if this intention was indicated in the grounds of appeal as is clear from a reference to them, there could be no question of delay because the application was necessitated only by the peculiar reasoning which is found in the judgment of the lower appellate Court. In my opinion this application, had it been

4. ('22) 9 A I R 1922 Oudh 47 : 66 I C 799: 9 O L J 17, Ghafur Khan v. Prag Narayan.
5. ('05) 8 O C 177, Thakur Sheo Narain Singh v. Bodal Singh.
6. ('26) 13 A I R 1926 Oudh 393 : 94 I C 1034 : 1 Luck 469: 3 O W N 475, Hulas v. Barkat-un-nisa Begam.

necessary, could not have been successfully resisted on the grounds put forward, but I think that the application is unnecessary in as much as it was clear to everybody in the trial Court what the substance of the suit was, and that it really was a suit for possession. It seems to have occurred to no one until it occurred to the learned civil Judge that this could possibly be a suit of any description other than a suit for possession. In view of the fact that the application is unnecessary I reject it. I am quite satisfied that the learned civil Judge has taken an entirely wrong view of the case in applying Art. 120 to the plaintiff's suit. I hold that the suit really falls under Art. 144 of Sch. 1, Limitation Act, and was rightly decreed by the Court of first instance. I accordingly allow this appeal with costs of this and the Court below, set aside the decree of the learned civil Judge and restore that of the trial Court.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Oudh 48

YORKE J.

Saiyad Mohammad Mehdi — Applicant

v.

L. Ramji Lal — Opposite Party.

Civil Revn. Appln. No. 136 of 1939, Decided on 18th September 1940, from order of District Judge, Lucknow, D/- 16th May 1939.

(a) Criminal P. C. (1898), S. 476 — Special Judge sitting as Court under U. P. Encumbered Estates Act can as civil Court proceed under section 476.

A Special Judge sitting as a Court under the U. P. Encumbered Estates Act has jurisdiction as a Civil Court to proceed under S. 476, Criminal P. C. [P 49 C 1]

(b) Penal Code (1860), S. 191—Burden is on accused to show that he did not know or believe statement to be false.

Section 191 itself indicates the nature of the defence which may be put up and places the burden upon the accused to show that he did not know or believe the statement to be false provided the prosecution discharges the burden which rests upon it. [P 49 C 1, 2]

Mahabir Prasad Srivastava — for Applicant.

Ganesh Prasad — for Opposite Party.

Order. — This is an application in revision under S. 115, Civil P. C., against the appellate judgment of the District Judge of Lucknow dismissing the applicant's appeal under the provisions of S. 476-B, Criminal P. C. This application arises out of the following circumstances : In the year 1928 two persons Mohammad Mehdi, applicant, and one Abdul Rahman borrowed a sum of Rs. 250 from one Ramji Lal. On 12th November 1931, Ramji Lal obtained a decree for the amount of this debt, the proceedings being ex parte against Mohammad Mehdi. It is said that service on Mohammad Mehdi was by affixation, but no application has ever been made to set aside the ex parte decree. In August 1937, the property of Mohammad Mehdi was attached and thereupon he filed an objection stating that he had applied under the Encumbered Estates Act on 10th March 1936 and had filed his written statement in the Court of the special Judge on 16th July the same year. Hence, he sought the protection of S. 7, Encumbered Estates Act. It appears that both in the application and in the written statement filed by Mohammad Mehdi under the Encumbered Estates Act no mention had been made of this decretal debt. The applicant had mentioned miscellaneous debts totalling Rs. 19,843 and it is suggested that he could have had no reason to conceal this debt of Rs. 250 only. When Ramji Lal the creditor put in a statement of claim on learning in this way of the proceedings under the Encumbered Estates Act the present applicant pleaded the bar of Ss. 9 and 13, saying that the application had been filed after the period of limitation had expired, and therefore the debt was to be deemed as discharged and it appears that Ramji Lal's claim was in fact rejected. He has since under the amended Act been able to file a fresh application and it is said has got his claim decreed.

It was in these circumstances that on 28th January 1938 Ramji Lal filed an application against Mohammad Mehdi under S. 476, Criminal P. C., asking the Court to file a complaint against Mohammad Mehdi for false verification of his written statement. Section 8 (1), Encumbered Estates Act, requires that the applicant under that Act should file a written statement containing so far as may be practicable,

(a) full particulars respecting the public and private debts to which the landlord is subject . . . . .

(b) the names and addresses of his creditors, so far as they are known to or can be ascertained by the applicant.

Sub-section (2) provides that "the statement shall be verified in the manner provided by law for the verification of the plaint." The learned special Judge of the second grade by an order dated 12th September 1938 instituted a complaint against Mohammad Mehdi in respect of this false verification and omission of the debt of

Ramji Lal from the written statement. Thereupon the applicant went in appeal to the learned District Judge of Lucknow who has dismissed his appeal and hence the present application. A number of grounds have been taken but only two have been pressed by learned counsel for the applicant. In Ground No. 4 it is urged that the learned trial Court sitting as a special Judge had no jurisdiction to proceed under S. 476, Criminal P. C. The gravamen of this ground of appeal is that the special Judge was not sitting as a civil Court. In my opinion, there is no substance in this contention. The special Judge sitting as a Court under the Encumbered Estates Act cannot possibly, in my opinion, be in a position inferior to that of a'Commissioner sitting as an election tribunal and it has been held in 46 ALL 611[1] that a Commissioner sitting as an election tribunal is a civil Court. I have no hesitation in holding that a special Judge sitting as a Court under the Encumbered Estates Act has jurisdiction as a civil Court to proceed under S. 476, Criminal P. C. The only other ground which has been argued is Ground No. 1 that the Court below has misapplied the provisions of S. 191, Penal Code, and has acted in the exercise of its jurisdiction illegally. Section 191, Penal Code, provides that :

> Whoever being legally bound by an oath or by an express provision of law to state the truth or being bound by law to make a declaration upon any subject, makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Learned counsel contends that in the circumstances of the present case it could not be said that the applicant was aware of the existence of the decretal debt, and therefore his verification of a written statement which omitted mention of this debt could not be held to be a false statement. That, as it appears to me is a matter which goes to the merits of the order and will go to the merits of the case when it comes for trial before that Court which shall in the future have to dispose of it. In fact the section itself indicates the nature of the defence which will or may be put up that is the burden will be upon the applicant as accused in the criminal Court to show that he did not know or believe the statement to be false. I am of course assuming that the prosecution discharges the burden which will rest upon it. Neither this ground nor any of the other grounds mentioned in the application have any real reference to the question whether the Court below has acted in the exercise of its jurisdiction illegally or with material irregularity. There is in my mind no question whatever that the special Judge had jurisdiction to make the complaint and the lower appellate Court had jurisdiction to dismiss the appeal. I find nothing in the exercise of their jurisdiction either by the first Court or the lower appellate Court which can possibly be held to amount to illegal or irregular exercise of jurisdiction. This application accordingly fails and is dismissed with costs.

G.N./R.K. *Application dismissed.*

1. ('24) 11 A I R 1924 All 684 : 83 I C 654 : 46 All 611 : 26 Cr L J 94 : 22 A L J 497, Ram Nath v. Emperor.

A. I. R. 1941 Oudh 49

THOMAS C. J. AND BENNETT J.

Ram Baran Upadhya and others — *Plaintiffs* — Appellants

v.

B. Shri Madho Pershad Singh — *Defendant* — Respondent.

First Appeal No. 30 of 1937, Decided on 1st August 1940, against decree of Addl. Civil Judge, Fyzabad, D/- 30th November 1936.

(a) Oudh Taluqdars Relief Act (24 of 1870), S. 4 (3) (a) — Taluqdar under disability whose estate is put in charge of manager is incompetent to refer any matter to arbitration.

A taluqdar whose estate has been put in charge of a manager on account of his disability cannot enter into contracts. As long as his disability continues he cannot do anything detrimental to his interest. Consequently, he is not competent to make a reference to arbitrators. [P 51 C 2]

(b) Landlord and tenant — Tenant cannot by mere assertion of under-proprietary right for some period become under-proprietor.

The mere assertion of an under-proprietary right for some period cannot make a tenant under-proprietor. [P 51 C 2]

Hyder Husain and N. H. Zaidi — for Appellants.

H. D. Chandra, Sri Ram and R. D. Sinha — for Respondent 1.

Judgment. — This is a plaintiffs' first appeal against the judgment and decree of the learned Additional Civil Judge of Fyzabad dated 30th November 1936 dismissing the plaintiffs' suit. The plaintiffs brought the suit for possession of properties mentioned in list A and for a declaration that they were under-proprietors of properties in lists B to D attached to the plaint. It was alleged by them that the properties in lists A to D belonged to Hirde Ram, their predecessor-in-title, as an under-proprietor by virtue

of a lease dated asarh badi panchami 1215 Fasli granted by Bhaggu Khan, the former taluqdar of village Pararam, that Sheo Balak inherited the property from Hirde Ram and was in possession at the time of the first settlement, that after his death Mt. Sheorani, his mother, came into possession of the property and she bequeathed it about 11 years ago to the plaintiffs' father Mohan, that since then he and plaintiffs have been in possession as under-proprietors and that in any case they had acquired under-proprietary rights by adverse possession. It was further alleged that out of the land which was in possession of Hirde Ram 1 bigha, and 16 biswas of specified numbers was exchanged and the plaintiffs have been in possession of the exchanged plots.

It appears that about 100, years ago Bhaggu Khan's estate passed to the taluqdar of Khapradih estate and the village Pararam in which the dispute property is situated has been in possession of Thakur Ram Swarup Singh, Thakur Anant Bahadur Singh and his widow Thakurain Sri Ram Kuar successively as taluqdars of Khapradih estate. The defendant Sri Madho Prasad Singh is the adopted son of Thakurain Sri Ram Kuar. The plaintiffs alleged that since the first settlement, Sheo Balak and on his death his successors including the present plaintiffs have all along been in possession of the property in suit as under-proprietors, that they asserted this title against the taluqdar, that in 1238 Fasli the property was also given to the plaintiffs against the then taluqdar under an award. The alleged cause of action was the ejectment of the plaintiffs under a notice of ejectment through the revenue Court on 30th August 1934. The defendant denied the plaintiffs' title and right to the property in suit as under-proprietors. He stated that he was the adopted son of Thakur Anant Bahadur Singh, last male-holder of the taluqa, that the village in which the disputed property was situated was mutated in his name, that he was entitled to eject the plaintiffs from the land in suit in which they were ordinary tenants. He denied the plaintiffs' possession of the properties mentioned in lists B to D and contended that a suit for mere declaration was not maintainable. The learned Judge framed the following issues :

(1). Are the plaintiffs under-proprietors of the properties specified in lists A to D attached to the plaint as alleged? (2). If not, have the plaintiffs acquired under-proprietary rights in the property in suit by adverse possession for more than 12 years? (3). Is the suit for mere declaration maintainable? (4). To what reliefs are the plaintiffs entitled and in respect of which property?

The plaintiffs based their title on (1) the lease of birt shankalap alleged to have been granted by Bhaggu Khan to Hirde Ram before the British Rule, (2) the award dated 3rd June 1876 which was given by the arbitrators between Thakur Ram Swarup Singh, the then taluqdar of Khapradih estate, and Sheo Balak, (3) adverse possession and (4) a will executed by Mt. Sheorani, mother of Sheo Balak, in favour of the plaintiffs' father. The learned Judge decided issues 1 and 2 against the plaintiffs holding that the lease of birt shankalap set up by the plaintiffs was not genuine, that the award (Ex. 6) dated 30th June 1876 was inoperative as it was made at a time when the estate was under the superintendence of the Court of Wards, that the will was inoperative and that the plaintiffs have failed to prove their title by adverse possession. He gave no finding on issue 3. He therefore dismissed the plaintiff's suit with costs. The learned counsel on behalf of the appellants has argued only one point before us, namely that under the award, Ex. 6, dated 3rd June 1876, the plaintiffs are entitled to under-proprietary rights. B. Ram Swarup Singh was the talukdar of Khapradih estate at the time when this award was made. The award is in the writing of one Kamta Prasad, moharrir peshi of the talukdar. As this is an important piece of evidence in favour of the appellants we quote it in extenso :

B. Ram Sarup Singh talukdar Khapradih sent for all of us, i. e., B. Tulshi Singh and Chandika Singh of Tharya, Bisheshar Pandey of Khapradih, Mohan Pandey of Mallawan and Sheo Ghulam Pandey of Inkari and said that for the last seven days Sheo Balak Pathak had offered Dharua and says that he would die and that his birt had been forcibly taken; that (Ram Sarup) should give up the birt otherwise he (Sheo Balak) would die and that (Ram Sarup) would be held sinful: that we should make enquiry and decide the matter and that Sheo Balak should go away and that Ram Sarup should be saved from sin; that we are the respectable persons of the locality and whatever we decide Ram Sarup would accept it. We have investigated everything and enquired from Mian Abid Husain whether the birt was granted by his ancestors to Sheo Balak. Mian Sahib said that the birt was granted by his father Bhaggu Khan. 351 bighas were given to Hirday Ram. Knowing all this we decide that Sheo Balak had nothing to do with the fields in possession of Babu Ram Sarup Singh. He should take 75 bighas of cultivated land, Bagat, jungle, groves, Parti, and Talia which have been relinquished and are in possession of Sheo Balak by birt right. He should continue to pay Rs. 25 as jama of the cultivated land. He should take as muafi what is written as rent-free and take dhanki wood from the jungle. He should not go against it. Both B. Ram Sarup Singh and

Sheo Balak agreed to this decision. The numbers are given below : Miti Jeth Sudi 12, 1283 Fasli.

The signatories of the award are dead and the plaintiffs examined, P. W. 2, Madho Singh, and P. W. 3, Jata Shankar, to prove the signatures of their deceased fathers on the award. The learned Judge has not relied on the evidence of these witnesses. He has also not presumed its genuineness though the document is more than thirty years old. He held as follows :

... on 12th May 1876 Sheo Balak had instituted a suit in forma pauperis against the Court of Wards in charge of Khapradih estate for possession of this very property and his suit was dismissed on 5th October 1876 as he failed to prove himself to be a pauper. So, obviously, during this time the Khapradih estate was under Court of Wards and its talukdar, Thakur Ram Sarup Singh was then a minor. The award relied on by the plaintiffs seems to have been made during the pendency of this suit out of Court with the consent of the talukdar who was then a minor and under a disability as his estate was under the superintendence of the Court of Wards. So the award thus made was wholly inoperative and void and could confer no rights on Sheo Balak.

There is no evidence on record to show why and when the estate was taken under the superintendence of the Court of Wards. Nor is there any evidence to show that the talukdar was then a minor. We do not know how the learned Judge has come to the conclusion that Thakur Ram Swarup Singh was a minor. Ex. 2 is the plaint dated 12th May 1876, filed by Sheo Balak Pathak against the Court of Wards Khapradih. The words in Urdu are "*korat taluka Khapradih.*" In this plaint Sheo Balak stated that village Pararam was the birt and self-acquired property of his ancestors for more than 200 years. Ex. 3 is the list of property. Ex. 7 is the list of numbers. Ex. 8 is the judgment dated 5th October 1876. The plaintiff had asked for permission to sue as a pauper and this judgment shows that the Court held that he was not a pauper and his application was disallowed. It is thus clear that the award was made when these proceedings were pending. The learned Judge has therefore given the finding that as the proceedings were pending and the estate was under the Court of Wards, the talukdar was incompetent to enter into any contract with Sheo Balak.

Under chap. 2, S. 3 of Act 24 of 1870, (the Oudh Talukdars' Relief Act), which was in force at the time when the award was made, when an application was made on behalf of a talukdar, who was a minor or of unsound mind or whose estate was charged with debts or liabilities, by his guardian to the Chief Commissioner, the Chief Commissioner with the previous consent of the Governor-General of India in Council could appoint an officer called the manager and vest in him the management of the immovable property. Under S. 4, cl. (3) (a) of the said Act, the taluqdar and his heir were incompetent to mortgage, charge, lease or alienate their immovable property or any part thereof. We have said that there is no evidence in the case showing why the estate was put under the charge of a manager, but there can be no doubt that it must have been done on account of some disability of the taluqdar. We therefore hold that Thakur Ram Swarup Singh taluqdar was not competent to make a reference to the arbitrator and therefore the award even if genuine is invalid. There are a large number of documents on record which go to show that the appellants are ordinary tenants : *vide* Exs. 11 to 23, khasras, khetanuis, etc. The mere assertion of an under-proprietary right for some period cannot make the plaintiffs under-proprietors.

The learned counsel on behalf of the appellants argued that the Oudh Taluqdars Relief Act was a special Act and it should have been proved that an application was made to the Chief Commissioner on behalf of the taluqdar to put the estate under the superintendence of a manager, that the Act could not be considered to be a substitute for the Court of Wards Act. At this length of time, it is difficult, if not impossible, to prove that any application was made to the Chief Commissioner, but the fact remains that the estate admittedly was under the superintendence of the Court of Wards or a manager, and as we have said, it must have been taken on account of certain disabilities of the taluqdar. It was further urged that the Act does not debar a taluqdar from making a reference and therefore the award should be treated on the same footing as a decision of a Court of law. We do not agree with this contention. It is absurd to think that a ward whose estate has been put in charge of a manager could with impunity enter into contracts. As long as his disability continued, he could not do anything detrimental to his interest. The learned counsel on behalf of the respondent drew our attention to S. 173 of Act 17 of 1876, (the Oudh Land Revenue Act), which lays down that persons whose property is under the superintendence of the Court of Wards shall not be competent to create, without the sanction of the Court, any charge upon or

interest in such property or any part thereof. This Act came into force on 10th October 1876 while the award is dated Miti Jeth Sudi 12, 1283 Fasli, which corresponds to 3rd June 1876. So, it can hardly have any application. We therefore hold that the appellants have failed to prove that they are under-proprietors. The suit was rightly dismissed by the lower Court.

No other point was argued. We therefore dismiss the appeal with costs. We may mention that the learned counsel requested us by means of an application to accept four new documents in this Court to prove that Thakur Ram Swarup Singh was not a minor at the time when the award was made. If the decision of the appeal had depended on the majority or minority of Thakur Ram Swarup Singh we might have admitted those documents. As we have remarked there is no evidence to show how the estate was taken under the superintendence of a manager, nor has the learned counsel for the appellants been able to throw any light. These documents were to be filed really to meet the finding of the learned Additional Civil Judge that Thakur Ram Swarup Singh was a minor at the time when the award was made. In our opinion these documents are irrelevant, and we reject them. Let them be returned to the counsel.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 52

YORKE J.

Municipal Board, Lucknow—Defendant — Appellant

v.

Mt. Ram Devi — Respondent.

Second Appeal No. 464 of 1937, Decided on 21st August 1940, against order of the Civil Judge, Malihabad, Lucknow, D/- 31st August 1937.

(a) U. P. Municipalities Act (2 of 1916) S. 7—General public apathetic and tolerating acts which might be expected to annoy it—Acts are not public nuisance—Regular though temporary heap of rubbish stacked on public thoroughfare at busy and frequented part of town is public nuisance.

Where the general public is apathetic and tolerates acts or things which one might expect to annoy it, then it cannot be said that such acts or things cause annoyance to the public or people in general and, therefore, cannot be regarded as nuisance. A regular though temporary heap of rubbish stacked on a public thoroughfare at a busy and frequented part of the town is a public nuisance, on the ground that it must necessarily cause obstruction to members of the public. [P 54 C 1, 2]

(b) Civil P. C. (1908), S. 91 — Public nuisance — Special damage—Plaintiff individually maintaining action must show that he suffered damage more than general body of public — Mere placing of obstruction in front of plaintiff's house which does not impede his coming in or going out from his house cannot be said to cause special damage to plaintiff.

In the case of a relief for personal or special damage suffered as a result of a public nuisance it must be established that the plaintiff has suffered special damage in order that he may be individually entitled to maintain a civil action for such public nuisance, that is to say, he must show that he has suffered some damage more than what the general body of the public had to suffer. [P 54 C 2; P 55 C 1]

The mere placing of some obstruction in front of the plaintiff's house which does not in any manner impede his coming to or going from his house, and is merely a possible nuisance from some quite different point of view cannot be regarded as causing special damage to the plaintiff : 33 All 287 and AIR 1924 All 599, *Disting.* [P 55 C 2 ; P 56 C 1]

(c) U. P. Municipalities Act (2 of 1916), Ss. 273 and 7 — Authority of Municipal Board under Ss. 273 and 7 to put up receptacles is conditional and does not absolve Board from liability where nuisance results.

The authority to put up receptacles given to the Municipal Board by S. 273 read with S. 7 is not absolute. Municipalities Act merely allows the board to put up the receptacles. It follows that the authority is conditional and does not absolve the board from liability, if nuisance results from its act : AIR 1936 Cal 707, *Rel. on.* [P 56 C 1]

K. P. Misra and Mohd. Ayub Qureshi — for Appellant.

L. S. Misra — for Respondent.

Judgment. — This is a second appeal on behalf of the Municipal Board, Lucknow, in a case of a claim by private person in respect of a public nuisance. The plaintiff Mt. Ram Dei is the widow of one Manni Lal who had a house in what is called Bazaza Park, Lucknow, about 200 yards away from the Aminabad Park. In S. 7, U. P. Municipalities Act (2 of 1916) it is laid down that it shall be the duty of every board to make reasonable provision within the municipality for (c) cleansing public streets, places, and drains, removing noxious vegetation and abating all public nuisances.

In order to perform the duties so prescribed the municipal board appoints sweepers who collect rubbish from all the lanes and streets of the city. This is collected in a number of receptacles (if not in them then around them), and from them it is removed in motor lorries which take it away to the municipal refuse dumps. Section 273 (1) of the same Act provides that "the board may (a) provide receptacles and places for the temporary deposit of offensive matter and rubbish." Acting under this provision the Lucknow Municipal Board provided a receptacle No. 18 in Bazaza Park which it put

upon the road way opposite the house of Mani Lal. It is in evidence that the arrangements for this collection and removal of rubbish are that rubbish is brought to the receptacle at this place from 4 A. M. to 7 A. M. and is removed in lorries not later than 7 A. M. It is again collected there between 2 and 4 P. M. and removed not later than 4. P. M. There are some photographs on the record showing the nature of the heaps of rubbish which is collected. These photographs, when examined with a magnifying glass, show that the rubbish collected is in the main dry rubbish, old baskets, straw, paper, so on and so forth, but it is highly probable that along with this rubbish there is often mixed other rubbish of a more offensive nature, such as decaying vegetation or vegetable. The photographs also show that the receptacle which is said to be at this place is completely concealed under the heaps of rubbish which are evidently much larger than the receptacle could possibly contain. It is in evidence that this system has been in operation for the last 5 years prior to the institution of the present suit.

On 5th August 1936, Manni Lal served a notice under S. 326, Municipalities Act, which showed that a representative suit would be filed by the public of the locality in respect of these daily collections of rubbish at this place. It appears however that permission for the filing of such a suit was refused by the Legal Remembrancer. Subsequently Manni Lal died, but his widow the present respondent none the less on 5th October 1936, without any fresh notice, filed a suit against the Municipal Board alleging that this heaping of rubbish constituted a public nuisance, and claiming that she had suffered special damage and was therefore entitled to relief. It may be noted that in the notice served by Manni Lal the reliefs claimed had been (1) a declaration that the stacking of rubbish at this place was a public nuisance, (2) that an injunction should be given against the Municipal Board to deter the Board from stacking rubbish in future, and (3) a decree for damages at the rate of Rs. 22 per mensem from 10th February 1936 which was given as the date of discovery of nuisance.

The Municipal Board raised a number of defences which gave rise to a number of issues. On these issues the learned Munsif held (1) that there was no public nuisance, (2) that the suit was maintainable because it would be too strict an interpretation of the law to hold that the notice given by the husband was insufficient and the suit therefore not maintainable. That point is no longer contested before me. On issue 4 he held that there was no special damage established by the plaintiff and therefore the suit was not maintainable under the provisions of S. 91, Civil P. C. On issue 5 he held relying on A I R 1929 ALL 756,[1] that as the Board had not exceeded its statutory powers given by S. 273, Municipalities Act, the suit was not maintainable. On the question of limitation he held that there could be no bar of limitation because the nuisance complained of was a continuing wrong giving rise to a fresh cause of action from day to day. In view of his findings on issues 4 and 5 he dismissed the plaintiff's suit. The learned civil Judge in appeal came to three findings, first he found that this heap of rubbish amounted to a public nuisance, secondly he held that the plaintiff had suffered special damage and thirdly he held that the Board was not protected by its statutory authority under S. 273, Municipalities Act. Before I come to consider these three findings of the learned civil Judge, it is necessary to note the basis of the plaintiff's claim as stated in the plaint. In para. 2 she speaks of the Municipal Board using the road in front of his house as a depot of rubbish. She then goes on in para. 3 to speak of the daily routine of collecting rubbish as a result of which "bad smell from it spreads to neighbouring houses. Further there is noise from the carts carrying rubbish from the early part of the morning till 8 in the evening". In para. 7 she says, "that sometimes night soil is also mixed in the rubbish" but his point has been given up. In para. 8 she says:

> The above facts constitute a public nuisance and the public health department of the city is thus endangering the health of the citizens.

Presumably this was really based on the allegation about night soil. In para. 11 the plaintiff goes on to state what special damage she has suffered, and says:

> The plaintiff has suffered special damage inasmuch as the depot for rubbish is just in front of her house and further the tenant occupying her house left it on account of insanitary state of the locality, but on further entreaty by the plaintiff he came back on the reduced rent of Rs. 15 from Rs. 22 a month.

It is important to note that before the learned civil Judge counsel for the plaintiff, appellant of that Court, gave up the second of these two grounds "in view of its being a very remote cause of special damage." The

1. ('29) 16 AIR 1929 All 756 : 119 I C 248, Ata Karim v. Municipal Board, Fatehpur.

plaintiff was therefore left only with one ground of special damage, namely that the depot for rubbish was just in front of her house. Coming now to the incidental findings of the learned civil Judge, prima facie some of these are apparently findings of facts, and in so far as they are findings of fact they are not assailable in second appeal. The learned Munsif had held that the evidence of the plaintiff's witnesses that there was a bad smell because of this deposit of rubbish was not worthy of credit. The learned civil Judge on one ground and one only held that these witnesses were worthy of credit, namely because it was most unlikely that all the efforts made by the plaintiff's husband should have been made for the mere fun of them, and without any real grievance. I cannot congratulate the learned civil Judge on this argument. When all is said and done, it was a question of fact to be decided on the evidence and the general probabilities. His finding was :

> On the testimony of the appellant's witnesses I hold that the rubbish complained of in fact does kick out an offensive smell.

The learned civil Judge went on, however, to make some remarks indicating that there was still a doubt remaining in his mind. He says:

> In view of the conflicting evidence, however, even if it be held that the heap did not stink it should still be a public nuisance,

and he went on to consider how this must necessarily be so. His view was that a huge heap of all sorts of rubbish on a public road at such a place must cause annoyance to every passer by, and that none the less so because there were other similar temporary deposits of rubbish on other roads in the city or because the Indian public being by nature apathetic tolerates it. He summed it up by saying that :

> The respondent's convenience or benefit must be kept out of consideration for deciding the question whether a regular, although temporary, heap of rubbish stacked on a public thoroughfare at a busy and frequented part of the town is or is not a public nuisance. Disagreeing with the trial Court, I hold it to be a public nuisance.

The finding of the learned civil Judge thus seems to be that a regular although temporary heap of rubbish stacked on a public thoroughfare at a busy and frequented part of the town is a public nuisance. It is evident that this is a finding on a point of law, and I need not discuss the question very widely particularly as I am in agreement with this finding although not on the grounds stated in the judgment of the learned civil Judge. For practical purposes the most convenient definition of public nuisance is that which is found in S. 268, Penal Code. That section provides that :

> A person is guilty of a public nuisance who does any act or is guilty of an illegal omission which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right.

The learned civil Judge, as it appears to me, has not really arrived at a clear idea of the ground on which public nuisance can be held to have occurred in the present case. The word "injury" is interpreted in the dictionary as meaning "harm or damage." There being no proof whatever that this temporary heap of rubbish for 3 hours in the morning and 2 hours in the evening, at the end of which time it is all removed, can cause any harm or damage to the public, the act complained of in the present case cannot be considered to be a public nuisance on that ground, nor is there any evidence that it causes danger or annoyance to the public generally. The learned civil Judge is wrong in saying that the fact that the Indian public is by nature apathetic and therefore tolerates it will make it any the less a nuisance. If the general public is apathetic and tolerates things which one might expect to annoy it then it cannot be said that such an act does cause annoyance to the public or people in general, and indeed there is no such evidence. What is to me most apparent is that such a deposit of rubbish on a public road (or indeed the placing of receptacles on the public road) must necessarily cause obstruction to persons who have occasion to exercise their right as members of the public of proceeding along that road. Such a heap doubtless is sufficient to prevent two vehicles from passing one another at this point of the road and obstruction must result. In my opinion the learned civil Judge has rightly said that a regular though temporary heap of rubbish stacked on a public thoroughfare at a busy and frequented part of the town is a public nuisance, but it is so on the ground that it must necessarily cause obstruction to members of the public. It is in the light of this consideration that I have to consider the question of special damage. The law on the question of relief for personal or special damage suffered as a result of a public nuisance, has been frequently laid down and it must be established that the plaintiff has suffered special damage in order that he may be individually entitled to

maintain a civil action for such public nuisance, that is to say, he must show that he has suffered some damage more than what the general body of the public had to suffer. After referring to two cases, both of them cases of obstruction to a public road, the learned civil Judge states his finding in the following terms:

> There can be little doubt that a heap of rubbish must be more obnoxious and objectionable to the person in front of whose house it is stacked than to others. I therefore agree with the contention of the learned counsel for the appellant and hold that the very fact that the complained of heap lay just in front of the plaintiff's house constituted special damage to her.

The only possible comment which can be made on this remark is that there is no logical argument leading to the conclusion which is arrived at. In my opinion, the conclusion is wrong. It is certainly a fact that there is an obstruction. It may be a fact that the heaps which are put down daily and removed daily from in front of the plaintiff's house emit some amount of smell, but it is not established that by reason of this smell there is any appreciable discomfort or danger to the occupants of the plaintiff's house. So far from this being the case the plaintiff's chief witness, her own brother-in-law incidently, who is said to have left the house because of the discomfort caused by the smell, found no difficulty in returning to the house and continuing to live in it when the rent was somewhat reduced. We may infer that in reality there is no particular discomfort caused by the smell and indeed in the light of one's personal experience of the streets in the neighbourhood of Aminabad it hardly seems likely that there could have been any appreciable increase. Learned counsel for the respondent somewhat unwisely invited my attention to the case in 40 Bom 401[2] and another case of a not dissimilar nature, A I R 1936 Cal 707.[3] In the latter case the learned District Judge who inspected the locality found that the smell emitting from a hackney carriage stand was not more noxious or disagreeable than the smell emitting from the streets of Pabna generally. In the Bombay case[2] the learned Judge at p. 409 remarked that a legal nuisance is rather an evasive shifting and intangible thing, hard to be pinned down by a verbal definition, and quoted the remark of a learned Judge in another case that "what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey," and himself remarked that

> doubtless what would be a very real nuisance in a select and refined residential quarter would not be a nuisance in a slum; and that possibly ten per cent. of the population of Bombay might genuinely feel to be a nuisance what would never occur to the minds of ninety per cent. of the population to be a nuisance at all.

He went on to remark:

> There is probably hardly any part of this city, except specially select residential quarters outside what may be called the native limits, where the bulk of the inhabitants are not daily and hourly exposed to malignant odours and incessant noises.

"Mutatis mutandis" these remarks are not so very inapplicable to the neighbourhood of the Bazaza Park. In the light of the conduct of the plaintiff's chief witness it is clear that such smell as temporarily arises from these heaps is not, as I have already indicated, sufficient to be regarded as a public nuisance, and indeed the plaintiff has really given up that contention. She founded her case, as I have already stated, on special damage by reduction of rent due to the fact that her tenant, on account of the insanitary state of the surroundings, left the house, but in fact the tenant has not left the house but has come back to it, and in the lower Court the plaintiff's learned counsel gave up this ground in view of its being a very remote cause of special damage and fell back on the mere position of the heap of rubbish. I conceive that in these circumstances what the plaintiff did was to fall back on the position of the heap of rubbish regarded as an obstruction, which in fact was the only point of view from which it could be regarded as constituting a public nuisance. It was for this reason I suppose that the learned civil Judge referred to the cases in 33 ALL 287[4] and 46 ALL 470,[5] although he has tried to protect himself by saying that none of these cases was quite analogous. Both these decisions are authorities for the proposition that where by reason of an obstruction in the roadway the plaintiff suffers special inconvenience in coming to and going from his house, he is thereby placed in the position of being able to say that he has sustained special damage. Neither of these cases are authorities for the proposition that the mere placing of some obstruction in front

2. ('15) 2 A I R 1915 Bom 284 : 33 I C 192 : 40 Bom 401 : 17 Bom L R 1040, Bai Bhicaji v. Perojshaw Jivanji.
3. ('36) 23 A I R 1936 Cal 707 : 167 I C 254 : ILR (1937) 1 Cal 407: 40 C W N 1353, Nirmal Chandra Sanyal v. Municipal Commissioners, Pabna.
4. ('11) 33 All 287 : 8 I C 808 : 8 A L J 19, Ram Chandra v. Joti Parshad.
5. ('24) 11 A I R 1924 All 599 : 85 I C 304 : 46 All 470 : 22 A L J 729, Muhammad Raza Khan v. Muhammad Askari Khan.

of a person's house which does not in any manner impede his coming to or going from his house, and is merely a possible nuisance from some quite different point of view, can be regarded as causing special damage to the plaintiff.

In my opinion the finding of the learned civil Judge that the very fact that the complained of heap lay just in front of the appellant's house constituted special damage to her is a finding which is bad in law and not capable of being supported from the cases on which he has relied. On this view, I am clearly of opinion that the plaintiff was not entitled to any relief in the circumstances of the present case and her appeal should have been dismissed by the lower appellate Court. One other point has been raised in appeal by the learned counsel for the appellant. He has sought to put forward the argument that in view of the provisions of Ss. 7 and 273 the Municipal Board is protected from suit by reason of the fact that it has acted under statutory authority. In this connexion the case reported in AIR 1936 Cal 707,[3] to which I have referred already is in point. In that case the learned Judge laid down the principles of exemption from liability coming within this head of statutory power as follows :

(i) Whenever an act otherwise unlawful and actionable is expressly authorized by the Legislature, no action would lie against the person who has the statutory authority to do the act, provided it is done without negligence. The statutory authority is to be regarded as statutory indemnity. (ii) The statutory authority and the consequent statutory indemnity extends not only to the act itself, but to all its necessary consequences. The test of the necessity of a consequence is the impossibility of avoiding it by the exercise of due care and skill. (iii) The aforesaid two principles of exemption from liability are only applicable when the statutory authority is absolute and unconditional. A good working test is that where the authority to do an act is imperative, that is where the statute imperatively directs the act to be done, and not permissive, that is merely allows it to be done, it is to be considered as absolute ; if it is merely permissive the authority is prima facie conditional and does not absolve the authorized person doing the act from liability, if nuisance results from the act.

In my opinion it is clear that the authority given to the Municipal Board by S. 273 read with S. 7 is not absolute. The Municipalities Act merely allows the Board to put up these receptacles. It follows that the authority is conditional and does not absolve the Board from liability, if nuisance results from its act. The learned civil Judge, in my opinion, rightly held that the respondent was not protected by the provisions of S. 273, Municipalities Act. In view however of my findings on the questions of public nuisance and special damage, the defendant's appeal is allowed, the judgment and decree of the lower appellate Court is set aside and the plaintiff's suit dismissed with costs of all three Courts.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Oudh 56

YORKE J.

Swami Khat Khata Nand — *Plaintiff* — Appellant

v.

Surajpal Singh and others — *Defendants* — Respondents.

Second Appeal No. 403 of 1937, Decided on 16th August 1940, against order of Addl. Civil Judge, Unao, D/- 1st September 1937.

(a) Limitation Act (1908), S. 20 — Record of payment of itself not showing that it was made towards interest —Creditor cannot establish by evidence aliunde that payment was made towards interest.

A payment cannot be credited to interest by the creditor unless it was paid towards interest as such. It is not competent for a creditor to establish by evidence 'aliunde' that a payment, the record of which does not itself show that it was made towards interest, was so made. [P 57 C 2]

(b) Limitation Act (1908), S. 20 — Payment towards principal — It must be shown that payment was made towards principal or appropriated by creditor towards principal — Appropriation must be shown to be within limitation.

In order that a payment may be treated as having been made towards principal, it would be necessary to show either that it was made towards principal by the debtor or that the creditor appropriated it to principal. In order that the appropriation by the creditor towards principal may operate to save limitation that appropriation must have been made before the period of limitation had expired : AIR 1940 P C 63, *Rel. on.* [P 57 C 2 ; P 58 C 1]

(c) Civil P. C. (1908), O. 41, R. 33—Point that O. 41, R. 33 should be applied not raised in lower appellate Court — Whether second appellate Court can apply those provisions (Quaere).

It is doubtful whether the second appellate Court would be justified in applying the principles of O. 41, R. 33 when the question of their applicability was not raised in the lower appellate Court. [P 58 C 1]

(d) Civil P. C. (1908), O. 1, R. 3, S. 99 and O. 2, R. 3 — Suit by vendee of mortgagee rights against mortgagors —Vendee can implead his vendor as well and ask for relief against him in alternative — Suit is not barred by O. 1 R. 3—Nor can relief against vendor be said to be premature — Applicability of O. 2, R. 3 is doubtful.

A vendee of mortgagee rights in his suit against the mortgagors is entitled to implead his vendor the original mortgagee as well and ask for relief

against him in the alternative. The suit is not barred by O. 1, R. 3 inasmuch as common questions of law and fact arise against both the defendants in such a suit. Nor can the cause of action for relief against the mortgagee be said to be premature. But the applicability of O. 2, R. 3 to such a case is doubtful : 7 I C 69, *Rel. on.* [P 58 C 2; P 59 C 1]

Section 99 can be applied to the decision of the trial Court in such a case. [P 59 C 2]

(c) Civil P. C. (1908), O. 2, R. 6 —O. 2, R. 6 is enabling rule — Fact that Court did not choose to avail of it is no ground for interference in second appeal.

Order 2, R. 6 is an enabling rule and the fact that a Court has not chosen to avail of it is not a ground for interference in second appeal. [P 58 C 2]

L. S. Misra — for Appellant.

Ghulam Hasan, and H. H. Zaidi — for Respondents 1, and 2 and 3, respectively.

Judgment. — This is a plaintiff's second appeal from the judgment of the Additional Civil Judge of Unao allowing the appeal of the present respondent 1, defendant 3, and dismissing against him the suit of the plaintiff which had been dismissed by the trial Court against defendants 1 and 2 but decreed against defendant 3. This appeal arises out of the following circumstances : On 20th March 1919 a mortgage by conditional sale for a period of three years was executed by Har Bakhsh Singh, defendant 1 and Beni Madho Singh, since deceased, husband of defendant 2, Mt. Indrana, in favour of defendant 3, Surajpal Singh, the consideration being a sum of Rs. 260. Interest was payable at 1 per cent. per mensem compoundable annually. On 16th March 1934 when limitation for a suit on foot of the mortgage was about to expire a sum of Rs. 7 was paid and was endorsed on the back of the mortgage deed as received "babat dastawez haza". This endorsement was signed by Har Bakhsh Singh and Beni Madho Singh the executants of the mortgage. On 15th August 1936 defendant 3 sold his mortgagee rights under this deed to the present plaintiff Swami Khat Khata Nand for a sum of Rs. 450 and accordingly the vendee Khat Khata Nand on 17th December 1936 filed a suit for the recovery of a sum of Rs. 797-11-0, impleading on the one hand the original mortgagors Har Bakhsh Singh and Beni Madho Singh's widow, and on the other his own vendor the original mortgagee Surajpal Singh. Defendants 1 and 2 pleaded that the suit against them was time-barred, while defendant 3 pleaded that the suit so far as it related him was premature and bad for multifariousness. The learned Munsif held that the suit was time-barred against the original mortgagors and dismissed the suit against them. As against the original mortgagee the plaintiff's vendor he held that the suit was neither premature nor defective on the ground of multifariousness, and he accordingly decreed the suit against him.

Against the dismissal of his suit as against defendants 1 and 2 the plaintiff filed no appeal and therefore prima facie that decree became final. Defendant 3 however appealed against the decree made against him and he impleaded defendants 1 and 2 along with the plaintiff as respondents. The lower appellate Court proceeded to hold, differing from the Munsif, that the suit as against defendants 1 and 2 should not have been held to be barred by limitation. He conceded that this point was unimportant in the appeal as it was filed before him, but none the less he felt it necessary to decide the point. Secondly, he held that the suit against defendant 3 who was the appellant before him was premature and bad for multifariousness, and accordingly allowed defendant 3's appeal and dismissed the suit. The attention of the learned Additional Civil Judge was not apparently drawn to the provisions of O. 41, R. 33, and he was not asked to pass a decree in favour of the plaintiff-respondent against defendants 1 and 2.

In this appeal the first point for consideration is the finding on the point of limitation, and it may be said at once that it is practically conceded by all parties to this appeal (and I should note that the original mortgagee defendant 3 and defendants 1 and 2 are all separately represented in this appeal) that the decision of the lower appellate Court on the question of limitation cannot possibly be supported. I need scarcely discuss his arguments but merely state how the matter stands. It was sought to establish that in virtue of the payment of Rs. 7 on 16th March 1934, limitation as against the original mortgagors was saved. This payment was not specified as being towards either principal or interest. It could not be credited to interest by the creditor unless it was paid towards interest as such. It is not competent for a creditor to establish by evidence "aliunde" that a payment, the record of which does not itself show that it was made towards interest, was so made. It follows that this payment cannot be treated as having been made towards interest. In order that it should be treated as having been made towards principal, it would be necessary to show either that it was made towards principal by the debtor or that the creditor appropriated it to principal. In the light of

the recent pronouncement on this subject by their Lordships of the Privy Council in 1940 O W N 315[1] in order that an appropriation by the creditor towards principal may operate to save limitation that appropriation must have been made before the period of limitation had expired. There was, however, no evidence on the record to show that the creditor had ever made an appropriation of the payment towards principal, much less that he had made such an appropriation within the period of limitation.

On the assumption that the lower appellate Court was right on the question of limitation and therefore right in holding that the trial Court had wrongly dismissed the suit against defendants 1 and 2, learned counsel for the plaintiff-appellant has contended that the lower appellate Court should have acted under the provisions of O. 41, R. 33 and given the plaintiff a decree against the original mortgagors defendants 1 and 2, and that he was entitled so to do in view of the fact that those defendants had been made parties to the appeal by defendant 3, and for this purpose reliance was placed on 7 I C 69.[2] It may be that the lower appellate Court could have done so, but I feel considerable doubt whether in second appeal this Court would have been justified in applying the principles of Order 41, R. 33, that point not having been raised in the lower appellate Court. However, in view of my finding on the question of limitation the question whether O. 41, R. 33 should have been applied by the lower appellate Court or should be applied by this Court now no longer arises, and I do not propose to go into it.

The question which does arise, however, is whether the plaintiff's suit against defendants 1 and 2 having been dismissed as barred by limitation, the plaintiff was entitled and is entitled to a decree against defendant 3, his vendor as held by the trial Court. Learned counsel for the plaintiff-appellant has referred to the Notes in Chitaley's Code of Civil Procedure (Edn. 3) Vol. 2, P. 1264, under O. 1, R. 3, and to the provisions of O. 2, R. 3 and S. 99, Civil P. C. He has also referred to the same case in 7 I C 69,[2] to which I have referred above, and which is one of the cases quoted in Chitaley's Commentary under O. 1, R. 3. Two objections have been put forward to the right of the plaintiff to get such a decree. First, it has been argued that the plaintiff's suit against defendant 3 was premature and that the plaint as against him showed no cause of action; secondly, it has been argued that the suit as against him was bad for multifariousness, that is I suppose as somehow contravening the provisions of O. 1, R. 3, or O. 2, R. 3 or both. The two questions are rather mixed up one with the other. Taking the question of prematureness first the argument is that the plaintiff was not entitled to combine a suit against the original mortgagors with a suit against his own vendor, because his cause of action against his own vendor would only arise on the dismissal of the suit against the original mortgagors as time-barred. The same criticism might be levied against a large proportion of suits which are filed against two persons in the alternative, and the claim is made against one first and the other as a second string. Order 1, R. 3 provides that:

> All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative where, if separate suits were brought against such persons, any question of law or fact would arise.

I think it is reasonable to say that the transaction out of which the present suit has arisen both against defendants 1 and 2 and defendant 3 is the sale by defendant 3 of his rights under the mortgage to the plaintiff. There can be no doubt that in the suit against both common questions of law and fact do arise, and therefore prima facie this suit is not barred by the provisions of O. 1, R. 3. Order 2, R. 3 seems to me of doubtful applicability. It relates to joinder of causes of action and provides that:

> Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly.

Some reference has also been made to O. 2, R. 6 which provides that:

> Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may order separate trials or make such other order as may be expedient.

This is an enabling Rule and the fact that a Court has not chosen to avail of it is not, in my opinion, a ground for interference in second appeal. Doubtless the trial Court could have acted under the provisions of this rule, if it had thought it desirable to do so. In 7 I C 69[2] (referred to above) in somewhat similar circumstances the same question was raised whether the plaintiff was entitled to implead his assignor (the

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1. ('40) 27 AIR 1940 P C 63 : 187 I C 283 : I L R (1940) Kar 134 : 67 I A 160 : 1940 O W N 315 (P C), Rama Shah v. Lal Chand.
2. ('11) 7 I C 69, Drig Singh v. Manbhar.

original mortgagee) in the same suit along with the original mortgagors. The headnote runs as follows:

D, the assignee of a mortgage, brought a suit on the mortgage and made the original mortgagor and the original mortgagee parties to the suit. The mortgagor admitted the execution of the deed but denied the receipt of consideration: *Held*, that the original mortgagee was rightly impleaded in the suit and that the plaintiff was entitled to ask for a relief against him if he failed to obtain a decree against the mortgaged property.

The view stated supports the appellant's arguments but it is an unfortunate fact that the reasoning on which this decision was founded finds no place in the judgment. All that the learned Judges say is:

The learned subordinate Judge held that the plaintiff did not disclose any cause of action against Manbhar (the original mortgagee) that he was simply a pro forma defendant and no relief ought to have been asked against him so long as it was not decided that the mortgage-deed in suit was void for want of consideration. We do not agree with the learned subordinate Judge upon this point. We think that Manbhar was rightly impleaded and that the plaintiff was entitled to ask for the relief against him if he failed to obtain a decree against the mortgaged property.

At p. 1264, Vol 2, (Edn. 3) of his Commentary on the Civil Procedure Code, Chitaley refers to several other cases of an analogous description. Learned counsel for the respondent presses the argument that the plaint did not show any cause of action against defendant 3, and in fact a reference to the plaint shows that there is no distinct statement of a cause of action, and indeed there could in a sense not be any such statement because the immediate cause of action against defendant 3 must necessarily be the failure of the suit against defendants 1 and 2. The plaint however did explain how and why relief was sought against defendant 3 and what relief was claimed, and it does not seem to me really possible to say that such a suit which claims a relief in the alternative can reasonably be held to be premature. In my opinion, the learned Additional Civil Judge was wrong in the view he took that the suit was premature because it did not disclose a cause of action already arisen against defendant 3. As to the second question whether the suit was bad for multifariousness, in this connexion reference was made by the learned Additional Civil Judge to S. 99, Civil P C., which provides that:

No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any mis-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

A reference in this connexion has been made to R. 9 of O. 1 which provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Learned counsel for the respondent points out that there is no similar provision in the case of misjoinder of causes of action or joining a suit for which there is an existing cause of action with one for which there is only a possible cause of action. He argues that the indemnity clause contained in the sale deed of the plaintiff gives him a right of suit against his vendor only on the arising of certain eventualities which could not arise until the plaintiff's suit against the original mortgagors failed. The learned Munsif on this point remarked, "I fail to find how this suit is bad for misjoinder of cause of action." The learned Additional Civil Judge considers that the suit is bad for misjoinder of causes of action because the cause of action of the plaintiff had not yet arisen and because that misjoinder was not protected by the provisions of S. 99. His argument on this point is that defendant 3, if sued separately after the decision of the case against defendants 1 and 2, could have raised various pleas in defence, for instance that that suit failed on account of want of proper prosecution, on account of collusion or for want of due diligence and so on. To my mind there is no force in this argument because defendant 3 by being joined as a defendant in the same suit along with defendants 1 and 2 was placed in a position to see that the suit was prosecuted in the fullest possible manner, that is that there was not want of proper prosecution, that there was no collusion, and no absence of due diligence. It is not suggested that there is any other way in which the joinder of defendant 3 along with defendants 1 and 2 could possibly have affected the merits of the case, and in these circumstances it seems to me clear that even if there had been any misjoinder of parties or causes of action S. 99 would have applied and the judgment of the trial Court could not have been set aside on that ground. The learned Additional Civil Judge has reversed it on the clear finding that S. 99 did not protect the decision of the trial Court. I hold that on this point the lower appellate Court is wrong. I accordingly allow this appeal, set aside the judgment and decree of the lower appellate Court and restore that of the trial Court. The plaintiff will have his costs in

all Courts as against defendant 3. His appeal as against respondents 2 and 3, defendants 1 and 2, has failed and he must pay the costs of these defendants.

G.N./R.K. *Order accordingly.*

A. I. R. 1941 Oudh 60

ZIAUL HASAN AND YORKE JJ.

Kr. Rameshwar Bakhsh Singh and others — Claimants — Appellants

v.

L. Govind Prasad and others — Applicants — Respondents.

Misc. Appeal No. 55 of 1939, Decided on 12th August 1940, against order of Special Judge, First Grade, Sitapur, D/- 10th May 1939.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 14 — Decree under S. 14 — Appeal on ground that claim was barred by limitation falls under Sch. 2, Art. 11, Court-fees Act.

An appeal from a decree passed under S. 14 on the ground that the creditors's claim was barred falls within the scope of Sch. 2, Art. 11, Court-fees Act, and consequently court-fee need not be paid ad valorem on the entire amount of the claim.

[P 61 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 9 (1) and (3)—Construction—Phrase "within three months from" in S. 9 (1) explained — Written statement filed a few days before commencement of date from which last date of limitation is to be calculated cannot be treated as not filed within the period of limitation — Nor can it be thrown out as being premature.

The phrase "within three months from" in S. 9 (1) only prescribes the date of publication of the notice as the date by reference to which the last day of limitation is to be calculated and not as prescribing a kind of compartment of time and enacting that any written statement in order to be presented within time must be presented between the first and the last days of that compartment of time. Section 9(1) and (3) fix the latest date for the filing by the creditors of written statements of their claims and it cannot be said that a written statement which is filed long after the filing of the written statement by the landlord debtor and after the issue of notices in the news-papers but a few days before the beginning of the date from which the calculation of the last date of limitation is to be made is liable to be treated as not filed within the period of limitation. Nor can it be thrown out as being premature: A I R 1924 Mad 257 (SB), *Disting.* [P 62 C 1]

(c) U. P. Encumbered Estates Act (25 of 1934), S. 15 — Special Judge cannot reopen questions decided by Court which passed decree — Nor can he permit debtor to raise questions not raised in prior litigation.

The only thing under S. 15 which the special Judge has to look to in connection with a decretal debt is whether the findings of the Court which passed the decree are inconsistent with the provisions of S. 14. He cannot re-open questions which have been decided nor can he permit the debtor to raise questions which he did not raise in the previous litigation. In point of fact questions not raised in the previous litigation would evidently be barred by the principle of constructive res judicata.

[P 62 C 1, 2]

(d) U. P. Encumbered Estates Act (25 of 1934), S. 15—Provisions of Usurious Loans Act applied in previous litigation—Special Judge should consider effect of amendment of Act on decree.

Where the provisions of the Usurious Loans Act have been actually applied in the previous litigation, the special Judge will have to consider the effect of the subsequent amendment of that Act on the decree.

[P 62 C 2]

Dr. Qutbuddin Ahmad — for Appellants.

M. Wasim, C. N. Harkauli and Ali Hasan— for Respondents 1 to 8.

Judgment. — This is a miscellaneous appeal under S. 45, Encumbered Estates Act, from the decision of two issues framed in a creditors' claim case under S. 14 of the Act. The creditors based their claim on two mortgage deeds, one for Rs. 40,000 and one for Rs. 12,000 dated respectively 18th August 1927 and 23rd August 1928. The debtors pleaded that the written statement of the creditors was not filed within the period of limitation prescribed by the Act, having been filed 10 days before the publication of notice in the Government Gazette. He further pleaded that the consideration of the first mortgage was fictitious to the extent of Rs. 1700 odd, and that the mortgagees did not pay Rs. 1510 which had been left with them for payment to a creditor, one Narain. In reply it was contended that in view of the provisions of S. 15 as the mortgage debt was a decretal debt, that decretal debt could not be reopened save in so far as is allowed under the provisions of S. 15, Encumbered Estates Act. The learned special Judge framed five issues:

1. Whether the deed of mortgage dated 18th August 1927, is fictitious for a sum of Rs. 1704-7-6?

2. Did the claimants pay Rs. 1510 which was left for payment with him to Narain?

3. Are the points covered by issues 1 and 2 not to be re-opened as urged by the claimants?

4. To what amount are the claimants entitled?

5. (a) Did the claimants file their claim within time as required by law? (b) If not is the claim to be deemed as discharged under S. 13, Encumbered Estates Act, as alleged?

On issue 3 the learned special Judge decided that the findings of the Court which tried the mortgage suit and gave the present creditors-respondents a decree could not be re-opened with reference to the points raised in issues 1 and 2. On issue 5 he held that there was nothing in the Act to show that the claims filed before the publication of the notice in the Gazette were not to be

entertained as being barred by limitation. Hence he held that the claim was within limitation and that acccordingly the question raised by issue 5 (b) did not require any decision.

A preliminary point has been raised in this appeal whether the court-fee paid is sufficient, it being contended that as the appellants seek to get a decision that the whole claim is barred by limitation, they are seeking in effect to get rid of the whole claim which is for Rs. 82,000 odd and must therefore pay court-fee ad valorem. We are of opinion that the present appeal being an appeal against a decision only, falls within the scope of Art. 11 of Sch. 2 and that the court-fee paid is sufficient.

Coming next to the question of limitation and the interpretation of S. 9 (1), Encumbered Estates Act, some dates must first be given. The landlord debtors filed their application under the Encumbered Estates Act on 6th January 1936, and showed therein the two mortgages to which reference has been made above and the decree on foot of those mortgages. On 15th July 1936, they filed their written statement under S. 8 in the Court of the special Judge. An order was made for issue of notices under S. 9 of the Act and 11th November was fixed as the next date of hearing, it being naturally presumed that publication of the notice in the Gazette would have been made by that date. Notices were issued to creditors under the provisions of S. 9 (2) by publication in three newspapers. That publication took place on 26th July, 28th July and 30th October 1936, and it instructed the creditors to file their written statements of claim within three months of the publication of the notice in the Gazette, that is the Government Gazette. The same notice showed that 11th November was fixed for the next hearing in the case. It was in these circumstances that on the date fixed for the hearing, that is 11th November 1936, the creditors-respondents filed their written statement. The contention put forward in the Court of the special Judge and now urged before us is that this written statement having been filed prematurely, is barred by limitation. Section 9(1), Encumbered Estates Act, as at that time framed, provided :

> The special Judge shall publish in the Gazette a notice in English, Urdu and Hindi calling upon all persons having claims in respect of private debts both decreed and undecreed against the person or the property of the landlord by or on whose behalf the application has been made under S. 4, to present to the special Judge within three months from the date of the publication of the notice a written statement of their claims.

Learned counsel for the appellants, debtors applicants under the Act has contended keenly before us that the only possible interpretation of the words "to present within three months from the date of the publication of the notice a written statement" is that it requires the creditor to file his statement within three months subsequent to the date of the publication of the notice. If one had to interpret the words " within three months from the date of the publication of the notice" standing entirely by themselves, it is obvious that they would imply a date which falls not later than three months after the date of the said publication. Learned counsel has referred us to Stroud's Judicial Dictionary for the meaning of the word "from" which is defined there as being much akin to " after ". We feel no doubt on that particular point. He has also referred to a case of the Madras High Court, in A I R 1924 Mad 257,[1] for the interpretation of the word "from" where it was held that the words "from a named date" means on and after that date, but we are inclined to think that although no question arises about that interpretation the case itself is not strictly applicable to the question which we have to decide, and that question has to be decided in the light of the object and intention of the provision in S. 9 (1). Section 9 (1) speaking generally provides a period of three months from the date of the publication of the notice as the first period of limitation for the filing of a written statement by a creditor. Section 9 (3) makes a provision for a further period of limitation. As it stood before the recent amendment it ran as follows :

> The written statement must be presented within the period specified in the notice, unless the claimant satisfies the special Judge that he had sufficient cause for not presenting it within such period, in which case the special Judge may receive the statement if presented within a further period of two months.

It seems to us that these two sub-sections enact provisions fixing the latest date for the filing by the creditors of written statements of their claims, and that it cannot be said that a written statement which was filed a few days before the beginning of the date from which the calculation of the last date of limitation was to be made is liable to be treated as not filed within the period

1. ('24) 11 AIR 1924 Mad 257: 76 I C 721: 46 Mad 685 : 45 M L J 557 (SB), In re Court-fees.

of limitation. The phrase "within three months from" in S. 9 (1) thus seems to us really only to prescribe the date of publication of the notice as the date by reference to which the last day of limitation is to be calculated and not as prescribing a kind of compartment of time and enacting that any written statement in order to be presented within time must be presented between the first and the last days of that compartment of time. The only ground on which the view put forward by learned counsel for the appellants could be supported would be that by filing the written statement before the date of the publication of the notice in the Gazette the creditor was to be regarded as filing a plaint before the cause of action had accrued. In the circumstances of the present, and indeed of all similar applications where the written statement of the creditor is filed long after the filing of the written statement by the landlord debtor and after the issue of notices in the newspapers, it could hardly be said that the creditor's cause of action had not yet arisen and moreover, as learned counsel for the respondents has pointed out, even in cases where a plaint has been filed prematurely, but the cause of action has arisen during the pendency of the suit so instituted it has been held that the suit would not be liable to be thrown out.

In our opinion the learned special Judge rightly held that the claim was within limitation. The only other point which has been argued before us relates to the finding on issue 3. Learned counsel for the appellants has sought to argue that despite the fact that the mortgages of 1927 and 1928 had merged in a decretal debt, he is entitled to raise the questions raised in issues 1 and 2. Section 15, Encumbered Etates Act, provides that:

in determining the amount due on the basis of a loan which has been the subject of a decree the special Judge shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14.

The provisions of S. 15 have been the subject of several recent decisions of this Court in which it has been held that the only thing which the special Judge has to look to in connexion with a decretal debt is whether the findings of the Court which passed the decree are inconsistent with the provisions of S. 14. He cannot reopen questions which have been decided, nor can he permit the debtor to raise questions which he did not raise in the previous litigation. In point of fact questions not raised in the previous litigation would evidently be barred by the principle of constructive res judicata. The learned special Judge therefore rightly held that the points covered by issues 1 and 2 could not be re-opened. The points which can be re-opened by the special Judge and into which he will necessarily go in dealing with issue 4 framed by him will be those points which are mentioned in cls. (a) and (b) of sub-s. (4) of S. 14. In the present case it appears that the provisions of the Usurious Loans Act (10 of 1918) were actually applied in the previous litigation but the learned special Judge will have to consider the effect of the subsequent amendment of that Act by the Usurious Loans Amendment Act, (Act 22 of 1934) which as appears from S. 2 (4) (ii) was amended specifically with a view to proceedings for the determination of a claim under the Encumbered Estates Act. On the merits we find no force whatever in the present appeal and dismiss it accordingly with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 62

YORKE AND BENNETT JJ.

Ram Kirpal — Judgment-debtor — Appellant

v.

Bhura Mal — Decree-holder — Respondent.

Exn. Appeal No. 8 of 1938, Decided on 9th August 1940, from order of Civil Judge, Partabgarh, D/- 22nd October 1937.

(a) Hindu Law—Debts—Father — Liability of son — A obtaining decree against B — C member of joint Hindu family executing pronote in A's favour to satisfy decree—C borrowing money from D on pronote to pay off earlier pronote—C's debt from D cannot be said to be without consideration so as to relieve his son of his liability.

A obtained a decree against *B*. *C* a member of a joint Hindu family in order to satisfy that decree executed a promissory note in favour of *A*. Subsequently to pay off the amount due on the pronote *C* borrowed money from *D* on a pronote. *D* obtained a decree on the pronote against *C* and sought to execute the decree against his son after his death :

Held that the son was liable for the decree passed against his father on the basis of the promissory note as it could not be said that the debt was due for a promise made without consideration such as would relieve the son of his liability.

[P 63 C 2]

(b) Hindu Law—Debts — Father—Son's pious obligation—Son's liability is not limited to accretion to family property which he receives by survivorship on his father's death but extends to whole of his share in joint family property including that portion of it to which he was entitled before his father's death.

The liability of a son is not limited to the accretion to the family property which he receives by survivorship on his father's death ; it extends to the whole of his share in the joint family property, including that portion of it to which he was entitled before his father's death. A creditor is not following in such cases the assets of the father in the hands of the several surviving members of the joint Hindu family; he is executing his decree against the son's share in the joint family property, the son being under a pious obligation to discharge the debt therefrom: A I R 1934 All 590; A I R 1935 Oudh 510; A I R 1933 Lah 857; A I R 1934 Oudh 1 (F B), *Rel. on.* [P 64 C 2]

P. N. Chaudhri — for Appellant.

S. N. Srivastava — for Respondent.

Judgment. — This is an execution of decree appeal against an order of the learned civil Judge of Partabgarh, dated 22nd October 1937, allowing an application of the decree-holder-respondent for bringing on the record in execution proceedings the appellant Ram Kirpal in place of his father, Ram Sukh, deceased. The circumstances giving rise to the respondent's application are as follows: One Behari Lal obtained a decree against the Raja of Kaithaula and to satisfy that decree Ram Sukh executed a promissory note for Rs. 3350 in favour of Behari Lal. Ram Sukh was a member of a joint Hindu family. His father, Ram Narain, was alive when Ram Sukh incurred this liability and he is still living. Admittedly the liability was incurred by Ram Sukh as a personal liability and not as manager of the joint Hindu family. It is conceded that he never was manager of the family. Behari Lal obtained a decree against Ram Sukh on the basis of the promissory note and Ram Sukh satisfied this decree by borrowing the amount required from the respondent, Lala Bhurumal, on another promissory note. Lala Bhurumal then obtained a decree on foot of it against Ram Sukh. On Ram Sukh's death the respondent sought to execute the decree against Ram Sukh's son, the present appellant, Ram Kirpal. It was prayed in the application that as the original judgment-debtor, Ram Sukh, had died some one and a half year ago, and his son, Ram Kirpal, was in possession of his entire assets and there was no other heir, Ram Kirpal might be appointed representative of the judgment-debtor under O. 21, R. 22 Civil P. C., and the property in his possession be attached and put to sale. This application was opposed by Ram Kirpal. He pointed out in his objection that his grand-father, Ram Narain, who was still alive, was the manager and head of the family, and he contended that on the death of Ram Sukh he and Ram Narain became owners of the entire property as survivors. He was not in possession of any property as the heir or representative of Ram Sukh, but was in possession on the strength of his own title.

In additional objections by the appellant it was alleged that Ram Sukh was of extravagant habits and that the debt was fictitious and without consideration. It may be mentioned here that there is a third member of this joint family, namely, Ram Sunder, a nephew of Ram Narain. He is referred to in the application of the respondent. The learned civil Judge after stating the history of the debt observed that it was evident that the debt was not immoral and that as the decretal amount had been borrowed to pay off another decree it had become an antecedent debt. He added that a son is bound to pay off his father's debts if not immoral, and the fact that the father was not the manager or that there were others who were members of the family does not affect this liability. Consequently, the son's share in the joint family property was liable to discharge this debt and could be taken in execution by the decree-holder. He accordingly allowed the application. Against this order it has been contended first of all that Ram Kirpal cannot be held liable for the debt because it was due for a promise made without consideration, reference being made to S. 298 of Mulla's Hindu Law (Edn. 9). The learned counsel could not, however, refer us to any authority which would show that a son could not be held liable for a decree passed against his father on the basis of a promissory note executed for the purpose stated, and we do not consider that on the facts it can be said that the debt was due for a promise made without consideration such as would relieve the son of his liability. But the principal contention put forward on behalf of the appellant was that a son is not liable to pay his father's debts when he has succeeded on his father's death by survivorship along with other coparceners. We were referred by counsel to a number of rulings bearing on the question of a son's liability for his father's debts. In earlier cases the Allahabad High Court held that the pious duty of sons to discharge their father's debts is confined to property received from the father and that it cannot be held that the sons have received such property from their father in cases of succession by survivorship where there are other coparceners. The cases to which we

were referred in support of this view were: 48 ALL 245[1] and 55 ALL 417.[2] Learned counsel conceded, however, that in a later ruling a different view was taken by a Full Bench of the Allahabad High Court, namely in 57 ALL 176.[3] The head note of this case reads :

> The pious obligation of a Hindu son to pay his father's debts is not affected by the fact that the joint family also comprises members other than the father and his sons ; and the sons' liability based on the pious obligation does not become unenforceable against the joint family property if there happen to be coparceners other than the sons and their descendants, like uncles, cousins, etc. The liability can be enforced by attachment and sale of the sons' undivided share in the joint family property and the purchaser becomes entitled to obtain ascertainment and partition of that share.

It was held by this Court also in 1935 O W N 1005[4] that where the father in a joint Hindu family stands surety for payment of a debt, and a decree against the principal debtor is executed against him, but he dies during the pendency of the execution, it is open to the decree-holder to enforce the personal obligation incurred by the surety against his sons by attachment and sale of their undivided share, in the joint family property, although the family consists of other members besides the sons.

Learned counsel then argued that, admitting the sons' liability, that liability would extend only to the assets derived by them from their father's share in the joint family property. In the present case Ram Sukh had a quarter share in the joint family property. There being two other coparceners, namely, the grandfather, Ram Narain, and the nephew, Ram Sunder, in addition to the son, Ram Kirpal, the latter's liability would be only one-third of Ram Sukh's quarter share, that is to say one-twelfth in the whole joint family property. Reliance was placed for this contention on S. 288 of Mulla's Principles of Hindu Law where it is said that it is settled law that the heir of a deceased Hindu is liable to pay the debts of the deceased only to the extent of the assets inherited by him from the deceased, and that the heir is not personally liable to pay the debts of the deceased, even if he be a son or grandson. But this statement is made in connexion with the liability of separate property for debts, and not in connexion with the liability of the undivided interest of a coparcener for the debts of a deceased coparcener. In S. 290 it is said that where the sons are joint with their father, and debts have been contracted by the father for his own personal benefit, the sons are liable to pay the debts provided they were not incurred for an illegal or immoral purpose, and that the liability exists irrespective of the fact whether the joint family includes persons other than the father and son. Further, on it is stated that the liability is limited to the interest of the son in the joint family property. This was laid down by the Lahore High Court in 15 Lah 50.[5] It may now also be considered settled law that the sons are liable for their father's debts in their father's lifetime when no property of their father has been obtained by them. In 10 O W N 1233[6] it was held by this Court that when a joint Hindu father governed by the Mitakshara law is adjudicated an insolvent, his joint sons' shares do not vest in the receiver and it is open to the receiver in insolvency to seize a son's share and sell it in order to satisfy the debt payable by the father when the debt payable by the father is one which it is the pious duty of the son to pay.

It is clear, therefore, that the liability of a son is not limited to the accretion to the family property which he receives by survivorship on his father's death ; it extends to the whole of his share in the joint family property, including that portion of it to which he was entitled before his father's death. A creditor is not following in such cases the assets of the father in the hands of the several surviving members of the joint Hindu family ; he is executing his decree against the son's share in the joint family property, the son being under a pious obligation to discharge the debt therefrom. For these reasons we are clearly of opinion that the view taken by the lower Court was correct and we accordingly dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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1. ('26) 13 A I R 1926 All 220 : 91 I C 785 : 48 All 245 : 24 A L J 273, Binda Prasad v. Raj Ballabh Sahai.
2. ('33) 20 A I R 1933 All 334: 143 I C 762: 55 All 417 : 1933 A L J 1401, U. P. Oil Mills Co. Ltd. v. Jamna Prasad.
3. ('34) 21 A I R 1934 All 590: 150 I C 411: 57 All 176 : 1934 A L J 483 (FB), Chhotey Lal v. Ganpat Rai.
4. ('35) 22 A I R 1935 Oudh 510 : 157 I C 945 : 11 Luck 449 : 1935 O W N 1005, Malak Chand v. Hira Lal.
5. ('33) 20 AIR 1933 Lah 857 : 147 I C 225 : 15 Lah 50 : 35 P L R 80, Devi Das v. Jada Ram.
6. ('34) 21 AIR 1934 Oudh 1 : 147 I C 642 : 9 Luck 304 : 10 O W N 1233 (FB), Siddheshwar Nath v. Deokali Din.

A. I. R. 1941 Oudh 66

YORKE J.

Tulshi Ram — Defendant — Applicant

v.

Madho Ram — Plaintiff —

Opposite Party.

Civil Revn. Appln. No. 1 of 1940, Decided on 9th September 1940, from order of Dist. Judge, Gonda, D/- 4th November 1939.

U. P. Tenancy Act (17 of 1939), S. 276 — S. 276 is not retrospective—Appellate decision of District Judge in rent suit passed before enactment of Act is not open to revision.

Changes in procedure or law cannot operate retrospectively so as to affect rights which have accrued before the Act which makes those changes come into force. Consequently no revision lies from the appellate decision of a District Judge in a rent suit given before the U. P. Tenancy Act came into force inasmuch as there was no right of revision prior to the enactment of the U. P. Tenancy Act of 1939 : A I R 1940 Oudh 335 and A I R 1927 P C 242, *Rel. on.* [P 66 C 1]

Mahabir Prasad Srivastava — for Applicant.

R. N. Sinha — for Opposite Party.

Order.—This is an application in revision under S. 276, U. P. Tenancy Act of 1939 from the appellate decree of the District Judge of Gonda, dated 4th November 1939. This was a suit for arrears of revenue under S. 108, cl. (15) in which a first appeal lay to the District Judge under S. 119, Oudh Rent Act. It was not a case in which any second appeal lay and accordingly an application was filed in revision. A preliminary objection is taken that no application lies in revision either under S. 115, Civil P. C., or under S. 276 of the new Tenancy Act. Learned counsel for the applicant contends that even prior to the new Tenancy Act such an application was entertainable by this Court under the provisions of S. 115, Civil P. C., and he contends that since the enactment of the new Tenancy Act such a right is specifically provided for by S. 276 which section is couched in very similar terms to those which are found in S. 115, Civil P. C. Learned counsel for the opposite party contends that both the provisions relied upon on behalf of the applicant are inapplicable. He has referred to 4 O W N 1258,[1] 5 O W N 457,[2] and the Full Bench case in 6 O W N 661[3] in which it was held that no revision lay to the Chief Court under S. 115, Civil P. C., from the appellate decision of a District Judge in a rent suit. The cases quoted were all subsequent to those relied upon by learned counsel for the applicant. As regards the applicability of S. 276 of the new Tenancy Act he points out that the Tenancy Act only came into force on 1st January 1940. He admits that in the ordinary way changes in procedure or law have a retrospective effect, but he contends, as I think with great force, that changes in procedure or law cannot operate retrospectively so as to affect rights which have accrued before the Act which makes those changes come in force. In a recent case in 1940 O W N 545[4] it was held that

the provision of a second appeal in cl. 2 (a) of S. 45, U. P. Encumbered Estates Act, as it stands after the amendment of the Act in 1939, has no retrospective effect.

This decision was based in the main upon the principle that the right of having an order treated as final vested in a party cannot be taken away by a subsequent enactment in the absence of express words to that effect. The position here is that the opposite party had on 4th November 1939, obtained an appellate decision in their favour which was final. That advantage could not be taken away from them by any enactment of procedural law which was not expressly stated to have retrospective effect upon cases finally decided before the enactment came into force. The decision rests ultimately on principles laid down by their Lordships of the Privy Council in A I R 1927 P C 242[5] where their Lordships remarked :

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in (1905) A C 369[6] where it is in effect laid down that, while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality, orders, which, when the statute came into force, were final, are provisions which touch existing rights.

In my opinion, it is perfectly clear that the preliminary objection must be sustained.

1. ('28) 15 A I R 1928 Oudh 214 : 107 I C 877 : 3 Luck 150 : 4 O W N 1258, Narayan v. Baldeo Singh.
2. ('28) 5 O W N 457 : 109 I C 794, Fateh Bahadur Khan v. Chhotey Khan.
3. ('29) 16 A I R 1929 Oudh 389 : 119 I C 357 : 4 Luck 539 : 6 O W N 661 (FB), Gaya Prasad v. Kalap Nath.
4. ('40) 27 A I R 1940 Oudh 335 : 189 I C 265 : 15 Luck 612 : 1940 O W N 545, Ali Mohammad v. Khalil Ahmad.
5. ('27) 14 A I R 1927 P C 242 : 106 I C 156 : 9 Lah 284 : 54 I A 421 (PC), Delhi Cloth and General Mills Co., Ltd. v. Income-tax Commissioner, Delhi.
6. (1905) 1905 A C 369 : 74 L J P C 77 : 92 L T 788 : 21 T L R 513, Colonial Sugar Refining Co. v. Irving.

There was no right of application in revision against the present order prior to the enactment of the new U. P. Tenancy Act, and the provisions of the new Act which allow applications under S. 115, Civil P. C., cannot be applied with retrospective effect so as to deprive the opposite party of the benefit of the final order made in their favour on 4th November 1939. In these circumstances, it is unnecessary to go into the question whether this application really involves any question of jurisdiction or the question whether there is any substance in the application on the merits. The preliminary objection is sustained, the present application is not maintainable and is dismissed accordingly with costs.

G.N./R.K. *Application dismissed.*

A. I. R. 1941 Oudh 66

YORKE J.

S. Mujawir Husain — Applicant

v.

Mt. Kishwar Jehan Begam and another — Opposite Party.

Civil Revn. Appln. No. 121 of 1938, Decided on 20th September 1940, from order of Munsif, North Lucknow, D/- 13th August 1938.

(a) Civil P. C. (1908), Ss. 115 and 152—Application under S. 115 against order of amendment of decree under S. 152 can be maintained.

Applications can be entertained under S. 115 against orders of amendment of decree made under S. 152 if the original decree was not in conformity with the judgment. [P 66 C 2]

(b) Civil P. C. (1908), O. 33, Rr. 10 and 11 — Suit in forma pauperis — Plaintiff succeeding only in part — Court may order defendant to pay whole of court-fee leviable on plaint if it thinks it proper.

In a suit in forma pauperis even if the plaintiff has succeeded in part and failed as to the rest of the claim, there is nothing improper in the Court ordering the defendant to pay whole of the court-fee leviable on the plaint, if in the circumstances of the case the Court thinks it proper : A I R 1928 Cal 196, *Rel. on*; A I R 1916 All 327 and AIR 1928 Mad 216, *Not foll.* [P 67 C 1]

S. M. Rafi — for Applicant.

P. N. Bhatt and Assistant Government Advocate —for Opposite Party Nos. 1 and 2, respectively.

Order. — This is an application in revision against an order purporting to be an order under S. 152, Civil P. C., made by the Munsif, North Lucknow, ordering amendment of the decree so that the defendant should be required to pay ad valorem court-fee on Rs. 1000 instead of a sum of Rs. 7-8-0 only. The matter has arisen out of a pauper suit. Mt. Kishwar Jahan Begam instituted a suit in forma pauperis to recover a dower debt claimed to amount to Rs. 1000. The suit was decreed on 27th April 1937 for Rs. 100 and proportionate costs and a further clause was added in the operative order as follows: "The court-fees shall be paid by the defendant." The court-fees payable on Rs. 1000 amounted to Rs. 107-8-0, but, whether by mistake or how does not appear, the amount taxed against the defendant was only Rupees 7-8-0 that being the court-fee taxable on Rs. 100. At a date considerably later an application was made by the U. P. Government through the Additional Government Pleader of Lucknow under S. 152 asking for an amendment of the decree with a view to the plaintiff being made liable for the balance of the ad valorem court-fee. The learned Munsif thereupon referred to the judgment of his predecessor and the decree prepared and he took the view that the decree was not in conformity with the judgment and he proceeded to amend the decree so as to tax Rs. 107-8-0 against the defendant instead of Rs. 7-8-0 on account of the court-fee payable in the suit. It is against this order that the present application is filed under S. 115 on the ground that the learned Munsif had no jurisdiction to amend the decree because the decree was already in conformity with the judgment.

A preliminary objection is taken to the maintainability of the present application on the ground that it has been held by the High Court at Madras that the amended decree was appealable under S. 96, Civil P. C. It is therefore contended that as the present applicant had another remedy available to him he should not be permitted to rely upon S. 115. On the other hand, learned counsel for the applicant has pointed to the fact that the view that an appeal lies from the amended decree is not held by all the High Courts and the further fact that in numerous cases applications have been entertained by this Court under S. 115 against orders of amendment of decrees made under S. 152. In my opinion there is no substance in the preliminary objection. Coming to the merits of the application learned counsel for the applicant has referred to 38 ALL 469,[1] the head-note of which runs as follows :

In a suit brought in forma pauperis, the plaintiff succeeded only in part and failed as to the rest of the claim; the lower Court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of court-fees which would have been payable on the plaint. *Held* that the court-fees payable on the plaint should be appor-

1. ('16) 3 AIR 1916 All 327 : 35 I C 46 : 38 All 469 : 14 A L J 657, Ganga Dahal Rai v. Mt. Gaura.

to two of the most recent cases of this Court. In one recent case of this Court, 1939 O W N 1132,[1] it was held that

> the special privilege of the press is a time-worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court.

We might say further that so far from there being any special privilege of the press we are of opinion that there is on the other hand a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as prejudice to the course of litigation. The real test in cases of contempt has been clearly laid down in another recent case of this Court, 1940 O W N 491,[2] in which it was held that

> the question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice, and on the same principle, it is contempt of Court to make a speech tending to influence the result of a pending trial, whether civil or criminal, or to deliver a speech at a meeting.

As remarked in a case quoted at p. 174 of the Law of Contempt of Court by Tek Chand:

> Whether the articles will in fact prejudice the defendants or not, or scare away their witnesses, or lead them to compromise the suit, is not the real and proper test in such a case. The Court has to read the articles and see whether the articles may have that effect, and thereby tend to interfere with the proper course of justice.

On a full consideration of this leaderette, both the headline and the contents, we are quite clear in our minds that it does tend to interfere with the administration of justice by suggesting that the complainant is the "King of Liars" and inferentially that anybody who comes forward to support him must necessarily be a liar, and further conveying a threat of future proceedings against the complainant and possibly even the witnesses in case the complainant's case under S. 500 should not succeed. We would further refer at this stage to an argument put forward that the opposite parties are entitled to some sort of extra consideration because this article is not with reference to some litigation concerning third parties but is with reference to a complaint filed against the editor and the printer of the paper themselves. So; far from considering that this is in any way a point in favour of the respondent, we consider that it greatly aggravates the offence. What it comes to is that the opposite parties have taken advantage of their position to act in such a way as is likely to interfere with the course of justice. They are no better off than they would have been had they printed handbills in the same terms as this leaderette and posted them up on the walls of buildings in Lucknow.

When the arguments of this case were coming to a close and it became apparent to learned counsel for the opposite parties that we were of opinion that the respondents had been guilty of gross contempt, learned counsel asked us to grant time for the making of an application by way of apology. We allowed time and an application has now been put before us signed by both the opposite parties in which they state that they acted in ignorance and had no intention to commit any contempt of Court by prejudicing the trial of the complaint under S. 500. They say further that they express their regret and offer an unqualified and unconditional apology for their act which they have unfortunately done in good faith. They throw themselves completely at the mercy of the Court and pray that they may be pardoned for the offence and state that they undertake not to repeat it. We might perhaps have been inclined to give some weight to this application had the accused applied at an earlier stage stating that they had no intention of prejudicing the trial of the case under S. 500, Penal Code. It is true that the proviso to S. 3, Contempt of Courts Act, seems to contemplate an apology at a late stage in view of its terms which are as follows :

> Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

But we are inclined to think that where the accused takes such action as any reasonable man must realize to be likely to prejudice the trial of a case and where instead of apologising at the earliest opportunity he or his counsel contends most strenuously that no contempt has been committed, his apology can only be regarded as an afterthought put forward in the hope of avoiding

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1. ('40) 27 A I R 1940 Oudh 137 : 185 I C 342 : 15 Luck 268 : 41 Cr L J 169 : 1939 O W N 1132, District Magistrate, Kheri v. Hamid Ali.
2. ('41) 28 A I R 1941 Oudh 14 : 188 I C 408 : 41 Cr L J 584 : 1940 O W N 491, Radha Krishna v. Raja Ram.

case the complainant's case under S. 500 should not succeed, amounts to contempt of Court. [P 69 C 1]

(b) Contempt of Courts Act (1926), S. 3, Proviso — Apology at late stage—Value of.

Where the accused takes such action as any reasonable man must realize to be likely to prejudice the trial of a case and where instead of apologizing at the earliest opportunity he or his counsel contends most strenuously that no contempt has been committed, his apology can only be regarded as an afterthought put forward in the hope of avoiding the wrath to come. [P 69 C 2, P 70 C 1]

Nasirullah Beg — for Applicant.

K. P. Misra and Shahenshah Husain Rezavi — for Opposite Party.

Order.—This is an application under S. 2, Contempt of Courts Act, by Hakim Qari Nasir Ahmad, editor of the "Hamdam," Lucknow, against Anis Ahmad Abbasi, editor and publisher, and also against Mohammad Idris, printer of the "Haqiqat," another newspaper of Lucknow. The facts which have given rise to this application are as follows: On 23rd July 1940, the "Hamdam" published an account of an interview between the Sunni leader Maulana Abdul Shakur and certain Punjab Khaksar leaders said to have taken place at Lucknow. In reply to this article there was published in the "Haqiqat" on 25th July 1940, over the signature of one Haji Mohammad Kamil an article headed "Lies told by the 'Hamdam,' King of Liars." In this article it was alleged that the whole account of the interview in the "Hamdam" of 23rd July was a fabrication. On 30th July 1940 the editor of the "Hamdam" filed a complaint in Court against the editor of the "Haqiqat," the printer of the "Haqiqat" and the said Mohammad Kamil under S. 500, I. P. C., and the Court directed the issue of summonses to the accused persons. This was the situation when on 3rd August 1940, a short editorial paragraph extending across two columns was published in the "Haqiqat" with the heading "*Jhuton ke Badshah ka dawa: Haqiqat ke khilaf mukaddama.*" In the short editorial paragraph which follows the editor remarked that:

The editor of the "Hamdam" has filed a complaint against the editor of the "Haqiqat" and Haji Mohammad Kamil under S. 500. Many people are asking about this case. We desire to inform our friends that this case will be fought with all our strength and if we prove in the Court that the "Hamdam" is a liar, after that by the grace of God there will be a suit filed by us for damages and costs. The chain of litigation will not end there. We gladly accept the challenge which has been given to us. We have not yet received the summonses but are awaiting them eagerly.

It is in respect of this leaderette that the present application is filed, and it is alleged that it falls within the mischief of the law of contempt and that it was clearly intended or at any rate likely to prejudice the trial of the case pending under S. 500, I. P. C., in the Court of the Additional City Magistrate of Lucknow. Learned counsel for the applicant contends that the clear intention of this article is to suggest that the criminal case of defamation which has been filed is a case filed by someone who deserves the title of "king of liars." The necessary inference is that his case must be false and that anybody who gives evidence in his support or any counsel who appears for him is someone who is aiding a person deserving the name of liar. He further urges that apart from the inferences obviously to be drawn from the first headline with its mark of exclamation at the end, the statement in the body of the article, even if it is no more than the statement of the legal rights of the writer in case of his success in the criminal case, is also intended to or likely to convey a threat both to the complainant and to any person who may come forward to give evidence on his behalf, and is therefore clearly calculated to prejudice and interfere with the course of justice. On behalf of the opposite party it has been argued at quite considerable length that the reference to the "Hamdam" as "King of Liars" in the headlines of this editorial paragraph has no particular significance but is merely a repetition of the epithet attached to the name of the "Hamdam" in the previous article. It is denied that the headline can have any of the effects suggested and the same defence is put forward in regard to the remarks in the body of the article.

Learned counsel for the applicant has drawn our attention to a series of cases on the law of contempt of Court beginning with the well-known case of *Read* v. *Huggonson* decided some 200 years ago by Lord Hardwicke in which he laid it down that there were three different sorts of contempt: (a) scandalizing the Court itself, (b) cases in which parties concerned in causes are abused and thereby a contempt of the Court is committed, and (c) those cases in which there is contempt of Court by prejudicing mankind against persons before the cause is heard. The simple question in the present case is whether the writing published is calculated to obstruct or interfere with the due course of justice. If it is, it amounts to a contempt of Court. We do not think it is necessary in the present case to discuss any of the cases to which reference has been made though we may refer with advantage

to two of the most recent cases of this Court. In one recent case of this Court, 1939 O W N 1132,[1] it was held that

> the special privilege of the press is a time-worn fallacy, and the sooner the misconception that the press is not accountable to the law is removed the better it will be. No editor has a right to assume the role of investigator or try to prejudice the Court against any person. Writing and publishing an article in a newspaper likely to prejudice the course of justice relating to a pending case amounts to a contempt of Court.

We might say further that so far from there being any special privilege of the press we are of opinion that there is on the other hand a special responsibility affecting the editor of a newspaper, namely that he is in duty bound always to bear in mind the danger of prejudicing the course of justice by the publication of articles in his newspaper which though innocent in appearance may easily be so read by members of the public as prejudice to the course of litigation. The real test in cases of contempt has been clearly laid down in another recent case of this Court, 1940 O W N 491,[2] in which it was held that

> the question in all cases of comment on pending proceedings is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice, and on the same principle, it is contempt of Court to make a speech tending to influence the result of a pending trial, whether civil or criminal, or to deliver a speech at a meeting.

As remarked in a case quoted at p. 174 of the Law of Contempt of Court by Tek Chand:

> Whether the articles will in fact prejudice the defendants or not, or scare away their witnesses, or lead them to compromise the suit, is not the real and proper test in such a case. The Court has to read the articles and see whether the articles may have that effect, and thereby tend to interfere with the proper course of justice.

On a full consideration of this leaderette, both the headline and the contents, we are quite clear in our minds that it does tend to interfere with the administration of justice by suggesting that the complainant is the "King of Liars" and inferentially that anybody who comes forward to support him must necessarily be a liar, and further conveying a threat of future proceedings against the complainant and possibly even the witnesses in case the complainant's case under S. 500 should not succeed. We would further refer at this stage to an argument put forward that the opposite parties are entitled to some sort of extra consideration because this article is not with reference to some litigation concerning third parties but is with reference to a complaint filed against the editor and the printer of the paper themselves. So; far from considering that this is in any way a point in favour of the respondent, we consider that it greatly aggravates the offence. What it comes to is that the opposite parties have taken advantage of their position to act in such a way as is likely to interfere with the course of justice. They are no better off than they would have been had they printed handbills in the same terms as this leaderette and posted them up on the walls of buildings in Lucknow.

When the arguments of this case were coming to a close and it became apparent to learned counsel for the opposite parties that we were of opinion that the respondents had been guilty of gross contempt, learned counsel asked us to grant time for the making of an application by way of apology. We allowed time and an application has now been put before us signed by both the opposite parties in which they state that they acted in ignorance and had no intention to commit any contempt of Court by prejudicing the trial of the complaint under S. 500. They say further that they express their regret and offer an unqualified and unconditional apology for their act which they have unfortunately done in good faith. They throw themselves completely at the mercy of the Court and pray that they may be pardoned for the offence and state that they undertake not to repeat it. We might perhaps have been inclined to give some weight to this application had the accused applied at an earlier stage stating that they had no intention of prejudicing the trial of the case under S. 500, Penal Code. It is true that the proviso to S. 3, Contempt of Courts Act, seems to contemplate an apology at a late stage in view of its terms which are as follows :

> Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court.

But we are inclined to think that where the accused takes such action as any reasonable man must realize to be likely to prejudice the trial of a case and where instead of apologising at the earliest opportunity he or his counsel contends most strenuously that no contempt has been committed, his apology can only be regarded as an afterthought put forward in the hope of avoiding

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1. ('40) 27 A I R 1940 Oudh 137 : 185 I C 342 : 15 Luck 268 : 41 Cr L J 169 : 1939 O W N 1132, District Magistrate, Kheri v. Hamid Ali.
2. ('41) 28 A I R 1941 Oudh 14 : 188 I C 408 : 41 Cr L J 584 : 1940 O W N 491, Radha Krishna v. Raja Ram.

the wrath to come. We think therefore that this is a case of gross contempt which the opposite parties must purge by a suitable sentence. The question then is what is the proper measure of punishment for the contempt which has been committed in the present case. The maximum punishment provided by S. 3 is simple imprisonment for a term which may extend to six months or fine which may extend to Rs. 2000 or both. Bearing in mind the status of the two opposite parties we think that the ends of justice will be met by inflicting a fine of Rs. 200 on Anis Ahmad Abbasi and of Rs. 100 on Mohammad Idris. The opposite parties shall also pay the costs incurred by the applicant which we assess at Rs. 50. We order that the opposite parties shall pay the fines and the costs into this Court within two weeks.

D.S./R.K. *Order accordingly.*

A. I. R. 1941 Oudh 70

YORKE J.

Rani Kaniz Baqar — Plaintiff — Appellant

v.

Mt. Lakhraji w/o Cheddi — Defendant —Respondent.

Second Rent Appeals Nos. 62 to 67 and 70 to 72 of 1937, Decided on 25th September 1940, against order of District Judge, Gonda, D/- 3rd August 1937.

Oudh Rent Act (22 of 1886), S. 127 as amended by Act 4 of 1921—Person against whom ejectment decree was passed retaining possession — Aforesaid person is not entitled to possession from date of decree and therefore falls within mischief of Section 127.

A person against whom a decree for ejectment has been passed is not entitled from the date of the decree, to possession of land in respect of which his ejectment has been ordered. Consequently where he retains possession of the land in spite of the ejectment decree he falls within the mischief of S. 127 and is liable to have a decree passed against him for rent at a fair and equitable rate and is also liable to ejectment : 15 O C 311, *Held no longer good law* ; A I R 1926 Oudh 555 and A I R 1930 Oudh 202, *Disting.* [P 72 C 1]

Haider Husain and H. H. Zaidi — for Appellant.

H. D. Chandra — for Respondent.

Judgment. — These are nine connected appeals from the decrees of the District Judge of Gonda dismissing the plaintiff's suits under S. 127, Oudh Rent Act, which had been decreed by the trial Court of an Assistant Collector, first class of Gonda District. The circumstances out of which these appeals have arisen, put shortly, are as follows: On 18th November 1869, the predecessors of the present defendants-respondents got a decree from the settlement Court in the capacity of "dahiyak" holders allowing them 10 per cent. of the profits. This decree was interpreted in the Court of the Judicial Commissioner of Oudh on 13th July 1913, as a decree granting heritable non-transferable rights commonly called the rights of perpetual lessees, in fact a kind of occupancy tenancy. In 1917 Raja Abdul Hasan Khan, instituted a suit for ejectment under S. 52, Oudh Rent Act, and obtained a decree, but it is not in dispute that this decree was never put into execution. There is no evidence whatsoever as to the circumstances in which or the reasons on account of which the decree was not executed and the defendants of these suits not ejected, but it is probable that it had some connexion with other litigation which was going on during those years. It is stated that the defendants, somewhere about 1910, purchased proprietary rights in a court sale, so that about the same time when this ejectment decree was obtained they combined the capacities of proprietors and perpetual lessees, and that may explain why, although a decree for ejectment was obtained, it was never executed. Subsequently in 1926 the defendants whose purchase of proprietary rights had led to litigation right up to the Privy Council, lost those rights. In the same year they were entered as tenants "*bila tasfia lagan*," and continued to be so entered up to the present day. The learned Assistant Collector who tried the suit and gave a decree for rent (damages for use and occupation) and ejectment under S. 127 held, relying on the order in the correction of papers case of 1926 and on the rest of the history of the case, that the defendants were "*bila faisla*" tenants, and decreed the plaintiff's suit accordingly.

In the appeals to the lower Court the contention put forward was that as the defendants were never actually ejected in spite of the decree of 1917, they continued to hold the plots in suit in their former capacity of perpetual lessees and hence were not liable to ejectment on a suit under S. 127, Oudh Rent Act. This is the view which has found favour with the lower appellate Court. The District Judge in the body of the judgment wrote as follows :

The question is can the defendants be ejected under S. 127? The decree of 1917 not having been put in execution can have no effect now. The appellants hold the same position as they held before. Being perpetual lessees they could not be ejected under S. 127, even if they refused to pay

the rent demanded. This happened in 1917 and the proprietor himself thought that the appellants should be ejected by a suit under S. 52.

It is argued that on refusal to pay the demanded rent the appellants ceased to have any right to retain possession of the land and so could be ejected under S. 127. They certainly ceased to have any right, but it does not mean that they became trespassers. They ought to be ejected in a regular manner and so long as it is not done they would have the same rights.

The argument which finds a place in this portion of the lower appellate Court's judgment would certainly have been very effective had S. 127 still been worded as it was in 1917, but that is not the case. On behalf of the appellant strong reliance is placed on this remark of the learned District Judge that defendants certainly ceased to have any right, and it is contended that the further remark which follows that the defendants did not become trespassers (within the meaning of S. 127) is not sound. I have been shown a series of cases ending with the case relied upon by the lower appellate Court. In 15 O C 311[1] it was held that

where a tenant was ejected formally under the provisions of S. 60, Oudh Rent Act, but nevertheless continued to cultivate the holding in question without any break for any period, however small, held, that the provisions of S. 127, Oudh Rent Act, could not apply to such a case.

That was a case of 1912, and with the greatest respect I do not think that that decision is any longer sound in view of the present wording of S. 127. In point of fact I doubt its inherent soundness. If an ejectment decree is put into execution and formal "dakhl" is given, the tenant then and there ceases to be in possession, and any subsequent taking of possession by the ex-tenant is within the meaning of S. 127 taking possession without being entitled to such possession. The next case quoted was 3 O W N Sup 162[2] in which it was held that

where a suit by a tenant to contest the notice of ejectment has failed but the landlord does not succeed in ejecting him and in getting possession of the land, suit by the landlord against the tenant for ejectment from the land in his possession is not maintainable in the civil Court. As long as the tenant continues in the occupation of his holding and is not legally ejected he cannot be treated as a trespasser.

This decision appears to me to be really irrelevant to the question for decision in the present case. The real ratio is that the defendant was a person who was either a tenant or a person to whom the provisions of S. 127, Oudh Rent Act, were applicable, and therefore no suit for ejectment lay in a civil Court. In this particular case the formal "dakhl" was found to be a fictitious proceeding, and therefore the tenant had never actually been ejected at all, but again this was a suit to which the provisions of the Oudh Rent Act prior to its amendment were applicable. Lastly reliance has been placed on 7 O W N 330[3] in which it was held that

where a notice of ejectment is issued against a tenant and the notice is not contested or if a suit is instituted to contest the notice but is unsuccessful and the notice is upheld, in either of these cases the tenancy is determined only when the tenant actually surrenders possession of the holding or when proceedings for actual ejectment are taken under S. 60, Oudh Rent Act. Where the tenant does not surrender possession of the holding and the landlord does not take proceedings under S. 60, Oudh Rent Act, the tenant must be deemed to have continued as a tenant holding over and cannot be considered to be a trespasser and S. 127 does not apply.

Reliance was placed on the case in 3 O W N Sup 162[2] referred to above. No reference was made in this case to the terms of S. 127, Oudh Rent Act, and the decision is founded purely on the proposition that the legal status of the tenant (or in the present case perpetual lessee) does not change by reason of a decree for ejectment, unless that decree is actually put into execution. Learned counsel for the appellant contends that this case also is founded on the original wording of S. 127 as the case related to a compromise dated 18th April 1921, whereas the amending Act (Act 4 of 1921) had not received the assent of the Governor of the United Provinces until 28th November 1921, and of the Governor-General until 18th January 1922, and was only published under S. 81, Government of India Act on 11th February 1922. The old wording was as follows :

Any person in possession of land occupied without consent of the landlord shall at the option of the person entitled to eject him as a trespasser be treated as a tenant, and shall thereupon be liable, etc.

After the amending Act the present wording was substituted and the section now runs as follows :

A person taking or retaining possession of land without being entitled to such possession may at the option of the person entitled to eject him as a trespasser be treated as a tenant and shall thereupon be liable, etc.

Learned counsel contends that as the section is now worded a tenant holding over

1. ('12) 15 O C 311 : 17 I C 464, Deputy Commissioner, Fyzabad v. Gur Dayal Singh.
2. ('26) 13 AIR 1926 Oudh 555 : 97 I C 893 : 3 O W N Sup 162, Anporna Kuer v. Ram Ratan Singh.
3. ('30) 17 AIR 1930 Oudh 202 : 123 I C 49 : 7 O W N 330, Haraj Kunwar v. Samad.

whether after formal ejectment or without formal ejectment ever having taken place, comes directly within the scope of S. 127 as being a person retaining possession of land without being entitled to such possession. He points to the remark of the learned District Judge himself where he says that after the ejectment decision of 1917 the defendants ceased to have any right. A further contention is put forward that this being a case of ejectment this Court is just as much bound by the entries in the revenue papers as the trial Court was, save only where the defence is a plea of proprietary title. The entry of the defendants as "*bila faisla*" tenants was made under an order of Court in 1926, and if the defendants were not satisfied with that entry, of which they must be presumed to be aware, they should have taken steps to get rid of it.

In my opinion it is not possible to hold that S. 127 as now worded is inapplicable to the circumstances of the present case. The result of the decree of 1917 is at any rate this much, that since the defendants are persons whose ejectment has once been ordered, from the date of that decision (subject of course to any appeal that might have been against it) the defendants are persons who are not entitled to possession of the land in respect of which their ejectment has been ordered. They have none the less retained possession of that land, and in my opinion they fall within the mischief of S. 127, and they are liable to have a decree given against them for rent at a fair and equitable rate, and they are also liable to ejectment. In my opinion the learned District Judge has wrongly held that the defendants could not be ejected under S. 127. I accordingly allow these appeals with costs of this and the Court below, set aside the decrees of the learned District Judge and restore those of the trial Court.

G.N./R.K. *Appeals allowed.*

A. I. R. 1941 Oudh 72

BENNETT J.

Mohammad Iftikhar Khan and others —Appellants

v.

Mohammad Hayat Khan and others — Respondents.

Second Appeal No. 370 of 1937, Decided on 19th September 1940, against order of Civil Judge, Gonda, D/- 3rd June 1937.

(a) Cosharers—Sale of fractional share means sale of that share out of entire khata and not out of area remaining after transfers of specific plots.

Fractions relate by their very nature to some one whole entity and it could not be that that entity be something for one sub-division of the khata of some cosharers but quite another for another sub-division of other cosharers. The sale of a fractional share means the sale of that share out of the entire khata and not out of the area remaining after transfers of specific plots.

[P 73 C 2]

(b) Civil P. C. (1908), O. 41, R. 2 — Grounds not set forth in memo of appeal — Leave to argue cannot be granted in absence of particular reasons.

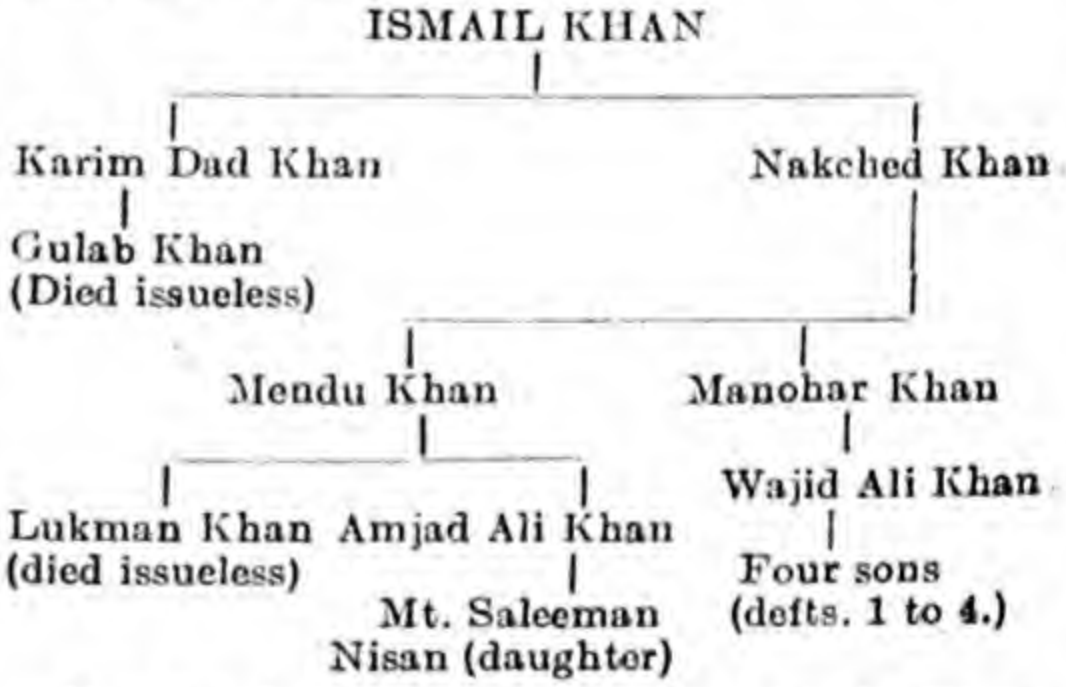
A Court cannot give leave to an appellant to argue on grounds not set forth in the memorandum of appeal unless particular reasons are shown why the leave of the Court should be granted.

[P 74 C 1]

Haider Husain—for Appellants.

Mohammad Ayub — for Respondents 1, 2, 4 to 10, 11/1 to 11/6, 13 and 14.

Judgment.—This is a second civil appeal against the judgment and decree passed by the learned civil Judge of Gonda on 3rd June 1937, upholding the decree passed by the learned Munsif of Gonda on 3rd September 1936, decreeing in part a suit for partition. The suit was brought by Hayat Khan for partition of an under-proprietary khata of 21.99 acres. Hayat Khan claimed a 1 anna 9 pies share in this khata. The Munsif held that he had this share, but did not decree him an area to the extent claimed by him. The facts of the case have not been very clearly explained in the judgments of the lower Courts. The learned counsel for the appellants, who are Nos. 1 to 4, 6 to 16, 18 to 21, 24, 25 and 27 of the defendants, has explained them in the following way. He has first of all given the following pedigree which will help to elucidate the case.



On the death of Ismail Khan khata No. 2 consisting of 21.99 acres was divided equally between his two sons, that is, each had an 8 annas share. Karim Dad Khan's share was inherited by his son, Gulab Khan, and on Gulab Khan's death this 8 annas share devolved on the sons of Mendu Khan and Manohar Khan, the former obtaining a 2 annas share each and the latter, that is

Wajid Ali Khan, obtaining a 4 annas share. Altogether therefore at that time Wajid Ali Khan had an 8 annas share, while Lukman Khan and Amjad Khan had a 4 annas share each. Wajid Ali Khan transferred a 3 annas 6 pies share and had consequently only a 4 annas 6 pies share left. His four sons inherited this equally on his death, that is to say, their shares were 1 anna 1½ pies each. On the death of Lukman Khan, his share went to his brother, Amjad Ali Khan, who thus became possessed of an 8 annas share. On 26th July 1901, Amjad Ali Khan transferred a 1 anna share to Mohammad Husain by a sale deed, Ex. 9. On 6th August 1910, Mohammad Husain sold this 1 anna share to the plaintiff and a third person named Fazal Ali Khan by a sale deed, Ex. 1. On 19th December 1913, Fazal Ali Khan transferred his half anna share thus obtained to the plaintiff who in this way came to hold the whole of the 1 anna share originally transferred by Amjad Ali Khan in 1901.

Amjad Ali Khan was left with a 7 annas share and this he transferred in part to his daughter, Mt. Saleeman Nisan, and in part to defendants 1 to 4, sons of Wajid Ali Khan. He transferred to the latter a 3 annas share, that is to say each got a 9 pies share in addition to the share of 1 anna 1½ pies inherited by each of them from their father Wajid Ali Khan. One of these four defendants, Abdul Ghaffar Khan, (defendant 4 now dead and represented in this appeal by his minor sons) transferred a 9 pies share out of his 1 anna 10½ pies share to the plaintiff who thus became possessed of a 1 anna 1½ pies share. The facts stated above are not in dispute. It appears, however, that in addition to the above transfers there were a number of other transfers of specific plots which affected the shares of certain shareholders. It is said that mutation was effected on these transfers of specific plots, that is to say, the transferees were shown as holders of these plots, but at the same time the shares of the transferors remained recorded as before the mutation Court having no power to alter them. The result was that while certain persons continued to be recorded in the revenue papers as holding a certain share, that share was actually diminished as a result of the transfers of specific plots, that is the share recorded was in excess of the real share.

It is said in particular that although Abdul Ghaffar Khan purported to have a 1 anna 10½ pies share when he transferred a 9 pies share to the plaintiff, he had not actually a 1 anna 10½ pies share because his share had been reduced by various transfers. At the same time it is admitted that he still had left at least a 9 pies share to transfer. There is no dispute with regard to the 1 anna share obtained by the plaintiff from Mohammad Husain and Fazal Ali Khan in 1910 and 1913. There had been no transfers to affect this share. The dispute between the parties relates to the 9 pies share sold to the plaintiff by Abdul Ghaffar Khan. The contention of the appellants was that since Abdul Ghaffar Khan had not as much as a 1 anna 10½ pies share when on 11th May 1925 he transferred a 9 pies share to the plaintiff, that 9 pies share should not be considered to be a 9 pies share of the original 16 annas, but only a 9 pies share in the 1 anna 10½ pies of Abdul Ghaffar Khan as diminished by the transfers referred to. That is to say it is argued that there should be a reduction in the nine pies proportionate to the reduction in the 1 anna 10½ pies. Learned counsel for the appellants has suggested that if this view is accepted the case should be remanded to the trial Court to ascertain what on this basis a 9 pies share would amount to.

The same argument was put forward in the lower Courts, but did not find favour there. The civil Judge has explained the appellants' contention by a simple illustration. He takes the case of a khata of 64 acres of which 24 acres are sold. A 4 annas share is subsequently sold. According to the appellants' contention that 4 annas share really means a quarter of what is left in the khata after the sale of 24 acres, that is a quarter of 40 acres and not a quarter of the original khata of 64 acres. The learned civil Judge thought that it would be quite impossible to accept the appellants' contention. He observed that "fractions relate by their very nature to some one whole entity" and that it could not be that that entity "be something for one sub-division of the khata of some cosharers but quite another for another sub-division of other cosharers." If the appellants' contention were accepted, he observed, one cosharer's sale of a 4 annas share would mean something and another cosharer's sale of a 4 annas share would mean quite another. He agreed with the Munsif that the sale of a fractional share meant the sale of that share out of the entire khata and not out of the area remaining after transfers of specific plots.

Learned counsel for the appellants concedes that there is no authority which would

support a contrary view. The suggestion made on their behalf is apparently a novel one. I can myself see no good reason for dissenting from the view taken by the lower Courts. It is obvious that complications might ensue if any other view were taken. There appears to be no serious objection to the view which has found favour with the lower Courts. As the learned counsel for the appellants admits, while the revenue papers continue to show the original share of a transferor even after a transfer diminishing that share has taken place, they also show what transfers of specific plots have taken place. It is possible therefore for a would-be transferee to ascertain without much difficulty what share, or at least approximately what share, remains in his transferor's hands. Actual changes of the shares resulting from a transfer of specific plots would not, I understand, be made until partition. But all that is necessary for a would-be transferee to consider is whether his transferor has, after previous transfers of specific plots are taken into consideration, the share which he desires to purchase. It appears to me that more difficulties are likely to arise from accepting the appellants' contention than from adopting the normal method of calculation based uniformly on a 16 annas unit, and I am therefore not inclined, in the absence of any authority to the contrary, to adopt the other view. I think the lower Courts decided the point rightly. I have little doubt also that the parties to the sale understood that what was being sold was a 9 pies share out of the whole 16 annas unit.

The lower appellate Court also considered the effect of an arbitration award between certain defendants, and agreed with the trial Court also on this point. Learned counsel for the appellants proposed to argue against the finding of the lower Courts with regard to this, but he conceded that the question was not included in any of the grounds of appeal. He referred to the provisions of O. 41, R. 2, Civil P. C., under which a Court can give leave to an appellant to argue on grounds not set forth in the memorandum of appeal, but he could not suggest any particular reason why the leave of the Court should be granted in this case. I saw no reason, therefere, to grant him leave. This appeal is accordingly dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 74

YORKE J.

Sheo Narain and others — *Plaintiffs* — Applicants

v.

Bageshur and others — *Defendants* — Opposite Party.

Civil Revn. Appln. No. 44 of 1937, Decided on 27th September 1940, from order of Addl. Civil Judge (as Judge of Small Cause Court), Unao, D/- 16th January 1937.

Limitation Act (1908), Art. 75 — Waiver — Instalment bond with default clause — Creditor not suing within limitation on default of first two instalments but accepting part of first instalment towards payment of sum due and then suing on subsequent defaults for whole amount—Held that there was waiver in respect of option arising on first two defaults.

Certain sum was payable in a number of instalments and it was provided that in case of default in payment of any instalment the obligee would have the option to recover the whole amount. On default of first two instalments, the creditor did not bring a suit within three years from the respective defaults but accepted part of first instalment after the default in second instalment. Subsequently, on default of the subsequent instalments, he brought a suit for the whole amount excluding the first two instalments which were time-barred.

Held that there was a waiver on the part of the plaintiff in respect of the option which had arisen to him on the first two defaults : A I R 1932 Oudh 176 ; A I R 1934 Oudh 455 and A I R 1936 Oudh 384, *Rel. on.* [P 76 C 2]

Siraj Husain — for Applicants.

Parmatma Saran Dwivedi — for Opposite Party Nos. 1 and 3.

Order.—This is an application on behalf of the plaintiff under S. 25, Provincial Small Cause Courts Act, from the decision of the additional civil Judge of Unao exercising the powers of a Small Cause Court. The plaintiff had instituted a suit to recover Rs. 475 on the basis of an instalment bond said to have been executed on 4th August 1932 and providing for payment of the amount due by a first instalment of Rs.22-8-0 and subsequent instalments of Rs. 20. The first instalment fell due on 13th December 1932, the next on 9th May 1933, the third on 1st December 1933, and subsequent instalments up to the date of suit in May 1934, December 1934, May 1935, December 1935 and May 1936. The suit was filed on 30th November 1936 and the plaintiff claimed the whole amount due, excluding the first two instalments, which were, of course, time-barred and which the plaintiff alleged to have been in any case paid up. The cause of action was stated in the plaint to have arisen on 3rd December 1933, in respect of the default of 1st December 1933, and on dates subsequent

to each of the other five instalments prior to the date of suit.

The learned Judge of the Court below held that the bond was duly executed and was for consideration, that is in lieu of earlier debt. On issue 2, "Were the first two instalments paid? If so, its effect?", he held that only Rs. 20 were paid which were credited towards the first instalment of Rs.22-8-0. That payment was held to have been made and accepted on 24th August 1933, subsequent to the default on the second instalment which was due on 9th May 1933. The learned Judge therefore held that the first two instalments had not been paid in full and therefore the averment in the plaint on which the cause of action was laid as arising on the third default was not correct. He proceeded to hold that in these circumstances the plaintiff could not be deemed to have waived the option of recovery of the whole amount outstanding which arose on the date of the first and second defaults. The sole question which is to be decided on this application is whether in the circumstances of the present case it has been rightly held that the plaintiff is not to be deemed to have waived the benefit of the provision, and whether therefore the plaintiff's suit which is based on each of the subsequent defaults prior to the date of suit should not have been decreed. Learned counsel for the plaintiff-applicant relies on the principles underlying the decision in 9 O W N 250,[1] 11 O W N 1191[2] and 1936 O W N 665.[3] In the first of these cases the head-note runs as follows:

> In order to claim the benefit of Art. 75, Lim. Act, it is necessary for the obligee to show that he has waived the benefit of the provisions entitling him to sue on an earlier default and that he bases his claim on the subsequent default in respect of which there is no waiver. It is not possible to lay down any hard and fast rule as to what would or would not constitute a waiver within Art. 75. Where the principal amount due on a money bond is payable in four annual instalments and it is provided that in case of default in payment of any instalment the obligee would have the option to recover the whole amount, a suit by the obligee not basing his claim on the provision entitling him to institute a suit on the occurrence of the first default but showing that the cause of action accrued to him on the defaults which occurred in case of each of the last three instalments must be held to be under Art. 75 and the plaintiff should be deemed to have waived the benefit of the provisions which entitled him to sue for the whole amount on the occurrence of the first default, notwithstanding the fact that he states that he has been paid his first instalment and fails to prove the same.

The main distinction between that case and the present case is that in the present case the suit is based upon the option although the cause of action is shown as having accrued on the defaults which occurred in the case of the last six instalments and not of the first two. The principle enunciated in this case is, to my mind, fairly clearly applicable to the present case. The learned Judge recognized that the plaintiff had pleaded payment of the first instalment and had been unable to prove it to the satisfaction of the lower Court, and he remarked that the only effect of it was that it was not possible to say that the plaintiff waived the benefit of the provision in respect of the first instalment. I think that by this he meant that the effect really was that the plaintiff had not claimed waiver in his plaint. He went on to hold that the plaintiff was to be deemed to have waived the claim arising on the first default (in the present case it would be on the first two defaults) because he based his cause of action on the subsequent defaults, and the option which arose on those subsequent defaults. The wording is not too satisfactory in one or two places but this is what I understand the learned Judge to have meant. He says at another place in the judgment:

> The very fact that the cause of action has been based on the defaults which occurred in the case of each of the last three instalments shows that the plaintiff placed reliance on each of the defaults and did not avail himself of the provision which gave him the option to sue for the whole amount on the happening of the first default.

It might perhaps have been supposed that a distinction could be drawn between that case and the present case due to the fact that when the suit with which the learned Judge was dealing was filed all four instalments due under the bond had become due, and therefore the decision did not go far enough to cover a case in which at the date of the suit only some of the instalments had already fallen due and many others were still to fall due in the future. In 1936 O W N 384[3] however it was held by the same learned Judge:

> In a suit on an instalment bond where the obligee is given the right to sue for the whole amount on the occurrence of default in payment of any instalment it is open to him to waive the benefit of the provision on the occurrence of default in payment of an instalment and yet to avail himself of that provision when a similar default takes place in the payment of a subsequent instalment, provided the claim is within time. What amounts to waiver must depend upon the circumstances of each case

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1. ('32) 19 A I R 1932 Oudh 176 : 137 I C 223 : 9 O W N 250, Nageshar Prasad Dube v. Bakridi.
2. ('34) 21 A I R 1934 Oudh 455 : 151 I C 852 : 11 O W N 1191, Gaya Din v. Khiali Ram.
3. ('36) 23 A I R 1936 Oudh 384 : 164 I C 431 : 1936 O W N 665, Jagat Jit Singh v. Manodat.

and it cannot be laid down as a general rule that wherever a person omits to claim a particular amount it must be held to constitute a waiver. A creditor need not adduce affirmative evidence in support of waiver, which generally is to be inferred from all the surrounding circumstances.

In that particular case, however, the learned Judge for practical purposes did base the conclusion that there had been waiver on the fact that the plaintiff had omitted to claim the amount due on the first instalment which had become time-barred. He took the view that the plaintiff was evidently aware of his right to sue on the earliest default, and that as he did not do so, and as he framed his plaint specially with an eye on the provisions of Art. 75 with a view to claim the whole of the amount of the bond (less that which had become time-barred) on the basis of the provision entitling the plaintiff to recover the whole amount on the occurrence of default in payment of any instalment, he must be deemed to have waived the exercise of the option on the first instalment. In 11 O W N 1191[2] the same learned Judge sitting in Bench with another Judge held that

if a certain amount is agreed to be paid by monthly instalments with a condition that in default in payment of any instalment, the whole remaining sum should become payable, the creditor may accept payment of instalments after due date, thereby impliedly waiving his right to sue for the whole amount due and may sue upon a subsequent default in payment of any future instalment. It is, however, not possible to lay down any hard and fast rule as to what would or would not constitute a waiver.

The general current of decisions in this Court is clearly in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation, and does not seek to found his cause of action on the earlier defaults. The question then is, are there any facts or circumstances in the present case which can lead to the inference that there has been a waiver on the part of the plaintiff ? In the light of the decision in 9 O W N 250[1] the view taken by the learned Judge of the Small Cause Court that in view of the fact that the plaintiff has pleaded payment he cannot be allowed to fall back on a plea of waiver is not sustainable. In the present case, we have it that the first instalment fell due in December 1932 and the second in May 1933. Despite the fact that the plaintiff had by the first default an option to sue for the whole amount at once, he did not institute any suit either before the second instalment fell due nor yet within the period of three years from the date of the first default. Similarly, in the case of the second instalment not only did he not institute a suit within the six months before the third instalment fell due nor within three years, but after this default had taken place, he also accepted payment of a sum of Rs. 20 towards the amount due on the bond. It was said by the lower Court that a part payment of an instalment after that instalment had fallen due does not amount to an implied waiver, whereas the acceptance of full payment of an instalment which had fallen in default would amount to a waiver. To my mind the matter should be looked at in a different way. The payment of Rs. 20 by the defaulting borrower afforded the creditor a good motive or a good reason for not instituting a suit against his debtor, and if the plaintiff had a good motive for not exercising the option, that very fact is a reason for supposing him to have waived it. Then again the learned Judge of the Court below has been led astray by thinking that the plaintiff has in effect based his cause of action on the first two instalments by alleging that those instalments had been paid. He says, "It is to be noted that in the present case the plaintiff has not omitted to claim these first two instalments." It is incomprehensible to me how a party can be said not to have omitted to claim instalments for which he deliberately says he makes no claim. The reasoning upon which therefore the learned Judge says that there could not be deemed to be any waiver by reason of the plaintiff not having omitted to claim those instalments is fallacious.

Learned counsel for the opposite party has argued that there is nothing whatsoever on the record to justify the view that there has been any waiver. On the other hand, there are the facts to which I have drawn attention above and the very frame of the plaint which is based on the defaults subsequent to the first and second defaults. In the light of the decisions of this Court to which I have referred above I am of opinion that the circumstances present in this case do bring it within the current of decisions in the cases quoted and make it obligatory upon me to hold that there was a waiver on the part of the plaintiff in respect of the option which had arisen to him on the first two defaults. The learned Judge of the Small Cause Court has wrongly dismissed the suit as being barred by limita-

tion. I set aside the order of the Court below and hold that the suit was not barred by limitation. As there are some points arising out of the plea that the defendants are agriculturists which are still to be decided, I remand the suit for disposal to the Court below. The applicant will in any event be entitled to his costs of this application.

D.S./R.K. *Suit remanded.*

A. I. R. 1941 Oudh 77

YORKE J.

Khadim Ali — Defendant — Appellant

v.

Jagannath, Plaintiff and others — Defendants — Respondents.

Second Appeal No. 137 of 1938, Decided on 16th September 1940, against order of Addl. Civil Judge, Bara Banki, D/- 6th April 1938.

(a) Oudh Laws Act (18 of 1876), S. 8 — Area outside urban area or abadi is not town.

The word "town" in S. 8, Oudh Laws Act, means nothing outside the urban area or abadi. Hence in the case of Fatehpur it is the abadi only which constitutes the town of Fatehpur, and the lands outside the abadi which form part of a revenue mahal and village are not town, and are therefore subject to the ordinary law as provided in Ss. 6 and 7, Oudh Laws Act: 7 O C 74 and 12 O C 1, *Rel. on.* [P 78 C 1]

(b) Oudh Laws Act (18 of 1876), S. 9 — Sale of under-proprietary tenure — Member of village under-proprietary community has preferential right to member of village proprietary community.

In the case of a transfer of property held under an under-proprietary tenure the order of priority is (1) cosharers of the sub-division or patti, that is the under-proprietary patti in order of their relationship to the vendor or mortgagor, (2) cosharers of the whole under-proprietary mahal in the same order, (3) any member of the village under-proprietary community, and (4) the proprietor, which would apparently mean any member of the village proprietary community. An under-proprietor has no right of pre-emption in respect of a transfer of proprietary property, but a proprietor has such right in the case of a transfer of property held under an under-proprietary tenure under clause 4. [P 79 C 1]

(c) Evidence Act (1872), S. 76—Copy of public document not bearing certificate required by S. 76 is inadmissible.

Where a copy of public document does not bear a certificate written at the foot of such copy that it is a true copy of such document and is not supported by the evidence of the person who prepared it, the copy is inadmissible in evidence. [P 79 C 1]

(d) Civil P. C. (1908), O. 41, R. 27—Document all along in possession of party not produced by him in trial Court — It cannot be allowed in appeal to fill up lacuna in evidence.

Where a document which was all along in the possession of the party, but was not produced by him in the trial Court as evidence of his title, the document cannot be allowed in appeal to fill up a lacuna in evidence. [P 79 C 2]

Akhtar Husain — for Appellant.

L. S. Misra — for Respondent 1.

Judgment.—This is a second appeal in a pre-emption suit relating to certain land in Fatehpur. Defendants 2 to 4, by a sale deed dated 11th June 1936, sold to the vendee appellant Khadim Ali proprietary plots in mahal Raja Amir Hasan Khan and under-proprietary plot in mahal chak Aima both situated in village Fatehpur for Rs. 2300 of which Rs. 1180 were left for redemption of a mortgage. Thereupon the present respondent 1 Jagannath instituted a suit for pre-emption alleging that the vendee Khadim Ali was a stranger and that he had a preferential right in respect of both the properties transferred by the sale deed. A number of pleas were raised which gave rise to the following among other issues:

(1) Has the plaintiff got a preferential right to pre-empt the property in suit?

(2) Is Fatehpur a town and not subject to right of pre-emption as pleaded? Its effect.

The remaining issues are no longer in dispute in this appeal. The trial Court held that the plaintiff had a preferential right and that the land in suit was not situated in a town and was therefore subject to a right of pre-emption. It held that the plaintiff was entitled to pre-empt on payment of the full amount of consideration, namely Rs. 2300. The learned additional civil Judge of Bara Banki in appeal has maintained the findings of the trial Court on the points raised in issues 1 and 2. The first question for decision in the suit as also in the appeal was really that which was raised in issue 2. The lower appellate Court has held that Fatehpur is a town but that the land in suit is part of the rural agricultural area, is situated outside the abadi and therefore any transfer of these plots is subject to a right of pre-emption. Learned counsel for the appellant has relied on the decision of a single Judge of this Court in 6 O W N 412[1] in which it was held that

Amethi being a town, the inhabitants thereof do not form a village community and any right of pre-emption which they may have belongs to them as a special custom and not as a matter of law.

Pullan J. remarked that

there can be no distinction drawn in my opinion between the land lying outside the town and the land lying inside it.

It seems that there was something special about the town of Amethi or else the

1. ('29) 16 A I R 1929 Oudh 278 : 118 I C 813 : 6 O W N 412, Mt. Mithan v. Mahabir.

attention of the learned Judge was not drawn to the cases which have been put before me. It would have appeared to me that the expression 'town' or 'city' which finds place in S. 8, Oudh Laws Act could in the case of Fatehpur, which was a town under the provisions of the Bengal Chaukidari Act (Act 20 of 1856), now replaced by the U. P. Town Areas Act of 1914, at best relate to that area which was included within the limits of the town as provided by S. 4 of the former and S. 3 of the latter Act. Learned counsel for the respondent has however referred me to two cases of the Judicial Commissioner's Court in which it was held that "town" in S. 8, Oudh Laws Act, means nothing outside the urban area or abadi. The learned Judicial Commissioners in 7 O C 74[2] at p. 76 remarked:

> When a word is not expressly defined in an Act it must be read in its popular, natural and ordinary sense unless there is reason upon the face of it to believe that it was not intended to bear that construction. In its popular signification a town means the space which, for the time being, is covered by, or occupied as accessory to, houses collected together in a mass, and in sufficient number to be ordinarily designated as a town; and includes unbuilt on lands that may be within the ambit of such collected mass of houses, but not lands outside such ambit, though within a borough: Stroud's Judicial Dictionary, S. V. Town.

This view was followed in a later Bench case of the same Court in 12 O C 1.[3] In the present case the evidence was clear and it was shown that the lands in suit lay outside the 'town' area which was confined to the abadi. In my opinion the lower appellate Court rightly held that it was the abadi only which constituted the town of Fatehpur, and the lands outside the abadi which formed part of a revenue mahal and village were not town, and were therefore subject to the ordinary law as provided in Ss. 6 and 7, Oudh Laws Act. The lower appellate Court therefore rightly held that there was a right of pre-emption arising on the sale of these plots. The second point which arose in the Courts below and which has again been argued at some length before me is whether the plaintiff has a preferential right over the vendee. It appears to me on a consideration of the judgment of the lower appellate Court that that Court had not got a very clear idea as to the interpretation of S. 9, Oudh Laws Act, and this has led that Court to say that even if the vendee were an under-proprietor in mahal Raja Amir Hasan Khan, the plaintiff as a proprietor in mahal Chak Aima would have a preferential right to pre-empt the sale of the under-proprietary plots in mahal Chak Aima. The foundation of the whole matter is this. The plaintiff in order to succeed in his suit must be able to oust the defendant from both the properties. If he had priority over the defendant vendee in respect of only a portion of the property his suit must be dismissed because he would then be in a position to pre-empt only a portion of the sale. The position of the plaintiff is quite clear. He is proved to be a superior proprietor in mahal Chak Aima. In reference to mahal Raja Amir Hasan Khan he is a member only of the proprietary village community of Fatehpur village wherein both these mahals are situated. The defendant vendee claimed to be an under-proprietor in mahal Raja Amir Hasan Khan and had it been the fact that he was an under-proprietor in mahal Raja Amir Hasan Khan, it appears to me that he would also have been a member of the village under-proprietary community for the whole village of Fatehpur, and he would therefore have had a preferential right to the plaintiff pre-emptor in respect of the sale of under-proprietary property in mahal Chak Aima of village Fatehpur.

The confusion in the mind of the learned civil Judge arises probably from the fact that the decision of the Privy Council in 11 O W N 843[4] was not put before him. Learned counsel for the respondent has referred to Abdus Salam's Law of Pre-emption in Oudh, 1938 Edition, p. 35 following where in discussing cls. 3 and 4 of S. 9 the learned commentator has referred to the course of judicial interpretation in regard to these clauses. Their Lordships of the Privy Council at page 848 following referred to the decision of the Judicial Commissioner in 1 O D 209,[5] in which it was held that S. 7 contemplates two separate village communities, one proprietary and the other under-proprietary. This view was approved by their Lordships who remarked:

> In the next place their Lordships are of opinion that the section contemplates a proprietary village community as distinguished from an under-proprietary village community.

It follows that when we come to analyze S. 9 the position is that in the case of sale of

2. ('04) 7 O C 74, Janki Pershad v. Saheb-Unnisa.
3. ('09) 12 O C 1: 1 I C 7, Ram Dayal v. Mohammad Abdul Basti.
4. ('34) 21 AIR 1934 P C 153: 151 I C 74: 61 I A 235: 9 Luck 407: 11 O W N 843 (P C), Birendra Bikram Singh v. Brij Mohan Pande.
5. ('88) 1 O D 209: Oudh S. C. No. 140, p. 161, Ashraf-un-nissa v. Parbhu Narain.

proprietary share of plots the order of persons entitled to claim the right of pre-emption is as follows : (1) Cosharers of the sub-division of patti, (if any), of the tenure in which the property is comprised, *i. e.*, cosharers of the proprietary patti in order of their relationship to the vendor or mortgagor, (2) cosharers of the proprietary mahal in the same order, (3) any member of the village proprietary community, (4) does not arise in this case as it applies to cases of sales of under-proprietary property. In the case of a transfer of property held under an under-proprietary tenure the order of priority is : (1) cosharers of the sub-division or patti, that is the under-proprietary patti in order of their relationship to the vendor or mortgagor, (2) cosharers of the whole under-proprietary mahal in the same order, (3) any member of the village under-proprietary community, and (4) the proprietor, which would apparently mean any member of the village proprietary community. An under-proprietor has no right of pre-emption in respect of a transfer of proprietary property, *vide* 1937 O W N 1217,[6] but a proprietor has such right in the case of a transfer of property held under an under-proprietary tenure under cl. 4.

It is in the light of this gradation list that we have to consider the rights of the parties to the present suit and it thus becomes necessary first to decide what, if any, status whether as proprietor or under-proprietor the defendant had. The case of the defendant was that he was an under-proprietor of a plot in mahal Raja Amir Hasan Khan. The burden was clearly upon the defendant to establish his status as under-proprietor. The only evidence upon which he relied was a copy of an extract from the under-proprietary khewat, Ex. 45. The trial Court considered this document to be suspicious. I have looked at the document and have not the smallest hesitation in saying that whether or no it was suspicious it was certainly inadmissible in view of the provisions of S. 76, Evidence Act. The document purports to be a copy given by a public officer having custody of a public document but S. 76, Evidence Act, requires that such a copy should bear a certificate written at the foot of such copy that it is a true copy of such document. This document, Ex. 45, bears no such certificate and it was not supported by the evidence of the person who prepared it. It was, in my opinion, very rightly regarded as not proving that the vendee was an under-proprietor or a cosharer in mahal Raja Amir Hasan Khan. The defendant in the lower appellate Court sought to support the entry in Ex. 45 by tendering his own sale deed as a fresh evidence in appeal.

The learned Judge remarked that "in the absence of very strong reasons I am not prepared to admit that title deed as a fresh evidence in appeal" and I cannot by any means say that the learned civil Judge was wrong in refusing to admit in appeal a document which was all along in the possession of the defendant but was not produced by him in the trial Court as evidence of his title. The document, if admitted in appeal, would probably have been denied, and in the absence of evidence to prove its genuineness and effectiveness would not have improved the defendant's case. An application has been made that this document should be permitted to be filed in this Court on the view that it is necessary to enable the Court to pronounce judgment. In my opinion that is not the case and the application is really only made to enable the defendant to fill up a lacuna in his evidence which lacuna was the result of his own negligence. The learned civil Judge rightly refused to admit this document and I reject the application for its admission in this Court. The result of this is that there is no evidence on the record at all to show that the defendant had any share either proprietary or under-proprietary in either of the two mahals in suit. The plaintiff being a member of the proprietary village community was clearly entitled to pre-empt the sale of the proprietary plots in mahal Raja Amir Hasan Khan under clause "thirdly" of S. 9. Similarly as a member of the proprietary village community he was also entitled to pre-empt the sale of the under-proprietary plot in mahal Chak Aima under clause "fourthly" of the same section. The plaintiff's suit was, in my opinion, rightly decreed by the trial Court, and the defendant's appeal was rightly dismissed by the lower appellate Court. There is no force in the present appeal which also fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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6. ('37) 1937 O W N 1217 : 171 I C 891, Manraj Kuer v. Basant Rai.

A. I. R. 1941 Oudh 80

YORKE AND GHULAM HASAN JJ.

Sheikh Dildar Husain — Plaintiff — Applicant

v.

Baboo Lal and another — Defendants — Opposite Party.

Civil Revn. Appln. No. 139 of 1939, Decided on 30th September 1940, from order of Munsif, North Lucknow, D/- 2nd May 1939.

U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (a) — S. 7 (1) (a) applies to all proceedings whether instituted by debtor or by creditor— Suit by debtor under S. 33, U. P. Agriculturists' Relief Act, pending at time of application by him under S. 4, U.P. Encumbered Estates Act, can be stayed.

Section 7 (1) (a), U.P. Encumbered Estates Act, applies to all proceedings in any civil Court whether instituted by the landlord (debtor) or by the claimant (creditor). Hence, where the debtor had applied under S.4, U.P.Encumbered Estates Act,and the debt is proved under the provisions of that Act a suit by him under S. 33, U P. Agriculturists' Relief Act, which is pending at that time can be stayed under S. 7 (1)(a), U. P. Encumbered Estates Act : A I R 1938 All 477 and dictum in A I R 1940 Oudh 207, *Dissent*. [P 80 C 2; P 81 C 2]

P. N. Asthana — for Applicant.

H. D. Chandra and P. D. Rastogi — for Opposite Party Nos. 1 and 2.

Order. — This is an application under S. 115, Civil P. C., and arises in the following way. The plaintiff-applicant filed a suit for accounts before the Munsif, North Lucknow on 23rd March 1936 under S. 33, U. P. Agriculturists' Relief Act, with respect to certain mortgages and promissory notes executed by him in favour of the defendants-opposite parties. In September 1936, while the said suit was pending, he applied under S. 4, U. P. Encumbered Estates Act, before the learned special Judge, first grade, against the various creditors including the opposite parties. The opposite parties applied to the learned special Judge, first grade, to stay the suit pending before the learned Munsif North Lucknow, under S. 33, U. P. Agriculturists' Relief Act. This prayer was refused. An appeal against the aforesaid decision was also dismissed. Subsequently, they applied to the learned Munsif North Lucknow for stay of the suit under S. 7, U. P. Encumbered Estates Act. By an order dated 2nd May 1939, the learned Munsif, North Lucknow directed the stay of proceedings under S. 33, U.P. Agriculturists' Relief Act, till the disposal of the proceedings under the Encumbered Estates Act pending before the learned special Judge, first grade, Lucknow. The applicant (debtor) comes up in revision against the aforesaid order of the learned Munsif. The matter originally came up before our learned brother, the late Radha Krishna Srivastava J., who by an order dated 23rd January 1940, referred the question in issue for decision to a Bench of this Court under S. 14, cl. 2, Oudh Courts Act, inasmuch as in his opinion there was a conflict of authority between the two decisions of this Court reported in 1939 O A 174[1] and 1939 O A 371[2] and a case of the Allahabad High Court reported in A I R 1938 ALL 477.[3] The question for determination before us is whether the learned Munsif had the jurisdiction to stay the suit under S. 33, U.P. Agriculturists' Relief Act, pending before him under the provisions of S. 7 (1) (a), Encumbered Estates Act. Section 7, cl. 1 (a) lays down :

> When the Collector has passed an order under S. 6 the following consequences shall ensue (a) all proceedings pending at the date of the said order in any civil or revenue Court in the United Provinces in respect of any public or private debt to which the landlord is subject or with which his immovable property is encumbered, except an appeal, review or rivision against a decree or order, shall be stayed, all attachments and other execution processes issued by any such Court and then in force in respect of any such debt shall become null and void, and no fresh process in execution shall, except as hereinafter provided, be issued.

It is contended on behalf of the debtor that S. 7 (1) (a) refers to proceedings and suits against the debtor and not by him. Reliance is placed upon a decision of the Allahabad High Court reported in A I R 1938 ALL 477,[3] where it was held that

> the proceedings, attachments, processes and suits mentioned in clauses (a) and (b) of S. 7, U. P. Encumbered Estates Act, are proceedings, attachments, processes and suits against the landlord in respect of debts and the landlord himself is not necessarily under any disability for taking proceedings which he may be entitled to take under the law for the protection of his interest.

No reasons are given in support of the view taken in the above case. We are of opinion that the language of S. 7 (1) (a), U.P. Encumbered Estates Act, is quite clear and unambiguous and leaves no room for doubt that it applies to all proceedings in any civil Court whether instituted by the landlord (debtor) or by the claimant (creditor). We do not think that the Legislature could have contemplated that a debtor should

1. ('39) 26 A I R 1939 Oudh 75 : 179 I C 630 : 14 Luck 524: 1939 O W N 118: 1939 O A 174, Ramsagar Prasad v. Mt. Shayama.
2. ('39) 26 A I R 1939 Oudh 184: 181 I C 61: 1939 O W N 385 : 1939 O A 371, Baijnath Singh v. Tulshi Ram.
3. ('38) 25 A I R 1938 All 477 : 177 I C 215 : 1938 A L J 541, Sheo Baran Singh v. Ranbir Prasad.

carry on two separate proceedings under the Agriculturists' Relief Act, as well as under the U. P. Encumbered Estates Act, simultaneously. The intention of the Legislature must be gathered from the language of S. 7 (1) (a), Encumbered Estates Act, and it is not permissible for us to read into that section an intention which the Legislature has not chosen to express. We feel we are justified in this conclusion by the language of S. 14, Cl. 4 (c), Encumbered Estates Act, which definitely states that

the provisions of the U. P. Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under this Act.

It seems to us that the Legislature provided separate reliefs to a debtor under the Agriculturists' Relief Act and the Encumbered Estates Act, and it was left to him to choose whether he should take advantage of the provisions of S. 33, Agriculturists' Relief Act or S. 4, Encumbered Estates Act. Under S. 33, Agriculturists' Relief Act, an agriculturist debtor is entitled to sue for an account of money lent or advanced to or paid for him by any persons. The Court is given the power to follow the provisions of Ch. IV of the Act and the provisions of the Usurious Loans Act, 10 of 1918. Sections 28 to 31 of Ch. IV deal with the reduction of interest in favour of the debtor. Section 32 relates to the duty of a creditor to maintain and furnish accounts while S. 34 imposes penalties for non-compliance with the provisions of S. 32 namely the disallowance of interest and costs. Ample relief is available to a debtor under the provisions of S. 14 (4) (a) and (b), Encumbered Estates Act. A careful perusal of the aforesaid provisions in the two Acts is enough to show that the Legislature did not intend the continuation of the proceedings under the Agriculturists' Relief Act, when the debtor had applied under S. 4, Encumbered Estates Act. Once the debt is proved under the provisions of the latter Act there seems to be no good reason for the continuation of the proceedings under the Agriculturists' Relief Act. The debtor himself submitted to the jurisdiction of the special Judge by applying under S. 4, Encumbered Estates Act, and it is somewhat anomalous that he should be allowed to carry on proceedings at the same time under S. 33, U. P. Agriculturists' Relief Act. We are therefore of opinion that S. 7 (1) (a) upon a proper construction of its language unmistakably shows that it applies to all proceedings whether instituted by the debtor or by the creditor.' In a case reported in 1940 O A 138[4] it was held that :

Clause (b) of S. 7 (1) appears on the face of it to apply to a suit or other proceeding filed by a party after the passing of an order under S. 6 and does not contemplate suits or proceedings remanded by a Court of appeal.

At p. 140, however, it was observed following the view enunciated in A I R 1938 ALL 477[3] that

both the clauses of S. 7 (1) appear to contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlords themselves are entitled to institute under any law.

We are of opinion that the latter observation was really not necessary for the decision of that case. The result is that the decision of the lower Court directing the stay of the proceedings under S. 33, Agriculturists' Relief Act, till the disposal of the proceedings under the Encumbered Estates Act, pending between the parties before the special Judge, first grade, is correct. The application fails and is dismissed with costs.

D.S./R.K. *Application dismissed.*

4. ('40) 27 AIR 1940 Oudh 207: 185 I C 726: 1940 O W N 129 : 1940 O A 138, Ambika Prasad v. Mt. Maqbulunnissa.

A. I. R. 1941 Oudh 81

THOMAS C. J. AND GHULAM HASAN J.

Sheo Rakhan Lal — Applicant

v.

Sundar Lal — Opposite Party.

Civil Ref. No. 8 of 1940, Decided on 21st October 1940, made by the Commissioner, Lucknow Division.

U. P. Tenancy Act (17 of 1939), S. 296—Word 'suit' does not include appeal — Suit instituted under S. 127, Oudh Rent Act of 1886, dismissed before commencement of U. P. Tenancy Act of 1939 — Appeal lies to District Judge and not to Commissioner.

The word "suit" used in S. 296 means nothing more nor less than a suit contemplated under the provisions of the Agra Tenancy Act of 1926 or the Oudh Rent Act of 1886, and there is no warrant for holding that the meaning of the word "suit" should be so extended as to include an appeal: AIR 1940 Oudh 364 and A I R 1940 All 445, *Rel. on.* [P 82 C 1]

Hence, where a suit instituted under S. 127, Oudh Rent Act of 1886, is dismissed before the commencement of the U. P. Tenancy Act of 1939 appeal lies to the District Judge and not to the Commissioner. [P 83 C 1]

Parmeshwar Din, Special Agent in person — for Applicant.

Opposite Party in person.

Order.—This is a reference made by the learned Commissioner of the Lucknow Division under S. 289 (2), U. P. Tenancy Act (17 of 1939) and arises out of a suit for ejectment and arrears of rent under S. 127, Oudh Rent Act (22 of 1886), filed by the appellant against

the respondent. The suit was dismissed on 24th September 1939, by the Sub-divisional Officer of Muhamdi, District Kheri. The appeal was filed before the District Judge on 30th October 1939, but it was returned by him on 29th January 1940, on the ground that he had no jurisdiction to decide the appeal which in his opinion should be filed before the Commissioner. Accordingly he returned the appeal to the appellant for presentation before the Commissioner. The learned Commissioner is of the opinion that the appeal was rightly filed in the Court of the District Judge as it is that Court to which the appeal from the order under S.127, Oudh Rent Act, lay under the old Act. He has taken the view that S. 296, U. P. Tenancy Act, does not apply as the word "suit" used in that section does not include an appeal. The Oudh Rent Act (22 of 1886) has been repealed by the U. P. Tenancy Act of 1939 from 1st January 1940. Under the former Act, appeals in such cases lay to the District Judge while under the U. P. Tenancy Act of 1939 the appeal in a similar suit lies to the Commissioner. The learned Commissioner has made a reference to this Court for the decision of the question of jurisdiction. The only question raised by the reference is whether the appeal against the decision of the Sub-divisional Officer of Muhamdi under S. 127, Oudh Rent Act of 1886, lay to the District Judge or whether in view of the provisions of S. 296, U. P. Tenancy Act of 1939 it lies to the Commissioner. Section 296, U. P. Tenancy Act, runs as follows:

A suit under any of the provisions of the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, which is pending at the commencement of this Act or a decree under any of the provisions of either of these Acts, which has not been satisfied in full at such commencement, shall be decided or executed, as the case may be, in accordance with the corresponding provision of this Act and if there is no such corresponding provision, the proceedings relating to such suit or decree shall be quashed.

The word "suit" has not been defined in the Act. On the other hand, we find that suits and appeals have been separately treated in the Act (*vide* Chap. 14). We are of opinion that the word "suit" used in S. 296 means nothing more nor less than a suit contemplated under the provisions of the Agra Tenancy Act of 1926 or the Oudh Rent Act of 1886, and there is no warrant for holding that the meaning of the word "suit" should be so extended as to include an appeal. All that the section lays down is that a suit under any of the provisions of the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, which is pending at the date of the commencement of the U. P. Tenancy Act of 1939, i. e., 1st January 1940, shall be decided in accordance with the corresponding provision of this Act and if there is no such corresponding provision, the proceedings relating to such suit shall be quashed. Whether there is any corresponding provision in the U. P. Tenancy Act of 1939 analogous to S. 127, Oudh Rent Act of 1886 or not, it is clear that if the word 'suit' used in the section cannot be construed to include the case of an appeal, this section will not apply. As a matter of fact, this case is covered by a decision of this Court in 1940 O W N 621.[1] It was held in this case that S. 296, U. P. Tenancy Act, refers only to suits which have not already been decided by the trial Court at the time when the new Act came into force, and that a suit cannot be said to be pending within the meaning of S. 296 after it has been decided by the trial Court. A similar view has been taken by the Allahabad High Court in 1940 R D 274.[2]

We have no doubt that the Legislature never intended to lay down that once the rights of the parties had been adjudicated by a Court according to the law prevalent at the time of such adjudication, a wholly different law should be applied to the decision of the case when the matter reached the stage of an appeal. It was held by a Full Bench of the Allahabad High Court in 50 ALL 965[3] that a right of appeal in a suit is governed by the law prevailing at the date of the institution of the suit, and not by the law prevailing at the date of the decision of the suit or at the date of the filing of the appeal. It was held that under S. 6, U. P. General Clauses Act of 1904, unless a different intention appears, the repeal of an Act cannot affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or affect any remedy or any investigation or legal proceeding commenced before the repealing Act shall have come into operation, and any such remedy may be enforced, and any such investigation or legal proceeding may be continued and concluded, as if the repealing Act had not been passed. In 1940 O W N 888,[4] it was held that

1. ('40) 27 AIR 1940 Oudh 364: 189 I C 248: 1940 O W N 621, Bhagwati Prasad v. Ram Lautan.
2. ('40) 27 AIR 1940 All 445 : 190 I C 522 : 1940 A L J 573 : 1940 R D 274, Bindraban Katiar v. Ganga Ram.
3. ('28) 15 AIR 1928 All 437 : 111 I C 6 : 50 All 965: 26 ALJ 998 (FB), Ram Singha v. Shankar.
4. ('41) 28 AIR 1941 Oudh 65 : 190 I C 797 :1940 O W N 888, Tulsi Ram v. Madho Ram.

changes in procedural law cannot operate retrospectively so as to affect rights which have accrued before the Act which makes those changes come into force. We are therefore satisfied that the right to appeal in the present case is governed by the Oudh Rent Act of 1886 and as such the appeal lay to the Court of the District Judge. We accordingly accept the reference and direct that the learned Commissioner shall return the appeal for presentation to the Court of the District Judge. This order governs Civil Reference Nos. 9, 10 and 11 of 1940 also. When these appeals are re-filed before the District Judge by the appellants in the respective cases, they shall be decided on the merits and no plea on the ground that the appeals have become time-barred by reason of the order of the District Judge returning the appeals for presentation to the Commissioner shall be entertained. Such time as may have elapsed is excused under S. 14, Limitation Act. Let the papers be returned to the Commissioner.

D.S./R.K. *Reference accepted.*

A. I. R. 1941 Oudh 83

YORKE AND GHULAM HASAN JJ.

Sampat Singh — Applicant

v.

Nakchhed Singh and others —

Opposite Party.

Civil Ref. No. 16 of 1940, Decided on 4th October 1940; reference made by Munsif, Partabgarh.

Civil P. C. (1908), Ss. 113, 151 and O. 46, R. 1—Suit pending before trial Court being one subject to appeal and second appeal — It is not competent for the trial Court either under S. 113 or S. 151 to refer to High Court question whether it is competent to decide certain issue.

Where the suit pending before the trial Court is one which is subject to appeal not only to the lower appellate Court but also to a second appeal to High Court, the trial Court is not competent either under S. 113 read with O. 46, R. 1 or under S. 151 to refer to High Court the question whether it (trial Court) is competent to decide certain issue.

[P 83 C 2; P 84 C 1]

Applicant in person.

K. N. Tandon — for Opposite Party.

Order.—This is a reference made by the learned Munsif of Partabgarh under S. 151, Civil P. C., in a suit pending before him. The suit was for possession of some tenancy plots and for damages by the plaintiff on the ground that he was the statutory tenant of the plots in suit and had been dispossessed by the defendants. The plaintiff and the first two defendants are brothers while defendant 3 is the plaintiff's nephew. The defence was that the tenancy rights belonged to the joint family of the parties and that the defendants came into possession of the plots upon a partition among the family members. The learned Munsif framed the following issue :

Whether the tenancy in suit was the joint family property of the parties? If so, has there been partition of the tenancy and have allotments been made as alleged ?

The learned Munsif referred the aforesaid issue to the Sub-divisional Officer, Partabgarh, for decision under S. 288, U. P. Tenancy Act, (Act 17 of 1939). The Sub-divisional Officer decided the first part of the issue in the affirmative but gave no decision on the second part of the issue as in his opinion he had no jurisdiction to decide that point. He returned the case to the learned Munsif after recording the finding stated above. The learned Munsif was of opinion that he had his doubts whether he had any jurisdiction to decide the latter part of the issue which the Sub-divisional Officer has declined to decide. Accordingly he formulated the following point for decision by this Court :

Is this Court or the Court of the Sub-divisional Officer, Partabgarh, competent to decide the latter part of the above issue ?

The learned Munsif felt that S. 289, U. P. Tenancy Act, did not authorize him to make a reference to this Court and referred the matter under S. 151, Civil P. C., as according to him there was no bar to such reference by any statute. We are of opinion that the reference is incompetent. There is no doubt that under S. 289, U. P. Tenancy Act, a civil or a revenue Court may submit the record to the High Court or the Chief Court as the case may be only when it is in doubt whether it is competent to entertain any suit, application or appeal. It cannot be seriously contended that the learned Munsif felt any doubts about his competency to entertain the suit that was filed before him. In these circumstances it is quite clear that no reference could be made under the provisions of S. 289, U. P. Tenancy Act. We are further of opinion that a reference is not permissible even under the provisions of S. 113 read with O. 46, R. 1, Civil P. C., which clearly lays down that :

Where, before or on the hearing of a suit or an appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such state-

ment with its own opinion on the point for the decision of the High Court.

The suit pending before the learned Munsif is one which is subject to an appeal not only to the lower appellate Court but also to a second appeal to this Court if the conditions of S. 100, Civil P. C., are satisfied. In these circumstances the learned Munsif has chosen to resort to the provisions of S. 151, Civil P. C., and has referred the case to this Court with a view to obtaining its opinion on the point referred to it. We are satisfied that the learned Munsif had no power to make any reference under the provisions of S. 151, Civil P. C., and consequently we are unable to entertain this reference. As we have already stated the matter could be thrashed out not only in the trial Court but also in appeal and we see no reason why the trial Court should be relieved of the necessity of deciding the question arising before it however difficult it might appear to be. Holding that this reference is not entertainable we return the papers to the lower Court with a direction that the lower Court should proceed to decide the matter according to law. We may however point out that the learned Munsif would be well advised in deciding the matter himself as expeditiously as possible unless he should find it absolutely necessary to refer it back to the Sub-divisional Officer, Partabgarh. Let the reference be returned to the lower Court.

D.S./R.K. *Order accordingly.*

A. I. R. 1941 Oudh 84

YORKE J.

Angnu Ram — Appellant

v.

Bhikhi and others — Respondents.

Second appeal No. 4 of 1938, Decided on 23rd October 1940.

(a) Adverse possession—Mortgagee, during subsistence of mortgage, taking possession with mortgagor's consent — Such possession is possession as mortgagee and is not adverse.

In a case where during the subsistence of a mortgage a mortgagee is proved or admitted by both parties to have come into possession of the property with the consent of the mortgagor, the possession of the mortgagee must be taken to be possession as a mortgagee and cannot be said to be adverse possession. [P 86 C 2]

(b) Transfer of Property Act (1882), S. 76 (g) and (h) — Mortgagee taking possession of mortgaged property failing to keep accounts — Court can make every presumption against him.

Where a mortgagee takes possession of the mortgaged property, he is, during the continuance of the mortgage, under a statutory liability to keep accounts under S. 76, cls. (g) and (h) and this is so in the case of every mortgage, whether usufructuary or otherwise. Where the mortgagee fails to keep the accounts as required by law the Court can make every presumption against him : A I R 1932 Oudh 123, *Rel. on.* [P 87 C 1]

Hargovind Dayal Srivastava — for Appellant.

Judgment. — This is a second appeal by the plaintiff in a suit for redemption of a shop which was decreed by the trial Court but dismissed on appeal by the lower appellate Court. It is a pity that this appeal had to be heard ex parte as no appearance was put in on behalf of the respondents. The point for decision is not free from difficulty, and I should have preferred to have been able to hear learned counsel on both sides in the appeal. This suit relates to a shop in the bazar or small town of Nawabganj in the district of Gonda. On 26th April 1889, a simple mortgage in respect of this shop was executed by the plaintiff Angnu Ram's elder brother Bachchu Lal and their mother Mt. Umrai for a sum of Rs. 200. Interest was stated to be at Rupees 15 per cent. per annum and the period for payment was three years. It was stated on behalf of the plaintiff that the mortgagees had been put in possession of this shop as lessees at Rs. 3 per mensem, probably about the year 1886, and that it was agreed (presumably subsequently) between the parties that the rent would be credited first to interest and second to principal. As the rent would have been Rs. 36 per annum and interest only Rs. 30 per annum, that would have meant that there would have been a surplus of Rs. 6 to be credited annually to principal which would thus have been progressively reduced and paid off within a period of thirty-three years at the most. In fact as the principal became reduced by the annual payments, the annual interest would also have been reduced, and therefore the whole amount of the loan would have been paid off probably in about thirty years.

The present suit was filed after forty-seven years from the date of the mortgage on 24th September 1936. A number of pleas were raised. The statement on behalf of the plaintiffs has already been mentioned. On behalf of the defendants it was pleaded that the shop was never let out to the mortgagees, Hanoman and Ganesh, but that when the period fixed for payment expired and the mortgagees demanded the money from Bachchu Lal, Bachchu Lal pleaded inability to pay and transferred the shop to the mortgagees outright by an oral sale, and that thereupon the mortgagees entered into possession of the shop as owners. They subsequently rebuilt it after obtaining per-

mission from the notified area authorities and spent about Rs. 500 in making new constructions. The defendants contended that in any case they and their predecessors had been in adverse possession of the shop in dispute for more than twelve years. The learned Munsif held that the plaintiff had failed to prove the letting of the shop to the original mortgagees or the agreement that the rent of the shop would be credited towards interest and principal. While holding that the defendants had failed to prove the oral sale he held that the mortgagees had entered into possession as mortgagees and were bound to keep accounts under S. 76, T. P. Act, which they had not done, but that the plaintiff had failed to adduce evidence as to the amount of the profits. He further held that the defendants' allegations as to the amount spent on rebuilding the shop were exaggerated, that the defendants had not acquired title by adverse possession, and therefore the plaintiff was entitled to redeem the shop on payment of Rs. 200 principal and Rs. 90 interest for three years at Rs. 15 per cent. per annum.

The lower appellate Court took a different view of the case and held that the possession of the defendants was adverse, that although their story of the oral sale had failed, it could not be said that they had come into possession as mortgagees, and therefore they were not liable to keep accounts. In as much therefore as the defendants' possession was adverse, the plaintiffs could not maintain the suit for redemption. The position which emerges from the findings of fact of the Courts below is this much that there undoubtedly was a mortgage of this shop in the year 1889. The period for redemption in the case of an usufructury mortgage would not in the ordinary way finally expire until the year 1949. Secondly, we have it found that the defendants were not lessees of the shop, nor was there any agreement that rent should be credited towards the amount due under the mortgage, nor on the other hand is it proved that the defendants came into possession under an oral sale. It is not the contention of either party that the mortgagees got possession as mortgagees. The resulting facts then are that the defendants are or rather were mortgagees under this simple mortgage of 1889, and that they have somehow or other come to be and are in possession of the mortgaged property since many years (the defendants say 1892 while the plaintiff himself says 1886) and have rebuilt the house or at any rate spent money on it. The question is what is the proper inference in law to be drawn from these facts. On the one hand, it is contended that the defendants must be in possession as mortgagees, and on the other hand it is contended as was held by the learned additional civil Judge that their possession is adverse to the plaintiff.

The learned additional civil Judge relied upon A I R 1929 P C 61[1] and A I R 1931 Oudh 69.[2] In the former of these two cases, a foreclosure decree in the English form had been passed in 1875 directing that if the mortgagor failed to pay within six months the mortgage amount, he would stand absolutely debarred and foreclosed of and from the equity of redemption. Not being in a position to find the necessary funds the mortgagor gave up possession to the mortgagee some years after. The mortgagee and those claiming through him remained in unchallenged possession for fourty five years and expended large sums in improving and rebuilding the property. A suit for redemption was brought in 1921. It was held that the mortgagor acquiesced in the position that the mortgagee was entitled to hold the property as his own and that it was no longer necessary for the latter to execute the foreclosure decree. At least a mortgagor seeking to redeem after a foreclosure decree was bound to do so within a reasonable time, and was not entitled to wait for more than fourty five years.

The significant facts in this case are that there had been a foreclosure decree and that subsequent to that decree the mortgagor gave up possession to the mortgagee just as he would have had to do if the mortgagee had executed his decree. For this reason it was considered in effect that the position was as if the mortgage decree had been executed and the mortgagee had come into possession under that decree. In the Oudh case a somewhat similar position arose. A mortgagee's suit for the recovery of the mortgage money was decreed but the mortgagor made default in payment of the decretal amount. Neither the mortgagor nor the mortgagee took any further steps in connexion with the decree but the mortgagee subsequent to the date of the decree entered into possession of the mortgaged property. It was held that the mortgagee's possession was adverse. It was however remarked that ordinarily the right to redeem subsists until a sale under a decree on the foot of a mortgage takes place and is con-

1. ('29) 16 A I R 1929 P C 61 : 114 I C 574 (PC), Keshavrao Vasantrao v. Nanabhai Sadanand.
2. ('31) 18 A I R 1931 Oudh 69 : 127 I C 252 : 7 O W N 538, Humayun Qadar v. Suraiya Begam.

firmed by the Court. The Court took the view in this case that from the year 1889 right up to the present moment, 1931, the houses in question had been held and possessed by the decree-holder and his representatives in the character of owners and not of mortgagees, and they proceeded to follow the decision in A I R 1929 P C 61.[1] There is obviously a very wide distinction between cases in which there has been a decree and subsequent to that decree, although without execution of that decree, the mortgagee comes into possession of the mortgaged property and cases where without any decree at all during the duration of the mortgage the mortgagee who was originally a simple mortgagee comes into possession of the mortgaged property. Learned counsel for the appellant has relied upon the Nagpur case in 46 I C 872,[3] in which the learned Additional Judicial Commissioner laid down the following proposition:

> I hold that where a person having a mortgage in any form over a property takes possession of such property rightly or wrongly with, without or against the consent of the mortgagor, under whatsoever claim or title, his possession will be that of a mortgagee, subject at least to the same liabilities: and such possession for any length of time short of the statutory period, except in cases where the right of redemption has been released by the mortgagor, will be no bar or defence to a suit for redemption where the plaintiff is otherwise entitled to redeem.

This very broad proposition was said to be founded on the decision of their Lordships of the Privy Council in 32 Cal 296[4] and with the greatest respect it does not seem to me to follow very clearly from that decision. I am inclined to think that the proposition is a little too broadly stated and that there is somewhat too little emphasis laid upon the provisos, but substantially I would agree with it. Learned counsel for the appellant has himself referred to 32 Cal 296[4] but an examination of that case shows that the defendants had begun by being in possession as usufructuary mortgagees, and therefore this case did not furnish a real foundation for the proposition laid down in the Nagpur case[3]. Learned counsel referred to the case in 44 Mad 253[5] as being one which might be taken to stand in his way. In that case there was an oral arrangement between the mortgagor and the usufructuary mortgagee, whereby the latter retained possession of a portion of the mortgaged property in full ownership in satisfaction of the mortgage debt, and enjoyed it as full owner for more than twelve years after this arrangement. On a suit being instituted by the mortgagor to redeem the property more than twelve years later, it was held that the mortgagee had acquired by adverse possession an absolute title to the property, and that the mortgagor's right to redeem the property was barred by limitation.

In my opinion it is difficult to deduce any principle from this case which is applicable to the present case. That case depended on proof of the arrangement. That arrangement being proved, it was held that the possession which could not otherwise have been anything but mortgagee possession could be regarded as adverse possession in the capacity of owner, which could ripen into full ownership. It appears to me that the decision of the present case must turn on the proper construction to be placed on the proved facts, excluding from consideration those which are not proved. The defendants failed to prove that they being mortgagees came into possession under an arrangement that their possession would be that of owners. On the other hand they concede that they came into possession with the consent of their mortgagors. It would appear to me that in a case where during the subsistence of a mortgage a mortgagee is proved or admitted by both parties to have come into possession of the property with the consent of the mortgagor, the possession of the mortgagee must be taken to be possession as a mortgagee. In order to avoid this position the mortgagees had to prove their allegation that they entered into possession in discharge of the debt, and that thereby the mortgage was extinguished. As I said earlier, this amounts to a substantial agreement with the proposition laid down in the Nagpur case. On these findings I hold that the defendants are in possession as mortgagees and that as the period for redemption of sixty years has not expired the plaintiff is entitled to a decree for redemption. Coming to the second question as to the proper amount on payment of which redemption should be decreed. Once it is found that the defendants entered into possession as mortgagees they were liable under S. 76, T. P. Act, to maintain accounts. It has been held in 9 O W N 60[6] that:

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3. ('17) 4 A I R 1917 Nag 33 : 46 I C 872 : 1 N L J 59, Awdh Singh v. Nanhai.

4. ('06) 32 Cal 296 : 32 I A 23 : 8 Sar 734 : 9 C W N 201 (P C), Khiarajmal v. Daim.

5. ('21) 8 A I R 1921 Mad 82 : 62 I C 603 : 44 Mad 253 : 40 M L J 105, Kandasami Pillai v. Chinnabha.

6. ('32) 19 A I R 1932 Oudh 123 : 137 I C 102 : 7 Luck 454 : 9 O W N 60, Lakshmi Narain v. Mt. Mohamdi Begam.

Where a mortgagee takes possession of the mortgaged property, he is, during the continuance of the mortgage, under a statutory liability to keep accounts under S. 76, cls. (g) and (h), T. P. Act, and this is so in the case of every mortgage, whether usufructuary or otherwise. Where the mortgagee fails to keep the accounts as required by law the Court can make every presumption against him.

It seems to me to be a reasonable presumption since there has been no accounting between the parties throughout the period from 1892 up to date that the amount of the rent was taken to be equivalent to the interest due on the mortgage amount. The learned Munsif gave the plaintiff a decree for redemption on payment of the mortgage amount of Rs. 200 with interest for the three years during which the defendants were out of possession at the contractual rate, Rs. 30 per annum. I see no reason to differ from this view, and accordingly allow this appeal, set aside the decree of the learned additional civil Judge, and while restoring the decree of the trial Court with costs throughout I extend the period for payment of the redemption money which may be found due after deducting the costs of all the Courts and direct that payment be made of the sum so found due within six months from this date.

D.S./R.K. *Appeal allowed.*

A. I. R. 1941 Oudh 87

THOMAS C. J. AND GHULAM HASAN J.

Shree Goswami Purshotam Lalji — *Plaintiff* — Applicant

v.

Shri Mahant Hara Narayan Dass and others—Defendants — Opposite Party.

Civil Revision Appln. No. 120 of 1937, Decided on 16th October 1940, from order of Civil Judge, Fyzabad, D/- 3rd September 1937.

Civil P. C. (1908), O. 6, R. 17 — Order under O. 6, R. 17 — No revision lies.

No revision lies from an order under O. 6, R. 17 allowing or disallowing an amendment of a pleading: AIR 1936 All 686 (FB), *Foll.*; AIR 1936 Oudh 22 (FB); AIR 1918 Oudh 430 and AIR 1925 Oudh 254, *Rel. on*; A I R 1935 All 353 *held Overruled* by A I R 1936 All 686 (FB); A I R 1940 Oudh 367, *Disting.* [P 88 C 2]

S. N. Srivastava — for Applicant.

M. Wasim — for Opposite Party, Nos. 1, 2, 4, 7 and 8.

Order.—This revision application under S. 115, Civil P. C., is directed against an order dated 3rd September 1937, passed by the learned civil Judge of Fyzabad, rejecting the application of the plaintiff-applicant to amend his plaint. It appears that originally two plaintiffs filed a suit for possession of certain property against the defendants-opposite-party jointly and severally on the allegation that plaintiff 1 had succeeded as a widow upon the death of her husband in 1911. It was stated in para. 3 of the plaint that plaintiff 1 had appointed plaintiff 2 as her successor to all properties of which plaintiff 1 had been in possession as successor of her husband throughout India and Native States including the properties in suit. The suit was instituted on 7th December 1936. Plaintiff 1 died on 31st January 1937, while the suit was pending. Plaintiff 2 was allowed to continue the suit under O. 22, R. 2, Civil P. C., as the right to sue survived to him alone. The surviving plaintiff applied for amendment of the plaint on 5th July 1937, whereby it was intended to introduce the plea of adoption of plaintiff 2 by plaintiff 1 without the permission of her husband under a special custom pleaded by plaintiff 2. The application for amendment was opposed by the defendants on the ground that the amendment was mala fide and was intended to alter the claim or the nature of the suit. The learned civil Judge by an order dated 3rd September 1937 held that the amendment sought would alter the nature of the suit and would introduce a matter of much more contentious nature than what was contained in the plaint originally, and hence he refused the application for amendment.

The sole surviving plaintiff has now come up in revision against the order of the trial Court refusing his application for amendment. A preliminary objection is taken to the hearing of this application on the ground that no case has been decided and, therefore, no revision lies under S. 115, Civil P. C. Reference is made in support of the preliminary objection to 1935 O W N 1158[1] and 1936 A L J 923.[2] The learned counsel on behalf of the applicant relies on 57 ALL 459[3] and 1940 O W N 500.[4]

The case in 57 ALL 459[3] has been overruled in the Full Bench decision in 1936 A L J 923.[2] There being a conflict of authority in the Allahabad High Court on the question, the

1. ('36) 23 A I R 1936 Oudh 22 : 158 I C 949 : 11 Luck 529 : 1935 O W N 1158 (FB), Paras Nath v. Ran Bahadur.
2. ('36) 23 A I R 1936 All 686 : 165 I C 1 : I L R (1937) All 17 : 1936 A L J 923 (FB), Mt. Suraj Pali v. Ariya Pretinidhi Sabha.
3. ('35) 22 A I R 1935 All 353 : 153 I C 65 : 57 All 459 : 1934 A L J 989, Rurmal Ramnath v. Kapilman Misir.
4. ('40) 27 A I R 1940 Oudh 367 : 188 I C 893 : 1940 O W N 500, Mt. Lachmin v. Bhairon Bakhsh Singh.

matter was referred to a Full Bench. After discussing at length several decisions of the Allahabad High Court, including the Bench decision in 57 ALL 459,[3] the learned Judges held that no revision lies from an order under O. 6, R. 17, Civil P. C., refusing to allow an amendment of a pleading. A distinction was drawn in the case reported in 57 ALL 459[3] between an order allowing an amendment and an order refusing to allow the amendment, and it was laid down at p. 473 of the report that an order allowing an amendment cannot be successfully challenged in revision as the Court cannot be said to have acted without jurisdiction or to have failed to exercise a jurisdiction or to have acted illegally or with material irregularity in the exercise of its jurisdiction but where a Court refuses to allow amendments, the order of refusal proceeds on an illegal or irregular exercise of jurisdiction and hence is liable to interference under S. 115, Civil P. C. The learned Chief Justice in the Full Bench decision in 1936 A L J 923[2] observed :

Now if a case within the meaning of S. 115, Civil P. C., is started as soon as an application for the amendment of a pleading is made then the case would be decided when final orders on that application are passed, no matter whether the application is allowed or disallowed. There would be an anomaly in holding that if the application is allowed the case is not decided, but if it is not allowed the case is decided. If the filing of the application was the commencement of a new proceeding of a case, then the case must necessarily be decided if the application is allowed. But it has been held consistently by this Court that when an application for amendment has been allowed no case can be said to have been decided so as to be made the subject of a revision to this Court. The cases laying down that no revision lies from orders merely allowing or disallowing amendments which are to some extent matters of discretion seem to have laid down the correct law.

The case in 1940 O W N 500[4] affords no help to the applicant. In that case the trial Court had dismissed the suit of the plaintiff as it had not been proved that the plaintiff was dispossessed by any of the defendants. The plaintiff then appealed and in appeal the learned civil Judge allowed the plaintiff to amend his plaint so as to base his claim not on his dispossession but on the allegation that defendant 1 was not the owner in possession of some of the property sold. The reliefs for possession and damages were deleted, and the suit was confined only to a prayer for recovery of the sale price with interest. The learned civil Judge remanded the suit for a trial de novo in the light of the amendment allowed by him. It was held that no appeal lay against the order of remand made under the inherent powers of the Court. It was further held that the lower appellate Court exercised jurisdiction vested in it by law with material irregularity and the order allowing the amendment was open to revision and was interfered with. That case therefore is clearly distinguishable inasmuch as the trial Court had actually decided the case and it was only in the lower appellate Court that the amendment was allowed and the suit remanded.

It was held in 1935 O W N 1158[1] in a case where the plaintiff had paid an insufficient amount of court-fee and was ordered to make good the deficiency within a certain time, that no revision lay against the interlocutory order, as no case had been decided within the meaning of S. 115, Civil P. C., by the mere decision of a preliminary point regarding court-fees, and secondly because no question of jurisdiction arose in such a case. There are at least two decisions of the late Court of the Judicial Commissioner of Oudh, in 5 O L J 430[5] and A I R 1925 Oudh 254[6] which are directly in point. It was held in the former case by a Bench that S. 115 authorized the Court to call for the record of any case, which had been decided, but where there had been no decision and the case was still pending, interlocutory orders, passed during the course of the hearing, could not be made the subject of revision, unless those orders had the effect of determining the case, so far as the party applying for revision was concerned, or concluding the claim otherwise in a manner not open to appeal. In this case, the revision had been filed against an order refusing to permit an amendment of the plaint in certain particulars. It was observed at p. 432 :

It is open to the plaintiff to contest the propriety of the order, refusing him leave to amend the plaint under S. 105, Civil P. C., when an appeal is filed from the final decree.

In the latter case, A I R 1925 Oudh 254,[6] it was held that the application for leave to amend was not a case, and therefore no revision could lie against an order refusing to grant leave to amend either under S. 25, Provincial Small Cause Courts Act, or under S. 115, Civil P. C. We uphold the preliminary objection and hold that no revision is entertainable in this case. We, therefore, dismiss this application with costs.

G.N./R.K. *Application dismissed.*

5. ('18) 5 AIR 1918 Oudh 430 : 47 I C 676 : 5 O L J 430, Brij Indra Bahadur Singh v. Deputy Commissioner, Kheri.
6. ('25) 12 AIR 1925 Oudh 254 : 77 I C 553, Badri Prasad v. Murli Dhar.

A. I. R. 1941 Oudh 89

ZIAUL HASAN J.

Kali Charan — Plaintiff — Appellant

v.

Suraj Bali and others — Defendants— Respondents.

Second Appeal No. 372 of 1937, Decided on 3rd October 1940, against order of Civil Judge, Lucknow, D/- 8th July 1937.

(a) Evidence Act (1872), S. 68, Proviso — Suit on mortgage — Defendant denying execution of mortgage deed and also stating that it was not genuine—Denial is specific.

Where, in a mortgage suit, the defendant not only denied the execution of the mortgage deed but stated in his written statement that it was not genuine, the denial of execution by the defendant is a specific denial within the meaning of proviso to S. 68 and therefore it is incumbent on the plaintiff to produce at least one of the attesting witnesses. [P 90 C 1]

(b) Evidence Act (1872), S. 68 — Fact that one of attesting witnesses had turned hostile is no ground for not producing him.

The fact that in mortgage suit one of the attesting witnesses had turned hostile is no sufficient ground for not producing him. The plaintiff can undoubtedly obtain the Court's permission to cross-examine the witness : AIR 1932 Mad 148 and AIR 1939 P C 117, *Rel. on.* [P 90 C 1]

(c) Evidence Act (1872), S. 68, Proviso—In case of mortgage bond, word "execution" means and includes whole series of acts which are necessary to give document validity as mortgage.

The word "execution" as used in the proviso to S. 68 in the case of a mortgage bond means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage : AIR 1939 Cal 688, *Rel. on.* [P 90 C 1]

(d) Civil P. C. (1908), O. 41, R. 27 — Question of proof of execution of document required by law to be attested — Plaintiff giving insufficient evidence — He cannot be allowed in second appeal to produce fresh evidence.

Where in the trial Court the pleading and the issues cover the question regarding proof of execution of a document required by law to be attested and the plaintiff has given evidence though insufficient to prove its execution, the plaintiff cannot be allowed in second appeal to adduce fresh evidence as regards the execution and he cannot thus be allowed to patch up the weak parts of his case and fill up the omissions: AIR 1932 Mad 148; AIR 1931 Oudh 298 and AIR 1931 P C 143, *Rel. on.* [P 90 C 2]

R. B. Lal and M. M. Lal — for Appellant.

Rajeshwari Prasad and Raj Bahadur — for Respondent 1.

Judgment. — This is a plaintiff's appeal against an appellate decree of the learned civil Judge of Lucknow dismissing his suit on a mortgage. The mortgage deed in question was alleged to have been executed by Chhedi, father of respondent 2, in favour of Gaya Prasad, uncle of the plaintiff-appellant, and the suit was for recovery of Rs. 227-7-9. The other respondents are subsequent transferees of the mortgaged property. The plaintiff's case was that he formed a joint Hindu family with his uncle Gaya Prasad and that on Gaya Prasad's death he succeeded to the joint property by right of survivorship. The suit was contested by defendant 4 only who denied the mortgage deed in suit. He also pleaded that even if the deed be held to have been duly executed by Cheddi, the plaintiff was not entitled to maintain the suit as Gaya Prasad's wife was living and as the plaintiff was not a member of a joint family with him. In any case, he urged, that the plaintiff was not entitled to a decree without producing a succession certificate. There was also a plea of limitation and the defendant claimed to be an agriculturist. Issues were framed by the trial Court on all these points and all of them were decided in favour of the plaintiff. Accordingly a decree was passed in favour of the plaintiff as prayed. The defendant appealed and the following three points were urged before the learned civil Judge who heard the appeal : (1) that the plaintiff had failed to prove the execution of the mortgage deed in suit ; (2) that the plaintiff was not a member of a joint family with his uncle Gaya Prasad ; and (3) that the defendant-appellant was entitled to the benefits of the U. P. Agriculturists' Relief Act.

The latter two points were decided by the learned civil Judge in favour of the plaintiff and against the defendant-appellant but on the first point he held that the mortgage deed in suit had not been proved according to law as no attesting witness had been called by the plaintiff. The appeal of the defendant was therefore allowed and the plaintiff's suit dismissed. The plaintiff brings this second appeal and urges that as the contesting defendant had not 'specifically denied' the execution of the mortgage deed, it was not necessary for the plaintiff to produce an attesting witness. It appears that in proof of the deed in suit, the plaintiff examined himself. There were two attesting witnesses but one of them was said not to be traceable and about the other the plaintiff stated that he did not want to produce him as he had refused to give evidence in his favour. The learned Munsif was of opinion that there was no specific denial of the execution of the document by the defendant and that therefore the proviso to S. 68, Evidence Act, applied. The learned civil Judge was however of the contrary opinion and

held that the denial of execution by the defendant was a specific denial within the meaning of the proviso to S. 68 and that therefore it was incumbent on the plaintiff to produce at least one of the attesting witnesses. I am of opinion that the learned civil Judge was right in his opinion. The defendant not only denied the execution of the document but stated in his written statement that it was not genuine. I agree with the learned civil Judge that by taking this plea the defendant put the plaintiff to proof of the document and that the plaintiff should have proved it according to law.

I also agree that the fact that one of the attesting witnesses had turned hostile was no sufficient ground for not producing him. The plaintiff could undoubtedly have obtained the Court's permission to cross-examine the witness. In A I R 1932 Mad 148,[1] it was held that the provisions of S. 68, Evidence Act, were mandatory and the fact that when called the said witness would prove hostile did not excuse the party producing the document from this duty of calling the said witness. In the case in 1939 O W N 450,[2] which was a suit on the basis of a mortgage, the defendant pleaded that he did not admit the execution of the mortgage deed and it was held by their Lordships of the Judicial Committee that the execution of the mortgage deed was 'specifically denied' by the defendant within the meaning of the proviso to S. 68, Evidence Act. In that case one of the five attesting witnesses had been examined by the plaintiffs but as his evidence was held to be unreliable, it was held by their Lordships that the provisions of S. 68, Evidence Act, had not been complied with.

It was argued that what the contesting defendant denied was the execution of the document and not its attestation according to law, but it has been held in various cases that the word "execution" as used in the proviso to S. 68, Evidence Act, in the case of a mortgage bond, means and includes not only the signature of the executant but the whole series of acts or formalities which are necessary to give the document validity as a mortgage: *vide* for example 187 I C 644.[3] I am therefore of opinion that the finding of the learned civil Judge on the point is correct. The learned counsel for the appellant urged that if it be held that the plaintiffs had failed to prove the mortgage deed, opportunity might be given to him now to produce one of the attesting witnesses. I am afraid I cannot accede to this request at this stage. In the case in A I R 1932 Mad 148,[1] already referred to, it was held that where in the trial Court the pleading and the issues cover the question regarding proof of execution of a document required by law to be attested and the plaintiff has given evidence though insufficient to prove its execution, the plaintiff cannot be allowed in second appeal to adduce fresh evidence as regards the execution and that he cannot thus be allowed to patch up the weak parts of his case and fill up the omissions. In 8 O W N 627[4] also, it was held that when a party could have applied to the lower Court for an adjournment to call further evidence but does not do so and takes the chance of a judgment in his favour on the evidence then at his disposal, he will not be allowed to call it in the appellate Court. Their Lordships of the Judicial Committee also held in A I R 1931 P C 143[5] that the provisions of S. 107, as elucidated by O. 41, R. 27, are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. In the present case, the plaintiff did make an attempt in the trial Court to get the case adjourned for producing one of the attesting witnesses but this request was eventually given up and while the case was in the lower appellate Court no attempt was made by the plaintiff to produce an attesting witness or to get the case remanded to the trial Court for the evidence of an attesting witness. In these circumstances it would not in my opinion be just to the defendant-respondent to send the case back for the evidence of a witness whom the plaintiff should have produced long before this. The appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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1. ('32) 19 AIR 1932 Mad 148 : 135 I C 532, Peda Manikyam v. Periagadu.
2. ('39) 26 AIR 1939 P C 117 : 181 I C 216 : I L R (1939) Kar P C 222 : 1939 O W N 450 (PC), Surendra Bahadur Singh v. Behari Singh.
3. ('39) 26 AIR 1939 Cal 688: 187 I C 644: 69 CLJ 454 : 43 C W N 1025, Hare Krishna Panigrahi v. Jogneswar Panda.
4. ('31) 18 AIR 1931 Oudh 298 : 132 I C 259 : 8 O W N 627, Kazim Husain v. Shambhoo Nath.
5. ('31) 18 AIR 1931 P C 143 : 132 I C 721 : 58 I A 254 : 10 Pat 654 (PC), Parsotim Thakur v. Lal Mohar Thakur.

*** A. I. R. 1941 Oudh 91**

GHULAM HASAN J.

Badri Prasad and another — Applicants

v.

Ambika Pershad and another —

Opposite Party.

Civil Revn. Appln. No. 54 of 1939, Decided on 2nd October 1940, from order of Munsif, North Lucknow, D/- 25-2-1939.

(a) Civil P. C. (1908), O. 9, R. 9—O. 9, R. 9 whether applies to restoration of application under O. 21, R. 97 (Quære).

Whether an application under O. 21, R. 97, dismissed for default can be restored by resorting to the provisions of O. 9, R. 9: *Case law referred.*

[P 91 C 2 ; P 92 C 1]

** (b) Civil P. C. (1908), S. 151—Application of auction-purchaser under O. 21, R. 97 erroneously dismissed when he was late only by fifteen minutes—Application can be restored under provisions of S. 151.*

It is not correct to say that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under S. 151. There is absolutely no reason for circumscribing the powers of the Court in cases where the Court is moved to correct its own mistake and wants to afford redress to the party who has been made to suffer for such mistake. Hence, where Court has erroneously dismissed application of auction-purchaser under O. 21, R. 97 so early in the day when he was late by only fifteen minutes, the Court has perfect jurisdiction under S. 151 to restore the application: A I R 1928 All 301, *Rel. on; Case law reviewed.*

[P 93 C 1, 2]

Suraj Sahai — for Applicants.

K. P. Srivastava — for Opposite Party No. 1.

Order. — This is an application under S. 115, Civil P. C., filed in the following circumstances. One Gopi Krishan obtained a simple money decree against Narain Das. In execution of the decree, the decree-holder put a house belonging to the judgment-debtor to sale. B. Ambika Prasad purchased the house on 22nd August 1936, in an auction sale, for Rs. 750. The sale certificate was granted to the auction-purchaser on 2nd June 1937. The auction-purchaser was obstructed by Bishun Gopal and Badri Prasad, the present applicants, in obtaining possession of the house sold to him. On 7th July 1937, the auction-purchaser applied under O. 21, R. 97, Civil P. C., complaining of the said obstruction. On 24th July 1937, the applicants filed objections. The application was subsequently withdrawn for reasons which need not be detailed. The auction-purchaser made another attempt to obtain delivery of possession, but he was again resisted by the applicants with the result that he had to file a fresh application on 23rd April 1938, under O. 21, R. 97, Civil P. C.

On 28th May 1938 the applicants again filed objections. The case was fixed for hearing for 3rd December 1938. It was taken up by the learned Munsif soon after he sat in Court and was dismissed in default. The learned Munsif states in the order which is the subject of revision that as far as his recollection went, the application was dismissed for default by him between 10 and 11 A. M., being the first case on the cause list. An application for restoration was made in the forenoon of the same day, namely 3rd December 1938, under O. 9, R. 9, Civil P. C., and S. 151, Civil P. C. The auction-purchaser went into the witness box and stated on oath that his application had been dismissed before he entered the Court room at 10.15 A. M., and that he had made an application for restoration within half an hour of such dismissal. In the explanation given by the auction-purchaser, the delay in appearing fifteen minutes late in Court was ascribed to a cycle accident which the applicant had met with on his way to Court. There was no rebuttal against this evidence. The learned Munsif believed the evidence of the auction-purchaser with which, he says, he was impressed and accepted the explanation of the cycle accident as given by the auction-purchaser. As a result, he restored the application. The objectors have now come up to this Court in revision against the aforesaid order of restoration of the application under O. 21, R. 97, Civil P. C.

Three points have been urged in support of the present application. Firstly it has been argued on behalf of the applicants that the learned Munsif had no jurisdiction to restore the application because O. 9, R. 9, Civil P. C., did not apply to the case even with the aid of S. 141, Civil P. C. Secondly it has been urged that the learned Munsif had no jurisdiction to restore the application under his inherent powers under S. 151, Civil P. C. Lastly, it has been contended that in any view of the matter the learned Munsif should not have passed the order of restoration without awarding costs to the applicants against the auction-purchaser. I have heard the learned counsel for both parties at great length in this case. As regards the first proposition, advanced on behalf of the applicants that O. 9, R. 9, Civil P. C., does not apply to the case, reliance is placed in support of the contention on 52 Mad 899[1] where it was held by a Full Bench of the Madras High Court that proceedings under R. 97 or R. 100 of O. 21, Civil P. C., are pro-

1. ('29) 16 A I R 1929 Mad 757 : 120 I C 567 : 52 Mad 899 : 57 M L J 381 (F B), Alagasundaram Pillai v. Pichuvier.

ceedings in execution, and S. 141 of the Code is therefore not applicable to such proceedings (unless they also fall within S. 47), and in consequence the provisions of O. 9 do not apply to them.

In 41 Cal 1[2] it has been held that O. 9, R. 13, Civil P. C., is not applicable to a proceeding under Rr. 100 and 101 of O. 21 of that Code. On behalf of the opposite party, reliance has been placed on the following cases: 23 O C 349,[3] A I R 1918 Pat 486,[4] A I R 1923 Pat 239[5] and A I R 1933 Nag 176.[6] There is no doubt that there is conflict of authority upon the point between the various High Courts, but having regard to the view that I propose to take in this case, it is not necessary for me to express any opinion on the point. The next question therefore that arises for consideration is whether the lower appellate Court was competent to restore the application under its own inherent powers. The learned counsel on behalf of the applicants has relied on the following cases, 5 O W N 895,[7] 46 ALL 631[8] and A I R 1934 Cal 653,[9] in support of the contention that as there was a remedy open to the auction-purchaser by means of a suit under O. 21, R. 103, Civil P. C., the Court was not justified in resorting to the provisions of S. 151, Civil P. C.

The first case related to an application for execution which was dismissed for default of the decree-holder's agent, but it was restored under S. 151, Civil P. C. The learned Chief Judge (Sir Louis Stuart) observed that the Court below had applied the provisions of S. 151 rightly to the case. He referred to his own decision reported in 46 ALL 144[10] where he had held that a Court cannot make use of the special provisions of S. 151, Civil P. C., where the applicant has his remedy provided elsewhere in the Code and has wilfully neglected to avail himself of the remedy so provided. The learned Chief Judge expressed his adherence to the view expressed in the above case, but observed that in the case before him the decree-holder had no remedy if S. 151 was not applied as the second application had become time-barred. The second case was a single Judge decision of the Allahabad High Court. An application for restoration was not made within the time allowed by law. The Court below however allowed it in the exercise of its inherent powers under S. 151. In these circumstances the learned Judge held that the Court cannot ignore the provisions of law of limitation by appealing to S. 151 of the Code.

The last case was also a single Judge decision of the Calcutta High Court where the learned Judge held that where the Code provided an alternative remedy, the Court has no jurisdiction to act under S. 151, Civil P. C. The case in A I R 1928 Cal 179[11] was cited before the learned Judge. That case laid down in the clearest terms that where there is no provision in the Code expressly providing for a remedy and none which prohibits a remedy being administered and such remedy is called for in order to do that real and substantial justice for the administration of which it exists, the provisions of S. 151 may and should be resorted to. That was a case under O. 21, R. 100, Civil P. C., and the decree-holder not having appeared, the petitioner's claim was allowed ex parte. It was held that O. 9, R. 13, Civil P. C., did not apply to the case and the decree-holder's application could not be allowed under those provisions. The Court however exercised jurisdiction under S. 151 and ordered the case to be restored to the file. This decision also laid down that a suit contemplated under R. 103 of O. 21, Civil P. C., is one which may be instituted after a due and proper investigation of the matter in accordance with R. 100. Where the matter however has not been so investigated, but has been disposed of on default on the part of one or other of the parties the remedy by way of suit is hardly a remedy for the dismissal by default, but is merely a further step which the law provides for all unsuccessful parties in such cases. In the end, in spite of the fact that the remedy by way of O. 21, R. 103, was available to the decree-holder, the learned Judge held that there was no bar to the exercise of jurisdiction under S. 151, Civil P. C. I do not find that the learned Judge in the case cited, A I R 1934 Cal 653,[9] expressed any dissent from the decision in

2. ('14) 1 A I R 1914 Cal 126: 19 I C 683: 41 Cal 1: 18 C W N 343, Hari Charan v. Manmatha Nath.
3. ('20) 7 A I R 1920 Oudh 177: 59 I C 575: 23 O C 349, Gauri v. Hinga.
4. ('18) 5 A I R 1918 Pat 486 : 43 I C 951 : 3 P L J 250, Satya Narayan Lal v. Gobind Sahay.
5. ('23) 10 A I R 1923 Pat 239 : 71 I C 484 : 2 Pat 372: 4 P L T 93, Sheonandan v. Debi Lal.
6. ('33) 20 A I R 1933 Nag 176 : 143 I C 584 : 29 N L R 176, Raghunath Haribar v. Khatum Bi.
7. ('28) 15 A I R 1928 Oudh 478 : 114 I C 128 : 5 O W N 895, Jagdat Sinha v. Rajpal Kuar.
8. ('24) 11 A I R 1924 All 668 : 79 I C 997 : 46 All 631 : 22 A L J 583, Tota Ram v. Panna Lal.
9. ('34) 21 AIR 1934 Cal 653: 152 I C 24: 59 C L J 218, Sukhomoy Biswas v. Asia Khatun.
10. ('24) 11 A I R 1924 All 446: 78 I C 416 : 46 All 144, Shib Prakash v. Jhinguria.
11. ('28) 15 A I R 1928 Cal 179 : 107 I C 729 : 47 C L J 87, Nabu Sahu v. Kamdev.

A I R 1928 Cal 179,[11] though in the result he held that there being an alternative remedy under R. 103 the case could not be restored under S. 151, Civil P. C.

On behalf of the opposite party reliance has been placed on A I R 1929 ALL 721,[12] A I R 1930 ALL 701,[13] A I R 1931 ALL 594,[14] A I R 1933 ALL 783,[15] A I R 1930 Lah 20,[16] A I R 1939 Lah 223,[17] A I R 1932 Bom 271[18] and A I R 1937 Sind 101,[19] where S. 151 was applied irrespective of the question whether an alternative remedy was available to the aggrieved party or not. In A I R 1930 ALL 701[13] the learned Judge observed that the mere fact that the defendant had a right of appeal under O. 43, R. 1, cl. (f), Civil P. C., does not preclude the Court from exercising jurisdiction in setting aside an ex parte decree which had been wrongly and illegally passed. After having carefully considered the cases cited on both sides, I am of opinion that the proposition that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under S. 151, Civil P. C., is too wide and does not take into account cases of a special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs. I am, therefore, of opinion that the learned Munsif who himself had originally dismissed the case for default of appearance was justified in restoring it upon an application of the auction-purchaser. The learned Munsif admits that he was in error in dismissing the application so early in the day when the auction-purchaser was late only by fifteen minutes. There is absolutely no reason for circumscribing the powers of the Court in cases where the Court is moved to correct its own mistake and wants to afford redress to the party who has been made to suffer for such mistake. In the case reported in A I R 1928 ALL 301[20] Dalal J. in a somewhat similar case observed that no order of dismissal in default should be passed till the end of the day when the Court was rising because there could be no default until the Court rose for the day. It appears that in that case the judgment-debtor was not present at the time when the case was called out and the Court dismissed his application in default. The man immediately appeared in Court afterwards and applied for restoration and the Court acting under S. 151, Civil P. C., rescinded its previous order of dismissal.

I hold in this case, therefore, that the order of dismissal was entirely mistaken and should not have been passed. There was in fact no dismissal for default at all, and the Court had perfect jurisdiction to revoke its own order passed under a misapprehension. The learned Munsif was, therefore, justified in restoring the application of the auction-purchaser under O. 21, R. 97, Civil P. C. It may be stated that the learned counsel on behalf of the applicants has not questioned the order of the learned Munsif upon the merits. In fact it was not possible for him to challenge that order in revision. Even apart from that the order was eminently just and reasonable. As regards costs, I do not see how in correcting its own order passed under a mistake, the learned Munsif would have been justified in awarding costs to the applicants against the auction-purchaser who was guilty of delay only by fifteen minutes. The result is that there is no substance in this application and it is accordingly dismissed with costs.

D.S./R.K. *Application dismissed.*

12. ('29) 16 A I R 1929 All 721 : 119 I C 851 : 51 All 901 : 1929 A L J 1079, Yudhishter Lal v. Fatch Singh.
13. ('30) 17 A I R 1930 All 701 : 132 I C 807, Kallan v. Nanhe.
14. ('31) 18 A I R 1931 All 594 : 136 I C 283 : 1931 A L J 622, Dwarka Das Babu Ram v. Vaish Flour Mill.
15. ('33) 20 A I R 1933 All 783 : 145 I C 995 : 55 All 891 : 1933 A L J 1032 (F B), Mohammad Hanif v. Ali Raza.
16. ('30) 17 A I R 1930 Lah 20 : 119 I C 494 : 11 Lah 93 : 31 P L R 375, Hari Singh v. Bulaqi Mal & Sons.
17. ('39) 26 A I R 1939 Lah 223 : 41 P L R 544, Mt. Acharji Bibi v. Swami Shesh Sahai.
18. ('32) 19 A I R 1932 Bom 271 : 138 I C 248 : 34 Bom L R 714, Mohanlal & Co. v. Yolibai.
19. ('37) 24 A I R 1937 Sind 101 : 169 I C 918 : 31 S L R 32, Mohanlal Tejumal v. Khushalibai.
20. ('28) 15 A I R 1928 All 301 : 108 I C 576 : 26 A L J 382, Ram Shanker v. Ram Narain.

* A. I. R. 1941 Oudh 93

YORKE J.

Gurdin Bhant — Decree-holder — Appellant

v.

Chhedi Bhant — Judgment-Debtor — Respondent.

Exn. Second Appeal No. 6 of 1939, Decided on 18th October 1940, against order of the Addl. Civil Judge, Fyzabad, D/- 21st October 1938.

(a) Execution — Limitation — Step-in-aid — Certifying of payment is not step-in-aid.

The certifying of a payment of an amount towards a decree is not a step-in-aid of execution.

[P 94 C 2]

**(b) Limitation Act (1908), S. 15 — S. 15 does not apply to administrative instruction to Courts to keep execution cases pending against certain classes of persons until further orders.*

Section 15 has application only to injunctions and orders judicially made, and can have no application whatsoever, to a letter by the Chief Court requesting the District Judge to stay all execution proceedings in civil Court decrees passed against agriculturists as defined in the Agriculturists' Relief Bill until that Bill should become law, and also asking them to instruct the Courts subordinate to them to the same effect, as this letter is no more than an administrative instruction to the Courts to keep execution cases pending against certain classes of persons until further orders. [P 95 C 1]

(c) Execution—Instalment decree with default clause — Decree-holder, on default of instalment, exercising option to execute his decree for whole amount—He cannot again claim to realize any of instalments as they fell due.

Where the decree-holder who has obtained instalment decree has exercised successfully the option to execute his decree for the whole amount on default of any instalment, he at once has converted the decree from being an instalment decree into an ordinary decree for the realization of the full decretal amount. He cannot again claim to realize any of the instalments as they fall due or rather within three years from the date on which they fell due. [P 95 C 2]

P. N. Bhatt — for Appellant.

Sri Ram — for Respondent.

Judgment.—This is an execution second appeal by the decree-holder whose application for execution of his decree was dismissed by the Court of first instance and whose appeal was subsequently dismissed by the additional civil Judge of Fyzabad. The facts set forth in the judgment of the lower appellate Court are not as full as they might have been, and it looks rather as if learned counsel appearing in that Court had made something of an attempt to conceal facts from that Court. The decree-holder appellant obtained an instalment decree for Rs. 614-11-0 with costs Rs. 97-8-0 and future interest at six per cent. per annum on 9th December 1929. It was directed that the judgment-debtor would pay the amount of the decree in five equal instalments on 9th December 1930, 1931, 1932, 1933 and 1934. It was further stated in the decree that in case of any default the decree-holder would have a right to execute the decree for the whole outstanding amount. On 5th December 1930, the judgment-debtor paid into Court the sum of Rs. 142-7-0 purporting to be the full amount of the first instalment. An application was made to execute the whole decree on 8th January 1931, that is to say the decree-holder claimed then and there to exercise his option to realize the whole decretal amount.

The decree-holder's application was dismissed on the following day, that is 9th January 1931, on an office report that the first instalment had been paid. Against this dismissal of the application, an appeal was filed by the decree-holder who claimed that Rs. 142-7-0 was not the full amount due as the first instalment. It appears on a rough calculation of the future interest which would have accrued during the first year that the amount of the first instalment would have been not less than Rs. 151 but that is based on a calculation only of the interest for one year and not on a calculation of the interest which would accrue over the whole period of five years. If that is taken into consideration the amount of the first instalment would have been considerably higher. The decree-holder's appeal was allowed and the execution case restored, and it seems to have proceeded in the Court of first instance for several months. It was ultimately consigned to records on 10th July 1931, both parties being absent on that date. It was in these circumstances that no further application for execution was filed by the decree-holder until 5th January 1938. Extension of time for filing this application was sought on a plea that the decree-holder had on 10th May 1934, filed a certificate of payment of Rs. 5 and a further plea that on 15th April 1935, a sum of Rs. 10 had been paid to the decree-holder. No certificate of payment of this amount had been filed and in view of the decisions that the certifying of a payment of an amount towards a decree is not a step-in-aid of execution, these two payments cannot be considered to have any bearing on the case at all. No other point was raised in the trial Court which accordingly dismissed the application.

In the lower appellate Court a further point was taken that limitation should be extended under the provisions of S. 15, Limitation Act, by reason of the fact that under a letter of the Chief Court execution proceedings were stayed in the subordinate Courts pending the debt legislation which was then on the legislative anvil. There is some dispute as to the period for which this so-called stay order was in force. On behalf of the appellant it is said to have remained in force up to some time in November 1935, while on behalf of the respondent it is said that it came to an end on 30th April 1935. The learned additional civil Judge held that in any case the letter of this Court which is being construed as a stay order related only to the stay of execu-

tion proceedings pending at that time, and he also stated, incorrectly as it happens, that the decree had already become time barred before the orders of the Hon'ble Chief Court. The incorrect statement seems to have been due to an incorrect statement of facts by learned counsel appearing in his Court. Actually in view of the fact that the first application for execution was consigned to records on 10th July 1931, the period of limitation for a fresh application would have expired on 9th July 1934, that is to say during the period after the issue of this letter.

On the other hand, I am in full agreement with the learned additional civil Judge that this letter could not have operated to prevent the filing of fresh execution applications, although it would have led the Courts in which such applications were filed to stay them also. The letter requests the District Judges to stay all execution proceedings in civil Court decrees passed against agriculturists as defined in the Agriculturists' Relief Bill until that bill should become law, and also asks them to instruct the Courts subordinate to them to the same effect. It is obvious that this was no more than an administrative instruction to the Courts to keep execution cases pending against certain classes of persons until further orders. There are two points in this connexion. In the first place, there is nothing whatsoever on the record of the present case to show that the judgment-debtor respondent was an agriculturist as defined in the bill as it stood at that date, and therefore to induce the application of this letter. Secondly, I am clearly of opinion that the issue of this letter could not in any case induce the application of S. 15, Limitation Act. That section provides that :

> In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

It is to my mind perfectly clear that this section has application only to injunctions and orders judicially made, and could have no application whatsoever to such an instruction as this letter issued by the Chief Court to District Judges in 1934. The learned additional civil Judge therefore rightly declined to consider this letter. Failing the application of this letter it is clear that the present application made on 5th January 1938, was hopelessly time-barred. Learned counsel for the appellant had suggested that by the application of S. 15 in connexion with this letter the application for execution might not have been time-barred with regard to the instalments falling due on 9th December 1933 and 9th December 1934. In my opinion, even to that extent his appeal would have been entirely without force because the moment the decree-holder exercised successfully the option to execute his decree for the whole amount, he at once converted the decree from being an instalment decree into an ordinary decree for the realisation of the full decretal amount. He could not again claim to realize any of the instalments as they fell due or rather within three years from the date on which they fell due. The learned additional civil Judge rightly dismissed the decree-holder's appeal. There is no force in the present appeal which therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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* A. I. R. 1941 Oudh 95

YORKE J.

Mt. Hidayat-ul Nissa — Plaintiff — Appellant

v.

Jalal-ud Din and others — Defendants — Respondents.

Second Appeal No. 214 of 1937, Decided on 26th September 1940, against order of Sessions and Civil Judge, Lucknow, D/- 13th March 1937.

(a) Transfer of Property Act (1882), S. 53 — Attack under S. 53 involves admission that transfer is real.

Attack based on S. 53 involves the admission that the transfer is a real transfer. [P 96 C 1]

(b) Civil P. C. (1908), O. 21, Rr. 58 and 63— Objection under R. 58 dismissed — Within one year from order of dismissal amount of decree paid up by judgment-debtor and attachment withdrawn — Claimant need not sue under R. 63.

Where after an order disallowing the claimant's claim and directing the attachment to continue, the attachment ceases within the period of one year from the date of the order, e. g., by reason of the dismissal of the application for execution under R. 57 for default of prosecution or by reason of the withdrawal of attachment on payment by the judgment-debtor to the decree-holder of the amount of the decree, it is not incumbent upon the claimant to institute a suit under R. 63 or to prosecute the suit if he has already brought one, and he will not be affected by any of the consequences which result from a failure to institute a suit under this rule. [P 97 C 2]

(c) Transfer of Property Act (1882), S. 53 — Allegation that deed of transfer was fictitious — S. 53 does not apply.

Section 53 can have no application to a case where the allegation is that the deed of transfer was fictitious and not that it was voidable as executed with fraudulent intention. [P 97 C 2]

(d) Trusts Act (1882), S. 84 — Argument based on S. 84 — Assumption is that document is liable to be assailed under S. 53, T. P. Act.

Any argument based on S. 84, Trusts Act, proceeds on the assumption that the document in question has been assailed or is liable to be assailed under S. 53, T. P. Act, as executed with the intent to commit fraud. [P 97 C 2]

Nazir-ud-din Siddiqi — for Appellant.

Ram Pershad Verma — for Respondent 1.

Judgment. — This is a second appeal in a suit for partition which was decreed by the trial Court but dismissed in appeal by the Sessions and the civil Judge of Lucknow. The plaintiff, Mt. Hidayat-ul-nisa, sued for partition of a house and other property. The defendants to the suit were Mt. Zainab, mother of the plaintiff, her brother Jalal Uddin and her sister and two half-brothers and a half-sister. The contesting defendants were, however, the mother, Mt. Zainab and the brother Jalal Uddin. The plaintiff sought partition on the ground that she had a share in this property as one of the heirs of her father Amir Uddin. The defence was that Amir Uddin had gifted the property to Mt. Zainab in the year 1900, and that subsequently Mt. Zainab had gifted it to Jalal Uddin in 1934. On this plea being raised, it was stated in oral pleadings in the trial Court that the gift executed by Amir Uddin in favour of Mt. Zainab was denied and it was said that even if it was proved it was a fictitious transaction, that is to say the deed was not a real instrument of transfer but merely a colourable document not intended to effect any transfer. The contention that the document was fraudulent and intended to defeat creditors, that is attack based on S. 53, T. P. Act, was not put forward doubtless for the reasons that such an attack involves the admission that the transfer is a real transfer and a document intended to effect a real transfer but with a view to fraud is only voidable at the option of the creditors.

The learned Munsif came to the conclusion that the deed of gift executed by Amir Uddin on 3rd February 1900 was a fictitious and colourable document. The lower appellate Court after a consideration of the whole of the evidence has come to the conclusion that the document is not fictitious and colourable. Prima facie, this is a finding of fact not assailable in second appeal. Learned counsel for the appellant, however, puts forward the contention that this is one of those cases in which the proved facts upon the record do not warrant the inference of fact drawn from them. In effect learned counsel concedes that the inferences of fact drawn by the learned civil Judge cannot be assailed in the manner he suggests because his main line of attack on the finding is that the learned civil Judge has discarded a piece of evidence by which he was really bound. I shall come to this piece of evidence in due course and it is really the only piece of evidence which requires consideration in the case. The facts upon which the finding of the fact of the lower appellate Court has been arrived at are as follows :

Mt. Zainab was married to Amir Uddin in 1884. On 15th January 1900, one Ram Charan sued Amir Uddin to recover the amount of certain debts and applied for attachment before judgment. Two days later, he obtained an injunction restraining Amir Uddin from transferring any of his property which was served on Amir Uddin on 18th January. This was the position when on 3rd February 1900, Amir Uddin executed a deed of gift of the house in suit in favour of his wife Mt. Zainab, admitting the existence of a dower debt due by him to her. On 10th February Ram Charan got a decree for Rs. 1600. Thereafter at the end of 1900 or beginning of 1901 Amir Uddin made an application in insolvency. That application was dismissed on 12th February 1901, on the finding that Amir Uddin was in possession of the property and that the deed of gift executed by him in favour of his wife was fictitious. That order or judgment is not inter partes and was rightly left out of consideration by the learned civil Judge. On 9th October 1903, Mt. Zainab obtained mutation in respect of the house, the name of Amir Uddin being struck off.

At a later date some time in 1905 or 1906 Ram Charan proceeded to execute his decree by attachment of the house in suit. Mt. Zainab thereupon filed an objection under the provisions of O. 21, R. 58 but on 28th May 1906, her objection was dismissed on the finding that the house in dispute did not belong to her but did belong to the judgment-debtor Amir Uddin. In the ordinary way it would have been the duty of Mt. Zainab to institute a declaratory suit under the provisions of O. 21, R. 63, and failing the institution of such a suit, O. 21, R. 63 provides that the order in the objection case shall be conclusive. Such a suit is to be instituted within one year. Before that year could elapse, and in fact within a fortnight of the dismissal of the objection the amount of the decree was paid up, and in consequence the attachment was withdrawn. The

learned civil Judge has held that in these circumstances the order of the subordinate Judge in the objection case does not make the matter final and is not at all binding with regard to the fraudulent nature of the deed of gift. In effect an order under O. 21, R. 63 is really final as to the title of the objector rather than as to the fraudulent nature of the deed of gift, and in any case the question in issue in the present suit was not whether the deed of gift was fraudulent but whether it was fictitious.

Subsequently, on 19th October 1915, Amir Uddin and Mt. Zainab executed a mortgage of the house in dispute and in 1920 it is said that Amir Uddin died in this very house. In 1933 Mt. Zainab redeemed the mortgage of 1915 by payments out of Court made by Jalal Uddin, and finally on 7th December 1934, Mt. Zainab executed a deed of gift in favour of Jalal Uddin. The learned civil Judge taking all these facts into consideration was of the opinion that the deed of gift was genuine and not fictitious. In regard to the decision of the objection case in 1906 he held that inasmuch as the attachment was withdrawn within the period of limitation for filing a suit, it was no longer necessary for Mt. Zainab to institute a declaratory suit, and therefore the finding in the objection case lost its finality, and in fact ceased to have any effect.

The main argument which has been put forward in this appeal is an attempt to restore force to the judgment in the objection case. In order to be able to give some strength to the argument that the facts on the record do not warrant the conclusion of fact arrived at, learned counsel attempts to draw a distinction between cases in which the claim of the objector has been allowed and it is for the decree-holder to institute a suit and cases in which the objection has been dismissed and it is for the objector to institute such a suit. He contends that although it may not be necessary for the objector to institute a suit against the decree-holder in cases where the attachment has for any reason been withdrawn within the period of limitation for filing a suit, it is none the less necessary for the objector to institute such a declaratory suit making the judgment-debtor a defendant. Learned counsel has not been able to put forward any decision of any High Court to that effect. In Mulla's Commentary on the Civil Procedure Code (Edn. 10 at p. 785) the learned Commentator in a paragraph headed "Suit not necessary if the property is released from attachment within the period of limitation" sums up the result of a number of cases as follows :

> Where after an order disallowing the claimant's claim and directing the attachment to continue, the attachment ceases within the period of one year from the date of the order, e. g., by reason of the dismissal of the application for execution under R. 57 above for default of prosecution or by reason of the withdrawal of attachment on payment by the judgment-debtor to the decree-holder of the amount of the decree, it is not incumbent upon the claimant to institute a suit under this rule or to prosecute the suit if he has already brought one, and will not be affected by any of the consequences which result from a failure to institute a suit under this rule.

That is to say, in such a case the order which had been made in the objection case ceases to be conclusive. In my opinion there was no necessity for Mt. Zainab to institute any suit for a declaration and the order in the objection case is entirely without effect and was rightly discarded by the lower appellate Court as a piece of evidence bearing on the question whether or not the execution of the deed of gift by Amir Uddin was a fictitious transaction. Learned counsel for the appellant has sought to base some arguments on S. 53, T. P. Act, and S. 84, Trusts Act. It is sufficient to say that S. 53 could have no application to this case it being the definite case of the plaintiff that the deed of gift was fictitious and not that it was voidable as executed with fraudulent intention. As regards S. 84 any argument based on that section proceeds on the assumption that the document in question has been assailed or is liable to be assailed under S. 53 as executed with the intent to commit fraud.

Learned counsel has concluded by the general argument that the facts which have been set out, discussed and considerd in the lower appellate Court's judgment do not warrant the conclusion of fact. In my opinion this is the weakest line of attack possible upon a finding of fact. The finding of the lower appellate Court is based on a consideration of all the facts, and I am not prepared to say that on a reasonable consideration of those facts it is not a possible conclusion that the deed of gift was a genuine document intended to effect a transfer of the property in favour of the donor's wife, Mt. Zainab. In these circumstances the lower appellate Court rightly held that the plaintiff's claim to partition of the property could not succeed and therefore dismissed the plaintiff's suit. I find no force in the present appeal which is really concluded by

findings of fact and I dismiss it accordingly with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 98

THOMAS C. J. AND GHULAM HASAN J.

Emperor

v.

Swami Sarupanand — Accused

Opposite Party.

Criminal Revn. Appln. No. 99 of 1940, Decided on 30th September 1940, from order of Sess. Judge, Hardoi, D/- 29th May 1940.

(a) Criminal P. C. (1898), Ss. 123 (6) and 108 — Security for good behaviour under S. 108 — Rigorous imprisonment for failure to give is illegal under S. 123 (6).

A sentence of rigorous imprisonment for failure to give security for good behaviour in proceedings under S. 108 is illegal under S. 123 (6). [P 98 C 2]

(b) Penal Code (1860), Ss. 124A and 153A — Speech whether brought accused within S. 124A or S. 153A held doubtful.

The speech relied upon by the prosecution was as follows: "O, white-skinned! We are all ready to receive bullets, go to jail and die; but we want complete independence. We will bear all hardship and win the fight that is to come. Be ready:"

Held that it was very doubtful whether the speech would bring the accused within the purview of S. 124A or S. 153A. [P 99 C 2]

(c) Criminal P. C. (1898), S. 439—High Court in revision is bound by findings of fact—Finding that record of speech is not true is binding in revision.

The High Court in revision is bound to accept the findings of fact arrived at by the lower Court and therefore a finding that the record of a speech is not true must be accepted in revision. [P 99 C 2]

(d) Criminal P. C. (1898), S. 108 — Person making seditious speech or on one occasion circulating notices promoting enmity between classes may be prosecuted under S. 153A, Penal Code — But he cannot be proceeded against under S. 108.

A person who makes seditious speech or who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes, may possibly be prosecuted under S. 153A, Penal Code, but he cannot be proceeded against under S. 108 : A I R 1934 Oudh 70, *Foll.* [P 100 C 1]

Assist. Government Advocate — for the Crown.

K. N. Tandon — for Accused.

Order. — This is an application in revision on behalf of the Local Government under S. 439, Criminal P. C., against the order of the learned Sessions Judge of Hardoi dated 29th May 1940, setting aside the order of the learned District Magistrate of Hardoi binding the accused Swami Swarupanand under S. 108, Criminal P. C. The accused Swami Swarupanand was called upon on 28th March 1940 to show cause why he should not be ordered to furnish a personal bond in Rs. 500 with two sureties, each in the like amount, to be of good behaviour for a period of one year. The reason why this notice was issued was that he delivered objectionable speeches at Pihani, Mallawan and Pali with the intention of disseminating seditious matters and promoting or attempting to promote feelings of hatred or enmity between different classes of His Majesty's subjects.

The learned District Magistrate under the provisions of S. 112, Criminal P. C., confirmed the notice, and ordered the accused to execute a bond in Rs. 500 with two sureties, each in Rs. 250, to be of good behaviour for a period of one year and in default to undergo rigorous imprisonment for one year. Under the provisions of S. 123 (6), Criminal P. C., the sentence of rigorous imprisonment for one year was illegal. The imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under S. 108, be simple, and the learned District Magistrate was wrong in ordering rigorous imprisonment. The notice which was issued to the accused contained a list of 11 speeches alleged to have been delivered by the accused in different villages, but the prosecution at the trial put forward only three speeches, namely: (1) Ex. 4 delivered at Pali on 6th November 1939; (2) Ex. 3 delivered at Mallawan on 15th November 1939; (3) Ex. 1 delivered at Islamnagar on 8th February 1940. The accused denied making the objectionable portions of the speeches relied on by the prosecution, and stated that he had in his speech stated that British rule was better than Russian or German but not as compared with that of Indians. The speech of 6th November 1939 was recorded by head-constable Razzaq Beg and was read over to Saghir Ahmad. The speech of 15th November 1939 was delivered to an audience of 400 or 500 persons, and it was recorded by Khuda Yar Khan, head constable. The speech of 8th February 1940 was recorded by naik Wailayat Husain and, according to his evidence, the audience numbered about 500. The finding of the learned Sessions Judge with regard to the speech (Ex. 1) of 8th February 1940, is as follows:

It appears to me that the report (Ex. 1) is merely a gist of the speech and is not a full record of it, and in the case the sentences introduced in the report are merely isolated sentences of the speech and are without the correct context in which they were uttered by the speaker . . . . No doubt, as I have observed above, the sentences if

they be considered to be the correct statement of the speaker, would certainly bring the accused within the offence under S. 124A but if once I conclude that the report is not a full record and a good deal of the speech had been omitted, and if I fail to put the proper context to the sentences, I would hesitate to take any action on it. . . . . and with these considerations I do not consider it proper to accuse him (i. e. the accused) of the speech as is reported in Ex. 1.

It is thus clear from the above finding that the learned Sessions Judge is not satisfied and he is of opinion that the speech recorded by the witness was not the correct speech. The finding of the learned Sessions Judge in respect of the speech made at Mallawan on 15th November 1939 is to the effect that the speech was made by the accused and it was offensive. With regard to the speech of 6th November 1939, delivered at Pali the finding of the learned Sessions Judge is to the following effect :

There are no words in it which could be said to excite disaffection against the Government or to set a class against another. The speaker simply addressed the gathering to bring up the spirit of self-sacrifice to action and to be prepared even to go to jail or die for their cause, and I do not think the words as are reported in Ex. 4 and discussed above would bring the accused within an offence under S. 124A or S. 153A, Penal Code. . . . . I do not consider it to be one on which any prosecution under S. 124A or S. 153A could be possible.

The objectionable portion of Ex. 4 relied upon by the prosecution is as follows :

O, white-skinned ! We are all ready to receive bullets, go to jail and die but we want complete independence. We will bear all hardship and win the fight that is to come. Be ready.

The objectionable portion of the speech relied on by the prosecution delivered at Mallawan on 15th November 1939 is as follows :

The bugles for the freedom of this country were first sounded 53 years ago. Speeches alone were not made but sacrifices were offered. In India where rivers of milk used to flow rivers of blood are flowing. Government delivered its first ultimatum by passing a Defence of India Act on 1st September 1939. The taluqdars and zamindars are brokers of Government and what they desire is to go on committing repression on the ryots. . . . There remains the white face and the oblique eye. He has ruled over you for 150 years and set Hindus against Mussalmans and destroyed their strength, the zamindars against kisans, and gave a fillip to crime.

The objectionable portions of the speech made on 8th February 1940 are as follows :

These taluqdars are tools of the Government and will not do anything against it. The Government has committed many cruelties since the great mutiny up to the present day. They hanged the sons of the Emperor Bahadur Shah and sent to gallows big men—Hindus and Mahomedans. They had come to trade and by deceit and treachery became the rulers. The Congress Government has inflicted a death blow on the British and they now desire to call a truce. We will continue to worry the English till we have achieved complete independence. We must gird up our loins to fight the Government. Nothing can be achieved without bloodshed.

There can be no doubt that this speech, if proved to have been made by the accused, is seditious and attempts to promote feelings of enmity and hatred between different classes of His Majesty's subjects, but, as we have said above, the learned Sessions Judge is of opinion that it is not a true record of what the accused said. We are dealing with an application for revision and not an appeal, and we feel ourselves bound to accept the findings of fact arrived at by the learned Sessions Judge. The accused is alleged to have delivered the speech for about 45 minutes. The note taken down by the witness consists of 17 lines. The witness stated that it was drizzling. The note appears to have been taken down with a fountain pen and there is no blur on the paper and nothing to show that even a drop of water fell on it. We have carefully read the speech and find that no Sanskrit or Hindi words are used by the speaker, who is a Hindu. We therefore reject this speech from consideration. With regard to Ex. 4 of 6th November 1939, we are of opinion that it is very doubtful whether this speech would bring the accused within the purview of S. 124A or S. 153A, Penal Code. We are therefore left with the speech of 15th November 1939 (Ex. 3). The learned Sessions Judge, as we have said, held that it was delivered by the accused and it was objectionable, but "in his opinion the commission of only one offence under S. 153A was not to be taken to justify the proceedings under S. 108, Criminal P. C." He was further of opinion that the element of intention on the part of the accused was not to be deduced from a solitary instance. In 11 O W N 26,[1] it was held that :

The provisions of S. 108 (a), Criminal P. C., cannot properly be applied in respect of an isolated speech made by the accused on a special occasion and at a meeting for a special purpose and therefore an accused cannot be proceeded against under that section in respect of an isolated speech when there is no evidence of his having made any other objectionable speech in the past, or of his having any intention of doing so in the future.

There is, of course, no evidence on the record of any intention of the accused of delivering such speeches in future. In the notice, as we have pointed out, eleven speeches were referred to, but with the exception of three which formed part of the charge, the prosecution did not attempt to prove the remaining speeches; so we refuse to take

1. ('34) 21 A I R 1934 Oudh 70 : 147 I C 1082 : 35 Cr L J 562 : 9 Luck 344 : 11 O W N 26, Chandra Bhan v. Emperor.

them into consideration. In our opinion a person who makes seditious speech or who is found on one occasion only circulating notices which may have the effect of promoting enmity between classes, may possibly be prosecuted under S. 153A, Penal Code, but he cannot be proceeded against under S. 108, Criminal P. C. It may be pointed out that with the exception of one speech, which was made on 8th February 1940, all the speeches were made in November 1939, and there is nothing on the record to show why no action was taken against the accused till 14th March 1940. It may be on account of his speech of 8th February 1940. It is not necessary for us to consider whether action should not have been taken against the accused under Ss. 124A and 153A, Penal Code. We are therefore of opinion that the order of the learned Sessions Judge is correct and we dismiss the application.

G.N./R.K. *Application dismissed.*

A. I. R. 1941 Oudh 100

YORKE AND GHULAM HASAN JJ.

Bharat Singh and others—Plaintiffs—
Appellants

v.

Thakur Chhotey Singh — Defendant —
Respondent.

Second Appeal No. 468 of 1937, Decided on 22nd October 1940, against decree of Dist. Judge, Sitapur, D/- 27th September 1937.

(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 33 — Suit under S. 33 must be deemed to be for accounts for purposes of Court-fees Act and Suits Valuation Act — Appellant must value his appeal according to S. 7 (iv) (b), Court-fees Act — Appellant seeking modification of lower Court's decree is entitled to value appeal at reasonable amount — Appellate Court allowing greater reduction of amount than that at which appeal was valued — Procedure to be followed stated.

Rule 268 (3), Oudh Civil Rules, makes it clear that suits under S. 33 must be deemed to be suits for accounts both for the purposes of the Court-fees Act and the Suits Valuation Act and must be valued according to the provisions of S. 7 (iv) (b), Court-fees Act, and court-fee paid accordingly: AIR 1938 All 467, *Approved*. [P 101 C 1]

But where the appellant seeks a modification of the lower Court's decree he is entitled to value his appeal at a reasonable amount, it being impossible for him to know what modification the appellate Court will be prepared to grant. [P 101 C 1]

The proper procedure, in case the appellate Court at the time of the hearing of the appeal decides to make a greater reduction in favour of the appellant than that at which the appeal was valued is to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up: A I R 1933 Mad 330, *Rel. on.* [P 101 C 2]

(b) Interpretation of Statutes—Fiscal Act should be construed in favour of subject.

A fiscal Act should be read in favour of the subject, that is it should be interpreted strictly and not made too elastic. [P 101 C 2]

S. C. Dass — for Appellants 1, 3 and 4.

M. Wasim — for Respondent.

Judgment.— This is a matter which has arisen first on an objection on behalf of the respondent, and secondly, on a report of the Stamp Reporter, the case being one under S. 33, Agriculturists' Relief Act. In the present case the plaintiff mortgagor instituted a suit under S. 33, Agriculturists' Relief Act, for accounts in respect of a mortgage for a sum of Rs. 10,500. The plaintiff had to value his suit under the terms of sub-s. (3) of S. 33, and he valued it at Rs. 500, alleging that if accounting were to be done after reduction of interest to which he was entitled, the whole amount of the mortgage was paid off except Rs. 500. In the lower appellate Court the plaintiff was appellant, and he again valued his appeal at Rs. 500, but paid court-fee of Rs. 10 as for a declaratory relief. The appeal failed and the plaintiff-debtor has come up in second appeal to this Court. It was contended on behalf of the respondent that the appellant was bound to value his appeal according to the difference between the amount of the decree as it now stands and the amount of the decree as it would stand in case the plaintiff gets the modification of the decretal amount which he seeks.

The Stamp Reporter reports that the practice in this Court has been to treat these cases as suits for a declaration and to recover court-fee accordingly. He therefore reports that in this Court there is no apparent deficiency, but he has referred to cl. 3 of R. 268, Oudh Civil Rules, and a decision of the Allahabad High Court in 1938 A L J 708.[1] In that case a Division Bench of the Allahabad High Court considered what the proper court-fee for the appellant to pay was (1) in cases where the defendant to a suit under S. 33 has applied for a decree, and (2) when there has been no such application. The conclusion reached was that there being no special provision for the court-fee payable in appeal contained in S. 33 of the Act the general law applies, and these suits are to be treated as suits for accounts and valued by the appellant

1. ('38) 25 A I R 1938 All 467 : 177 I C 76 : I L R (1938) All 686 : 1938 A L J 708, Pahlad Singh v. Niadar Singh.

according to the provisions of S. 7 (iv) (b), Court-fees Act, and court-fee paid accordingly.

The amendment of cl. 3 of R. 268, Oudh Civil Rules, leads to the same conclusion that cases under S. 33 are deemed to be suits for accounts for the purposes both of the Court-fees Act and the Suits Valuation Act, and we therefore find no difficulty at all in agreeing with the decision in 1938 A L J 708.[1] Learned counsel for the appellants does not indeed in the present case contest this point, but he agrees that he has to pay court-fee according to the amount at which he values his appeal. He points out that he has valued his appeal both in the lower appellate Court and in this Court at Rupees 500 and he urges that there is nothing unreasonable in this valuation because it is impossible for him to know what, if any, modification of the decree of the Court below this Court will be prepared to grant. The only difficulty which stands in the way of the appellants is the fact that in their grounds of appeal in this Court they have asked for a reduction of the rate of interest from 12 per cent. per annum compound interest with six-monthly rests to 6 per cent. per annum simple which would have the effect of reducing the decretal amount by something between three and four thousand rupees. Obviously, if the appeal is so described the appellants are not at liberty to give an arbitrary valuation of Rs. 500 to the appeal.

In view however of what has been said above learned counsel has filed an application on behalf of the appellants to be permitted to delete the words "to 6 per cent. per annum simple" from ground 5 of his grounds of appeal and to make a corresponding modification of the prayer, which follows that paragraph, by striking out the words "and interest be allowed at 6 per cent. per annum simple." Learned counsel for the respondent points out that in case the appellants elect to value their appeal at Rs. 500 the respondent may prefer to confess judgment and agree to the reduction of the decretal amount to that extent. He contends that there is no difficulty in the fixing of a reasonable amount in the present case, and that as held in more than one case it is the duty of the appellants to fix a reasonable amount and not an arbitrary sum.

On a full consideration of the circumstances we are of opinion that by fixing Rs. 500 it could not be said (provided that we permit this amendment of the grounds of appeal) that the appellant was not fixing a reasonable amount. Rs. 500 would in fact correspond roughly to the difference between the interest at 12 per cent. per annum compound with six-monthly rests and 12 per cent. per annum simple interest according to the statement of counsel. We think that this being a question of the interpretation of a fiscal Act, it is to be read, speaking generally, in favour of the subject, that is, it is to be interpreted strictly and not made too elastic. We do not think it could possibly be said that the Government is defrauded by the appellants' fixing, as they are entitled to, a valuation which is not unreasonable. The proper procedure, in case this Court should at the time of the hearing of the appeal decide to make a greater reduction than that at which the appeal is valued, is suggested in 56 Mad 705[2] in which it was stated that

> if the appellate Court after the hearing and consideration of the appeal comes to a conclusion in favour of the appellant in respect of a far larger amount than what he has paid court-fees for, the proper thing would be to post the case for orders and direct the appellant to pay additional court-fee and only then the judgment should be delivered and the decree should be allowed to be drawn up.

Reference was made in this connexion to S. 149, Civil P. C. On this view we allow the application made on behalf of the appellants and permit them to amend their grounds of appeal as stated in the application. The appellants must now pay court-fees ad valorem on the amount at which they value their appeal and they must also make good the deficiency in the lower appellate Court. We allow the appellants one month to make good the deficiency in both Courts.

G.N./R.K. *Order accordingly.*

2. ('33) 20 A I R 1933 Mad 330: 141 I C 602: 56 Mad 705: 64 M L J 122, In re Venkatanandam.

A. I. R. 1941 Oudh 101

GHULAM HASAN J.

Sita Ram — Judgment-debtor — Appellant

v.

Baba Badri Dass, Decree-holder and another — Respondents 1 and 2.

Exn. Decree Appeal No. 9 of 1938, Decided on 30th September 1940, against order of Addl. Civil Judge, Fyzabad, D/- 25th January 1938.

(a) Civil P. C. (1908), S. 102—Order made in execution proceedings in suit of nature cognizable by Court of small causes — Second appeal does not lie.

In the case of a suit of the nature of small causes no second appeal lies under S. 102, Civil

P. C., whether the appeal was against the decision in the suit or whether the matter arose in the course of the execution proceedings : *Case law referred.* [P 102 C 2 ; P 103 C 1]

(b) Civil P. C. (1908), Ss. 47, 115—Decision of lower appellate Court as to whether certain house attached belonged to judgment-debtor exclusively held not liable to any interference in revision.

A decree was obtained against A as the legal representative of the deceased debtor and certain house was attached. The judgment-debtor filed an objection to the attachment alleging that the house did not belong to the deceased but to him (A) exclusively. The Court allowed the objection. On appeal the lower appellate Court held that the house did not belong to A exclusively but that it belonged to the deceased as well :

Held that the lower appellate Court had a jurisdiction to decide as to whether the attached house belonged to the judgment-debtor exclusively or whether the deceased had any share in the said house. That decision was not liable to any interference in revision under S. 115. [P 103 C 2]

Sri Ram — for Appellant.

Sooraj Narain — for Respondent 1.

Respondent 2 in person.

Judgment. — This is an appeal filed by one of the judgment-debtors purporting to be under S. 47, Civil P. C. The facts are as follows : Respondent 1, decree-holder, obtained a decree for Rs. 85 with costs and future interest against the appellant and respondent 2 to the extent of the assets received by them from one Baij Nath, deceased, who originally owed the debt to respondent 1. The suit was filed against the appellant judgment-debtor and respondent 2 as legal representatives of the deceased Baij Nath. The suit was decreed by the learned Munsif of Fyzabad sitting on the Small Cause Court side. In execution of the decree the decree-holder attached a plot of land and a certain house situate on Nos. 288, 289, 290, 291 and 292. The attachment was ordered by the same learned Munsif sitting on the regular side. The judgment-debtors filed objections to the attachment alleging that the property attached did not belong to the deceased Baij Nath but to them exclusively. The learned Munsif allowed the objection in respect of the house but disallowed it in respect of the plot. In appeal by the decree-holder, the decision of the learned Munsif was set aside in respect of his order relating to the house and it was held by the lower appellate Court that the house did not belong to the judgment-debtors exclusively but that it belonged to the deceased Baij Nath as well. The judgment-debtor now files this second appeal against the dismissal of his objection by the lower appellate Court. A preliminary objection is taken on behalf of the decree-holder that a second appeal is not maintainable under the provisions of S. 102, Civil P. C. I have heard the learned counsel on both sides at some length and I am of opinion that the contention must prevail. Section 102, Civil P. C., lays down that

no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

The learned counsel for the appellant contends that S. 102, Civil P. C., applies only to suits and not to execution proceedings and that the objection having been made under S. 47, Civil P. C., a second appeal could lie to this Court. The learned counsel is unable to refer to any authority of any Court in support of the contention which he has advanced. In my opinion the matter is concluded by a long catena of decisions of the various High Courts in India including our own Court that in the case of a suit of the nature of small causes no second appeal lay under S. 586, Civil P. C., whether the appeal was against the decision in the suit or whether the matter arose in the course of the execution proceedings. The earliest case is reported in 8 O C 405.[1] It was an execution case decided by a Bench of the old Court of the Judicial Commissioner. In the case reported in A I R 1918 Oudh 269[2] it was held by Lindsay J. C. that

no second appeal lies from an order passed in execution of a decree obtained in any suit of the nature cognizable by a Court of Small Causes where the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

In A I R 1936 Oudh 129[3] it was held that

where a suit cognizable by a Court of Small Causes is tried by a Munsif as a regular suit no second appeal lies from it under S. 102, Civil P. C.

Similarly, in A I R 1937 Oudh 244[4] a similar view was taken. Coming to the Allahabad decisions a Full Bench of the Allahabad High Court, following an earlier decision of the same Court reported in 12 ALL 579[5] decided in a case under the old S. 586 of the Code of 1882 corresponding to the present S. 102, Civil P. C. (1908), reported in 18 ALL 481[6] that

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1. ('05) 8 O C 405, Mt. Umut-ul-Athar Begum v. Baldeo Das.
2. ('18) 5 A I R 1918 Oudh 269 : 46 I C 82, Gudar Singh v. Kandhai Lal.
3. ('36) 23 A I R 1936 Oudh 129 : 165 I C 251 : 1935 O W N 1244, Nand Lal v. Ali Akbar.
4. ('37) 24 A I R 1937 Oudh 244 : 167 I C 557 : 13 Luck 204 : 1937 O W N 263, Ram Charan v. Kedar Nath.
5. ('90) 12 All 579 : 1890 A W N 206, Harakh v. Ram Sarup.
6. ('96) 18 All 481 : 1896 A W N 160 (F B), Din Dayal v. Patra Khan.

no second appeal will lie in respect of an order made in execution proceedings in a suit of the nature cognizable in a Court of small causes where the subject-matter of the suit does not exceed Rs. 500 in value.

Similar view was taken in the following decisions of the Allahabad High Court reported in A I R 1921 ALL 55,[7] A I R 1926 ALL 345[8] and A I R 1927 ALL 740.[9] Lastly it has been held by a Bench of the Sind Judicial Commissioner's Court in a case reported in A I R 1939 Sind 360[10] that "S. 102 not only applies to appeals but to orders in execution under S. 47 of the Code."

I may also refer to the Full Bench case of the Madras High Court reported in 23 Mad 547[11] which arose under the old S. 586, Civil P. C., where it was held that no second appeal lay from a decision in a suit of the nature cognizable in Courts of small causes. Having regard to the aforementioned decisions I am satisfied that the preliminary objection is well founded and this second appeal is not maintainable. The learned counsel for the appellant has also asked me to treat this appeal as a revision if it is held that the present appeal is not competent. Even if I were prepared to entertain the matter under S. 115, Civil P. C., on the revisional side, I do not think that the case falls within the purview of that section. There is no question of jurisdiction involved in the case nor am I convinced that there is any illegality or material irregularity committed by the lower appellate Court. It is urged that the decision of the lower appellate Court dismissing the objection proceeds upon a certain admission contained in EX. A1, a plaint filed by the judgment-debtor and respondent 2 in the year 1935, regarding this very house.

In para. 4 of that plaint the plaintiffs admitted that the deceased Baij Nath had a share in the house in dispute. It is urged before me that the admission relates not to the house attached in this case but to some other house and reliance is based on the boundaries contained in Ex. A1 and the certificate of search filed by the decree-holder dated 7th August 1936 in the present execution proceedings. I have compared the boundaries given in the two documents and have also considered the oral evidence produced in the case. Exhibit A1 was filed in the case by the decree-holder and its genuineness was admitted by the judgment-debtor. In his evidence before the Court as P. W. 1 the judgment-debtor made no attempt whatsoever to explain the admission contained in EX. A1. No question was put to him by his counsel to show that the admission contained in EX. A1 related to a different house as is urged now before me. I am of opinion that it was the bounden duty of the judgment-debtor himself to show that the admission contained in EX. A1 was either mistaken or untrue or it related to a different property altogether. The point raised here does not appear to have been raised in either of the two Courts below and it seems to me that the decision on the merits by the lower appellate Court is perfectly justified. I do not think therefore that S. 115 has any application to the facts of this case. The lower appellate Court had a jurisdiction to decide as to whether the attached house belonged to the judgment-debtor exclusively or whether the deceased Baij Nath had any share in the said house. That decision is not liable to any interference in revision under S. 115, Civil P. C. This appeal therefore fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

7. ('21) 8 A I R 1921 All 55 : 60 I C 831 : 43 All 403 : 19 A L J 72, Sant Prasad v. Bhawani Prasad.
8. ('26) 13 A I R 1926 All 345 : 93 I C 292, Ram Raj Dassundhi v. Mt. Umraji.
9. ('27) 14 A I R 1927 All 740 : 103 I C 344, Mt. Mendha Kunwar v. Mt. Ganga Saran Sahu.
10. ('39) 26 A I R 1939 Sind 360 : 185 I C 486 : I L R (1939) Kar 342, Khan Chand Maya Ram v. Pessumal Lakhumal.
11. (1900) 23 Mad 547 : 10 M L J 329 (F B), Soundaram Ayyar v. Sennia Naickan.

A. I. R. 1941 Oudh 103

YORKE J.

Mt. Shikhani—Defendant — Applicant

v.

Bishambhar Nath, Plaintiff and another, Defendant—Opposite Party.

Civil Revn. Appln. No. 2 of 1939, Decided on 21st October 1940, from order of Judge, Small Cause Court, Lucknow, D/- 28th November 1938.

Provincial Small Cause Courts Act (1887), S. 17, Proviso (as amended by Act 9 of 1935)—S. 17 is absolutely mandatory—Security bond filed after application to set aside ex parte decree without previous permission of Court — Application is nevertheless not maintainable.

A person made an application for setting aside ex parte decree against him, without having previously made an application for permission to give security or a deposit in cash of the amount of decree, but on being ordered to make the deposit, filed a security bond :

Held that the provisions of S. 17 were absolutely mandatory and hence the application was not maintainable in spite of the filing of the security bond : A I R 1937 Oudh 206 and A I R 1938 Pat 106, *Expl.;* A I R 1938 Lah 18, *Rel. on.*

[P 105 C 1]

Kanhaiya Lal Nigam — for Applicant.
K. P. Srivastava — for Opposite Party No. 1.

Order. — This is an application under S. 25, Provincial Small Cause Courts Act, against the order of the Judge of the Small Cause Court, Lucknow, rejecting an application under O. 9, R. 13 for restoration of a suit decreed ex parte. The opposite party plaintiff instituted a suit No. 3168 of 1937 in the Small Cause Court, Lucknow, against three persons to recover a sum of Rs. 428-8-0 due on a pronote purporting to have been executed by all those three persons. The plaintiff discharged one of these persons, apparently because the promissory note was partly burnt and the thumb impression of this defendant was not any longer in existence. On 21st December 1937, a decree on contest was given against the defendant Madar Bakhsh and an ex parte decree against Mt. Sheikhani, the present applicant. The decree-holder proceeded to execute his decree which he got transferred to the Court of the Munsif North, against the immovable property of Mt. Sheikhani. A notice was issued under O. 21, R. 54, but learned counsel says that he is unable to give the date of that notice. On 20th July 1938 an application was made to the Judge of the Small Cause Court under O. 9, R. 13 in which it was alleged that the applicant got knowledge of the ex parte decree in the last week of July, evidently a slip either for the first or some earlier week of July. Section 17, Provincial Small Cause Courts Act, contains a proviso limiting the general application of the procedure prescribed by the Code of Civil Procedure. It provides that :

> An applicant for an order to set aside a decree passed ex parte, or for a review of judgment, shall, at the time of presenting his application, either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the Court may, on a previous application made by him in this behalf, have directed.

It seems to me to be perfectly obvious that the intention of this section is that a person who proposes to apply under O. 9, R. 13 in the case of a decree of a Small Cause Court and does not propose to deposit the amount due under the decree along with his application but to deposit a security must previously make a formal application to the Court and obtain permission by means of such application for the giving of security. With the present application the applicant neither deposited the amount required nor had she previously made any application for permission to give security. The Judge of the Small Cause Court passed an order: "Let the decretal amount be filed first." Instead of complying with this order Mt. Sheikhani, on 21st July 1938, filed a security bond executed on the previous day by one Mohammad Ibrahim, and on this the Judge passed the order: "Let it be filed." Proceedings followed for registration and verification of the security, and it was not until 10th September 1938, that notice was issued to the decree-holder for the first time. The decree-holder at once put in an objection that the provisions of S. 17 had not been complied with. The matter proceeded further and it was not until the stage of arguments was reached that on 17th November the present applicant filed an application saying that the Judge had given oral permission for the filing of security. Upon this application the Judge passed an order or comment stating that the allegation was without foundation. He proceeded on 28th November to dismiss the application under O. 9, R. 13 holding that there had been no substantial compliance with the provisions of the amended S. 17 which are mandatory. He referred to cases which have also been put before me of the Patna and Lahore High Courts in this connexion.

Learned counsel for the present applicant seems to contend that there was a substantial compliance with the provisions of S. 17, but in the light of the remarks of the learned Judge of the Small Cause Court on the application of 17th November, it is apparent that no permission was at any stage given to the applicant to give security. Learned counsel has referred to only one case of this Court, A I R 1937 Oudh 206,[1] which he thinks supports the view that the provisions contained in the proviso to S. 17 are only directive and not mandatory, but this case does not lead to that conclusion. It is a case in which with an application for restoration a security bond was filed. Subsequently this security bond was held to be insufficient but the applicant was allowed to file a fresh bond. No question was raised in that case as to whether permission had been taken from the Court on an application previously made for the giving of security. What the learned single Judge of this Court held was that there had been substantial compliance with the provisions of S. 17, and indeed unless the point was taken that no permission had been previously granted, there evidently was substantial compliance. This case is there-

1. ('37) 24 AIR 1937 Oudh 206: 166 I C 137 : 1937 O W N 53, Din Mohammad v. Darbarilal.

fore not helpful. Reference was also made to the Patna case in A I R 1938 Pat 106.[2] In the course of the judgment in this case the learned Judge remarked :

It appears to be the view of all the High Courts in India except Lahore that the requirements of S. 17, Small Cause Courts Act, that the amount due or security for it is to be furnished "at the time of presenting the application" can only be relaxed to this extent that if the application is presented without the money or the security bond and the security bond or money is put in thereafter, the application will be considered to have been duly filed on the date on which the money was put in or the security furnished as the case may be.

The learned Judge of the Court below has remarked that this view seems to be based on the section as it stood prior to the amendment, and it is apparent on a reference to the old section that that must be the case. The old section provided that the applicant should "at the time of presenting his application" either deposit in the Court the amount due from him under the decree or in pursuance of the judgment, or give security to the satisfaction of the Court for the performance of the decree. The learned Judge of the Patna High Court does not seem to have had the amended section in front of him when he thus summarized the law. On the other hand, in A I R 1938 Lah 18[3] a Division Bench of the Lahore High Court has held that the provisions of the section as amended are absolutely mandatory and I can see no good reason for differing from that view. The applicant chose to come to the Small Cause Court without having previously made an application for permission to give security and did not deposit in cash the amount of the decree. Her application was clearly not maintainable and was rightly rejected by the Court below. I find no force in this application and dismiss it accordingly with costs.

W.N./R.K. *Application dismissed.*

2. ('38) 25 AIR 1938 Pat 106: 166 I C 671, Ghinoo Chaudhuri v. Ramjapu Singh.
3. ('38) 25 AIR 1938 Lah 18 : 173 I C 952 : I L R (1937) Lah 728: 40 P L R 164, Mohammad Ramzan Khan v. Khubi Khan.

A. I. R. 1941 Oudh 105

BENNETT AND GHULAM HASAN JJ.

Sri Thakurji Mahraj Brijman Asthan Thakurdwara constructed by Narain Dutt — Plaintiff — Appellant

v.

Raj Indra Prasad and another — Defendants — Respondents.

First Appeal No. 39 of 1937, Decided on 20th November 1940, against order of Civil Judge, Gonda, D/- 23rd December 1936.

Will—Construction—Will by Hindu referring to testator's minor son as his only heir and providing that during his minority certain person would be his guardian and would be absolute owner (malik kamil) — Will further providing that in case of his son's death guardian would be absolute owner with power to transfer—Testator held conferred on son absolute interest and interest of guardian was neither absolute nor life interest.

A Hindu died leaving behind him his minor son as his only heir. He made a will in which he provided that until his son who was his only heir (waris) attained majority certain person should be his guardian and should be absolute owner (malik kamil) like testator. It was provided that after attaining majority the son was to do business only with the consent of the said guardian. He further provided that if the son who was entitled to the property died the guardian would be the absolute owner, of the property with all powers to make transfer and the income thereof would be spent on certain Thakurdwara :

Held that the intention of the testator was to confer absolute interest in favour of his son. He did not intend to confer any absolute or even life interest in favour of the guardian, notwithstanding the use of the word 'malik kamil.' It was not testator's primary intention to make dedication to a deity. The alternative and later provision in the will in favour of the deity was only to come into operation if the son died prematurely in the guardian's lifetime without leaving issue. [P 110 C 2; P 111 C 1, 2]

R. B. Lal, H. D. Chandra, M. M. Lal, Bishun Prasad and J. D. Pradhan — for Appellant.

H. Husain, Kashi Prasad Srivastava and S. C. Banerji — for Respondent 1.

Judgment. — This is a first civil appeal against the judgment and decree of the civil Judge of Gonda dated 23rd December 1936, dismissing the appellant's suit. The suit was brought for possession of certain immovable property and also for damages. The plaintiff is shown as

Sri Thakurji Mahraj Brijman Asthan Thakurdwara constructed by Narain Dutt at village Chapia, pergana Bamhnipair, tahsil Utraula, district Gonda, under the sarbarahkarship of Adeshwar Prasad minor, aged about ten years, under the guardianship of his step-mother Mt. Ram Piari.

There were two defendants, the first Rajender Prasad, being the minor son of one Kunj Behari Prasad, under the guardianship of his own father, and the second, Radha Raman Prasad, father of the alleged sarbarahkar Adeshwar Prasad. Radha Raman Prasad was a pro forma defendant and did not contest the suit. Adeshwar Prasad's great-grandfather, Narain Dutt, executed a will on 25th September 1894, and died about three weeks later, namely on 15th October 1894. His widow, Mt. Bidhan Kuar, survived him and also his infant son Lachhmi Prasad. Lachhmi Prasad's age at the time of his father's death is not stated but he is shown as a minor in the year 1909, 13 years after the execution of the will.

Lachhmi Prasad died in 1914. He had two wives, Mt. Gulab Dei and Mt. Ishwar Dei. The former is dead and the latter is shown in the plaint as being still alive. Mt. Gulab Dei was the mother of the pro forma defendant Radha Raman Prasad. Mt. Bidhan Kuar, Narain Dutt's widow, died in 1934. The main controversy in the case, as well as in previous litigation to which we will refer presently, centres round the will which was executed by Narain Dutt on 25th September 1894. It is a curious document, and though we do not know who was responsible for its drafting, it appears to have been drafted by a person inexperienced in legal matters. The official translation as amended by counsel during arguments in this appeal is as follows:

I am Narain Dutt Pandey, son of Thakur Ram Pandey, occupation zamindari, caste Brahman, resident of village Chhapiya, pargana Babhani Payar, district Gonda.

Whereas I, the executant, have attained full age and no reliance can be placed on this borrowed life and except my only son Lachhman Prasad who is minor for whom I have great love there is no other heir, so of my own free will and accord, without the instigation of anyone else, while in possession of sound mind and body I, the executant, make a will and reduce it to writing so that after my death no dispute of any sort may arise in respect of my property. Accordingly Mahant Behari Lalji Mahraj, son of Sri Bhagwat Prasad Ji Maharaj, resident and zamindar of village Padri Ballam, etc., pargana and district Gonda, shall like myself be manager of my entire ancestral and self-acquired property which exist at present or may accrue in future such as houses and villages, etc., owned and possessed by me and such other property of this nature which may be acquired during my lifetime, except the ornaments and household effects, after my death and the aforesaid Maharaj Behari Lal shall regularly support my wife and the aforesaid son till he attains majority; whereas the said Mahant shall in every way be the absolute owner like myself of all my moveable and immovable property of every sort till the aforesaid son attains majority, and after my death no one will have any claim of any sort or right to become the guardian of the minor son or any other right of any sort, whereas whatever business the aforesaid son does after attaining majority he will be competent to do so with the consent of Mahantji Saheb and he alone cannot do any act; if he does so it shall be deemed void, whereas after my death and after the death of my wife the Mahant will have to perform my kirya karam ceremony as well as that of my wife in its entirety and he shall be competent to realize debts due to me either personally or through his servants. Whereas if by chance and to my misfortune this son who is entitled to the property dies the Mahant will become the absolute owner of my entire moveable and immovable property with all powers to make transfer, and the income thereof will be spent on the Thakurdwara which I have personally got constructed, and then no person, whether relation or stranger except Thakurji, shall get a single shell out of my property.

Letters of administration were obtained in respect of this will on 13th September 1897, on the application of Mahant Behari Lal. In the following year, that is 1898, Lachhmi Prasad under the guardianship of his mother Mt. Bidhan Kuar, instituted a suit against Mahant Behari Lal to obtain possession of the property of which Behari Lal had taken possession after obtaining letters of administration. There were several issues in the suit, but as shown by the judgment of 31st August 1898 (Ex. 12), the parties went to trial on one point, namely whether the will was valid if the property in suit was ancestral. It was held by the additional subordinate Judge that the will was valid and other issues were not pressed by the plaintiff's learned counsel. The question of the construction to be placed upon the will was not considered. The plaintiff's claim for possession was dismissed. There is a reference in this judgment to the provision in the will that "the plaintiff on attaining majority will deal with the property with the consent and advice of Behari Lal" and it was added:

But the latter has by a written application stated that he does not wish to avail himself of the said provision of the will.

Mutation had been effected in Lachhmi Prasad's name on his father's death and the property appears to have been treated as his personal property subject to the control and management of Behari Lal, who however died in 1899, while Lachhmi Prasad was still a minor. On 6th December 1910, Lachhmi Prasad transferred the property to his mother, Mt. Bidhan Kuar, and on the same date she executed an agreement in his favour. The deed of gift, Ex. A25, recites that the transfer is made in lieu of services rendered by her and for her maintenance. She is to remain in possession without any power of transfer and should she die during the donor's lifetime the property is to return to him and his heirs. The agreement, Ex. A58, contains these conditions. Lachhmi Prasad left considerable debts and some of his creditors obtained a decree on 27th July 1918, against the assets in the hands of his son Radha Raman and in execution of that decree attached the property in suit. This was the beginning of the litigation to which we have referred. Mt. Bidhan Kuar made an objection in execution proceedings, basing it on the deed of gift, Ex. A25, and on 29th October 1927 her objection was allowed. The decree-holders then filed a declaratory suit against that decision. The suit was decreed by the trial Court on 20th December 1928,

but this decree was modified by the Chief Court in appeal, it being held that the decree-holders were entitled to a declaratory decree to the effect that they could attach and put to sale the property in execution of their decree subject to the life interest of Mt. Bidhan Kuar. The Chief Court judgment, Ex. A31, is dated 26th November 1931. There are passages in it which, we think, will be of some assistance when we come to consider what construction should be placed on the will of Narain Dutt. The Bench of this Court which decided the case observed, referring to the deed of gift :

> This is clearly a very badly worded disposition. Passages in it are obscure to a degree. To take only the last passage : the executant states that if the lady dies in his lifetime the property is to revert to him or to his heirs. If he were alive there would be no question of the property reverting to his heirs. This is one of the cases where the Court is dealing with a badly drafted document, prepared by a man who has no pretensions either to legal knowledge or accuracy, executed under the instructions of an ignorant man and it is the duty of the Court in such circumstances to gather as best as it can what the man meant and what he wanted. We have fortunately something to guide us. We must remember that at the time when this deed was executed Mt. Bidhan Kuar was about 40 years old. We do not know what was the age of her son. We know that he was a minor as late as 1900. The purpose of the deed is stated to be in order to provide maintenance to his mother. He was hardly likely to take into account with any seriousness the possibility of his mother surviving him (it will be seen however that she actually did survive him), but he wished to grant her maintenance and this maintenance would ordinarily only be for her life. In a case where a grant is on the face of it a grant of an absolute estate it cannot be inferred that merely because it was made for the purposes of maintenance it is other than a grant of an absolute estate. That was laid down by their Lordships of the Judicial Committee in 23 I A 37.[1] But the usual intention of maintenance grant is that it should be a maintenance for life. This was decided by their Lordships of the Judicial Committee in 28 I A 1.[2] Ordinarily, it would not be expected that a Hindu son, when his object was to provide his mother with maintenance, would grant her an absolute estate. The executant clearly intended that his mother should have no right of transfer. It is true that he has added a peculiar condition that she is to have no right of transfer as long as he is alive. But why he should wish to have a right of transfer to the detriment of his heirs is not clear. Further he has taken into account the reversion after his mother's death to himself or his heirs, and states that the property is to come back intact. It is very difficult, taking the words separately, to attach any meaning to the disposition, but reading the deed as a whole we have no difficulty in finding that Lachhman Prasad intended to give his mother a life estate with remainder to himself and his heirs and we place that construction upon the disposition.

1. ('96) 23 Cal 670 : 23 I A 37 : 7 Sar 13 (P C), Jogeshwar Narain v. Ram Chand.
2. ('01) 23 All 194 : 28 I A 1 : 7 Sar 804 (P C), Rameshar Bakhsh Singh v. Arjun Singh.

Radha Raman objected to the decree on the ground that the debt was an immoral debt. He failed throughout. Ex. A34 dated 16th November 1931 is the judgment of this Court upholding the decision of the first Court. Radha Raman who was then a minor, had been a party in the previous case. The subordinate Judge dismissed his objection on the ground that it should have been taken in the suit and this view was upheld by this Court. It was said :

> The real question raised in the case is not as to the nature of any specific property which is liable to be seized in execution of the decree. The objection raised by the appellant is in our judgment clearly an objection as to the nature of the debt.

The family then made an attempt to prevent the property from passing into the hands of the creditors through Adeshwar Prasad, Radha Raman's son. In 1932, when Adeshwar Prasad was about six years old, he brought a suit under the guardianship of one Bhagwan Dutt Ram for a declaration of his right to the property. The original plaint has not been placed before us but it is clear from the proceedings of the Court that as originally framed the suit did not raise the question of a religious endowment. On 3rd March 1933, an application (Ex. A36) was made for amendment of the plaint. The amendment was allowed and Ex. A35 is the amended plaint. As amended, the plaint avers that under the will of Narain Dutt, Lachhmi Prasad had only a life interest in the property which life interest devolved on his death on his heirs. Sri Thakurji Mahraj was, it is said, the real owner of the property. This amendment necessitated an amended written statement from the defendant and five additional issues. These are to be found in Ex. A39. These issues raised the question of the validity and effect of the will executed by Narain Dutt. It has been suggested that the case put forward by or rather on behalf of Adeshwar Prasad in his application for amendment of the plaint was by way of an alternative to his original case, wherein he had claimed the property solely on his own account, but this is not clearly stated in the application of 3rd March 1933. It is also to be noted that he continued to be the sole plaintiff in the suit, the deity not having been imported into it as a party. The case did not come up for hearing until about a year and a half later and then a statement was made by Adeshwar Prasad's advocate, B. Bishun Prasad (who had signed on his behalf the application for amendment

of the plaint). This statement (EX. A70) was as follows :

The plaintiff does not rely on nor bases any claim on the will (copy Ex. 1). He also denies that Thakurji has any interest in the property in suit and the plaintiff or his father or sarbarahkar of the property on behalf of the Thakurji. The plaintiff's case is only that the property is joint family property of the plaintiff and his father defendant (now discharged) and the debts in question are illegal and immoral. The plaintiff does not take the plea of the bar of limitation in respect of the decrees. Issues 4, 5, 10, 11, 12, 13 and 14 are struck off and not pressed. They are unnecessary in view of the plaintiff's case as stated above.

It will be seen from this that the plaintiff's case was again completely altered. The suit was dismissed by the trial Court on 6th September 1934 (EX. A-41 is the decree) and the District Judge of Gonda dismissed Adeshwar Prasad's appeal on 27th March 1935 (EX. A-42 is the judgment). Meanwhile sale of the property in execution of the decree had taken place on 25th March 1933, and the sale was confirmed on 3rd April 1935 (Ex. A-54 is the sale certificate). The sale was followed by mutation in favour of the vendee. Another objection was then preferred by Radha Raman on the ground that he was a major and not minor. This objection was finally disposed of and dismissed by this Court in a judgment reported in 1938 O W N 758.[3] After this Adeshwar Prasad made another attempt to set the sale aside by means of a suit, but that failed through want of court-fees. The plaint, EX. A-43, is dated 3rd April 1935. This suit was brought in the name of the deity under the sarbarahkarship of Adeshwar Prasad, minor, under the guardianship of his mother, Mt. Kamla Kishori.

A further attempt to save the property followed by means of a suit brought through a different sarbarahkar. The judgment (Ex. 9) shows that the suit was brought in the name of Thakur Lachhman Deo Thakurdwara Chhapia through Ram Ujagar mutwalli and sarbarahkar. This suit was decreed by the trial Court, but was dismissed on appeal. The appellate judgment dated 10th. December 1936 is EX. A-76. In this judgment the District Judge of Gonda observed that the questions for consideration were whether the property was waqf property and whether Ram Ujagar was entitled to maintain the suit. He agreed with the Additional Subordinate Judge that the execution of the will had been proved (a point which was raised in the present case, but is no longer in dispute). But he did not agree that only a life estate was given to Lachhmi Prasad with remainder to Thakur Lachman Deo. He said :

In my opinion the true meaning of this will was the appointment of a testamentary guardian for Lachmi Prasad during his minority and the testator constituted in Mahant Behari Lal Ji such a guardian, and he further intended that in case of the son not surviving him the property should go to Thakur Ji absolutely. When a testator bequeaths his property by any will, unless the contrary intention is expressed in the instrument, it must be presumed that he bequeathed his entire interest in the property to the legatee.

Further on he says :

In my opinion the omission of the word 'malik' with reference to the son and the restriction laid upon the son to conduct any karobar do not lead to the inference that only a life estate was conferred upon the son. With reference to Mahant Behari Lal Ji the testator says that Mahant Behari Lal Ji would be 'malik kamil' till Lachhmi Prasad attained majority. This is meaningless on the face of it for, if one becomes 'malik kamil' he will continue to be so for all time to come even including his posterity, and he cannot cease to be a malik on the happening of a certain event such as the attainment of majority by Lachhmi Prasad in the present case. The restriction put upon Lachhmi Prasad's right of conducting any business also does not mean that only a life estate was given to him. If that was the intention the testator would have said that Lachhmi Prasad would remain in possession without power of alienation. This restriction was only advisory and shows unflinching confidence in Mahant Ji and has no legal effect. I believe the word 'malik' was not used expressly with reference to Lachhmi Prasad because in the preamble of the will the testator had said that his minor son Lachhmi Prasad was his only waris. If Lachhmi Prasad was his only waris he would naturally have all the rights and interests of a legal heir. If the will is read as a whole it will appear that the testator only intended to appoint a guardian for his minor son Lachhmi Prasad, for at two places he clearly said that none other than Mahant Behari Lal Ji would have any right to the guardianship of his minor son.

I have quoted above the passage on which the learned subordinate Judge laid special stress. I think its real meaning is that if the minor son died in the lifetime of the testator, in that case Mahant Behari Lal Ji would be 'malik kamil' with full power of alienation and would apply the usufruct of the property for purposes of Thakurdwara and not a pice out of it would be applied for any other purpose. The testator says 'if by chance (ahivanan) and to my ill luck (ba-takdir) my son who is entitled to the estate (mustahqa) dies.' The use of the word 'mustahqa' in this passage clearly shows that he did not mean to deprive the son of his interest in the property as a waris and the use of the words 'ahivanan' and 'ba-takdir' clearly express the fear in his mind of Lachmi Prasad predeceasing the testator. Otherwise he could not have any fear in his mind, for nothing is more certain in this world than death is. In this clause also the words 'malik kamil' are used with reference to Mahant Behari Ji, but at the same time he is enjoined to apply the income of the property in a particular way which is also incompatible with full owner-

3. ('38) 25 A I R 1938 Oudh 188 : 177 I C 77 : 14 Luck 213 : 1938 O W N 758, Radha Rawan Prasad v. Rajendra Prasad.

ship. So in my opinion here also the words do not mean that only a life estate was given to Lachmi Prasad. In fact, the learned counsel appearing for the plaintiff having failed to point out any passage in the will which might be interpreted as conferring a life estate on Lachhmi Prasad changed his front and took up the position that by this will the testator meant to disinherit Lachhmi Prasad and conferred an absolute estate on Thakur Lachhman Deo Ji. This is also in my opinion an equally untenable position. Narain Dutt's will shows that the only object of his executing the testament was to safeguard the interest of his only waris and minor son Lachhmi Prasad for whom he had the deepest affection. The word 'mustahqa' is used with reference to the son. He mentions at more than one place that during his son's minority mahant Behari Lal Ji would be his guardian and none would have preferential right. There is nothing in the will from which it might be concluded that the testator meant to deprive his only son of his property, which is against Hindu idea.

The District Judge did not decide the question of Ram Ujagar's competency to maintain the suit, as he had no locus standi on the finding that the property was not wakf property. The additional subordinate Judge had decreed this suit on 28th March 1936, and his decree was still under appeal to the District Judge when the suit now under consideration was instituted on 29th July 1936. This latter suit was brought, as we showed at the beginning of this judgment, by the deity (who is not, however, referred to under the name of 'Lachman Deo') under the sarbarahkarship of Adeshwar Prasad minor under the guardianship of his stepmother. It was dismissed on 23rd December 1936. The civil Judge considered two issues only, whether Narain Dutt had dedicated the property in suit by means of this will, and whether the decision in the three previous cases operated as res judicata. He held, for much the same reasons as the District Judge, that there had been no dedication and that the will conferred on Lachhmi Prasad full rights of ownership. He was of opinion that the disposition in favour of the deity was to take effect only on the untimely death of Lachmi Prasad without issue. He was also of opinion that the suit was barred by the principle of res judicata in view of the previous suit brought by Adeshwar Prasad in 1932 against the predecessor-in-interest of the defendant who contested the suit before him. He took into consideration the fact that the character of the earlier suit had changed and that issues relating to Sri Thakurji had been struck off, but he considered that the suit (under the amended plaint) had been heard, "in the sense that issues were framed, and the rejection of a plea even on the party's own request is final adjudication of it." He did not consider whether the question of dedication was res judicata by reason of the other suits. We may mention here that the learned counsel for the contesting respondent has not attempted to support this view. He has, however, contended that the suit is barred by O. 23, R. 1 (3), Civil P. C., which reads :

> Where the plaintiff withdraws from a suit or abandons part of a claim, without the permission referred to in sub-r: (2), he shall be. . . precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

The learned counsel for the contesting respondent also contended that the question was res judicata in view of the decision in the previous suit brought by the deity under the sarbarahkarship of Ram Ujagar. He conceded that the dismissal of the other suit for deficiency in court-fees would not make the matter res judicata. Questions of some difficulty arise out of these contentions, as the parties in the previous cases were not specifically the same as in the present cases. We do not however consider it necessary to come to any finding on the question of the applicability of sub-r. (3) of R. 1 of O. 23 in the one case or of the principle of res judicata in the other, because we are satisfied that the civil Judge was justified in the view which he took on the construction to be placed on the will. We have been referred by learned counsel to a number of authorities bearing on the construction of such documents generally and also on the meaning of particular words used in the will. Counsel are agreed that the will must have been drafted without professional aid and that undue stress should not therefore be laid on words or expressions which might be held to have particular significance if they had been used by a lawyer. We may refer first of all to certain observations in Gour's Hindu Code. He says (on p. 774, Edn. 4) :

> There are two modes of construction favoured by law, the literal and the benignant construction. The English law enacted in several sections of Chap. 2, T. P. Act, and of Chap. 6, Succession Act, favours the first method of interpretation which is natural owing to the advanced stage of English conveyancing and its phraseology, adapted to the rules of interpretation which have become an integral part thereof, but the same rule of literal construction cannot be extended to this country where the law of property is different and the art of conveyancing outside the presidency towns practically unknown.

On the same page, but in a previous section, it is said :

In the construction of a man's words law takes account of the varying degree of the human mind. If his dominant motive was to benefit a person as a centre of his affection, then it ignores his description of him. If his intention was to pass the benefit to a person who answers his description, then it ignores the fact that he is named unless the description fits him. If his gift is conditional, it is then a question whether the condition was a condition precedent to its validity. And since human language is at best an inadequate vehicle for expressing human thought, and people take many things for granted, law cannot ignore this infirmity of the human mind.

In A I R 1930 P C 242[4] it was said by their Lordships of the Privy Council:

In England, as also in India, even where a document is executed in vernacular, the fundamental rule of construction is the same. The duty of the Court is to ascertain the intention from the words used in the document. The Court is entitled and bound to bear in mind surrounding circumstances, but the Court does that only to ascertain the real intention of the executant from the words used by him. The surroundings of an Indian, his manners, his outlook proceeding from different religions and social customs, are often different from those of Englishmen. Ordinarily documents executed by an Indian in his own language, particularly without any professional aid, are often expressed in loose and inaccurate language. All these considerations have to be borne in mind, and sometimes by reason of these aforesaid circumstances a more extended or restricted meaning may have to be given to particular words than their exact literal meaning permits, provided always that the context justifies it. In short the Court is entitled to "put itself into the testator's armchair."

Finally on the point of construction generally we may refer to a case of this Court, 7 O W N 1010,[5] one of the headnotes to which reads:

Where there are no express words defining the quality of an estate conferred by the bequest on any of the donees, the nature of the estate is to be deduced by considering the meaning of the words employed by the testator in the whole of the will and in the light of the circumstances in which he was placed at the time when he made the bequest. There is no magic in the use of any particular word or form of words. The document must be construed as a whole and its fair import deduced in the ordinary way.

There are numerous authorities bearing on the construction to be placed on the word "malik," a word used in two places in the will under consideration with reference to the position to be enjoyed by Mahant Behari Lal. In each case the word "kamil" follows it. In 49 I A 1[6] it was held by their Lordships of the Privy Council that if a Hindu testator in making a gift to his widow uses words conferring absolute ownership (one of the words being "malik") she enjoys all the rights of an owner, although those rights are not conferred by express and additional words, unless the circumstances or the context are sufficient to show that absolute ownership was not intended. A Bench of this Court held in 1936 O W N 1219[7] with reference to a provision in a wajib-ul-arz making a Hindu widow 'malik' of her husband's assets in the absence of male issue, that the word 'malik' is taken to mean absolute owner only where there is nothing to the contrary either in the context of the document in which the word occurs or in the surrounding circumstances. It was observed by another Bench of this Court in 1937 O W N 1211[8] that the word 'malik' does not necessarily define the quality of the estate taken, but the ownership of whatever that estate may be; and that if the will read as a whole shows that the testator's intention was only to give a life estate to the legatee, the mere use of the word 'malik' cannot be held to indicate that absolute proprietorship in the property was intended to be given.

Now in the case now under consideration it is the contention of neither party that an absolute right of ownership or even a life estate was intended to be conferred on the mahant, despite the declaration that he is to be 'malik kamil' like the testator during the minority of Lachhmi Prasad, and subsequently also, should Lachhmi Prasad unfortunately die, subject to the condition that the income from the property is expended on the Thakurdwara. Previously he had been described as manager 'mumtazimkar' like the testator. And it is clear in view of the other provisions of the will that Narain Dutt had no intention of conferring on the mahant any absolute interest or even a life interest, notwithstanding the wide powers with which he invested him. It is contended by the learned counsel for the appellant that although the testator did not refer to any dedication to the deity in the earlier part of the will, it was really his primary intention to make such a dedication, providing only a life interest for his son with the property under the management of the mahant during the latter's lifetime. Refer-

4. ('30) 17 A I R 1930 P C 242 : 127 I C 743 : 10 Pat 187 : 57 I A 296 (P C), Rajendra Prasad v. Gopal Prasad.
5. ('30) 17 A I R 1930 Oudh 481 : 7 O W N 1010, Abadi Begam v. Mohammad Khalil Khan.
6. ('22) 9 A I R 1922 P C 193 : 65 I C 974 : 46 Bom 153 : 49 I A 1 (P C), Bhaidas Shivdas v. Bai Ghulab.
7. ('37) 24 A I R 1937 Oudh 181 : 165 I C 865 : 12 Luck 746 : 1936 O W N 1219, Durga Baksh Singh v. Chandrapal Singh.
8. ('38) 25 A I R 1938 Oudh 51 : 172 I C 884 : 13 Luck 713 : 1937 O W N 1211, Naziruddin v. Khairat Ali.

ence was made to the statement in the will that the testator had already constructed a Thakurdwara as showing that the testator had already expended money on the principal beneficiary under the will, and it was argued that the intention of the testator was to make permanent provision for the deity and to continue the expenditure on this object which he had himself initiated. Against this we have the denial by the other side that any Thakurdwara had actually been constructed (a point which was never decided), and the omission in the will to make any express provision for the Thakurdwara during the lifetime of Lachhmi Prasad. It might also be thought that if the main idea of the testator was to make a dedication of his property to the deity he would have so stated earlier in the will.

For the respondent it is submitted that the will is divisible into two parts, the first part dealing with the position if the son survived, and the second part with the position that would arise if he died prematurely without issue in the mahant's lifetime. It was intended, it is argued, to confer an absolute estate on the son, that being sufficiently indicated in the opinion of the testator by the use of the word "heir" (waris) in reference to him, and the testator was chiefly concerned with arranging for the management of his estate during the son's minority and for such time afterwards as he might require assistance in the management. By the time he had attained an age when he could be trusted to manage it himself the mahant would probably be no longer alive. It seems to us that this was by far the more probable intention of the testator. We do not know the exact circumstances in which the will was executed or the age of the testator; but we do know that he died about three weeks later, so that the will may very well have been made in anticipation of his early death. He says in the will that he has attained full age. We also know that Lachhmi Prasad was only a few years old at the time. We do not know the mahant's age, but he died five years later.

The testator commences by referring to Lachhmi Prasad as his heir, for whom he has great affection, so that it is very unlikely that he intended to limit his estate or to make any provision which would exclude Lachhmi Prasad's issue from inheritance. We are also of opinion that the alternative and later provision in the will in favour of the deity was only to come into operation if Lachhmi Prasad died prematurely in the mahant's lifetime without leaving issue, although this is not expressly stated. It has indeed been argued by the respondent's counsel that the words 'aulad mustahqa' which have been translated 'my son who is entitled to the property,' really mean 'my male line which is entitled to the property,' but we doubt whether such an idea was consciously present in the testator's mind. He was, we believe, thinking at the time only of his son Lachhmi Prasad, and probably he did not consider the possibility of that son having issue in the lifetime of the mahant. And he meant this alternative provision to take effect only if the son died before growing up and having issue. We consider that this construction is justified by the principles enunciated in the authorities referred to, bearing in mind the circumstances in which the will was executed and the evident desire of the testator to provide for his son and to exclude collaterals from his estate. For these reasons we agree with the construction placed on the will by the Court below and we dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 111

GHULAM HASAN J.

M. Raj Bahadur — Applicant

v.

Raja Ram — Opposite Party.

Civil Revision Appln. No. 114 of 1938, Decided on 21st September 1940, from order of the Munsif (as Judge, Small Cause Court), Dalmau at Rae Bareli, Dated 9th September 1938.

Practice—New plea—Revision — Limitation — New ground of exemption from bar of limitation can be raised for first time in revision especially when based on Act of Legislature and raising question of law even though it is not stated in grounds of revision— Plaintiff can rely for first time in revision on S. 5, U. P. Temporary Postponement of Execution of Decrees Act, 10 of 1937, to show that suit was within time.

It is true that where a suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff should state the ground of exemption but the plaintiff is not precluded from relying on any other ground specially when such ground is furnished by an Act of the Legislature and raises a question of law. The fact that it was not specifically stated in the grounds of revision is immaterial. [P 112 C 1, 2]

Consequently a plaintiff is entitled to rely for the first time in revision on the provisions of S. 5, U. P. Temporary Postponement of Execution of

Decrees Act, 10 of 1937, to show that his suit was within time: AIR 1932 P C 118, *Ref.* [P 112 C 2]

Ganesh Prasad — for Applicant.

Hyder Husain — for Opposite Party.

Order. — This is an application under S. 25, Provincial Small Cause Courts Act, arising out of the suit filed by the plaintiff on the basis of a pro-note, dated 9th July 1935. The ordinary limitation for filing the suit expired on 9th July 1938, and the suit was filed on 8th August 1938. In para 3 of the plaint the plaintiff sought extension of limitation by reason of an acknowledgment of liability by the defendant on 25th December 1937. The plaintiff relied on this date as the basis of his cause of action on the ground that the defendant had signed the annual account submitted by the plaintiff to the defendant. This account is Ex. 4. The defendant among other things pleaded bar of limitation and urged that the suit had become time barred on 9th July 1938, and Exs. 2 to 4, the accounts signed by the defendant, did not save limitation. The lower Court accepted the defence and dismissed the suit as time barred. The plaintiff has filed the present application against the dismissal of that suit. The learned counsel for the applicant contends that under S. 5 of U. P. Act 10 of 1937 the time for filing of suits against agriculturists was extended for six months with effect from 1st January 1938—the date of its coming into force—till 30th June 1938. He relies in support of his contention on a decision of the Allahabad High Court in 1938 R D 893.[1] I am of opinion that this contention must prevail and the suit must be held to be within time.

The learned counsel for the opposite party contends that the plaintiff should not be allowed to urge this new plea as he came to Court basing his cause of action upon certain acknowledgments of liability. He relies on O. 6, R. 7, Civil P. C., and urges that the plaintiff should have specifically stated this new ground if he claimed exemption from the law of limitation. It is true that where a suit is instituted after the expiration of the period prescribed by the law of limitation the plaintiff should state the ground of exemption but I am of opinion that the plaintiff is not precluded from relying on any other ground specially when such ground is furnished by an Act of the Legislature. It is also urged that this plea is not taken even in the grounds of revision. It is true that though the grounds of revision question the decision of the lower Court on the point of limitation yet they do not specifically refer to the provisions of Act 10 of 1937, (Temporary Postponement of Execution of Decrees Act, 1937). I am, however, of opinion that the question raised is one of law and even though it was not specifically urged in the lower Court it can be entertained here: *vide* 59 I A 161.[2] The learned counsel for the opposite party further contends that there is no evidence on the record to show that he is an agriculturist within the meaning of Act 10 of 1937 and is entitled to take advantage of the provisions of S. 5 of that Act. The defendant himself in para 5 of his written statement admits that he is a zamindar and an agriculturist. I can therefore see no justification for not allowing the plaintiff the benefit of S. 5 of Act 10 of 1937. The language of S. 5 of the Act is perfectly clear that in computing the period of limitation for a suit for money against an agriculturist the period during which the Act remained in force is to be excluded. It may also be mentioned that in a subsequent Act of the Provincial Legislature, namely the Temporary Postponement of Execution of Decrees Amendment Act of 1938, (Act XV of 1938) the period of six months mentioned in S. 5 of Act 10 of 1937 was further extended by the substitution of 24 months for the six months mentioned in section 5 of Act 10 of 1937. In this view of the matter the suit of the plaintiff was within time and ought not to have been dismissed.

It is not necessary to enter into the other question whether Exs. 2 to 4, the accounts signed by the defendant, constitute an admission of liability within the meaning of S. 19, Limitation Act. I hold that the suit was within time. The judgment of the Court below is set aside and the suit decreed with future interest at 6 per cent. per annum. In these circumstances I make no order as to costs.

G.N./R.K. *Application allowed.*

1. ('39) 26 AIR 1939 All 157 : 180 I C 50 : I L R (1938) All 1001 :1938 A L J 1074 : 1938 R D 893, Badri Prasad v. Ram Narain Singh.

2. ('32) 19 A I R 1932 P C 118 : 136 I C 737 : 10 Rang 242 : 59 I A 161 (P C), M. E. Moola Sons, Ltd. v. Perian R. Burjorjee.

* A. I. R. 1941 Oudh 113

THOMAS C. J. AND GHULAM HASAN J.

Nasir Ahmad Khan — Plaintiff —
Applicant

v.

Mt. Saidan and others — Defendants
— Opposite Party.

Misc. Appln. No. 620 of 1940, Decided on 28th October 1940, in F. A. No. 130 of 1940, for permission to appeal as a pauper.

* *Civil P.C. (1908), O. 44, R. 1, O. 33, R. 1—Suit in forma pauperis partly decreed—Application by plaintiff to appeal as pauper against part of decree dismissing suit—Valuation of suit property decreed to plaintiff held could not be taken into account in determining whether he was pauper.*

The plaintiff whose suit in forma pauperis had been partly decreed applied for permission to appeal as pauper against that portion of the decree which dismissed his suit. No appeal had been filed by the defendants in the case but it was possible that if and when the plaintiff's appeal was admitted the defendants could exercise their right of filing cross-objections in regard to that item of property which had been decreed to the plaintiff :

Held that the property decreed in favour of the plaintiff by the trial Court could not be taken into account in determining the sufficiency or otherwise of the plaintiff's means to enable him to pay the court-fee. That decree had not become final as there was a possibility of the defendants' filing cross-objections against it, the right to do which would arise upon the admission of the appeal. It being possible for the defendants to assail the finality of that decree it could not be said that the plaintiff could exercise effective control or dominion over the decreed property and therefore it could not be taken into account : A I R 1930 Cal 147, *Rel. on.* [P 113 C 2; P 114 C 1]

Ali Zaheer — for Applicant.

N. Banerji — for Opposite Party No. 2.

H. K. Ghose, Assistant Government Advocate — for the Crown.

Order. — This is an application under Order 44, Rule 1, Civil P. C., filed by the plaintiff-applicant. The plaintiff brought a suit in the Court of the civil Judge of Bahraich as a pauper in respect of six items of property detailed in the plaint. After the necessary enquiry into his pauperism, the learned civil Judge allowed the plaintiff to sue as a pauper and ultimately decreed the suit in his favour to the extent of twelve annas in two groves, which constituted item 5 of List A of the properties attached to the plaint. The suit was dismissed in respect of other items of the properties. The plaintiff-appellant has filed a first civil appeal against that portion of the decree of the trial Court which dismissed his suit. The decree was made on 31st May 1940. No appeal has been filed by the defendants in the case but it is possible that if and when the plaintiff's appeal is admitted the defendants may exercise their right of filing cross-objections in regard to that item of property which has been decreed to the plaintiff-appellant.

The plaintiff-appellant has filed the present application alleging that he is unable to pay the fee required for the memorandum of appeal in this Court and he is not possessed of any other property except that shown in the schedule annexed to the application, the valuation of which is only Rs. 9. The application also urges that the decree of the trial Court in so far as it is against him is contrary to law and is erroneous and unjust. The defendants oppose this application. Mr. Ghosh appearing on behalf of the Government, also opposes the application.

We have heard counsel on both sides and are satisfied that the plaintiff-appellant is a pauper within the meaning of O. 44, R. 1, Civil P. C., and as such he is entitled to appeal as a pauper. The proviso to O. 44, R. 1 says that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. It may be mentioned that the present application arises in a first civil appeal, which has been filed against the judgment and decree of the trial Court and that the whole case will be open to determination on questions of fact as well as law in the appeal. We have perused the application and the judgment in this case and having regard to the questions raised in the memorandum of appeal to this Court we think that the requirements of the proviso are fully satisfied in this case. Upon the merits, therefore, we see no reason to reject the application.

As regards the other question whether the plaintiff-appellant is a pauper within the meaning of O. 33, R. 1, Civil P. C., it is urged on behalf of the defendants that the plaintiff has already obtained a decree in his favour from the trial Court, that the valuation of the share decreed to him is Rs. 1350 and under these circumstances the plaintiff is possessed of sufficient means to enable him to pay the court-fee. We do not think that the property decreed in favour of the plaintiff-appellant by the trial Court can possibly be taken into account in the present case in determining the sufficiency or otherwise of the plaintiff's means to enable him to pay the court-fee. That

decree has not yet become final as there is still a possibility of the defendants' filing cross-objections against it, the right to do which will arise upon the admission of this appeal. Where, as here, it is still possible for the defendants to assail the finality of that decree, it cannot be said that the appellant can exercise effective control or dominion over the decreed property and therefore he cannot be held to be possessed of sufficient means to pay the court-fee.

In 57 Cal 980[1] it was held that in determining the question whether a person is entitled to sue in forma pauperis under O. 33, R. 1, Civil P. C., the subject-matter of the suit cannot be taken into consideration, even if the defendant admits a portion of the claim and is ready to place it at the petitioner's disposal, and, even if the case falls under the first part of the explanation to R. 1. Any amount which is not actually in the petitioner's possession, and is not in his power or control at the date when the application was made cannot be taken into account in making the calculation for the purpose of determining his means. We are of opinion, therefore, that the plaintiff-appellant is not possessed of sufficient means to enable him to pay the court-fee required for the memorandum of appeal in this Court. We accept the application and allow the plaintiff-appellant to appeal as a pauper under O. 44, R. 1, Civil P. C. We make no order as to costs.

G.N./R.K. *Application accepted.*

1. ('30) 17 AIR 1930 Cal 147 : 125 I C 102 : 57 Cal 980 : 34 C W N 188, Provashchandra Lahiri v. Municipal Commissioners of Howrah.

A. I. R. 1941 Oudh 114

THOMAS C. J. AND GHULAM HASAN J.

Kr. Man Singh — Defendant — Appellant

v.

L. Baboo Lal and others — Plaintiffs — Respondents.

First Appeal No. 9 of 1937, Decided on 30th September 1940, against order of Civil Judge, Partabgarh, D/- 30th September 1936.

(a) U. P. Court of Wards Act (4 of 1912), S. 61 (2)—Sale by Court of Wards with covenant of warranty of title—Title subsequently discovered to be defective and transferee exposed to risk of eviction by title paramount—Ward is personally bound to make good loss to transferee.

A covenant of warranty of title given by the Court of Wards on behalf of a ward under its superintendence can be enforced in a Court of law against the ward at the instance of the covenantee and the ward shall be personally bound to make good the loss to the transferee from the Court of Wards on behalf of the ward if the title to the property is subsequently discovered to be defective and the transferee is exposed to the risk of eviction by the title paramount from the property. In order to impose a personal liability upon the ward the covenant in the deed need not be an express covenant: A I R 1924 Oudh 99, *Expl., and Rel. on.* [P 117 C 1, 2]

(b) Custom (Oudh)—Jethansi custom prevailing in zamindari of Chhatrapalgarh in district of Partabgarh — Word 'son' held did not include grandsons.

According to the jethansi custom prevailing in the family of zamindars and recorded in the wajib-ul-arz of Chhatrapalgarh in the District of Partabgarh of Oudh, the eldest son ('pisar kalan') got two shares while the younger ones got one share :

Held **that there was no warrant for extending the meaning of the word son used in the wajib-ul-arz so as to include grandsons within the purview of the custom.** [P 118 C 2]

Haider Husain, Ali Zaheer, H. H. Zaidi and Girja Shankar — for Appellant.

L. S. Misra, Surendra Nath Srivastava and Radhey Behari Misra — for Respondents.

Judgment.—This is a defendant's appeal arising out of the suit brought by the plaintiffs-respondents to recover Rs. 6432.12.0 as damages consequent upon the sale of certain property to them by the Deputy Commissioner of Partabgarh as Manager, Court of Wards, Chhitpalgarh, on behalf of the defendant-appellant who was then a ward under the superintendence of the Court of Wards. The following pedigree will serve to elucidate the facts of the case :

Chhatrapal Singh = Rani Dilraj Kuer
|
Hitkaran Singh (adopted son)
|
Bhairon Din Singh
|
| | |
Kunwar Man Singh | Lal Dharam Murat Singh | Ram Partap Singh alias Laloosar-

Chhatrapal Singh was a taluqdar of an estate called Chhatrapalgarh in the district of Partabgarh. His name was entered at No. 274 of list I and at No. 88 of list III in the lists appended to the Oudh Estates Act. He was issueless and upon his death he left Rani Dilraj Kuar as his widow. It appears that Chhatrapal Singh made a will of his entire property in favour of Rani Dilraj Kuar on 24th June 1895, (*vide* Ex. 47, p. 139). Subsequently, on 5th June 1899, he made a gift of some specific properties in favour of Rani Dilraj Kuar including two plots, Nos. 811 (new) and 812 (new), *vide* Ex. 13. Chhatrapal Singh died on 6th February 1901, and was succeeded by his widow Rani Dilraj Kuar. Rani Dilraj Kuar made a will on 30th

November 1904 of the entire property possessed by her in favour of Hitkaran Singh whom she had adopted (*vide* Ex. 14). On 28th July 1907, Rani Dilraj Kuar made a gift of bulk of the properties including Nos. 811 and 812 in favour of Bhairon Din Singh, the son of Hitkaran Singh (*vide* Ex. 15). Bhairon Din Singh died some time in 1917 and upon his death mutation in respect of the properties gifted to him including the two numbers 811 and 812, was made in favour of Kunwar Man Singh, his eldest son. On 4th September 1920, Kunwar Man Singh was declared a disqualified proprietor and his estate was taken under the superintendence of the Court of Wards.

It is not disputed that on 6th February 1879, Chhatrapal Singh had acquired No. 472 (old) corresponding to No. 811 (new) from one Mt. Lachhmin. Subsequently on 5th March 1897, he acquired two more plots, namely Nos. 473 (old) corresponding to 812 (new) and 474 (old) corresponding to 813 (new) from Mahant Har Charan. Rani Dilraj Kuar died on 28th January 1919 and No. 813 devolved upon Hitkaran Singh by right of inheritance. Hitkaran Singh died some time in 1927 leaving Kunwar Man Singh and Lal Dharam Murat Singh as his heirs; the third son Ram Partap Singh had predeceased him. It appears that Bhairon Din Singh executed a mortgage deed without possession on 18th July 1915, in lieu of Rs. 32,000 in favour of Panchayati Akhara Mahanirbani Daraganj, City Allahabad, and got it registered. On 28th August 1925, the Deputy Commissioner, Partabgarh, as Manager, Court of Wards, representing the estate of Kunwar Man Singh executed a sale deed of Nos. 811, 812 and 813, (second settlement numbers), out of the qabiz darmiyani haqiat situate in Babaganj and Takkarganj, village Belaghat, having a total area of 2 bighas, 8 biswas, 2 biswansis, along with the shops standing thereon for Rs. 13,000 in favour of plaintiffs 1 to 3 and the father of plaintiff 4, (*vide* Ex. 1). After the said sale the plaintiffs raised permanent buildings upon the land in question. Subsequently, on 2nd March 1931, Lal Dharam Murat Singh declaring himself to be entitled to a half share in the lands in question executed a sale deed in favour of the minor sons of Pandit Ajab Narain Vakil, (*vide* Ex. 41).

Again on 30th April 1931, Lal Dharam Murat Singh executed another sale deed in respect of 19 biswas 1 biswansi land in favour of one Samar Bahadur Singh for Rs. 1000 (*vide* Ex. 2). Samar Bahadur Singh then brought a suit on 26th April 1932 on the basis of his sale deed against the plaintiffs for recovery of joint possession by demolition of the structures erected by the plaintiffs after their purchase. The Court passed a decree in respect of 14 biswa land besides Rs. 90-15-0, costs of the suit in favour of Samar Bahadur Singh on 29th March 1933. Exhibits 3, 4, 5, 6, 7, 8 and 9 are the documents relating to the aforementioned litigation. The plaintiffs being advised that they had no chance of success in the appeal purchased the decretal rights from Samar Bahadur Singh on 28th February 1934, for Rs. 3850. On 6th April 1934, Pandit Ajab Narain Vakil also filed a suit on behalf of his sons on the basis of their sale deed and obtained a decree on 17th August 1934. Exhibits 29, 30, 31 and 32 are the documents relating to the said litigation. The plaintiffs compromised the matter with Pandit Ajab Narain Vakil and on 14th December 1934, they actually tendered the decretal amount plus the cost of execution, total Rs. 1995-8-0 to the decree-holder in satisfaction of the decree. The receipt of this amount is acknowledged by the decree-holder (*vide* Ex. 33, p. 123). It was in this manner that the plaintiffs by paying off Samar Bahadur Singh and Pandit Ajab Narain Vakil succeeded in securing title and possession of the entire property in dispute.

The plaintiffs thereafter instituted the present suit on 27th March 1936, against the defendant for recovery of Rs. 6432-12-0 whose property had by then been released by the Court of Wards on 25th November 1929. The claim was based on the ground that the Court of Wards sold the property on behalf of the ward and entered into the contract of sale for his benefit, for protecting his properties and for paying off the debts of his father. The amount of claim was arrived at by calculating the proportionate price of the alleged share of Lal Dharam Murat Singh. The defendant admitted the sale by the Court of Wards to the plaintiffs, the sale by Lal Dharam Murat Singh to Samar Bahadur Singh and Pandit Ajab Narain Vakil, the litigations which ensued at the instance of the two vendees and their final termination by the composition of their claims by payments made by the plaintiffs. These facts were not disputed by the defendant. He, however, contended in the first instance that he owned the entire property sold to the plaintiffs and alleged that this property was considered and remained a part of Chhitpalgarh Taluqa and consequently he alone was the owner in possession of the said plots

as the Taluqdar of Chhitpalgarh Estate. In the alternative he pleaded that if he was not the exclusive owner of the said plots then the sale by the Court of Wards was invalid and that the action of the Court of Wards did not create any personal obligation or liability against the ward. These were the two main defences raised to the suit in addition to some other defences. The trial Court raised the following issues :

(1) (a) Was the defendant the exclusive owner of the plots sold to the plaintiffs ? (b) If not what was his share ? (2) Is the defendant not liable to make good the money spent by the plaintiffs in purchasing such part of the property as belonged to the brother of the defendant, because the Court of Wards exceeded its rights ? (3) Is the suit within time ? (4) Was the whole contract void ab initio ? If so should the parties be made to restore what they got under the sale of 1925 ? (5) To what relief are the plaintiffs entitled and against whom ? (6) Was the property sold in 1925 for discharging debts of the defendant's father ? Its effect on the claim. (7) Is the defendant bound by the compromise and the payment made under it by the plaintiffs to Samar Bahadur Singh and Kailash Nath, Kashi Nath and Kamta Nath ? If so to what extent.

The trial Court found on issue 1 that the defendant owned only five-eighths of plots Nos. 811 and 812 and half of plot No. 813. On issue 2 which was the main issue in the case he held in favour of the plaintiffs. Issues 3 and 4 were found in favour of the plaintiff. Issues 6 and 7 were considered unnecessary in view of the finding recorded by the trial Court on issue 2. Lastly on issue 5 the trial Court held that the defendant was liable for the proportionate price of the property which the plaintiffs had paid to the vendees of Lal Dharam Murat Singh and decreed the suit in terms of the plaint. Against the aforesaid judgment and decree the defendant has preferred the present appeal. The learned counsel appearing for the appellant stated at the outset that out of the two main defences raised by his client in the Court below he was not prepared to argue that his client was the exclusive owner of the plots in dispute and that Lal Dharam Murat Singh had no interest therein. This point therefore was expressly abandoned. He confined his argument to the principal issue in the case, namely, that his client was not liable for the wrongful act of the Court of Wards and that the latter could not impose any personal obligation upon the defendant who was a minor and a ward of the Court of Wards.

There can be no doubt whatever that on 4th September 1920, when the estate of the defendant was taken over by the Court of Wards the plots in dispute were included in the properties over which the Court of Wards assumed superintendence. Ex. A9, p. 171, is an extract from the U. P. Gazette dated 18th September 1920, containing the notification by virtue of which the Court of Wards took possession of the properties of the defendant. The Court of Wards which was in possession of the plots in dispute transferred possession of these plots to the plaintiffs by virtue of the sale deed executed in their favour on 28th August 1925. There is also no doubt that Lal Dharam Murat Singh, the brother of Kunwar Man Singh, was entitled to a share in the plots in dispute, a fact which was apparently not brought to the knowledge of the Court of Wards nor could have been brought to their knowledge at the time when the defendant's property was taken over by the Court of Wards. Whether the mistake is deliberate or accidental, it is not possible at this distance of time to say, but one thing is clear beyond doubt that even in the present proceedings the defendant in his written statement, Para. 24, asserted an exclusive title in the plots in dispute as forming part and parcel of Chhitpalgarh Taluqa of which he was no doubt the owner. That case has been found against the defendant by the trial Court and the learned counsel has very properly abandoned that case in this Court as there was not the slightest foundation for any such plea. It is further clear that the plaintiffs, who have not only parted with money in favour of the Court of Wards, who must necessarily be presumed to have utilized it for the benefit of the ward but had upon the strength of the sale deed executed in their favour raised valuable constructions upon the plots in dispute, would have been evicted from the plots in dispute by the vendees of Lal Dharam Murat Singh if they had not paid them off with a view to securing their possession.

The only question for determination, therefore, which arises in this case is whether in the circumstances stated above the plaintiffs are entitled to enforce the covenants contained in their sale deed against the defendant and obtain a decree against him for damages sustained by them. We are of opinion that the liability of the defendant must fall to be determined under the provisions of S. 61, cl. 2, U. P. Court of Wards Act, (Act 4 of 1912). Sub-clause 2 of S. 61 runs thus :

Covenants entered into by the Court of Wards shall be binding on the Court of Wards only so long

as the ward or property affected by such covenants remains under its superintendence, and only to the extent of such property, such covenants shall be binding on the ward or on the person entitled to such property after the ward or the property or both shall have ceased to be under the superintendence of the Court of Wards.

The second portion of sub-cl. 2, namely, "such covenants shall be binding on the ward or on the person entitled to such property after the ward or the property or both shall have ceased to be under the superintendence of the Court of Wards" leaves no room for doubt that a covenant of warranty of title given by the Court of Wards on behalf of a ward under its superintendence can be enforced in a Court of law against the ward at the instance of the covenantee and that the ward shall be personally bound to make good the loss to the transferee from the Court of Wards on behalf of the ward if the title to the property is subsequently discovered to be defective and the transferee is exposed to the risk of eviction by the title paramount from the property. It has already been stated above that eviction of the plaintiffs by title paramount asserted by the vendees of Lal Dharam Murat Singh would have been certain, had it not been for the fact that the plaintiffs succeeded in warding it off by compensating those vendees in money. That money now represents the measure of damages sustained by the plaintiffs. Turning to the sale deed itself, we find the following recitals which may be given here :

Whereas the said Court of Wards (hereinafter called the vendor) considering it to be for the advantage of the said Kunwar Man Singh and for the benefit of his property has agreed with the purchasers for the sale to them of all the right, title and interest of the said Kunwar Man Singh in the property described in the schedule hereto for the sum of Rs. 13,000 . . . . . the vendor hereby grants and transfers to the purchasers free from incumbrances all the property described in the schedule hereto together with all right of sir, siwai, abadi and all buildings, ways, watercourses, easements and appurtenances thereto and all the estates, title and interest of the vendor and of the said Kunwar Man Singh upon the same. *To have and to hold the same* unto and to the use of the purchasers their heirs and assigns for ever.

And the vendor hereby covenants with the purchasers that the premises hereby transferred shall be quietly entered into and upon and held and enjoyed and the rents and profits received without any interruption or disturbance by the said Kunwar Man Singh or any person claiming through or in trust for him and further that the said Kunwar Man Singh and every person claiming through or in trust for him will, at the cost of the person requiring the same, execute and do every assurance or thing necessary for the further or more perfectly assuring the said premises to the purchasers, their heirs or assigns, as by them shall be reasonably required.

Upon a careful consideration of the language of the deed quoted above we are satisfied that the words underlined (here italicized) sufficiently constitute a covenant of the warranty of title in relation to the property conveyed by the deed, and a breach of that covenant imposes an obligation upon the defendant to indemnify the plaintiffs for the damages sustained by them. The trial Court in respect of its conclusion relies upon A I R 1924 Oudh 99,[1] where the learned Additional Judicial Commissioner held that

if the sale deed contains an express covenant of warranty of title then the ward will be bound to indemnify the vendee under the provisions of the special law applicable to him as contained in S. 61, U. P. Court of Wards Act of 1912.

It has been argued in this Court on behalf of the defendant that in order to impose a personal liability upon the ward the covenant in the deed must be an express covenant. The language of sub-cl. 2 of S. 61 places no such restrictions upon the nature of the covenants which is made binding upon the ward, and we see no justification for introducing into the section a word which does not find a place there. In the case referred to above, no doubt the words "express covenant" were used in the argument but the question is whether the covenant contemplated under sub-cl. 2 of S. 61 to be binding upon the ward must necessarily be an express covenant. The distinction between an express covenant and an implied covenant was neither considered nor discussed in that case and the decision proceeded upon the ground that the language of the deed under consideration in the case justified the conclusion that there was an express covenant which imposes a personal liability upon the ward. Assuming for the sake of argument that sub-cl. 2 of S. 61 contemplates the case of an express covenant only we are of opinion that the language quoted above fully justifies the finding of the trial Court that there was such an express covenant in the deed itself as required by S. 61, sub-cl. 2, Court of Wards Act. We do not think it necessary to elaborate this point any further.

Reference was made in the course of arguments to the following cases : 14 I A 89[2] at p. 96, A I R 1926 Nag 31[3] and A I R 1924 Oudh 99,[1] in support of the contention that

1. (24) 11 AIR 1924 Oudh 99 : 74 I C 90, Pirthipal Singh v. Muhammad Ejaz Rasul Khan.
2. ('87) 11 Bom 551 : 14 I A 89 : 5 Sar 16 (PC), Waghela Rajsanji v. Shekh Masludin.
3. ('26) 13 AIR 1926 Nag 31 : 89 I C 896 : 24 N L R 54, Lalchand v. Narhar.

the breach of warranty implied by law in respect of a sale effected by the Court of Wards cannot result in a personal liability of the ward for damages because a guardian cannot so contract in the name of his ward as to entail the imposition of a personal liability on the ward. This contention shows that under the general law apart from the provisions of S. 61, the minor could not be bound by a contract of the guardian entered into on his behalf imposing a personal liability upon him. It is unnecessary to pursue that point as we have already stated that the question can be decided upon a construction of the language of special law namely S. 61, sub-cl. 2, Court of Wards Act, without reference to the general law and without invoking the assistance of S. 55 (2), T. P. Act. Dr. Gour in his voluminous work on the Law of Transfer in British India, Vol. 1, Edn. 6, 1930, states at p. 743 :

> The usual covenants for title comprise the following covenants : (i) that he has the interest, (ii) that he has power to convey it, (iii) for quiet enjoyment by the purchaser, his heirs and assigns, (iv) that the property is free from encumbrances, and (v) for further assurance.

It will appear that all these covenants are present in the sale deed in question. Halsbury's Laws of England, Vol. 29, Edn. 2, p. 410, para. 576, contains a similar statement.

> The ordinary covenants for title are for right to convey, for quiet enjoyment, for freedom from encumbrance, and for further assurance . . . . . The remedy for a breach of such covenants is an action for damages.

Paragraph 663 at p. 457 of the same book lays down that :

> The covenant for right to convey is a covenant for title. . . . . A covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey and it is broken by the existence of an adverse right such as a right of way or any outstanding interest, charge, or claim which may prevent the purchaser from enjoying this estate.

The following words "to have and to hold the same into and to the use of the purchasers, their heirs and assigns for ever" and the words "that the vendor hereby covenants with the purchasers that the premises hereby transferred shall be quietly entered unto and upon and held and enjoyed etc. etc.," leave no room for doubt whatever that the Court of Wards at the time of executing the deed deliberately entered into a covenant of title which was sought to be conveyed free from defect or doubt. Both the vendor and the vendee knew that the vendor had a right to convey and the transfer of that right was conveyed by the words "all the estates, title and interest of the vendor and of the said Kunwar Man Singh upon the same." No doubt, the property did not pass out of the possession of the plaintiffs but they were able to retain it only upon payment of the claims of the vendees of Lal Dharam Murat Singh which they were forced in a Court of law to answer and to meet to a considerable amount. The claims were met under a compulsion and we cannot therefore but hold that the plaintiffs are entitled to be recouped by the defendant for the payments so made. For the foregoing reasons we are of opinion that the defendant is liable to make good the money spent by the plaintiffs in purchasing such part of the property as belonged to Lal Dharam Murat Singh, the brother of the defendant.

The learned counsel on behalf of the defendant also questioned the finding of the trial Court on issue 1 and contended that the defendant's share found by the trial Court is incorrect. The finding arrived at by the trial Court was that the plots Nos. 811 and 812 were inherited by the defendant and his brother, Lal Dharam Murat Singh from their father Kunwar Bhairon Din Singh and plot No. 813 came to the defendant from his grandfather Hit Karan Singh. As regards plots Nos. 811 and 812 they were inherited in equal moieties by the two brothers, namely the defendant and Lal Dharam Murat Singh, and there is no controversy about these shares. The dispute is raised only with respect to plot No. 813. The plaintiffs contended that the custom of jethansi did not apply to plot No. 813 as it was inherited by the defendant not from his father but from his grandfather while the defendant contended that the custom applied to the inheritance both from the father and the grandfather. Exhibit 16, the wajib-ul-arz records the custom in the following words :

> The jethansi custom according to which the eldest son gets two shares while the younger ones get one share prevails in the family of the zamindars of this village.

The vernacular words are "pisar kalan," (eldest son). It is contended that 'son' should be interpreted in a generic sense to include grandsons as well. We see no warrant for extending the meaning of the words used in the wajib-ul-arz so as to include grandsons within the purview of the custom. We therefore cannot accept this contention. Lastly

it was contended on behalf of the defendant that being an agriculturist his client was entitled to instalments under the Agriculturists' Relief Act. We find from the record that this point was not raised before the trial Court and has not been raised in the grounds of appeal to this Court. There is no evidence on the record to show whether the defendant is an agriculturist within the meaning of the Agriculturists Relief Act. Besides, the plaintiffs can have no opportunity of contesting the position taken up by the defendant in regard to this matter. We do not therefore propose to take any action upon this plea. It will be open to the defendant to apply to the trial Court if so advised. In the result we hold that the judgment and decree of the trial Court is correct and dismiss the appeal with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 119

YORKE AND GHULAM HASAN JJ.

Lala Jai Shankar and others —
Defendants — Appellants

v.

Sheikh Maqbul-ur-Rahman, Plaintiff and another, Defendant —
Respondents.

Appeal No. 15 of 1939, Decided on 23rd October 1940.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 7—S. 7 bars suits whether instituted by creditor or debtor applicant.

Section 7 bars suits relating to debts incurred before the passing of the order under S. 6 whether they be suits instituted by the creditors or suits instituted by the debtor-applicant: AIR 1941 Oudh 80, *Foll.*; AIR 1938 All 477, *Not foll.* [P 120 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), Ss. 7 and 9—Mortgage by deceased Mahomedan — Application under Encumbered Estates Act by one heir — Other heirs of deceased mortgagor cannot sue under S. 33, U. P. Agriculturists' Relief Act, in respect of mortgage unless and until mortgage is split up.

Where a mortgage is executed by a deceased Mahomedan and an application under the Encumbered Estates Act has been made by one of his heirs, the other heirs are persons who come within the purview of S. 9, sub-s. (5) or sub-s. (6), Encumbered Estates Act. Prima facie they are persons who come within the scope of sub-s. (6) as being the heirs of the deceased debtor who are not members of a joint Hindu family. Unless and until there is a splitting up of the mortgage and the mortgage debt it is not competent to the other heirs of the mortgagor to institute suits under S. 33, Agriculturists' Relief Act, with respect to those debts which are common to them and the applicant under the Encumbered Estates Act. Once however apportionment has been made by the special Judge under S. 9 (6) it will be open to any member of the family who have not applied under the Encumbered Estates Act to institute suits under S. 33, Agriculturists' Relief Act, because once that is done their shares in the original mortgage debts will have become separate debts, in respect of which they can institute suits for accounting. [P 120 C 2]

B. K. Dhaon — for Appellants.

Mohammad Nasiruddin, and Hyder Husain — for Respondents 1, and 1 & 2, respectively.

Judgment. — These are two appeals under S. 12 (2), Oudh Courts Act, from the judgment of Bennett J. in suits under S. 33, Agriculturists' Relief Act. These suits related to mortgages executed by the late Khan Bahadur Wasi-ul-Zaman in favour of the present appellants. The Khan Bahadur died on 14th January 1933, and on 13th April 1933, some share in the property was given to his son Aziz-ul-Rahman by a family settlement while the rest was mutated in favour of his son Maqbul-ur-Rahman and his grandson Mushir-ul-Zaman son of Maqbul-ur-Rahman who got specified share in the property of the deceased. On 3rd February 1936, Maqbul-ur-Rahman instituted the present suits under S. 33, Agriculturists' Relief Act, impleading among others his brother Aziz-ul-Rahman. It happened that Aziz-ul-Rahman had already on 9th July 1935, made an application under the Encumbered Estates Act and an order under S. 6 of that Act has been made on 29th July, and the debtor, Aziz-ul-Rahman, had filed his written statement under S. 8 of the Act on 28th September 1935. The trial Court which had to deal with these suits for accounting decreed the suits on 26th August 1936. Among other points which were for decision it held that S. 33, Agriculturists' Relief Act, applied to mortgage debts and it also held that the suits were maintainable in spite of the provisions of S. 7, Encumbered Estates Act. In the first appeal the learned District Judge held that S. 33, Agriculturists' Relief Act, was not applicable to mortgages and he further held that these suits were in any case not maintainable in view of the provisions of S. 7 (1) (b), Encumbered Estates Act.

On the matter coming to this Court in second appeal it was held, following the decision in 1938 O W N 535,[1] that S. 33, Agriculturists' Relief Act, is applicable to mortgages. Secondly it was held, relying on the decision of the Allahabad High Court in A I R 1938 ALL 477,[2] that S. 7, Encumbered Estates Act, does not operate to bar a suit

1. ('38) 25 A I R 1938 Oudh 156 : 175 I C 50 : 14 Luck 49: 1938 O W N 535, Ram Narain v. Chandrika Prasad.
2. ('38) 25 A I R 1938 All 477 : 177 I C 215 : 1938 A L J 541, Sheo Baran Singh v. Ranbir Prasad.

by the landlord with respect to a debt. In the result the appeals of the plaintiffs were allowed and the decisions of the trial Court restored. In these appeals the only point prima facie arising for decision is whether S. 7 (1) (b), Encumbered Estates Act, imposes a disability on the landlord from taking proceedings which he may be entitled to take under the law for the protection of his interest, as admittedly it does bar creditors from instituting suits in respect of debts to which the landlord is subject or with which his immovable property is encumbered, that is in respect of debts incurred before the passing of the order under S. 6, Encumbered Estates Act. When this matter came before the Court below the only decision of this Court to which reference could be made was the decision of a single Judge in 1940 O W N 129,[3] in which it was held that

both the clauses of S. 7 (1), Encumbered Estates Act, contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlords themselves are entitled to institute under any law.

While the decision on the particular point in question in this case was not quite obiter dictum, yet the ultimate decision of the appeal really rested on other grounds, and it was only in re-enforcement of those grounds that the learned Judge remarked :

Moreover, both the clauses of S. 7 (1) appear to me to contemplate suits or proceedings against landlords for enforcement of debts due by them and not to suits or proceedings that the landlords themselves are entitled to institute under any law.

He went on to refer to A I R 1938 ALL 477.[2] This matter came before both of us in a recent case under S. 115, Civil P. C., (S. 115 Application No. 139 of 1939 decided on 30th September 1940), 191 I C 415,[4] which has not yet been reported. In that case we held that S. 7 bars suits relating to debts incurred before the order passed under S. 6, Encumbered Estates Act, whether they be suits instituted by the creditors or suits instituted by the debtor-applicant. In view of this decision, prima facie, we should be bound to set aside the decree of the learned single Judge which is based on A I R 1938 ALL 477.[2] Learned counsel for the respondents however contends that even accepting the position as stated above, S. 7 would not operate to bar the present suits which are not instituted by the applicant, under the Encumbered Estates Act, Aziz-ul-Rahman, but by another member of the family Maqbul-ur-Rahman who has not made any application under the Encumbered Estates Act. There can be no room for doubt that as these suits relate to mortgages executed by the late Khan Bahadur Wasi-ul-Zaman and an application under the Encumbered Estates Act has been made by one of his heirs, Aziz-ul-Rahman, the other heirs of Wasi-ul-Zaman are persons who come within the purview of S. 9, sub-s. (5) or sub-s. (6), Encumbered Estates Act. Prima facie, they are persons who come within the scope of sub-s. (6) as being the heirs of the deceased debtor who are not members of a joint Hindu family. It will therefore be for the special Judge in due course applying the provisions of that section to apportion the debts due by and the property belonging to the deceased debtor between those heirs who have made an application and those who have not. The sub-section continues that

subject to the provisions of S. 49 that portion of the debt which falls to the share of the heirs who have applied shall be liquidated from the property allotted to them and they shall not be responsible for the portion of the debt which falls to the share of the heirs who have not joined in the application.

It is conceded that under the general law it is not open either to the mortgagee or to the mortgagor to split up the mortgage and the mortgage debt. Section 9, Encumbered Estates Act, is in modification of the general law and under the provisions of that section an exceptional power is given to the Special Judge to override the general law and permit the splitting up of the mortgage and the mortgage debt. It seems to us clear that unless and until there is such a splitting up of the mortgage and the mortgage debt it is not competent to the other heirs of the mortgagor to institute suits under S. 33, Agriculturists' Relief Act, with respect to those debts which are common to them and the applicant under the Encumbered Estates Act. The applicant himself cannot institute such a suit and the other heirs cannot make him a defendant to such a suit. Once however apportionment has been made by the Special Judge under S. 9 (6) it will be open to any member of the family who have not applied under the Encumbered Estates Act to institute suits under S. 33, Agriculturists Relief Act, because once that is done their shares in the original mortgage debts will have become separate debts, in respect of which they can institute suits for accounting.

This point was carefully considered by the learned District Judge in his judgment,

3. ('40) 27 AIR 1940 Oudh 207: 185 I C 726 : 1940 O W N 129, Ambika Prasad v. Mt. Maqbul-un-nisa.
4. *Since reported in* ('41) 28 AIR 1941 Oudh 80 : 191 I C 415 : 1940 O W N 1126, Dildar Hussain v. Baboo Lal.

and we see no reason to differ from the view taken by him, which was only departed from by the learned single Judge on the view that S. 7 did not operate to bar a suit even by the applicant himself in respect of these debts, and could not therefore bar a suit by the co-debtors making him a pro forma defendant. This is the only point which has been raised on behalf of the respondents. We are clearly of opinion, that there is no force in it, and that in view of the Bench decision of this Court, to which we have referred above, the Allahabad decision in A I R 1938 ALL 477[2] is no longer applicable. We accordingly allow these appeals, set aside the decision of the learned Single Judge and restore that of the District Judge. The result is that the suits to which the present appeals relate will stand dismissed with costs of this Court and of the Courts below.

D.S./R.K. *Appeals allowed.*

A. I. R. 1941 Oudh 121

YORKE J.

Raza Husain — Applicant

v.

Shankery Saran—Opposite Party.

Civil Revn. Application No. 49 of 1938, Decided on 21st October 1940, from order of Judge, Small Cause Court, Lucknow, D/- 4th April 1938.

(a) U.P. Agriculturists' Relief Act (27 of 1934), S. 2 (2) Expl. II and Proviso 1—Construction — S. 2 (2) Expl. II does not affect S. 2 (2) Proviso 1.

Section 2(2), Expl. II only restricts the benefit of Chaps. II (except Ss. 3, 4, 5 and 8), and III and VI to such members of a joint Hindu family as fulfil the conditions as to limit of rent, revenue and local rates laid down in cls. (a) to (g) but does not lay down that such members, if their rent, revenue, etc., exceeds the limits so prescribed, have no right to avail of the provisions of other portions of the Act, which right they have been expressly given by proviso 1 to S. 2 (2): A I R 1937 All 633, *Approved*; A I R 1939 All 391, *Expl.*; A I R 1938 All 12, *Not approved.* [P 122 C 2]

(b) U.P. Agriculturists' Relief Act (27 of 1934), S. 3 (2) and (3) — Attachment under S. 3 (2) is discretionary — Whether S. 3 (3) applies to case doubtful — Court in its discretion refusing continuance of attachment—Discretion held not wrongly used.

The power to make an order of attachment under S. 3 (2) is discretionary.

In a case it was doubtful whether the provisions of S. 3 (3) applied to it; the Court in the exercise of its discretion refused to continue an attachment :

Held that the use of the discretion was not wrong. [P 123 C 1]

C. P. Lal—for Applicant.

Azizuddin — for Opposite Party.

Order. — This application under S. 25, Provincial Small Cause Courts Act, raises an interesting point of law. The decree-holder applicant Raza Husain obtained a simple money decree against the opposite party Shankery Saran on 24th September 1936. On 5th January 1938, he applied to execute this decree for a sum of Rs. 203-11-0. On 23rd February 1938, the judgment-debtor applied stating that he was an agriculturist and asking that the provisions of Ss. 4, 5 and 30 be applied in his case, that is to say he sought for the grant of instalments under S. 5 which forms part of Chap. II and he sought a reduction of interest under Chap. IV of the Act. In order to show that he was an agriculturist he filed a copy of the khewat in which his name did not appear but the name of his father Shankari Bakhsh did appear. The Court below has held that this property is ancestral property and that Shankery Saran has a share in it, and that his share of the land revenue payable is less than Rs. 1000. It has accordingly held that the judgment-debtor is an agriculturist and entitled to the benefits of Ss. 5 and 30. It has not made any reduction in the interest under S. 30 but has ordered under S. 5 that the decretal amount be made payable in three equal half-yearly instalments to be paid in Jeth, Aghan and Jeth following. In the course of his judgment, the learned Judge has discussed the view of the Allahabad High Court in regard to the interpretation of Explanation II to sub-s. (2) of S. 2, Agriculturists Relief Act, but has discarded it in holding as above. The question of law which is raised in this case is whether Explanation II to sub-s. (2) of S. 2, Agriculturists Relief Act, is really a proviso, that being the view which has been taken in 1937 A L J 970.[1] The headnote runs as follows :

If a person is recorded as holding certain property or if the revenue papers show that a certain person actually pays land revenue, etc., then he is the person who is prima facie an 'agriculturist' within the meaning of sub-s. (2) of S. 2 of the Act. Explanation II to this sub-section makes it clear that each member of a joint Hindu family or joint owner or joint tenant cannot claim the benefits conferred by S. 5 of the Act, or by S. 30 which is one of the sections in Chap. IV, because S. 5 and Chap. IV are expressly excluded in this explanation. For the purposes of application under S. 5 or applications under Chap. IV the person recorded as owner or the person paying revenue, etc., is the only person who can apply. Normally such a person in a joint Hindu family would be the karta.

The headnote is to my mind slightly misleading, although it may be in agreement with what is said in the body of the

1. ('38) 25 A I R 1938 All 12 : 172 I C 951 : I L R (1938) All 19 : 1937 A L J 970, Allahabad Bank Ltd., Meerut v. Prakashnath.

judgment. In point of fact Explanation II sub-s. (2) of S. 2, Agriculturists' Relief Act, does not make any express exclusion. This explanation provides as follows:

> In the case of members of a joint Hindu family or joint owners or joint tenants, each member or owner or tenant shall be considered to be an agriculturist for the purposes of Chaps. II (except Ss. 3, 4, 5 and 8), III and VI, whose share or interest in revenue, local rate or rent or the rent-free land, as the case may be, does not respectively exceed the aforesaid limits.

If this explanation is read entirely by itself, it seems to carry the meaning that in the case of members of a joint Hindu family or joint owners or joint tenants each member or owner or tenant is to be considered an agriculturist for the purposes only of Chapters II (Except Ss. 3, 4, 5 and 8), III and VI, and for no other Sections or Chapters, and that is the view which has been taken in the Allahabad case referred to. On the other hand this provision has been described as an "explanation," and it is, I think as the learned Judge of the Small Cause Court has said, capable of an entirely different interpretation and one much more in keeping with the spirit of the Act, although it also is not entirely free from possible criticism.

Sub-section (2) describes as agriculturists certain persons and in each case the definition is more or less in the form that "agriculturist" means a person, for example, under (a) it is a person who pays land revenue, under (b) and (c) it is a person who pays local rate, under (d) an under-proprietor, under (e) a thekadar, under (f) a person who pays rent and under (g) a person holding land free of rent. In the absence of any explanation, there might have been some difficulty in applying this definition to cases where land for example was owned by a joint Hindu family, but the only person whose name stood in the papers and the person therefore who was actually paying the land revenue was the 'karta' of the family. A similar difficulty might have arisen in a case where there were joint owners recorded in the khewat but only one of those joint owners was paying the land revenue. Again there might have been a difficulty where there were joint tenants recorded in the village papers but only one of those persons was actually paying the rent to the zamindar. It is suggested that it was to meet this difficulty that Expl. II was added to show that members of a joint Hindu family, joint owners of land, and joint tenants of land were also entitled to be considered agriculturists for the purpose of the Act generally, but in this explanation there was also included a limitation on those general rights of persons entitled to be classed as agriculturists. The limitation is that for the purposes of Ss. 5 and 6 of Chaps. 2, 3 and 6 those persons are held strictly to the limits of revenue, local rate, rent, etc., prescribed in sub-s. (2) of S. 2, leaving out of account the provisos. In point of fact it must be admitted, and this is the criticism to which I referred earlier, that this part of the explanation amounts to little more than a repetition of the contents of proviso 1 which permits the disregarding of the pecuniary and other limits prescribed under heads (a) to (g) of sub-s. (2) in the cases only of S. 2 (10) (a), Ss. 3, 4, 5 and 8 of Chap. II and Chaps. IV and V. None the less I am of opinion, with all due respect for the view taken in the Allahabad case that this is the correct view of the section. The learned Judge of the Small Cause Court has put it in this way that

> Explanation II only restricts the benefit of Chapters II (except Ss. 3, 4, 5 and 8) and III and VI to such members of a joint Hindu family, as fulfil the conditions as to limit of rent, revenue and local rates laid down in cls. (a) to (g), but does not lay down that such members, if their rent, revenue, etc., exceeds the limits so prescribed, have no right to avail of the provisions of other portions of the Act, which right they have been expressly given by proviso 1 to sub-s. (2) of S. 2 of the Act.

Learned counsel for the opposite party has also drawn my attention to a subsequent case of the Allahabad High Court in 1939 A L J 233.[2] In that case another Bench of the Allahabad High Court mentioned the earlier case and did not disagree with it, but none the less they held that a person who was not entitled under the earlier ruling to make an application under S. 30 of the Act, which falls within chap. IV, is entitled to get the benefit of the section, that is to say, that although they avoided disagreeing with the earlier decision, they managed to get round it, or I might almost say to disregard it. I might also refer to another case of the Allahabad High Court in 1937 A L J 680[3] in which the following remark was made by a Bench of that Court:

> It follows that applications which are governed by Chaps. IV and V are completely covered by the proviso (proviso 1 to sub-s. (2)) and not affected by the Explanation.

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2. ('39) 26 AIR 1939 All 391 : 187 I C 249 : I L R (1939) All 431 : 1939 A L J 233, Bangali Mal v. Bansidhar.

3. ('37) 24 AIR 1937 All 633 : 171 I C 573 : I L R (1937) All 759 : 1937 A L J 680, Sheo Shankar Das v. Mohammad Hasan.

This remark seems to me to be consistent with the view of Explanation II which I have put forward. In my opinion the learned Judge of the Court below rightly applied S. 5 on the application of the opposite party and rightly made an order for instalments. Learned counsel for the applicant further laid some stress on the failure of the Court below to make any order of attachment under sub-s. (2) of S. 3 as he had the power to do under the provisions of sub-s. (1) of S. 5. The power to make an order of attachment under sub-s. (2) of S. 3 is however discretionary and this was not a case to which S. 3 was applicable, and in which the Court had in exercise of the power given by S. 3 made an order of attachment. In these circumstances I doubt whether the provision in sub-s. (3) of S. 3 was applicable. It appears to me that the Court had in the circumstances a discretion in the matter of continuing the attachment, and I am not prepared to say that by making no order for its continuance there was a wrong use of the discretion.

One other point was raised, namely that as the opposite party judgment-debtor has paid no instalments under the order of the lower Court, this Court should not give him the benefit of instalments at this late stage. It is not apparent on the face of the record what the cause was of this failure to pay the instalment. I think the ends of justice will be met by directing that the opposite party is allowed to pay the decretal sum in three instalments of which the first shall be payable into the lower Court within one month from this date. The second instalment would be payable six months later and the third instalment six months after that. On failure to deposit any one instalment the decree-holder will be entitled to execute his decree for the whole outstanding amount without further ado. In view of what I have said earlier the present application fails and is dismissed with costs.

G.N./R.K. *Application dismissed.*

A. I. R. 1941 Oudh 123

YORKE J.

Bijleshari Bakhsh Singh and another —*Plaintiffs*—Appellants

v.

Gajadhar and others — *Defendants* — Respondents.

Second Appeal No. 444 of 1937, Decided on 24th September 1940, against order of Addl. Civil Judge, Gonda, D/- 16th September 1937.

Transfer of Property Act (1882), S. 43—Mortgage by manager of joint Hindu family without legal necessity and not in lieu of antecedent debts —Possibility of mortgage deed being liable to be assailed clearly indicated in mortgage deed—Mortgagee cannot take advantage of S. 43.

In Oudh, mortgage by manager of joint Hindu family without legal necessity and not in lieu of antecedent debts is void ab initio and where the possibility of such deed being liable to be assailed is clearly indicated in the deed, the mortgagee cannot say that there was fraudulent or erroneous representation on the part of the mortgagor and the principles of S. 43 cannot therefore apply to such a case : A I R 1934 All 969 and A I R 1927 Oudh 177, *Rel. on.* [P 124 C 2; P 125 C 2; P 126 C 1]

M. Wasim — for Appellants.

Ram Nath and Ramapal Rai — for Respondent 1.

Judgment. — This is a second appeal by the plaintiffs in a suit for recovery of possession of plots measuring 24.36 acres in mahal Rudrapal Singh of village Chandpur which was decreed by the trial Court, but dismissed by the Additional Civil Judge of Gonda on appeal. The facts are not in dispute. One Ambika Baksh Singh, defendant 2, as manager of a Hindu joint family, mortgaged the plots in suit to the defendant Gajadhar for Rs. 3500 on 6th November 1925. The plots mortgaged corresponded to a one anna two pies odd share out of the 16 annas mahal in which the share of the mortgagor himself as an individual member of the joint family at the time of the execution of the mortgage was 6 annas. The present suit was instituted by Bijleshare Baksh Singh, brother of Ambika Baksh Singh, and his son Rameshar Baksh Singh who claimed that the mortgagor had no right to execute any mortgage deed without legal necessity, and that even if the mortgage were binding on the plaintiffs the mortgage money had been paid out of the usufruct of the property, and the plaintiffs were entitled to the share in suit which included the specific plots given in the list attached to the plaint. The defence put forward was that the mortgage was taken for legal necessity and the plaintiffs were bound by it, and it was further contended that there had been a separation of the members of the joint family arising out of the fact that Ambika Baksh Singh had filed an application under the Encumbered Estates Act, and in order to do so had expressed his intention of separation.

The learned Munsif of Tarabganj who tried the suit held that no portion of the mortgage consideration was taken for legal necessity or for payment of antecedent debt, and that the mortgage deed was therefore not binding on the plaintiffs. The lower ap-

pellate Court has affirmed the finding of the trial Court that no portion of the mortgage consideration was taken for legal necessity. The trial Court was of opinion that the filing of the application under the Encumbered Estates Act did not result in a separation, and it accordingly held that the plaintiffs and Ambika Baksh Singh were members of a joint Hindu family, and that it could not be said what was the actual share of Ambika Baksh Singh in the joint family property, and the suit for possession was, therefore, decreed. The lower appellate Court on this point held that the express declaration made by Ambika Baksh Singh in his application under para. 4, Encumbered Estates Act, had the effect of effecting a disruption of the joint Hindu family, and hence the plaintiffs and Ambika Baksh Singh were no longer members of a joint Hindu family at the date of the institution of the suit on 7th November 1936. It took the view that Ambika Baksh Singh had become entitled to a six annas share out of the 16 annas, and the share mortgaged being only one anna odd or corresponding to only that share, the plaintiffs were not entitled to recover possession, and it accordingly dismissed the suit. It would appear that the learned civil Judge was applying the principle of S. 43, T. P. Act, and holding that even if the mortgagor Ambika Baksh Singh was not legally entitled to mortgage the property, which he did mortgage, at the date of the mortgage, he became entitled to this property at a later date, and, therefore, the mortgage became effective against this property, and the plaintiffs were not entitled to maintain a suit for its recovery.

A number of grounds were taken in this appeal but learned counsel for the appellants has begun by conceding that the application under the Encumbered Estates Act effects a separation between Ambika Bakhsh Singh and the other members of the joint family, but he contends that the mortgage executed by Ambika Bakhsh Singh was void ab initio and could not be validated by the subsequent separation by the operation of S. 43, T. P. Act. Learned counsel has referred to Mulla's Hindu Law (9th Edn.) S. 242, subss. (3) and (4) where it is pointed out that

> in Bengal and the United Provinces, where a coparcener cannot alienate even his own interest in joint family property without the consent of all other coparceners, the alienation of joint family property made by the manager without legal necessity would not bind the shares either of the alienor or of the consenting members (sub-section 3).

It is further stated in sub-s. (4) that

> an alienation by the manager of a joint family made without legal necessity is not void but voidable at the option of the other coparceners.

He has also referred to S. 261 at p. 295 where it is stated as follows:

> According to the Mitakshara law as it prevails in Bengal and the United Provinces no coparcener can alienate even his own undivided interest in the coparcenary property without the consent of the other coparceners. If he does so, the alienation is void in its entirety; it is not valid even to the extent of his own interest in the property.

He concedes that there is a difference of opinion on the question whether such a transfer is void or merely voidable but he contends that for the province of Oudh it is settled law that such a transfer is void ab initio. Reliance has been placed on 44 I A 163[1] in which it was held by their Lordships of the Privy Council that

> a mortgage of the joint family property of a Mitakshara family by its "karta", unless necessity or even an antecedent debt is proved is void; the transaction itself gives to the mortgagee no rights against the karta's interest in the joint family property.

In the present case, it is no longer in issue that this transfer was not for antecedent debt or legal necessity. Following the decision in 44 I A 163[1] it was held by the Court of the Judicial Commissioner in 8 O L J 81[2] that such a mortgage of joint family property by the manager is absolutely void and ineffectual from its inception if not made for purposes laid down in the Hindu law, and creates no charge against the joint family property and even against the interests of the actual mortgagor. The same view was taken by the Full Bench of this Court in 6 Luck 158[3] in which in a suit by the mortgagee to obtain possession of the mortgaged property it was held that

> a mortgage of joint ancestral property effected by a Hindu father not for legal necessity or for discharging an antecedent debt is void from its inception and so the mortgagee cannot be allowed to enforce it. Therefore, where a mortgagee of a Hindu father in respect of the ancestral property seeks to enforce the mortgage against the sons he must establish either that the mortgage was justified by legal necessity or it was supported by antecedent debt.

The same view was expressed more recently in 1935 O W N 777[4] in which it was held that

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1. ('17) 4 AIR 1917 P C 41 : 40 I C 284 : 39 All 500 : 44 I A 163 (PC), Lachhman Prasad v. Sarnam Singh.
2. ('21) 8 AIR 1921 Oudh 47 : 61 I C 205 : 8 O L J 81, Gajadhar Baksh v. Gauri Shanker.
3. ('30) 17 AIR 1930 Oudh 284 : 127 I C 38 : 6 Luck 158 ; 7 O W N 603 (FB), Angaraj Bahadur Singh v. Ram Rup.
4. ('35) 156 I C 711 : 1935 O W N 777, Gaya Ram Sahu v. Bishnath.

in Oudh it is now settled law that the alienation of joint ancestral property by the father in a joint Hindu family is void ab initio, unless it is made for legal necessity or in lieu of an antecedent debt.

In the face of these decisions learned counsel for the respondent has sought to rely upon the principle of S. 43, T. P. Act, on the contention that Ambika Bakhsh Singh the mortgagor represented himself to be the owner of the property in question and fully competent to transfer it. Section 43 provides that

where a person fraudulently or erroneously represents that he is authorised to transfer certain immovable property and professes to transfer such property for consideration, such transfer shall, at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists.

In order to apply this section it is clearly necessary first that there should be a fraudulent or erroneous representation and secondly that at the subsequent date the contract of transfer which is to be made operable on the interest subsequently acquired shall be a subsisting contract. Learned counsel for the respondent referred to 26 O C 245[5] in which it was held that although a mortgage of joint family property was void, yet the principle of S. 43, T. P. Act, would apply. In that case reliance was placed at p. 255 on a Patna case in which it was stated that various authorities were reviewed and the result summed up in two propositions :

(1) that a mortgage of the whole of a share of the joint family property of a mitakshara family is void and inoperative as against the property hypothecated and gives the mortgagee no rights even against the mortgagor's undivided share, and (2) that where the mortgagor's interest has been separated from that of the other members of the family it may become available as security for the mortgage debt.

It was remarked that the second proposition was obiter but appeared to the learned Judges of the Judicial Commissioner's Court to be sound. Reference was also made to 58 I C 72[6] but this was the very Patna case on which reliance was placed in 26 O C 245.[5] Another case referred to, A I R 1930 ALL 115,[7] turns out on examination not to be case of joint family property at all, but a clear case of an erroneous representation on the part of the mortgagor. The case for the respondent therefore rests upon the case reported in 26 O C 245[5] only. It appears to me that in the circumstances of the present case the principles embodied in S. 43, T. P. Act, are not applicable. In the first place, no reliance was placed upon S. 43 in the pleadings and no evidence was led on the question of fraudulent or erroneous representation. So, far from there being any question of such representation, learned counsel for the appellants has been able to point to a number of passages in the deed of mortgage executed by Ambika Bakhsh Singh which show clearly that there was no misrepresentation or erroneous representation. On the contrary it was clearly indicated that there was a possibility of the mortgage deed being liable to be assailed. The mortgagee is saddled with knowledge in the present case of the fact that the property was ancestral property in possession of two brothers who were not separate. It is therefore clear that so far from the mortgagee Gajadhar being able to say that there was a fraudulent or erroneous representation on the part of the mortgagor, he is a person who entered into the transaction with his eyes open. In 151 I C 561[8] it was held by a single Judge of the Allahabad High Court that

the benefit of S. 43, T. P. Act, can only be claimed by a person who has acted on the erroneous representation of the party who subsequently acquires an interest in the property. Where the plaintiff, a Hindu, lends money in a mortgage transaction to a Hindu widow, the Court must conclude that he is aware of the elementary principles of the Hindu law that a Hindu widow taking possession of property on the death of her husband holds it for her life with the limited interest of a Hindu widow. He cannot be allowed to say that he took the property under the mortgage on the assurance that she is the owner of the property.

Similarly in 4 O W N 256[9] it was held by a Bench of this Court that

the presumption is that the parties know the law, so that if the 'karta' of a joint Hindu family mortgages the joint family property without legal necessity, and not for the purpose of discharging an antecedent debt, the parties to the mortgage must be presumed to know that the mortgage is unenforceable and void.

There are numerous cases in which on this principle it has been held that S. 43 is not applicable to cases of transfers of property which by law was not transferable, for example, it has been held that the transfer by a reversioner of property to which he has only a 'spes successionis' cannot be held subject to the application of that section,

5. ('23) 10 A I R 1923 Oudh 265 : 71 I C 581 : 26 O C 245, Ram Ratan v. Ganga Bakhsh Singh.
6. ('20) 7 AIR 1920 Pat 433 : 58 I C 72 : 5 Pat L J 605 : 1 P L T 511, Amar Dayal Singh v. Har Pershad Sahu.
7. ('30) 17 AIR 1930 All 115 : 122 I C 177, Eshaq Lal v. Dulla.
8. ('34) 21 A I R 1934 All 969: 151 I C 561, Jagernath Prasad v. Mt. Dhanpati.
9. ('27) 14 A I R 1927 Oudh 177 : 101 I C 265 : 4 O W N 256, Shambhoo Shukul v. Dhaneshar Singh.

and the same has been held in regard to the transfer of property by a ward who was under the superintendence of the Court of Wards. In the result it appears to me to be absolutely clear that the mortgagee in the present case took this property with his eyes open. This is not a case of fraudulent or erroneous representation, and inasmuch as the mortgage was void ab initio, it could not possibly be said that at the date of separation in the family of Ambika Bakhsh Singh the contract of transfer was a subsisting contract. In these circumstances, the plaintiffs as members of joint family, and therefore joint owners of the property transferred by Ambika Bakhsh Singh in 1925, were entitled to a decree for the recovery of the plots in suit, they being cosharers in those plots. The mortgagee was in effect a trespasser and it was competent for any of the cosharers to maintain a suit for the recovery of possession by his ejectment. The plaintiffs' suit was rightly decreed by the trial Court. I allow this appeal with costs of this and the Court below, set aside the decree of the lower appellate Court, and restore that of the trial Court.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1941 Oudh 126

ZIAUL HASAN AND YORKE JJ.

Dinshaw & Co. (Bankers) Ltd., (in liquidation) through S. S. Nigam, Official Liquidator — Appellant

v.

Mt. Krishna Piary — Respondent.

Misc. Appeal No. 20 of 1940, Decided on 20th September 1940, against order of Thomas C. J., Lucknow, D/- 13th December 1939.

* *(a) Companies Act (1913), S. 230 — Money deposited with bank as security for good behaviour of employee constitutes trust money — Depositor is entitled to priority over other creditors.*

Where a person has deposited money with a bank as security for the good behaviour of an employee the money so deposited constitutes trust money in the hands of the bank and on the liquidation of the bank, the depositor is entitled to priority over other creditors: AIR 1939 Mad 337, *Rel. on.* [P 127 C 2; P 128 C 1]

(b) Company — Liquidation — Realizations of assets subsequent to liquidation being really only previously existing assets changed into different form — They are liable for charge in respect of trust moneys.

Where realizations of assets of a bank subsequent to its liquidation are really only the previously existing assets present in the bank's strong rooms changed into different form, the charge in respect of trust moneys deposited with the bank extends also to these subsequent realizations of assets: (1915) 1 Ch 62, *Disting.* [P 128 C 1]

* *(c) Trusts Act (1882), Ss. 77 and 78 —Money deposited with bank being trust money — Demand by depositor for its return is not revocation of trust — Trust cannot be held to be extinguished until return of trust money to depositor.*

Where money is deposited by a person with a bank as security for good behaviour of an employee and the depositor serves a notice on the bank demanding the return of the money, there is no express revocation of the trust by the demand for the return of the money. On the contrary the demand is to be regarded as a demand for the performance of the trust. The trust cannot be extinguished until the purpose of the trust was completely fulfilled by the return of the trust property to the depositor subject to the lawful claims of the bank against that property. [P 128 C 2]

(d) Company — Liquidation—Promissory notes deposited with bank as security for good behaviour of employee —Bank going into liquidation—Bank not producing its accounts —It cannot be heard to say that there was no evidence as to what has become of those notes so as to refute depositor's claim for priority.

Where promissory notes are deposited with a bank as security for good behaviour of an employee it is clearly impossible for the depositor to trace the subsequent disposal of these notes after they were put in possession of the bank. That is a matter which is within the special knowledge of the bank and with reference to which therefore the burden of proof is specifically upon the bank. Hence if the bank has not produced its accounts in Court, it cannot be heard to say that there is no evidence as to what has become of these promissory notes and it cannot refuse to allow the depositor's claim for priority on the ground that there was no evidence as to what had become of these promissory notes. [P 129 C 1]

(e) Company —Liquidation—Trust moneys are outside liquidation and do not vest in liquidator.

Trust moneys are really entirely outside the liquidation and do not vest in the liquidator as assets. Trust moneys in fact never become assets of the bank in which they are deposited. [P 129 C 2]

(f) Oudh Civil Rules, Chap. VI, R. 279(51)— Bank in liquidation — Claim for sum due under trust —R. 279 (51) has no application—Claimant is entitled to interest up to date of payment.

Where a bank has gone into liquidation and there is a claim for a sum due under a trust and governed by S. 23, Trusts Act, sub-r. (51), R. 279, Chap. VI of the Oudh Civil Rules has no application and the claimant is entitled to recover interest up to the time of payment of the amount due to him and not only up to the date of the winding up. [P 129 C 2]

S. S. Nigam (Official Liquidator) — for Appellant.

J. K. Tandon — for Respondent.

Judgment. — This is a miscellaneous appeal from the judgment of the Hon'ble Chief Judge, sitting as company Judge, ordering the Official Liquidator of the Dinshaw Bank to pay to the respondent Mt. Krishna Piari a sum of Rs. 5854-6-10 plus interest from 20th August 1935, up to the date of payment at 3½ per cent. per annum in preference to the other creditors and share-holders within 30 days and directing

that the parties should bear their own costs. The facts out of which this matter has arisen do not, with one exception, admit of any doubt. The Dinshaw Bank had two branches, one at Lucknow and one at Cawnpore. One Nanak Chand Kapur applied for the post of cashier of the bank at Cawnpore, and was asked by the bank to furnish security for Rs. 10,000. Mt. Krishna Piari furnished security for him. On 26th April 1933, she deposited with the bank 100, 3½ per cent. Government promissory notes of the face value of Rs. 10,000, but valued by her at that time at Rs. 8700. On the following day she deposited a sum of Rs. 1300 in cash which was kept in fixed deposit. This fixed deposit matured on 27th April 1934, and the amount was then repaid to Mt. Krishna Piari, the bank apparently remaining satisfied to have security for Nanak Chand to the extent of Rs. 8700 only, or whatever amount the promissory notes might from time to time represent.

As a result of this deposit made by Mt. Krishna Piari in April 1933 Nanak Chand was appointed cashier with effect from 1st May 1933, and continued to be cashier upto 15th October 1935 when compulsory liquidation of the Bank was ordered. Prior to the compulsory liquidation, the Bank had gone into voluntary liquidation on 12th July 1935. On 20th May 1935, Mt. Krishna Piari served a notice on the Bank stating that she did not wish to continue as surety for Nanak Chand Kapur any longer and demanding back from the Bank her promissory notes. These notes were, however, never forthcoming and never returned to her. On 4th July, Mt. Krishna Piari in the course of correspondence with the Bank agreed that a sum of Rs. 2166 due from Nanak Chand to the Bank on overdraft should be set off against her claim and she further agreed on 12th July 1935, to accept from the Bank transfer of a promissory note for Rs. 1175-6-6 due from one Raj Narain. She thus agreed to set off Rs. 3341-6-6 against her claim stated in Ex. 2 at the time of this voluntary liquidation as Rs. 9500, the value of the G. P. Notes at the date of notice, that is 20th May, plus Rs. 495 odd interest due less Rs. 3341 odd, making the net claim Rs. 6654 odd. Subsequently in the compulsory liquidation proceedings Mt. Krishna Piari claimed Rs. 10,000 full face value of the promissory notes or the notes themselves and she allowed a set off of Rs. 2166 only. The further amount of Rs. 1175 odd has, however, since that date been admitted. The official liquidator admitted her claim only for Rs. 8700 value of the promissory notes at the date of their deposit with interest Rs. 495 odd up to 20th May 1935, making a total of Rs. 9195 odd, from which he deducted Rs. 3341 odd as above, leaving a net claim of Rs. 5854 odd. The official liquidator did not include Mt. Krishna Piari's name in the list of preferential creditors under S. 230, Companies Act. He did, however, include her name in a list of persons said to be entitled to preference under S. 234 by which apparently he only meant that he asked the Court to sanction his paying Mt. Krishna Piari in full: *vide* S. 234 (1) (i), Companies Act. In the Court of the Company Judge Mt. Krishna Piari claimed that she was entitled to priority as a beneficiary on the view that this money had been entrusted to the Bank for her ultimate benefit and that the Bank was therefore in the position of a trustee. The learned company Judge framed 4 issues:

1. Is Mt. Krishna Piari entitled to the return of G. P. Notes? If not, what is the exact amount to which she is entitled?
2. Whether she is entitled to priority over other creditors and share-holders?
3. Is she entitled to any interest?
4. Is the liquidator entitled to deduct the sum of Rs. 1175-6-6 without handing over the G. P. Note for Rs. 1000 with the accrued interest thereon?

This last issue no longer arises as the G. P. Note has been handed over to Mt. Krishna Piari. On issue 1 the learned company Judge held that as the Notes could not be traced, the official liquidator could not return those Notes. It was remarked that the Notes had disappeared from the Bank and nobody knew what had happened to them, hence their return was impossible. He went on to consider the amount to which Mt. Krishna Piari was entitled in replacement of the Notes, and he held that the Notes were valued at Rs. 8700 at the time when they were deposited and the present market value at the date of his order was only very slightly different from the value then stated, and he accordingly allowed the claim for Rs. 8700 less Rs. 3341 odd. On issue 2 reliance was placed upon a decision of the Madras High Court, A I R 1939 Mad 337,[1] in which it was held, with reference to cash amounts deposited with the bank by certain employees as security for the good behaviour of those employees that

as the amounts were received by the bank on a specific understanding to be applied by the bank for a specific purpose, such amounts constituted

1. ('39) 26 A I R 1939 Mad 337 : 183 I C 203 : (1939) 1 M L J 209, In the matter of Travancore National & Quilon Bank Ltd.

trust money in the hands of the bank and did not form part of the assets of the bank divisible among its creditors and the fact that these amounts were to carry interest did not alter its character.

The learned company Judge held that the present case was upon the same footing. These promissory notes were entrusted to the bank for the ultimate benefit of Mt. Krishna Piari herself, the bank as trustee only having a specific right to realise from these promissory notes or the proceeds thereof in case of any defalcation on the part of Nanak Chand Kapur. That is a conclusion from which it is quite impossible to differ considering the facts upon the record. Before the learned Company Judge the defence put forward by the official liquidator was that at the time of the compulsory liquidation the only assets in the hands of the bank amounted to a few rupees only. He contended that the charge in respect of these trust moneys of Mt. Krishna Piari could extend only to this sum, and that the subsequent realisations of assets of the bank were replenishment of the bank's funds, but not necessarily of the trust funds as in the case in (1915) 1 Ch 62.[2] We are in agreement with the learned Company Judge that the principles laid down in that case have no application to the present case. In order to induce the application of that case it would have been necessary to show that there was some distinction between the subsequent realizations and the funds previously present in the bank's strong-rooms. The subsequent realizations in the present case are really only the previously existing assets changed into a different form, and not as in the case quoted fresh funds which were not part of the previous assets.

In the grounds of appeal relating to this matter of trust the first ground taken was that the learned Company Judge erred in holding that the appellant bank held the money as a trustee on the date of liquidation, but some attempt has been made to suggest that the bank did not hold these notes as a trustee at all. We have already stated our view that there is no room for doubt that the money was held by the bank as a trustee. We understand that by this ground the appellant was seeking to contend, as he originally began to contend in argument, that although the money was held by the bank as a trustee up to 25th May 1935, the trust was terminated and the bank was no longer a trustee on the date of compulsory liquidation. Learned counsel appears to have lost sight of the provisions of S. 77, Trusts Act. That section provides that :

A trust is extinguished: (a) when its purpose is completely fulfilled; or (b) when its purpose becomes unlawful; or (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise, or (d) when the trust, being revocable, is expressly revoked.

It is clear that (b) and (c) have no application in the present case. It is not shown that the trust property has been destroyed. Learned counsel would suggest that clause (d) applies and that by her notice of 20th May 1935, Mt. Krishna Piari expressly revoked the trust, but a trust can only be revoked in the circumstances mentioned in S. 78, Trusts Act, and learned counsel has not sought to show that any of the provisions of that section is applicable to the present case. It is clear that there is no express revocation of the trust by the demand for the return of the money. On the contrary the demand made by Mt. Krishna Piari seems to be a demand for the performance of the trust. The trust created by the deposit of these notes with the Bank for the ultimate benefit of Mt. Krishna Piari could not, in our opinion, be extinguished until the purpose of the trust was completely fulfilled by the return of the trust property to her subject to the lawful claims of the Bank against that property. In our opinion there is no force in the contention that the Bank, though holding the money as a trustee up to 20th May 1935, was not holding it as a trustee on the date of liquidation.

The second point argued by learned counsel for the appellant was that stated in ground 2, namely that the learned Company Judge having held that the G. P. notes were untraceable erred in allowing the respondent priority in respect of the price of these notes. It was in this connexion that learned counsel contended that there was no evidence that these notes were disposed of by the bank, that is the directors or managers of the bank, and the proceeds included in the bank's accounts, and he contended that the lady could not claim any priority unless there was either admission or proof that the proceeds of the notes were so mixed with bank's money. He suggested that the notes had disappeared, presumably due to fraud on the part of the employees of the bank, and he went on to argue that a bank in liquidation represents the general body of the creditors and is not liable for torts committed by the former employees. Learned

2. (1915) 1 Ch 62 : 84 L J Ch 286 : 112 L T 121 : 1915 H B R 61 : 59 S J 105, Roscoe (Bolton) Ltd. v. Winder.

counsel conceded that had the promissory notes been present in the bank, Mt. Krishna Piari would certainly have been entitled to follow them, but his contention was that in the absence of evidence to show that they had been disposed of by the bank and the proceeds included in the bank's assets, the respondent was not entitled to follow them as against the bank's other assets. On behalf of the respondent it is argued that this position is untenable on a number of grounds. In the first place it is clearly impossible for Mt. Krishna Piari to trace the subsequent disposal of these notes after they were put in the possession of the bank. That is a matter which is within the special knowledge of the bank, and with reference to which, therefore, the burden of proof is specifically upon the bank, that is upon the official liquidator. Section 106, Evidence Act, provides that

when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

It follows that if the bank has not produced its accounts in Court, it cannot be heard to say that there is no evidence as to what has become of these promissory notes. Learned counsel for the respondent referred in this connexion to AIR 1935 Mad 152,[3] in which it was held that

if a defendant suppresses his accounts or has falsified them, the Court will presume everything most unfavourable to him consistent with the established facts.

Learned counsel for the respondent has further pointed out that it is not open to the appellant to contend that the respondent was not entitled to follow these sums on the ground that they are not shown to have been included in the bank's monies, because in the list of debts and claims prepared by the official liquidator and supported by his affidavit dated 24th February 1938 he has described Mt. Krishna Piari's claim on p. 26 in the following form : He includes her claim in the list of preferential claims under S. 234, Companies Act, and the entry in the list is as follows :

S. No. 1.
No. of the list 218.
Name—Mt. Krishna Piari.
Particulars of debt or claim—Security deposit.
Amount claimed—Rs. 6654-6-10.
Amount proper to be allowed—Rs. 5854-6-10.
Reasons for belief that amounts are proper to be allowed. } From account-books and receipt.

This would seem to be an admission that the claim had been allowed by reason of verification from account-books and from the receipt given by the bank to Mt. Krishna Piari ; therefore an admission that the proceeds of those notes were included in the bank's moneys. Learned counsel for respondent further points out that the effect of the Madras decision relied upon by the learned company Judge, a decision which is founded on a number of previous cases which it is not in our opinion necessary to quote, is that trust monies are really entirely outside the liquidation and do not vest in the liquidator as assets. Trust monies in fact never become assets of the bank. It follows that if this money had been misappropriated as is now suggested, the bank should have disclaimed liability from the very start, and that is not the position which has ever been taken up. In our opinion, it is correct to say that it is no longer open to the official liquidator to disclaim all responsibility, and the only question which can still be disputed is the proper amount to be allowed to the claimant respondent. In ground 3, it is contended that the Hon'ble Court erred in allowing interest to the respondent beyond the time admitted by the appellant. Learned counsel contends that interest should only have been allowed up to the date of the winding up, that is the order for compulsory liquidation: *vide* sub-r. 51, R. 279, Chap. 6, Oudh Civil Rules, which provides as follows :

Creditors whose debts and claims carry interest and are allowed shall be entitled to receive dividends upon what was due for principal and interest at the date of the winding up. In the event of there being a surplus, the dividends payable to such creditors shall be applied, firstly, towards payment of the interest, and, secondly, in reduction of the principal due to them. Interest may be allowed on all claims in respect of which it is recoverable as damages.

In our opinion this rule has really no application. The claim of Mt. Krishna Piari is a claim for a sum due under a trust and governed by S. 23, Trusts Act. The bank paid Mt. Krishna Piari the interest which accrued on the promissory notes for some period and then ceased paying. Had the promissory notes been in the hands of the bank, as they should have been, Mt. Krishna Piari would have been able to recover the interest accruing right up to the date on which she got the promissory notes back. She is not an ordinary creditor, and she is in our opinion entitled to recover interest up to the time of payment of the amount due to her, as held by the learned company Judge. The last point urged is that the learned company

3. ('35) 22 AIR 1935 Mad 152 : 155 I C 1059 : 69 M L J 558, Chidambaram Chettiar v. Ayyappa Chettiar.

Judge should not have directed payment of the amount due to Mt. Krishna Piari within 30 days. It is contended that there are a number of similar cases and that all these will have to be paid simultaneously, and if the assets are not sufficient they will have to be paid pro rata. Learned counsel has, however, to admit that the official liquidator has money available to pay both this and all other preferential claims as was stated orally to the learned company Judge. In these circumstances we can find nothing wrong with the order made by the learned company Judge.

A cross-objection has been filed on behalf of the respondent Mt. Krishna Piari in which it is urged (1) that the G. P. Notes should have been valued to the full extent of their face value and the respondent's claim therefore be further allowed to the extent of Rs. 1300, (2) that the learned company Judge should have directed the official liquidator to purchase G. P. Notes of the same denomination and face value and hand them over to the respondent and (3) that in the alternative the learned company Judge should have ordered that the respondent is entitled to such amount as would enable her to purchase $3\frac{1}{2}$ per cent. G. P. Notes of the face value of Rs. 10,000 on the date the money is handed over to her. It is clear that by his order the learned company Judge intended to put Mt. Krishna Piari in the same position as she would have been at the date of his order had she been able to recover possession of the notes themselves. The learned company Judge discounted the extra 12 annas above Rs. 87 at which each 100 rupee note was said to be valued in the market at the date of his order. Learned counsel for the respondent says that the market value today of each note is Rs. 90. It is clear to us that owing to the filing of the present appeal and the consequent non-compliance with the order to pay up the full amount of Mt. Krishna Piari's claim within 30 days, Mt. Krishna Piari has been caused a very definite loss. We are therefore of opinion that we should add to the amount decreed by the learned company Judge a further sum of Rs. 300 only, that being the difference between the rate on which the learned company Judge's order was calculated and the current rate. In order to avoid any danger of further loss we direct that the payment shall be made within 10 days of the date of this order. The effect of this order is that we dismiss the appeal of the official liquidator with costs. We allow the cross-objection on behalf of the respondent to the extent of Rs. 300 only but make no order as to costs of the cross-objection.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 130

ZIAUL HASAN AND BENNETT JJ.

Kr. Shyam Kumar Singh and another

Appellants

v.

Emperor.

Criminal Appeal No. 399 of 1940, Decided on 4th November 1940, against order of Sess. Judge, Lucknow, D/- 3rd July 1940.

(a) Criminal trial — Evidence — Investigating officer can indicate before Court his source of information—Such evidence is admissible.

There is no reason why an investigating police officer should not indicate before the Court the source of the information upon which he takes action, and it is sometimes of assistance to the Court to know what the source is. [P 134 C 2]

(b) Evidence—Appreciation — Previous conviction 8 or 10 years before — Acquaintance with person interested in prosecution—Only for this, witness need not be discredited.

The mere facts that a witness was previously acquainted with a person interested in the prosecution and that he admitted a conviction for cheating 8 or 10 years before are not sufficient to discredit him. [P 135 C 1]

(c) Criminal trial — Evidence — Accomplice—Corroborative value is more with respect to particulars not already known than with respect to matters known.

Corroborative evidence about particulars not already known to the police and which are discovered in consequence of information given by an accomplice is of greater value than corroborative evidence about matters known to the police before any information is received from an accomplice : A I R 1933 Oudh 265, *Expl.* [P 138 C 1]

(d) Criminal trial — Evidence — Accomplice—Corroboration—Conspiracy—Nature of corroboration explained.

Where the details relate chiefly to the meetings of the conspirators, their plans and talks, it is natural that no corroborative evidence for such details should be available. What has to be seen is whether there is sufficient corroborative evidence on essential points relating to the conspiracy and sufficient corroborative evidence with regard to each alleged conspirator : A I R 1936 Rang 373, *Rel. on.* [P 138 C 2]

(e) Evidence Act (1872), S. 10—Applicability.

Where there is reasonable ground to believe that there was a conspiracy to commit an offence and that the accused were members of it, S. 10 is applicable to the case. Any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and as such may be admitted. Whether it should be believed or not is another question : A I R 1934 Cal 221, *Applied.* [P 138 C 2 ; P 139 C 1]

(f) Criminal trial — Evidence—Accessory after fact—His evidence cannot be put higher than that of approver.

Where a witness is admittedly an accessory after the fact and though not privy to the plot beforehand

but must certainly have suspected that something sinister was afoot, his evidence cannot be put on a higher level than that of an approver. [P 143 C 1]

(g) Criminal trial — Evidence — Unreliable witness need not be totally discarded.

The evidence of an admittedly unreliable witness need not be discarded from consideration altogether. [P 143 C 2]

(h) Criminal trial—Hostile witness—His evidence can be believed in part — Either side may rely on his evidence.

Simply because a witness is declared hostile it cannot be said that that amounts to a declaration that his evidence is worthless and unreliable. It is incorrect to say that his evidence cannot be believed in part but must be excluded from consideration altogether; either side may rely upon his evidence and the whole of the evidence, so far as it affects both parties favourably or unfavourably must be considered for what it is worth: A I R 1931 Cal 401 (F B); A I R 1934 Oudh 507 and A I R 1933 Pat 517, *Rel. on.* [P 143 C 2]

(i) Criminal trial — Evidence — Approver — Verification proceedings — Value of, stated.

Verification proceedings held in connexion with the confessions and the statements of the approvers do not add to their value. Such proceedings cannot be regarded as corroboration, and are open to criticism in other respects. But such proceedings cannot be deprecated altogether; they show at least that the approver has or has not some knowledge of the places which he has mentioned in his confession. No doubt if he has been tutored by the police to make certain statements he might also have been carefully rehearsed by them in his part and taken to and shown the various places referred to in his statement, though it might be difficult to arrange this without it becoming known. The verification proceedings are in any case a test of the approver's memory, and as it might not be easy for him to remember such details, if placed in his mouth, however carefully rehearsed he may have been, the fact that he is able to point out in proper sequence the places previously mentioned by him does suggest that there is some foundation for his story. There would however be more justification for such a conclusion in the case of a man who had been a stranger to the locality prior to the crime. The test is not of very much value where the approver is a resident of the town where the places are and is therefore probably well acquainted with them. The procedure however is not illegal and may afford some test of the truth of the approver's statement: A I R 1937 Cal 99, *Rel. on.* [P 144 C 2]

R. F. Bahadurji, R. D. Seth, B. N. Mulla and R. B. Asthana — for Appellants.

Government Advocate — for the Crown.

Judgment. — Kunwar Shyam Kumar Singh, Taluqdar of Hathaura in the Hardoi district, commonly referred to as the Raja of Hathaura, and his mother, Rani Abhiraj Kunwar, generally referred to in this case as the Rajmata, Bua Saheb, or Sarkar, were convicted by the learned Sessions Judge of Lucknow of offences under S. 302 read with S. 115, and also under S. 120B read with S. 302, Penal Code. They were each sentenced for each offence to 14 years' rigorous imprisonment, these sentences to run concurrently. At the same trial Afaque Ahmad, referred to generally as Afaque, who was at one time manager of the Hathaura Estate, together with him a man named Punnu (or Punnoo) Khan, were convicted under S. 120B read with S. 302. Punnu Khan was also convicted under S. 307, and Afaque was also convicted under S. 307 read with S. 114, Penal Code. They were each sentenced for each offence to transportation for life, the sentences to run concurrently. Appeal No. 399 of 1940 was filed jointly against their convictions and sentences by the Raja and his mother; Appeal No. 420 was filed by Afaque and Appeal No. 429 was filed by Punnu Khan. Separate counsel have represented the appellants in each appeal.

The case against the appellants originated in an attempt to kill Rani Subadra Devi, (also called Kalindi Devi), wife of the Raja, on 19th January 1939, by shooting her with a revolver. She had been separated from the Raja since 1932, and for about two years prior to the attempt on her life she had been living at No. 106, Model House, Lucknow. She was shot about 9 p. m. on the evening of 19th January, as she was returning from a visit to her father, the Raja of Kashipur, who lived in Outram Road, Lucknow. She had just got out of her motor car and was about to pass through the gate in front of her house when she was shot. Her driver was a man named Kali Charan, who subsequently identified Punnu Khan as the man who fired the shot. Other servants ran out of the house and found the Rani collapsed in front of the gate. She had been shot through the right breast and right arm. She was carried into the house and taken not long afterwards to the Medical College. Kali Charan went to inform the Raja of Kashipur; the latter took Kali Charan to a legal practitioner named Mr. A. P. Singh, who has since died. Mr. Singh wrote a short report, Ex. 13, which was taken to the Hazratganj police station. After an X-ray examination Rani Subadra Devi made a statement to a Magistrate, Ex. 38R, and then underwent an operation. This was successful; a bullet corresponding in weight to bullets used in a. 455 revolver was removed from her right arm, and the Rani recovered. The medical evidence disclosed four injuries, all caused by a single shot, fired at close quarters.

Two of the appellants, Afaque and Punnu Khan, were arrested by the police on 12th February, together with a third man named Nanhu alias Har Narain, who made a con-

fession in June, and became an approver. The Raja of Hathaura and his mother, the Rajmata, were not arrested until 15th August, and proceedings in the Magistrate's Court were taken against them after proceedings against the other two appellants had commenced. The prosecution story, which was believed by the learned Sessions Judge, was stated briefly as follows: The Raja of Hathaura married Subadra Devi as his second Rani on 21st April 1927. A month earlier he had executed a pre-nuptial agreement in which he made various promises. These included a promise to make Subadra Devi an allowance of Rs. 1000 per mensem as maintenance, and a promise not to marry again for at least ten years, and not to marry again at all if a male child should be born either to Subadra Devi or to his first wife, Bhopal Kunwar (who died in 1933). Soon after the marriage the Raja met a sister of Subadra Devi named Sita Devi and became very anxious to marry her. Negotiations commenced with this object, but the proposal was discouraged by the Court of Wards (which was in control of the Kashipur estate) and also by Subadra Devi, with the result that the Raja's suit was rejected and Sita Devi married someone else.

The Raja of Hathaura did not at first realize the extent of Subadra Devi's opposition to match; although she had never encouraged her husband in the proposal, she had admitted that it would be preferable for him to marry a member of her family than a stranger and apparently acquiesced in it. When later he came to know through the Raja of Malajani, who is married to the Raja of Hathaura's sister, that Subadra Devi had secretly taken direct steps to prevent the marriage with Sita Devi, both he and his mother, the Rajmata, became very embittered against Subadra Devi, and subjected her in various ways to cruel treatment. Some description of this was given by her in a letter to the Deputy Commissioner of Hardoi (Ex. 27R), in which she expressed the fear that her life was in danger and asked the Deputy Commissioner to save her from "this hell of a house." As the result of complaints made by Subadra Devi to the authorities she was allowed to go to Naini Tal in September 1932. There she repeated to her parents the complaints which in various ways she had already communicated to them during the previous three years. But her father was unsympathetic, having strong views about Hindu marriage and the duties of a wife. He sent her back at the beginning of November 1932, with a letter to the Deputy Commissioner of Hardoi, asking the latter to make arrangements for her comfort and safety. The Deputy Commissioner did not feel that he could interfere, and Subadra Devi, being unwilling to return to Hathaura, went to Lucknow. She never lived with her husband again.

In September 1933, Rani Subadra Devi instituted a suit against the Raja for maintenance. The Raja rejoined with a suit for restitution of conjugal rights. In the written statement filed by Subadra Devi in this case, she made certain allegations against the Raja and his mother. Inter alia she alleged that the Raja had contracted venereal disease and that the Rajmata indulged in immoral practices with a maidservant. The two suits were compromised in June 1934 (not, as the Sessions Judge says, at the end of 1933) and the prosecution suggestion was that the Raja and his mother agreed to this course, because they were not prepared to face the evidence which Subadra might have produced to support her allegations. Though Subadra did not get as much as she asked for, the compromise was undoubtedly very favourable to her. The suit for restitution of conjugal rights was dismissed, and Subadra Devi obtained a decree for Rs. 40,000 in cash and Rs. 9000 a year for her maintenance.

As the cases were compromised the allegations against the Raja and his mother were not proved, nor have they been proved in the present case. It has been suggested however that some support is to be found for them in evidence which shows that the maidservant referred to occupied a very privileged position and that the Raja has provided for her (and also for some prostitutes or dancing girls) in his will. Rani Subadra Devi stated that the Raja was treated for his venereal disease by the family doctor, Dr. Hukku, and it is argued for the prosecution that if the allegation were false the defence would naturally have called Dr. Hukku to disprove it. This has not been done. It seems to us in these circumstances that while we must find, as the Sessions Judge found, that the more serious allegations were not proved, we must also find that it is not proved that they were made falsely and vexatiously in order to force a compromise. Nothing particularly relevant to the case occurred for some time after this litigation. Rani Subadra Devi lived in Naini Tal or Dehra Dun in the hot weather, and with a sister, the Rani of Majgain, in the cold weather. The Raja had

taken a third wife in 1934, but she died after a year or so, and we hear nothing of her. In May 1937 he married a fourth Rani from the State of Raira Khol in Orissa.

Rani Subadra Devi took up her residence at No. 106, Model House, Lucknow in 1937, and under the instructions of her father she engaged a man named Jagannath Prasad Gupta as her private secretary. Jagannath Prasad Gupta was the manager of the Hathaura estate at the time of Subadra's marriage in 1927, but he resigned in 1929. Various reasons have been suggested for his resignation; the Raja gave him a very good testimonial when he left, and this suggested that he left because he wished to continue his legal studies. Jagannath Prasad Gupta himself said however that he resigned because in face of official opposition to the match he was not prepared to support the Raja in his suit for the hand of Sita Devi. When in 1933 Subadra Devi sued her husband for maintenance Jagannath Prasad Gupta was engaged at the instance of her father and other relatives to assist her in the case, and on its successful conclusion he was given a sum of Rs. 5000, this amount having been agreed upon, should the proceedings be successful. A number of motives for the crime have been suggested by the prosecution; one of those most prominently put forward is the alleged desire of the Raja and his mother to terminate the payment of Rs. 9000 per annum maintenance, another suggestion is that the Raja may have suspected the existence of illicit relations between Jagannath Prasad Gupta and Subadra Devi (though no such relationship is admitted by the prosecution) and considered that his honour was at stake. In his statement as an accused in the case, the Raja said that he dismissed Jagannath Prasad Gupta because he had "swallowed thousands of rupees in the matter of the Kashipur marriage" and also because he suspected that he had an intrigue with Subadra Devi.

The prosecution suggestion was that the conspiracy to murder Subadra Devi was formed some time in 1937, and that the first steps taken in this direction were abortive because the persons hired to murder her only wished to get money from Afaque and did not intend to risk their necks by murdering her. According to the Raja, Afaque became manager of the Hathaura estate about March 1937, that is not long before the Raja's fourth marriage. The Hathaura estate is by no means a wealthy estate and there are various indications that the Raja was in financial difficulties and had difficulty in meeting Subadra Devi's maintenance claim; it is shown that the amount decreed her under the compromise was never paid until execution proceedings were taken by her. The fourth Rani left Hathaura for Orissa in June 1938, and never returned, and the circumstances were such as might have led the Raja to apprehend that she also might bring a suit against him for maintenance. We shall revert to this later. For the present it is sufficient to say that of the various motives suggested for the conspiracy the desire to terminate the payment of Subadra Devi's maintenance allowance would appear to constitute the strongest motive, though other feelings may have exercised some influence in the decision, that is, if we agree with the learned Sessions Judge that it is proved that there was such a conspiracy, to which the Raja and his mother were parties.

Subadra Devi was living in Almora and Naini Tal from the spring of 1938 to the autumn of the same year and according to the prosecution story a party of four men visited Almora at the end of March 1938, at the instance of Afaque, with the object of murdering her. The four men were Hasan Mohammad, Dhanush Dhar, (also called Dhanur Dhar), his brother Dharni Dhar, and a man named Syed, who is said to have been a 'musahib' or hanger-on of the Hathaura estate. The visit was unsuccessful, as it was found, so it is said, that the Rani had the relatives and other persons staying with her whose presence made an attempt to murder her too dangerous. The Rani deposed that her sister, the Rani of Majgain, and the Rani of Jhandi were living with her at Almora at this time, and there is other evidence to the same effect. For this story of the visit of some of the conspirators to Almora we are dependent primarily on the evidence of two of the four men referred to, Hasan Mohammad and Dhanush Dhar, admittedly bad characters. But there is corroborative evidence of the visit of the party first to Ranikhet and from there to Almora. The defence have suggested another motive for the trip to Ranikhet, but have not been able to suggest any particular motive, save that of pleasure, for the trip to Almora. Syed, who is represented as playing a rather prominent part in the early history of the conspiracy, passes out of the story now. It is said that he became ill after the return of the party from Almora at the beginning of April and died a few months later.

Hasan Mohammad, Dhanush Dhar and Dharni Dhar also pass out of the story after Punnu Khan had been introduced to Afaque by Hasan Mohammad. According to Hasan Mohammad none of them had really intended to kill Subadra Devi ; they merely pretended to join the conspiracy in order to obtain money on various pretexts from Afaque, Dhanush Dhar and his brother being brought in only for the Almora trip. It was suggested by one of the defence counsel that as these three men admittedly purported to join the conspiracy they also should have been arrested by the police and placed on their trial. Presumably, this was not done because there was no reason to doubt the explanations given by them. There is at least nothing to connect any of them with the subsequent attempt upon Subadra Devi's life—that is apart from the introduction of Punnu Khan to Afaque by Hasan Mohammad. The learned Sessions Judge however treated them, and no doubt rightly treated them, as accomplices in considering the value to be attached to their evidence.

No further steps to murder Subadra Devi were taken until after her return from Almora in November 1938. It was then, according to Hasan Mohammad, that he introduced Punnu Khan to Afaque. He says that he had private reasons for leaving the conspiracy, and that, while introducing Punnu Khan to Afaque, he did not intend that the latter should actually murder the Rani, but that he should pretend to join the conspiracy just as he himself had done and thus obtain small sums of money from Afaque. Punnu Khan, however, it is suggested, had no use for such small amounts and wanted the Rs. 3000 which Afaque was offering for the murder. From this stage up to the actual attempt on 19th January 1939, the prosecution case rests primarily on the evidence of the approver Nanhu, who according to his story was approached by Punnu because he had a revolver. This revolver is said by him to have been bought by Afaque for Rs. 130, this amount being divided equally between Punnu Khan and Nanhu. According to Nanhu's story Afaque now took a direct part in the proceedings which led up to the murder, accompanying these two men to the Rani's house on numerous occasions, right up to the night of the actual attempt. He brought them that night to the vicinity of the Rani's house in his motor car, and arranged for the street light to be switched off. They did not however trust him to wait for them after the Rani had been fired at, and arranged for an ekka to be waiting for them not far away. This precaution, it is said, was justified, for Afaque did not wait for them and they made their escape in the ekka after Punnu Khan had fired the shot which wounded the Rani.

Before considering the evidence of these accomplices and the corroborative evidence in greater detail we will first refer to the police investigation. We have mentioned that Afaque, Punnu Khan and Nanhu were arrested on 12th February. We do not know the source of the information which led to their arrest, for the Sessions Judge would not record evidence on this point, considering it inadmissible. In this we think he was mistaken. There is no reason why an investigating police officer should not indicate the source of the information upon which he takes action, and it is sometimes of assistance to the Court to know what the source is. There can be no doubt that Subadra Devi suspected the complicity of her husband in the attempt upon her life, for she said as much to her father when he visited her in the hospital shortly afterwards. She did not mention her suspicions in her dying delaration, Ex. 38R, which was a brief statement confined in the actual occurrence but she did mention them in a statement recorded under S. 162, Criminal P. C., on 21st January when she also mentioned the desire which her father had expressed that she should not implicate the Raja.

In addition to such information as was given by Subadra Devi, her secretary, Jagannath Prasad Gupta, and Kali Charan, the driver of her car, the police obtained at an early stage in the investigation some information from two Bengalis, Hardhan Chatterji (P. W. 5) and Monindra Nath Bhattacharji alias Dasu Babu (P. W. 73) who live (in different directions) some 200 yards from Subadra Devi's house. The former was known to Jagannath Prasad Gupta, but the latter was not. Their story is that they had observed two or three strange persons on several occasions in the vicinity of the Rani's house and after the occurrence Hardhan Chatterji mentioned this to Jagannath Prasad Gupta who took them to the police. They were able to give some description of the men. At identification proceedings held on 27th April 1939, both these witnesses identified Nanhu as one of the men seen by them near the Rani's house. Neither of them

identified Punnu Khan, and their failure to do so has been stressed by the defence. But one of the other men may have been Afaque, who was not put up for identification because he had been released on bail. Both these witnesses described only two men, though M. N. Bhattacharji said that he sometimes saw three; the third stranger, he said, had left very little impression on his mind. The only points which have been made against this evidence are that H. Chatterji was previously acquainted with Jagannath Prasad Gupta, and that he admitted a conviction for cheating eight or ten years before. We do not think that this is sufficient to discredit him. The fact that these witnesses identified Nanhu and failed to identify Punnu Khan, against whom the police would have particularly desired to obtain evidence, is an indication both of their good faith and of the genuine nature of the identification proceedings. It has been argued that if they saw Nanhu they must also have seen Punnu and should have been able to identify both. But Nanhu and Punnu may not have always been together and there may also have been reasons why one man attracted their notice, while the other did not.

Other information on which the police may have taken action against Punnu Khan in another connexion was received by them on 22nd January, when a Sub-Inspector named Hamid Ali (P. W. 40) made a report based on information given to him by a vakil named Mr. Jagdish Narain Seth (P. W. 22). The report is Ex. 39. The evidence of Mr. Jagdish Narain Seth shows that Hyderabad Day was observed on 22nd January in Lucknow and communal feeling ran high. There was to be a Hindu procession and a mob of 100 or 125 Mahomedans had gathered near the place from which it was to start. Mr. Seth saw Punnu Khan, whom he knew well by sight, though not by name pass up and down in front of the crowd with a large revolver in his hand. He thought the revolver might be of .450 bore, as he had seen similar revolvers of this bore before. Mr. Seth ascertained Punnu Khan's name and informed the Sub-Inspector Hamid Ali, who had gone to the scene in view of the possibility of a Hindu-Mahomedan clash of what he had seen. No attempt has been made to challenge this evidence. It is clear that the information received about Punnu Khan was entirely unconnected with the investigation into the attempt on the Rani's life. The only argument put forward with regard to this evidence is that it really favours the defence, because if Punnu Khan had fired the shot on the 19th he would not have been so foolish as to appear in public with a revolver only three days afterwards. We do not think there is much force in this argument. The fact that Punnu Khan was in possession of a revolver on 22nd January does not directly connect him with the crime but it shows that he had in his possession a weapon with which he may have committed it.

The Sub-Inspector, Hamid Ali, has explained why Punnu Khan was not arrested immediately after this report. He says that Punnu Khan did not return home at once. He "was generally in Lucknow between Hyderabad Day and his arrest," so that it would seem that the police were keeping a watch on him but had reasons for not arresting him immediately. His house was searched when he was arrested on 12th February; the police hoped to find the revolver there then, but this expectation was not realized. It is clear that suspicion concentrated on the Raja of Hathaura and Afaque, his manager, from the first. The investigation was taken in hand by B. Shadi Lal (P. W. 80), the station officer of the Hazratganj police station, who on the night of the occurrence took the statements of several persons who were present at the hospital where the Rani was. The same night he sent one Sub-Inspector to check the Hathaura firearms in the Raja's house at Lucknow, and another to check the arms of Afaque at his house at Lucknow. He also posted constables on the Hardoi road to watch for suspicious characters. A third Sub-Inspector was sent to Hathaura to arrange for the arms there to be checked. This was done on 20th January by the Deputy Superintendent of Police, Nawabzada Ali Qadir, whose evidence about his visit is referred to elsewhere. B. Shadi Lal prepared a site plan of the occurrence on the 20th, Ex. 14. This shows the route taken by the criminal according to the statements made to him by the witnesses who were subsequently produced by the prosecution. Their evidence with regard to the route has been challenged by the defence and it has been argued that the police and witnesses represented that the criminal fled north so that Kali Charan might be able to say there was sufficient light for him to see him clearly. We mention this here to show that if there is any foundation for this suggestion, the police must have distorted the evidence from the commencement of

the investigation, which is very difficult to believe.

Punnu Khan was arrested at his house on the morning of 12th February by M. Tausifullah, station officer of the chowk kotwali (P. W. 56). He arrested Afaque that evening. As he wished to keep them separate he sent Punnu Khan to the Hazratganj police station. He was less than 24 hours in police custody and there is a good deal of formal evidence to show that strict precautions were taken to prevent his being seen after his arrest by members of the public. It has however been contended that there were opportunities for this. Afaque was released on bail on 13th February. Sub-Inspector Barjor Singh (P. W. 60) was deputed to arrest Nanhu and he did so on 12th February at his house. On the same date a man named Manna Singh, chaukidar at the house of the Raja of Hathaura in mohalla Raniganj, was arrested by this Sub-Inspector. Manna remained in custody until 11th April when he was released. Nothing of importance was discovered from these searches and arrests. Nanhu was sent up by the police not long after his arrest to have his confession recorded by the Magistrate, but he did not make a confession then; he denied that he had any knowledge about the occurrence.

B. Shadi Lal continued to investigate the case until 9th March, when the investigation was taken over by Inspector Rampal Singh of the Criminal Investigation Department (P. W. 82). He took the statement of Hasan Mohammad on 16th March and this statement was evidently of great assistance in the investigation. A Sub-Inspector named Mr. Speake (P. W. 57) was sent to Ranikhet and Almora on 27th March, presumably in consequence of Hasan Mohammad's statement and for the purpose of checking it on certain points. Several witnesses whom he examined at these places were produced by the prosecution. Steps were also taken to check Hasan Mohammad's statement in other directions. We may mention here that it is the defence case that much of the evidence given by Hasan Mohammad was or may have been already in possession of the police and was put into Hasan Mohammad's mouth to strengthen the theory of conspiracy. It is possible that the police may have known of the trip of Hasan Mohammad and three other persons to Ranikhet at the end of March 1938, but there is no indication or suggestion that they had any previous knowledge of the further journey of this party of four persons to Almora. The defence suggestion (by one learned counsel) with regard to this is that the evidence is false, procured by the police to connect a journey, made to Ranikhet for another purpose, with the alleged conspiracy.

We shall consider this in detail later, but we may mention here that it does not appear that the police had any particular reason to bring in falsely the journey to Almora, because as Rani Subadra Devi, who is said to have been at Almora at the time, did not apprehend that her life was in danger while she was staying there, there was no reason for her to mention her stay there to the police. It has been argued (by the same counsel) that actually she did not stay there at all and that her own evidence and that of Jagannath Prasad Gupta (who did not accompany her there) is not sufficient to establish the fact. That is to say the defence suggestion is that the story of her stay there was invented and put into her mouth by the police, that the story of the journey of these four persons to Almora in pursuance of a conspiracy to murder her was then put into the mouth of Hasan Mohammad, and finally false evidence was procured from Almora to corroborate his evidence on the point. Identification proceedings in respect of Nanhu and Punnu Khan took place on 27th April. The reason for the delay has not been clearly shown, but it has been suggested that Rani Subadra Devi had not sufficiently recovered before this to attend. Nanhu and Punnu Khan were challaned on 11th May.

Nanhu's confession (Ex. C10) was recorded by a Magistrate on 17th June, and on 25th June he was taken by another Magistrate, Mr. Wahid Ahmad (P. W. 70), for a local verification of places mentioned by him therein. The Magistrate recorded the result in a memo, Ex. 12. Meanwhile, Inspector Rampal Singh had applied for permission to see Nanhu in jail in order to obtain further information on certain points. Permission was granted and after the interview on 26th June further evidence was obtained. Afaque was re-arrested on 19th June and proceedings against him and Punnu Khan commenced in the Magistrate's Court on 1st July, Nanhu accepting an offer of pardon on his becoming an approver. Inspector Rampal Singh explained that the reason why he had challaned Nanhu and Punnu Khan on 11th May before Afaque was that the witnesses were being approached and he did not know how many of them would

adhere to their statements. Thakur Rampal Singh consulted his superior officers before proceeding against Afaque and at the same time, he says, he consulted them about taking action against the Raja and Rajmata. This question remained for a short time under consideration, but they were both arrested on 15th August. They were subsequently released on bail, the Rajmata under the orders of the Sessions Judge and the Raja under the orders of this Court. Bail was also granted to them by this Court after their conviction by the Sessions Judge.

The circumstances attending the arrest of the Raja and Rajmata on 15th August are of some importance. The evidence of Mr. N. C. Misra, Superintendent of Police at Hardoi, shows that he arrested the Raja under instructions from the Deputy Inspector-General which were brought to him from Lucknow by Mr. Stockwell, an Assistant Superintendent of Police. The Raja was brought to Lucknow by train in the custody of Mr. Misra, Mr. Stockwell and other police officers. Certain registers and bahis, details of which are given in a recovery list, EX. 23R, were also brought from Hathaura Garhi. The recovery list was prepared by Mr. Speake (P. W. 57). Five days later it was discovered that the registers and bahis were missing. Mr. Lane, Joint Magistrate at Lucknow (P. W. 72) was ordered by the District Magistrate on 31st August to make an enquiry into their loss, and he submitted a report (EX. 40R) on 8th September. This report (and also the evidence of Mr. Speake) shows that the police party were driven from Hathaura to Balamau (the nearest railway station—five or six miles away) by the Raja himself. They had not much time to catch the train at Balamau and after getting into one compartment they had to change into another in a hurry owing to some defect in the former. Mr. Lane concluded that the register and bahis had been accidentally lost either at Balamau station or in the train between there and Lucknow. The defence suggestion is that they were deliberately suppressed by the police because they contained evidence which would have helped the Raja and Rajmata. We are not told what this evidence is, and had it existed we have little doubt that there would have been support for it in other documents which were not taken by the police. Only three registers and two bahis were taken.

Mr. Lane with several police officers went to Hathaura House at Lucknow to arrest the Rajmata and search the house on the same day, that is 15th August. The Rajmata was arrested and certain papers were taken from two boxes; a list, EX. 20R, shows the papers recovered from each box; they are marked EXS. 4R to 19R. The key of one box was produced by the Rajmata and the key of the other by a man named Puttu Singh. He is referred to by Mr. Lane as a servant, but the Rajmata herself stated that he was a relation. Some of these papers are claimed by the prosecution to be of considerable importance; they will be considered in detail later on. Nanhu did not make a confession until 17th June 1939, that is four months after his arrest. It is suggested that he made it under inducement and that he was led to expect a pardon if he made it. His own statement in the Sessions Court suggests that he was partly influenced by the fact that he had been identified by the two Bengalis (P. WS. 5 and 73), and by the advice of relatives and others (non-officials) who came to see him. No doubt he hoped to obtain some advantage from confessing; he admits as much. It appears that he confessed in a previous case in which he was prosecuted for an offence under S. 307, Penal Code. He was not pardoned and made an approver in that case; he was sentenced to four years' rigorous imprisonment, but he may have thought that his confession was taken into consideration in his favour in awarding sentence.

There is nothing to show that any inducement was held out to him before he confessed. It has been pointed out that the police had opportunities of communicating with him because he was brought to Court several times prior to his confession in connexion with another case, but we cannot infer that these opportunities were utilized by the police to persuade and tutor him. No doubt the evidence of Nanhu and of the other accomplices, Hasan Mohammad and Dhanush (or Dhanur) Dhar must be regarded with great caution. But it may be said at once that there is no internal indication in the statements of these witnesses that they had been tutored to make them. Though the evidence of these witnesses was criticized at length on general grounds, no attempt was made to point out any passages in it which appeared from the way in which it was given to have been given under instruction and not on the basis of personal experience. The main criticism was that the police were or may have been already in possession of many of the details to which these witnesses deposed and therefore may have tutored

them. Very few discrepancies or contradictions have been pointed out and their stories fit in remarkably well with other evidence. Nanhu's confession runs to nearly ten typed pages and his evidence to more than fifty. He added some details in his evidence which he had omitted in his confession, but there is nothing strange in this.

The learned counsel for the Raja and Rajmata has argued in discussing the evidence adduced to corroborate the evidence of Nanhu and the other accomplices that such evidence cannot be properly considered corroborative unless it relates to some matter which was not within the knowledge of the police before the confession was made. It is suggested that if some detail was already known to the police it may have been put into the mouth of the accomplice by the police for the purpose of corroborating the evidence already existing about it, and that that evidence therefore cannot be considered to corroborate the confession. There may be some force in this argument, but we cannot agree that such evidence is of no corroborative value. We can only agree that corroborative evidence about particulars not already known to the police and which are discovered in consequence of information given by an accomplice is of greater value than corroborative evidence about matters known to the police before any information is received from an accomplice. Learned counsel referred us on this point to certain observations made by a Bench of this Court in 10 O W N 1108.[1] The headnote on the point reads :

> Where the entire evidence of the approver is full of contradictions and unworthy of belief and apart from these contradictions and intrinsic discrepancies, the approver has not been able to give in his confession any new fact which would serve to furnish intrinsic proof of the veracity of his confession, the Court should unhesitatingly reject the evidence of the approver as being not true.

In the present case it certainly cannot be said that the evidence of the approver or of the other admitted accomplices is full of contradictions and intrinsic discrepancies and no attempt has been made to argue that it is; and although it is true that before the statements were made the police may have been in possession of some facts referred to in those statements, it is also true that some information was obtained from these witnesses up till then not in possession of the police, about which corroborative evidence was subsequently obtained. Learned counsel for the Raja and Rajmata has also argued that for many details of the stories told by these witnesses no corroborative evidence at all has been produced. These details relate chiefly to the meetings of the conspirators, their plans and talks, and it is natural that no corroborative evidence for such details should be available. What has to be seen is whether there is sufficient corroborative evidence on essential points relating to the conspiracy and sufficient corroborative evidence with regard to each alleged conspirator. As was observed in A I R 1936 Rang 373[2] :

> It is not necessary that the story of an accomplice should be corroborated in every details of the crime. When it is established that there are good grounds for believing the accomplice's story by reason of the existence of corroboration on material points implicating any of the accused, the Court can safely come to a conclusion as to the truth of the whole story on uncorroborated points so far as they implicate the same accused persons.

Learned counsel for the Raja and Rajmata has further argued with reference to the provisions of S. 10, Evidence Act, that this section is not applicable to the case because the condition precedent for its application is not satisfied, and also that the learned Sessions Judge was not justified in relying on statements made by one or other of these accomplices about what Afaque or some other person told them about the Raja or his mother being at the back of the conspiracy. He argues that the acceptance of such statements offends both against the law of hearsay and against the principle that the evidence of an accomplice requires corroboration. He contends that when it is said in S. 10 that

> when there is reasonable ground to believe that two or more persons have conspired together to commit an offence, anything said, done or written by any one of such persons in reference to their common intention . . . is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it

the words "anything said, done or written" mean "anything legally proved to have been said, done or written." For reasons which we shall indicate presently, we are of opinion that there is reasonable ground to believe that there was a conspiracy to kill the Rani and that these appellants were members of it. We agree therefore with the Sessions Judge that S. 10 is applicable to the case.

We have not been referred by the defence counsel to any authority in support of his

1. ('33) 20 AIR 1933 Oudh 265 : 145 I C 470 : 34 Cr L J 1009 : 10 O W N 1108, Ghirrao v. Emperor.

2. ('36) 23 AIR 1936 Rang 373 : 164 I C 677 : 37 Cr L J 992, Gafoor v. Emperor.

contention that evidence which is of a hearsay nature should not be admitted under S. 10 and he conceded that he could find no authority to support it. For the Crown we were referred to the case in A I R 1934 Cal 221.[3] It was held therein by the Calcutta High Court that a document written by a woman since deceased in which she described her conversations with a third person and said that he had told her that among his revolutionary friends was the accused is admissible under S. 10, as the statement, if proved, is itself a relevant fact by virtue of S. 10. The statement by the writer is a relevant fact and being admissible under S. 10 is evidence against all the conspirators that the third person made his statement concerning the accused. The facts in the present case are different, but we are of opinion that on this ruling any statement made by one conspirator to another indicating in any way the complicity of a third conspirator is a relevant fact and as such may be admitted. Whether it should be believed or not is another question. There is naturally no corroborative evidence of such statements, but we consider that such evidence may be treated in the same way as the other evidence given by accomplices and the principle laid down in A I R 1936 Rang 378[2] applied. At the same time it was also said in A I R 1934 Cal 221[3] that

> having regard to the fact that it is the report of the conversation of a third person, we do not attach great evidentiary value to it

and we are inclined to take the same view. The early history of Subadra Devi's married life is of importance only to show the state of affairs in the Raja's household and the reasons why Subadra Devi was so anxious to get away from Hathaura. The Rajmata had been in control during her son's minority and the Sessions Judge has found on the evidence that she continued to exercise a considerable measure of control and influence after he had attained majority. It is not stated when this occurred, but Jagannath Prasad Gupta (P. W. 79) tells us that the Raja was a minor during part of the period from 1923 to 1929 when he was manager of the estate. The defence argument is that Subadra Devi was a girl of modern tastes, educated in European ways, and thus naturally fell out with a conservative mother-in-law. Although there may be something in this, we agree with the Sessions Judge that it does not furnish a complete explanation. For the allegations of positive ill-treatment we have only the evidence of Subadra Devi herself and it has been argued by the defence that the prosecution should have produced as witnesses the persons who carried complaints from her to her parents. Presumably this was not done, either because the story of her ill-treatment many years before it is suggested a definite conspiracy to murder her existed was thought to have only a remote bearing on the case, or because it was considered that the best evidence on the point would be that of Subadra Devi herself, supported by the letters of complaint, which she wrote from time to time. Moreover as regards the conspiracy the prosecution suggestion is that feelings of hatred against her may have been inspired or at least aggravated by the allegations which she made in the suit brought by the Raja for restitution of conjugal rights.

In this suit she filed a number of letters alleged to have been written by her to her parents between 1929 and 1932, excluding the period from April 1929 to February 1930, when the Raja of Kashipur was in England. The Raja of Kashipur said that he had found the letters in his wife's file and that he did not recollect seeing them before. He said that complaints from Subadra Devi had reached him through special messengers. It was argued for the defence that the letters were concocted for the purpose of the civil case referred to. Envelopes addressed to Rani Durga Devi, Subadra Devi's mother (now deceased), were produced to support the letters in most cases, but it was argued that the letters exhibited may have been substituted for the original letters sent. The envelopes were addressed to Rani Durga Devi only, and she may have had reasons of her own for not showing them to her husband. There is documentary evidence to prove that she was at one time (during her husband's absence in England) trying to obtain financial assistance from her son-in-law. We also find in the evidence that Rani Durga Devi was blind and we do not know who read the letters to her.

We agree with the Sessions Judge that there is not sufficient reason to hold that these letters are subsequent concoctions; there are other letters the authenticity of which has not been disputed, which clearly show what Subadra Devi's feelings were, and the letters to her parents only indicate in greater detail the reasons for the complaints which she addressed to the autho-

3. ('34) 21 A I R 1934 Cal 221 : 147 I C 32 : 35 Cr L J 334 (S B), Emperor v. Suriya Kunwar Sen.

rities in the latter part of 1932. In replying to the arguments advanced on behalf of the Crown, the learned counsel for the Raja and Rajmata changed his ground and argued that while the letters might be genuine the complaints of ill-treatment contained in them were false, being invented by Subadra Devi to justify her desertion of a husband whom she disliked and of surroundings with which she was out of sympathy. (His Lordship then quoted some letters by Subadra Devi and proceeded.) We have quoted passages from these letters in extenso both because their very nature repels the earlier suggestion that they were concocted in 1933 for the purpose of the civil litigation, as well as the latter suggestion that the complaints contained in them were the product of her imagination, and also because they show very clearly the relations which existed between Subadra Devi and her husband and mother-in-law. Even if we make allowances for possible exaggeration and attribute her suspicions that she was being poisoned to the imagination of a sick woman we cannot doubt that Subadra Devi genuinely thought that her life was in danger.

On 23rd August 1932, Subadra Devi addressed identical letters to the Deputy Commissioner of Hardoi and the Commissioner of Lucknow, (Exs. 28R and 29R). These letters were written in English and admittedly she received some local legal assistance in drafting them. In these letters she alleged that her husband was keeping prostitutes and had taken to excessive drinking with the result that the estate was being mismanaged and the income dwindling. To meet his extravagancies he had borrowed large sums and the estate was being heavily encumbered. He was proposing to contract a third marriage and this too was involving the estate in unnecessary expense. Subadra Devi was being subjected to all kinds of ill-treatment, disgrace and torture and for the previous four years had not gone to the hills (although residence in the hills in summer was one of the conditions of the marriage agreement). Her allowances had been stopped with the object of forcing her rights under that agreement, and even her life was in danger. Subadra Devi concluded by asking that a European officer might be deputed to inquire into the affairs of the estate, and that steps might be taken to ensure her safety, or that she might be released from confinement and allowed to go to her father. Otherwise, she said, her life was not at all safe. (After referring to the letter to the Deputy Commissioner of Hardoi, other correspondence and discussing evidence, his Lordship proceeded.) We will now examine the evidence produced by the prosecution to corroborate Nanhu's story of the occurrence and to establish in particular that it was Punnu Khan who fired the shot. We have heard defence arguments at great length on this part of the prosecution case, not only from Punnu Khan's counsel but also from the counsel for the Raja and Rajmata who has contended that Punnu Khan could not be the man who fired the shot. This is no doubt a crucial point in the prosecution case, because if there is doubt on this point no reliance could be placed on Hasan Mohammad or Nanhu and there would be little on which to maintain the conviction of the other appellants.

The principal corroborating witnesses with regard to the actual occurrence are the Rani herself and her driver Kali Charan. Another important witness in this connexion, on whom however the Sessions Judge did not rely, is Hamid Husain (P.W. 6), the driver of the car in which Afaque and his companions are said to have come on the evening of the occurrence as far as the rubbish heap near the garage. It is argued by the defence counsel that the descriptions given by the Rani and by Kali Charan of the assailants are irreconcilable and that neither fits Punnu Khan. The Sessions Judge observed that the descriptions, while not identical, tally sufficiently well and are fairly accurate. In the dying declaration (Ex. 38R), which was recorded by a Magistrate a little after midnight and before she was operated upon, Subadra Devi said that she saw her assailant's face in the light of the flash when the revolver was fired. She described him as a man of "Sanwala" complexion, neither very dark nor very fair. He had a moustache and he was wearing a khaddar cap, a coat and white loose pyjamas. She had never seen him before, so far as she knew. He was not very tall. She shrieked loudly on being shot. Her driver pursued the assailant, but could not catch him. Punnu Khan was brought before this Court at the request of the defence counsel and it was pointed out that he was rather dark than fair, though not very dark. "Sanwala," it was said, was not a correct description of his complexion. His height is only 5 feet 2½ inches and it might therefore be thought that the Rani correctly described him as *bahut lamba nahin tha*, but it was argued that this was an under-statement and that

she should have described him as very short. In a supplementary statement (EX. C6) made by Subadra Devi the next morning under S. 162, Criminal P. C., she described his moustache as *adhi adhi kati hui thin*. She also said that her driver Kali Charan did not raise an alarm. It has been argued from this that other evidence to the effect that he did raise an alarm must be false. It appears that at first Subadra Devi thought that her driver was a party to the conspiracy. There is no indication of this and subsequently she appears to have given up the idea. We do not consider that her statement under S. 162 throws any doubt on other evidence that her driver raised an alarm because if Subadra Devi was herself shrieking or screaming loudly (which there is no reason to doubt) she could not have observed whether her driver raised an alarm or not. Kali Charan stated that he had three opportunities of seeing the man, firstly through the window at the back of the car, secondly through the window on the left side of the car as he rushed past it, and thirdly when he was pursuing him and the man turned round and glared at him and aimed his revolver at him. He was then 7 or 8 paces from Kali Charan and Kali Charan stopped when the revolver was levelled at him. The Sessions Judge found that there was electric light burning in the verandah and that there was also light from the lamps of the car. The latter is not disputed, but it has been argued that there was no light in the verandah. There is clear evidence that there was and the probabilities support it; we can see no good reason to doubt it. Kali Charan said he told the Raja of Kashipur about the man turning round and glaring at him, but there is no mention of this in the first report. In the circumstances in which it was made the omission is not very important. It is more difficult to explain the absence of this incident from Kali Charan's statement to the police (EX. C2). Kali Charan said that he did tell the police about it, but if so it was not recorded.

The first report was very brief. The Raja of Kashipur took Kali Charan to a vakil who is now dead, Mr. A. P. Singh, but according to the Raja himself (P. W. 44) he told Mr. Singh the story from what the driver had told him. He also said that he was so terribly upset that he did not mention everything which Kali Charan had told him. He explained that he wanted to go to the Medical College immediately and told his counsel to write a short report. The report (EX. 13) merely stated that the Raja of Kashipur's daughter had been shot by an unknown man about 9 P. M. just after she had got out of her car and was going to her house. The electric light in the road had been extinguished. The driver Kali Charan had seen the assailant as he ran away. He was wearing a dhoti and white mirzai and an angocha was wrapped round his head. It is argued by the defence counsel that in his evidence Kali Charan attempted to reconcile his earlier description with that given by Subadra Devi and also with that given by Nanhu. Nanhu tells us that Punnu Khan was wearing a mirzai and a dhoti dolungi and a Gandhi cap. He had tied up his beard with a piece of cloth and put his cap over it. In his evidence Kali Charan said that the man was wearing a bandhi with long sleeves and a dhoti of which both corners were tied up behind his back. He had on a Gandhi cap and cloth was tied round his beard.

It is argued that if the man had cloth tied round his face this must have been a very noticeable feature and would have been mentioned by Subadra Devi. It is also argued that there is substantial difference between an angocha wrapped round a man's head and a piece of cloth tied round his beard. With regard to the former criticism something, we think, would depend on the colour of the cloth. Hamid Husain and Nanhu say that it was black. In any case we do not consider that any definite inference can be drawn from Subadra Devi's description of the man. She was unable to identify him (though she identified a man who resembled him) and she can have had only a very fleeting and possibly blurred impression of him. In the circumstances there is nothing unnatural, we consider, in the variations in the descriptions given by these two witnesses. As regards Kali Charan there is the difficulty arising from his apparent omission to tell the police about the assailant turning back and threatening him. There can be no doubt that if this happened Kali Charan would have had a much better view of him than he could have had through the car windows. The man would have been looking straight into the light from the headlights of the car. It is indeed suggested by the defence counsel that the facts were altered by the prosecution witnesses (of course at the instance of the police) for this very reason; it is argued that the man must have run back southward instead of forward northward, and

that the witnesses made him run northward so that he might be brought into a position where Kali Charan could have had a good view of him.

The defence endeavoured to show that members of the public had opportunities of seeing Punnu Khan after his arrest and they produced as a defence witness one Musa Jafari, an assistant master at the Colvin Taluqdars College, (D. W. 9), to support this. The Sessions Judge disbelieved his evidence, principally because he admitted having employed Punnu Khan's brother-in-law Sarwar, and having given defence evidence at his instance. We think that the Session Judge's distrust of him was justified, as well as his distrust of another witness, produced for the same purpose. We do not propose to consider the objections taken to Kali Charan's identification of Punnu Khan in greater detail because we do not think that in any case complete reliance can be placed on it. It did not take place till more than two months after Punnu Khan's arrest and more than three months after the occurrence, and it is certainly a little surprising that he should have been able to identify him after such a long time, after having seen him previously only for a few moments. Moreover, Punnu Khan's beard was not tied up at the identification parade and, as we have ourselves seen, this gives him a somewhat different appearance. We are not prepared to say that Kali Charan's identification of Punnu Khan was not a bona fide identification; there is no indication that it was not bona fide; but identification by a single witness is generally considered insufficient by itself to prove an accused person's guilt, and in the circumstances we have mentioned we are not prepared to hold that this identification by itself is sufficient corroboration of Nanhu's evidence.

Before dealing with the evidence of Bishambhar Dayal, we may first dispose of the argument that the assailant would not have run northward between the Rani (who had collapsed by the gate) and the car. In considering this argument and also in considering the evidence of Bishambhar Dayal, the plan, Ex. 96, prepared by Inspector Rampal Singh, should be referred to. It may be mentioned first that the gate leading to the Rani's house is not directly on the pukka road; there is a distance of about three paces between it and the road, the ground here being on a rather lower level than the pukka road. So that the car would naturally have drawn up on the left side of the pukka road about three paces from the gate. This accords with the evidence that the Rani was shot as she was walking from the car to the gate and collapsed near the gate. Nanhu was waiting (according to his evidence) in a lane to the south where it was dark and it is argued that the assailant would more naturally have run back in this direction after firing the shot than in the opposite direction where the head-lights of the car were shining.

The Sessions Judge has suggested that it would be unsafe to accept an argument that a criminal should have taken a certain course after committing a crime, and we agree; but we also think that there were good reasons for the assailant running northward instead of southward, one reason being to avoid the driver of the car. The assailant may very well have thought that the driver would assume he would run back into the darkness and would therefore run in that direction after him. Anticipating this the assailant may have deliberately run in the opposite direction, although he was running into the light. He had only a short distance to go to the cross-roads and might expect to reach them and turn down another road before the driver discovered his mistake. But the driver did not do as he might have been expected to do because he saw the assailant through the car window running northward. Another and perhaps a stronger reason for the man running northward instead of southward is that according to Nanhu's story both the motor car which had brought them and the ekka which they had procured were waiting in the Aminabad road, and the quickest way to either of them was to go north and then turn west at the cross-roads. There is plenty of evidence to show that the driver Kali Charan came back after his pursuit from the direction of the cross-roads and, as we have already pointed out, this evidence must have been forthcoming at an early stage in the investigation. The Rani herself stated that this was the direction taken by her assailant, and two more of her servants, Lachhu (P. W. 2) and Ram Lal (P. W. 7) support Kali Charan's story, as well as Jagannath Prasad Gupta. Lachhu said:

> Kali Charan came from the direction of the west road, saying that the man who had fired had gone in that direction and that he was dark and of short stature. By the west road I mean the road which goes in the direction of Aminabad.

Ram Lal said that when he came out of the house he saw Kali Charan returning from

the turning of the road on the west. Jagannath Prasad Gupta said :

The driver was coming running from the cross-roads. These cross-roads are at the place where the Tarak Mukerjee road and the road to Aminabad meet. He said that the man who had fired ran along the Aminabad road and then along the lane behind the Rani's house.

Bishambhar Dayal was called by the committing Magistrate under S. 540, Criminal P. C., in somewhat peculiar circumstances. He was not mentioned by Nanhu in his confession nor in his examination-in-chief. It was in answer to a question in cross-examination as to whether they were pursued, that Nanhu said that they ran into Bishambhar Dayal as they emerged from the lane into the Aminabad road. Upon this the Magistrate very rightly sent at once for Bishambhar Dayal, who fully corroborated Nanhu's story about him. There does not seem to have been any opportunity for him to have been tutored beforehand, and he was certainly not tutored by the police, as the prosecution did not want to call him. The orders passed show that both prosecution and defence counsel accompanied the Court officials sent to bring him and he was found at some distance from his home. In view of certain admissions made by Bishambhar Dayal it is certainly necessary to accept his evidence with caution, but we have not been able to find any good reason for rejecting it. He appeared in the Sessions Court as P. W. 3, having been subsequently adopted as a prosecution witness. Bishambhar Dayal commenced his evidence by saying that he had known Nanhu for 7 or 8 years and Punnu Khan for 19 months. He was returning from Husainganj on a cycle on the night of the occurrence and going towards Aminabad. He had gone some 20 or 25 paces beyond the Model House cross-roads when he heard the sound of a shot, and shouting from the same direction, this being the direction of the crossing from which he had just come. (After discussing Bishambhar Dayal's evidence and considering the defence arguments, his Lordship proceeded.) Our general impression from the evidence of this witness is that he had been instructed that he could confirm statements previously made by him, provided he introduced certain new statements. He was admittedly an accessory after the fact and if he was not privy to the plot beforehand he must certainly have suspected that something sinister was afoot. His evidence cannot be put on a higher level than that of an approver. The learned counsel for the Crown stated that he relied on the evidence of this witness given in examination-in-chief and asked us to take it into consideration as corroboration of Nanhu's evidence. He referred us to several authorities which show that the evidence of an admittedly unreliable witness need not be discarded from consideration altogether.

In AIR 1933 Pat 517[4] it was laid down that simply because a witness is declared hostile it cannot be said that that amounts to a declaration that his evidence is worthless and unreliable. The value of a witness's testimony in such cases is to be judged in the light of the results of the cross-examination by the party for whom he appeared. It is incorrect to say that his evidence cannot be believed in part, but must be excluded from consideration altogether. The correct rule is that either side may rely upon his evidence and that the whole of the evidence, so far as it affects both parties favourably or unfavourably, must be considered for what it is worth. In A I R 1931 Cal 401,[5] it was said that there is no rule of law that if a jury thinks that a witness has been discredited on one point, they may not give credit to him on another. There is nothing which warrants the view that the party who called and cross-examined a witness can take no advantage from any part of his evidence. In 1934 O W N 1269[6] it was said that when a witness makes two contradictory statements, one of those statements must be true, and there is no reason why Courts should be prevented from applying their minds to discovering which of such statements is true and from drawing conclusions therefrom.

Now in the case of Hamid Husain certain facts about his evidence stand out very prominently. The first is that he was not cross-examined on the day when his examination-in-chief took place, cross-examination being reserved at the express request of the defence. The reason given was the illness of the senior defence counsel engaged in the Sessions Court, and while the prosecution do not suggest that this reason was false, they point out that the delay gave the defence an opportunity of tampering with the witness after his statement in examina-

4. ('33) 20 A I R 1933 Pat 517 : 146 I C 993 : 35 Cr L J 240 : 14 P L T 494, Emperor v. Haradhan.
5. ('31) 18 AIR 1931 Cal 401: 131 IC 575: 32 Cr L J 768 : 58 Cal 1404 : 53 C L J 427 : 35 C W N 731 (FB), Profulla Kumar v. Emperor.
6. ('34) 21 A I R 1934 Oudh 507: 152 I C 331 : 36 Cr L J 86 : (1934) 11 O W N 1269, Emperor v. Ram Lal.

tion-in-chief. Secondly, it is to be noted that no material discrepancies are to be found in any of the earlier statements of this witness before a Magistrate (of which there were three, Exs. 106, 107 and 108) and his statement in examination-in-chief in the Sessions Court. Thirdly, very little emerged in cross-examination by defence counsel which would throw doubt on that evidence. Lastly it was admitted by the witness in cross-examination by the counsel for the Crown that all the most important new statements made by him in cross-examination by the defence counsel had been made by him for the first time. We have also to take into consideration the fact that on certain points his evidence is corroborated by evidence other than that of Nanhu, namely the evidence of Kali Charan and Priya Nath Ghoshal.

It appears to us in these circumstances that we are entitled to find, applying the principles enunciated in the authorities cited, that what we may call the new evidence is undoubtedly false (it is not relied upon even by the defence) and that the earlier evidence is probably true. We do not put it higher than this because, as we have observed, Hamid Husain must be regarded much as an accomplice, though it is not, we think, likely that he was a member of the conspiracy.

There is some other evidence also which corroborates that of Hamid Husain, though it has only a remote bearing on the case. He stated in examination-in-chief that Munni's car which he drove and which was used by Afaque was a Fiat. The number was, he said, 5046. It was a maroon coloured car. It was registered in the name of Shujaat Ali, a contractor of Sandila, who had a liaision with Munni's mother. [After discussing evidence his Lordship proceeded.] It has also been argued that in any case this local verification of Nanhu's confession should not be regarded as a corroboration of it, and we agree that at most it is of very slight value for this purpose. Counsel referred us to the case in 15 C W N 593[7] where one of the headnotes reads:

> Verification proceedings held in connexion with the confessions and the statements of the approvers did not add to their value. Such proceedings cannot be regarded as corroboration, and are open to criticism in other respects.

We would not ourselves deprecate such proceedings altogether; they show at least that the approver has or has not some knowledge of the places which he has mentioned in his confession. No doubt if he has been tutored by the police to make certain statements he might also have been carefully rehearsed by them in his part and taken to and shown the various places referred to in his statement, though it might be difficult to arrange this without it becoming known. The verification proceedings are in any case a test of the approver's memory, and as it might not be easy for him to remember such details if placed in his mouth, however carefully rehearsed he may have been, the fact that he is able to point out in proper sequence the places previously mentioned by him does suggest that there is some foundation for his story. There would however be more justification for such a conclusion in the case of a man who had been a stranger to the locality prior to the crime. We do not think that the test is of very much value where, as in the present case, the approver is a resident of the town where the places are and is therefore probably well acquainted with them.

We are however supported in the view that the procedure is not illegal and may afford some test of the truth of the approver's statement. By a later case of the Calcutta High Court in A I R 1937 Cal 99[8] it was said that a verification report made by a Magistrate so far as the confessional statement of an accused person is concerned cannot be ruled out on the ground that it is inadmissible in evidence when the Magistrate himself is examined as a witness in the case and speaks to the contents of the report made by him, this report being placed on record as evidence to support the accused's confessional statement. It was added that such verification proceedings are not illegal, and that such evidence may be obtained to ascertain that the prisoner is familiar with or ignorant of the localities of which he has spoken or in furnishing clues to further inquiries. According to Nanhu's evidence he and Punnu were invited inside on their arrival at the house of Munni and Mushtaque. (After discussing the evidence, the judgment proceeded.)

The evidence of these witnesses directly implicates Punnu Khan and Afaque and there is in our opinion ample corroborative evidence against both these accused. We would refer in particular to the evidence of Bishambhar Dayal, Mustafa Ali Khan and

7. ('11) 38 Cal 559 : 10 I C 582 : 15 C W N 593, Emperor v. Noni Gopal.

8. ('37) 24 A I R 1937 Cal 99 : 169 I C 977 : 38 Cr L J 818 (S B), Jitendra Nath Gupta v. Emperor.

Mr. J. N. Seth as corroborating the accomplices' evidence against Punnu Khan, and to the evidence of Hashmat Ullah and Dr. Rahman as corroborating it against Afaque.

We see no reason on the evidence to doubt that Syed was a member of the conspiracy. We find therefore that there was a conspiracy to murder Rani Subadra Devi from at least the year 1938, and that officials of the Hathaura estate were parties to and active supporters of it. When we take further into consideration the admitted fact that these officials had no motive of their own for the murder and that their employer, the Raja, had a strong motive and when we also see that a ziledar (Parmanand) of the Rajmata, who was found at her house when she was arrested, assisted in the manufacture of an alibi required for Hasan Mohammad, we have no difficulty in holding that there is reasonable ground to believe that both the Raja and his mother inspired the conspiracy and that Afaque received his instructions in the matter from them.

We anticipated this finding earlier in this judgment in considering the applicability of S. 10, Evidence Act, because it was inconvenient in considering the evidence of Hasan Mohammad and Nanhu to exclude all references to the Raja and Rajmata. For the reasons which we gave then we are of opinion that such evidence is admissible, even though neither of these witnesses came into contact with either of them, and their knowledge of the participation of the Raja and Rajmata in the conspiracy was derived from what Syed or Afaque told them. We may now collect and draw particular attention to those parts of the evidence of these witnesses which tends to incriminate the Raja and Rajmata, first however repeating what we said before that we do not attach much value to this evidence except where there exists some corroboration of it. (After discussing evidence, the judgment proceeded.) Other cases of tampering with witnesses which hardly admit of dispute are those of Hamid Husain, Sanwle, and Mohammad Aslam. It is said that the prosecution were unable to produce Dharni Dhar and Tej Narain, nephew of Nanhu (for whose marriage ornaments were made) because they were won over, and it is also alleged that attempts were made to tamper with Dhanush Dar and G. C. Roy. It has been argued by the defence counsel that in considering what was said or done by the alleged conspirators after the occurrence of 19th January, S. 10, Evidence Act, cannot be taken into consideration and that for the purpose of this section a distinction must be drawn between what was said and done while the conspiracy was still going on and what was said and done after it had terminated. To this it may be said that there is nothing to show that the conspiracy had terminated with the attempt to shoot the Rani; its object had not been achieved. Suspicious characters are said to have been seen in the neighbourhood of the hospital where Subadra Devi was being treated, and precautions were taken for her safety there. But, apart from this, we do not think it necessary to rely much on what was said by the appellants after the occurrence, as distinct from what they did. What they did, that is to say, their conduct, is relevant under section 8, Evidence Act, and it is immaterial whether the conduct on which the prosecution relies was previous or subsequent to the occurrence. Illustration (e) of this section also shows that when a person is accused of a crime the fact that, either before or at the time of or after the alleged crime, he destroyed or concealed evidence or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, is relevant.

After carefully considering all the evidence in the case and the arguments put forward by the learned counsel for the appellants we can find no reason to doubt their guilt. Kunwar Shyama Kumar Singh had a very strong motive for the murder of his wife, in the liability to provide her with a substantial amount by way of maintenance out of an impoverished estate. It has not been suggested that he was not in a bad way financially; this is proved by his attempts to borrow Rs. 20,000 for the purpose of the case from the Raja of Raire Khol. His mother, who, as we have shown, had always at least an equal say in the management of the estate, seems to have assumed full control and to have put him on an allowance either before or after the occurrence. In any case she herself said that she advanced money from her private purse when the estate fell short of money. Presumably, Dr. J. N. Misra's fees came from her private purse (as well as those of Mr. G. G. Chatterji). There has not been the slightest suggestion throughout the lengthy arguments to which we have carefully listened that either Afaque or any other official

of the Hathaura estate could have had any personal motive for murdering Subadra Devi, and the conclusion is irresistible that he and the other officials concerned must have been acting under instructions.

We have given reasons in detail for believing the evidence of the approver and of Hasan Mohammad on all substantial points. We have no doubt that Punnu Khan was engaged by Afaque to shoot the Rani. We have no doubt that after the occurrence Afaque went at once to Hathaura in order to obtain money for Punnu Khan and Nanhu and that when the Raja and Rajmata were at first unable to provide it, he obtained it from Dr. Rahman by the sale of his property. It is not difficult to imagine the sort of pressure men like Punnu Khan and Nanhu would have brought to bear upon him, and probably he had reason to expect that he would soon be re-imbursed. This is shown by the agreement for re-transfer within 15 days. There is no evidence on the point, but we have little doubt that the money for the re-transfer came from the Hathaura estate. The learned counsel for Afaque argued that Afaque's conviction under S. 307 read with S. 114, Penal Code, was not justified, because, if the evidence of Hamid Husain is excluded, there is nothing except the evidence of the approver Nanhu upon which to base it. It was not disputed that if Afaque brought the party to the scene of the occurrence in a motor car and waited for Punnu Khan and Nanhu not far away, he must be considered to have been present when the act was committed, but it was contended that this had not been proved. On our finding that there is reliable evidence, apart from the evidence of Nanhu, to connect Afaque with the conspiracy, we see no reason why the evidence of Nanhu on this point should not be accepted. As we observed earlier in this judgment, citing the ruling in A I R 1936 Rang 373[2] it is not necessary that the story of an accomplice should be corroborated in every detail, if there exist good grounds for believing the accomplice's story by reason of the existence of corroboration on material points implicating the accused whose case is under consideration. We have not been addressed by any of the defence counsel on the question of sentence. The plea that the sentence was too severe was taken in their appeals by Punnu Khan and Afaque, but not by the Raja and Rajmata. The sentences may be severe, but severe sentences should be passed in a case of this kind where a young woman has been the victim of a conspiracy to murder her, pursued relentlessly for more than two years by persons of education and position. Their education and position do not, in our opinion, constitute a reason for treating them leniently; rather the reverse. We find that all the appellants were rightly convicted, and rightly sentenced, and we dismiss their appeals.

R.K. *Appeals dismissed.*

A. I. R. 1941 Oudh 146

THOMAS C. J. AND ZIAUL HASAN J.

B. Debi Charan — Appellant

v.

Lala Sheo Shankar and others — Respondents.

First Appeals Nos. 5 and 6 of 1937, Decided on 27th August 1940, against order of Civil Judge, Lucknow, dated 9th November 1936.

(a) Succession Act (1925), S. 333—S. 333 does not relate to general bequests.

Section 333 relates to specific bequests, that is to say to bequests of particular articles or kinds of property and not to general bequests. [P 148 C 2]

(b) Succession Act (1925), Ss. 211 and 307 — Sale in execution of decree against executor—Burden is on party challenging sale to prove that decree was against executor in his personal capacity.

Where property is sold in execution of a decree against an executor and a party challenges the sale on the ground that the decree was personal decree against the executor, the burden is on that party to prove that decree was personal decree against the executor : *Case law referred.* [P 148 C 2]

Niamatuallah and Mahabir Prasad Srivastava —for Appellant.

M. Wasim and Hyder Husain — for Respondents 1 and 2.

Judgment.—These are two appeals from a decision of the learned civil Judge of Lucknow, in a case under the Land Acquisition Act. The dispute in the case relates to the apportionment of compensation in respect of two bungalows, Nos. 10 and 11, Tombs Road, Cantonments, Lucknow, which have been acquired by Government. The Land Acquisition Officer awarded Rs. 11,297 for bungalow No. 10 and Rs. 13,166 for bungalow No. 11. As there were three sets of claimants to the compensation and as the claimants did not accept the award of the Land Acquisition Officer, the case was referred by the Collector under Ss. 18 and 30, Land Acquisition Act, to the Court of the District Judge. The learned District Judge held that the amount of compensation awarded by the Land Acquisition Officer was proper, but in regard to the claims of the various claimants he sent the case to the learned civil Judge for determination of the party entitled to receive compensation. One set of

claimants consists of Lala Sheo Shankar and Lala Gobardhan Das, respondents 1 and 2 in both the appeals. Another claimant is Babu Debi Charan, appellant in both the appeals, and the third set consists of Babu Bhagwan Charan and Babu Ram Charan, respondents 3 and 4. While the appellant and respondents 1 and 2 (henceforth to be called the respondents) claim to be entitled to the whole of the compensation, respondents 3 and 4 claim to be cosharers of the appellant. The learned Civil Judge has held that the respondents are entitled to the whole of the compensation. Hence these appeals by Babu Debi Charan. The bungalows in question, and a third, which bears the number 8, were built by one Richard Grant on leasehold land obtained from Government. On 4th April 1890, Richard Grant executed a will in respect of his property including nine houses. The material portion of the will runs as follows:

After payment of all my just debts, funeral and testamentary expenses I give, devise and bequeath unto my dear and beloved wife, Alice Maud Mary Grant and to my children after her, to wit :
(Here follow details of the immovable property devised). . . .
And as to the residue and remainder of all my property I give, devise and bequeath upto my dear and beloved wife Alice Maud Mary Grant to and for her own and my children's use and benefit absolutely for their natural lives to wit :
(Details of moveable property). . . .
And I hereby nominate, constitute and appoint my dearly beloved wife Alice Maud Mary Grant executrix and another whomsoever my wife with prudence and good advice nominates as executor of this my last will and testament until such time as one or all my children are of age according to law and competent to administer the estates either for their mother or for themselves.

The children consisted of a daughter and two sons, all of whom were minors at the time of the testator's death which took place on 12th July 1894. On his death probate of the will was granted to the widow. In the year 1900, the widow filed a suit against her minor children under the guardianship of one Mr. M. H. Fitzpatrick for a declaration that according to a proper interpretation of the will of her husband Richard Grant, she was the absolute owner of her husband's estate and could sell or mortgage the same. This suit was decided on a compromise between the parties and it was

declared that the plaintiff is empowered to sell three houses situated in Dilkusha Cantonments and numbered 88, 90 and 91 respectively facing the European Cavalry Officers' Mess House, the said property will be sold so far as may be necessary up to Rs. 13,000.

Nos. 88, 90 and 91 were the old numbers of the present bungalows Nos. 11, 10 and 8 respectively. Mrs. Grant did not sell these houses but on 25th May 1901, she mortgaged the bungalows on her own behalf and on behalf of her minor children to one Rai Bahadur Narain Das for a sum of Rs. 13,000. About a year later, on 27th March 1902, when she was in need of some more money, she executed a deed of possessory mortgage in favour of the said Narain Das in lieu of Rs. 15,000. A sum of Rs. 13,660 was set off against the amount due on the previous mortgage and Rs. 1340 were paid by cheque on the Allahabad Bank Ltd., Lucknow. It is admitted that the respondents are now the representatives-in-interest of Rai Bahadur Narain Das, mortgagee. In 1902 bungalow No. 11 was sold in execution of a decree obtained by the Delhi and London Bank against Mrs. Grant and was purchased by Lachhmi Narain and Brij Mohan. The other two bungalows, Nos. 8 and 10, were sold by auction on 13th March 1906, in execution of a decree obtained by one Mr. A. J. Cooke against Mrs. Grant and were purchased by Ram Lal and Sidh Gopal. The respondents claim to have acquired the rights of the purchasers of all the three bungalows and though some of the deeds relating to the transfers of these bungalows are not on the record, yet it was not disputed before us that the respondents are now successors-in-interest of Lachhmi Narain and Brij Mohan as well as of Ram Lal and Sidh Gopal.

Bungalow No. 8 was acquired by Government from the respondents for a sum of Rs. 28,000 and proceedings for acquisition of the other two bungalows, Nos. 10 and 11, started in 1934 and have led upto these proceedings. On 4th June 1912, the three children of Richard Grant, namely his daughter Louisa Margaret Mary Grant (then Mrs. Everett of Howrah) and his two sons, Cecil Grant and Patrick Grant, who had all come of age sold all the three bungalows to Babu Debi Charan, the present appellant, for a sum of Rs. 12,000 out of which a sum of Rs. 250 was paid in cash while the rest was promised to be paid when the vendee should obtain possession of the bungalows. It is on the basis of this deed of sale that the appellant claims to be the sole owner of the bungalows in question and his case is that the mortgage of 27th March 1902 has been paid off by the usufruct of the property. The respondents on the other hand contend that they are not only the representatives-in-interest of the mortgagee but have

acquired the equity of redemption in respect of the three bungalows by having acquired the interests of the auction-purchasers and that Mrs. Grant being the executrix of her husband's estate was solely vested with the estate so that the purchasers in auction of the equity of redemption acquired good title to the property as against the legatees. The respondents rely on Ss. 211 and 307, Succession Act. Section 211 (1) provides:

> The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such,

and S. 307 (1) runs as follows:

> Subject to the provisions of sub-s. (2) (which deals with cases of Hindus, Mahomedans, Budhists, Sikhs, and Jains), an executor or administrator has power to dispose of the property of the deceased vested in him under S. 211, either wholly or in part, in such manner as he may think fit.

The argument is that as the entire estate of Richard Grant was vested in Mrs. Grant as the executrix of his will the latter had absolute power to dispose of the property and as the sales were held in execution of decrees against her, the purchasers acquired all the rights and interests of Mrs. Grant. The applicant contends in the first place that at the time when the bungalows were sold in auction Mrs. Grant had ceased to be the executrix of her husband's estate, and, in the second, that there is no proof that the decrees in execution of which the bungalows were sold were obtained against Mrs. Grant in her capacity as executrix of the estate and not in her own personal capacity. We have heard the learned counsel for parties at length and are of opinion that the learned Judge of the Court below came to a correct conclusion in the case, and that the respondents have acquired a good title to the bungalows in question.

The contention of the learned counsel for the appellant that when the bungalows were sold by Court Mrs. Grant was no longer executrix of her husband's estate is based on two grounds. In the first place, it is said that all the debts standing against Richard Grant had been paid off by the time that the bungalows were sold, and, in the second, the plea is that as Mrs. Grant assented to the bequest in favour of the children long before the sales were held, she ceased to be the executrix. For the first ground reliance is placed on the judgment of the subordinate Judge of Lucknow in Mrs. Grant's suit against her children (Ex. C.8) in which a list of the debts left by Richard Grant is given, and it is urged that this list consists not only of the debts left by the testator but also of some others which Mrs. Grant contracted after her husband's death and that the judgment shows that those debts had been paid off by sale of some houses for Rs. 23,500. It is no doubt true that some at least of the debts enumerated in the judgment appear to have been paid off before the judgment was delivered, but it cannot be said that the list of debts given in this judgment was exhaustive of the debts left by Mr. Grant. Moreover, it cannot be said that Mrs. Grant was to be executrix for only so long as the debts remained unpaid. The extract of the will that we have given above, shows that she was to continue executrix for so long as any of the children was a minor and it is an admitted fact that up to the time when the bungalows were sold only the daughter had attained majority. In regard to the second ground learned counsel for the appellant places reliance on S. 333, Succession Act, and argues that as Mrs. Grant assented to the legacy in favour of the children by the mortgage deeds of 1901 and 1902, she thereby divested herself of her interests as an executrix. Section 333, Succession Act, runs as follows:

> (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.
>
> (2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

The section shows that it relates to specific bequests, that is to say to bequests of particular articles or kinds of property and not to general bequests. All the five illustrations given under S. 333 make this abundantly clear. In the present case there was no specific bequest in favour of any of the children and S. 333 has, therefore, no application. As regards the argument that the respondents had failed to prove that the debts for the recovery of which the bungalows were sold by Court were the debts standing against the testator, we are of opinion that the burden of proof was on the appellant to show that those debts were the personal debts of Mrs. Grant. In 60 Cal 394[1] it was held that a transfer by an executor as such is valid unless it is established that the transferee had notice that the executor was acting in breach of trust. Reference was made in this case to a previous case of the

1. ('33) 20 AIR 1933 Cal 429 : 144 I C 137 : 60 Cal 394, Geetaranee v. Narendra Krishna.

same Court, O. C. No. 1838 of 1929,[2] from which the following remarks dealing with transfers by executors were quoted :

With regard to mortgages by executors, disclosed as executors, the principles appear to me to be as follows :

(i) An executor qua executor may make a mortgage for purposes of administration. He may not do so for any other purpose, i.e., for his private purposes (or for carrying on a business left by the testator).

(ii) He is, however, when mortgaging, presumed by law to be mortgaging for purposes of administration, and a mortgagee is not bound to see to the application of the money.

(iii) If the mortgagee has notice that the executor is not mortgaging for purposes of administration, i. e., if he has notice that the executor is borrowing for his own private purposes, (he) becomes a transferee with notice of breach of trust, and he gets no better title.

The Madras High Court also in 36 Mad 575[3] held that in the absence of proof that a sale by an executor was not a proper act of administration and was not required for the purpose of discharging debts of the deceased, and that the vendee was a mala fide purchaser having knowledge that the sale was not in due course of administration, the onus of proving all of which lies on the party attacking the sale, the sale is valid and binding on all. The above principle was applied by the Bombay High Court even to a case of a Mahomedan and it was said :

The terms of S. 4, Probate and Administration Act, are clear and unambiguous on the point. They vest all the property of the deceased person in the executor. Should the executor abuse his powers in respect of such property while it is vested in him, the remedy can only be a personal remedy against the executor himself. Outsiders who have to deal with the executor on the faith of the property being vested in him must be protected. The authorities go to the length of holding that while the property is vested in the executor, even though it may afterwards be found to have been wrongly so vested, e. g., as in the case of a forged will, all acts of the executor in respect of such property where bona fide purchasers are concerned must be regarded as valid : *vide* A I R 1927 Bom 387.[4]

In A I R 1931 Bom 533[5] also it was held that the executor of a will of a Mahomedan can validly sell and convey the testator's immovable property without taking out probate or obtaining the consent of all the heirs of the testator and that if the mortgage by the executor is valid, the mortgagee is not bound to see to the application of the money nor is he bound to inquire as to the necessity for the loan. The law in this respect appears to us to be the same in India and England. In Halsbury's Laws of England, Vol. 14, second edition, p. 392, it is said :

The mortgagee or purchaser from the representative has the right to infer that the representative is acting fairly in the execution of his duty and is not bound to enquire as to the debts or legacies or the application of the money. The property alienated cannot be followed into his hands by either creditor or legatee. The title of the alienee will not be affected by the fact that a long time has elapsed between the death and the date of the alienation, nor by the fact that, in a transaction in which the personal representative is known to be acting as such, the alienation does not purport to be made for administrative purposes, nor to be executed by the representative in his character of representative.

and again at p. 394 it is said :

But if the nature of the transaction not affecting a legal estate affords intrinsic evidence that the representative is not acting in the execution of his duty, but is committing a breach of trust, the purchaser or mortgagee holds the property subject to the claims of creditors and beneficiaries. It rests, however, upon the person seeking to impeach the validity of the transaction to prove that the purchaser or mortgagee had notice of the true state of facts. . . . .

At page 696 of Williams' Executors and Administrators, 1921 Edition, we find the following:

Again it is not incumbent on the purchaser or mortgagee of the assets to see the money properly applied, although he knew he was dealing with an executor. 'It is of great significance,' said Lord Thurlow in *Scott* v. *Tyler*, 'that no rule should be laid down here which may impede executors in their administration, or render their disposition of the testator's effects unsafe or uncertain to a purchaser. His title is complete by sale and delivery; what becomes of the price is of no concern to him'.

We are therefore of opinion that the learned Judge rightly placed the burden of proof on the present appellant and as there is nothing to show that the decrees were obtained by the Delhi and London Bank and Mr. Cooke against Mrs. Grant in her personal capacity, it must be presumed that they were due by her as executrix of her husband's estate. It was also argued that the principle of the burden of proof as laid down in the cases cited above applies only to voluntary sales and not to sales by Court. We are, however, of opinion that there is no reason to make a distinction in this respect between voluntary and involuntary sales. The entire estate of a testator having become vested in the executor and the executor being entitled to dispose of it as he thinks best, it follows that if the estate is sold in execution of a decree obtained on a

2. O. C. No. 1838 of 1929, Shishir Kumar Kar v. Dhirendra Chandra Kar.
3. ('13) 36 Mad 575 : 17 I C 4 : 23 M L J 306 : 1912 M W N 1112, Ganapathi Aiyar v. Sivamalai Goundan.
4. ('27) 14 AIR 1927 Bom 387 : 102 I C 129 : 29 Bom L R 434, Mt. Azimunnisa Begum v. Sirdar Ali Khan.
5. ('31) 18 A I R 1931 Bom 533 : 135 I C 817 : 33 Bom L R 1056, Ahronee Shemail v. Ahmed Omer.

debt due by the executor as such, the sale must be held to be perfectly valid and good. Lastly it was argued on behalf of the appellant that the Court should have proceeded in this case under S. 32, Land Acquisition Act. That section provides for the compensation money being invested in the purchase of other land or in the purchase of Government or other approved securities in a case in which it appears that the land in respect whereof the compensation was awarded belongs to any person who has no power to alienate the same. It was argued that as the respondents are successors-in-interest of Mrs. Grant, the executrix, who was in possession only as an executrix and the appellant represents the legatees and as neither of the two parties can alienate the property, the procedure laid down in S. 32 should be adopted. We have however held that the title to the bungalows has passed to the respondents and so this is not a case of property belonging to a person who has no power to alienate it. Section 32, Land Acquisition Act, has therefore no application. We dismiss the appeals with costs and affirm the decision of the lower Court.

D.S./R.K. *Appeals dismissed.*

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* A. I. R. 1941 Oudh 150

YORKE AND BENNETT J.

Ram Narain Singh and others — *Defendants* — Appellants

v.

Raj Bahadur Singh and another, *Plaintiffs, and another, Defendant* — Respondents.

First Appeals Nos. 112 and 116 of 1936, Decided on 24th September 1940, against order of Civil Judge, Fyzabad, D/- 31st July 1936.

* *(a) Registration Act (1908), S. 17 (1) (b) — Family settlement merely declaring existing title and permitting female member to remain in possession during her life time — Registration is not compulsory.*

A family settlement merely declaring an existing title or rather a title believed to exist and doing no more than permitting a female member to remain in possession of the property during her life time does not operate to confer title or effect any transfer of immovable property. It does not, therefore, require registration: *Case law refrred.* [P 155 C 1]

(b) Hindu law — Partition — Partition between sons — Mother is entitled to equal share even if in possession of some property by way of maintenance.

If a partition takes place between the sons, the mother is entitled to a share equal to that of a son in the coparcenary property. There is no qualification of this provision and she is entitled to equal share even if she is in possession of certain property by way of maintenance. [P 155 C 1]

Ghulam Hasan — for Appellants.

Haider Husain and Raghunath Singh (General Agent) — for Respondents Nos. 2 and 3, respectively.

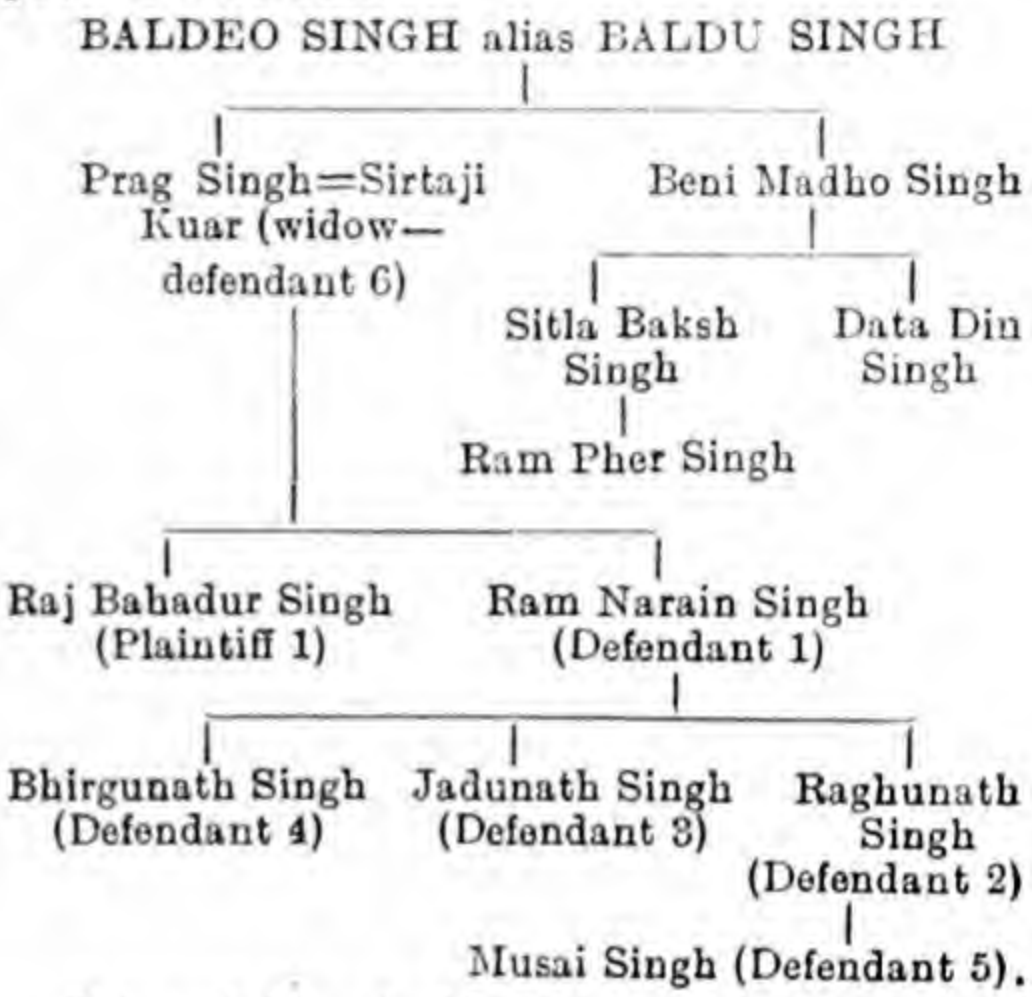
Judgment.—These are two first appeals from the judgment of the civil Judge of Fyzabad dismissing the plaintiffs' suit for partition of joint family property save only with reference to some house property and zamindari property in village Rustampur in which the plaintiffs were given a 1/3rd share. The suit was dismissed so far as it related to the claim for partition of property in villages Fakhanpur, Parasrampur, Paharpur and Husainpur Sondhauna (Khattegaon), and the plaintiffs were ordered to pay 7/8ths of the defendants' costs of the suit and receive from defendants 1/8th of their own costs of the suit. Against this decision, the plaintiffs filed an appeal No. 116 of 1936 with respect to that portion of the suit which had been dismissed. Subsequent to the filing of this appeal they transferred a portion of the property to which they had made claim to Manmohan Lal, Chandra Mohan Lal and Syed Ejaz Husain whose names were brought on the record by an order dated 13th July 1937. The defendants also filed an appeal, No. 112 of 1936, with reference to that portion of the suit for which the plaintiffs' claim had been decreed, alleging that the suit had been wrongly decreed even to that extent, and that the plaintiffs' suit should have been dismissed in its entirety. In this appeal the transferees of the plaintiffs were not ever made parties.

Subsequently to this transfer of part of the plaintiffs' claim applications were made by the parties to these appeals other than the assignees of the plaintiffs for permission to compromise both appeals. The plaintiffs had claimed half share in the properties in suit and they had been decreed what was evidently regarded by the learned civil Judge as roughly 1/8th share in the properties. By the compromise, the plaintiffs Raj Bahadur Singh and his son Permanand Singh, then a minor, were to get a 1/4th share in the properties in suit and were to be given possession of that 1/4th share of the remaining 3/4th share. Mt. Sartaji Kuar, the party at present in possession, was to continue in possession for her lifetime, after which it was agreed that the will of the late Prag Singh would be binding upon the original defendants of the suit. It was further said that it was not admitted that the assignees had acquired any interest in the properties in suit by the transfer in their favour, but

in case it was found that they had acquired interest it was agreed that their claim would be met out of the share which was thus to come into the hands of the plaintiffs under the terms of the compromise. Another condition of the compromise was that the parties would forgo the costs of the suit and the appeals against one another. This compromise was slightly varied by a fresh compromise filed by the original parties of the suit on 31st March 1938.

This case has come up before the Court on numerous occasions in connexion with this compromise to which, of course, the assignees were in no way agreeable. As early as 4th May 1938, an application with an affidavit sworn by Parmanand Singh plaintiff was filed objecting to the compromise on the ground that the signature of Parmanand Singh and his mother Mt. Karamraji, as guardian of the plaintiff Raj Bahadur Singh, had been obtained without disclosing the true facts of the case. Ultimately, on 31st October 1939, Mt. Karamraji who was by this time the widow of plaintiff 1, Raj Bahadur Singh, and Parmanand Singh made an application against this compromise alleging that it was bad for various reasons but not on the ground that it was not for the benefit of the plaintiffs. A Bench of this Court on the same date framed issues and remitted them for decision to the Court of first instance relating to the validity of the compromise. On these issues the learned civil Judge (not the same Judge who had tried the suit) held that Mt. Karamraji and Parmanand Singh were not, owing to fever, of unsound mind at the time when they entered into compromise, that the compromise was not invalid on the ground that there was an incorrect representation made to Mt. Karamraji and Parmanand Singh, and that the compromise was not invalid because it had not been explained to Raj Bahadur Singh's wife, Mt. Karamraji, who represented him. On receipt of these findings, time was given for the filing of objections but the plaintiffs allowed that time to expire without filing any objections and the findings have therefore become final as between the parties.

We have considered in connexion with these appeals the question whether as matters stood after the decision of the suit by the trial Court, the compromise effected between the parties was for the benefit of the plaintiffs of whom one was a lunatic under the guardianship of his wife and the other a minor under the guardianship of the same lady his mother, and we are satisfied that the terms which we have explained above were clearly for the benefit of the plaintiffs. It follows that unless appeal No. 116 of 1936 as prosecuted by the assignees Manmohan Lal, Chandra Mohan Lal and Syed Ejaz Husain succeeds both appeals are to be disposed of in terms of the compromise. We come now to the merits of the suit and of these appeals. As we mentioned earlier this was a suit for partition. The following pedigree is necessary for the disposal of the suit.



It is not disputed between the parties that subsequent to the death of Baldeo Singh there was a separation of his two sons, Prag Singh and Beni Madho Singh and that the original 16 annas share of Baldeo Singh was divided into two shares of 8 annas each. Baldeo Singh Subedar was a party grantee whose name appears at No. 96 in list VI prepared under S. 8, Oudh Estates Act. He had been married to one Mt. Rahas Kuar. He died about 1890 leaving two sons, Prag Singh and Beni Madho Singh, besides grandsons, that is, sons of his two sons. We are concerned only with the branch of Prag Singh. It was said by the plaintiffs that after Baldeo Singh's death there was a partition as mentioned above between the two branches whereby Prag Singh's branch came into possession of the property entered in list B. On 1st October 1916 Prag Singh executed an unregistered will, Ex. F-1, in favour of his wife Mt. Sartaji Kuar, defendant 6. Prag Singh died six months later on 6th April 1917, leaving two sons Raj Bahadur Singh, the husband of Mt. Karamraji, and Ram Narain Singh. Subsequently, there was a dispute over mutation between the two sons and the widow Mt. Sartaji Kuar, and in

those mutation proceedings a compromise was effected on 1st May 1917, whereby the sons agreed to Mt. Sartaji Kuar retaining possession of the whole property of Prag Singh during her lifetime. This compromise, Ex. F-5 related to villages Husainpur Sondhauna, Fakhanpur, Parasrampur and Paharpur and nothing was said about Rustampur. The explanation of this omission is found in the will, Ex. F-1, referred to in the compromise.

It shows that village Rustampur had already been mutated in favour of Ram Narain Singh who was described as having inherited it from his grandmother Mt. Rahas Kuar Subedaria. The plaintiffs contended that this mutation of 1917 was made only for the satisfaction and consolation of Mt. Sartaji Kuar and that Raj Bahadur Singh on the one side and his brother and nephews on the other were in joint possession of this property from the death of Prag Singh, but that shortly before the institution of the suit owing to Raj Bahadur Singh having become insane the attitude of Mt. Sartaji Kuar had changed, and in consequence it had become necessary to file a partition suit. In defence reference was made to the will of Prag Singh and a number of points were raised upon which the learned civil Judge framed no less than 12 issues as follows :

(1) Were the properties in dispute the joint family properties of Baldeo Singh, Prag Singh, Beni Madho Singh, Data Din Singh, Sitla Baksh Singh and Ram Narain Singh as alleged by the plaintiffs ?

(2) (a) Did Baldeo Singh make a gift of the property mentioned in list A, excepting the property in Rustampur, to his sons Beni Madho Singh and Prag Singh as alleged by the defendants ? If so, was the gift valid ? (b) Did Prag Singh and Beni Madho Singh enter into possession under that gift ? If so, what was its effect ?

(3) Was there a partition between Prag Singh and Beni Madho Singh in 1881 as alleged by the defendants ? If so, what was its effect ?

(4) Did Prag Singh bequeath all his property to Mt. Sirtaji, defendant 6, on 1st October 1916, as alleged by the defendants ?

(5) Was there any such family settlement on the death of Prag Singh as is set up by the defendants in para. 20 of the written statement ?

(6) Has Mt. Sirtaji acquired a perfect title to the property comprised in list B annexed to the plaint by adverse possession ?

(7) (a) Was Rahas Kuar the owner of the property in dispute in village Rustampur as alleged by the defendants? (b) Did Rahas Kuar make a gift of the said property to Ram Narain Singh, defendant 1 ?

(8) (a) Are the plaintiffs in possession of the property in suit ? (b) If not, is the court-fee paid sufficient ?

(9) (a) Are the defendants in possession of the property comprised in list C annexed to the plaint ? (b) What is the value of that property ?

10. Is plaintiff 2 not the son of plaintiff 1 as alleged by the defendants ?

11. Is Karamraji of immoral character ?

12. Is the suit for partition not maintainable as alleged by the defendants ?

The learned civil Judge entered first into a discussion of issue 5. He came to the conclusion that on the death of Prag Singh there was a family settlement such as was set up by the defendants in para. 20 of the written statements, whereunder the property in suit was declared to be the property of defendant 6 for her life time and mutation was effected, and thereafter defendant 6, Mt. Sartaji Kuar, had been in continuous possession and occupation of the property which was the subject of that compromise. It followed that under issue 8 he held the plaintiffs to be out of possession and therefore not competent to maintain a suit for partition, and he further held that the court-fee paid was insufficient for a suit for possession. On issue 7 (a) the learned civil Judge held that it was not proved that Mt. Rahas Kuar was the owner of village Rustampur. That property being of value in excess of Rs. 100, he held that an oral gift of it by Mt. Rahas Kuar in favour of Ram Narain Singh was invalid.

On the question of fact in regard to the possession of this property he came to no clear finding, but he held that even if it were believed that Ram Narain Singh was in possession of this property his possession would be deemed to have been on behalf of all the members of the family unless it was established that he asserted hostile title to the property, whereas in the present case adverse possession has not in fact even been pleaded. He therefore decided this issue against the defendants, and held the plaintiffs to be in constructive possession of the Rustampur property and therefore entitled to partition of that property. On issue 9 relating to moveable property he held that the plaintiffs were not entitled to claim any share, there being no evidence to show whether the items mentioned in this list were purchased in Prag Singh's time or out of joint funds. On issues 10 and 11 he held that Parmanand Singh, plaintiff 2, was the son of Raj Bahadur Singh, and that Mt. Karamraji was not of immoral character, and this point has not been raised in this appeal. On the last issue he held that there was no ground on which it could be said that the plaintiffs were not entitled to maintain a suit for partition in respect of joint property and that in fact partition was desirable. In view of his finding on

issue 5 no decisions on issues 1 to 4 and 6 were necessary.

These being the circumstances of the case the only matter, which has been argued seriously before us, is as regards the correctness of the finding of the lower Court on issue 5 that there was a family settlement on the death of Prag Singh which was binding on the parties. Learned counsel for the plaintiffs-appellants, that is to say really for the assignees of the plaintiffs who are the only persons now prosecuting the appeal, has contested the validity of the compromise of 1st May 1917, on the allegation that this was a document not admissible in evidence because it was a document conferring title upon Mt. Sartaji Kuar and therefore requiring registration under the provisions of S. 17 (1) (b), Registration Act. This document was admittedly not registered, and therefore it is argued that it was inadmissible in evidence, and the decision of the Court below which is founded upon this document cannot be sustained. Learned counsel has taken the matter back beyond the compromise itself. He points out that the compromise purports to be founded upon the will of Prag Singh dated 1st October 1916, EX. F-1. Learned counsel argues that this document was a document requiring registration in view of the provisions of S. 13A, Oudh Estates Act.

Referring to Ss. 22 and 23 of the same Act it is clear that as Baldeo Singh, the original grantee, was not a person whose name was included in lists 2, 3 and 5 prepared under S. 8, he did not come under the special rules in regard to succession in case of intestacy which are set forth in S. 22. It follows that under S. 23, succession of Prag Singh was regulated by the ordinary law to which members of his tribe and religion were subject. Prag Singh's property on his death would therefore go in the first instance to his sons. By S. 13A, Oudh Estates Act, no grantee and no heir or legatee of a grantee and no transferee referred to in S. 14 or heir of such transferee has power to bequeath his estate to his next heir or his daughter or his daughter's son or his younger son except by a will duly executed and attested. The will executed by Prag Singh was in favour of his widow Mt. Sartaji Kuar. Under sub-s. 2 of S. 13A such a grantee may not bequeath his property to a person who might, in the absence of other heirs, have succeeded to such estate, had the person so bequeathing died intestate as to this estate at the time when the bequest took effect, except by a will duly executed and attested not less than three months before the death of the testator and presented for registration within one month from the date of its execution and registered. It is pointed out that Prag Singh's will was never registered and therefore in so far as the compromise was founded upon the will the will was not a valid document creating any rights in favour of Mt. Sartaji Kuer.

Learned counsel contends that in these circumstances the compromise stands by itself and the compromise is a document which, within its terms of clause 1 (b) of S. 17, Registration Act, is a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish a right, title or interest of the value of Rs. 100 and upwards in immovable property. His view is that this document creates or confers title on Mt. Sartaji to property in which she had no previously existing title. Hence he says that the document, not having been registered, is under S. 49 of the same Act inadmissible in evidence. Section 49 in fact provides that no document required by S. 17 to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property unless it has been registered.

That a document creating a right in immovable property worth more than Rs. 100 is not admissible in evidence unless registered is a matter about which there is no room for dispute. The question for decision is whether this is really a document which confers title and not merely one which is properly speaking a family settlement in the sense that it is a settlement effected in the course of a family dispute and under which the rights, whether properly or not properly founded, of the disputants were recognized and declared. It is clear that as between the parties to the dispute at the time of Prag Singh's death the will of Prag Singh was regarded with respect as a document which gave Mt. Sartaji Kuar a life interest with vested remainder to her sons. It further provided that Rustampur, which stood mutated in the name of Ram Narain Singh though inherited from his grandmother, really belonged to both the sons of Prag Singh but that if Ram Narain Singh should at some future date not give his younger brother Raj Bahadur Singh a share in it then on Mt. Sartaji Kuar's death property corresponding to Rustampur would be excluded from partition in favour of Raj Bahadur

Singh and the rest of the family property would be divided equally. It may or may not be the case, that point not having been decided, that this will was invalid and could not have been enforced, but it was certainly the basis on which the parties regarded themselves ultimately as entitled to deal with the property, and we find it difficult in these circumstances to say that the compromise or family settlement founded upon this document upon the belief of the parties as to their rights is one which confers a title upon Mt. Sartaji Kuar and does not merely declare an existing title or rather a title believed to exist. In this connexion we have been referred to a number of decisions of this Court. In 19 O C 75,[1] it was held that

transactions in the nature of family arrangements or settlements are binding on the parties and must be enforced. It was further held that in order to constitute a binding family arrangement it is not necessary that there should be any formal contract between the parties. In order to decide whether a petition by way of compromise presented to a revenue Court in the course of mutation proceedings requires registration or not, one must consider the situation of the parties at the time when the document was presented and deduce from surrounding circumstances what the parties intended by laying the petition before the Court. If it purports to be nothing more than an admission or acknowledgment of title already in existence, it does not require registration. On the other hand, if it amounts to a declaration of an agreement which was to regulate the respective interests of the parties in the property not merely in presenti but in futuro, then the document is one registration of which is compulsory under s. 17, Registration Act. The word "declare" as used in s. 17, Registration Act, implies a declaration of will and not a mere statement of fact.

In 28 O C 65,[2] Pullan, A. J. C., referred with approval to the decision in 19 O C 75,[1] but he held that in the case before him the document executed purported to limit or extinguish the rights of one of the parties and to assign new rights to another. He remarked that he was unable to find that in the case before him the document amounted merely to an admission or acknowledgment of title already in existence. In the next case quoted, 11 O L J 213[3] Wazir Hasan A. J. C. held that

the documents in suit are clearly of a nature which purports or operates neither to create, assign or extinguish any right, title or interest in present or in future in immovable property;

and this despite the fact that under the arrangement agreed to in those documents the plaintiff as the eldest member of the family got a somewhat larger share than he was entitled to, an arrangement which could not have been said to be founded on the strict legal rights of the parties. In 3 O W N 181[4] Raza J. held that

the test of a family arrangement is that it constitutes the recognition of a pre-existing title and not that the parties derive any title from each other. Where therefore a party has no pre-existing title and is not entitled to any share in the property and there is nothing to show that any dispute existed between the parties and that a settlement of that dispute was made in the mutation proceedings a mere statement in the mutation proceedings by one party agreeing to a share being given to the other party does not establish a family settlement so as to debar the former from suing for recovery of the possession of the property.

There are certain obvious distinctions between the facts in that case and those in the present case, as for example the fact in the present case that there certainly was a dispute in the mutation proceedings which was settled by this family settlement. The fact that the pre-existing title recognized need not necessarily be an absolute legal title would appear from the decision in 3 O W N 993,[5] in which it was held by Gokaran Nath Misra J. that

where after the death of the widow of the last owner all the members of the family join together in filing their application for mutation of names asking the revenue Court to enter the names of all of them in the revenue records irrespective of the consideration whether they were nearly or remotely related to the last holder they must be deemed to have arrived at what may be styled as a family arrangement settling all their future disputes and such a family arrangement does not require either writing or registration.

In 6 O W N 109,[6] it was held by a Bench of this Court that

it is not necessary that a family settlement should be embodied in a formal registered document. It is sufficient that members of the family should agree among themselves to make a settlement and give effect to such agreement. The essence of a family arrangement lies in an adjustment of conflicting claims bona fide made and recognized on both sides with the object of putting an end to a controversy. A controversy may be something less than an active contest and it is enough if the settlement seeks to lay down once for all a position which will avoid possible litigation in the future. Where a question settled previously between the parties is subsequently in litigation, the mere fact that at the time of settlement the parties agreed among themselves that they would not dispute each other's claim in respect to the

1. ('16) 3 A I R 1916 Oudh 339: 35 I C 770 : 19 O C 75, Satrohan Lal v. Nageshar Prasad.
2. ('25) 12 A I R 1925 Oudh 168 : 83 I C 193 : 28 O C 65, Nand Kumar v. Babu Ram.
3. ('24) 11 A I R 1924 Oudh 397 : 78 I C 878 : 11 O L J 213, Swami Dayal v. Tirbhuwan.
4. ('26) 13 A I R 1926 Oudh 338 : 93 I C 378 : 1 Luck 318:3 O W N 181, Phuljhari v. Har Prasad.
5. ('27) 14 A I R 1927 Oudh 97 : 99 I C 472 : 3 O W N 993, Tej Bahadur Khan v. Nakko Khan.
6. ('29) 16 A I R 1929 Oudh 305 : 115 I C 197 : 6 O W N 109, Balbhaddar Singh v. Shamsher Singh.

property in question is sufficient to establish the fact that a valid and binding family settlement took place among them.

Reference has also been made to 6 O W N 169,[7] but the document in question in that case seems to have been a registered document. In our opinion even if it be assumed that the family settlement effected between the parties in the mutation proceedings was founded upon the idea that the rights of the parties were in accordance with the terms of the will of Prag Singh the petition of compromise Ex. F-5 filed by them is not a document which operates to confer title or to effect any transfer of immovable property. It did no more than permit Mt. Sartaji Kuar to remain in possession of the property of Prag Singh during her life time and it was, therefore, not a document whose registration was compulsory. It follows that the document is still binding upon the parties to it, and as the learned civil Judge has said they cannot be allowed to go back upon it. It has not, of course, been contended before us that full effect was not given to this family settlement.

The only other point which was argued in this appeal was that the Court below was wrong in holding on issue 12 that the plaintiffs' share in the above-mentioned properties would be one-third only in view of the fact that on partition among sons the mother is also entitled to a share equal to that of a son. It is contended that the right of the widow to get a share equal to that of a son on a partition between sons is founded on the mother's right to maintenance and that where, as here, it is held that the mother cannot be deprived of the bulk of the property she cannot be held entitled to get a one-third share on partition of a small fraction of the family property. The learned counsel has not been able to substantiate this argument by reference to any decisions. In Mulla's Hindu law, Edn. 9, 1940, at p. 385 it is stated in S. 316 that a mother cannot compel a partition so long as the sons remain united but if a partition takes place between the sons, (as is the case in the present suit with reference to village Rustampur and the house property), she is entitled to a share equal to that of a son in the coparcenary property. There is no qualification of this provision, and we see no reason to invent such a qualification in the present case.

In the result it appears to us that the learned civil Judge rightly dismissed the plaintiffs' suit with reference to the property other than the house property and the Rustampur property specified in list B. In view however of the fact that there has been a compromise between the original parties to this suit and we have held that this compromise is good and binding and for the benefit of the plaintiffs-appellants the plaintiffs' appeal will succeed to this extent that their claim will be decreed in terms of the compromise. The defendants' appeal is also decided in terms of the compromise, and in view of the fact that parties have so agreed between themselves under the compromise there will be no order as to costs of either Court as between the original plaintiffs and the defendants. As the appeal on behalf of the assignees has failed the assignees will be liable to pay such costs of Appeal No. 116 as the respondents have been forced to incur due to the assignees continuing the prosecution of the appeal.

D.S./R.K. *Appeal partly allowed.*

7. ('29) 16 A I R 1929 Oudh 193 : 120 I C 387 : 4 Luck 452 : 6 O W N 169, Hanuman Sahu v. Abbas Bandi Bibi.

*** A. I. R. 1941 Oudh 155**

GHULAM HASAN J.

Sheo Govind and others — *Plaintiffs* — Appellants

v.

Zahur Mohammad and others — *Defendants* — Respondents.

Second Appeal No. 157 of 1937, Decided on 14th October 1940, against order of Addl. Civil Judge, Unao, D/- 17th December 1936.

* *Civil P. C. (1908), O. 22, R. 3 and O. 41, R. 4 — R. 4 of O. 41 applies to case under O. 22, R. 3 (2).*

There is no inconsistency or conflict between the provisions of Rr. 4 and 33 of O. 41, and O. 22, R. 3. The provisions of R. 4 cannot be brought into operation unless the first essential condition under that rule is satisfied namely that the decree appealed from proceeds on any ground common to all the plaintiffs or defendants. R. 4 of O. 41 applies to a case under O. 22, R. 3 (2): *Case law discussed.* [P 159 C 2]

Behari Lal Nigam — for Appellants.

Raj Bahadur Srivastava—for Respondents Nos. 1 and 2.

Judgment. — This is the plaintiffs' appeal arising out of a suit for possession brought by them against the defendants-respondents. The facts are as follows. The plaintiffs came to Court on the allegation that the plaintiffs and defendants 6 and 7 are cosharers of qasba Pachhim, patti Sukhnandan, that the abadi plot No. 103 (house) 175 (ahata) and plot No. 172, another abadi plot, are situate in the said patti. It is stated in the plaint that defendant 1

began to live in the house No. 103 after the death of her father as a licensee, that there are two chabutras on plot No. 172, one of which has been in existence for a long time and which defendant 1 made use of for keeping tazias during the Moharram, and the other chabutra was constructed by her on plot No. 172 in September 1932 only. It was further alleged that the plaintiffs used to realize bazar dues from the shop-keepers as zamindars on market days, but that since defendant 1 has constructed the chabutra in 1932 the shop-keepers have been sitting upon it and paying bazar dues to defendant 1. There was a further averment in the plaint that defendant 1 had put earth on land and had given it the appearance of graves and that she had buried the dead body of her husband on plot No. 172 in May 1931. The plaintiffs, therefore, claim possession of house No. 103 of plot marked A B C D in the plan attached to the plaint measuring 1 biswa 4 biswansis and of land measuring 4 biswansis between the chabutra marked A B C D and the wall of house No. 103 by demolition of the chabutra. An injunction was also claimed to the effect that defendant 1 should remove the grave of her husband on plot No. 172 and bring the other alleged graves to the level of the ground. Defendant 1 was to be further restrained from burying any more dead bodies on the plot. Defendants 2 to 5 are the alleged shop-keepers and an injunction was sought against them not to pay any bazar dues to defendant 1 in future. Defendants 6 and 7 were impleaded as pro forma defendants as they did not join the suit.

Defendant 1, who alone contested the suit denied the entire claim of the plaintiffs and pleaded that she was the owner of the house standing on plot No. 103 and of the site. She also pleaded title by adverse possession. As regards the existence of the graves defendant 1 stated that the chabutra adjoining her house had been in existence for the last 40 or 45 years, that the dead bodies of her family had been buried in that chabutra for a long time and that she had been realising the bazar dues from those shop-keepers who used to sit on that chabutra. She denied that she ever realized bazar dues from shop-keepers who used to sit on the second chabutra and further set up the bar of limitation to the suit. Proceedings were ex parte against the other defendants. Upon these pleadings the trial Court framed the following issues:

1. (a) Are the plaintiffs the cosharers of Qasba Pachhim Patti Sukhnandan? (b) Are the plots and the house in question situated in this village?

2. (a) Are the plaintiffs the owners of the house standing on plot No. 103? (b) If so, is defendant 1 a riyaya as alleged?

3. Has defendant 1 perfected her title by adverse possession as alleged?

4. (a) Has the first chabutra been in existence for the last 40 or 50 years as alleged? (b) Were the dead bodies of the family of defendant 1 buried in this chabutra as alleged? (c) Has defendant 1 perfected her title by adverse possession as alleged? (d) Has defendant 1 a right of easement to bury dead bodies as alleged? (e) Are the plaintiffs estopped from bringing this suit?

5. (a) Has defendant 1 realized any bazar dues from shop-keepers sitting on the second chabutra? (b) Did any shop-keeper ever sit on this second chabutra?

6. To what relief and damages are the plaintiffs entitled?

On issue 1 the trial Court held that the plaintiffs were cosharers of Qasba Pachhim Patti Sukhnandan and that the house and the chabutra in suit were in bazar Dhirana of village Qasba Pachhim. It held on issues 2 (a) and (b) that the plaintiffs were not the owners of the house standing on plot No. 103 and that defendant 1 was not the riyaya as alleged by the plaintiffs. It further held upon issue 3 that defendant 1 had perfected her title by adverse possession. The finding upon issue 4 (a) was that the first chabutra had been built within the last six years and upon issue 4 (b) that the dead bodies of the family of defendant 1 were buried on the land on which the present chabutra stands and also in the chabutra in suit. Issues 4(c), (d) and (e) were found against defendant 1. Upon issues 5 (a) and (b) the trial Court held that the shop-keepers used to sit on the second chabutra and defendant 1 never realized bazar dues from them. In the end the suit of the plaintiffs was decreed for the possession of the plot marked ABCD in the plan attached to the plaint. The plaintiffs however were held to have no right to the removal of the graves lying on the chabutra in suit nor any right to dig them out. The trial Court further decreed possession over the land lying between the chabutra in suit and the wall of the house No. 103. The plaintiffs however were given no right to dig out the grave of *shaheed mard* lying on this land. The chabutra was to be demolished but not the graves existing thereon. Defendant 1 was restrained from realizing any bazar dues from the shop-keepers sitting on the first chabutra or those who would sit on the ground after demolition of the chabutra. She was also restrained from burying any more dead bodies on plot No. 172. Defendants 2

to 5 were also restrained from paying any bazar dues to defendant 1. Rupees 10 were awarded as damages to the plaintiffs. The plaintiffs' suit, so far as house No. 103 was concerned, was however dismissed. Imtiazan, defendant 1 died, and is now represented by respondents 1 and 2 in the present appeal.

Upon an appeal by the representatives of defendant 1, the lower appellate Court came to the finding that the chabutra adjacent to the house of defendant 1 existed from a long time as appurtenant to the house in suit. It also came to the conclusion that the graves standing on chabutra A B C D were those of the members of defendant 1's family. The decree in respect of the demolition of chabutra A B C D was therefore set aside. The plaintiffs filed cross-objections against the dismissal of their claims for the possession of the house and the demolition of the graves on chabutra A B C D. The lower appellate Court dismissed the cross-objections. At the end of the judgment, the lower appellate Court discharged the decree of the trial Court for possession over the land lying between the chabutra in suit and the wall of the house No. 103 on the ground that there was absolutely no evidence to identify the said land. The plaintiffs have now come up in second appeal to this Court. A preliminary objection is taken on behalf of the respondents to the hearing of this appeal to the effect that by reason of the death of Mt. Jasoda, appellant 10, and Mt. Gendana, appellant 12, the entire appeal had abated inasmuch as no application to bring their legal representatives on the record had been made by the other appellants. The appeal was originally filed by fifteen appellants on 16th March 1937. Appellant 10, Mt. Jasoda, died on 30th August 1937, and appellant 12, Mt. Gendana died on 14th September 1937. Pandit Sheo Govind, appellant 1, filed an application (C. M. A. No. 309 of 1940) on 26th March 1940, in which he stated that appellant No. 10 had left a daughter, Mt. Parbati and appellant 12 had left Mt. Munna, daughter-in-law, as their legal representatives but they were not brought on the record within the time allowed by law.

It was further stated by appellant 1 in para. 4 of his application that all the other appellants were cosharers and could sue without joining other cosharers. He also urged that any of the appellants could appeal against the whole decree on a ground common to all and the mere fact that the legal representatives of appellants 10 and 12 did not care to come before the Court should not debar the remaining thirteen appellants from being heard in respect of the whole case. Civil Miscellaneous Application No. 309 of 1940 was ordered to be fixed for disposal on the date of the hearing of the appeal and notice of the application was ordered to be sent to Mt. Parbati and Mt. Munna. It is on record that when the appeal came up for hearing on 17th July 1940, the counsel of both parties were present but Mt. Munna and Mt. Parbati were absent although they were served. The appeal was however adjourned for want of time. It seems therefore that the legal representatives of appellants 10 and 12 did not take any interest in the appeal. The argument put forward on behalf of the respondents is that under O. 22, R. 3, read with R. 11, Civil P. C., the appeal must be held to have abated in toto inasmuch as the legal representatives of appellants 10 and 12 had not been brought on the record. I have heard the learned counsel on both sides and after carefully considering the matter and the authorities cited before me I have come to the conclusion that this preliminary objection has no force. Order 41, R. 4, Civil P. C., lays down that:

> Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be.

Rule 33 of the same order defines the powers of the Court of appeal thus:

> The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection.

The combined effect of the language used in Rr. 4 and 33 of O. 41 is in my opinion sufficient to empower the appellate Court to pass any decree as a whole even though the appeal may have been filed by some of the appellants. This view received support from the following decisions: In A I R 1926 Cal 462,[1] it was held that

> where an appeal proceeds on grounds common to all the defendants and one of them might have appealed and secured a modification of the decree in favour of all it is unreasonable to hold that the absence of one or after his death the absence of his representatives must disqualify the others from carrying on the appeal.

1. ('26) 13 A I R 1926 Cal 462 : 88 I C 970, Upendra Nath Ghosh v. Bhusan Sahana.

In a later case of the Calcutta High Court in A I R 1934 Cal 703[2] it was held by a Bench that, in a case where the defendant had died during the pendency of the appeal in the lower appellate Court and his two sons had been substituted as his heirs but one of the sons having died during the pendency of the second appeal and no heirs having been brought on the record in his place, one of the two heirs of the defendant was entitled to maintain the appeal from the whole decree and it was competent to the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants under O. 41, R. 4, Civil P. C. Coming to the Madras decisions there are two cases, namely A I R 1933 Mad 655[3] and A I R 1938 Mad 374.[4] In the former case two appellants died during the pendency of the appeal and the application to bring the legal representative of one of the appellants was dismissed. It was held that the lower Court's decree could be dealt with as a whole as it stood against all the appellants even though the legal representative of one of the appellants was absent on the record. In the latter case it was held that the provisions of O. 41, R. 4, Civil P. C., enabled the Court to vary the decree as a whole even though the appeal of one of the appellants might have abated by reason of death.

The case in 22 Bom 718,[5] decided by a Bench of the Bombay High Court under the old Code of 1882 lays down that the mere fact of the death of one of several appellants cannot affect the right of the other appellants to proceed with the appeal if they choose to do so. In two decisions of the Allahabad High Court similar view was taken. In the case in A I R 1933 ALL 733,[6] the trial Court treating the purchase of the entire property jointly in favour of all the vendees without specification of their different interests in the sale deed passed one joint decree for pre-emption against all the vendees. One of the vendees died pending the appeal and legal representative was not brought on the record. It was held by the Bench of Sulaiman C. J., and Mukerji J. that the mere fact that one of the vendees had dropped out would not prevent the other vendees from prosecuting their appeal because they were interested in the entire property transferred and were entitled to press their appeal as against the plaintiff on a ground common to all the vendees and that the appeal did not abate as a whole. It was further observed that the appellate Court could reverse or vary the decree in favour of all the defendants under O. 41, R. 4, Civil P. C., even though some of them had not appealed.

The second case, A I R 1938 ALL 235,[7] decided by a Bench of the Allahabad High Court was a case in which some only of the plaintiffs had appealed and some of the respondents died during the pendency of the appeal. It was held that if on the death of such respondents the right to appeal survived against the remaining respondents the appeal did not abate and become incompetent on account of the fact that the heirs of the deceased respondents were not brought on the record. The cases in A I R 1927 ALL 311,[8] A I R 1934 Cal 703,[2] A I R 1923 Mad 58[9] and A I R 1933 Mad 655,[3] were followed in the above case. Following the decision in A I R 1934 Cal 703,[2] it was held by the Patna High Court in A I R 1938 Pat 147[10] that

> the provisions of O. 41, R. 4, apply to the case of an appellant whose appeal has abated by his death, because the effect of the abatement is that to all intents and purposes there is no appeal on behalf of the appellant whose appeal has abated.

Lastly it has been held in 1937 O W N 768[11] that

> where one of the two defendants in a suit is a minor, and both of them appeal against the decree passed against them, but the appeal on behalf of the minor defendant fails on the technical ground of its being filed under the guardianship of a person other than the one who was appointed guardian ad litem by the trial Court, the whole appeal cannot be held to be incompetent if both the defendants have a common case and common interest.

It was further observed that there is no valid ground for putting the defendant other than the minor in a worse position than he would have been if he alone filed an appeal against the whole decree and the minor defendant had not been joined as an appellant when the appeal was filed, for in

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2. ('34) 21 A I R 1934 Cal 703 : 154 I C 147 : 61 Cal 879 : 59 C L J 362 : 38 C W N 743, Satulal Bhattacharjee v. Asiraddi Sheikh.
3. ('33) 20 AIR 1933 Mad 655 : 145 I C 26, Chenchuramayya v. Dama Venkatasubbayya Chetty.
4. ('38) 25 AIR 1938 Mad 374 : 179 I C 125, Sakkarai Chettiar v. Chellappa Chettiar.
5. ('98) 22 Bom 718, Chandarsang v. Khimabhai.
6. ('33) 20 AIR 1933 All 733 : 146 I C 511 : 1933 A L J 1049, Jamna Bhagat v. Oudh Behari Mal.
7. ('38) 25 AIR 1938 All 235 : 176 I C 91 : I L R (1938) All 350 : 1938 A L J 159, Abdul Rahman v. Girjesh Bahadur Pal.
8. ('27) 14 A I R 1927 All 311 : 100 I C 346, Maha Mangal Rai v. Kishun Kandu.
9. ('23) 10 A I R 1923 Mad 58 : 70 I C 168, Subbaraya Mudaliar v. Kandasamy Mudaly.
10. ('38) 25 A I R 1938 Pat 147 : 174 I C 388 : 19 P L T 398, Narain Pande v. Gaya Rai.
11. ('37) 24 A I R 1937 Oudh 448 : 170 I C 636 : 1937 O W N 768, Dull v. Badri Prasad.

such a case the appellate Court could reverse or vary the decree in favour not only of the appealing defendant but also in favour of minor defendant under the provisions of O. 41, R. 4, Civil P. C. Admittedly, in the present case, the suit for possession was filed by the plaintiffs as cosharers and joint owners in the plots in dispute and all the plaintiffs were interested in a common case. The result of the decree in favour of the plaintiffs would also enure to the benefit of all the cosharers. As against the above decisions the learned counsel for the respondents has relied on 31 Cal 487,[12] A I R 1920 Cal 168,[13] A I R 1927 ALL 331,[14] 15 Lah 667,[15] A I R 1935 Lah 478[16] and A I R 1935 Pat 4.[17] He had also referred to S. 45, Contract Act, in support of the argument that the joint right should be exercised jointly by all the joint owners and the legal representatives of appellants 10 and 12 not having been brought on the record as co-appellants the joint right could not be exercised by some only of the cosharers. The case in 31 Cal 487[12] is a case in which their Lordships of the Privy Council held that as the legal representative of the deceased respondent had not been substituted on the record within the time allowed by law and as the cause of action did not survive against the remaining respondents alone, the appeal abated under S. 368 (as amended by S. 66 of Act 7 of 1888) and S. 582, Civil P. C. (Act 14 of 1882). At p. 494 of the report their Lordships observed :

> It is not disputed that the right to sue did not survive against the other defendants alone, nor could it be successfully contended that the appeals could proceed in the absence of a representative of Abhoy Churn Chowdhry.

This case therefore has no application to the facts of the present case. The case in A I R 1920 Cal 168,[13] makes no reference to the provisions of Order 41, Rr. 4 and 33, Civil P. C., and is distinguishable upon the facts. The case in A I R 1927 ALL 331[14] is a single Judge decision of the Allahabad High Court and is also inapplicable. It was a case of a joint mortgage in favour of two mortgagees in which the interest of the mortgagees had not been specified. The suit for redemption of the mortgage was decreed by the trial Court but the decree was reversed by the lower appellate Court and the suit was dismissed. During the pendency of the second appeal, one of the mortgagees died and his legal representatives were not brought on the record within the time allowed by law. It was held that the appeal abated in its entirety inasmuch as the mortgage could either be redeemed as a whole or could not be redeemed at all and the appeal could not be heard as against the surviving mortgagee alone. The provisions of O. 41, Rr. 4 and 33, Civil P. C., were not considered in the case. The same learned Judge in the case of *Maha Mangal Rai* v. *Kishun Kandu*,[8] reported at p. 311 of the same volume has held that under O. 41, Rr. 4 and 33 in an appeal having been filed by one of several plaintiffs or defendants the appellate Court could reverse or vary the decree of the trial Court not only in favour of the party appealing but also in favour of those who might not be parties to the appeal.

The decision in A I R 1935 Pat 4,[17] is a single Judge decision and makes no reference whatsoever to the provisions of O. 41, Rr. 4 and 33, Civil P. C. The case in 15 Lah 667[15] lays down

> that the mandatory words of O. 22, R. 3 (2), are not qualified by O. 41, R. 4, which does not discuss abatement and that the provisions of the latter rule cannot negative the provisions of the very specific rule dealing expressly with the abatement.

With the utmost possible respect to the learned Bench in the above case this reasoning does not appear to be sound. The two orders are no doubt independent but there seems to be no inconsistency or conflict between the provisions of Rules 4 and 33 of O. 41, and O. 22, R. 3, Civil P. C. The provisions of R. 4 cannot be brought into operation unless the first essential condition under that rule is satisfied namely that the decree appealed from proceeds on any ground common to all the plaintiffs or all the defendants. In my opinion, it would be misreading O. 41, R. 4 of the Code and nullifying the effect which the law intended in enacting that rule if it is held not to apply to a case under O. 22, R. 3 (2), Civil P. C. Further, the provisions of R. 33 of O. 41 have been overlooked in that case which clearly gives power to the appellate Court to pass any decree as the case may require even in cases where the parties may not

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12. ('04) 31 Cal 487 : 31 I A 71 : 8 C W N 442 : 8 Sar 623 (PC), Raj Chunder Sen v. Ganga Das Seal.
13. ('20) 7 A I R 1920 Cal 168 : 54 I C 396 : 30 C L J 203, Narendra Nath v. Satyadhan Ghoshal.
14. ('27) 14 A I R 1927 All 331 : 100 I C 482, Sheo Chand Misra v. Sita Ram Misra.
15. ('34) 21 A I R 1934 Lah 206 : 151 I C 784 : 15 Lah 667 : 35 P L R 92, Amin Chand v. Baldeo Sahai-Ganga Sahai.
16. ('35) 22 A I R 1935 Lah 478 : 155 I C 610 : 37 P L R 400, Pir Baksh v. Kidar Nath.
17. ('35) 22 A I R 1935 Pat 4 : 158 I C 56, Pheku Tewari v. Bhagwat Lal.

have filed any appeal or objection. The learned Judges followed an earlier decision of their own Court in A I R 1935 Lah 478,[16] in which it was laid down that where a suit for specific performance of a contract in favour of two persons was dismissed and the appeal was filed by both of them but during the pendency of the appeal one of the appellants died and his legal representative was not brought on the record nor the share of the deceased appellant in the contract was ascertainable or specified, the whole appeal abated. Reference was also made to S. 45, Contract Act. Section 45, Contract Act, has no application as the suit in the present case was filed by all the co-sharers as plaintiffs and those that had not joined the plaintiffs were added as defendants. Section 45, Contract Act, cannot apply in view of the provisions of O. 41, R. 4 which regulates the procedure for appeal and allows some of the appellants to prosecute the appeal in a case which is common to all.

The learned counsel for the respondents concedes that if the appeal had originally been filed by some plaintiffs only out of the plaintiffs who actually filed it, the appellate Court had full authority to grant relief in regard to the whole appeal in favour of such of the appellants as had appealed under O. 41, R. 4, Civil P. C. I have considered the matter carefully, and I am satisfied that the appellants are entitled to continue the appeal even in the absence of the legal representatives of appellants 10 and 12. The preliminary objection thus falls to the ground. The second objection raised on behalf of the respondents was that Imtiazan, defendant 1, who had appealed to the lower appellate Court died on 23rd July 1936, leaving respondents 1 and 2 as her sons and another son Mohammad Raza who has not been impleaded in the appeal. It is contended that the failure of the appellants to implead Mohammad Raza in the appeal causes the appeal to abate qua the interest of Mohammad Raza inherited by him through his mother Imtiazan. I find from the record that upon the death of Imtiazan during the pendency of the appeal to the lower appellate Court all her three sons including Mohammad Raza were brought on the record as legal representatives and necessary amendment was made in the heading of the memorandum of appeal. The application also mentioned all the three sons as legal representatives and the order of the Court referred to all the three sons. Unfortunately, decree as drawn up mentioned only respondents 1 and 2 and not Mohammad Raza. It was the duty of the respondents to have got the decree amended which was in their own favour so as to include the name of Mohammad Raza the brother of respondents 1 and 2 and it is not open to them to take advantage of that omission by urging that the appeal abated as against Mohammad Raza.

The appellants have appealed against the decree of the lower appellate Court which was made in favour of respondents 1 and 2 only and they were not bound to implead Mohammad Raza in the appeal as there was no decree in his favour. I do not think that there is any substance in this objection. Lastly, on the merits, it has been contended that the finding of the lower appellate Court in respect of the plot No. 103 (house)/175 (ahata) to the fact that the plaintiffs were not the owners of the house and that the defendants were not the licensees of the same is not correct. It has been strenuously urged that Mt. Husaini was the original licensee of the house and that after her death her husband Bechu stayed in the house as a riyaya and Mt. Imtiazan defendant 1 who is the daughter of Bechu from his second wife came into possession of the said house in the same capacity. This contention is without force. Mt. Imtiazan had clearly alleged in her written statement that she claimed the house as an owner in her own right and that the case of license set up by the plaintiffs was absolutely false and neither she nor her predecessors-in-interest had ever obtained license in respect of the land and the house.

The trial Court came to a distinct finding that Mt. Husaini was not living in the house as a riyaya. It also found that there was no proof that the possession of Bechu or defendant 1 was of a permissive nature. The trial Court believed the evidence of defendant 1 and held that the possession of Bechu and defendant 1 who had been living in the house in suit for more than 30 years was never discontinued, that it was of a hostile nature and that defendant 1 had succeeded in proving adverse possession. The argument raised here that defendant 1 claimed through Mt. Husaini and her possession must therefore be deemed to be permissive was put forward in the trial Court but it was clearly negatived. The trial Court remarked that it was nobody's case that Bechu or defendant 1 claimed through Mt. Husaini and there was no evidence to prove that permission was given to Bechu and then to defen-

dant 1 to live in the house. This finding was confirmed by the lower appellate Court. I am of opinion that the finding is perfectly justified by the evidence on the record and cannot be disturbed.

The other argument related to the chabutra marked A B C D in the plan attached to the plaint. It was argued that the lower appellate Court had not correctly interpreted para. 6 of Ex. A2, the report of the Tahsildar made in connexion with the proceedings under S. 145, Criminal P.C., against Imtiazan. This paragraph stated that the vacant land which had assumed the form of a chabutra by reason of the falling of mud of the wall of Imtiazan's house has two old graves and one new grave. The trial Court concluded from this that there was no chabutra from before the falling of this wall. The lower appellate Court set aside that finding holding that the trial Court had overlooked the evidence of D. W. 6 and D. W. 8 who definitely stated that there were chabutras on either side of the house of Imtiazan even before the wall fell down. This finding of the lower appellate Court is in my opinion fully justified and cannot be questioned. Lastly it was argued that the appellants were entitled to some land which was alleged to lie between the chabutra in suit and the wall of the house No. 103. The lower appellate Court rightly rejected that relief as in its opinion the appellants had failed to produce any evidence to identify that land and I do not see any reason to interfere with that finding. The result is that the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 161

YORKE AND GHULAM HASAN JJ.

Abdulla Khan — Plaintiff — Applicant

v.

Tirbhuan Dutt Singh — Defendant — Opposite Party.

Civil Revision Appln. No. 103 of 1937, Decided on 23rd October 1940.

U. P. Agriculturists' Relief Act (27 of 1934), S. 7 (a) — Defendant in municipal service actually residing at Fyzabad borrowing money and executing pronote in plaintiff's favour at Fyzabad — Plaintiff not aware of defendant being agriculturist and instituting suit at Fyzabad — Prior to institution of suit defendant discharged from service and claiming to reside at village outside Court's jurisdiction — But defendant actually served at Fyzabad — Court when deciding that it had no jurisdiction acquiring jurisdiction by reason of Government notification but still dismissing suit as barred for not having been instituted in proper Court within limitation—Plaintiff held entitled to benefit of S. 14, Limitation Act — Court, held, under circumstances of case could not act under O. 7, R. 10, Civil P. C., and that despite absence of formal return of plaint and its re-presentation original plaint did not become time barred.

The defendant who was in municipal service at Fyzabad and actually resided there borrowed money from the plaintiff and executed a pronote in his favour at Fyzabad. The plaintiff however was not aware of the fact that the defendant was an agriculturist and instituted the suit at Fyzabad. But prior to the institution of the suit the defendant had been discharged from municipal service and he claimed to have gone away to his village, for purposes of residence, which was outside the jurisdiction of the Fyzabad Court. The Court when holding that it had no jurisdiction to entertain the plaint had come to have jurisdiction by reason of a Government notification but in spite of that he held the plaint to be time barred for not having been instituted in the proper Court within limitation :

Held that the mere fact that the defendant was discharged from the municipal service could not lead to the inference that he must necessarily have left his residence in Fyzabad immediately after service, and could not inevitably have put the plaintiff upon an enquiry as to whether the defendant had or had not left Fyzabad for his village. The plaintiff was in the circumstances of the case entitled to the benefit of S. 14, Limitation Act : A I R 1937 All 333; A I R 1940 Oudh 412; A I R 1914 Oudh 282 and A I R 1922 All 404, *Rel. on*; A I R 1938 Oudh 112 and A I R 1929 Rang 297, *Disting.* [P 163 C 1, 2]

Held further that the Judge could not take action under O. 7, R. 10, Civil P. C., inasmuch as when he held that he had no jurisdiction to entertain the plaint he himself had come to acquire jurisdiction, and that despite the absence of a formal return of the plaint and its re-presentation the original plaint did not become time-barred : A I R 1915 All 344, *Rel. on.* [P 164 C 1]

R. K. Bose — for Applicant.

H. K. Ghose and B. K. Dhaon — for Opposite Party.

Order. — This is an application under S. 25, Provincial Small Cause Courts Act, arising out of a suit for recovery of money on a promissory note executed by the defendant in favour of the plaintiff. The suit was thrown out by the learned Munsif sitting as a Judge, Small Cause Court, on the ground that the suit was beyond his territorial jurisdiction and that it was time barred. The facts are as follows :

The defendant executed a promissory note on 5th April 1934, in favour of the plaintiff with interest at Bazar Salarganj, Fyzabad. The plaintiff instituted a suit on 16th February 1937, for the recovery of Rs. 250, including interest, on the basis of the aforesaid promissory note, in the Court of the Munsif, North Fyzabad. The defendant's residence was described in the plaint as muhalla Reidganj, Fyzabad. The Munsif, North, admittedly had jurisdiction over both Bazar Salarganj and Muhalla Reidganj. The defendant was a treasurer employed in the Muni-

cipal Board at Fyzabad but was discharged from the service on 25th January 1937. There were as many as three hearings, namely 18th March 1937, 28th April 1937 and 27th May 1937, which were fixed for the final disposal of the case, but were adjourned from time to time as the Munsif had no time to take up the case. No written statement was filed on any of these adjourned hearings, although the defendant was represented on the first two hearings by a counsel and was present in person at the last adjourned hearing. On 27th May 1937, the case was again adjourned to 7th July 1937, when a written statement was filed by the defendant, wherein he admitted the execution of the promissory note but pleaded payment. The written statement bears the date 18th March 1937, at the top as well as under the signature of the defendant at the bottom. Two more dates are given under the signature. One is 28th April 1937 and the other is 7th July 1937. It is clear from a look at the written statement that originally it was intended to be filed on 18th March 1937, but because the case was adjourned it was not filed on that date. It was again intended to be filed on 28th April 1937, the adjourned date of hearing, but again it was not filed on that date. Ultimately it was filed on 7th July 1937. In the written statement the defendant for the first time in para. 13 raised the defence that he is an agriculturist and resides in pargana Amsin, which is beyond the territorial jurisdiction of the Court, and as such the suit should have been filed in the Court of the Munsif, Havali. It is quite clear from a look at the written statement that para. 13 is a subsequent addition and an after-thought and that on the three adjourned hearings the defendant, although present either in person or through counsel, never thought of raising the defence of jurisdiction. The summons to the defendant was issued to his residence in muhalla Reidganj but the process-server on 28th February 1937 reported that the defendant used to reside in Reidganj but he was not to be found there. The summons was, however, served by another process-server on the following day, namely 1st March 1937, at Fyzabad. The learned Munsif framed two issues as preliminary issues in the case:

(1) Whether the suit is beyond the territorial jurisdiction of the Court ? and (2) Whether the suit is within time ?

After recording evidence of the parties he held against the plaintiff upon these two issues and dismissed the suit. His finding was that although the defendant used to reside in Muhalla Reidganj while he was in service, yet he had left that residence for village Salon in pargana Amsin since he was discharged from the municipal service. He also held that the defendant was an agriculturist and according to the provisions of S. 7 (a), U. P. Agriculturists' Relief Act, the suit should have been instituted in that Court within the local limits of whose jurisdiction the defendant actually and voluntarily resided, and as the defendant resided in village Salon, pargana Amsin, the suit should have been filed in the Court of the Munsif, Havali. The suit was therefore instituted in the wrong Court. It may be mentioned that pargana Amsin came under the jurisdiction of the Munsif, North, in May 1937, although it was not included within his jurisdiction at the date of the institution of the suit. The learned Munsif held that this fact could not help the plaintiff and the suit not having been instituted in a right Court within limitation was barred by time. He refused to extend the benefit of S. 14, Limitation Act, to the plaintiff holding that the plaintiff in instituting this suit had shown himself to be negligent and had not established good faith.

The plaintiff filed the present application for revision against the aforesaid dismissal of the suit. The matter came up originally before our learned brother, the late Radha Krishna Srivastava J., who referred the case for decision to a Bench of two Judges of this Court by his order dated 13th March 1940, as in his opinion the case involved some important questions of law. In the referring order our learned brother did not feel disposed to follow the view expressed in 1937 A L J 176,[1] where in a similar case the principle of S. 14, Limitation Act, was applied and the suit was held to be within time.

Two points have been raised before us in arguments on behalf of the plaintiff-applicant. The first is that the finding of the lower Court that the defendant did not reside at Reidganj at the time of the institution of the suit is not according to law as it has ignored important evidence. The second point raised is that in any view of the matter the benefit of S. 14, Limitation Act, should have been extended to the plaintiff and the suit should have been held within time.

1. ('37) 24 A I R 1937 All 333 : 168 I C 936 : 1937 A L J 176, Ahmad v. Ram Chander.

As regards the first point, the lower Court refers to the evidence of the defendant himself, who stated that after he was discharged from service he left muhalla Reidganj and shifted to his home in village Salon, and observes that the statement is probable in view of the fact that the first process-server reported on 28th February 1937, on the back of the summons, that the defendant was not found at his house in Reidganj. The lower Court has completely ignored the fact that on the very next day the service of the summons was effected upon the defendant in Fyzabad. The defendant realized his provident fund in the Municipal Board some time in March 1937, and the lower Court remarks that the defendant may have visited Fyzabad in connexion with the receipt of his provident fund when he was served on 1st March 1937. No evidence however was produced by the defendant to substantiate this assertion. The vakalatnama dated 10th March 1937, filed by the defendant engaging a pleader on his behalf mentions his residence as muhalla Reidganj, Fyzabad. The mere fact that the defendant was discharged from the municipal service on 25th January 1937 cannot lead to the inference that he must necessarily have left his residence in Fyzabad immediately after service, specially when we find that he was actually served in Fyzabad on 1st March 1937. It appears that along with the plaint the plaintiff filed an application for injunction against the defendant restraining the Municipal Board from paying the provident fund money to the defendant. In that application he stated that the defendant had resigned the service about a month ago. From this the lower Court concludes that the plaintiff must have been aware that the defendant had left Fyzabad as there was no reason for him to stay any longer in muhalla Reidganj and that it was the duty of the plaintiff to have made proper enquiries about the defendant's residence before instituting the suit. We do not think that the mere fact that the defendant had resigned service should inevitably have put the plaintiff upon an enquiry as to whether the defendant had or had not left Fyzabad for his village. The plaintiff had no ground whatever for thinking that the defendant's residence was otherwise than at the place where he was employed, where he borrowed the money and where he actually executed the promissory note. Having regard to the circumstances stated above, we are of opinion that the lower Court was not justified in overlooking important evidence and in coming to the finding that the defendant was not residing in Fyzabad at the time of the institution of the suit but had left for his village immediately after he was discharged by the Municipal Board.

Even if we were prepared to uphold the finding of the lower Court upon the first point, which we do not think is at all justified by the materials on the record, we are satisfied that the plaintiff had made out a case for exclusion of time during which he was prosecuting the proceedings with due diligence and in good faith. It is urged on behalf of the plaintiff-applicant that he was not aware at the date of the suit that the defendant was an agriculturist and that he had no motive for filing the suit deliberately in a wrong Court, namely the Munsif, North Fyzabad, when he could have easily instituted the suit in the Court of the Munsif of Havali, as the two Courts were situate in the same compound. There is no evidence on the record to show that the plaintiff was aware of the fact of the defendant's being an agriculturist, and as we have pointed out above there are strong indications to show that the plaintiff bona fide believed that the defendant resided in Reidganj, Fyzabad. He had no reason whatsoever for thinking that because the defendant had been removed from service he had automatically ceased to reside at his actual place of residence in Reidganj. The learned Munsif could not take action under O. 7, R. 10, Civil P. C., and return the plaint to be presented to the Court of the Munsif of Havali, in which the suit should have been originally instituted, inasmuch as when he held that he had no jurisdiction to entertain the plaint he himself had come to acquire jurisdiction by reason of certain Government notification. It would have been an act of supererogation on his part to have formally noted on the back of the plaint that it was returned from the Court of the Munsif, North, existing prior to the notification to the Court of the Munsif, North, as constituted after the notification, namely himself. It is clear that the learned Munsif could not have passed an order returning the plaint earlier than 14th August 1937, when he actually came to hold that he had no jurisdiction.

It was held in 30 I C 544[2] by the Allahabad High Court that where a plaint which had been presented within time was return-

2. ('15) 2 A I R 1915 All 344 : 30 I C 544, Ganga Prasad v. Ramanand Gir.

ed to be re-presented to the proper Court and was re-presented in accordance with the order of the Court but after the limitation for the original suit had expired, the re-presentation was a continuance of the suit and therefore the suit was not barred by limitation. Following the view enunciated in this case, we are of opinion that despite the absence of a formal return of the plaint and its re-presentation the original plaint did not become time-barred. As regards the application of the principle of S. 14, Limitation Act, to the circumstances of the present case, we are satisfied that the plaintiff has established the essential condition required by that section, viz., the prosecution of the civil proceedings in good faith and with due diligence in the Court of the learned Munsif, North, and as such the time taken in prosecuting those proceedings should be excluded in computing the period of limitation prescribed for the filing of the suit.

In somewhat similar circumstances the Allahabad High Court in 1937 A L J 176[1] held that where the objection of jurisdiction was based on S. 7 (a), U. P. Agriculturists' Relief Act, the plaintiff was entitled to the benefit of S. 14, Limitation Act, and that the plaint presented by him after the period of limitation had gone out was within time. This case has been followed in 1940 O W N 657,[3] wherein it was held that where a plaintiff in ignorance of the special forum prescribed by the Agriculturists' Relief Act prosecutes his suit in a Court without jurisdiction, he must be deemed to have been prosecuting with due diligence and in good faith the proceedings in the wrong Court, so that he is entitled to the benefit of S. 14, Limitation Act. "Good faith" has been defined in the Limitation Act as follows: "Nothing shall be deemed to be done in good faith which is not done with due care and attention." Having regard to the fact and circumstances of the present case, we have no doubt that the plaintiff did all he could to serve the defendant soon after the institution of the suit and succeeded in getting him served on 1st March 1937, in Fyzabad. He therefore acted with due diligence, and there was no absence of due care and attention on his part in the conduct of prosecution of the suit.

In 17 O C 210[4] it was held in a suit for pre-emption in which the claim had been undervalued and the plaint was returned for presentation to the proper Court on the correct valuation having been discovered, that as there was nothing to show a deliberate or reckless undervaluation of the property in order to secure some improper advantage or a mala fide desire to institute the suit in a wrong Court, S. 14, Limitation Act, applied to the case and the plaintiff was entitled to the exclusion of time during which he had been prosecuting the proceedings in the Court of the subordinate Judge. In A I R 1922 ALL 404[5] it was held that the time during which a Court holds up a case while it is discovering that it ought to have been presented in another Court, is time which ought to be excluded in computing the period of limitation which is applicable, as provided by S. 14, Limitation Act. It cannot be said that a plaintiff is not prosecuting a suit with due diligence in a Court of first instance when the delay is caused by the action of the Court itself.

The learned counsel appearing on behalf of the opposite party has argued that not only the institution of the suit against the agriculturist but the trial as well has been forbidden by S. 7 of the U. P. Agriculturists' Relief Act, and that under cl. (a) of that section unless the agriculturist defendant actually and voluntarily resides within the local limits of the jurisdiction of the Court, the Court has no jurisdiction whatsoever to try the suit against him. He has cited 1938 O W N 801.[6] This proposition is, however, not contested by the learned counsel for the applicant. The learned counsel for the opposite party has also relied on 1938 O W N 360[7] in support of the proposition that speaking generally negligence on the part of counsel cannot be relied upon by the litigant in order to support a plea that he was prosecuting an application in good faith though in a wrong Court. This case has no application to the present case as there is no question here of any counsel's negligence. He has also referred to 7 Rang 466.[8] It appears that an order under O. 21, R. 63, Civil P. C., having been made against a party, the aggrieved person chose to apply

3. ('40) 27 A I R 1940 Oudh 412 : 190 I C 93 : 1940 O W N 657, Ram Shankar v. Bechan Chaudhari.
4. ('14) 1 A I R 1914 Oudh 282 : 25 I C 403 : 17 O C 210, Ram Dayal v. Sarju Prasad.
5. ('22) 9 AIR 1922 All 404 : 70 I C 613, Mt. Maryam Bibi v. Ram Das.
6. ('38) 25 AIR 1938 Oudh 224 : 177 I C 131 : 14 Luck 218 : 1938 O W N 801, Gulzari Singh v. Ram Adhin.
7. ('38) 25 AIR 1938 Oudh 112 : 173 I C 956 : 1938 O W N 360, Ram Dutta v. Mahpal Singh.
8. ('29) 16 AIR 1929 Rang 297 : 120 I C 236 : 7 Rang 466, S. R. M. M. A. Firm v. Maung Po Saung.

for revision of such an order and after the dismissal of his revision application filed a declaratory suit more than a year after the passing of the order under O. 21, R. 63. The question was whether he could claim the benefit of S. 14, Limitation Act, and ask for exclusion of the time taken up in revision proceedings. It was held that the proceedings contrary to a clearly expressed provision of law could not be regarded as prosecuting another civil proceeding in good faith, and the plaintiff was not entitled to any exclusion of time. Order 21, R. 63, Civil P. C., mentions clearly that the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive. Since the rule itself provides a remedy by way of a suit, a person or his advocate choosing to apply for revision of such an order cannot rightly be regarded as prosecuting a civil proceeding in good faith. This decision, therefore, has no application to the present case.

For the foregoing reasons we are of opinion that the decision of the lower Court cannot be maintained. We, therefore, allow the application, set aside the decision and remand the case to the lower Court with direction to dispose of it according to law. The applicant will get his costs from the opposite party in this Court. Costs in the Court below will abide the event.

G.N./R.K. *Application allowed.*

A. I. R. 1941 Oudh 165

YORKE AND GHULAM HASAN JJ.

Jagdish Narain—Plaintiff—Appellant

v.

Bishun Datt and others—Defendants—Respondents.

Second Appeal No. 294 of 1937, Decided on 6th November 1940, against order of Addl. Judge, Small Causes and Additional Civil Judge, Lucknow, D/- 30th March 1937.

Limitation Act (1908), S. 7 — Case falling under S. 7 — Word "discharge" in S. 7 includes discharge of right to sue—Joint Hindu family of brothers — Right to sue for recovery of property improperly alienated by guardian is joint — Manager of such family can give discharge or release of aforesaid right to sue — Consequently failure of elder brother, on attaining majority and becoming manager, to sue within limitation bars right of younger brothers also.

Section 7 bars a suit by a younger minor member of a joint Hindu family in a case where an elder brother having become major and having therefore also become manager of the joint family, has failed to institute a suit within the period of limitation applicable to him. [P 169 C 1]

The word "discharge" in S. 7 is wide enough to include the discharge of a right to institute a suit. There can be no doubt that the right of the members of a joint Hindu family consisting of brothers to institute a suit to recover property improperly alienated by their guardian is a right jointly enjoyed by them and they must be regarded as persons jointly entitled to institute the suit. The manager of such a family of brothers can give a discharge or release of the aforesaid right to sue. Consequently on the failure of the elder brother to sue on attaining majority and becoming manager of the joint family within the period of limitation the right to sue becomes barred not only against the elder brother but also against the younger brothers who cannot be said to have a separate individual right to institute such a suit: *Case law reviewed.* [P 167 C 2; P 169 C 2]

D. P. Khare — for Appellant.

Parmatma Saran Dwivedi — for Respondents 1 to 3.

Judgment. — This is a second appeal by Jagdish Narain, plaintiff, whose suit to recover possession of land by demolition of constructions and for price of patawar grass was dismissed by the Munsif, Havali, Lucknow, whose decree was confirmed in appeal by the additional civil Judge of Lucknow. The plaintiff is the son of one Parshotam Narain who is said to have died in or about the year 1918. Parshotam Narain was the owner of an ancestral share in village Bhilawan which included the plots in suit Nos. 546 and 547 measuring respectively 13 biswas and 14 biswas. On the death of Parshotam Narain, his two sons, Jagdish Narain, plaintiff, and Hirday Narain, defendant 4, were minors and Mt. Binda Dei, his widow, became their certificated guardian. It was said by the plaintiff that in 1925 defendants 1 to 3 took illegal possession of these plots and constructed 40 residential quarters thereon. It has been found that in fact Mt. Binda Dei, their certificated guardian, through her general agent, Chhote Lal, on 23rd January 1920 executed a deed of perpetual lease in favour of the father of defendants 1 to 3 in which the rent of the plots was fixed at Rs. 12 per annum which rent had admittedly been paid thereafter. Defendants 1 to 3 claimed to have acquired title by adverse possession both to the land covered by the constructions and also to the whole of the two plots. They further contended that as the elder brother of the plaintiff Hirday Narain, who had been impleaded as defendant 4 in the suit, had been manager of the joint family property and was bound to institute a suit either within 12 years of the date of dispossession by the defendants or within three years of his attaining majority on 8th November 1930, had failed to institute any suit, the present plaintiff was barred from

instituting the present suit for possession of the plots. For the plaintiff it was contended that Mt. Binda Dei's agent was not competent to execute this deed of perpetual lease which was invalid as being unstamped and unregistered.

By the trial Court it was held that Chhote Lal was competent to give the lease of the plots in suit and that defendants 1 to 3 had acquired a prescriptive title to hold the plots as permanent lessees on payment of Rs. 12 per annum, that the lease was invalid and that the plaintiff's suit was barred by time.

In the lower appellate Court, as is stated in the judgment of the learned additional civil Judge only two points were argued, first that defendants 1 to 3 had failed to prove the power of attorney which was said to have authorized Chhote Lal to execute this perpetual lease, and secondly that the suit was not barred by limitation. On both these points the learned additional civil Judge held against the plaintiff-appellant, and therefore confirmed the decision of the trial Court dismissing the suit. The important point to be remembered in the present appeal is that the execution of this unregistered perpetual lease in favour of Murli Dhar, father of defendants 1 to 3, by Chhote Lal on 23rd January 1920, was proved. It follows therefrom that the dispossession of the plaintiffs has to be taken as beginning from that date, and therefore a suit for the recovery of possession must necessarily be barred after 22nd January 1932, unless by the application of Ss. 6 and 8, Limitation Act, it could be extended as far as the date on which the suit was actually instituted, 20th January 1936.

In this case we have listened to a considerable amount of argument in regard to the validity of the deed of perpetual lease, Ex. A-1, and also the proof of the power of attorney Ex. A-20, on the authority of which Chhote Lal, general agent of Mt. Binda Dei, was said to have executed the lease. Learned counsel for the appellant contended that defendants 1 to 3 had failed to prove that Chhote Lal had any authority to execute the lease. In regard to the power of attorney the facts were that the original power of attorney would necessarily have been in the possession of Chhote Lal unless he was called upon by his master to return it. Actually Chhote Lal was dead and the presumption would be that this document would be in the hands of Chhote Lal's heirs. In order to be able to lead secondary evidence of this document defendants 1 to 3 had to give notice under S. 66, Evidence Act, and they only gave notice to the plaintiff. It must obviously be doubtful whether this power of attorney was within the possession or power of the plaintiff, and therefore it was contended that defendants 1 to 3 had not put themselves in a position which entitled them to lead secondary evidence. It has been argued however, and cases have been quoted in support of the proposition, that unless such a point is raised in the trial Court, it is too late in appeal, much more so in second appeal, to raise, in regard to a document which had been admitted, the point that the party on whose behalf it was admitted did not put themselves in a position to claim its admission.

Secondly it was argued that even if defendants 1 to 3 put themselves in a position which entitled them to produce secondary evidence of the power of attorney, Ex. A-20, is not a copy, but a copy of a copy, and therefore it is not secondary evidence within the purview of S. 63, Evidence Act. On this point it would have been sufficient to say that an original copy of that power of attorney was present on the file of a guardianship case which was called for and produced before the trial Court, and therefore the copy on which that Court really acted was not a copy of the copy but the copy itself. We would not have been prepared to reject Ex. A-20 on the ground that it is a copy of the copy because we regard Ex. A-20 as only representing on the file of the trial Court the copy which is in the file of the guardianship suit and was there marked by the Court as having been compared with the original. A further point was argued that even if defendants 1 to 3 were entitled to lead secondary evidence of this power-of-attorney, there was a burden on them none the less to prove due and intelligent execution of the power-of-attorney. On this point however reference was made for defendants-respondents 1 to 3 to S. 89, Evidence Act, which provides that

> the Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

There might, of course, be a doubt as to whether this goes as far as is necessary in order to validate and put on a completely satisfactory footing a document executed by a pardanashin lady. The fact however does remain that it is free from doubt that Chhote Lal did act for years as general agent of Mt. Binda Dei. It was pointed out on behalf

of the appellant that in any case this lease required the sanction of the District Judge under the provisions of S. 29, Guardians and Wards Act. Absence of this sanction would, of course, render the lease invalid and therefore voidable, but learned counsel for the appellant sought to contend that the document was completely void as executed without authority, and therefore he argued that the other questions raised of ratification and estoppel could not arise.

All this argument in regard to the execution of the lease however admittedly leads nowhere unless it be first found that the plaintiff's suit was instituted within limitation. As we have already pointed out, it makes little difference in the present case whether the suit so far as limitation goes was framed as a suit to recover possession of property of which the plaintiff and his elder brother had lost possession in 1920 or it be treated as a suit to avoid the transfer made by the guardian. The suit was not framed in the latter form. Had it been so framed, it must have been instituted by the elder of the two sons of Parshotam Narain, Hirday Narain, within three years of his attaining majority under Article 44, Limitation Act. Failing a suit by Hirday Narain, prima facie it would be competent for the present plaintiff to institute this suit within three years of the date on which he attained majority, which appears to have been 20th January 1933, but the question would arise in that case whether Hirday Narain not having instituted a suit, the suit by Jagdish Narain was not barred in view of the provisions of S. 7, Limitation Act. On the other hand the suit having been actually filed as a suit merely for recovery of possession the period of limitation under Art. 142, Limitation Act, was 12 years from the date of dispossession and this period would have expired on 22nd January 1932. Hirday Narain had become a major on 8th November 1930, and would have obtained no extension of time for instituting a suit. His younger brother Jagdish Narain might possibly have been able to claim an extension of three years under Ss. 6 and 8, Limitation Act, from the date of his majority but that again would be subject to the provisions of S. 7, Limitation Act.

The only real question therefore for decision in the present case is whether in view of the fact that no suit was instituted at any time by the elder brother and manager of the joint Hindu family Hirday Narain and a suit by him is barred by limitation, it is competent for the younger brother Jagdish Narain to maintain the present suit which in his case, if he has an independent right, is not barred by limitation. It is because of the view that we take on this point that we have not considered it necessary to come to any findings on the numerous other points which have been raised in this appeal and cursorily indicated above. Section 6, Limitation Act, provides that:

> Where a person entitled to institute a suit .... is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit ..... within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

Section 8 provides a special limitation on the general rule in S. 6 and provides that:

> Nothing in s. 6 or in s. 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

This is the section which lays down the three years' rule. Under S. 7 it is provided that:

> Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, (that is minority, insanity or idiocy) and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased.

The effect of this section in the present case is that if it be held that the elder brother Hirday Narain who became major in 1930 was capable of giving a discharge within the meaning of section 7, then the period of limitation for filing the present suit finally expired not only as against Hirday Narain but also as against Jagdish Narain, plaintiff, on the 22nd January 1932. The question for decision is a pure question of law and a number of cases have been quoted to us. It is conceded that all the High Courts with the exception of the Allahabad High Court give a wide significance to the word "discharge" and interpret it as including discharge of the right to institute a suit. This interpretation of the section is clearly supported by the wording of S. 8, because if S. 7 did not include suits other than suits for debt (as held in some cases of the Allahabad High Court) there would have been no necessity in S. 8 to make

any reference in connexion with S. 7 to suits to enforce rights of pre-emption.

For the plaintiff-appellant reliance was placed in the first instance on 31 ALL 156.[1] In that case the certificated guardian of two Hindu minors sold certain property of the minors without the sanction of the District Judge. Within three years of his attaining majority, the younger of the two minors, who were brothers, sued to avoid the sale. The elder, however, had come of age several years earlier and had taken no steps to repudiate the transaction. It was held that "the suit was not barred by limitation," on the view that the elder brother had never acted as manager and that all he did was to remain inactive without taking any step to recover possession of the property or set aside the transaction which was completely against the interest of himself and his minor brother. The learned Judges held :

> On the whole we have come to the conclusion that plaintiff 1 (the elder brother) was not capable of giving a discharge without the concurrence of plaintiff 2 within the meaning of S. 8 of Act 15 of 1877. The consequence is that time did not run against either of the plaintiffs and the suit is maintainable.

In a subsequent case of the same High Court which went up to the Privy Council, 53 I A 36,[2] the view had been taken that S. 7 of the present Limitation Act was limited in its application to those matters, debts and the like, to which the word "discharge" is in its most ordinary sense applicable. On that ground a certain suit by one of two brothers to set aside a transfer by the father and manager of the joint family property in the lifetime of the father was held to be within time, although the elder had not instituted such a suit within limitation. In the Privy Council the suit was also held not to be barred by time, probably because it was conceded by learned counsel that the suit could not be barred. In the judgment their Lordships wrote that on the question of limitation they concurred with the view of the High Court, and this decision was interpreted in two later Allahabad cases, A I R 1930 ALL 861[3] and A I R 1931 ALL 378[4] as meaning that the Privy Council had accepted the view of S. 7 expressed by the High Court. Other High Courts examining these cases have come to the conclusion that nothing more was meant than that their Lordships concurred with the High Court in the decision that the suit was not barred by limitation as indeed they must almost necessarily have done, since that point was conceded by learned counsel for the appellants, although not on the ground stated in the High Court's judgment. In a later judgment of the Allahabad High Court, A I R 1935 ALL 746,[5] the narrow view of section has been entirely given up without its even being discussed. It would seem therefore that even in Allahabad the narrow interpretation of S. 7 as applicable only to matters of debts no longer holds the field. Learned counsel for the appellant conceded that in Bombay, Madras, Patna and Lahore the more elastic view of S. 7 is the one which prevails. On behalf of respondents 1 to 3, apart from the recent Allahabad case, reliance has been placed on A I R 1934 Mad 469[6] in which the headnote runs :

> Where two brothers sue for a declaration that a sale by their mother is invalid and if one brother comes of age and allows three years to pass before suing, time has run against the younger brother also.

In this case there was some discussion of the Privy Council decision in 53 I A 36,[2] but it was considered that it had been misinterpreted. In a Full Bench case of the Patna High Court, A I R 1937 Pat 435,[7] it was held that

> in an undivided Hindu family governed by the law of Mitakshara an elder brother who has attained majority and is the manager of the family can without the concurrence of his minor brother or brothers give up the right to sue for the recovery of property which has been improperly alienated by their guardian at a time when all the brothers were minors. Hence a suit to recover such property, if barred against the major elder brother who is karta, is also barred against other minor brothers.

It was also held that

> the term 'discharge' in S. 7, Limitation Act, does not mean merely a discharge of pecuniary liability, but has a wider significance and includes a release of rights in immovable property such as even the equity of redemption or a release of other rights, as for instance, a right to institute a suit.

In Bombay in 45 Bom 446[8] the same view has been taken. In that case three brothers,

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1. ('09) 31 All 156 : 1 I C 824 : 6 A L J 62, Ganga Dayal v. Mani Ram.
2. ('26) 13 A I R 1926 P C 16 : 93 I C 216 : 48 All 152 : 53 I A 36 (P C), Jawahir Singh v. Udai Parkash.
3. ('30) 17 A I R 1930 All 861 : 130 I C 691 : 52 All 768 : 1930 A L J 852, Sheonandan Prasad v. Mt. Tahiran Bibi.
4. ('31) 18 A I R 1931 All 378 : 135 I C 116, Raghunath Prasad v. Jwala Prasad.
5. ('35) 22 A I R 1935 All 746 : 155 I C 569 : 1935 A L J 838 : 57 All 891, Anrudh Rai v. Sant Prasad Rai.
6. ('34) 21 A I R 1934 Mad 469 : 150 I C 76 : 58 Mad 155 : 67 MLJ 27, Jaddu Padhi v. Chokkapa Boddu.
7. ('37) 24 A I R 1937 Pat 435 : 170 I C 362 : 16 Pat 422 : 18 PLT 385 (F B), Karan Singh v. Mt. Tetar Kuer.
8. ('21) 8 AIR 1921 Bom 289 : 59 I C 759 : 45 Bom 446 : 22 Bom LR 1383, Bapu Tatya v. Bala Ravji.

members of a joint Hindu family, sued in 1915 to recover possession of property after setting aside a sale deed passed by their mother during their minority on 28th July 1905. Plaintiffs 1 and 2 were minors and plaintiff 3 was more than 21 years of age at the date of the suit. The suit was held barred as against plaintiff 3, but a question having arisen whether it was barred as against plaintiffs 1 and 2 under S. 7, Limitation Act, 1908, it was held :

It was barred as against plaintiffs 1 and 2 also inasmuch as plaintiff 3 on his attaining majority became manager of the joint family and as such could give a valid discharge and acquittance of all claims against the defendants without the concurrence of the minor plaintiffs.

It was remarked by one of the Judges that

the main object of the Legislature in S. 7 is to limit the indulgence which is otherwise given to minors, so that if there are several minors who can claim the benefit of S. 7 that concession does not extend to cover the whole period of time up to the youngest of the minors becoming a major, but can only be availed of by the eldest of them.

It is obvious that this gives a wide interpretation to S. 7, Limitation Act. In another case of the Bombay High Court, 52 Bom 441,[9] it was held that

under S. 7, Limitation Act, 1908, a manager of a joint Hindu family can give a valid discharge without the concurrence of the minor members of the family in the case of an application to execute a decree, just as he can in the case of a suit, and the mere fact that one of the members is a minor will not prevent time running against all the members of the family.

Reliance was placed in this case on 45 Bom 446[8] quoted above. In the light of the general consensus of other High Courts as to the interpretation of S. 7, Limitation Act, we feel no doubt that in all cases to which the terms of S. 7 are strictly applicable that section bars a suit by a younger minor member of a joint Hindu family in a case where an elder brother having become major and having therefore also become manager of the joint family, has failed to institute a suit within the period of limitation applicable to him.

Learned counsel for the appellant in his reply drew our attention to a single Judge case of the Madras High Court in A I R 1939 Mad 907[10] in which the learned Judge drew attention to the importance of considering the question whether the disabling provisions of S. 7, as apart from the general scope of the section which is covered by the above cases, are strictly applicable. The questions which would arise in this connexion in the present case are, first whether Hirday Narain and Jagdish Narain were jointly entitled to institute the present suit and secondly whether Hirday Narain as manager of the joint family was capable of giving a discharge without the concurrence of Jagdish Narain. In our opinion there can be no doubt that the right of the members of the joint Hindu family consisting of Hirday Narain and Jagdish Narain to institute a suit to recover the property in the possession of defendants 1 to 3 is a right jointly enjoyed by them and they must be regarded as persons jointly entitled to institute the suit. Secondly we can see no justification for holding that the manager of the joint Hindu family consisting of these two persons was not capable of giving a discharge or release of the right to institute such a suit. In our opinion it is clear that on the failure of Hirday Narain to institute a suit within the period of limitation prescribed for a suit by him, the right of suit for the recovery of this property became barred not only against Hirday Narain but also against the other members of the Hindu joint family and it could not be said that Jagdish Narain had a separate individual right to institute such a suit. We have no hesitation in holding that the present suit is barred by limitation in view of the provisions of S. 7, Limitation Act. The plaintiff's suit was therefore rightly dismissed. There is no force in this appeal which accordingly fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

9. ('29) 16 A I R 1929 Bom 13 : 110 I C 276 : 52 Bom 441 : 30 Bom L R 537, Supdu Daulatsing v. Sakharam Ramji.

10. ('39) 26 A I R 1939 Mad 907 : 189 I C 167 : (1939) 2 M L J 619, Kunhi Kannan v. Vazhayil Devaki.

A. I. R. 1941 Oudh 169

THOMAS C. J. AND ZIAUL HASAN J.

All India Barai Mahasabha through Kshetra Nath Sen—Plaintiff—Appellant

v.

Pandit Jangi Lal Chaurasia — Defendant — Respondent.

Misc. Appeal No. 91 of 1937, Decided on 12th November 1940, against order of Civil Judge, Lucknow, D/- 5th August 1937.

Civil P. C. (1908), O. 3, R. 1, S. 26 and O. 41, R. 1 — Presentation of every document in Court must be governed by O. 3, R. 1 — O. 41, R. 1 is combination of S. 26 and O. 3, R. 1 — Presentation of plaint, memo of appeal or application to Munsarim of Court is "act in any Court" within meaning of O. 3, R. 1— Application under Sch. 2 Para. 20 presented by party's counsel — Counsel's certificate of practice expiring before date of pre-

sentation and renewed only after aforesaid date—Presentation of application is invalid.

Order 3, Rule 1 contains a general provision relating to procedure in Courts and is as much applicable to the presentation of suits as to that of appeals and applications for execution. O. 41, R. 1 is in fact a combination of the provisions of S. 26 and O. 3, R. 1. The presentation of every document in Court must therefore be governed by O. 3, R. 1. The presentation of a plaint, memorandum of appeal or an application to the Munsarim of a Court is undoubtedly an "act in any Court" so that it is imperative that that presentation should be made by the party in person or by his recognized agent or by a pleader. Consequently, where an application under Sch. 2, para. 20 is presented by a party's counsel whose certificate had expired before the date of presentation and was renewed only after the aforesaid date the presentation of the application is irregular. The irregularity however can be cured in the trial Court but it is too late to rectify it at the appellate stage especially when the application has become barred by time : AIR 1931 All 507 (FB) and 164 I C 442, *Expl.* ; 1 N W P H C R 154, *Disting*; *Case law referred.* [P 170 C 1,2; P 171 C 1, 2]

The fact that the Court which was unaware of the irregularity allowed the counsel to appear in the case on several dates does not amount to a condonation of the defect in the presentation of the application. [P 172 C 1]

Hyder Husain and Naziruddin—for Appellant.

Niamatuallah and S. B. Bajpai —for Respondent.

Judgment. — This miscellaneous appeal against an order of the learned civil Judge of Lucknow dated 5th August 1937, arises out of an application presented on behalf of the plaintiff-appellant under para. 20 of Sch. 2, Civil P. C., for the award of an arbitrator being made a rule of the Court. It appears that there was a dispute between the parties as to the ownership of a building situated in Lucknow. By an agreement dated 22nd April 1935 the parties referred the dispute for decision to five arbitrators. The arbitrators delivered their award on 19th July 1936, and it was to enforce this award that the present appellant filed an application under para. 20 of Sch. 2 on 4th December 1936. Along with the application was filed a vakalatnama executed by the plaintiff-appellant in favour of seven legal practitioners one of whom was Mr. Yusuf Husain pleader. The application and the vakalatnama were presented on 4th December 1936, by Mr. Yusuf Husain. The respondent filed objections to the application of the appellant. One of the objections taken was that the application was not properly presented as the certificate of practice granted to Mr. Yusuf Husain had expired before 4th December 1936 and was not renewed till some time after that date so that on 4th December 1936, he was not a pleader authorized to act or appear in Court. This objection was upheld by the learned civil Judge and the appellant's application was rejected on that ground.

It is argued on behalf of the appellant that as under para. 20 (2) of Sch. 2, an application under para. 20 is to be numbered and registered as a suit between the applicant as plaintiff and the opposite party as defendant, the application must be deemed to be a plaint and that there is no provision of law which requires a plaint to be presented to the Munsarim by a practising pleader. The argument of the learned counsel is that so far as S. 26, Civil P. C., is concerned which lays down that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed, there is no provision as to who is to present a plaint and that O. 3, R. 1 of the Code does not apply to the presentation of a plaint. Order 3, R. 1 runs as follows:

> Any appearance, application or act in or to any Court, required or authorized by law, to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognized agent or by a pleader on his behalf.

The argument is that O. 3, R. 1, applies to appearances and presentations made in or to any Court and not to presentations of plaints, applications, etc., to the Munsarim of the Court. We are not prepared to accept this argument as it leads to the preposterous result that a plaint or a memorandum of appeal would be validly presented even though presented to the Munsarim by a man in the street. In A I R 1930 ALL 112[1] it was held that where a memorandum of appeal is presented in Court by an unauthorized person it is no appeal at all and the Court may reject it for that obvious defect. The Patna High Court in 55 I C 271[2] held that the presentation of a memorandum of appeal by a vakil without any authority in the shape of a vakalatnama is not a valid presentation. In 36 ALL 46[3] the name of a vakil who had filed an appeal was omitted from the body of his vakalatnama and it was held that the document was invalid and the appeal consequently had not been properly

1. ('30) 17 A I R 1930 All 112 : 121 I C 546 : 1930 A L J 394, Mohammad Qamar Shah Khan v. Mohammad Salamat Ali Khan.
2. ('20) 7 A I R 1920 Pat 581 : 55 I C 271, Sheikh Palat v. Sarwan Sahu.
3. ('14) 1 A I R 1914 All 536 : 19 I C 674 : 36 All 46 : 11 A L J 1015, Muhammad Ali Khan v. Jas Ram.

presented. In A I R 1937 Mad 239,[4] it was held that if a pleader purports to do something which he has no power or capacity to do, what he purports to do can have no legal effect. In that case an execution application was presented by a pleader without any documentary authority in his favour by the decree-holder and it was held that the pleader having no capacity or power to act, the application had no legal effect as not having been made in accordance with law. With regard to the first three of these cases it was argued that they have no application to the present case as they relate to the presentation of appeals, which is provided for by O. 41, R. 1, which is to the following effect:

> Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. . . . . .

Similarly with regard to the Madras case it was said that it relates to the presentation of an application for execution. We are of opinion however that what was held in the above cases is applicable with equal force to the presentation of plaints. Order 3, R. 1 contains a general provision relating to procedure in Courts and is as much applicable to the presentation of suits as to that of appeals and applications for execution. Order 41, R. 1 is in fact a combination of the provisions of S. 26 and O. 3, R. 1. The presentation of every document in Court must therefore be governed by O. 3, R. 1. The presentation of a plaint, memorandum of appeal or an application to the Munsarim of a Court is undoubtedly an "act in any Court" so that it is imperative that that presentation should be made by the party in person or by his recognized agent or by a pleader. This view finds support from the decision of the Lahore High Court in A I R 1938 Lah 698[5] in which it was held that a pleader who puts in an application on behalf of a litigant acts for him and cannot therefore do so unless he is authorized in writing by him. Similarly it was held by the Rangoon High Court in 4 Rang 249[6] that an advocate "acts" when he files a memorandum of appeal or cross-objections or any other document in a case.

The learned counsel for the appellant strongly relies on the case in 54 ALL 57[7] decided by a Full Bench of that Court. It was no doubt held in that case that omission to comply with the provisions regarding the presentation of plaints is a mere irregularity and that if a person presenting it is not properly authorized, the presentation would be irregular and the Court would then have the discretion to allow the irregularity to be cured or not. In that case a person alleged to be under 18 years of age filed a suit for pre-emption under the guardianship of his mother. The plaint was signed by the mother and by a pleader appointed under a vakalatnama bearing her signature. On the plaintiff's minority being questioned by a rival pre-emptor the trial Court thought that because the plaintiff himself had been prosecuting the suit there was no serious defect in the frame of the suit. The lower appellate Court took a contrary view of the legal position of the plaintiff and remitted an issue for a finding on the question of minority. It was found that the plaintiff had attained majority before the institution of the suit. Thereupon, the lower appellate Court dismissed the suit. Their Lordships of the Allahabad High Court having regard to the equities of the case and considering the fact that the plaintiff had been prosecuting the suit in person remanded the suit with direction to allow the plaintiff to amend the description of himself in the plaint and then dispose of it according to law. In this case the learned Judges did not hold that O. 3, R. 1, Civil P. C., does not apply to the presentation of a plaint but only expressed a doubt on the point. Moreover they themselves remarked:

> We do not mean to imply that a plaintiff has the right to get his plaint presented by a man in the street.

They no doubt lay down that the presentation of a plaint by a person not properly authorized would be an irregularity and that the Court would have discretion to allow the irregularity to be cured or not; but the stage at which the irregularity in the present case could have been cured has long passed. The appellant made no attempt whatever in the trial Court to get the irregularity cured and it is now too late in the day to cure it, the application being barred by time. The learned counsel has also referred us to the case in 164 I C 442.[8] In

4. ('37) 24 A I R 1937 Mad 239 : 165 I C 659 ; I L R (1937) Mad 820 : 71 M L J 604, Nandamani Anangabhima v. Modono Mohono Deo.
5. ('38) 25 A I R 1938 Lah 698 : 179 I C 755 : I L R (1938) Lah 417 : 40 P L R 235, Mian Bashir Ahmad v. Mrs. Mary Minck.
6. ('26) 13 AIR 1926 Rang 215 : 98 I C 15 : 4 Rang 249, In the Matter of Filing Powers.
7. ('31) 18 A I R 1931 All 507 : 134 I C 26 : 54 All 57 : 1931 A L J 777 (FB), Wali Muhammad Khan v. Ishaq Ali Khan.
8. ('35) 164 I C 442 : 39 C W N 534 : 62 C L J 277, Chandra Kant Hazra v. Rajani Kanta Das.

this case also it was held that where a plaint has been filed by a pleader who has accepted the vakalatnama which was not signed by the plaintiff the presentation of a plaint is an irregular presentation and the matter can be regularized in one manner, namely by an order of condonation passed by the Court; but as we have just said, the stage at which the order of condonation could have been passed expired long ago. It was argued that as the Court allowed Mr. Yusuf Husain and another pleader to appear in the case, before it on several dates, this amounted to condonation of the defect in the presentation of the application; but the fact that Mr. Yusuf Husain was allowed to represent the plaintiff in Court was presumably due to the fact that the Court's attention had not up to that time been drawn to the irregularity in the presentation of the application. In the Calcutta case[8] relied on by the learned counsel himself and just referred to it was said:

> But certainly a party will not be allowed to urge that he himself has put the thing in order by altering or correcting the record himself . . . . without a reference to the Court.

The case in 1 N W P H C R 154,[9] in which it was held that the filing of a written statement is not an appearance in Court, was also relied on by the learned counsel for the appellant but that case has no bearing on the present case as no question of "appearance" is involved in the present case. We therefore see no reason to interfere with the order of the Court below and dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

9. ('69) 1 N W P H C R 154, Purus Ram v. Juyuntee Pershad.

A. I. R. 1941 Oudh 172

YORKE AND GHULAM HASAN JJ.

Hirday Narain and another —
Plaintiffs — Appellants

v.

Babu Ram and others —
Defendants — Respondents.

Second Appeal No. 58 of 1937, Decided on 11th November 1940, against order of Sess. and Civil Judge, Lucknow, D/- 10th November 1936.

(a) Easements Act (1882), S. 56—Transfer by licensee in favour of third person—Transferee is rank trespasser as against original grantor.

In the case of a transfer by a licensee in favour of a third person which contravenes the provisions of S. 56, the transferees of the licensee, who are evidently not in possession as trespassers against their own transferor, are rank trespassers as against the original grantor who can at once eject them. [P 174 C 2]

(b) Pardanashin lady — Execution of deed by —Burden is on person founding on deed to show that grantor intelligently understood it—Burden not discharged—Deed is void ab initio—Question of undue influence arises only when document is prima facie valid.

In cases in which a document executed by a pardanashin lady comes in question, the burden is always in the first instance on the persons founding on that document to show that the grantor intelligently understood the deed. If they fail to establish that point, then the document is not binding on the executant or anyone else and is void ab initio. It is only when the document is prima facie valid, proof having been given of intelligent execution, that the question of undue influence arises: *Case law relied on.* [P 177 C 1]

(c) Limitation Act (1908), Arts. 44 and 142—Transfer found void ab initio — Suit for possession—Article 142 applies and not Art. 44—Cause of action accrues at date of dispossession.

A suit for possession in a case where the transfer is found void ab initio is governed by Art. 142 and not Art. 44 as the cause of action must be regarded as having accrued at the date of dispossession. [P 177 C 1]

(d) Limitation Act (1908), Arts. 36 and 39—Removal of earth of plot by persons having no title or grant is tortious act and falls under Article 36.

The removal of the earth of a plot by persons who have no title or grant in respect of that earth given by the plaintiffs is a tortious act which comes within the scope of Art. 36. [P 177 C 2]

D. P. Khare — for Appellants.

Anant Prasad Nigam and Jagdish Narain — for Respondents 1, and 2 to 4, respectively.

Judgment. — This is a second appeal by the plaintiffs in a suit to recover possession of a plot No. 769 of mahal Parshotam Narain, village Bhilawan in Lucknow district, and also for damages and mesne profits. This plot, which has an area of 2 bighas 7 biswas, formed part of the 4½ annas share of Parshotam Narain, father of the plaintiffs who is said to have died in 1918. After the death of Parshotam Narain, his widow Mt. Binda Dei was appointed guardian of her two minor sons, Hirday Narain and Jagdish Narain. On 29th December 1928, Mt. Binda Dei executed a deed, Ex. B-5, whose proper description is doubtful, in favour of one Harnam Singh, by which she transferred to Harnam Singh the clay of the plot in question, originally for a period of three years, but with a right of extension of the period on payment of Rs. 12 per annum rent. Mt. Binda Dei gave possession to Harnam Singh on 26th January 1930 under a 'dakhlnama' Ex. B-3. On the following day, 27th January 1930, Harnam Singh sold his rights under Ex. B-5 to one Sardar Bai Ant Singh under a deed of transfer, Ex. B-4, and three and a half years later on 6th Ocober 1933 the transferee sold his rights to Babu Ram, defendant 1, under a document, Ex. B-2. Finally

on 15th February 1935 Babu Ram, defendant 1, transferred his rights to the present defendants 2 to 4 under a document, Ex. B-1. It may be noted that the deeds, Exs. B-4 and B-2 have not been proved. Two other documents have been mentioned, Ex. B-7 dated 29th November 1928, a receipt for Rs. 200 paid by Harnam Singh to Mt. Binda Dei and Ex. B-6, a receipt for Rs. 349-4-0 paid by Harnam Singh to Mt. Binda Dei on 26th January 1930, the same day on which Harnam Singh was put in possession.

Plaintiff 1, Hirday Narain, became major on 8th November 1930. He did not, however, institute any suit at that time. It appears that plaintiff 2, Jagdish Narain, became major on 20th January 1933. This was mentioned in the statement of the defendants and the plaintiffs made no attempt to controvert it. The present suit was filed on 27th January 1936. It will be clear that if this document was a transfer effected by a guardian and a valid document it was necessary for the plaintiffs to sue to have it set aside within three years of attaining majority, and as this suit was not instituted within three years of the majority of either plaintiff it must necessarily fail if Art. 144, Limitation Act, was applicable. On the other hand, if this transfer was a transfer void ab initio then the article applicable for recovery of possession is Art. 142 and the period of limitation being 12 years from the date of the execution of the document, Ex. B-5, or failing that from the date of delivery of possession, the present suit would be well within time for both plaintiffs.

The plaintiffs came into Court alleging that the present defendants had entered into wrongful possession in the year 1934, and claiming Rs. 400 per bigha as damages for the digging out of clay from the plot and Rs. 12 per annum as mesne profits. The defendants put forward the plea that they had been in possession as successors-in-interest of Harnam Singh who obtained possession under a valid document which was for the benefit of the minors and therefore binding on them. It was said that plaintiff 1 took rent from the defendants after he had become major and he was therefore estopped by ratification. It was further said that plaintiff 1 having become major on 8th November 1930 and no suit having been filed within three years from that date the present suit was barred by limitation, Art. 44, Limitation Act, being applicable. To this the plaintiffs replied that Mt. Binda Dei was a pardanashin lady, that there had been no intelligent execution of Ex. B-5 and that document was therefore void ab initio. They further said that in any case no sanction of the District Judge had been obtained for the execution of this document which must therefore in any case be voidable. Thirdly, they contended that the document was not sufficiently stamped and was unregistered and therefore the lessee had in no case greater rights than a licensee and the licence was revocable at will.

A number of issues were framed. On these issues the trial Court held that Ex. B-5 was genuine, that Mt. Binda Dei was a pardanashin lady and that Ex. B-5 was not intelligently executed by her. It was further held that Ex. B-5 was a licence coupled with a grant, and therefore irrevocable until the object of the grant was fulfilled. On issues 3 and 4 it was held that there was no ratification and that the plaintiffs were not estopped. On issue 5 the finding was that the document was not for the benefit of the minors or made in due course of management. Finally, on issue 6, it was held that Art. 44, Limitation Act, was applicable, but the learned Munsif seems to have lost sight of the fact that if Art. 44 was applicable, then as the suit had been filed more than three years after the younger plaintiff had become a major, it must necessarily be barred entirely. Thinking that the younger of the two plaintiffs had not been a major for more than three years at the date of the institution of the suit, he went into a discussion of the applicability of S. 7, Limitation Act, and held that as plaintiff 1 was the manager of the joint family property as soon as he became a major, he had authority to give a valid discharge in respect of the right of instituting a suit and had done so by not instituting a suit within three years of his attaining majority. He held that in these circumstances a suit could not be maintained by the younger brother as the right of suit had already become barred by limitation.

In the lower appellate Court very much the same points were raised as before. The learned Sessions and civil Judge in appeal similarly came to the conclusion that the document "Ex. B-5 had not been properly understood by Mt. Binda Dei and was therefore not binding on her sons." He also remarked, "Ex. B-5 having been executed without the sanction of the Judge is voidable at the instance of the plaintiffs." Later on, he went on to hold that the lower Court was justified in holding that the contesting

defendants were rank trespassers. He then entered into a lengthy discussion of the application of S. 7, Limitation Act, and towards the end of his judgment he remarked :

> Even assuming that Ex. B-5 had not the sanction of the District Judge behind it, it could only be avoided. It was not null and void ab initio. No suit was brought to avoid the document. It was therefore a valid transfer and Art. 44 applies to valid transfers.

Holding then that Art. 44 was applicable and that S. 7, Limitation Act, barred a suit by the younger plaintiff after the elder had failed to institute a suit within limitation, he affirmed the decision of the Court of first instance dismissing the suit. Incidentally he had held that the transfer which the plaintiffs could avoid was the transfer under Ex. B-5 and not the subsequent transfers, and therefore the fact that the present defendants were rank trespassers did not bring in the application of Art. 144. Apparently he must have based this conclusion on the view that the contesting defendants, even though they might be rank trespassers, were trespassers against the original licensee or lessee Harnam Singh and not against the plaintiffs. The present appeal has been argued at great length and a number of points have been raised. It is questionable whether it is really necessary to deal with all these points on the view which we take of the document, Ex. B-5. The first point which has been raised is whether this document Ex. B-5 is really a lease or, as has been held by the lower appellate Court, a licence coupled with a grant. The view that the document is a licence coupled with a grant is based on the reasoning that what it really amounts to is a licence to enter upon plot No. 769, coupled with a transfer of moveable property that is the earth of which that plot is composed to a depth of 7 feet.

We think that learned counsel who have argued this appeal have missed the implications of some of the arguments which they have put forward. For the appellants it is contended that this document is nothing more nor less than a lease, but if it is a lease there can be no room for doubt that the rights of the lessee under a lease other than a purely agricultural lease are ordinarily transferable, and in that case, as has been argued on behalf of the respondents, the subsequent transferees of the lessee, in case the deeds of transfer in their favour are not proved, cannot be anything worse than trespassers as against the lessee. But the lessee's rights have not been terminated and are not terminated unless and until the earth of this plot is fully dug out up to the depth mentioned in the document, since no period has been prescribed within which the lessee must either complete his digging or even if he has not completed his digging, vacate the plot. If therefore this document is really a lease as alleged by the plaintiffs, the plaintiffs are not in a position to institute a suit for possession but only to sue their own transferee for rent of the plot as provided in the document. In this document a certain sum was taken as the consideration for the grant of this plot for three years and thereafter a rent of Rupees 12 per annum (or possibly Rupees 12 per bigha per annum) was fixed. On the other hand the position put forward by the defendant-respondents is, as we have said already, that this is a case of licence coupled with a transfer of moveable property. In that case it did not require registration nor in view of the provisions of S. 60, Easements Act, (5 of 1882) would it be revocable. That section provides that "a license may be revoked by the grantor, unless (a) it is coupled with a transfer of property and such transfer is in force". On the other hand, learned counsel seems to have forgotten that in the ordinary way a license is not transferable. Section 56 of the same Act provides:

> Unless a different intention is expressed or necessarily implied, a license to attend a place of public entertainment may be transferred by the licensee; but, save as aforesaid, a license cannot be transferred by the licensee or exercised by his servants or agents.

It appears to us clear that the necessary result is that in case of a transfer by a licensee in favour of a third person which contravenes the provisions of S. 56, the transferees of the licensee, who are evidently not in possession as trespassers against their own transferor, will be rank trespassers as against the original grantor who will at once have a right to eject them. A very large number of rulings have been quoted to us in connexion with the question whether this document is really a lease or a license coupled with a grant, but we consider that the question does not call for decision because we are of opinion that whether it was intended to be a license or a lease and whether in law it is a license on the one hand or a lease on the other, in either case it is a document which is void ab initio, and conferred no rights whatever upon the grantee. As we have mentioned already the learned Munsif held that Mt. Binda Dei is a pardanashin lady and he further held that the document Ex. B.5 was

not intelligently executed by her. He pointed out first that there was not a word in the evidence to suggest that the terms of the document were explained to or understood by her, secondly that whereas the ordinary rate of sale of clay for brick making in this particular village was Rs. 400 a bigha, she was made to sell the clay of this plot for Rs. 265 per bigha, and thirdly that she was made to state in the deed that the lessee or licensee might remain in occupation of the plot for as long as he liked, whereas the ordinary and proper arrangement in such cases is to fix a term within which the lessee must vacate the plot. The learned Sessions and civil Judge in dealing with this point confirmed the finding of the trial Court that Mt. Binda Dei was a pardanashin lady. He further affirmed the decision that the document was not properly understood by Mt. Binda Dei, and he proceeded to hold that it was not binding on her sons, but we take the view that it was only voidable and not void. The crucial question which has to be decided in this appeal is whether this document is void ab initio or is merely voidable at the instance of the sons. If on the one hand it is void ab initio it confers no title on the transferee and so far as the plaintiffs are concerned both the original transferee and his successors (whether by a valid deed or otherwise) are all trespassers, against whom the plaintiffs are entitled to recover possession and damages by a suit instituted at any time within 12 years of either Ex. B-5 or the delivery of possession thereunder. On the other hand if the document is only voidable, Art. 44, Limitation Act, is clearly applicable.

Learned counsel for the appellants contends that in all cases of documents executed by pardanashin ladies whether the suit is by persons seeking to treat such a document as Ex. B-5 executed by a pardanashin lady as void or by persons seeking to enforce such a document, the burden of proof is always on the persons who seek to rely on the document to show that the document was intelligently executed by the pardanashin lady. If they fail to establish this point, then the matter is at an end. The document is void just as if it had been executed for example by a minor or an idiot. For the plaintiffs-appellants reliance has been placed first on the decision of their Lordships of the Privy Council in 35 I A 98.[1]

1. ('08) 35 Cal 551 : 35 I A 98 : 4 L B R 266 : 12 C W N 562 : 7 C L J 528 (P C), Pethorpermal Chetty v. R. Muniandi Servai.

That was not a suit quite of the present kind but the document in that case was void as being of a fictitious nature (the word used is "bename," but the judgment shows that it was really a fictitious and colourable document) and it was held that it was inoperative and did not require to be set aside, and consequently Art. 144 and not Art. 91 of Sch. 2, Limitation Act, was applicable. On the whole this case is therefore only applicable on the general point as to the effect on the question of limitation if it be found that Ex. B.5 is void. In the same connexion reliance has been placed on 1937 O W N 1012[2] in which it was held that

a minor is incompetent to make a contract. Any agreement which he enters into is not binding upon him as a contract. If therefore a minor along with others executes a sale deed of certain property, the sale deed is null and void ab initio so far as it relates to the minor's share. It is not necessary for the minor to get the sale deed set aside before getting possession. The sale deed does not stand as a bar between him and the suit for possession. He can therefore sue for possession directly, and the period of limitation for the suit is, under Art. 144 read with S. 6, Limitation Act, 12 years from the date of his attaining majority.

This proposition has not been disputed. Coming now to the question whether Ex. B.5 is a void document reliance has been placed on A I R 1939 All 348[3] in which it was held that :

If a deed of relinquishment executed by a pardanashin lady is a void document, it is not necessary to avoid it or to get it cancelled; and Art. 91 of the schedule to the Limitation Act has no application to a case where a suit is brought by her for possession upon declaration that an instrument under which the defendant claims is void.

In this case the learned Judges of the Division Bench remarked :

The question arises whether this document stands in the way of the plaintiffs when they claim possession for, if it does, then it is necessary for them to get it cancelled. It can stand in their way only if the document is a valid document and has to be avoided, but if the document is a void document, it is not necessary to avoid it or to get it cancelled, and in the view that we have taken of this document it is clearly a void document.

In arriving at this decision that the document in suit before them was a void document the learned Judges referred among others at p. 361 to two very important decisions of the Privy Council on this subject. In 41 I A 23,[4] their Lordships said:

The law throws around her (a pardanashin lady) a special cloak of protection. It demands that the

2. ('37) 24 A I R 1937 Oudh 521 : 171 I C 187 : 1937 OWN 1012, Mt. Bachai v. Hayat Mohamad.
3. ('39) 26 A I R 1939 All 348 : 182 I C 801 : 1939 A L J 642, Mt. Izhar Fatma Bibi v. Mt. Ansar Fatma Bibi.
4. ('13) 36 All 81: 21 I C 985: 41 I A 23:16 O C 378 (PC), Kali Bakhsh Singh v. Ram Gopal Singh.

burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to and was really understood by, the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor . . . . The rule of law that a gift cannot stand unless it is proved that the lady had independent advice is not an absolute rule of law. The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction.

In another very well-known case, 52 I A 342,[5] their Lordships further observed:

The law of India contains well-known principles for the protection of persons who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. . . . The case of an illiterate pardanashin lady, denuding herself of a large proportion of her property without professional or independent advice, is one on which there is much authority. Independent legal advice is not in itself essential. . . . The real point is that the disposition made must be substantially understood and must really be the mental act, as its execution is the physical act, of the person who makes it. . . . Again, the question arises how the state of the settlor's mind is to be proved. That the parties to prove it are the parties who set up and rely on the deed is clear. They must satisfy the Court that the deed has been explained to and understood by the party thus under disability, either before execution, or after it under circumstances which establish adoption of it with full knowledge and comprehension. . . .the whole doctrine involves the view that mere execution by such a person, although unaccompanied by duress, protest or obvious signs of misunderstanding or want of comprehension, is in itself no real proof of a true understanding mind in the executant. Evidence to establish such comprehension is most obviously found in proof that the deed was read over to the settlor and, where necessary, explained. . . . The extent and character of the explanation required must depend on the circumstances . . . . On the other hand, the doctrine cannot be pushed so far as to demand the impossible. The mere declaration by the settlor, subsequently made, that she had not understood what she was doing obviously is not in itself conclusive. It must be a question whether, having regard to the proved personality of the settlor, the nature of the settlement, the circumstances under which it was executed, and the whole history of the parties, it is reasonably established that the deed executed was the free and intelligent act of the settlor or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course, duress and actual undue influence are separate matters.

The necessity of proof of intelligent execution of a document executed by a pardanashin lady has been emphasized even more strongly in two recent cases of the Privy Council. In A I R 1940 P C 134[6] the head-note runs as follows :

In the case of an execution of a document by a pardanashin lady, though there may not be a clear understanding of each detail of a matter which may be greatly involved in technicalities, there may still be an intelligent comprehension of the bargain on the part of the lady. In such a case the bargain is good and is good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady, the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed. The protection extended to a person in her situation is protection against being held bound by a transaction which never had her free and intelligent consent.

An old pardanashin lady having considerable capacity for business executed a mortgage deed which was read over to her, though it was not explained. She understood its effect except that she did not understand that she was making herself personally liable to repay the money borrowed :

Held that if for want of explanation the lady did not understand an important feature of the transaction, it could not be held that her mind and free consent went with her act in executing the deed and therefore the mortgage deed did not bind her at all.

In a case decided very shortly after this case, A I R 1940 P C 147=1940 A L J 662[7] it was observed :

In the case of a pardanashin lady the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon the deed, and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by her. Where a pardanashin lady secured a loan on the security of certain agricultural lands and dwelling house belonging to her in her absolute title, and it was found that although she was aware of the contract in the mortgage deed so far as it related to agricultural lands but she was not so aware as to the inclusion of her house property and that the deed was not explained to her:

Held, that the whole deed was affected. Furthermore it could not be held that the mortgage was severable and the deed was binding on the lady so far as it related to the agricultural property.

Held further, that if those founding on the deed fail to show that the grantor intelligently understood the deed, that is an end of the matter. It is only when they have established the grantor's intelligent understanding of the deed, that the question of undue influence having affected such intelligent understanding can arise.

In the light of these decisions it appears to us to be settled law now that in cases in

5. ('25) 12 AIR 1925 P C 204 : 89 I C 649 : 52 I A 342 : 47 All 703 : 28 O C 338 (PC), Farid-un-nisa v. Mukhtar Ahmad.

6. ('40) 27 A I R 1940 P C 134 : 189 I C 509: ILR (1940) 2 Cal 486 : ILR (1940) Kar P C 271 (PC), Hem Chandra Roy v. Suradhani Debya.

7. ('40) 27 A I R 1940 P C 147 : 189 I C 890: ILR (1940) Kar P C 341 : 1940 A L J 662 (PC), Bank of Khulna Ltd. v. Jyoti Prokash Mitra.

which a document executed by a pardanashin lady comes in question, the burden is always in the first instance on the persons founding on that document to show that the grantor intelligently understood the deed.

If they fail to establish that point, then the document is not binding on the executant or anyone else and is void ab initio. It is only when the document is prima facie valid, proof having been given of intelligent execution, that the question of undue influence arises. In the present case, on the findings of fact, it is clear that the defendants have completely failed to establish intelligent execution of Ex. B5 on which their whole case rests. It follows that that document was void ab initio and conferred no rights upon the grantee Harnam Singh or on any of his transferees. We would remark before leaving this point that in our opinion the Courts below could not but come to the conclusion that the document was not understood. They had, before them first the fact that the document was not read over to the lady. It is a document which might perhaps have been regarded as a lease, and as there was no time limit, a lease for a period in excess of five years, and if so, it required the sanction of the District Judge which was not obtained. Similarly, if it was a lease, it required registration, and the deed was never registered, but the crucial facts are the facts that it was not read over to the lady and that it was vitiated in itself by the fact that the consideration was below the rates generally in force and the fact that no term of years was fixed in the document.

On this view of the case, Art. 44 which provides a period of three years for a suit by a ward who attains majority to set aside a transfer of the property by his guardian, the period to run from the date when the ward attains majority, has no application to the present case. The article of the Limitation Act which is applicable to the suit in such circumstances is clearly Art. 142 as the cause of action must be regarded as having accrued on the date of dispossession, that is 26th January 1930. The plaintiffs have founded their suit on a cause of action said to have arisen in 1934 by the wrongful entry in that year on the plot in question of defendant 1. We are clear that while this is certainly a case resting on dispossession, the dispossession began as far back as 1930. It however makes no difference to the suit which is clearly within time on any view. It follows from the above that the plaintiffs' suit for possession must necessarily succeed. In regard to the question of damages and mesne profits the plaintiffs claimed mesne profits at Rs. 12 per annum although the letting value is said to be considerably higher, and there is no question that the whole of the period during which defendants 1 to 4 have held possession of this plot is within limitation of three years provided for a claim for mesne profits.

As regards the question of damages learned counsel for the respondents contends that the article of the Limitation Act which is properly applicable is Art. 36. For the plaintiff-appellants, it is contended that Art. 39 is applicable. Article 39 provides a period of three years for a suit for compensation for trespass upon immovable property, the period to run from the date of the trespass. It appears to us that this is not a mere suit for compensation founded on a trespass. The act of the defendants goes much further. Not merely have they trespassed on the plot but they have also removed much of the earth which goes to make up that plot. Article 36 provides a period of two years only for a suit for compensation for any malfeasance, misfeasance or nonfeasance independent of contract and not herein specially provided for, and the period runs from the date when the malfeasance, misfeasance, or nonfeasance takes place. It appears to us that the removal of the earth of this plot by persons who had no title or grant in respect of that earth given by the plaintiffs is a tortious act which comes within the scope of Art. 36. On the other hand, we have it that even accepting defendant Babu Ram's own statement, his possession cannot date further back than 6th October 1933. Defendant Babu Ram himself pleaded that he had only taken sufficient earth to make 25,000 bricks. So far as the evidence goes, it appears to us to indicate that at the time of the transfer to Babu Ram there were about one and a quarter bighas of land not yet dug, and at the time of the transfer of Babu Ram to defendants 2 to 4, there was about one bigha left. It is in evidence that the ordinary rate for sale of earth to brick makers is Rs. 400 per bigha, and on this basis the amount for which defendant 1, Babu Ram, is liable is Rs. 100. In the case of defendants 2 to 4 as there is no evidence whatever on the record to show that they actually dug any earth from the plot in dispute, it follows that no decree can be given against them for damages, that is compensation for removal of earth.

The plaintiffs are also entitled to mesne profits at the rate of Rs. 12 per annum computed from 1st January 1934. We treat that date, and not 6th October 1933, as the proper date for calculation of mesne profits in view of the fact that the plaintiffs' own case is that the present defendants only came into possession in the year 1934. The plaintiffs are therefore entitled to a decree as against defendant 1 for compensation amounting to Rs. 100 as stated above and to mesne profits calculated at Rs. 12 per annum for the period from 1st January 1934 to the date of the transfer to defendants 2 to 4. As against defendants 2 to 4 the plaintiffs are entitled to a decree for possession and also to a decree for mesne profits at the rate of Rs. 12 per annum for the period from the date of the transfer in their favour to the date on which possession may ultimately be given to the plaintiffs. The amount realizable from these defendants should therefore be calculated in the execution department. On this view we allow the present appeal and order that the plaintiffs' suit be decreed as stated above. As the plaintiffs have to a great extent failed in their suit to recover damages but have succeeded on the other points, we order that the plaintiffs should get half of their costs only in all three Courts. The amount of costs shall be realizable to the extent of one-half against defendant 1 and the other half against defendants 2 to 4.

G.N./R.K. *Appeal allowed.*

A. I. R. 1941 Oudh 178

BENNETT AND GHULAM HASAN JJ.

Abdul Rahman, Official Receiver — *Plaintiff* — Appellant

v.

N. Sultan Begam and another — *Defendants* — Respondents.

First Appeal No. 45 of 1937, Decided on 8th November 1940, against order of Sess. and Civil Judge, Lucknow, D/- 18-12-1936.

Transfer of Property Act (1882), S. 53 — Suit for declaration under S. 53 that gift is void — Onus is on plaintiff to show gift to be fraudulent and fictitious — Gift by husband to wife — Suit under S. 53 —Crucial question is one of intention to defraud creditors —All creditors at date of deed paid off before suit—Donor not incurring fresh debts after execution of deed — Aforesaid facts though not conclusive very strongly negative intention to defraud.

In a suit for a declaration under S. 53 that a gift is fraudulent and fictitious, having been effected to defraud the donor's creditors, the onus of proving that the gift is fraudulent lies upon the plaintiff : A I R 1936 Lah 222, *Rel. on.*

[P 179 C 2]

Where a person executes a deed of gift in favour of his wife and a subsequent creditor brings a suit for a declaration that the deed was executed fraudulently in order to defeat and delay the creditors, the crucial question is one of intention to defraud the creditors and the facts that all the creditors existing at the date of the deed have been paid off before the institution of the suit and that no fresh debts were incurred by the donor for about three years after the execution of the deed even though not conclusive afford a very strong evidence negativing the intention to defraud : A I R 1931 Oudh 134 and A I R 1936 Lah 222, *Rel. on;* A I R 1938 Oudh 230 and AIR 1929 All 458, *Disting.*

[P 179 C 2]

Ram Bharose Lal for Kashi Prasad Srivastava — for Appellant.

Ali Zaheer, S. M. Yusuf and Abid Husain — for Respondent 1.

S. M. Yusuf — for Respondent 2.

Judgment. — This is a first civil appeal against the judgment and decree dated 18th December 1936 passed by the Sessions and Civil Judge of Lucknow in a suit for declaration by the plaintiff-appellant. Defendant 2 is the husband of defendant 1. Defendant 2 was adjudged insolvent on 27th March 1935. The plaintiff-appellant who is an Official Receiver was authorized by the learned Judge of the Small Cause Court exercising insolvency jurisdiction to file the present suit which has given rise to this appeal. The suit arises out of the following facts. Nawab Abida Begam who was a Shia Mahomedan lady died on 25th September 1924 leaving three step-sisters, Mehdi Begam, Sakina Begam and Sughra Begam as her heirs. Sughra Begam died leaving a daughter's daughter, Qamar Ara Begam. Nawab Abida Begam was twice married. Her first husband died in 1889. She then married one Abid Husain Khan who died on 22nd November 1910. Abid Husain Khan had two daughters from his first wife, Sultan Begam, defendant 1, and Fatima Begam. Sultan Begam was married to Taqi Ali Khan, defendant 2, in 1902. It appears that on the death of Nawab Abida Begam her three step-sisters were entitled to one-third share each in the inheritance left by her and that upon the death of Sughra Begam her one-third share devolved upon Qamar Ara Begam, her grand-daughter. Mt. Sultan Begam acquired rights of Mehdi Begam and Sakina Begam by purchase so that she became entitled to two-thirds share in the property of Nawab Abida Begam. Qamar Ara Begam instituted some time in 1927 a suit for partition of her one-third share in the estate left by Nawab Abida Begam against Sultan Begam impleading Taqi Ali Khan, her husband, and also their children. Taqi Ali Khan was impleaded in the suit on the ground that he

was alleged to be a benamidar for Nawab Abida Begam in respect of certain properties which stood in his name.

It was also alleged in the plaint that certain properties which really belonged to Nawab Abida Begam were acquired benami in the name of Sultan Begam. Out of the properties in dispute in the suit there were war loan certificates of the face value of Rs. 24,000, standing in the name of Sultan Begam, and war bonds of the face value of Rs. 12,000, standing in the name of Taqi Ali Khan. The subordinate Judge held that these properties were gifted by Nawab Abida Begam to Sultan Begam and Taqi Ali Khan, in whose names they stood, and were not benami transactions. That decision was set aside by the Chief Court. Their Lordships of the Privy Council, however, set aside the decision of the Chief Court and restored that of the subordinate Judge. It may be mentioned that Sultan Begam and Taqi Ali Khan both sold the war loans and war bonds and in their place purchased on 14th July 1925, from one Nawab Sultan Bahadur an annuity of Rs. 2100 for Rs. 35,000 under a sale deed (Ex. 1). Nawab Sultan Bahadur had sold certain properties to the Improvement Trust of Lucknow and had acquired a perpetual maintenance of Rs. 300 a month as part of the sale consideration which maintenance was charged over certain nazul property. It was out of this maintenance of Rs. 300 per month that Nawab Sultan Bahadur sold the annuity at the rate of Rs. 175 per mensem. On 21st April 1927, Taqi Ali Khan made a gift of his half share in the monthly annuity of Rs. 175 in favour of his wife Sultan Begam by a registered deed of gift dated 21st April 1927.

The case of the plaintiff is that Taqi Ali Khan dishonestly and fraudulently executed the aforesaid deed of gift of his half share in the annuity in favour of his wife Sultan Begam without any consideration in order to defraud his creditors. It is also stated in the plaint that Taqi Ali Khan continued to borrow money even after the date of the deed of gift from one Lachhman Prasad and others and executed promissory notes in their favour. The plaintiff as Official Receiver has thus brought the suit on behalf of the creditors for a declaration that the half share transferred under the aforesaid deed of gift is liable to attachment and sale in the Insolvency Suit No. 95 of 1934 decided by the Judge, Small Cause Court, Lucknow, on 27th March 1935. Sultan Begam and Taqi Ali Khan filed separate defences. Both the defendants pleaded that the deed of gift was perfectly genuine and was executed in good faith without any intention of defrauding the creditors. It is also alleged in the written statement that Taqi Ali Khan at the time of the gift was not indebted to anybody, except Lala Beni Madho and Basant Rai, and this debt also had been paid up by him before he had been adjudged insolvent by the insolvency Court. The litigation between Qamar Ara Begam and the defendants was admitted. Some other minor defences were raised but they are not material for the purposes of this appeal. The trial Court framed an issue to the effect whether the deed in suit was executed to defraud and delay the creditors both previous and subsequent. It held after considering the oral and documentary evidence and the circumstances of the case that the plaintiff had not established any fraud regarding the deed of gift and dismissed the suit. The plaintiff has preferred this first appeal.

Under S. 53, T. P. Act, every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed. It is a well settled rule of law that in a suit for a declaration under S. 53, T. P. Act, that the gift by a husband to his wife is fraudulent and fictitious, having been effected to defraud the donor's creditors, the onus of proving that the gift is fraudulent lies upon the plaintiff : *vide* A I R 1936 Lah 222.[1] It has been held in AIR 1931 Oudh 134[2] that where a person executes a deed of wakf in favour of his sons and a subsequent creditor brings a suit for a declaration that the deed was executed fraudulently in order to defeat and delay the creditors, the crucial question is one of intention to defraud the creditors for setting aside the deed at the instance of the plaintiff and the facts that all the creditors existing at the date of the deed have been paid off before the institution of the suit and that no fresh debts were incurred by the donor for about three years after the execution of the deed even though it may not be conclusive, afford a very strong evidence negativing the intention to defraud. This case was relied on by the Lahore High Court in AIR 1936 Lah 222[1] referred to above.

1. ('36) 23 A I R 1936 Lah 222 : 162 I C 922, Mt. Bibo v. Sampuran Singh.
2. ('31) 18 A I R 1931 Oudh 134 : 129 I C 333 : 6 Luck 397 : 7 O W N 1115, Zahir Ahmad Khan v. Devi Dayal.

The plaintiff produced three witnesses, Pyare Mirza (P. W. 1), Mazhar Hysain (P. W. 2) and Lachhman Prasad (P. W. 3) to prove that Taqi Ali Khan executed the deed of gift with a view to defraud his creditors. Pyare Mirza was at one time a clerk of Mirza Abid Husain, an Advocate of Lucknow. He is the husband of the sister of Taqi Ali Khan. This witness is an attesting witness to the deed of gift. He states that Taqi Ali Khan consulted him as regards the advisability of executing the deed of gift. Taqi Ali Khan is alleged to have told the witness that he was heavily indebted and as Qamar Ara Begam was going to file a suit he would have to borrow money and therefore sought the advice of the witness as to how he could save the property. The witness then suggested to Taqi Ali Khan that he should transfer the property in favour of somebody in whom he had perfect confidence. According to the witness, Mirza Abid Husain, advocate, was the legal adviser of both Taqi Ali Khan and Sultan Begam and that Taqi Ali Khan had a consultation with Mirza Abid Husain in his presence. Taqi Ali Khan is said to have spoken to Mirza Abid Husain and told him the advice that he had got from the witness about the transfer of the property and Mirza Abid Husain is said to have approved of that advice. Later Mirza Abid Husain, the witness states actually dictated the draft of the deed of gift. It was five or six months after the execution of the deed of gift that Qamar Ara Begam filed the contemplated suit. The learned trial Judge has disbelieved this witness and we agree with him. It is somewhat incomprehensible why Taqi Ali Khan should not consult his legal adviser Mirza Abid Husain straightway but, on the other hand, seek his approval to the advice already given by a mere clerk of his brother-in-law. It is also incredible that Taqi Ali Khan should disclose his fraudulent intention to the witness. Mirza Abid Husain has not been produced by the plaintiff in this case.

The learned counsel appearing on behalf of the appellant has urged that it was the duty of the defendants to produce Mirza Abid Husain in rebuttal of the evidence given by Pyare Mirza (P. W. 1). The learned counsel concedes that Mirza Abid Husain would have been a witness of unimpeachable integrity, had he entered into the witness box. If this is so, there is all the more reason that Mirza Abid Husain should have been produced by the plaintiff to substantiate the story put into the mouth of Pyare Mirza. The burden of proving the fraudulent intention heavily lay upon the plaintiff and there is no reason whatsoever why the best evidence was withheld. The second witness Mazhar Husain states that Taqi Ali Khan approached the witness to ask him to arrange a loan for Rs. 10,000 for him and that he took him to Lau Maharaj, a money lender. This money lender wanted some property as security. Taqi Ali Khan told the money lender that he would bring the title deeds, but when he left the money lender's place he told the witness that he was really trying to protect the property and would not give it as security. Taqi Ali Khan, who has come into the witness box as D. W. 1, denies acquaintance with this witness. The learned trial Judge has disbelieved the evidence of this witness and we are not prepared to differ from him in his estimate of the evidence. The evidence of the last witness, P. W. 3, Lachhman Prasad, has also been rightly disbelieved by the trial Court on the ground that he is an interested witness and is anxious to have the property in suit for the satisfaction of his debts. Taqi Ali Khan has been examined as D. W. 1 in the case and has stated that he was indebted only to Beni Madho Basant Rai at the time of the execution of the deed of gift to the extent of Rs. 4000. At that time Taqi Ali Khan possessed two properties, Munshiganj Khalaiq Bagh which he sold for Rs. 10,000, and the mortgagee rights in a certain house in Agha Mir ki Deorhi, which were sold in a court auction for Rs. 700. It appears from his evidence that he paid off the debt of Beni Madho Basant Rai and a joint debt of two other bankers out of the sale proceeds of Munshiganj Khaliq Bagh property.

It appears that from April 1927 till about May 1930 Taqi Ali Khan did not incur any debts. At any rate it is quite clear that the plaintiff has not furnished any evidence of borrowing by Taqi Ali Khan during this period. The learned counsel appearing on behalf of the plaintiff-appellant argues that the financial condition of Taqi Ali Khan was very bad and that the only property that he possessed at the time of the execution of the deed of gift was just enough to satisfy the debts outstanding against him. He further says that Taqi Ali Khan knew that Qamar Ara Begam was contemplating to file a suit and he would have to borrow money to fight out the case and with a view to saving his share in the annuity he resorted to the device of executing a gift in favour

of his wife in order to defraud future creditors. As we have stated above, the plaintiff has hopelessly failed to establish any fraud on the part of Taqi Ali Khan at the time of the gift and the mere fact that from 1927 to 1930 Taqi Ali Khan did not incur any debts was quite sufficient to rebut the likelihood of a fraudulent intention being present in the mind of Taki Ali Khan. The learned trial Judge has found that Taqi Ali Khan did not borrow any money for the suit filed by Qamar Ara Begam against him and his wife either in the trial Court or in the appeal to the Chief Court and that when he lost the appeal in the Chief Court and preferred an appeal to the Privy Council it was only then that he was required to borrow money. The judgment of the trial Court in Qamar Ara Begam's case was given on 23rd May 1928, while the judgment of the Chief Court, reported in 6 O W N 1112,[3] was given on 6th November 1929. The appeal to their Lordships of the Privy Council was not decided till 28th March 1933. Taqi Ali Khan could never have thought after he had succeeded in the trial Court that he would lose the appeal in the Chief Court with the result that he would have to borrow the money to fight out the case in the Privy Council. We are therefore of opinion that the circumstances pointed out on behalf of the plaintiff do not establish any fraudulent intention on the part of Taqi Ali Khan at the date of the gift to defraud his creditors in future.

Some argument has been addressed as regards the motive of the gift. There is no doubt that the deed mentions only one motive namely natural love and affection. In the evidence however Taqi Ali Khan on being questioned has stated that he was ill at the time of the gift and he thought that in case he died, his father with whom his relations were not cordial, might get a share in the property, and so in order to provide for his wife and children he made a gift to her. He also states that the annuity was bought by the money of his wife Sultan Begam in his name and in the name of his wife. It is not necessary for us to labour this point as we are convinced from the evidence and circumstances of this case that the plaintiff is not entitled to a relief for a declaration unless he succeeds in bringing his case within the four corners of S. 53, T. P. Act, and upon that point we agree with the trial Court that the plaintiff-appellant has failed to establish fraud. Curiously enough, Lachhman Prasad (P. W. 3), who is primarily responsible for the institution of the suit, states in his evidence before the Court that Taqi Ali Khan borrowed money from him for the purpose of fighting the case before the Privy Council and executed promissory notes in his favour. He says that at first the promissory notes were executed both by Taqi Ali Khan and his wife but later on he started 'borrowing only in his own name and he advanced the money because he trusted him. Lachhman Prasad never cared to enquire whether Taqi Ali Khan possessed any property out of which he could satisfy his liabilities.

The learned counsel for the plaintiff-appellant has relied on two cases, 1938 O W N 922[4] and A I R 1929 ALL 458.[5] In the former case it was held that where a debtor makes a gift of his property to his son orally after the creditor has obtained a decree against him, it is sufficient to raise a presumption that the object of the gift is to defeat or at least to delay the creditors. This case has no application to the facts of the present case. An oral gift was made after the creditor had obtained a decree and upon these facts it was held that it was sufficient by itself to raise a presumption that the object of the gift was to defeat or at least to delay the creditors. That case further lays down that each case under S. 53, T. P. Act, must be decided on its own facts. The case in A I R 1929 ALL 458,[5] is a single Judge decision of the Allahabad High Court. In that case there was a finding that there was collusion between the plaintiff and the judgment-debtor and that the object of this collusion was to defraud, defeat or delay the decree-holder. There was a further remark made by the learned Judge that the mere fact that the judgment-debtor has other property to meet the decree does not prevent the application of S. 53, T. P. Act. This remark really has no application to the facts of the present case. On the whole, we are of opinion that the judgment and decree of the trial Court is correct. We, therefore, dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

3. ('30) 17 A I R 1930 Oudh 131: 124 I C 431 : 6 O W N 1112, Qamar Ara Begam v. Sultan Begam.

4. ('38) 25 AIR 1938 Oudh 230 : 177 I C 611 : 1938 O W N 922, Mohammad Haider Kazmi v. Safdar Jah Zahid Ali Mirza.

5. ('29) 16 AIR 1929 All 458 : 116 I C 815, Gopi Chand v. Jodhraj Deojit.

*** A. I. R. 1941 Oudh 182**

YORKE AND BENNETT JJ.

Ram Lal and another—*Complainant*—Applicants

v.

Ram Piare and others—Opposite Party.

Criminal Revn. Appln. No. 95 of 1940, Decided on 12th November 1940, from order of Addl. Sess. Judge, Bahraich, D/- 9th May 1940.

* *Criminal P. C. (1898), S. 439 — Acquittal by Sessions Judge without exercising proper judicial mind and without proper review of evidence — Application by private person for setting aside order of acquittal—Order must be set aside.*

In all cases of application by private person for setting aside an order of acquittal the power is one to be exercised only in exceptional cases and with caution. Where there are signs of a possible failure of justice and where the Sessions Judge has not exercised a proper judicial mind and has come to a decision without a proper review of the evidence, the order of acquittal must be set aside and a rehearing of the appeal ordered : *Case law referred.* [P 185 C 1, 2]

G. G. Chatterji — for Applicants.

R. F. Bahadurji and J. P. Asthana — for Opposite Party Nos. 1 to 20.

Order. — This is an application in revision on behalf of the complainants in a criminal case under Ss. 147, 148 and 324 read with S. 149, Penal Code. The prayer in the application is that the order of acquittal passed by the Additional Sessions Judge of Gonda at Bahraich in the case of some of the accused of that case be set aside and the appeal of those persons which was allowed by the Additional Sessions Judge be sent back for disposal according to law. The application arises out of an occurrence which took place in village Gangwal on 5th August 1939. According to the prosecution story at 10 P. M. one Ram Lal was holding a "katha" or recital of the Ramayan at his house, for which a number of people had collected there, including two persons Sheoambar and Bhagwati. It was said that while the recital was proceeding a number of persons came to the complainants' house and one of these persons struck Ram Lal. Ram Lal shouted to Sheoambar to look out for himself and ran inside his house. Sheoambar tried to get away but was struck on the eyebrow with a sword by one Bandhu while Bhagwati was said to have received a blow with a sword from Pathera. There was a scuffle in which various injuries were inflicted on various persons, including a small child, Mt. Kamla, who received an incised wound, presumably with a sword. On the following morning, 6th August 1939, a first information report was made in which the above story was related by chaukidar Lotan. Another first information report was also filed in which what was subsequently put forward as the defence story was told. This story was to the effect that dacoity was committed at the house of Durga, accused by Sheoambar, Ram Lal and his sons, and that it was in this affair that Ram Lal's people received injuries. It was alleged that in the course of the dacoity some of the dacoits were actually captured, but as they were known to their captors, they were let go.

The first information report on behalf of the complainants, the present applicants, was made under Ss. 147, 452 and 307, Penal Code. The case was investigated by the police and the police prosecuted the accused named in Lotan's report under Ss. 147, 325 and 307 read with S. 149, Penal Code. The learned Magistrate who tried the case held that S. 307 was not applicable, and he therefore proceeded to try out the case in his own Court. He considered carefully the two stories told on the one side by Ram Lal, etc., and on the other by Durga, and he was satisfied that the defence story was false. It was part of the prosecution theory that this attack on Ram Lal and Sheoambar was instigated by the Raja of Gangwal. The Magistrate rejected the evidence against the Raja and discharged him. An application in revision was made against this order of discharge but that application was unsuccessful. In the result the Magistrate convicted 25 persons of offences under Ss. 147 and 324 read with S. 149, Penal Code. He also applied S. 148 in the case of two persons and S. 452 in the case of one. He further made an order binding over all these 25 persons under S. 106, Criminal P. C. The accused persons went in appeal to the Additional Sessions Judge of Gonda at Bahraich. The learned Additional Sessions Judge has written a judgment which can be divided into a number of separate portions. He begins by setting out the complaints on both sides. He goes on to set out over two pages, the replies put forward by the individual accused. He then goes on over two further pages to compare the two versions, and in effect to show that he was quite satisfied that the prosecution version was correct and the defence version incorrect. He concludes this portion of his judgment by remarking :

It is therefore clear that the version about the alleged dacoity at Durga's house was wholly false

and concocted and was rightly rejected by the learned Magistrate.

He then proceeds to consider the arguments addressed to him in connexion with the prosecution case, and for the purpose of this discussion he separates the cases of the five accused whose presence on the spot was admitted, they being persons supporting the defence story of Durga. About these persons he says :

It is clear that all these persons, although they admitted that they assaulted Ram Lal and others, failed to show that they were justified in doing so.

This portion of his judgment he concludes with the remark :

It is therefore clear that so far as these appellants are concerned, the learned Magistrate was fully justified in convicting them.

It is to be noted that even in dealing with these accused the learned Additional Sessions Judge made no attempt whatever to discuss the prosecution evidence, for the reason apparently that it was scarcely necessary to do so. It is only in the last page and a half of the typed judgment of the learned Additional Sessions Judge that he comes to discuss the case against the remaining 20 appellants other than the five dealt with above. In connexion with these persons he says that the case stands on a different footing and as they alleged enmity, it was absolutely necessary to consider whether they had any motive in committing the riot. He does not seem to have considered the fact that enmity is a double edged weapon, and that if there was a motive for the complainants to name these accused falsely, there must almost necessarily be a motive for these accused to take part in an attack on the complainants. The learned Additional Sessions Judge then proceeded to deal with the matter in this way. First of all he held that the suggestion that the attack on the complainants was due to communal feelings could not be accepted, because the accused, that is the persons said to be assailants, were both Hindus and Mahomedans. Secondly, he pointed out that the story of instigation by the Raja of Gangwal on account of prior ill-feeling had already been rejected. Thirdly, he went on to say that the theory that these accused might have beaten the complainants to please the Raja was far-fetched. Accordingly he proceeded to hold that there was no motive for these 20 appellants to have participated in this occurrence except the pre-existing enmity. He then went on to make a statement of a proposition of law which might be good in itself but had no application to the present case on the findings which had already been arrived at. He said :

It is settled law that when there is enmity between the parties and the prosecution version is improbable, the benefit of doubt should be given to the accused.

It is to be observed in this connexion that it had not been held and could not be held by the learned Additional Sessions Judge that the prosecution version was improbable. The examination of the prosecution and defence stories on pp. 5 and 6 leads fairly clearly to the conclusion that to a very considerable extent the prosecution version, so far from being improbable, was actually true. It seems to us that the learned Additional Sessions Judge has given the benefit of the doubt, to these accused on a conclusion which is founded on incorrect premises. This conclusion of the learned additional Sessions Judge has been further criticized on a different line of argument. It is pointed out that from beginning to end of this judgment the learned Additional Sessions Judge has not made any attempt to examine and consider in detail the evidence of the prosecution witnesses in order to arrive at a sound conclusion as to which, if any, of the 20 persons other than those whose presence and participation was admitted, actually took part in this occurrence. It may be that the whole matter has really been exaggerated to the extent that the learned Additional Sessions Judge has thought, but the learned Additional Sessions Judge has attempted a short cut which saved him the trouble of examining and coming to a proper finding on the evidence. On behalf of the applicants it is contended that by this judgment the learned Additional Sessions Judge has failed to dispose of the appeal according to law after a proper consideration of all the questions involved, and it is therefore urged that the judgment of acquittal should be set aside and the learned Sessions Judge or that Court to which the appeal may be sent back for disposal, be ordered to dispose of the appeal upon the merits according to law.

We have been referred to a number of cases on the question whether this Court will on an application in revision by a private person set aside an order of acquittal and direct the Court below to re-hear the appeal or a case on its merits. Learned counsel for the opposite parties treated this application as if it was an application complaining of nothing more than a technical irregularity on the part of the learned Additional Sessions Judge, that is a failure to

comply sufficiently with the provisions of S. 367, Criminal P. C. In this connexion he referred to 62 Cal 749[1] at p. 773, where it was remarked that :

Section 367 must be interpreted reasonably and so long as the appellate Court below makes a judgment from which the High Court can gather what the decision of the appellate Court really was, that, in the majority of cases, ought to be sufficient. It would be manifestly most unreasonable to expect an appellate Court to dot every 'i' and cross every 't' if one may use the expression.

These remarks are however in no way applicable to the present case where there is no indication of a proper examination of the evidence, and it is not a mere question of a failure to dot every 'i' and cross every 't'. Similarly he referred to A I R 1932 Bom 473[2] in which the headnote runs as follows :

The High Court is not invariably bound to interfere in revision because there is an irregularity in the form of a judgment, unless there is some reason to believe that there has been a failure of justice.

Where therefore the appellate judgment of the Sub-divisional Magistrate, although it does not strictly comply with the provisions of S. 367, does at least make it clear that the Magistrate had perused the evidence and heard arguments and having heard the case argued, had come to an independent opinion as to the guilt of the applicants, the High Court need not interfere as there has not been any failure of justice and as it is only a technical irregularity.

In this connexion he argued that there could not be any question of failure of justice. We do not desire to go at all deeply into that point, because it will be for the Court below to examine the evidence, but we may point out that so far as the case goes against the five persons whose convictions were maintained, there is not, so far as we are aware, any evidence that any of them used a sharp weapon, whereas there was evidence that some of those who have been acquitted did use swords and inflict with them incised wounds. The learned Additional Sessions Judge has made no examination of the question as to how incised wounds were caused if the five persons whose convictions he has maintained had no weapon with which such wounds could have been caused. It seems therefore that there may be found ultimately to have been a failure of justice. It is obviously not a point on which any final pronouncement is possible at this stage. Learned counsel also referred to 10 O W N 345[3] in which it was held that

the High Court does not interfere with an error or omission or irregularity unless the same has caused a failure of justice; and as regards question of facts, though the Court's jurisdiction to interfere in respect of the correctness of findings of facts, even when findings are concurrent, is unquestionable, it will not, as a rule, go into the evidence, save in exceptional cases, as where the judgment of the case is manifestly wrong and grossly and palpably unjust.

The parties have in the present case avoided going into the details of the evidence, but we note that in the case referred to, the learned Judge of this Court remarked that the learned Sessions Judge had written a detailed and careful judgment and that his findings were based on a most careful and exhaustive examination of the whole evidence produced in the case. The principles applicable to a case in which the Sessions Judge has written a judgment of that kind are obviously not applicable to a case in which the learned Additional Sessions Judge has not written either a detailed or a careful judgment or made anything like a careful and exhaustive examination of the whole evidence.

Another case to which reference has been made, 11 O W N 810,[4] is similarly a case in which the very foundation of the decision of this Court was that the trial Magistrate had weighed the whole evidence and considered some of the documents on the record. On behalf of the applicants we have been referred to a recent case of this Court, 1940 O W N 757[5] in which it was held that on an application in revision against an acquittal the High Court will not be prepared to interfere unless there are exceptional matters, as for example where the Magistrate does not appear to have exercised an impartial judicial mind in considering the evidence, where he has entirely left evidence out of consideration or has relied upon evidence which is not to be found on the record, compelling it to do so. We are asked to say in the present case that there is such an exceptional matter. Reference has also been made to 1937 O W N 281,[6] in which it was held by a single Judge of this Court that ordinarily the High Court will not interfere with an order of acquittal, especially in a case under S. 323, Penal Code, but it will interfere when the

1. ('35) 22 A I R 1935 Cal 316: 156 I C 678: 36 Cr L J 982 : 62 Cal 749, Abdul Rahman v. Emperor.
2. ('32) 19 AIR 1932 Bom 473: 139 I C 608: 33 Cr L J 801 : 34 Bom L R 1110, Tippanna v. Emperor.
3. ('33) 20 AIR 1933 Oudh 257 : 143 I C 852 : 34 Cr L J 661: 10 O W N 345, Rama Murti v. Jai Indra.
4. (35) 22 A I R 1935 Oudh 176 : 150 I C 951 : 35 Cr L J 1236 : 10 Luck 192 : 11 O W N 810, Mathura Prasad v. Chakra Dhar Jayal.
5. ('41) 28 A I R 1941 Oudh 7 : 190 I C 266 : 41 Cr L J 891 : 1940 O W N 757, Chandrika Prasad v. Mohammad Jafar.
6. ('37) 24 AIR 1937 Oudh 283 : 166 I C 987 : 38 Cr L J 329 : 1937 O W N 281, Ram Dayal v. Mata Din.

trial Magistrate has acquitted the accused owing to a wrong view of the law.

In that case the Magistrate had brushed aside the whole of the prosecution case on the view that it was exaggerated and had not attempted to sift the truth from falsehood. It was held in effect that it was an incorrect conception of the law to suppose that a case may be brushed aside entirely because there is some exaggeration in it. Learned counsel relied strongly on A I R 1938 Cal 613.[7] In that case it was held that

the High Court has power to interfere in revision with an appellate judgment of acquittal, and though that power should be sparingly exercised, it would be wrong to refuse to exercise it in cases where there has been a failure of justice by reason of the appellate Court not having brought a judicial mind to bear upon the evidence.

It appears to us to be difficult to hold that there has necessarily been a failure of justice at this stage, but it is sufficient that there should be reason to suppose it not improbable that there may have been a failure of justice. Learned counsel also relied on A I R 1925 Oudh 321,[8] in which the learned Judicial Commissioner held that

the jurisdiction of the High Court to revise an order of acquittal and direct a re-trial should be exercised only in exceptional cases and with caution. It should only be done in cases where the alleged offence is of a serious character and the Judge comes to the opinion that there has been a miscarriage of justice, where for instance the lower Court has misquoted the evidence, or where having the evidence before it, which prima facie is reasonable and credible, the Judge of the Court below gives no ground for rejecting it and does not satisfactorily review it.

The learned Judge remarked that there were grave defects in the judgment and that he could not accept the finding of the lower appellate Court as a finding of fact as that finding had been arrived at in such a summary fashion without reference to all the relevant law on the subject (the right of private defence). We are in full agreement with the general proposition that in all cases of application for setting aside an order of acquittal the power is one to be exercised only in exceptional cases and with caution, but we are of opinion that the present case falls within the principle laid down in numerous rulings in the past that where there are signs of a possible failure of justice and where the learned Sessions Judge has not exercised a proper judicial mind and has come to a decision without a proper review of the evidence, the order of acquittal must be set aside and a re-hearing of the appeal ordered. We accordingly allow this application, set aside the order of acquittal of the 20 accused who were acquitted by the learned Additional Sessions Judge of Bahraich and direct that the appeal be re-heard by the Sessions Judge of Gonda. The learned Sessions Judge will take necessary action to have the accused who were acquitted rearrested in view of the fact that they have been convicted by the Magistrate. It will, of course, be open to him, if he thinks fit, to release them again on bail pending disposal of the appeal.

D.S./R.K. *Application allowed.*

7. ('38) 25 AIR 1938 Cal 613 : 178 I C 56 : 39 Cr L J 988: 67 C L J 571: 43 C W N 25, Satish Chandra v. Chinta Haran.

8. ('25) 12 AIR 1925 Oudh 321 : 95 I C 934 : 27 Cr L J 854 : 28 O C 384 : 2 O W N 50, Bachcha Singh v. Bachcha Kurmi.

A. I. R. 1941 Oudh 185

GHULAM HASAN J.

Uma Datt and others — Defendants — Appellants

v.

Ram Jiwan, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 253 of 1938, Decided on 18th November 1940, against order of Civil Judge, Sultanpur, D/- 20th August 1938.

Hindu law — Family settlement — Validity of — Test is whether parties laid claims against each other and whether such claims were settled by family arrangement — Validity of claims of parties has no bearing on validity of settlement — Fact that one of parties is not member of family is irrelevant for determining validity of settlement.

It is wrong to test the validity of a family settlement by having recourse to the expedient of finding out whether the claims of the parties to that agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement." If a settlement was arrived at, the strength or validity of the claims of the parties has nothing to do with the validity of the family settlement. The fact that the claims of the parties had been adjusted and that the disputes between them had been settled amount to a sufficient consideration for the upholding of the family settlement. Consequently, where on the death of a person a dispute arises among the members of the family and an agreement arrived at between them contained in a mutation application evidences a bona fide adjustment of the conflicting claims, it constitutes a family settlement and its validity is not to be determined by the strength or validity of the claims of the parties. Such an agreement is a valid family settlement: A I R 1929 Oudh 373; AIR 1927 Oudh 572 and A I R 1934 Oudh 41, *Rel. on.* [P 187 C 2]

It is not open to the Court to try to ascertain as to whether the claims of the parties to the family settlement were good and well founded and to test the validity of the family arrangement after having

arrived at a finding upon the strength or otherwise of such claims. Consequently the fact that one of the parties to the settlement who asserted a bona fide right to the family property as a member of the family is not a member of the family is wholly irrelevant for the purpose of determining the validity or otherwise of the family settlement: A I R 1933 All 138, *Rel. on ;* AIR 1938 Oudh 190; AIR 1926 Oudh 338; AIR 1929 Oudh 193 and AIR 1926 All 7, *Disting.;* AIR 1924 Nag 214, *Ref.*

[P 188 C 2 ; P 189 C 1]

Motilal Saksena — for Appellants.

Respondent 1 in person.

Judgment. — This is a second appeal against the judgment and decree of the civil Judge of Sultanpur reversing the decree of the Munsif and decreeing the suit for mortgage possession with costs against defendants 1 to 5 only. The plaintiff's case was that defendant 1, Uma Datt, executed a possessory mortgage on 20th May 1924 in favour of Mt. Mohra, the first wife of Ram Bali, for Rs. 550, that the consideration was really advanced by Ram Bali and that Mt. Mohra was a mere benamidar. The plaintiff alleged himself to be the son of Ram Bali from another wife, who was a sister of Mt. Mohra, and claimed that he was the rightful heir of Ram Bali, and as the defendant had wrongfully dispossessed the plaintiff, he was entitled to a decree for possession. Defendant 1 was the original mortgagor and defendants 2 and 3 were the sons of defendant 1 and defendants 4 and 5 were impleaded as defendants on the ground that they were the tenants of defendant 1. Defendant 6 was Mt. Murat, who was the daughter of Ram Bali from his first wife Mt. Mohra. Defendants 1 to 3 denied the mortgage in suit and pleaded that the plaintiff was not the son of Ram Bali and could not, therefore, maintain the suit. Defendants 2 and 3 pleaded that the property was ancestral and the mortgage was not binding upon them as it was not executed for legal necessity or for the payment of any antecedent debt. The plaintiff's possession over the property in dispute within limitation was also denied. Defendant 6 supported the other defendants and pleaded that she was the sole rightful owner of the property, which was the stridhan of Mt. Mohra and upon her death had devolved upon her by right of inheritance. The trial Court held that the mortgage was proved but found that was without consideration. He also held that the plaintiff was not the son of Ram Bali and holding that he had not been in possession dismissed the suit with costs. The lower appellate Court on appeal admitted fresh documentary evidence and allowed certain amendments in the plaint prayed for by the plaintiff. The suit was remanded for a fresh trial after clearing the pleadings. Besides the issues originally framed by the trial Court, two more issues were added, namely issues 6 and 7. Issue 6 was:

(a) Whether the mortgage deed in suit was executed benami in the name of Mt. Mohra for Ram Bali? Or (b) Was the mortgaged property the stridhan of Mt. Mohra?

Issue 7 was whether there was any family settlement between the plaintiff and defendant 6, as alleged by the plaintiff, and if so, to what effect. The trial Court held upon issue 6 that the consideration of the property was in fact paid off by Ram Bali and the mortgage deed was executed benami in the name of Mt. Mohra for Ram Bali. It held that the property in suit was not proved to be the stridhan property. On issue 7 its finding was that the family settlement was not proved, as in its opinion Mt. Murat could not enter into family settlement with the plaintiff, who was a stranger to the family of Ram Bali and had no title to the property in suit. As a result of his findings the learned Munsif dismissed the suit. Upon a further appeal by the plaintiff, the lower appellate Court held, disagreeing with the view of the learned Munsif, that the plaintiff had acquired title to the property in suit by the family settlement with Mt. Mohra, and decreed the suit. Defendants 1 to 3 have now come up in second appeal to this Court. The only question argued on behalf of the defendants-appellants is that the lower appellate Court was wrong in upholding the family settlement as neither the essentials of the family settlement had been made out in the case nor could the plaintiff, being a stranger to the family and having no right to the property, set up a family settlement in his favour. The plaintiff was present in person and was not represented by a counsel.

I will deal with the first point whether the essentials of the family settlement have been proved in this case or not. The lower appellate Court has relied upon Ex. C-10, which is a report of the Naib Tahsildar, who tried the mutation case. This report clearly shows that upon the death of Ram Bali, one Ganga Din alleged himself to be his brother and claimed mutation of the property in dispute. The plaintiff contested the right of Ganga Din and claimed property on the ground that he was the son of the deceased born of a second wife and was

in possession of the disputed property. He denied that Ganga Din was the real brother of Ram Bali. Mt. Murat, defendant 6, set up her rights as the daughter of the deceased claiming half of the property and admitted the claim of the plaintiff to the remaining half. The controversy between the parties was put in the form of issues and evidence was led by the parties. The Naib Tahsildar found that Mt. Murat was the daughter of Ram Bali from his first wife and the plaintiff was his son from the second wife. As regards Ganga Din, he held that he was not the brother of Ram Bali, consequently he ordered mutation in favour of the plaintiff and defendant 6, Mt. Murat, in equal moieties. This order was passed on 9th May 1931. Exhibit 10 is a copy of the objections filed by Mt. Murat in the mutation case. Exhibit 8 is the statement of Mt. Murat in the mutation case to the effect that the plaintiff was the son of Ram Bali by his second wife and that he used to live with her. Exhibit 9 is the statement of her pleader to the same effect. The plaintiff had been in possession since the mutation was made in his favour and it was only in 1936 that he was obliged to bring the present suit because defendant 1 had unlawfully taken possession of the property in dispute.

There is no doubt whatever that upon the death of Ram Bali disputes arose regarding the rights to his property to which his son, his daughter and his brother laid separate claims. It is also true that the rights of the alleged brother and the alleged son were denied. It was in these circumstances that the parties, namely defendant 6 and the plaintiff, adjusted their bona fide dispute by agreeing that the property shall be mutated in equal moieties between them. Whether the claim of the son was strong or well founded has nothing whatever to do with the validity of the arrangement at which the parties eventually arrived. As a matter of fact, the Naib Tahsildar held that Ram Bali had great love for the plaintiff, he performed his marriage with great pomp and show, opened a savings bank account in his name and described him as his son in certain documents. The mutation order was not questioned by any of the parties to the mutation by a further appeal. In these circumstances I am of opinion that the essential elements of a family settlement are fully established in this case. It has been held in 5 O W N 1022[1] that it is a wrong principle of law to test the validity of an agreement by having recourse to the expedient of finding out whether the claims of the parties to that agreement were good. The true test is whether the parties had laid any claim against each other and whether those claims had been settled by virtue of the agreement termed the "family settlement." If a settlement was arrived at, the strength or validity of the claims of the parties had nothing to do with the validity of the family settlement. The fact that claims of the parties had been adjusted and that the disputes between them had been settled, would amount to a sufficient consideration for the upholding of the family settlement. In 4 O W N 663[2] it was ruled that the essence of a family arrangement lies in an adjustment of conflicting claims bona fide made and recognized on both sides with the laudable object of putting an end to a controversy.

In 10 O W N 336[3] it was held that where certain family differences are adjusted by means of a compromise as a result of which certain widows in the family are given possession of a portion of the property in lieu of maintenance and there is no reason to doubt the bona fides of the arrangement, such an adjustment of the dispute with a view to maintain amity and peace in the family, satisfies all the requirements of a family settlement. The case in 5 O W N 1022[1] was followed in this case. In another case, 10 O W N 1254,[4] it was held that if on the death of a person a dispute arises among the members of the family and an agreement arrived at between them contained in a mutation application evidences a bona fide adjustment of the conflicting claims, it constitutes a family settlement and its validity is not to be determined by the strength or validity of the claims of the parties. Such an agreement is a valid family settlement and does not require registration. I am therefore of opinion that the lower appellate Court was perfectly justified in holding that the family settlement was fully proved.

As regards the second point, it has been contended on behalf of the defendants-appellants, that in view of the finding of the lower appellate Court that the plaintiff is not the son of Ram Bali it must be held that he had no title to the property in dis-

1. ('29) 16 A I R 1929 Oudh 373 : 116 I C 59 : 4 Luck 57: 5 O W N 1022, Sital Singh v. Gijindra.

2. ('27) 14 A I R 1927 Oudh 572 : 103 I C 757 : 2 Luck 662 : 4 O W N 663, Mahabir v. Dwarika.

3. ('33) 20 A I R 1933 Oudh 295 : 144 I C 283 : 10 O W N 336, Mt. Raj Pati v. Mt. Parbati.

4. ('34) 21 A I R 1934 Oudh 41 : 147 I C 973 : 9 Luck 401 : 10 O W N 1254, Azizul Hasan v. Mohammad Faruq.

pute and not being a member of the family he could not enter into any family settlement. Reliance is placed on 1938 O A 573,[5] 3 O W N 181,[6] 6 O W N 169,[7] AIR 1926 ALL 7,[8] A I R 1933 ALL 138[9] and 76 I C 218.[10] I have carefully considered these cases but I am of opinion that neither of them helps the defendants-appellants. The case in 1938 O A 573[5] is wholly inapplicable to the facts of the present case. There was no question whatever involved in that case whether the family settlement could not be accepted because of the fact that any of the parties thereto was not a member of the family. On the other hand, at page 577 of the report, the following observation, quoted with approval from a Madras case, helps the case of the plaintiff-respondent :

It was there held that a compromise cannot be impeached between the parties to it on the sole ground that the party whose right is admitted by the compromise had in fact no such right.

The case in 3 O W N 181[6] is a single Judge decision by the late Raza J., and is distinguishable upon the facts. In that case it was found that there was no reliable evidence to prove the alleged family settlement nor was there anything on the record to show what were the terms, if any, of the alleged settlement. It was further observed that the daughter-in-law was not entitled to any share in the father-in-law's estate under the Hindu law. There was no dispute between the parties. In these circumstances it was held that the daughter-in-law had no pre-existing title and there being no settlement of dispute between the parties the alleged family arrangement had not been proved. In 10 O W N 336[3] at p. 344 this case is also distinguished. The case in 6 O W N 169,[7] is irrelevant as the family settlement in that case was admitted by both sides and it was held that every attempt must be made to give effect to the wishes of the parties to such a family settlement. The case in A I R 1926 ALL 7[8] is clearly distinguishable upon the facts. There the widow had adopted a relation of her own and made him a member of her husband's family. Up to the time of his adoption he was not a member of that family but belonged to the family of his adoptive mother. It was held in these circumstances that any arrangement arrived at between him (adopted son) and her before the adoption took place or at that very time cannot be said to have been an arrangement between the members of the same family. The case in A I R 1933 ALL 138[9] far from helping the appellants helps the case of the respondent. It was held therein that family arrangement is founded on the the assumption that there was some antecedent title of some kind between the parties and the agreement acknowledges what that title was. Such an arrangement very often follows disputes amongst the members of the family, but it is not necessary that these disputes should be necessarily founded upon just claims. All that is necessary is that each party must intend to press his claims to the property by litigation or otherwise, and the fact that the claim of one of the parties might if pressed in a Court of law prove unfounded will not invalidate a family arrangement if it is otherwise brought about in good faith.

The last case which remains to be noticed in this connexion is a decision of the Officiating Judicial Commissioner of Nagpur in 76 I C 218.[10] In this case the defendant supported his possession to the property under a family arrangement. It appeared however that the defendant was an utter stranger and was not a member of the family of the deceased owner of the property which was in his possession. In these circumstances it was held that the defendant being a perfect stranger to the family cannot be in possession of the property under a family arrangement which presupposes a claim by some member of the family to part of the family property, which is settled by an arrangement between the members of the family recognizing the claimant's real or supposed rights.

I am satisfied that in the present case the plaintiff-respondent asserted a bona fide right to the property of his father, that there was a pre-existing title in his favour and that such a right was recognized by the family settlement arrived at between him and defendant 6. As has been rightly observed in a number of cases, it is not open to the Court to try to ascertain as to whether the claims of the parties to the family settlement were good and well founded and

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5. ('38) 25 AIR 1938 Oudh 190 : 176 I C 958 : 1938 O W N 711 : 1938 O A 573, Chhatarpal Singh v. Sant Bakhsh Singh.
6. ('26) 13 A I R 1926 Oudh 338 : 93 I C 378 : 1 Luck 318 : 3 O W N 181, Mt. Phuljhari v. Har Prasad.
7. ('29) 16 A I R 1929 Oudh 193 : 120 I C 387 : 4 Luck 452 : 6 O W N 169, Hanuman Sahu v. Mt. Abbas Bandi Bibi.
8. ('26) 13 AIR 1926 All 7 : 87 I C 724, Mitar Sain v. Data Ram.
9. ('33) 20 A I R 1933 All 138 : 144 I C 33, Jamna Prasad v. Mt. Durga Dei.
10. ('24) 11 AIR 1924 Nag 214 : 76 I C 218, Lallu Prasad v. Babulal.

to test the validity of the family arrangement after having arrived at a finding upon the strength or otherwise of such claims. The finding arrived at by the lower appellate Court that the plaintiff is not the son of Ram Bali is wholly irrelevant for the purpose of determining the validity or otherwise of the family settlement and must therefore be disregarded from consideration. The result is that I uphold the judgment and decree of the lower appellate Court and dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 189

GHULAM HASAN J.

Mt. Batul Bandi — Plaintiff —
Appellant

v.

Sri Dhar and another — Defendants —
Respondents.

Second Appeal No. 309 of 1937, Decided on 12th November 1940, against order of Addl. Civil Judge, Gonda, D/- 26th April 1937.

(a) Oudh Land Revenue Act (17 of 1876), S. 56 —Khewat prepared under S. 56—Word "Matahtdar" in, means under-proprietor.

The word "matahtdar" in a khewat prepared under S. 56 means an under-proprietor and not merely a subordinate holder. [P 191 C 1]

(b) Evidence — Party denying genuineness of document can subsequently admit it on reconsideration — Court can take into consideration such document.

A party having once denied can, on a reconsideration, subsequently admit the genuineness of a document and where its genuineness has been so admitted the Court is not precluded from taking it into consideration. [P 192 C 1]

(c) Tenure — Birt right — Meaning.

Birt rights mean under-proprietary rights : 14 O C 41, *Rel. on.* [P 192 C 2]

(d) Tenure — Under-proprietary rights granted by settlement Court to party's predecessors in interest — Revenue authorities subsequently always treating predecessors as under-proprietors—Party's long recognized title as under-proprietors cannot be overthrown.

Where apart from the grant of under-proprietary rights by the settlement Court (in 1876) to a party's predecessors-in-interest, the revenue authorities have subsequently always treated the predecessors as under-proprietors, the party's long recognized title as proprietors cannot be overthrown : AIR 1925 Oudh 732 and A I R 1922 P C, 383, *Rel. on.* [P 192 C 2 ; P 193 C 1]

(e) Hindu law — Alienation — Widow—Reversioners alone can challenge.

An alienation by a widow is void only against the reversioners but not against the whole world and can be challenged only by the reversioners : A I R 1931 Mad 377, *Rel. on.* [P 193 C 1]

Zahur Ahmad — for Appellant.

Hargovind Dayal — for Respondents.

Judgment. — This is a plaintiff's appeal arising out of a suit for a declaration that defendant 1 is not an under-proprietor of the land in suit. The suit has been dismissed by both the Courts below. The facts which have given rise to this appeal are as follows: The plaintiff-appellant issued a notice of ejectment against defendant 1 under S. 127, Oudh Rent Act, with respect to the plot in suit in village Agia Khurd, pargana Utraula, district Gonda. Defendant 2 was impleaded as a transferee from defendant 1. In the rent Court the defendant pleaded that he was an under-proprietor with the result that the revenue Court accepted his plea and cancelled the notice of ejectment. The plaintiff thereupon brought the present suit for a declaration that defendant 1 is not an under-proprietor in the land in suit. The plaintiff alleged that Suraj Prasad and his widow, Mt. Jagrani, who had granted the land to defendant 1, had no right to the property in dispute and that the transfer is not binding upon her (the plaintiff). The defence was that Sheo Narain and Suraj Prasad, the two brothers, were under-proprietors of the land in suit, that they obtained a decree for under-proprietary rights against Mt. Raj Bibi, the mother and predecessor-in-interest of the plaintiff, that the suit was barred by the principle of res judicata, that in any view of the matter Sheo Narain and Suraj Prasad became under-proprietors in the plots in suit by adverse possession and that the suit was barred by limitation. The trial Court upheld the defence holding that Suraj Prasad and Sheo Narain were under-proprietors of the plots in suit by virtue of the settlement decree obtained by them against Mt. Raj Bibi and that the suit was barred by S. 11, Civil P. C. In the result the trial Court dismissed the suit. The lower appellate Court has confirmed the decision of the trial Court in appeal by the plaintiff. The plaintiff now comes up to this Court in second appeal.

Two points have been urged by the learned counsel appearing on behalf of the plaintiff-appellant in support of her appeal. Firstly, it has been argued that the decision of the Courts below is erroneous upon the question of res judicata; and secondly, the decree of the settlement Court did not confer upon Sheo Narain and Suraj Prasad under-proprietary rights. I am of opinion that the decision of the Courts below upon both the points is correct. It appears that on 23rd

July 1875, Sheo Narain and Suraj Prasad Pande filed a suit against Mehdi Ali Khan, sarbarakar of Mt. Raj Bibi, before the Settlement Court. The plaintiffs described themselves as muafidars, Agia Khurd, and the defendant was described as Mehdi Ali Khan, sarbarakar of Mt. Raj Bibi, lambardar of village Agia Khurd. Exhibit 13 is the plaint of this suit. In the plaint it was alleged that the land measuring 51 bighas kham with trees of mahua and mango grove situate in village Agia Khurd, pargana and tahsil Utraula, had been in the possession of the plaintiffs from the zamindar as a muafi free of rent and that the plaintiffs never paid any rent of the land to anybody. It was also alleged that from 1260 Fasli the land in question had been in the possession of the ancestors of the plaintiffs and the plaintiffs themselves, but the defendant taluqdar (taluqdar muddaleha) now wants to take possession of the land. The plaintiffs prayed that after due investigation the land in question with trees may be decreed to them.

Exhibit A-18 is the statement of Amir Ali, mukhtar-i-am of Mt. Raj Bibi, defendant, denying the status of the plaintiffs and pointing out that the plaintiffs were mere tenants and that the rent of 51 bighas of land was originally Rs. 25 but had now increased and that the plaintiffs had no possession over the grove or the mahua trees. The allegations in the plaint were generally denied. It is significant to note that in this statement Mt. Raj Bibi is mentioned as a muddaleha, namely a female defendant. Exhibit A-28 is the statement of Suraj Prasad in the same case. He states that one Puran Ban Goshain was the original birtdar of village Agia Khurd. In 1240 Ishwari Pande, the father of Suraj Prasad had purchased the village for a consideration and taken possession of the village. He also filed the sale deed. Suraj Prasad further stated that about 22 years ago Tafazzul Husain Khan, the taluqdar, made the village kham and separated 51 bighas kham with mahua trees and the mango grove from the village and granted the same to him without payment of any rent and that the same had been in their possession since then. It was further stated by him that the defendant taluqdar had wrongly entered his name as a tenant. Reference is also made to a certain patta, which had been granted by Tafazzul Husain Khan to Suraj Prasad in 1872 but which had subsequently been taken away from him. These are the only proceedings of the litigation of the year 1875.

Then followed a judgment, EX. A-14 passed by M. Mohammad Yahia Saheb, Tahsildar Sadr Munsarim, on 13th September 1876. After stating the facts of the case as gathered from the plaint and the statements of Amir Ali and Suraj Prasad two issues were framed:

1. Whether the plaintiffs are the birtdars of this land ? 2. Whether the plaintiffs hold possession over the land, the trees and the grove as birtdars or whether they are mere tenants ?

It is stated in the judgment that the issues were framed by Mr. Mohammad Saiyid-ud-din, Khan Bahadur, Extra Assistant Commissioner, and, after the framing of the issues the case had been transferred to the Tahsildar, Sadr Munsarim, on 4th November 1875, and that the latter subsequently held investigation in the case, received oral and documentary evidence produced by the parties, and eventually recorded the final order. The judgment, EX. A-14 states that it is proved from the documents that the plaintiffs of that suit held possession of the land in suit for a long time and that it was not a recent cultivation. It is also stated therein that in the column of remarks of a certain theka which had been granted to Amir Singh and Amar Singh by the taluqdar, the muafi land of the plaintiffs had been excepted from the theka. The plaintiffs also produced a sanad, dated Aghan badi 8, 1272 Fasli, written in Hindi and bearing the signature of Mehdi Ali Khan in respect of 51 bighas of muafi land. The mukhtar of the defendant taluqdar admitted the signature and accepted the genuineness of the sanad. Upon this evidence the Sadr Munsarim held that he was satisfied and required no further proof. These remarks of the Sadr Munsarim are quite sufficient to show that in his opinion issue 1 whether the plaintiffs were the birtdars of this land, was proved to his satisfaction, although the finding might have been made clearer. The Sadr Munsarim then proceeded to enquire whether the plaintiffs should get a decree without payment of rent or upon payment of rent; and on the ground that no Government land is exempt from payment of Government revenue he came to the conclusion that the land should be decreed upon payment of revenue fixed by Government plus 25 per cent. to the taluqdar. The operative portion of the judgment is:

It is hereby ordered that a decree for 51 bighas of land is granted to the plaintiffs upon payment of revenue to be fixed by the settlement authorities and 25 per cent. malikana to be paid to the taluqdar of Agia Khurd.

The judgment is signed by Mohammad

Yahia Tahsildar. Exhibit A-8 is the khewat of register No. 5, matahtdari of village Agia Khurd, which was prepared under S. 56, Oudh Land Revenue Act (17 of 1876, then in force), in which the names of Suraj Prasad and Sheo Narain are entered in the column headed as "malik adna" and the nature of their tenure is entered as "matahtdari" and below this entry appear the words "bahaq muafi atia Taluqdar." Under S. 56 (e), Oudh Land Revenue Act of 1876, every Deputy Commissioner was required to prepare for each mahal a list—(1) of all under-proprietors and lessees whose rent has been so fixed and of all tenants with a right of occupancy, with the nature and extent of the interest of each such person, and the rent (if any) which he is liable to pay therefor, (2) of all other persons (if any) holding land free of rent, or revenue free. The learned counsel appearing for the plaintiff-appellant urges that the word "matahtdar" does not mean an under-proprietor but only a subordinate holder. I do not agree with this contention. Exhibit A-23 is the khasra of 1307 Fasli, which also records the names of the plaintiffs as under-proprietors. A similar entry appears in the khewat (Ex. A-15) in respect of 1307 Fasli. Exhibit A-24 is an order dated 18th January 1902, passed by a settlement officer dismissing the claim of Suraj Prasad to the entire village but upholding his claim for 51 bighas kham, which had been decreed to him by the settlement Court and which was duly entered in the khewat. Exhibit A-22 is the copy of a robkar showing that in proceedings for the determination of rent under S. 79 of Act 3 of 1901 the zamindar and the matahtdars were ordered to appear before the settlement authorities. Under this robkar also, the word "matahtdar" is used, which the learned counsel interprets as meaning a subordinate holder.

The learned counsel has argued that Ex. A-14 does not operate as res judicata against his client because firstly Mt. Raj Bibi, the predecessor-in-interest of the plaintiff-appellant, was not a party to the case but that the real defendant was Mehdi Ali Khan himself, secondly, there is no evidence to show that the Sadr Munsarim, Munshi Mohammad Yahia, had any judicial powers and consequently his decision is not a decision of a Court of competent jurisdiction within the meaning of S. 11, Civil P. C., and thirdly it was urged that there are no words in Ex. A-14 to indicate that the Sadr Munsarim by his judgment granted underproprietary rights to the plaintiffs. As regards the first point, it may be mentioned that Mt. Raj Bibi was married to Mehdi Ali Khan's son, Amjad Ali Khan : *vide* Ex. 12. Mt. Raj Bibi was a pardanashin lady and Mehdi Ali Khan was her uncle and guardian at the time when she was a minor. Mehdi Ali Khan managed her property as uncle and sarbarakar (Ex. A-20). It is no longer disputed between the parties that the present plaintiff-appellant is the daughter of Mt. Raj Bibi, to whom the latter made a gift of the entire village. It is true that in the plaint (Ex. 13) the defendant to the suit is mentioned as Mehdi Ali Khan, but it must not be forgotten that his character in the suit is clearly as sarbarakar of Mt. Raj Bibi, defendant. The allegations in the plaint also disclose that the real complaint was against the Taluqdaria, who was no other than Mt. Raj Bibi. The position of Mehdi Ali Khan was merely that of an uncle who was managing the property of Mt. Raj Bibi, his young daughter-in-law, during the period of her minority. Then again, Exhibit A-18, the statement of Amir Ali, was recorded by the Court in the capacity of a mukhtar-i-am of Mt. Raj Bibi, defendant. If the proceedings were instituted against Mehdi Ali Khan in his personal capacity, it is difficult to understand why he should have been described as sarbarakar of Mt. Raj Bibi and why Amir Ali should have been described as mukhtar-i-am of Mt. Raj Bibi.

Exhibit 10 is an application of Mt. Raj Bibi, dated 12th December 1872. It purports to be signed by Amir Ali, mukhtar-i-am of Mt. Raj Bibi, taluqdar. This document was filed by the plaintiff herself. It was foolishly denied by the defendants' pleader and the trial Court made the endorsement "not proved, rejected," on the back of Ex. 10. The learned counsel for the plaintiff objects to the consideration of Ex. 10 by the Court as it is a rejected document and should have been returned by the Court under R. 54 of the Oudh Civil Rules, which requires that if a document is rejected as not proved, it shall, at the conclusion of the trial or earlier, be returned to the party producing it or to his pleader and the party or pleader shall be bound to take back the document and sign a receipt for it. The trial Court did not take action as required by R. 54 with the result that the document is still on record. The learned counsel appearing on behalf of the defendants-respondents now admits the genuineness of Ex. 10. I see no

ground why a party having once denied cannot on a reconsideration subsequently admit its genuineness, and if this is so how a Court can be precluded from taking such a document into consideration. This point however is not very material because in my opinion there is sufficient evidence on the record referred to above in addition to EX. 10, which unmistakably shows that the litigation in 1875 was launched not against Mehdi Ali Khan in his individual capacity but against Mt. Raj Bibi, the taluqdar, through him. I therefore hold that there is no substance in the objection raised on behalf of the plaintiff-appellant.

As regards the fact whether EX. A-14 is a judgment pronounced by a Court of competent jurisdiction, the learned counsel for the plaintiff-appellant argued that in order to invoke the benefit of S. 11, Civil P. C., in their favour the defendants-respondents should have proved as a matter of fact that Munshi Mohammad Yahia Tahsildar was competent to adjudicate upon the question of under-proprietary claims. It is contended on behalf of the defendants-respondents that this point was not raised in either of the Courts below and in any case the burden is upon the appellant, who wishes to displace the judgment and decree of the lower Courts, to prove as a matter of fact that the judgment, EX. A-14, was delivered by a Court devoid of jurisdiction. Counsel on both sides have attempted to take refuge behind technical pleas on this point and have not referred to any authority or any rule showing one way or the other whether the tahsildar was competent to pass the decree declaring the title of Suraj Prasad and Sheo Narain in respect of the land in dispute. I have however been able to discover in the Gonda Settlement Report, prepared by Mr. W. C. Benett, C. S., Assistant Commissioner of Rae Bareli, in the year 1878, that the Courts of Settlement Officers in the days of the Settlement consisted of : (1) Settlement Officers, (2) Assistant Settlement Officers, (3) Extra Assistant Commissioners, and (4) Sadr Munsarims with judicial powers. At p. 143 of this report, the name of Munshi Sayid-ud-din, Extra Assistant Commissioner, is mentioned and the name of Munshi Muhammad Yahia is mentioned under NO. 4, namely Sadr Munsarim with judicial powers. Special mention of Munshi Muhammad Yahia has been made by Mr. Benett at p. 144 in these words :

> Munshi Muhammad Yahia has already been rewarded for his honesty, energy, and great practical knowledge by his appointment to the post of tahsildar.

It will be seen from EX. A-14 that in the heading Munshi Muhammad Yahia has been referred to as Tahsildar Sadr Munsarim and in the copy of the judgment it is stated that the case was originally filed in the Court of Munshi Mohammad Saiyid-ud-din Khan, Extra Assistant Commissioner, and had been transferred by him to the Court of the Tahsildar Sadr Munsarim. I therefore hold that there is no force in this point. Thirdly, I must hold in agreement with the view expressed by both the Courts below that EX. A-14 coupled with EX. 13 and the proceedings of the litigation of 1875 is quite sufficient to show that Suraj Prasad and Sheo Narain were claiming birtdari rights in the land and the trees in dispute and were challenging the position taken up by the taluqdar that they were mere tenants. In these circumstances I am of opinion that the Settlement Court decreed birtdari rights in favour of Suraj Prasad and Sheo Narain. Birt rights have been construed to mean under-proprietary rights: *vide* 14 O C 41.[1] The decision against Mt. Raj Bibi had been obtained after full contest and without any fraud or collusion. In these circumstances the decision embodied in EX. A-14 must be held binding upon the plaintiff-appellant, who is admittedly the successor-in-interest of Mt. Raj Bibi, under S. 11, Civil P. C.

Apart from the fact that the settlement Court granted under-proprietary rights to Suraj Prasad and Sheo Narain, the revenue authorities subsequently always treated the defendants' predecessors as under proprietors: *vide* khewats EX. A-1, A-5, A-10, A-11 and A-16. Then there are proceedings for fixation of rent under S. 79, U. P. Land Revenue Act, which are proved by EXS. A-8, A-15, A-23, A-17, A-22 and A-21. The fixation of rent, according to the provisions of S. 79, U. P. Land Revenue Act, also lends corroboration to the view that Sheo Narain and Suraj Prasad were under-proprietors. In 2 O W N 894[2] it was held that where the final decree in favour of certain agricultural holders is of occupancy tenancy in their favour but they are consistently treated at the time of settlement and afterwards as under-proprietors, whatever may have the original effect of the decree, their title as under-proprietors so long recognized could

1. ('11) 14 O C 41 : 8 I C 725, Ram Autar v. Drigpal.
2. ('25) 12 A I R 1925 Oudh 732 : 91 I C 121 : 2 O W N 894, Bipin Chandra v. Dewan Singh.

not be overthrown by that suit. In 9 O L J 649,[3] the facts were that a taluqdar sued to obtain a declaration against the defendants that they had no proprietary or under-proprietary rights in a village forming part of the estate. It was found that the settlement of 1867 clothed the then taluqdar with rights which excluded the defendants' predecessors from the said rights, that in 1868 a declaratory decree to the same effect was passed, that in spite of this from 1869 down to the institution of the present suit there had never been any occasion on which the rights now denied to the defendants were not admitted, recognized or upheld, and that the settlement of 1897-98 was effected upon this footing. It was held that a title so long recognized could not now be overthrown. The principle enunciated by their Lordships of the Privy Council in the above-noted case is fully applicable to the facts of the present case.

Lastly, it has been contended on behalf of the defendants-respondents that in any view of the matter the transfer made by the widow of Suraj Prasad to defendant 1 is not void but voidable and can be challenged only by the reversioners and not by the plaintiff-appellant. Reliance has been placed on A I R 1931 Mad 377,[4] where it was held that the alienation by the widow is void only against the reversioners but not against the whole world and further that though the alienation would be useless against the reversioners but as against all persons other than the reversioners, the alienation is perfectly valid and the alienee can maintain an action against a person resisting him. For the foregoing reasons I hold that the judgment and decree of the lower appellate Court is correct and must be maintained. The appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

3. ('22) 9 AIR 1922 P C 383 : 71 I C 641 : 25 O C 396 : 50 I A 210*n* : 9 O L J 649 (PC), Pirthipal Singh v. Ganesh Din Singh.
4. ('31) 18 AIR 1931 Mad 377 : 128 I C 695 : 60 M L J 488, In re Appavu Naicken.

A. I. R. 1941 Oudh 193

BENNETT AND GHULAM HASAN JJ.

First Appeals Nos. 58 and 59 of 1937, Decided on 18th November 1940, against order of Special Judge, First Grade, Bara Banki, D/- 15th March 1937.

Syed Mohammad Husain — Debtor — Appellant

v.

Nageshwar Pershad and another — Creditors — Respondents.

1941 O/25 & 26

(a) U. P. Encumbered Estates Act (25 of 1934), S. 4 (3) — Landlord can take proceeding first under U. P. Agriculturists' Relief Act and then under U. P. Encumbered Estates Act.

The provisions of sub-s. (3) of S. 4 of the Act clearly contemplate the possibility of proceedings being taken by landlord first under the Agriculturists' Relief Act and later under the Encumbered Estates Act. [P 196 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 14 (4) (c)—Special Judge cannot ignore decision already arrived at under U. P. Agriculturists' Relief Act.

Section 14 (4) (c) means that the special Judge, while disposing of a matter under the Encumbered Estates Act, shall not apply the provisions of the Agriculturists' Relief Act; not that he shall ignore a decision already arrived at under that Act: A I R 1939 All 619, *Rel. on.* [P 196 C 2]

(c) U. P. Encumbered Estates Act (25 of 1934), S. 14—Mortgagor and mortgagee arriving at settlement of accounts based on U. P. Agriculturists' Relief Act and executing receipt and making endorsement—Special Judge cannot re-open mortgagor's liability under mortgage ignoring this receipt and endorsement.

Where the mortgagor and the mortgagee have come to an arrangement out of Court on the basis of the provisions of the Agriculturists' Relief Act and have executed a receipt and made an endorsement respectively in accordance therewith, it is not open to the Special Judge under the Encumbered Estates Act to re-open the question of the mortgagor's liability under the mortgage, ignoring this receipt and endorsement. [P 196 C 2]

(d) Registration Act (1908), S. 17 (2) (xi) — Receipt not purporting to extinguish mortgage but only limiting liability of mortgagor as regards interest — Receipt does not require registration.

Where the receipt does not purport to extinguish the mortgage, either in whole or in part but only limits the liability of the mortgagor thereunder so far as the interest is concerned, the provisions of Excep. (xi) would be applicable and the receipt does not require registration. [P 197 C 2]

M. Wasim, Ali Hasan and Akhtar Husain — for Appellant.

B. K. Dhaon — for Respondents.

Judgment. — These appeals arise out of orders passed by a Special Judge of the first grade on claims under the Encumbered Estates Act. The applicant under S. 4 of the Act was the appellant, Mohammad Husain. There were two creditors, Baba Din and Har Narain, both claims being based on mortgages. Baba Din's mortgage was for Rs. 20,000 and the debt carried interest at 11 annas per cent. per mensem compoundable with six-monthly rests. The mortgage deed is dated 1st March 1930. Har Narain's mortgage was for Rs. 25,000. It carried interest at 12 annas per cent. per mensem compoundable with six-monthly rests. The deed is dated 24th October 1929. The appellant instituted proceedings in respect of his liability on the mortgage under S. 33, Agriculturists' Relief Act, and obtained a declaration on 22nd October 1935, that the sum due from

him under the mortgage was Rs. 18,125. In the case of Har Narain there was no litigation under the Agriculturists' Relief Act, but the parties agreed to work out the sum due to Har Narain in the same way as it would be worked out by a Court under the provisions of the Agriculturists' Relief Act. As a result a sum of Rs. 20,400 was found due under the mortgage deed and an endorsement was made by the mortgagor on the back of the deed (EX. A-1) on 10th August 1935 to the following effect:

Rupees 4600 have been paid by way of set-off allowed towards the principal amount due under this deed out of the amount of interest found to have been paid in excess according to S. 30, Agriculturists' Relief Act, 1934, for the period between January 1930 to April 1935, and after allowing for this set-off of Rs. 4600, only Rs. 20,400 are due as the principal amount.

A receipt was also executed by the mortgagee for the same sum. Both claimants contended that these settlements were not binding upon them and should be ignored by the Special Judge in considering their claims under the Encumbered Estates Act, reliance being placed in support of this contention on the provisions of S. 14 (4) (c) and S. 15 of the Act. In both cases the contention found favour with the Special Judge who accordingly ignored the previous settlements, referred to and decreed the claims solely on the basis of the provisions of the Encumbered Estates Act. The applicant Mohammad Husain has appealed against this decision in both cases. We will take first the case of Baba Din in which a decree was passed under S. 33, Agriculturists' Relief Act. Section 14 (4) (c), Encumbered Estates Act, provides that the provisions of the U. P. Agriculturists' Relief Act, 1934, shall not be applicable to proceedings under the Encumbered Estates Act, and S. 15 provides that in determining the amount due on the basis of a loan which has been the subject of a decree the Special Judge shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14. It is therefore necessary to determine whether the decree under S. 33, Agriculturists' Relief Act is inconsistent with the provisions of S. 14.

Learned counsel for the appellant based his arguments mainly on the provisions of S. 4 (3), Encumbered Estates Act, which contemplate both an application by a landlord for amendment of a decree under the provisions of the U. P. Agriculturists' Relief Act and an application by the same landlord under the Encumbered Estates Act. The sub-section allows a landlord to exclude from the period within which he may make an application under sub-ss. (1) and (2) of S. 4 the period from the date of his application under the Agriculturists' Relief Act to the date of the final disposal thereof. Learned counsel also referred us to certain decisions of the Allahabad High Court and of this Court as showing that it was open to a landlord to make an application under both Acts, and he argued from these that it could not have been intended by S. 14 (4) (c) that where a decree has been obtained under the Agriculturists' Relief Act that decree should be ignored and the liability of the applicant under the Encumbered Estates Act considered de novo. In 1939 A L J 555,[1] a Bench of the Allahabad High Court held that the landlord is not necessarily under any disability by reason of the provisions of S. 7, Encumbered Estates Act, for taking proceedings for the protection of his interest. It was said:

We find that the intention of the Legislature was not to put the landlord under a disability but to provide for the relief of his encumbered estate, and when on an application by him the Collector has passed an order under S. 6 of the Act, the consequences that should flow from such order should be consequences to the benefit of the landlord and not to his detriment. The Act itself does not say clearly, as it might well have done, that the landlord will be precluded from taking any steps under any other provision of law. The U. P. Agriculturists' Relief Act and the U. P. Encumbered Estates Act came into force on the same day, namely 30th April 1935, and it was quite easy for the Legislature to say that if a landlord had chosen to take the benefit of the U. P. Encumbered Estates Act he could not take the benefit of the Agriculturists' Relief Act; on the contrary it is provided by S. 4 (3), Encumbered Estates Act, that if within three months after the date on which Chap. III of this Act comes into force a landlord has applied for amendment of a decree under the provisions of the U. P. Agriculturists' Relief Act 1934, the period from the date of his application to the date of the final disposal thereof shall be excluded from the period within which he may make an application under sub-ss. (1) and (2) of this section.

It is clear from the above that an agriculturist landlord may apply under the Agriculturists' Relief Act first for the amendment of a decree under S. 30 of the Act and he may then apply for relief under the Encumbered Estates Act. If it was thought that he should be precluded from applying under S. 30, Agriculturists' Relief Act, after he had applied under the Encumbered Estates Act, one would have expected the Legislature to say so in unambiguous language somewhere. Our attention was drawn to S. 14 (4) (c), Encumbered Estates Act, which says that the provisions of the U. P. Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under this Act, but this is for the special Judge and means that the special Judge will not,

1. ('39) 26 A I R 1939 All 619 : 186 I C 885 : 1939 A L J 555, Ranbir Prasad v. Sheobaran Singh.

while disposing of a matter under the Encumbered Estates Act, apply the provisions of the Agriculturists' Relief Act, and this does not prohibit the agriculturist landlord himself from taking independent proceedings under the Agriculturists' Relief Act.

A similar view was taken by a single Judge of this Court in 1940 O W N 129[2] but this view has recently been dissented from by a Bench of this Court (of which one of us was a member) in a case not yet reported on an appeal under S. 12 (2), Oudh Courts Act, (S. 12 (2), Oudh Courts Act, Appeals Nos. 15 and 16 of 1939[3]). The same Bench had previously considered the question on an application under S. 115, Civil P. C., (No. 139 of 1939) decided on 30th September 1940 and reported in 1940 O W N 1126.[4] The question considered by the Bench in the application under S. 115 was whether proceedings under S. 33, Agriculturists' Relief Act, should be stayed under S. 7, Encumbered Estates Act. It was said then that the language of S. 7 (1) (a), Encumbered Estates Act, is quite clear and unambiguous and leaves no room for doubt that it applies to all proceedings in any civil Court whether instituted by the landlord (debtor) or by the claimant (creditor) :

We do not think that the Legislature could have contemplated that a debtor should carry on two separate proceedings under the Agriculturists' Relief Act as well as under the U. P. Encumbered Estates Act simultaneously. The intention of the Legislature must be gathered from the language of S. 7 (1) (a), Encumbered Estates Act, and it is not permissible for us to read into that section an intention which the Legislature has not chosen to express. We feel we are justified in this conclusion by the language of S. 14, cl. 4 (c), Encumbered Estates Act, which definitely states that the provisions of the U. P. Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under this Act. It seems to us that the Legislature provided separate reliefs to a debtor under the Agriculturists' Relief Act and the Encumbered Estates Act, and it was left to him to choose whether he should take advantage of the provisions of S. 33, Agriculturists' Relief Act or S. 4, Encumbered Estates Act. Under S. 33, Agriculturists' Relief Act, an agriculturist debtor is entitled to sue for an account of money lent or advanced to or paid for him by any person. The Court is given the power to follow the provisions of Chap. IV of the Act and the provisions of the Usurious Loans Act 10 of 1918. Sections 28 to 31 of Chap. IV deal with the reduction of interest in favour of the debtor. Section 32 relates to the duty of a creditor to maintain and furnish accounts while S. 34 imposes penalties for non-compliance with the provisions of S. 32, namely the disallowance of interest and costs. Ample relief is available to a debtor under the provisions of S. 14 (4) (a) and (b), Encumbered Estates Act. A careful perusal of the aforesaid provisions in the two Acts is enough to show that the Legislature did not intend the continuation of the proceedings under the Agriculturists' Relief Act when the debtor had applied under S. 4, Encumbered Estates Act. Once the debt is proved under the provisions of the latter Act there seems to be no good reason for the continuation of the proceedings under the Agriculturists' Relief Act.

The debtor himself submitted to the jurisdiction of the special Judge by applying under S. 4, Encumbered Estates Act, and it is somewhat anomalous that he should be allowed to carry on proceedings at the same time under S. 33, U. P. Agriculturists' Relief Act.

We are therefore of opinion that S. 7 (1) (a) upon a proper construction of its language unmistakably shows that it applies to all proceedings whether instituted by the debtor or by the creditor.

It will be observed that in this case the question was whether proceedings should be allowed to continue under both Acts simultaneously. In the present case the proceedings under the Agriculturists' Relief Act are finished and no question arises therefore of continuing both proceedings simultaneously. The point which we have to consider in the present case is what construction should be placed on the provisions of S. 14 (4) (c) read in connexion with those of S. 15, Encumbered Estates Act, when the decree referred to in S. 15 has been passed under the Agriculturists' Relief Act. Sub-section 4 of S. 14 provides that in examining claims the Special Judge shall decide the questions in issue on the same principles as those on which a Court, in which a suit for the recovery of the money due would lie, would decide them, subject to the following provisions :

(a) the amount of interest held to be due on the date of the application shall not exceed that portion of the principal which may still be found to be due on the date of the application ;

(b) the provisions of the Usurious Loans Act 10 of 1918 will be applicable to proceedings under this Act ;

(c) the provisions of the U. P. Agriculturists' Relief Act of 1934 shall not be applicable to proceedings under this Act.

In 1939 O W N 118,[5] it was observed by a Bench of this Court :

When however there has been a decree, the special Judge must under S. 15 accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14. This, in our view, means that he has to see whether the civil Court that passed the decree could have passed the decree which it did pass if that Court had had to comply with the provisions of S. 14, or, to put it in other words, the special Judge has to say to himself "if I under S. 14 had then had to give a decree would the decree that I

2. ('40) 27 AIR 1940 Oudh 207: 185 I C 726 : 1940 O W N 129, Ambika Prasad v. Mt. Maqbulnissa.
3. *Reported in* ('41) 28 A I R 1941 Oudh 119 : 192 I C 264 : 1940 O W N 1223, Jai Shankar v. Maqbulur-Rahman.
4. ('41) 28 A I R 1941 Oudh 80: 191 I C 415: 1940 O W N 1126, Dildar Hussain v. Baboo Lal.
5. ('39) 26 A I R 1939 Oudh 75 : 179 I C 630 : 14 Luck 524 : 1939 O W N 118, Ramsagar Prasad v. Mt. Shyama.

could have given under S. 14 correspond with the decree which the civil Court has in fact given?".

In 1939 O W N 385,[6] it was observed as follows :

Now interpreting the phrase "shall accept the findings of the Court which passed the decree except in so far as they are inconsistent with the provisions of S. 14" in its widest possible sense, this may be taken to mean that the special Judge will consider first whether those findings are inconsistent with cl. (4) (a), that is whether the amount of interest allowed by the decree was in excess of the portion of the principal found still to be due at the date of decree, secondly he will have to consider whether the provisions of the Usurious Loans Act, have or have not been applied in the previous case, and thirdly he will have to consider whether in the previous case the Court has applied the provisions of the U. P. Agriculturists' Relief Act.

Certainly if this widest possible construction be adopted it would involve the exclusion from consideration in proceedings under the Encumbered Estates Act, of all decrees passed under the Agriculturists Relief Act, but the Bench in 1939 O W N 385,[6] did not expressly adopt this construction. Further on they say :

The learned special Judge is also of opinion that the only case in which it is possible for the findings of the Court which passed the decree to be inconsistent with the provisions of S. 14 is one in which the amount of interest decreed is in excess of the portion of principal still found to be due on the date of the suit or decree. The point is an interesting one but we do not think that for the purposes of the present appeal it is necessary to decide it.

That is to say, they considered the question still open and left it open. We do not find that there has been any decision that it is not open to a debtor to take proceedings first under the Agriculturists' Relief Act, and then after those proceedings are finished to make an application under the Encumbered Estates Act, or that sub-s. (4) of S. 14 of the latter Act rules out of consideration a decree passed under the former Act, though it is true that there are observations in some of the cases cited which might be thought to support these conclusions. It has certainly been held that S. 7, Encumbered Estates Act, applies to debtors as well as to creditors and that therefore proceedings cannot be maintained by a debtor under both Acts simultaneously, but the provisions of sub-s. (3) of S. 4 of that Act clearly contemplate the possibility of proceedings being taken by landlord first under the Agriculturists' Relief Act and later under the Encumbered Estates Act. As regards the construction which should be placed on cl. (c) of sub-s. 4 of S. 14, we see no reason why the construction placed upon it by the Allahabad High Court in 1939 A L J 555[1] should not be adopted, this being that the special Judge, while disposing of a matter under the Encumbered Estates Act, shall not apply the provisions of the Agriculturists' Relief Act; not that he shall ignore a decision already arrived at under that Act. On this view we are unable to maintain the order of the Court below on Baba Din's claim. The case of Har Narain stands on a different footing, no decree having been passed in his case. The special Judge was of opinion that the case of Har Narain was stronger than the case of Baba Din. He said :

If this is the correct view with regard to debts which have been the subject of decrees, the case of a mortgagee claimant like the present is much stronger. Here no decree declaring the amount payable to the mortgagee was passed by a Court of law. Only the parties mutually agreed that they should determine the amount payable under the terms of the Agriculturists' Relief Act.

I am clear that in view of the clear and mandatory provision contained in s. 14 (4) (c) such a settlement arrived at between the parties must be re-opened by the Special Judge. For if he did not do so it will be impossible for him to comply with the law as contained in s. 14. For, instance in a case wherein he would apply the provisions of the Usurious Loans Act he will not be in a position to do so unless he re-opened the previous settlement under the terms of the Agriculturists' Relief Act.

This view has been strongly opposed by the learned counsel for the appellant who has argued that the case of Har Narain is much weaker than that of Baba Din because it rests on a settlement between the parties for which there is no special provision in the Encumbered Estates Act, and not upon a decree which under S. 15 may be ignored if it is based on findings which are inconsistent with the provisions of S. 14. The fact that the parties came to an arrangement out of Court on the basis of the provisions of the Agriculturists' Relief Act appears to have influenced the Special Judge, but this cannot affect the legal position, which is that the parties, by whatever motive they may have been influenced and by whatever method they have made their calculations, arrived at a settlement of accounts, executed a receipt and made an endorsement respectively in accordance therewith. If the transaction so evidenced is valid and legally proved we are of opinion, that it is not open to the Special Judge under the Encumbered Estates Act to re-open the question of the mortgagor's liability under the mortgage, ignoring this receipt and endorsement. We do not find anything in S. 14 which would

6. ('39) 26 AIR 1939 Oudh 184 : 181 I C 61 : 1939 O W N 385, Baijnath Singh v. Tulshi Ram.

require him to do so. No question of the applicability of the Agriculturist's Relief Act or of the Usurious Loans Act arises. The Special Judge has merely to consider the position between the parties as it stood after this settlement of account.

This is hardly disputed by the learned counsel for the respondent. It has, however, been strongly argued by him that the settlement between the parties which occasioned this receipt and endorsement was not a settlement of accounts, but an agreement and as such requires registration under S. 17, Registration Act. Clause (b) of sub-s. (1) of S. 17, Registration Act, requires the following documents to be registered :

> Other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

But clause (xi) of sub-s. (2) provides that nothing in clause (b) of the preceding sub-section shall apply to

> any endorsement on a mortgage deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage.

The learned counsel for the appellant referred us to certain passages in Edn. 3 of Mulla's Commentary on the Indian Registration Act in which the correctness of the decision of the Allahabad High Court in 35 ALL 202[7] was questioned. In this case it was held that a receipt whereby the mortgagee gave up a part of the principal and interest in consideration of services rendered by the mortgagor required registration, the reason being that the receipt purported to extinguish the mortgage to the extent of a considerable portion of the mortgage debt. It was said by the learned Commentator, p. 100 :

> This decision, it is submitted, is not correct. The receipt did not extinguish the mortgage, that is the whole mortgage. The words of cl. (xi) are 'extinguish the mortgage' not 'extinguish the mortgage in whole or in part.' Moreover it is inconsistent with the decision in 42 Cal 546.[8]

In Edn. 4 of the same Commentary we find (p. 105) the following observations :

> The only test under the present clause is whether the receipt purports to extinguish the mortgage. If it does, it requires registration, but not otherwise. The Madras and Rangoon High Courts have said that there is a clear distinction between the discharge of a debt and the extinguishment of a mortgage, though one may be the result of the other. A receipt which purports to be merely a settlement of the mortgage debt between the mortgagee and mortgagor does not require registration.

The learned counsel for the respondent referred us to a recent single Judge decision of the Madras High Court, 1940 M W N 895.[9] In this case it was held that where a mortgagee agrees to forgo a portion of the mortgage amount and receives a substantial portion of the reduced amount, leaving a balance of over Rs. 100 still due under the agreement, and passes receipt therefor reciting the relinquishment, that relinquishment was not covered by Excep. (xi) to S. 17 (2), Registration Act, and that the same could not be admitted in evidence for want of registration. It was said by the learned Judge in this case :

> When a receipt does not purport to extinguish a mortgage deed, but merely operates to do so, it may be admissible in evidence without registration on account of Excep. (xi) mentioned in S. 17, sub-cl. 2 of the Act. But when a document is not a receipt of money but something more and does not come within the ambit of Excep. (xi) it would require registration to be admissible in evidence for the simple reason that it is a document which purports or operates to limit or extinguish, either in present or in future, a right, title or interest of the value of more than Rs. 100 to or in the mortgage property. The distinction between a receipt and an agreement of relinquishment of rights in a mortgaged property has been pointed out by a Division Bench of the Allahabad High Court in 35 All 202[7] and has been followed by a Division Bench of this Court in 1918 M W N 262.[10]

We do not think that this decision is applicable to the facts of the present case where both the endorsement and the receipt relate soley to interest found to have been paid in excess. The receipt does not purport to extinguish the mortgage, either in whole or in part. It only limits the liability of the mortgagor thereunder so far as the interest is concerned. We cannot find that it is something more than a receipt, to which the provisions of Excep. (xi) would not be applicable. We hold therefore that it was not necessary for the endorsement and receipt to be registered and that there was a valid settlement of accounts which must be taken into consideration by the special Judge. We accordingly allow both these appeals with costs and setting aside the decrees awarded by the special Judge direct him to decide these claims on the basis of the decree in the one case and of the settlement of accounts arrived at between the parties in the other.

D.S./R.K. *Appeals allowed.*

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7. ('13) 35 All 202 : 19 I C 449 : 11 A L J 258, Gobardhan Sahi v. Jadunath Rai.
8. ('15) 2 AIR 1915 Cal 513 : 30 I C 804 : 42 Cal 546, Kailash v. Sheikh Chhenu.
9. ('41) 28 AIR 1941 Mad 197 : 1940 M W N 895, Srinivasa Ayyangar v. Akayya Naidu.
10. ('18) 5 AIR 1918 Mad 331 : 44 I C 132 : 34 M L J 79 : 1918 M W N 262, Lakshmana Setti v. Chenchuramayya.

A. I. R. 1941 Oudh 198

YORKE J.

Second Appeal No. 227 of 1937, Decided on 12th November 1940, against decree of Civil Judge, Gonda, D/- 17th April 1937.

S. Mohammad Jafar and others —
Defendants — Appellants

v.

Lal Bahadur, Plaintiff and another,
Defendant — Respondents.

(a) Lessor and lessee — Lessor can prohibit lessee from making transfers of various kinds.

In a lease or theka it is competent for the lessor to include conditions prohibiting the lessee from making transfers of various kinds. [P 200 C 1]

(b) Deed—Construction — Mortgage — Usufructuary mortgage and lease — Document purporting to lease property at fixed-annual rent for five years—Grantee empowered to cultivate or put some one in residence but prohibited from effecting transfers in certain ways—Grantor taking Rs. 700 as peshgi on security of above-mentioned property and undertaking to redeem property by paying up aforesaid amount and to have lease cancelled — Transaction held usufructuary mortgage and not lease—Prohibitions as to transfer in deed held ineffective.

A document purported to grant a lease of a nine pies share for five years to the grantee at a rent of Rs. 70 per annum. The grantee was given a right *tarradud wa abad karna*. The grantee was to keep the land in question as his own khudkasht, but he was not to let it to relatives or others for cultivation, nor to get any one else's name entered in the papers. The document went on to say that the grantor had taken Rs. 700 as peshgi on the security of the share mentioned above, and that he would redeem the property by paying up Rs. 700 by Baisakh 1337 Fasli. After that date he would be entitled to pay up the mortgage amount in any khali fasl in Baisakh and to have the lease cancelled.

Held that the right *tarradud wa abad karna* could be interpreted as meaning to cultivate or put someone in residence and the phrase *abad karna* was nothing more than a reiteration of *taraddud karna* as *abad karna* also carried the meaning "to cultivate," and that the transaction was a usufructuary mortgage and not a lease and, therefore, the prohibitory conditions in the document were of no effect. Consequently, the mortgagee was competent to mortgage his mortgagee rights. [P 200 C 1,2]

(c) Wajib-ul-arz — Inheritance — Custom Entries in two wajib-ul-araiz of two villages in respect of same family found discrepant—Differences held due to different mentalities of officers making enquiries or clerks of those officers who under direction of settlement officer recorded result of enquiries—Both documents, however, recording that daughter having brother was excluded from inheritance and that in absence of male issue daughter was entitled to share — Both documents recording that inheritance was according to wives—Custom of exclusion of daughters and widows in presence of sons held established.

The entries as to custom governing inheritance in two wajib-ul-araiz of two villages in respect of the members of the same family were found to be discrepant. But both the documents, however, recorded in clear terms in the one case that a daughter who had a real brother would be excluded from inheritance and in the other case that in case there was no male issue, the daughter would be entitled to a share :

Held that the differences in the two wajib-ul-araiz were not because the documents represented rather the wishes of the parties who had them recorded than a declaration of an old established and binding custom but were the results of the different mentalities of the officers who were making the inquiries or more probably of the clerks of those officers who were, under the direction of settlement officers recording the result of the inquiries.

[P 202 C 2]

Held further that the custom of the exclusion of daughters by the sons was established and the statement in both the documents that inheritance was according to wives, that is to say, that sons inherited as it were per stirpes and not per capita was a clear indication of a custom excluding widows in the presence of sons and permitting partial inheritance only to childless widows : *Case law referred.*

[P 202 C 2 ; P 203 C 1]

(d) Civil P. C. (1908), S. 100 — Question of possession in lieu of dower — Issue framed but not pressed—Point not clearly taken in grounds of first appeal but argued very shortly — Point not taken in grounds of second appeal — Point cannot be raised as being one of fact.

The plea of possession in lieu of dower was taken in the trial Court and an issue was framed but the point was not pressed. In the first appellate Court the point was not taken clearly in the grounds of appeal but was very shortly argued. In the grounds of second appeal the point was not taken :

Held that in the circumstances the point could not be allowed to be raised in second appeal—particularly as it clearly raised questions of facts.

[P 203 C 1]

Siraj Husain — for Appellants.
Hyder Husain — for Respondent 1.

Judgment.—This is a second appeal in a suit for possession instituted by the plaintiff-respondent Lal Bahadur. One Saiyid Hasan now deceased owned a two annas share in village Lalganj and four pies share in village Ranipur. Saiyid Hasan married a first wife by whom he had a son Shabbir Hasan. Later he married Mt. Ism Bibi defendant 2 by whom he had a son Mohammad Jafar defendant 1 and a daughter Mt. Kaniz Hasan defendant 3. On the death of Saiyid Hasan, mutation was effected in favour of Shabbir Hasan and Mohammad Jafar in equal shares over both these properties. At the time of Saiyid Hasan's death, Mohammad Jafar was a minor, and the application for mutation appears to have been made by his mother Mt. Ism Bibi on his behalf. Subsequently, Shabbir Hasan sold his share in the Lalganj property, and in combination with Mohammad Jafar, who was by that time presumably a major, the whole of the Ranipur property was sold. There remained only the one anna share in Lalganj which stood in the name of Mohammad Jafar. On 24th July 1924 Mohammad Jafar executed a possessory mortgage of three pies out of this

one anna share in village Lalganj in favour of the plaintiff-respondent Lal Bahadur. Subsequently, by EX. 4 dated 2nd May 1925, he executed a zar-i-peshgi lease in respect of the remaining nine pies share in favour of one Ismail who was defendant 4 in the present suit. Both these deeds were registered deeds, and by them it would appear that Mohammad Jafar had disposed of the whole of his share in Lalganj.

On 14th April 1931 defendant 4 Ismail executed a mortgage in respect of his rights under Exhibit 4 in favour of the plaintiff-respondent Lal Bahadur under a deed of simple mortgage, EX. 17. Thereafter, in the year 1932, Lal Bahadur instituted a suit on foot of his mortgage, impleading Mohammad Jafar as a defendant along with his own mortgagor Ismail. A preliminary decree was given on 28th September 1932 and final decree on 29th April 1933. The mortgaged property was subsequently sold and formal possession was given to Lal Bahadur, who had purchased the mortgaged property in the auction sale in September 1935.

Subsequently to the passing of the preliminary decree and prior to the passing of the final decree on 24th January 1933 an application was made under S. 33, Land Revenue Act, for correction of the entry in the revenue papers by Mt. Ism Bibi and Mt. Kaniz Hasan. This application was not opposed by Mohammad Jafar and in the result the name of the two applicants was substituted for that of Mohammad Jafar, in respect of the nine pies share of which a transfer had been effected in favour of Ismail by means of the document EX. 4. Prima facie one cannot help suspecting that this procedure was a mere manoeuvre to save this property from being lost to Mohammad Jafar. Be that as it may, the matter has given rise to some problems which are by no means free from difficulty.

Lal Bahadur then instituted the present suit claiming to be in possession of the three pies which had been mortgaged to him, but claiming possession and damages in respect of the nine pies share, of which he has been dispossessed as a result of this mutation order. In his suit the plaintiff Lal Bahadur alleged that in the family of Saiyid Hasan, deceased, widows and daughters were excluded from inheritance by custom, and in consequence defendants 2 and 3 were not entitled to get their names entered or to take possession of this property. The learned Munsif decreed the plaintiff's suit holding that there was a custom of exclusion of daughters and widows in the family of Saiyid Hasan, and that therefore defendant 1 was owner of the whole one anna share. He further held that defendant 1 had transferred nine pies share by a zar-i-peshgi patta in favour of defendant 4 and that defendant 4 had executed a simple mortgage of his rights in favour of the plaintiff, and that the plaintiff had got a decree for sale on the basis of that mortgage and had got delivery of possession. On issue 3 (a) he held that there was a prohibition in the so-called lease against giving land in tenancy to some other persons but that there was no prohibition against the making of a simple mortgage of the rights conveyed by that document. He further held that the transfer by mortgage in the plaintiff's favour was valid, and in this connexion he held that as defendant 1 had been a party to Lal Bahadur's suit on foot of the mortgage he was barred by constructive res judicata from raising in the present suit the plea that the transfer in favour of the plaintiff was not valid. On issue 4 he held that Ismail got possession on the basis of his zar-i-peshgi patta and that he was in possession as a zar-i-peshgi patta holder and not as a tenant. On issues 8 and 9 he held that defendants 1 and 2 were not in possession under a family settlement and that defendant 2 was not in possession in lieu of dower. It is to be noted in connexion with the plea of possession in lieu of dower that the pleader for defendants 2 and 3 conceded that there was no force in the plea. On issue 7 he held that the plaintiff was protected by S. 41, T. P. Act, inasmuch as the plaintiff was right in regarding defendant 1, Mohammad Jafar, as ostensible owner of half the property of Saiyid Hasan with the consent of defendants 2 and 3 and his brother Shabbir. The basis of this finding was the fact that at the time of mutation proceedings defendant 2, the widow, set up neither her own title, nor that of her minor daughter defendant 3. Finally he held that the plaintiff was entitled to possession, that the patta in favour of Ismail stipulated for rent at Rs. 70 per annum, and the plaintiff had claimed damages at the same rate, and that he was entitled to get at that rate. These findings were upheld by the learned civil Judge in appeal.

The first question which arises in this second appeal is as to the nature of the document EX. 4. The Courts below have described it throughout as a zar-i-peshgi lease, and have not considered what its real

nature is. If it was a lease or *theka* then it was competent for the lessor to include conditions prohibiting the lessee from making transfers of various kinds. On behalf of the respondent it has been contended that EX. 4, though nominally a lease, is really a mortgage. This document purports to grant a lease of a nine pies share for five years to the grantee at a rent of Rs. 70 per annum. The grantee is given a right *tarradud wa abad karna* which can be interpreted as meaning to cultivate or put someone in residence. The phrase *abad karna* may however be nothing more than a reiteration of *taraddud karna* as *abad karna* also carries the meaning "to cultivate." Elsewhere, it is said that the grantee may keep the land in question as his own khudkasht, but he may not let it to relatives or others for cultivation, nor may he get anyone else's name entered in the papers. These prohibitions would be ineffective if the document is really a mortgage. The document goes on to say that the grantor has taken Rs. 700 as *peshgi* on the security of the share mentioned above, and that he will redeem the property by paying up Rs. 700 by Baisakh of 1337 Fasli. After that date he will be entitled to pay up the mortgage amount in any *khali fasl* in Baisakh and to have the lease cancelled.

I have been referred to Ghose's Law of Mortgage in India, Tagore Law Lectures—1875-76, Edn. 5, 1922, Vol. 1, p. 100, where the learned author devotes five pages to this form of usufructuary mortgage. There is another reference to this form of mortgage at p. 289. Learned counsel for the appellants contends that if EX. 4 is a mortgage at all, it is really a simple mortgage coupled with a lease. He seeks to divide the document into two parts, the first part being a lease only and nothing more, and the second, that part which relates to the matter of mortgage. The argument which has been put forward is ingenious, but it seems to me to be clear that the document is actually a mortgage and in nature and effect a usufructuary mortgage with a minimum period of five years for redemption. It follows that the prohibitory conditions which have been included in this mortgage are without effect, and that what was done by Ismail by EX. D.4 was to mortgage to the plaintiff his mortgagee rights as usufructuary mortgagee. It was perfectly competent for the plaintiff in execution of his decree to sell up those rights, and by purchasing those rights in the auction sale and getting formal possession, what he really got was actual possession of the mortgaged share as usufructuary mortgagee in the place of Ismail. It follows that if the plaintiff was dispossessed by defendants 2 and 3, he is entitled to recover possession unless it is shown that defendants 2 and 3 have a title of their own on the basis of which they can resist this suit.

It follows from this that the crucial point in the present suit is the point which was argued at considerable length both in this Court and in the Court below, namely the question of custom. On the question of custom reliance is placed in the first instance on two wajib-ul-araiz, one of village Ranipur, EX. 33, and the other of village Lalganj, EX. 12. There was also some evidence of instances put forward as contradicting this evidence of custom, but, it has been shown that these instances are instances of compromises, and do not therefore lead to the inference that there was no such custom as has been alleged by the plaintiff. The gist of the argument put forward on behalf of the appellants, however, is that there are such discrepancies between the paragraphs relating to this matter of custom in the two wajib-ul-araiz that it cannot be held that they lay down a custom at all. The relevant paragraph is paragraph 4 in each case. Each begins with a provision that every cosharer has power to transfer his share. The matter is put in more detail in the Lalganj wajib-ul-arz EX. 12 where it is stated that each cosharer has a power of sale and mortgage. Both wajib-ul-araiz then go on to the question of inheritance and provide that where a deceased cosharer has had more than one wife, inheritance is according to wives, that is if there is one son by one wife and more than one son by the other wife, the single son by the one wife will get half the estate and the more numerous sons by the other wife will get the other half. Both wajib-ul-araiz then go on to consider the position in case one wife has issue and the other has none. Here a notable difference arises. Under EX. 33 the one wife who has no children will remain in possession of half the estate without the power of transfer. Under EX. 12, the issueless wife will get maintenance only, while the whole of the property will devolve upon the sons.

Under EX. 33 it is further provided that after the death of the sonless widow the property goes to the children of the other widow, but that if the sonless widow has a daughter, she will get her mother's share, and this is emphasised by the remark that

a daughter who has got a real brother will be excluded from inheritance. In EX. 12, the wajib-ul-araz of Lalganj, there is no further provision after the provision that the entire inheritance devolves upon the children who *ex hypothesi* are the children of the other widow. Exhibit 33 provides further that after the death of a widow without child, the brothers, full nephews of the deceased husband will obtain possession of the property. The corresponding provision in Ex. 12 is that after the death of the widow the near relatives of the husband will become owners, which amounts to much the same thing. Going a little further forward Ex. 33 makes no remark about adoption but in Ex. 12 we find a provision that every sharer has a right, in case he is sonless, of making an adoption provided that the adopted son is a lineal male descendant of the same ancestor. Then again corresponding to the provision in Ex. 33 that a daughter who has a full brother by the same mother will not get any share, there is in Ex. 12 a provision that in case of there being no sons the daughters will be entitled to get a share. This is the provision finding a place in both wajib-ul-araiz on which reliance is placed for the plaintiff-respondent.

My attention has been further drawn to one other discrepancy between the two wajib-ul-araiz. In Ex. 33 it is provided that the share of a deceased brother without sons will be taken by all his brothers in equal shares; no consideration will be given to jointness or separation, but all the brothers will share in the funeral ceremonies and payment of debts, and whoever evades doing so, will be deprived of his share. It is pointed out that there is nothing which corresponds to this last provision about deprivation of share on account of non-participation in funeral ceremonies, etc., in Ex. 12. On the other hand, there are in Ex. 12 two other provisions which find no place in Ex. 33 by one of which a concubine is entitled to maintenance and by the other of which it is stated that if one of three brothers separates and two remain joint, and one of them dies issueless, the share of the deceased will be divided equally among the two surviving brothers. There is certainly no room for doubt that there are obvious differences between these two wajib-ul-araiz. On behalf of the appellants it is contended that these differences are irreconcilable, as for the most part they apparently are, and lead to the conclusion that these are not records of custom at all. For the respondent on the other hand it is contended that they are really reconcilable, and that the important point about them is that they are in clear agreement in providing that in the presence of sons, daughters get no share, and that mothers (i. e., widows) never succeed as heirs in the sense of heirs with absolute rights as under the Mahomedan law.

On behalf of the appellants reliance has been placed on 7 O W N 711,[1] in which it was held that if apparently entries in a wazib ul-arz are not entries made by the settlement officer as the result of his inquiries which he was enjoined by law to make and are not the record of the history and of the customs of the village made by him but merely contained the statements of the proprietors of the village, the wajib-ul-arz is not an official record but is a record of the statements of the proprietors of the village, and is of no weight whatever for the simple reason that it connotes the wishes of interested persons as to the practice that they would wish to see prevailing rather than the ascertained fact of well-established custom. Where such is the true nature of the entries in a wajib-ul-arz, the Court cannot attach to it the same sanctity as would have attached to a record of custom made by the settlement officer presumably after judicial or quasi-judicial inquiry. Reference was also made to 1940 O W N 719[2] in which it was held by a Bench of this Court, of which I was a member, that

> where no evidence is given of an instance in which a particular custom has been observed, wajib-ul-araiz containing entries in regard to the custom may be disregarded.

On the same point reliance was placed on 13 O C 163,[3] in which it was held by their Lordships of the Privy Council that

> there is no class of evidence that is more likely to vary in value according to circumstances than that of the wajib-ul-araiz,

and it was held further that

> where from internal evidence it seems probable that the entries recorded connote the view of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed.

This is a substantially different proposition from that which was laid down in 1940

1. ('30) 17 AIR 1930 Oudh 389 : 126 I C 657 : 7 O W N 711, Chandi Singh v. Gur Prasad Singh.
2. ('40) 27 A I R 1940 Oudh 269 : 187 I C 179 : 1940 O W N 719, Mt. Pirthipal Kunwar v. Mt. Suraj Kunwar.
3. ('09) 32 All 363: 6 I C 787: 37 I A 191: 13 O C 163 (P C), Anant Singh v. Durga Singh.

O W N 719[2] mentioned above. Learned counsel for the appellants also referred me to an unreported case of the Judicial Commissioner's Court, Second Civil Appeal No. 366 of 1916 decided by Mr. Lindsay on 7th September 1917, a case very similar to the present case in which there were two wajib-ul-araiz before the Court containing numerous discrepancies similar to those which we find in the present case. The learned Judge held that in these circumstances it would be most dangerous to accept one of the wajib-ul-araiz, Ex. 1, as being an authentic record of custom. He remarked :

> On the contrary it appears to me that these statements in these documents represent rather the wishes of the parties who had them recorded than a declaration of an old established and binding custom.

On behalf of the plaintiff-respondent it was contended that a wajib-ul-arz is by itself sufficient to prove custom, and that there is no such necessity for corroborative proof of instances of the observance of the custom as is suggested on behalf of the appellants. In 50 I A 196[4] at p. 201 their Lordships of the Privy Council remarked as follows :

> Settlement officers in recording custom in wajib-ul-arzes have to perform duties which the Government orders them to perform.
>
> One of these duties was to record customs as the settlement officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the settlement officer neglected to perform his duty or was misled in recording a custom and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

Reference was also made to 2 O W N 872[5] at p. 878 where a Bench of the Judicial Commissioner's Court held that the evidentiary value of the entries made in certain wajib-ul-araiz was not in their opinion in any manner minimized by the fact that the plaintiffs had not supported those entries by proof of instances of succession in accordance with those entries. They went on to refer to 50 I A 196.[4] Reference was made to a number of other cases but I do not think they take the matter any further. The two wajib-ul-araiz on the record in the present case are certainly curious documents, and suggest strong Hindu influence affecting the persons who were dictating these documents. It is certainly remarkable that in one village the family should record a custom that a widow will get nothing more than maintenance while in another village the same family records a custom that the widow will have a life estate over half of her husband's property. Similarly, it is remarkable that in one village the co-sharer is given a non-Mahomedan right of adoption while in the other nothing is said about the existence of such a right, and that the condition attached in one village to the rights of brothers to get a share in a deceased brother's property that they must share in funeral expenses and payment of debts should be omitted in the other village. It is suggested that the discrepancy in regard to this question of maintenance of an issueless widow is reconcilable in this way that it really affects only the quantum of maintenance which such a widow is to get.

On the other hand it seems to me to be quite unsound to suggest as an explanation of such differences that the differences have arisen because the wajib-ul-araiz represent only the wishes of the co-sharers. The co-sharers were in both cases the members of the same family and one should expect that they would dictate the wajib-ul-arz of each village in the same terms, even if they were only seeking to make a statement of their wishes in the matter of inheritance. It seems to me therefore that it is not sound reasoning to say that these discrepancies lead to the conclusion that these documents represent rather the wishes of the parties who had them recorded than a declaration of an old established and binding custom. It appears to me rather that the differences are the result of the different mentalities of the officers who were making the inquiries or more probably of the clerks of those officers who were, under the direction of the settlement officers, recording the result of the inquiries. It seems to me to follow that where as in both these documents we find it recorded in clear terms in the one case that a daughter who has got a real brother will be excluded from inheritance and in the other case that in case there is no male issue the daughter will be entitled to a share, we have a clear record of custom that daughters are excluded by sons. For the rest the statement which finds place in both these documents that inheritance is according to wives, that is to say, that sons inherit in the manner mentioned earlier, as it were per stirpes and not per capita, is similarly a clear indication of a custom excluding

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4. ('23) 10 A I R 1923 P C 70: 74 I C 449: 26 O C 217: 50 I A 196: 45 All 413 (P C), Balgobind v. Badri Prasad.
5. ('26) 13 A I R 1926 Oudh 101 : 91 I C 583 : 2 O W N 872, Balj Nath Singh v. Bahadur Singh.

widows in the presence of sons and permitting partial inheritance only to childless widows.

On this view I therefore agree with the lower appellate Court that on the evidence on record it must be held that the wajib-ul-araiz, Exs. 12 and 33, exclude both daughters and widows. Two other questions were raised in this appeal. First a suggestion was made that the appellant might be allowed to raise once more the question of possession in lieu of dower. On the other hand it has been pointed out that this point did not form part of the original written statement. A plea on this basis was taken by means of an amendment of the written statement and issue 9 was framed but the point was not pressed in the trial Court, and in the lower appellate Court the point was not even taken clearly in the grounds of appeal. It seems to have been argued very shortly, judging by the summary nature of the finding of the lower appellate Court. The point has not been taken in the grounds of appeal in this Court, and in my opinion in these circumstances it cannot be allowed to be raised at this late stage, particularly as it clearly raises questions of fact. The other point which has been argued is as to the application of S. 41, T. P. Act. On the findings at which I have arrived on the second question raised in this appeal, this question no longer arises, and I do not think it necessary to go into it. It is of course obvious that prima facie by her action in getting the name of Mohammad Jafar mutated along with that of Shabbir Hasan on the death of Saiyid Hasan, Ism Bibi put forward Mohammad Jafar as the ostensible owner of half the estate of her deceased husband. On the above findings the present appeal fails and is dismissed accordingly with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Oudh 203

YORKE J.

Second Appeal No. 425 of 1937, Decided on 13th November 1940, against order of Civil Judge, Lucknow, D/- 31st August 1937.

Mt. Asia Begam—Plaintiff—Appellant

v.

Lala Raghubar Dayal and others — Defendants — Respondents.

(a) Transfer of Property Act (1882), S. 100 — Charge — Maintenance charged on two properties — Charge-holder by his own neglect losing his remedy against one property — He cannot recover from other property more than proportionate share of original charge.

Where two properties are burdened with a maintenance charge and the charge-holder by his own negligence allows his remedy to be lost as against one of the properties he cannot claim as against the other property to recover anything more than a proportionate share of the original maintenance charge : 33 Cal 613; A I R 1920 Bom 306 and A I R 1916 Pat 249, *Rel. on;* 4 All 296 (FB), *Disting.* [P 204 C 2]

(b) Maintenance — Maintenance charged on village profits—Profits reduced — Maintenance can be reduced proportionately —Fact of Maintenance being fixed by will is immaterial.

Where a maintenance allowance is made a charge on the profits of a village the allowance can be reduced proportionately to the reduction of the village profits : A I R 1937 Oudh 82 and 1937 O W N 429, *Rel. on.* [P 205 C 1]

The fact that the maintenance was fixed by a will makes no difference. [P 205 C 1]

(c) Practice—Abandonment of plea — Maintenance charged on village profits —Issue whether maintenance could be reduced in proportion to reduction of profits framed but not pressed—Chief Court during pendency of appeal holding maintenance reducible—Party not pressing issue held not bound by admission and entitled to raise issue in appeal.

In a suit to recover maintenance charged on village profits an issue whether the maintenance was liable to be reduced in proportion to the reduction of the village profits, was framed but not pressed by the defendant's counsel. During the pendency of the appeal from the trial Court's decision the Chief Court held the maintenance to be reducible :

Held, that the defendant was not bound by the counsel's admission in the trial Court and in view of the subsequent decision of the Chief Court was entitled to raise the issue in appeal. [P 205 C 1]

(d) Civil P. C. (1908), S. 100 — Accounts of village profits directed to be taken by trial Court —Point that certain income was not considered is one of fact—Point raised in cross-objections in first appellate Court—No arguments addressed—Point cannot be raised in second appeal.

A point that certain income was not taken into account at the time of the preparation of accounts of village profits in the trial Court is one of fact and where cross-objections were filed in the first appellate Court on that point but no arguments were addressed the point cannot be raised in second appeal. [P 205 C 1]

M. K. Seth — for Appellant.

M. Wasim — for Respondents 2 to 4.

Judgment. — This is a second appeal by the plaintiff in a suit for the recovery of maintenance. The facts are not in dispute. Mohammad Ahmad Khan, talukdar of Kasmandi Khurd, who died in 1903, had executed a will on 23rd January 1888, by which he devised village Aomao and half of village Gahdon to three sons subject to a maintenance charge of Rs. 15 per month in favour of each of his daughters. The present plaintiff is one of those daughters. Subsequently the half share in village Aomao was held not subject to the maintenance charge in a suit which came up to this Court in second

appeal. The present defendants are persons who purchased village Aomao in court-auction. It was said by the plaintiff that the maintenance was paid up to June 1935, but not thereafter, and in consequence the present suit was instituted on 9th May 1936. In answer to the suit the defendants pleaded that they were boda fide transferees for value without notice of the charge, that village Aomao was not liable for the entire charge, that the charge on village Aomao should be rateably reduced by reason of fact that village Gahdon which was originally charged along with Aomao had gone out, and that the maintenance should be further reduced because there had been a decrease in the profits of village Aomao by reason of remissions of rent. Lastly it was pleaded that the defendants were not liable to pay any interest because they were agriculturists. The trial Court found on all points against the defendants.

On the matter coming up in appeal to the civil Judge of Lucknow two points only were argued, namely, (1) whether the charge of maintenance on village Aomao could be reduced on account of village Gahdon having been found not to be subject to the charge of Guzara, and (2) whether the maintenance charge could be reduced on account of the remissions of rent. The same two points have been argued in this second appeal. On the first point the learned civil Judge pointed out that originally both villages were liable for the payment of the maintenance allowance or guzara. On the question whether the maintenance charge as a whole was liable to rateable reduction on account of the fact that village Gahdon had gone out, he referred to three cases of mortgages. In 33 Cal 613[1] it was held that

where, subsequent to the date of a mortgage, different persons had become interested in different fragments of the equity of redemption, the properties continue to be so liable, and all that the owner of any portion of the equity of redemption is legitimately entitled to ask is that not more than a rateable part of the mortgage debt should be thrown upon the property in his hands. This is manifestly just and the mortgagees cannot claim to throw the entire burden upon a portion of the mortgaged premises because by reason of their own laches, they had lost their remedy as against the remainder.

The same view was taken in a Bombay case 44 Bom 223.[2] In that case certain property was mortgaged to the plaintiff. Subsequent to the date of the mortgage, M and K purchased the equity of redemption in half shares. Plaintiff sued to recover the entire mortgage debt by sale of half of the mortgaged property in the hands of M without adding K as a party to the suit. It was held that

it was contrary to the principles of equity that the plaintiff, who by his own negligence had lost his remedy against the owner of half of the equity of redemption, should seek to throw the whole burden of the mortgage on the owner of the other half.

The same view was taken by the Patna High Court in 36 I C 208.[3] In that case part of a property under mortgage was sold to the defendant by the mortgagor and the equity of redemption in respect of all the mortgaged properties was subsequently sold to the mortgagee. In a suit by the mortgagee to enforce the mortgage, it was held that

having regard to the terms of S. 82, T. P. Act, it was improper to order sale of the mortgaged property without fixing the proportion of the mortgage debt chargeable on the property purchased by the defendant.

The learned civil Judge held that the principle applied in these cases was applicable to the case of a charge. The charge holders had apparently by their own negligence allowed their remedy to be lost as against the Gahdon property and they could not claim as against the Aomao property to recover anything more than a proportionate share of the original maintenance charge. Learned counsel for the appellant referred to 4 ALL 296[4] but that ruling does not lay down any proposition of the kind which he suggests, namely that a maintenance charge is applicable to every part of the charged property in such a way that the whole of the charge can be recovered from any portion of the charged property. In my opinion the conclusion arrived at by the lower appellate Court on this point is certainly correct. The second point which is raised is whether the defendants were entitled to a reduction proportionate to the reduction of the profits of village Aomao. For this purpose reliance has been placed in this Court as in the Court below on 1937 O W N 136.[5] In that case it was held by a Bench of this Court that

where an agreement is executed by a taluqdar to pay a member of his family maintenance at a certain rate and the maintenance allowance is not totally independent of the income that the taluq-

1. ('06) 33 Cal 613 : 10 C W N 551 : 3 C L J 576, Imam Ali v. Baij Nath Ram Sahu.
2. ('20) 7 A I R 1920 Bom 306 : 55 I C 327 : 44 Bom 223 : 22 Bom L R 68, Budhmal Kevalchand v. Rama Yesu.
3. ('16) 3 A I R 1916 Pat 249 : 36 I C 208 : 1 Pat L J 228, Ram Narain Singh v. Ram Kumar Lal.
4. ('82) 4 All 296 : 1882 A W N 42 (F B), Sham Lal v. Banna.
5. ('37) 24 A I R 1937 Oudh 82 : 166 I C 194 : 1937 O W N 136 : 13 Luck 65, Rampal Singh v. Surendra Bikram Singh.

dar for the time being is to derive from the taluqa, the taluqdar is entitled in justice, equity and good conscience to be relieved of a portion of the allowance, if subsequently to the agreement the profits of the taluqa diminish.

The same principle was applied in 1937 O W N 429,[6] in which it was held that "allowance fixed by wakf can be reduced by Court on the ground of a reduction in the income of the wakf property." Learned counsel for the appellant suggests first that the principle is not applicable, because this is a case of an allowance fixed by a will. I do not think that makes any difference, particularly as it was specifically stated in the will that the allowance was to be paid "out of the profits." It has been shown that the profits which were nearly Rs. 3000 per annum in 1304 Fasli have fallen to a little over Rs. 1200. The property is, of course, not in the hands of the original devisees, but in the hands of purchasers. In my opinion they are clearly entitled to a reduction.

The only other ground on which the allowing of such a reduction was contested was that in the trial Court, although an issue was framed, learned counsel for the defendants did not press the issue. In the lower appellate Court the point was raised again and the Judge who first heard the appeal allowed the point to be taken and remanded the case to the trial Court for a finding as to the reduction of profits. It appears to me that this course was justifiable and that the defendants could not be held bound by this admission of their counsel in the trial Court, particularly bearing in mind that the admissions must have been made prior to the decision in 1937 O W N 136[5] which set at rest a question which had been previously in doubt. I am satisfied that the Court below rightly held that the defendants were entitled to a reduction in view of the falling off of the profits of the village. The only other point raised is in regard to sayar and forest income which was said not to have been taken into account. That however was a question of fact in regard to the accounts which had been prepared in the trial Court. Although a cross-objection had been taken on this question, no arguments were addressed to the lower appellate Court on this point, and therefore the lower appellate Court disallowed the cross-objection. It is obvious that this is not a point which can in the circumstances be raised again in second appeal. In my opinion the lower appellate Court rightly allowed the defendants' appeal in part and modified the decree of the trial Court. There is no force in the present appeal which accordingly fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

6. ('37) 1937 O W N 429, Mt. Badrul Nissa v. Muzaffar Husain.

A. I. R. 1941 Oudh 205

THOMAS C. J. AND GHULAM HASAN J.

First Appeal No. 65 of 1937, Decided on 4th December 1940, against decree of Civil Judge, Sultanpur, *D/-* 12th March 1937.

Ram Raj Singh — Defendant — Applt.

v.

Lal Chandra Pratap Singh, Plaintiff and another, Defendant — Respdts.

(a) Civil P. C. (1908), O. 21, R. 62 — Mere fact that incumbrances are notified in sale proclamation does not dispense with proof regarding validity of incumbrances.

The mere fact that incumbrances are notified in the sale proclamation does not dispense with the necessity of proof as regards the correctness and validity of these encumbrances in the absence of any inquiry having been made as contemplated by R. 62 of O. 21. [P 207 C 2]

(b) Transfer of Property Act (1882), S. 53 — Word 'transfer' covers transfer whether with or without consideration.

The word 'transfer' used in S. 53 is comprehensive enough to embrace within its purview all kinds of transfers, whether with consideration or without consideration. [P 208 C 2]

(c) Transfer of Property Act (1882), S. 53 — Mere fact that transfer is executed without consideration as in case of gift or mere fact that transfer is made merely with intent to defeat anticipated execution is not sufficient to make it fraudulent transfer.

The mere fact that a transfer is executed without consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with intent to defeat or delay the creditors of the transferor. Each case must be examined on its own merits and it must be found upon a consideration of the entire circumstances surrounding the execution of the deed of transfer, whether it was brought about with a fraudulent intent or otherwise. Similarly, a transfer made merely with intent to defeat an anticipated execution is not a transfer of property made with intent to defraud, defeat or delay creditors within the meaning of S. 53: A I R 1915 P C 115 and A I R 1920 Oudh 182, *Rel. on.* [P 208 C 2; P 209 C 2]

(d) Transfer of Property Act (1882), S. 53 — Onus to prove that transfer is fraudulent is on creditors.

Under the general law the burden of proving that the transfer is fraudulent within the meaning of S. 53, T.P. Act, lies on the creditors. [P 210 C 1]

(e) Transfer of Property Act (1882), S. 128 — Donor owning equity of redemption in mortgaged property and not including it in deed of gift—Donee is not universal donee.

Where at the date of gift deed the donor owns equity of redemption in certain mortgaged property and has not included it in deed of gift, the donor cannot be said to have transferred his whole property within the meaning of S. 128 and the donee

cannot be said to be universal donee : A I R 1932 Oudh 40, *Rel. on.* [P 210 C 2]

H. D. Chandra — for Appellant.

Hyder Husain, Ali Mohammad, P. N. Chaudhri, Bishun Singh and H. H. Zaidi — for Respondent 1.

Judgment. — This is a first civil appeal against the judgment and decree dated 12th March 1937, passed by the civil Judge of Sultanpur decreeing the plaintiff's suit for declaration. The plaintiff's case as put forward in the plaint was that the entire village of Ambarpur, situate in the district of Sultanpur, was owned along with several other villages by Babu Bankateshwar Rawan Bahadurpal Singh, defendant 2; that defendant 2, who is the real uncle of the plaintiff, executed a registered deed of gift in his favour on 17th February 1925, in respect of village Ambarpur and put the plaintiff in possession; that defendant 1 held a simple money decree against defendant 2 in execution whereof defendant 1 got the said village attached declaring it to be the property of defendant 2 and commenced sale proceedings; and that on 16th May 1936, the plaintiff filed an objection under O. 21, R. 58, Civil P. C., before the attaching Court, but the objection was dismissed summarily. The plaintiff thereupon brought the present suit, out of which this appeal arises, praying that a declaratory decree be passed in his favour to the effect that he is the sole and absolute owner of village Ambarpur, which is not liable to attachment and sale in execution of the decree held by defendant 1 against defendant 2.

The defence raised by defendant 1 was that defendant 2 had no male issue and that the plaintiff was the own nephew and heir of defendant 2. It was stated that defendant 2 was heavily indebted and that the deed of gift in the plaintiff's favour was executed merely to deprive the decree-holders of their money and to defraud them. Defendant 1 further stated that defendant 2 had executed a mortgage in favour of Rai Sahib Babu Sukhdeo Singh, the father of defendant 1, on 12th June 1920, in respect of village Antoo in the Partabgarh district, and the father of defendant 1 had obtained a decree for sale on 4th September 1924, for rupees 24,945-13-0 on foot of a mortgage. The village was sold but the decree was not fully satisfied. Defendant 1's father then obtained a money decree under O. 34, R. 6, Civil P. C., on 17th August 1929, for Rs. 16,937-0-6. Before village Ambarpur was put to sale by defendant 1, one Sheo Nath Tewari, who also held a decree against defendant 2, got the village proclaimed for sale, and the plaintiff filed an objection under O. 21, R. 58, Civil P. C., on 17th December 1930, on the basis of the deed of gift in his favour, which was dismissed on 5th August 1931. Upon this ground it was alleged that the present suit, having been filed more than one year after the dismissal of the objection, was barred by time. Lastly it was pleaded that defendant 2 had no property left with him at the time when he executed the deed of gift of village Ambarpur in favour of the plaintiff and that the plaintiff being a universal donee of defendant 2 was bound to pay the debts of the latter. Upon these pleadings the learned civil Judge of Sultanpur framed the following issues :

1. Is plaintiff universal donee as alleged by defendant 1? If so, its effect? 2. Is plaintiff donee from defendant 2 in respect of Ambarpur? 3. If so, was the gift deed executed to defraud the creditors as alleged by defendant 1? 4. Is the suit within limitation? 5. To what relief is plaintiff entitled?

Upon issue 1 the trial Court held that the plaintiff was not the universal donee of defendant 2, as alleged by defendant 1. Upon issue 2 the trial Court held the deed of gift to be proved, and on issue 3 it held that the deed of gift was not executed to defraud the creditors of defendant 2, as alleged by defendant 1. The question of limitation was also decided in favour of the plaintiff, it being held by the trial Court that as the attachment in the decree of Sheo Nath Tewari had been withdrawn the plaintiff was under no liability to file a regular suit within one year as required by O. 21, R. 63, Civil P. C. In the result, the trial Court decreed the plaintiff's suit. Defendant 1 has now preferred this first appeal. Although the memorandum of appeal challenges the findings of the trial Court in respect of all the points decided against defendant 1, yet in this Court the learned counsel appearing on behalf of the defendant-appellant has expressly abandoned the plea of limitation and has confined his arguments to the other two points with regard to the fraudulent character of the deed and the liability of the plaintiff as the universal donee of defendant 2. The principal question, which arises for determination therefore is whether the decision of the trial Court that the deed of gift is not fraudulent is correct or not. It has been admitted before us that the finding of the trial Court to the effect that the donee has been in exclusive possession of village Ambarpur since the date of the gift cannot be challenged with the result that the

transfer must be considered to be genuine and not fictitious. The only question therefore which remains for decision is whether the defendant-appellant has succeeded in establishing that the deed of gift in question is fraudulent.

It has been argued in this connexion that at the time of the gift defendant 2 owned only two villages, Antoo and Ambarpur, out of the four villages owned by him, as the other two villages, Bhawanipur and Fatehpur, had been foreclosed in 1924. It was pointed out that the liabilities against defendant 2 far out-weighed the value of village Antoo, that even after the sale of village Antoo the decree of the defendant-appellant remained unsatisfied to the extent of rupees 15,537-4-0 for which he had to obtain a decree under O. 34, R. 6, Civil P. C., and that under these circumstances the gift of village Ambarpur must be deemed to have been made with the intention to defraud the creditors, including the defendant-appellant. The trial Court has held that the extent of indebtedness of defendant 2 at the time when he executed the gift was about Rs. 85,000 and that village Antoo alone at that time was worth Rs. 88,661; consequently, the debts being less than the value of the property, no intention to defraud the creditors generally could be presumed from the fact of the execution of the deed of gift. The figures mentioned by the trial Court have been questioned by both sides as not being correct. The evidence on the point consists of Ex. A-44, the sale proclamation of village Antoo, prepared on 15th November 1927, in the sale proceedings. The valuation of the village is put down as follows:

Gross rental	...	... Rs. 9,237-15-8.
Government revenue		... Rs. 3,759-2-0.
Profits	...	... Rs. 5,478-13-8.
Valuation	...	... Rs. 87,661-10-8.

To this is added Rs. 1000, the price of trees. The total valuation therefore comes to Rs. 88,661-10-8. The learned counsel appearing on behalf of the plaintiff-respondent questions this valuation as being too low. He argues that the valuation of Rs. 87,661-10-8 put down in the sale proclamation works out at the rate of 16 times the amount of annual profits, which is grossly inadequate. According to him the valuation should have been made at 25 to 30 times the amount of the annual profits. Even if the valuation is taken at 20 times the amount of the annual profits, it will roughly come to Rs. 1,09,560. We may therefore take it that as far as the valuation of village Antoo is concerned it may be accepted to be about a lakh of rupees if not more. A large number of encumbrances upon village Antoo have been incorporated in the sale proclamation, the total of which comes to Rs. 83,382-11-0. It does not appear from the sale proclamation whether the property was sold subject to these encumbrances, and even if it was, whether any proceedings contemplated by R. 62 of O. 21, Civil P. C., had been taken in the case; in other words whether the Court was satisfied that the property proposed to be sold was subject to a mortgage or charge. There is no evidence on the record to show that any inquiry was made into the genuineness or otherwise of the debts shown by these encumbrances and the mere fact that they are notified in the sale proclamation does not dispense with the necessity of proof as regards the correctness and validity of these encumbrances in the absence of any inquiry having been made as contemplated by R. 62 of O. 21, Civil P. C. Be that as it may, the total amount of encumbrances shown in the sale proclamation falls short of the valuation of the property stated above. It must also be borne in mind that the deed of gift was executed on 17th February 1925, and the sale proclamation was drawn on 15th November 1927, namely about two years and nine months after the execution of the deed of gift. During this period the amount of indebtedness existing in February 1925 must have swollen into a large figure of which there is no precise evidence on the record.

It is pointed out on behalf of the appellant that the decrees in favour of the appellant's father for the sale of village Antoo to the extent of Rs. 24,945-13-0 is not shown in the sale proclamation. Even if this decree is taken into consideration, we are by no means satisfied that the amount of indebtedness will exceed the proper valuation of village Antoo as we have given above. There are three more decrees to which reference has been made on behalf of the defendant-appellant. One is a decree for Rupees 10,560 dated 29th November 1926, in favour of one Ghanshiam Das in respect of specific plots of village Bhawanipur and a hamlet of village Antoo (Ex. A-27). There is another decree in favour of Ghanshiam Das dated 10th August 1929, in respect of certain plots of village Antoo for Rs. 5412-10-0 (Ex. A-33), and lastly there is a decree in favour of one Sheo Nath, dated 28th November 1927, for Rs. 6374-6-0 (Ex. A-19). It will appear from these decrees that they relate to a period subsequent to the date of the gift.

It has been urged on behalf of the plaintiff-respondent that the trial Court was wrong in stating that village Bhawanipur had been foreclosed before the date of the gift. Reference has been made in this connexion to Exs. A-20 to A-24. Exhibit A-20 is a plaint of a suit filed by Jadunath and Brajendra Bahadur Singh on 28th November 1922, against the father of defendant 2 for sale of village Bhawanipur on foot of a mortgage executed in their favour. Exhibit A-21 is the judgment dated 3rd April 1923, which shows that the claim was decreed on the basis of the compromise. Exhibit A-22 is the decree in the case. The compromise attached to the decree shows that defendant 2 was required to pay the decretal amount within a period of three years. This compromise is dated 29th January 1923. This shows that the property could not be sold till 1926 when the stipulated period of three years expired. Exhibit A-23 is an application dated 21st December 1926, for execution of the decree by sale of village Bhawanipur. Exhibit A-24 is the order of Court dated 25th July 1928, to the effect that the property had been sold to the decree-holder and that the sale papers had been received back after the sale from the revenue Court. The sale papers were consigned to the record on this date. In proceedings before the lower Court Babu Pratap Singh, counsel for the plaintiff, stated on 6th November 1936, that at the time of the deed of gift defendant 2 owned Antoo, Ambarpur, Fatehpur and Bhawanipur. On 26th November 1936, the same counsel stated before the Court that he was unable to say whether Bhawanipur had been foreclosed or sold. Babu Ganpat Sahai, another counsel who appeared for the plaintiff, asked for further time for ascertaining the details. On 7th December 1936, another counsel, Babu R. S. Nigam, appeared for the plaintiff and stated as follows:

> It is also admitted that Bhawanipur and Fatehpur were mortgaged by a conditional sale to Pandit Balgobind and that the property has been foreclosed.

On this date the parties' counsel agreed that village Ambarpur was free from encumbrances on the date of the gift and that it was a very small property, its revenue being Rs. 336 and the cesses Rs. 33-9-6. The khewats of 1923-24 and 1925-26 show that defendant 2 was recorded as the owner of village Bhawanipur during the said period: *vide* Exs. 31 and A-39. It is argued on the strength of these documents that the sale of Bhawanipur took place in 1928 and the statement of the plaintiff's counsel that Bhawanipur had been foreclosed was due to a misapprehension. Having regard to the meagre materials on the record, we are by no means clear whether the village of Bhawanipur had or had not been foreclosed prior to the date of the gift in 1925. It has been contended on behalf of the appellant that the deed of gift executed by defendant 2 in favour of his own nephew was without consideration and that it was executed with a fraudulent intention to deprive defendant 1 of the fruits of his decree which he obtained on 17th August 1929, (Ex. A-38) for Rupees 16,937-0-6 under Order 34, R. 6, Civil P. C. Reference has been made in this connexion to Mulla's Transfer of Property Act, p. 251 (Edn. 2, 1936), where it is stated that the word "consideration" used in the section excludes natural love and affection, and transfers for natural love and affection are dealt with as transfers without consideration. The relevant portion of S. 53, T. P. Act, says :

> Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

The word "transfer" used in the section is comprehensive enough to embrace within its purview all kinds of transfers, whether with consideration or without consideration. The word "transfer" is not qualified by any words restricting it either to transfers with consideration or without consideration, but applies to both kinds of transfer. The crucial question, however, under the section is one of determining the intention and motive underlying the transfer. The mere fact that a transfer is executed without consideration, as in the case of a gift, will not necessarily lead to an inference that the transfer was made with intent to defeat or delay the creditors of the transferor. Each case must be examined on its own merits and it must be found, upon a consideration of the entire circumstances surrounding the execution of the deed of transfer, whether it was brought about with a fraudulent intent or otherwise. The learned counsel for the appellant has referred to the following decisions in support of his contention that the deed of gift in question must be held to be fraudulent: A I R 1938 Lah 136,[1] 1937 O W N 391[2] and 1938 O W N 922.[3]

1. ('38) 25 AIR 1938 Lah 136 : 180 I C 830, Rattan Chand v. Firm Kishen Chand-Ishar Das.
2. ('37) 24 AIR 1937 Oudh 349 : 168 I C 53 : 1937 O W N 391, Hashmat Begum v. Mohan Lal.
3. ('38) 25 AIR 1938 Oudh 230 : 177 I C 611 : 1938 O W N 922, Mohammad Haider Kazmi v. Safdar Jah Zahid Ali Mirza.

The first case is a single Judge decision of the Lahore High Court, the facts of which were entirely different. It appears from the report of the case that the deed of gift was executed by the mother in favour of her sons in respect of a certain house in 1933, while there was a decree pending against her. It appears that the mother continued the business started by her husband in connexion with which liability was incurred in favour of the decree-holders but the business failed. Prior to the date of the gift, the donor purchased goods for a considerable value from the decree-holders and paid part of the price leaving a large balance still outstanding against her. It was found in that case that the donor was incurring liabilities for larger amounts than she could ever pay, and that she had other creditors who had not all been satisfied even up to the date when the objection was made by the donees to the sale of the house. It also transpired that the donor had transferred the goods from the shop in which the business was carried on to other creditors in order to put them out of reach of the decree-holders and that she disposed of them for a price which was far below the market value of the goods. It was held in that case that the mere fact that debts were due from the donor was not alone sufficient to establish a fraudulent intention; on the other hand, it must be proved that at the time of the gift the motive of the transferor was to defeat the creditors. After taking into consideration the subsequent and the prior conduct as well as the contemporaneous conduct of the donor and the circumstances of the case, the learned Judge held that her motive in transferring the house to her sons by way of gift was fraudulent. This case has therefore no application to the facts of the present case.

The case in 1937 O W N 391[2] is also distinguishable upon the facts. In that case a sale deed executed by the son-in-law in respect of a house in favour of the mother-in-law was challenged as fraudulent by the decree-holder. Both the vendor and the vendee continued to live in the house even after the sale. Two dehanids, one in respect of a mortgage deed, and another in respect of a promissory note, in the sale deed were not forthcoming. It appears that the vendor had approached the decree-holder one day prior to the filing of the suit with a request to accept a small amount in full satisfaction of the loan and upon the refusal of this request the vendor executed the sale deed one day after the filing of the suit. It was held in these circumstances that the sale deed was executed in order to defraud and defeat the claim of the decree-holder. The case in 1938 O W N 922[3] was also decided upon its special facts. The plaintiffs in that case had obtained a decree against the transferor in December 1930 and attached the village in execution of their decree in June 1933. The transferee, who was the son of the transferor, raised objections to the attachment on the ground that the village had been gifted to him orally by his father, the transferor, in July 1932. It was observed that the reasons given for the deed of gift were inconsistent and inadequate and that the circumstances of the case showed that the object of the oral gift was to defeat and delay the creditors. It was remarked, however, that each case under S. 53, T. P. Act, must be decided on its own facts.

We are therefore of opinion that neither of the cases relied upon by the learned counsel for the defendant-appellant is applicable to the facts and circumstances of the present case. We may with advantage refer to a decision of their Lordships of the Judicial Committee in 43 I A 104[4] where their Lordships in a case under S. 53, T. P. Act, were pleased to observe that :

> A transfer of property is not made with intent to defraud, defeat or delay creditors within the meaning of the Transfer of Property Act, 1882, S. 53, because its effect or object is to prefer one creditor to another even if it is made with the intention to defeat an anticipated execution. What the section invalidates is a transfer which removes the whole or a part of the debtor's property from the creditors as a body to the benefit of the debtor.

This case was followed in 7 O L J 699[5] where it was held that a transfer made merely with intent to defeat an anticipated execution is not a transfer of property made with intent to defraud, defeat or delay creditors within the meaning of S. 53, T. P. Act. It was also observed in this case that there was no finding nor evidence to the effect that the appellant participated in the commission of fraud, if any, by his transferor. This observation applies with full force to the facts of the present case. The donee who is no doubt the nephew of the donor was about 13 years old at the time of the date of the gift. This will be obvious from the age of the plaintiff-respondent given in 1936 as 24. There is no suggestion, much less

4. ('15) 2 A I R 1915 P C 115 : 32 I C 343: 43 Cal 521 : 43 I A 104 (P C), Musahar Sahu v. Hakim Lal.
5. ('20) 7 A I R 1920 Oudh 182 : 60 I C 725 : 7 O L J 699, Riazat Husain v. Mt. Ali Bandi.

evidence, in the present case to show that the donee was a privy to the alleged fraud. In fact no suggestion could possibly be put forward in view of the fact that the donee was a minor at the date of the gift. There is no doubt whatever that under the general law the burden of proving that the transfer is fraudulent within the meaning of S. 53, T. P. Act, lies on the creditors. We are of opinion that the defendant-appellant has failed to discharge that burden.

It may be pointed out that the decree for recovery of Rs. 24,945-13-0 by sale of village Antoo was passed on 4th September 1924, (*vide* Ex. A-11) and the gift was made on 17th February 1925 (Ex. 1). The sale proceedings in respect of village Antoo went on for a considerable time and it was not until 17th August 1929 that the father of the defendant-appellant obtained a decree under O. 34, R. 6, Civil P. C., for Rs. 16,937-0-6. Village Antoo, according to the evidence which has been referred to above, was a valuable village as shown by the sale proclamation though it was encumbered with debts. Village Ambarpur, the subject-matter of the deed of gift, was situate in Sultanpur district and was free from encumbrances. Having regard to the sequence of dates given above, we are not prepared to hold that at the time of executing the deed of gift on 17th February 1925 the donor could possibly have contemplated that village Antoo would not fetch an adequate price so as to satisfy the liability of the decree-holders and that in view of an anticipated execution against village Ambarpur, the donor contrived a fraudulent design to dispose of it by means of a gift so as to put it out of reach of the defendant-appellant. Upon a consideration of the entire evidence and circumstances of the case, we are clearly of opinion that the decision of the trial Court upon this point is correct and must be maintained. As regards the second question raised on behalf of the defendant-appellant that the plaintiff is liable to pay the debts as a universal donee, it will suffice to refer to S. 128, T. P. Act, which runs thus :

> Subject to the provisions of S. 127, where a gift consists of the donor's whole property, the donee is personally liable for all the debts due by and liabilities of the donor at the time of the gift to the extent of the property comprised therein.

The leanred trial Judge has held upon this part of the case that the plaintiff is not a universal donee. It appears from the evidence on the record, which the learned Judge believed, that the donor still owns a house, holds certain ex-proprietary tenancy rights, and has household goods, such as grain, bullocks, chairs and tables, etc. etc. It is also evident that at the time the gift was made the donor owned the villages of Antoo and Ambarpur, and although village Antoo was heavily encumbered, the equity of redemption still vested in him. It cannot therefore be said in the circumstances of this case that the donor had transferred his whole property within the meaning of S. 128, T. P. Act. It was held in 7 Luck 411[6] that where a deed of gift executed by a husband in favour of his wife related only to his share of a certain village and the share of another village, which in spite of the encumbrance existing on it had not been foreclosed and in which the donor still retained the ownership, was not included in the deed, the deed of gift did not cover the donor's "whole property," and the donee could not be considered to be a universal donee, and S. 128, T. P. Act, was inapplicable. We therefore hold, in agreement with the finding of the trial Court, that the plaintiff-respondent is not a universal donee. The result is that the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

6. ('32) 19 AIR 1932 Oudh 40: 135 IC 869: 7 Luck 411 : 8 O W N 1291, Mt. Brij Raj Kaur v. Ram Dayal.

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* * A. I. R. 1941 Oudh 210

Full Bench

THOMAS C. J., YORKE AND GHULAM HASAN JJ.

Civil Revn. Appln. No. 26 of 1937, Decided on 15th January 1941, for revision of order of Civil Judge (as Judge of Small Cause Court), Fyzabad, D/- 4th November 1936.

Raghunandan Tewari — Plaintiff — Applicant

v.

Mt. Sheoraji — Defendant — Opposite Party.

* * Limitation Act (1908), Arts. 66, 80, 68, 74 and 75 — Bond stipulating repayment within fixed period—Interest payable yearly — Creditor entitled to sue on non-payment of interest — Suit for amount due under bond — Bond held single bond — Limitation runs from date specified for payment under Art. 66 and not from date of first default in payment of interest—Nor does whole amount become payable on date of first default so as to attract Art. 80 — Neither Art. 68 nor Arts. 74 and 75 apply to such case: *12 Luck 211=A I R 1936 Oudh 279=162 I C 459; 27 O C 318=A I R 1925 Oudh 502=85 I C 280, OVERRULED.*

Where a bond makes the original amount due thereunder payable with interest within a specified period and provides that interest would be paid at

the end of each year, and if it was not so paid, the creditor will be entitled to sue for the recovery of the entire amount with interest without waiting for expiry of the specified period stipulated in the bond, the bond is a single bond and the period of limitation for instituting a suit for the amount due under the bond runs from the date specified for payment as prescribed by Art. 66 and not from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80. The option which is given to the creditor is purely for the benefit of the creditor and does not make the money become payable. It merely gives the creditor a right, if he chooses to exercise it, to have the money made payable. Neither Art. 68 nor Arts. 74 and 75 apply to such a case : 12 Luck 211 = A I R 1936 Oudh 279 = 162 I C 459; 27 O C 318=A I R 1925 Oudh 502=85 I C 280, *OVERRULED* ; A I R 1932 P C 207, *Rel. on*; A I R 1934 All 661 (F B), *Disting.*; *Case law reviewed.* [P 216 C 2; P 217 C 1, 2]

K. P. Misra — for Applicant.

Hyder Husain — for Opposite Party.

Yorke J. — This Full Bench reference under S. 14 (1), Oudh Courts Act, arises out of a suit to recover a sum of Rs. 200 with interest at two annas per rupee per year due on an unregistered bond for Rs. 200 executed by the defendant on 2nd September 1926, whereby the original amount was made payable with interest within seven years. The bond further provided that interest would be paid at the end of each year, and if it was not so paid, the creditor will be entitled to sue for the recovery of the entire amount with interest without waiting for the expiry of the period of seven years stipulated in the bond. The case came before the civil Judge of Fyzabad, exercising the powers of a Small Cause Court, and he held that the cause of action for the suit arose on 2nd September 1927, when interest for the first year was not paid. He therefore held that limitation began to run, presumably under Art. 80, Limitation Act, from that date, and therefore the suit which was instituted on 1st September 1936, that is within three years from the expiry of the period of seven years specified in the bond, was barred by limitation, and he dismissed the suit relying on the decision of a Bench of this Court in 1936 O W N 518.[1]

The matter came on an application in revision under S. 25, Provincial Small Cause Courts Act, before the late Radha Krishna Srivastava J. It was argued before him that the decision in 1936 O W N 518[1] was unsound and a number of cases were quoted before him which led him to consider it desirable to refer the case for decision to a Bench of two Judges under S. 14 (2), Oudh Courts Act. On the case coming before a Bench of this Court, of which I was a member, the Bench felt a doubt as to the correctness of the law as laid down in 1936 O W N 518[1] and referred the case to a Full Bench for decision. The Division Bench lost sight of the fact that this reference was one falling under the provisions of S. 14 (1), Oudh Courts Act, and referred the whole case, whereas it could under that section only refer a question of law or custom having the force of law, or of the construction of any document, or of the admissibility of any evidence, arising before it. It appears to me that the question which the Bench really sought to refer to this Bench should be framed in the following form :

"Whether in the circumstances described limitation for a suit to recover the amount due under the bond ran from the date fixed for payment under Art. 66, Limitation Act, or it ran from the date of the first default in payment of interest on the view that the whole amount of the bond became payable on that date and Art. 80, Limitation Act, was applicable."

The matter is of general importance because bonds are frequently drafted in this particular form and such bonds do not fall within the purview of instalment bonds to which Art. 74 or Art. 75 is applicable, but the question whether Art. 66 or Art. 80 is applicable is by no means free from difficulty and has been the subject of difference of opinion in the High Courts. Learned counsel for the applicant and the opposite party have however taken us through the cases only of this Court and of the other High Court of this province, the Allahabad High Court. For the applicant the case which is put forward is that a bond of this type, despite the presence of the option given to the creditor on a default in the payment of interest to sue for the whole amount, is a "single" bond within the meaning of Art. 66. The first question for consideration is whether this is a sound view. Learned counsel for the opposite party argues that such a bond is not a single bond. For the definition of a "single bond" he has referred us to Halsbury's Laws of England and to various commentaries on the Limitation Act. In Halsbury's Laws of England (Edn. 2) Vol. III, para. 162 at p. 92 it is stated that

> a bond merely for the payment of a certain sum of money without any condition in or annexed to it, is called a simple or single bond. Such instruments

1. ('36) 23 A I R 1936 Oudh 279: 162 I C 459: 1936 O W N 518: 12 Luck 211, Shiva Narain v. Badal.

are rarely, if ever, met with at the present day, and the term 'single bond' is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more.

Referring to this definition Rustomji in his Law of Limitation (Edn. 5), Vol. 1, at p. 783 remarks, presumably quoting from a case :

The expression 'single bond' is undoubtedly a term of art borrowed from English law, but even in England a bond of this nature is rarely, if ever, met with at the present day, and it is therefore difficult to understand why these articles are still retained on the Indian statute book.

We have also been referred to U. N. Mitra's Limitation and Prescription, Tagore Law Lectures, (Edn. 6), Vol. II, p. 1241, where the learned Commentator dealing with Art. 66 remarks on the absence of an exhaustive definition of what a bond is and defines a 'single bond' as "a written engagement for the payment of money without a penalty." This definition necessarily gives rise to the question what is a penalty, and the obvious question in the present case would be whether the grant of an option to the creditor to sue for the whole amount can be construed as a penalty. It is, of course, obvious that if, for example, it is provided that in case of a default interest will be calculated 'compound' instead of 'simple' or it will be calculated at a higher rate, the bond provides for a penalty and in terms of this definition is not a single bond. The learned Commentator at p. 1252 under Art. 75 deals with this point and remarks :

A provision in a note or bond for the immediate payment of the whole, on any default in the payment of an instalment, is often spoken of as a penalty or a condition of forfeiture, but it has been held in equity that a debt being presently due, such stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The Courts cannot relieve the debtor against the consequence of a default in the punctual payment of any instalment, or compel the creditor to waive the default.

I am clearly of opinion that such a provision is not a penalty, and that view has been taken by the Allahabad High Court in one of the cases quoted to us (*vide* 15 A L J 313[2]), in which a Bench of that Court held Art. 66 applicable to such a bond. This same view was taken in cases of the Judicial Commissioner's Court, of which 16 O C 45[3] is a sample. In that case it was held that

as the bond in suit gave the plaintiff an option in express terms to wait till the expiry of the term originally fixed for repayment, whether the interest for the first six months was paid or not, the plaintiff's claim could not be regarded as barred by time because he chose to stick to the longer term.

The learned Judicial Commissioner held that where there was a condition permitting the creditor to wait for the expiry of the longer term or to sue before its expiry as he thought proper, the question was not one of waiver but of a pure contract and the creditor was entitled to adopt either of the two alternatives expressly contemplated by the bond. Article 65 (now Art. 66) or Art. 80, Limitation Act, applied to such cases, and the debtor had no right to compel the creditor to stick to the shorter term. In that case a reference was made to 5 Cal 21.[4] That was a case in which the defendant executed a bond which provided that interest should be payable monthly, and that the principal should become due within six months from the date of execution; the bond contained a clause to the effect that if the interest should not be paid according to the terms of the bond, or if the creditor should feel any doubt as to his being able to realise the principal he should not be bound to wait until the expiry of the six months in order to bring a suit but should be at liberty to realise the principal and interest in any manner he might choose. It was held that a suit on the bond brought within three years from the date of the day specified therein for payment was not barred by limitation, as the case fell under Art. 65 and not under Article 75 of Sch. II, Limitation Act, 9 of 1871. The learned Judges in effect held that such a bond was a single bond falling within the mischief of the present Art. 66. The decision in 16 O C 45[3] was followed most unwillingly by Mr. Wazir Hasan as Additional Judicial Commissioner in 26 O C 121.[5] He was of opinion that such a bond was not a "single" bond and that a bond which merely fixes a long period within which the whole amount is to be repaid does not specify a day for payment. He greatly preferred the view taken by Mr. Chamier, Additional Judicial Commissioner, in 8 O C 77,[6] that

such a bond is not to be regarded as a single bond because it contains something more than an undertaking to pay a certain sum of money on a day specified.

Mr. Chamier had gone on in that case to hold that Art. 80 was applicable and the suit was barred by limitation, since limitation began to run from the default which took place in November 1900, and the suit was not instituted until March 1904. After the decision in 26 O C 125,[5] the same question came before a Bench of the Judicial

2. ('17) 4 A I R 1917 All 402: 39 I C 574: 15 A L J 313, Gaya Prasad v. Sher Ali.
3. ('18) 16 O C 45: 19 I C 738, Durga v. Tota Ram.
4. ('80) 5 Cal 21, Narain Babu v. Gouri Persad Bias.
5. ('23) 10 AIR 1923 Oudh 19 : 70 I C 85 : 26 O C 121, Hari Lal v. Thamman Lal.
6. ('05) 8 O C 77, Har Narain v. Beni Pershad.

Commissioner's Court, of which Mr. Wazir Hasan was one of the members in 27 O C 318.[7] The Bench discussed the previous cases, including those which we have mentioned above and took the view that it was not open to the parties to an agreement to contract themselves out of the law of limitation by inserting in their agreement two alternative starting points for limitation. They held that on the date of the first default the creditor had a good cause of action, and therefore limitation began to run, that Art. 80, Limitation Act, was applicable and a suit instituted within three years from the date specified for payment, but outside three years from the date of the first default, was barred by limitation. The view which was taken in 27 O C 318[7] is the view which was followed in 1936 O W N 518,[1] the learned Judges saying in terms,

> we are not therefore prepared to agree with the applicants' contention that the ruling in 27 O C 318[7] has ceased to be good law because of the decision in 7 Luck 442.[8]

This brings us to a consideration of 7 Luck 442.[8] 7 Luck 442[8] was a case of a mortgage to which Art. 132, Limitation Act, was applicable. That article provides a period of 12 years for a suit to enforce payment of money charged upon immovable property, the period of limitation begins to run from the date when the money sued for becomes due, that is ordinarily the due date stated in the mortgage deed. *Lasa Din's case*[8] came in second appeal before a Bench of this Court which held that

> where a mortgage deed fixes a term of six years, which would mean that the money thereon is to become due at the end of this period and further contains a clause giving the mortgagee the right to sue within six years in case of default in the payment of interest, the money must be considered to become due at the earliest date when it is possible for the mortgagee to enforce payment of it, and the starting point for limitation of 12 years prescribed by Art. 132 of Sch. 1, Limitation Act, would be the date of the first default in the payment and a suit not brought within that period is time-barred.

That case went to the Privy Council and the decision of their Lordships is reported in 7 Luck 442.[8] Their Lordships held that

> under the Indian Limitation Act, 1908, Sch. I, Art. 132 a suit to enforce a mortgage for a stipulated period can be instituted within 12 years of the expiry of the period, although a default by the mortgagor has occurred during the period and by the terms of the mortgage the mortgagee thereupon had an immediate right to enforce the mortgage. The money becomes due within the meaning of the above article only when either the stipulated period has expired, or, a default having occurred, the mortgagee has exercised his option to enforce the mortgage.

Their Lordships had in a previous case, 53 I A 187,[9] expressed doubts as to the soundness of the view that limitation began to run against the mortgagee from the date of a default by the mortgagor which gave to the mortgagee an option to sue for the mortgage money. In 7 Luck 442[8] their Lordships held that "a proviso of this nature is inserted in a mortgage deed 'exclusively for the benefit of the mortgagees'." Their Lordships went on to say,

> it purports to give them an option either to enforce their security at once, or, if the security is ample, to stand by their investment for the full term of the mortgage. If on the default of the mortgagor—in other words by the breach of his contract—the mortgage money becomes immediately 'due,' it is clear that the intention of the parties is defeated, and that what was agreed to by them as an option in the mortgagee is, in effect, converted into an option in the mortgagor.

Their Lordships said further on that they were not prepared to hold that the mortgagor could in this way take advantage of his own default: they did not think that upon such default he would have the right to redeem, and in their opinion the mortgage money did not "become due" within the meaning of Art. 132, Limitation Act, until both the mortgagor's right to redeem and the mortgagee's right to enforce his security had accrued. Towards the end of their judgment their Lordships remarked:

> If in the Indian cases the question were 'When did the mortgagee's cause of action arise ?' i. e., when did he first become entitled to sue for the relief claimed by his suit — their Lordships think that there might be much to be said in support of the Allahabad decisions, (that is those which had been followed by the Chief Court in 7 Luck 442.[8]) 'Judged by the Indian criterion' (that is, the starting point of limitation mentioned in the article of the Limitation Act itself)' 'when the money sued for became due' upon the best consideration their Lordships have been able to give to this difficult question, they think that the decision of the Chief Court of Oudh was wrong and that they should have held that the appellant's suit was within time.

7 Luck 442[8] settled a vexed question for all mortgage cases following that decision, but the question arose whether the principle of that decision was applicable to bond suits to which Art. 132 is not applicable but Art. 80 or 66 is applicable. Prior to the decision in 27 O C 318[7] the Allahabad High Court had been inclined to the view that the stipulation for an option to sue on default of payment of interest during the

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7. ('25) 12 AIR 1925 Oudh 502 : 85 I C 280 : 27 O C 318, Pherai v. Pudai Ram.
8. ('32) 19 AIR 1932 P C 207 : 138 I C 779 : 59 I A 376 : 7 Luck 442 (PC), Lasa Din v. Gulab Kunwar.
9. ('26) 13 AIR 1926 P C 85 : 99 I C 650 : 53 I A 187 : 48 All 457 (PC), Pancham v. Ansar Husain.

period of the currency of a bond did not operate to take the bond out of the description of a single bond to which Art. 66 was applicable. The first case of the Allahabad High Court quoted to us was 15 A L J 313.[2] There the learned Judges said that the instrument sued upon was a single bond which specified a day for payment, namely three years from the date of the bond. They considered that the provision in the bond which provided that the creditor had the option of suing at once or waiting until the prescribed period to be immaterial for the purpose of computing the period of limitation and that the creditor must be presumed to have exercised the option which was clearly given to him by the terms of the bond. This view was followed in 17 ALJ 647,[10] a case of a mortgage bond in which the money was payable in seven years but the mortgagee was given the option of suing for his money in default of payment of interest in any year. The mortgagee had obtained a decree and got the mortgaged property sold and then applied for a personal decree and it was held that as the mortgage bond was a registered bond, he could claim a period of limitation of six years from the date specified in the bond and not merely six years from the first default in payment of interest.

The principle of these two cases was applied by another Bench of the same Court in 18 A L J 476.[11] In this case a mortgage deed provided that the money was to be repaid in five years, that interest was to be paid every six months and that in case of non-payment of interest for four six-monthly periods the creditor would have power to realise the whole of the amount due to him in a lump sum within the fixed period (that is without waiting for its expiry) and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason, then the same conditions and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full. On a suit to enforce this bond the mortgage as such was held to be invalid, but a simple money decree was passed in the plaintiff's favour. The suit was instituted within six years of the expiry of the period fixed for payment but beyond six years of the non-payment of two years' interest. It was held that the suit was not time-barred and the argument that Art. 80 read with Art. 116, Limitation Act, was applicable and that the suit ought to have been brought within six years from the failure to pay two years' interest was repelled.

We have not been shown any of the cases between this case and 7 Luck 442.[8] The first case of the Allahabad High Court after 7 Luck 442[8] to which we have been referred is A I R 1933 ALL 235.[12] In that case it was provided in a simple bond that the debt was to be paid in four years and that interest must be paid on the amount every six-months. It was further provided that in case of default in payment of interest of any six-monthly period or of the amount of principal, the creditor had power to realise in any way he liked his entire amount. Default was made in the payment of interest from the very outset. It was held that

> the covenant in the bond entitling the creditor to sue for the amount due on the bond before the expiry of the stipulated period of four years was for the benefit of the creditor and it was open to him to waive that option and to wait for the full period of four years before putting the bond into suit and that the time for recovery of the debt did not begin to run from the date of the first default.

The learned Judges referred to 7 Luck 442[8] and remarked that the reasons contained in the judgment of their Lordships applied with full force to the case of a simple money debt. In the headnote the editors have referred to this portion of the judgment as having reference to Art. 75, but it is quite clear that Art. 75 had no application whatever, and Art. 75 was not referred to in the judgment. Clearly the learned Judges treated the case as one to which Art. 66 was applicable. Following this decision a single Judge of the same Court in A I R 1935 ALL 405[13] held that

> where in a simple bond it is provided that, if the monthly interest is not paid or if the principal money lent is not paid at the end of a specified period, the creditor may sue, even though there is a breach of the condition for payment of interest, still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. In such cases the clause regarding right to sue on breach of condition regarding interest is exclusively for the benefit of the creditor. The two Arts. 66 and 68 must be read together in the case of such bonds; and limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together are tantamount to Art. 132 and the ex-

10. ('19) 6 A I R 1919 All 226 : 50 I C 640 : 41 All 581: 17 A L J 647, Makrand v. Kallu Singh.
11. ('20) 7 A I R 1920 All 124 : 58 I C 278 : 18 ALJ 476, Shiam Lal v. Teharia Lakhmi Chand.
12. ('33) 20 A I R 1933 All 235 : 149 I C 181 : 55 All 283 : 1933 A L J 550, Lalta Prasad v. Gajadhar Shukul.
13. ('35) 22 AIR 1935 All 405 : 157 I C 409 : 1935 A L J 341, Narain Das v. Mannoo Lal.

pression "when the money sued for becomes due" would apply to either Art. 66 or Art. 69.

The learned Judge who decided this case referred to 7 Luck 442[8] and discussed the question whether the principle laid down in that case was applicable to cases of simple bonds, and he considered that the reasoning would apply also to the latter class of cases. Dealing with an argument about the applicability of Art. 80 the learned Judge remarked that even if that article were taken, limitation would run from the time when the bond became payable, and he was evidently inclined to the view that the bond did not become payable merely because the creditor had an option to institute a suit at that date which he might or might not exercise, that is, he interpreted the word "payable" as having the same meaning as the word "due" in Art. 132, with the necessary implication that both these words imply not only that the creditor has a right to recover the money but that he is bound to exercise that right and has not merely an option either to exercise it or not to exercise it. The same view has been taken in a single Judge case of the Lahore High Court: AIR 1935 Lah 948.[14] The learned Judge said summarizing the decisions briefly :

It has been held that a clause, such as that attached to the bond now in suit, gives an option exclusively in favour of the creditor, who is entitled to the benefit of the investment for the full term originally provided, and need not sue until that term expired even if there is a default in the payment of interest.

Another case in which there is definite support for this view is 56 ALL 954.[15] It is stated in the head-note :

The Privy Council decision in *Lasa Din* v. *Gulab Kunwar*[8] has definitely overruled the ruling in *Shiv Dayal* v. *Meharban*[16] on the question of the commencement of limitation for a suit for sale on a mortgage, and has by necessary implication overruled it also on the question of commencement of limitation for a claim for a personal decree. The question in the present case being one of a personal decree was governed by Art. 80 read with Art. 116, Limitation Act, and not by Art. 132, applicable to a suit for sale on a mortgage, as in the case in *Lasa Din* v. *Gulab Kunwar*.[8] But there was no distinction between the expression "money becomes due" in Art. 132 and the expression "money becomes payable" in Art. 80, if in either case the creditor had an option to disregard the stipulated period and he did not exercise that option, and the same reasoning applied to both classes of suits on the question of the starting point of limitation.

King J. in his judgment in this case remarked that in 7 Luck 442[8] their Lordships laid stress upon the point that the provision enabling the mortgagees to sue before the expiry of stipulated period is inserted "exclusively for the benefit of the mortgagees," giving them an option either to enforce their security or to stand by their investment for the full term. He said that he took this to mean that the mortgagee had an option of treating the money as having become due by demanding or suing for it, and that it did not become due unless he exercised his option, even though the mortgagor might already have a right to redeem in accordance with the terms of the mortgage contract. Further on he remarked that the time did not begin to run against the mortgagee before the expiry of the stipulated period unless he availed himself of the option inserted exclusively for his benefit. As against this case reference was made on behalf of the opposite party to the Full Bench case in 57 ALL 108,[17] but this was a case under Art. 75, and therefore prima facie inapplicable. In the passage relied upon Sulaiman C. J. said :

The principle laid down by the Privy Council in 7 Luck 442[8] regarding the necessity of the mortgagee choosing to exercise his option under the default clause in order to make the mortgage money due and the limitation to start, should not be extended to cases of money bonds falling under Art. 75. The case of a mortgage is peculiar and stands on a different footing; and the reasoning in 7 Luck 442[8] is applicable only to cases of mortgage and inapplicable to money bonds. Further each article of the Limitation Act has to be interpreted according to the particular language employed in that article, and the starting point of limitation under Art. 75 is definitely laid down to be the date of default, and not, as in Art. 132, the date 'when the money becomes due'.

Even supposing, however, that on the principle in 7 Luck 442,[8] on the occurrence of the default it would depend on the choice of the creditor whether the whole amount would become due or not, in the present case the creditor exercised that option by giving notice enforcing the default clause and demanding payment of the whole amount. The whole amount became immediately due and time began to run against him and he could not thereafter fall back upon Art. 74.

This case is clearly distinguishable from cases of the type of the present case in a number of different ways. Coming now to consider 1936 O W N 518[1] in the light of these decisions, it seems to me, with great respect, that the view taken in that case is not satisfactory or convincing. The learned Judges, as I have remarked earlier, referred

14. ('35) 22 A I R 1935 Lah 948 : 160 I C 1068, Mool Chand v. Chhittar.
15. ('34) 21 AIR 1934 All 397: 148 I C 951: 56 All 954 : 1934 A L J 261 (F B), Muhammad Husain v. Sanwal Das.
16. ('23) 10 AIR 1923 All 1: 69 I C 981: 45 All 27: 20 A L J 819 (F B), Shib Daval v. Meharban.
17. ('34) 21 AIR 1934 All 661 : 151 I C 585 : 57 All 108 : 1934 A L J 1035 (F B), Jawahar Lal v. Mathura Prasad.

back to 27 O C 318[7] and they distinguished 7 Luck 442[8] on the ground that that was a case of a mortgage, and a mortgagor and a mortgagee had reciprocal rights which they did not consider to be the case between the executant of a bond and the obligor, (a point dealt with by Bennet J. in the Allahabad case in A I R 1935 ALL 405[13]). They further went on to refer to 57 ALL 108[17] on the question of the effect of the option, and in this connexion they referred to a remark of King J. where he said (with reference to an instalment bond to which Art. 75 applied) that when the statute laid down that in certain circumstances time would begin to run from the date when the default was made, it was not open to the parties to agree that the creditor might simply ignore the default and that if he did so, limitation would not begin to run until the expiry of the stipulated period. They remarked with reference to the bond in suit:

> It is clear from the terms of the bond that it became payable as soon as a default is made in the payment of interest.

Doubtless the bond could be described as having become payable in the sense that the creditor was entitled to have it made payable. They went on to say,

> when once the amount becomes payable limitation must begin to run and it cannot be stopped because the bond provides an alternative starting point for limitation. The creditor cannot be allowed to ignore the earlier starting point of limitation because, as soon as the money once becomes payable limitation must begin to run irrespective of the wishes and convenience of the creditor. The matter is one the determination of which rests on the terms of the statute and not on the wishes or option of the creditor,

that is to say they interpreted the option given to the creditor to institute a suit on this default as a clause which made the amount then due payable in the sense that that word is used in Art. 80, Limitation Act. What the learned Judges really did was I think to apply arguments based on the wording of Art. 75 (which makes time run from the date of default) to a case to which they held Art. 80 to be applicable, by taking the view that the money became "payable" on the default in payment of interest. It seems to me that on this point the reasoning in 7 Luck 442[8] is clearly applicable and that the option given to the creditor on such default does not make the whole amount payable but only gives the creditor a right which he may or may not exercise to have it made payable. Such an option does not bring in the application of Art. 75 or by itself make time begin to run under Art. 80. As pointed out by Sulaiman C. J. in 57 ALL 108[17]:

> The Limitation Act is in a sense a purely arbitrary enactment and the various starting points for purposes of limitation laid down in col. 3 of Sch. 1 are equally arbitrary. It is not absolutely necessary that there should be a consistency or a uniformity of any definite principle in fixing the various starting points. It is a mere matter of choice dependent on public policy. In some cases the starting point is fixed as the date of the execution of the bond. In other cases the starting point is the date fixed for payment. In some other cases it is the date of the first default. Each article has therefore to be interpreted according to the particular language employed in that article and, ordinarily, irrespective of somewhat similar language employed in other articles.

He went on to point out the contrast between the wording in col. 3 of Art. 132 and Art. 80 from that in col. 3 of Art. 75, under which article the starting point is when the default is made, and in case the obligee waives the benefit of the provision, then the date of the fresh default. On the reasoning adopted by the learned Chief Justice, 7 Luck 442[8] clearly could not be made applicable to a case under Art. 75 where under the statute itself time began to run from the date of default. On the other hand, as it appears to me, the refusal to apply the principle stated in 7 Luck 442[8] to cases of the present type involves straining the effect of the option to sue so as to make it lead inevitably to the result that the money has become payable. In this connexion I may refer to another remark of Sulaiman C. J. at p. 127 of 57 ALL 108[17] where he remarks:

> I would guard myself against holding that in the case of every bond with a default clause the whole amount would necessarily become due (that is upon the occurrence of a default). The answer would depend on the particular language of the document employed, but I would certainly hold that even if it be held that the money does not become due immediately on the occurrence of a default, it would certainly become due if the creditor exercises his option by demanding the amount and by serving notice on the debtor to pay the whole sum.

To sum up my conclusions, in the first place I am of opinion that a bond such as that with which we have to deal in the present case is a single bond, notwithstanding the fact that there is what is called a default clause. The fact that bonds of the single bond type are now rare in England seems to me to be irrelevant, as this type of bond is far from being rare in this country.

The next point I would make is with reference to Art. 68. Personally I feel some doubt about Art. 68 being applicable to cases of this kind. It is true that the bond contains a condition but the condition is not

one which relates to the whole sum due on the bond. It seems from the notes in the various commentaries on the Limitation Act that Art. 68 has been interpreted as applying rather to bonds of the nature of security bonds, where the executant is only liable to make a payment on breach of the condition and is not otherwise liable under the bond.

Next it seems to me that Art. 74 and Art. 75 and the various rulings under those articles have no application. By no stretch of imagination could the present bond or bonds of this type be called instalment bonds, and it is only in the case of an instalment bond to which Art. 75 applies that time begins to run from the date when the default is made. The only other article which can be construed as applicable is Art. 80. The only line of reasoning on which Art. 80 can be made applicable is first to accept the view that on a default occurring the money immediately becomes payable. To meet such an agreement, it appears to me that the reasoning and the general principles laid down in 7 Luck 442[8] are fully applicable. The option which is given to the creditor is purely for the benefit of the creditor and does not make the money become payable. It merely gives the creditor a right, if he chooses to exercise it, to have the money made payable. Whether therefore Art. 66 or Art. 80 is applied, limitation begins to run from the date fixed for payment or the date when the money becomes payable, and that is the date stated in the document itself, or the expiry of the period stated in the document.

Learned counsel for the opposite party has suggested that even if doubt is felt about the view of the law in 1936 O W N 518,[1] the Court should not readily modify the view of the law taken in that case because the law of limitation is adjectival or procedural law. I do not feel much force in this argument. It seems to me that if on a consideration of the decisions on the point we are satisfied that the view previously taken is the wrong view, there is no reason why we should not accept and declare what is the correct view; more particularly is this the case where the effect is not to deprive persons who have lent money under such a bond of an extended period of limitation to which formerly they had been held entitled but rather to enlarge the period of limitation, by doing which there can be no deprivation of rights. On this view I would answer the question which I consider to be the question that should have been put by the Division Bench by saying that in the circumstances described the period of limitation for instituting a suit for the amount of the bond runs from the date specified for payment as prescribed by Art. 66, Limitation Act, and that it does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80, Limitation Act.

Thomas C. J.—I have nothing useful to add to this exhaustive judgment and concur.

Ghulam Hasan J. — I concur and have nothing to add.

Order. — Our answer to the question which has been formulated is that in the circumstances described, the period of limitation for instituting a suit for the amount due under the bond, runs from the date specified for payment as prescribed by Art. 66, Limitation Act, and that it does not run from the date of the first default in payment of interest, nor does the whole amount of the bond become payable on that date so as there and then to induce the application of Art. 80, Limitation Act.

G.N./R.K. *Answer accordingly.*

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* A. I. R. 1941 Oudh 217

YORKE J.

Civil Ref. No. 1 of 1939, Decided on 6th March 1940, made by Chief Inspector of Stamps and Government Officers, U. P.

Mt. Nairulnisa and another —
Plaintiffs — Applicants

v.

Akhtiar Husain and others —
Defendants — Respondents.

* (a) Stamp Act (1899), Art. 35 (a) (i) and (viii) — Lease creating monthly tenancy, terminable on month's notice and not mentioning duration of lease falls under Art. 35 (a) (viii) and not under Art. 35 (a) (i).

A lease for less than one year within meaning of Art. 35 (a) (i) means a lease for some specified period which is less than twelve months. Hence a lease creating a monthly tenancy terminable on a month's notice and not mentioning any period of duration of the lease is not a lease purporting to be for a term of less than one year, and does not fall under Art. 35 (a) (i). Such lease falls under Art. 35 (a) (viii), Stamp Act (as amended in U. P.) : A I R 1919 Cal 200, *Expl., and not foll.;* A I R 1938 All 304; AIR 1939 Lah 531; A I R 1933 All 735 (F B) and A I R 1939 Mad 356, *Rel. on.* [P 219 C 1]

(b) Precedent—Case under Stamp Act —Uniformity of views between Oudh Chief Court and Allahabad High Court is desirable.

Uniformity between Oudh Chief Court and the Allahabad High Court is clearly desirable in a case under Stamp Act affecting the revenue of the pro-

vince unless there appears some strong reason for declining to agree with the views of the Judges of the Allahabad High Court. [P 218 C 2]

Kashi Prasad—for Applicants.
Naziruddin—for Respondents 1 and 2.
H. K. Ghose—for the Crown.

Order. — This is a reference under S. 61, Stamp Act, by the Chief Inspector of Stamps, exercising the powers of a Collector under Government notification No. C-4135/X-525 dated 20th August 1928, asking for a declaration in terms of S. 61 (2), Stamp Act. This reference has arisen in the following circumstances: One Mt. Achhan Bai, described as a *prima donna* of Lucknow, left property, and as the ultimate result of that fact, there followed a suit for partition between her representatives in the Court of the civil Judge, Lucknow. In this suit various parties were anxious to prove their individual possession over specific items of property, and one of the parties filed 10 documents of the nature of leases as evidence of possession. The Chief Inspector of Stamps in inspecting records of the Court of the civil Judge examined these documents on 2nd February 1937, and reported to the civil Judge that the 10 documents were leases for an indefinite period, and he asked the civil Judge to impound them and realise the deficiency in duty and the necessary penalty under the provisions of S. 35, Stamp Act. The Chief Inspector of Stamps did not refer to any particular case but merely remarked that each of these was chargeable with duty as on a lease for an indefinite period or term, and chargeable therefore with the rate of duty mentioned in Art. 35 (a) (iv) now 35 (a) (viii), Stamp Act. In reply to the letter of the Junior Secretary, Board of Revenue, forwarding extracts from the inspection reports of the Chief Inspector of Stamps the learned civil Judge wrote:

Papers Nos. 290A, 292A, 294A, 295A, 297A, 298A, 300A, 302A, 303A, and 304A are leases on monthly tenancy. The Inspector considers that they are leases for indefinite period, although they happened to be leases from month to month. A reference to 46 Cal 804[1] will show that such leases fall within the purview of Art. 35, sub-cl. (i), Sch. 1, Stamp Act, and are chargeable with a stamp duty of As. 8 payable on a bond under Art. 15, Stamp Act.

The Chief Inspector of Stamps is not satisfied with this decision and has therefore made this reference. The learned Assistant Government Advocate in support of this reference contends that in the case referred to by the learned civil Judge, 46 Cal 804,[1] the learned Judges really decided that the proper stamp duty was the same duty as for a bond referred to in Art. 15 on the admission of learned counsel that the tenancy was a monthly tenancy consequently came within Art. 35, cl. (a) sub-cl. (i), Sch. 1, Stamp Act, that is to say "the lease purports to be for a term of less than one year." There was no discussion in this judgment as to whether a lease with reference to a monthly tenancy terminable by notice on either side is really a lease for a term less than a year or a lease for an indefinite period or term. The learned Assistant Government Advocate pointed out that that case has been considered and dissented from in several cases. It was first dissented from in I L R (1938) ALL 481[2] in which it was held that

a lease creating a monthly tenancy of a house, terminable on a month's notice, and not mentioning any period of duration of the lease, is not a lease 'purporting to be for a term of less than one year' and does not fall under Art. 35 (a) (i), Stamp Act. A lease for less than one year means a lease for some specified period which is less than 12 months. The lease in question is for an indefinite period, and is a lease which 'does not purport to be for any definite term' and falls under Art. 35 (a) (viii), Stamp Act (as amended for the United Provinces).

Uniformity between this Court and the High Court at Allahabad is clearly desirable in a case of this kind affecting the revenue of the province unless there appears some strong reason for declining to agree with the views of the learned Judges of that Court. So far from there being anything of the kind the view taken in this case has been followed by the Lahore High Court in ILR (1939) 20 Lah 201[3] relying upon this case of the Allahabad High Court and also upon 55 ALL 874,[4] and by the Madras High Court in I L R (1939) Mad 384[5] in which also these two cases of the Allahabad High Court have been referred to with approval. Learned counsel for the respondents, that is the parties who filed these documents in Court, has been unable to show any case in which the Calcutta case has been followed, and he only seeks to argue that in these ordinary month to month leases the term is to be taken as one month, an argument which has

1. ('19) 6 A I R 1919 Cal 200 : 51 I C 221 : 46 Cal 804 : 23 C W N 398, Amolia v. Ibrahim Ishak,
2. ('38) 25 A I R 1938 All 304 : 175 I C 313 : ILR (1938) All 481 : 1938 A L J 324, Mangal Puri v. Baldeo Puri.
3. ('39) 26 A I R 1939 Lah 531 : 185 I C 227 : ILR (1939) 20 Lah 201 : 41 P L R 713, Noor Ahmad v. Mahmud Ali.
4. ('33) 20 AIR 1933 All 735 : 145 I C 674 : 55 All 874 : 1933 A L J 749 (F B), In the matter of Burmah Shell Oil Storage & Distributing Co. of India.
5. ('39) 26 AIR 1939 Mad 356 : 180 I C 651 : ILR (1939) Mad 384 : (1939) 1 M L J 350 (S B), S. K. Skinner v. Arunachalam Pandaram.

been considered and rejected in the cases to which I have referred already.

In these circumstances I have not the slightest hesitation in holding that the case relied upon by the learned civil Judge is no longer good law and should not be followed in this Court. Following the decisions of the Allahabad, Lahore and Madras High Courts, to which I have referred above, I hold that these leases are not leases purporting to be for a term of less than one year and do not fall under Art. 35 (a) (i), Stamp Act, but do fall, as stated by the Chief Inspector of Stamps under Art. 35 (a) (iv) which is now Art. 35 (a) (viii) which relates to cases where the lease does not purport to be for any definite term, and as I am of opinion that these instruments should not have been admitted in evidence without the payment of duty and penalty under S. 35 as stated in the original inspection note of the Chief Inspector of Stamps, I grant a declaration to that effect and hold that the amount of duty with which these ten documents are chargeable are those stated in the statement enclosed with the letter of the Chief Inspector of Stamps by which this reference has originated. These documents originally filed in suit No. 55/1/25/89 of 1936-1937 in the Court of the civil Judge of Lucknow are now in this Court in Civil Reference No. 1 of 1939. As the suit has since been decided by the civil Judge, Lucknow, and an appeal (First Civil Appeal No. 21 of 1938) is now pending in this Court, I direct that these documents should be impounded and deficiencies of Rs. 28-4-0 on the ten documents as shown in the chart attached to the reference with a penalty of Rs. 282-8-0 be realized. A copy of this order be sent to the Chief Inspector of Stamps and the Registrar of this Court shall take necessary steps under S. 61 (3), Stamp Act.

D.S./R.K. *Order accordingly.*

A. I. R. 1941 Oudh 219

Full Bench

THOMAS C. J., BENNETT AND GHULAM HASAN JJ.

Misc. Appeal No. 20 of 1937, Decided on 30th January 1941, against order of Special Judge, First Grade, Lucknow, D/- 30th August 1936.

Ghulam Abbas and others — Appellants

v.

Prince Safdar Jah Zahid Ali Mirza and others — Respondents.

Civil P. C. (1908), O. 22, R. 4 — Application by debtors under Ss. 4 and 49, U. P. Encumbered Estates Act, dismissed as applicants found not to be landlords within meaning of Act — Pending appeal by debtors one of creditors dying — Legal representatives of deceased not brought on record within limitation — Whether appeal abates as a whole — Test — Appeal held abated as a whole as it would lead to conflicting decisions since creditors' interests in defeating debtors' application were joint and indivisible.

Where during the pendency of an appeal one of the respondents dies and his legal representatives are not brought on the record within the period provided by law, the question whether the appeal has or has not abated must depend upon the nature and circumstances of each case. The test in such cases should be (1) whether the interest of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter: A I R 1936 Oudh 209, *Approved.* [P 222 C 1]

Where the application of the debtors under Secs. 4 and 49, U. P. Encumbered Estates Act, is dismissed on the ground that they had no locus standi to apply as they were not landlords within the meaning of the Act and on the death of one of the respondents creditors during the pendency of the appeal by the debtors the legal representatives of the deceased creditor are not brought on the record within the period prescribed by law, the appeal abates as a whole as it would lead to conflicting and inconsistent decisions with regard to the same subject-matter, inasmuch as the interests of the creditors in defeating the debtors' application are joint and indivisible and heirs of the deceased creditor are necessary parties: A I R 1928 Lah 572 (F B), *Disting.* [P 223 C 2]

Mahabir Prasad Srivastava — for Appellants.

L. S. Misra and S. N. Srivastava, and Raj Kumar Srivastava — for Respondents 6 to 9; and 10 and 11, respectively.

JUDGMENT OF DIVISION BENCH

Zia-ul-Hasan J. — In this appeal we have dismissed the appellants' application for setting aside the abatement of the appeal against Pandit Brahma Dutt, respondent 5, and the question now is whether the appeal should proceed against the remaining respondents or should be deemed to have abated in its entirety, as is contended on behalf of the respondents.

The appeal is against an order of a learned Special Judge under the U. P. Encumbered Estates Act holding that the present appellants have no locus standi to apply under the U. P. Encumbered Estates Act and rejecting their application as not maintainable. The respondents are the various creditors of the appellants. We have heard the learned counsel for the parties on the question whether or not the appeal has abated as a whole and I am clearly of opinion that it has not abated as against respondents other than Pandit Brahma Dutt deceased. It is argued by the learned counsel for the respondents that in case the appeal is allowed by this

Court there will be two conflicting decisions one of the Special Judge between the appellants and the heirs of Pandit Brahma Dutt that the appellants are not entitled to apply under the U. P. Encumbered Estates Act and the other of this Court's decision between the appellants and the other respondents that they are so entitled, and reliance is placed on the cases in 1934 O W N 1487,[1] 1935 O W N 297[2] and 1935 O W N 401.[3] There is however nothing in these cases in my view which can reasonably be construed as supporting the view that the appeal in the present case has wholly abated. The law appears to me to have been laid down clearly in 1935 O W N 297,[2] in which it was held that the question, whether an appeal can or cannot proceed in the absence of the legal representatives of a deceased respondent, must depend upon the nature of each case, and it is impossible to lay down a general rule applicable to all such cases. It was further said that each case must depend upon its own circumstances and that if in such a case the decree under appeal is a joint decree in favour of all the respondents the appeal abates as a whole, for, if the whole appeal is allowed not to abate, the decision may result in two conflicting decisions with regard to the same subject-matter.

In the present case not only is there no joint decree in favour of the respondents but the debt due to each of them or each set of them is quite separate from that due to any other creditor or set of creditors. Moreover, as far as I think the rule against the possibility of conflicting decisions coming into existence contemplates those cases in which conflicting decrees capable of execution may be passed and it may subsequently be found difficult or even impossible to execute those decrees. This can best be illustrated by an example. Supposing a suit is brought for possession of a house against four persons, who are jointly in possession of it, the suit is dismissed by the trial Court and the plaintiff brings an appeal against the dismissal. The appeal must of necessity be against all the four defendants. Now supposing one of the defendants dies and his heirs are not brought on the record within the time allowed by law, the result will be that the appeal will abate so far as the deceased defendant and his heirs are concerned, and if it is allowed to proceed against the other defendants it may possibly be decreed against them. In such a case it will be impossible to execute the appellate Court's decree as the decree of the trial Court dismissing the entire suit of the plaintiff will have become final so far as the deceased defendant's heirs are concerned, and they can successfully resist an attempt on the part of the plaintiff to get possession of the houses. Nothing of the kind can however happen in the present case. All that the order of the trial Court amounts to is that the appellants are not entitled to proceed under the U. P. Encumbered Estates Act and if this Court reverses this finding of the trial Court the case will go back to that Court and will proceed against the other creditors without any difficulty or any prejudice to anybody.

It is contended that the heirs of Pandit Brahma Dutt will have no remedy and will not be able to realise their debt from the appellants as under S. 13, U. P. Encumbered Estates Act, a creditor who does not put up a claim in the proceeding under the Encumbered Estates Act loses his right to recover the debt. I cannot accept this contention. When proceedings are opened in the Court of the Special Judge, the heirs of Pandit Brahma Dutt can apply to be made parties to those proceedings and they will have to be made parties to those proceedings by the learned Judge. Of course this will mean that the abatement of the appeal against the heirs of Pandit Brahma Dutt will have no effect upon the appellants' rights under the Encumbered Estates Act against them, but it is not necessary that it should have. In any case, the principle of the cases relied on by the respondents does not, in my opinion, apply at all to the present case, and I would therefore hold that the appeal has not abated against respondents other than Pandit Brahma Dutt.

Yorke J.— I have given this matter my anxious consideration but I regret that I am unable to agree with my learned brother. So far as I am able to see the point of view which appeals to him is that although something like a contradictory position might arise from the not improbable decision of this appeal in favour of the appellants in the absence of the heirs of Pandit Brahma Dutt, it should not be held that this appeal has abated as a whole because that contradictory position is curable by the future act of the heirs of Pandit Brahma Dutt. I am not satisfied in my mind that this is a decisive consideration. Another Bench of this Court,

1. ('35) 22 A I R 1935 Oudh 36: 153 I C 54: (1934) 11 O W N 1487 : 10 Luck 387, Fazl Mohammad Khan v. Ali Mohammad Khan.
2. ('36) 23 A I R 1936 Oudh 209: 165 I C 45: 1935 O W N 297, Ram Jas Tewari v. Ram Lal Tewari.
3. ('35) 22 AIR 1935 Oudh 329: 154 I C 897: 1935 O W N 401: 11 Luck 5, Md. Faruq v. Azizul.

of which I was a member had to consider the same point in Misc. Appeal No. 69 of 1937 decided on 8th May 1940.[4] In that case also the special Judge had dismissed the whole application on the view that the original application made to the Collector did not comply with the provisions of S. 4 of the Act. In the present case the decision is of an analogous nature that the applicants had no locus standi to apply under the Encumbered Estates Act and their application was therefore not maintainable. We took the view that the appeal must abate as a whole on the ground that if the appeal were to be allowed as things now stand the result would be that the application would have to proceed ab initio as against some and not as against other creditors, a procedure which would be in contravention of the whole intention of the Act. It seems to me that in a case under the Encumbered Estates Act it may well be said that the applicants landlords, that is the debtors, are ranged on one side as against the whole body of creditors on the other, and that the interests of the creditors are joint and cannot be considered to be joint and several. In case it is decided that the application as a whole does not lie, as has been decided in this case and was decided in the case which came before us in Miscellaneous Appeal No. 69 of 1937,[4] I am inclined to regard the interests of the creditors in the result of the appeal as joint and think that they cannot be regarded as joint and several.

The point may be looked at in another way. I think that in order to be able to say that an appeal does not abate as a whole when it has abated against one or more of the respondents it is necessary to be able to say that the appeal would have been properly filed even if those same respondents had not been impleaded in the appeal as respondents. I do not think it would be possible to argue in a case like the present one that the appeal of the landlord debtors would have been properly filed and could have been allowed to go forward if the landlord debtors had failed to implead as respondents in the appeal any of the creditors who were parties to the original decision. If those respondents were necessary parties to an appeal of this kind, I conceive that their representatives are necessary parties to the continuation of the appeal and as the appeal has abated against those representatives, the appeal must be taken to have abated as a whole. In this connexion, I may refer to the notes in Chitaley's Civil P. C., Vol. II (Edn. 2), page 2123 where he says, quoting of course from decisions of certain High Courts:

> In short therefore the test to see whether the suit or appeal abates as a whole or only in part is to find out if the suit (appeal) could, in the first instance, have been instituted and prosecuted with the deceased defendant (respondent) left out. In other words, if separate suits (appeals) are maintainable against defendants (respondents) severally, then the abatement will be only in part in spite of the other defendants (respondents) having been impleaded in the same suit (appeal).

Accepting this as a sound statement of the law, I do not feel that it is possible to depart from the view which was expressed by the Bench in Miscellaneous Appeal No. 69 of 1937,[4] and I would hold that this appeal must abate as a whole.

ORDER OF REFERENCE

Ziaul Hasan and Yorke JJ. — As we differ on the question whether or not this appeal has abated as a whole, we refer this question for decision to a Full Bench.

Judgment of the Full Bench

The three applicants-appellants filed an application under Ss. 4 and 49, Encumbered Estates Act, in respect of debts due from the ancestor of the applicants, Prince Humayun Qadar Bahadur. There were nine creditors. Creditors 5 to 9 obtained a preliminary decree on the basis of a mortgage deed executed on 18th January 1916, by the late Prince Humayun Qadar Bahadur, which was made final on 18th August 1928. The said creditors opposed the application on the ground that the applicants were not "landlords" within the meaning of the Encumbered Estates Act. The learned special Judge, first grade, Lucknow, decided the preliminary point against the applicants holding that they were not "landlords" as defined in the Encumbered Estates Act and thus had no locus standi to apply under the Encumbered Estates Act and dismissed the application.

The applicants then appealed to this Court against the said decision. During the pendency of the appeal, one of the creditors, (Pandit Brahma Datt, No. 5 in the application), died, and no application was made for substitution of his legal representatives within the period of 90 days provided by law. On 28th September 1939, the appellants applied for setting aside the abatement but their application was dismissed by a Bench of this Court on 16th July 1940, the question whether the whole appeal abated was left open to be decided at the hearing of the appeal. The appeal came up for hearing before a Bench of this Court consisting of

4. *Reported in* ('40) 27 A I R 1940 Oudh 365 : 15 Luck 748 : 1940 O W N 622, Udai Pratap v. Dwarka.

Zia-ul Hasan and Yorke JJ., and a preliminary objection was taken that the whole appeal had abated. Zia-ul Hasan J. was of opinion that the whole appeal had not abated, while Yorke J. took the view that the whole appeal had abated, and as there was a difference of opinion, they referred the following question for decision to the Full Bench : "Whether or not this appeal has abated as a whole."

The contention of the learned counsel for the appellants is that there are distinct creditors and their interests are separate and as such it cannot be said that the whole appeal has abated. In support of his contention the learned counsel has relied on the following two decisions : 1935 O W N 297[2] and 10 Lah 7.[5] In the case reported in 1935 O W N 297,[2] it was held that

the question, whether an appeal can or cannot proceed in the absence of the legal representatives of a deceased respondent, must depend upon the nature of each case, and it is impossible to lay down a general rule applicable to all such cases. Each case must depend upon its own circumstances. If in such a case the decree under appeal is a joint decree in favour of all the respondents the appeal abates as a whole, for if the whole appeal is allowed not to abate the decision may result in two conflicting decisions with regard to the same subject-matter.

In the case reported in 10 Lah 7,[5] which is a Full Bench decision, it was held that

as the interest of the deceased respondent in the subject-matter of the appeal was separate from those of the surviving respondents, and it could not therefore be said that the decree of the appellate Court if in favour of the appellant, would prove ineffective or inconsistent with that part of the lower Court's decree which had become final upon the abatement of the appeal qua the deceased the appeal did not abate in its entirety but could proceed against the surviving respondents.

We do not doubt the correctness of either of the two decisions. In our opinion, they lay down the correct law and we reiterate what has been said in the case reported in 1935 O W N 297,[2] that whether an appeal has or has not abated must depend upon the nature and circumstances of each case. The test in such cases should be (1) whether the interests of the defendants in the suit are joint and indivisible so that the interest of the deceased cannot be separated from those of the rest and (2) whether in the event of the appeal being allowed as against the remaining respondents, there would or would not be two inconsistent and contradictory decrees in the same case with respect to the same subject-matter. It is a matter of common sense that the Court should not be called upon to pass two inconsistent decrees about the same property, but if on the other hand the success of the appeal would not lead to such a result, there is no valid reason why the Court should not hear the appeal and adjudicate upon the dispute between the parties who are before it.

The Encumbered Estates Act lays down a special scheme for liquidation of debts. Section 7 of the Act lays down the consequences of acceptance of an application by the Collector and under cl. (1) (b) no fresh suit or other proceedings other than an appeal, review or revision against a decree or order, or a process for ejectment for arrears of rent shall, except as hereinafter provided, be instituted in any civil or revenue Court in the United Provinces in respect of any debts incurred before the passing of the said order. Section 8 provides for filing of written statements. Section 9 provides for calling of claims and under S. 13 if the claim is not duly notified it shall be deemed to be discharged. Section 14 provides for examination and determination of claims and amounts. Section 19 provides for transmission of the decree by the special Judge to the Collector. In short the intention of the Act is to secure the entire property of the landlord under the control of the Court, compel all his creditors to prove their claims against him, and to disencumber his property of all debts under a special scheme laid down in the Act.

Coming to the merits of the case, it is clear that all the creditors were interested in defeating the appellants' application on the ground that they were not "landlords." It is true that only creditors 5 to 9 specifically raised the plea, but there can be no doubt that it was for the benefit of all the creditors.

There is no doubt that the appeal so far as the deceased creditor is concerned has abated and the order of the Special Judge that the appellants are not "landlords" has become final, and if the appeal of the appellants in this Court is allowed on the ground that they are "landlords" within the meaning of the Encumbered Estates Act, the result will be two contradictory decrees. It is further clear that the heirs of the deceased cannot now in this Court contest the appeal, while the appellants may get a reversal of the order of the Special Judge behind their back. If the whole appeal does not abate it is to the advantage of the landlords and to the disadvantage of the heirs of the deceased

5. ('28) 15 A I R 1928 Lah 572 : 114 I C 417 : 10 Lah 7 : 30 P L R 453 (F B), Sant v. Gulab.

creditor and the effect would be that the creditor against whom the appeal has abated would be debarred from all remedy by the provisions of the Act itself. He would be faced with the difficulty arising out of S. 13 of the Act, namely that the claim not duly notified would be deemed to have been discharged whereas the effect of dismissing the appeal as having abated as a whole would be that the proceedings under the Encumbered Estates Act will come to an end and those creditors would not be debarred by S. 7 of the Act from pursuing further remedies still open to them against the applicants-debtors. It has been suggested that in the event of the appeal being allowed it would be open to the heirs of the deceased creditor to present a written statement of their claims and S. 13 of the Act will not stand in their way. We do not see any reason why the heirs of the deceased creditor in whose favour a decision had been passed by reason of abatement which had become final, should be forced to re-submit their claims as if nothing had happened. This suggestion destroys the effect of finality which the law gives to the decrees of Courts.

Abatement of suits and appeals as contemplated by the Civil P. C. is based on the principle of forfeiture of rights. The law imposes a penalty upon parties guilty of laches or negligence in the shape of abatement if they fail to take prompt steps to implead the legal representatives of deceased parties on the record so as to effectually continue the proceedings. It is true that so far as the statute is concerned, the appeal abates only qua the deceased respondent, but the question whether the partial abatement thus caused leads to an abatement of the appeal in its entirety depends upon general principles. All the creditors were jointly interested in defeating the application of the landlords and the order passed by the Special Judge on the objection of some of them was in favour of all of them, and unless the whole appeal abates, the result will be two inconsistent and contradictory orders.

Under S. 50 of the Act, if a landlord with regard to whom a notice has been published under S. 9 dies before a declaration has been made in respect of him under S. 44 under cl. (a) the proceedings under this Act shall be continued as nearly as may be possible in all respects as if the landlord were still living. The Act contains no similar provision that upon the death of any of the creditors the proceedings will not abate. The learned counsel for the appellants drew our attention to a passage at p. 25 of 10 Lah 7,[5] in which it was said that "there can be no legal objection to the so-called contradictory decrees or findings in such cases." These observations were made with regard to an illustration which was as follows :

> For instance, supposing there had been four sale deeds each with regard to a one-fourth share in the property in suit and four different suits had been instituted by the plaintiff in the trial Court it was open to the trial Court in some of them to come to the conclusion that the property was ancestral and in the others to hold that the property was not ancestral because each case had to be decided on the evidence produced therein, and it is conceivable that some of the vendees were able to produce convincing evidence as to the nature of the property and the rest were not equally fortunate.

The observations made by the learned Judge under these circumstances were perfectly justified, but we fail to see how they help the appellants. We are of opinion that in the case before us no contradictory decrees are possible and a contrary view will lead to grave injustice to the heirs of the deceased creditor. We have carefully considered the case reported in 10 Lah 7,[5] and as far as the facts of that case are concerned it lays down good law, but it does not help the appellants as the facts are clearly distinguishable. There was no prejudice in that case to the successful party, but in the case before us, as we have shown, if the appeal is allowed, the successful party will be greatly prejudiced and he will be precluded from obtaining any remedy in regard to the debts which stand in his favour.

We are therefore of opinion that the interest of the creditors in defeating the application of the appellants were joint and indivisible and the interests of the deceased creditor cannot be separated from those of the rest and that the heirs of the deceased creditor were necessary parties. We are therefore constrained to hold that the appeal has abated as a whole, otherwise it would lead to conflicting and inconsistent decisions with regard to the same subject-matter. Our reply therefore to the question referred is that the appeal has abated as a whole.

G.N./R.K. *Answer accordingly.*

A. I. R. 1941 Oudh 223

AGARWAL J.

Second Appeal No. 371 of 1937, Decided on 12th December 1940.

Kale Khan

v.

Masud Husain.

(a) Oudh Rent Act (22 of 1886), S. 108 — Minor — Decree against, obtained in revenue Court—Suit by minor for declaration that decree is not binding on him on ground that he was not properly represented is cognizable by civil Court—S. 108 is no bar.

A civil Court has jurisdiction to entertain a suit of every nature—of course of a civil nature—unless its jurisdiction has been barred by some legislative enactment. The civil Court can, therefore, entertain a suit by a minor to set aside a decree obtained against him in a revenue Court on the ground that he was not properly represented, as such right is recognized by law and the jurisdiction of the civil Court to entertain such suit is not excluded by the Oudh Rent Act or by any other legislative enactment : AIR 1932 All 293 (F B), *Rel. on;* AIR 1926 Oudh 348 ; A I R 1932 Oudh 273 and 1937 O W N 886, *Disting.* [P 224 C 2]

(b) Minor—Decree against — Setting aside—Gross negligence—Suit against minor by mortgagee for arrears of rent of mortgaged property decreed — Guardian not raising plea that minor was not mortgagor's heir under custom—Interests of guardian adverse to those of minor — Guardian held guilty of gross negligence — Minor held entitled to declaration that decree did not bind him.

In a suit by the mortgagee for arrears of rent of the mortgaged property against the minor and his uncle as heirs of the deceased mortgagor the uncle acted as the minor's guardian but failed to raise the plea that the minor was not liable as he was not the heir of the mortgagor under a custom. The guardian's interests were adverse to those of the minor and his liability was decreased if the minor also shared it. In the suit by the minor for declaration that the decree did not bind him :

Held that the guardian acted with gross negligence in not raising the plea of custom and therefore the minor was entitled to the declaration sought for. [P 224 C 2]

S. N. Srivastava — for Appellant.

Haider Husain and H. H. Zaidi — for Respondents.

Judgment. — This second appeal arises out of a suit brought by the respondents for a declaration that a decree obtained against them by the present appellant, Kale Khan, is not binding on them and their property cannot be sold in its execution. One Ashiq Ali made a mortgage of his property to the appellant, Kale Khan, on 8th July 1925 and agreed to deliver possession. Instead of putting the mortgagee in actual possession he executed a kabuliat in his favour and agreed to pay rent at the rate of Rs. 82-8-0 per annum. Ashiq Ali died leaving two sons Manzoor Ahmad and Aftab Ali, a daughter Shamshi Bibi and the respondents, another daughter's sons. Kale Khan sued these persons for rent in the revenue Court and obtained a decree. The plaintiffs brought a suit before the Munsif that the decree was not binding on them because under a custom they were not heirs of Ashiq Ali and their guardian acted with gross negligence in not taking up that plea. A case of fraud was also set up but subsequently withdrawn. The first Court dismissed the suit but the lower appellate Court has decreed it.

It has been argued before me that the civil Court had no jurisdiction to entertain the suit and reliance is placed on 6 O W N 1214,[1] 9 O W N 610[2] and 1937 O W N 886.[3] In these cases the plaintiff in the civil Court wanted to get rid of what was decided by the revenue Court and it was held that the suit was not maintainable. None of these suits was brought on the ground alleged by the plaintiffs in this case. If a plaintiff wants to re-agitate a matter decided by the revenue Court, he certainly cannot. In the present case the plaintiffs wanted a declaration that the decree is not binding on them on the ground that they were not properly represented. Such a right is recognized in law and there must be a remedy for a legal right. Section 108, Oudh Rent Act, bars the jurisdiction of the civil Court in respect of some suits, but the jurisdiction of the civil Court in respect of a suit of the present nature is not barred. A civil Court has jurisdiction to entertain a suit of every nature — of course of a civil nature — unless its jurisdiction has been barred by some legislative enactment. The jurisdiction of the civil Court has not been excluded by the Oudh Rent Act or by any other legislative enactment. I therefore hold that the civil Court has jurisdiction to entertain the suit. This view was held in 54 ALL 646.[4] It has been found by the lower appellate Court that under a custom the plaintiffs were not the heir of Ashiq Ali and the guardian acted with gross negligence. The plaintiffs' guardian was their uncle Manzoor Ahmad and his interests were adverse to theirs. His liability was decreased if the plaintiffs also shared it. He was grossly negligent in not raising the objection on behalf of the plaintiffs that they were not heirs of Ashiq Ali and so could not be made liable. I think the lower Court was quite right in granting the declaration prayed for by the plaintiffs. I see no force in the appeal and dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

1. ('26) 13 A I R 1926 Oudh 348 : 93 I C 374 : 6 O W N 1214, Har Nath Singh v. Sriram.
2. ('32) 19 A I R 1932 Oudh 273 : 139 I C 498 : 9 OWN 610, Jageshwar Singh v Rameshar Bakhsh Singh.
3. ('37) 1937 O W N 886 : 170 I C 639, Rustom Singh v. Ahmadunnisa.
4. ('32) 19 AIR 1932 All 293:138 I C 465:54 All 646: 1932 ALJ 437 (FB), Siraj Fatma v. Mahmud Ali.

A. I. R. 1941 Oudh 225

THOMAS C. J. AND AGARWAL J.

Raghuraj Singh — Applicant

v.

Lala Hari Kishen Dass — Creditor — Opposite Party.

Civil Revn. Appln. No. 4 of 1940, Decided on 9th December 1940, from order of Special Judge, First Grade, Sitapur, D/- 31st July 1940.

U. P. Encumbered Estates Act (25 of 1934), Ss. 4 (5), 9 and 11 — Application under S. 4 — Notices under Ss. 9 and 11 published—Application under S. 4 subsequently amended under S. 4 (5)—There should be fresh publication of notices under Ss. 9 and 11.

Section 4 (5) provides that the amendment will be made in accordance with the provisions of Civil Procedure Code and provides nothing more. It is not prescribed that the subsequent procedure will also be in accordance with the Civil Procedure Code. Where an application is made under S. 4 and notices under Ss. 9 and 11 published and subsequently the application under S. 4 is amended under the provisions of S. 4 (5), fresh publication of notices under Ss. 9 and 11 is necessary.

[P 226 C 1]

Ali Zaheer — for Applicant.

Niamatullah — for Opposite Party.

Order. — This is an application for revision of an order of the Special Judge of Sitapur, dated 31st July 1940. The applicant applied under S. 4, Encumbered Estates Act, on 29th October 1936, to the Collector of Sitapur. The Collector passed an order under S. 6 of the Act, on 2nd November 1936, that the application be forwarded to the Special Judge. Notices under Ss. 9 and 11 were published on 29th July 1936, and 12th February 1938, respectively. An application was made to the Board of Revenue that the application to the Collector under S. 4, Encumbered Estates Act, was defective because all the members of the applicant's family did not join it nor had the applicant made any express declaration in the application of his intention of separating from the joint family as required by proviso 2 to S. 4. The Board of Revenue passed an order on 13th August 1938, that the order of the Collector forwarding the application to the Special Judge be cancelled. The Special Judge consigned the case to the record room on 10th October 1938. Matters were at rest for some time but Act 11 of 1939 was passed and published in the U. P. Gazette on 30th September 1939. A new S. 20-A was added which provided that any application which was dismissed solely on the ground of some defect shall be amended in accordance with the provisions of sub-s. (5) of S. 4. The old Act contained four sub-sections of S. 4 and sub-s. (5) was added by this amending Act. It provides that if an objection is taken before the Collector or Special Judge that the application is defective and such an objection is upheld, the Collector or Special Judge as the case may be, shall at the request of the landlord amend the application in accordance with the provisions of the Code of Civil Procedure relating to the amendments of plaints and shall proceed with the case.

After these amendments in the Encumbered Estates Act, the present applicant made an application to the Collector on 10th October 1939, that his application be amended. The application was granted on 18th October 1939 and forwarded to the Special Judge. The Special Judge passed an order that the applicant should give the charges of the publications required to be made under Ss. 9 and 11 of the Act. This application for revision is against that order and it is contended that no further publications under Ss. 9 and 11 were necessary. Section 6 of the Act is to the effect that when an application has been duly made according to the provisions of S. 4, the Collector shall forthwith pass an order that it be forwarded to the Special Judge. When the Board of Revenue held that the original application made by the applicant was defective and the order of the Collector forwarding the application to the Special Judge was cancelled, the Special Judge had no jurisdiction left and all the proceedings came to an end. It is argued on behalf of the applicant that after the amendment the special Judge ought to have started proceedings from the stage that they had formerly reached. The amendment was made by the Collector under sub-s. (5) of S. 4 and after it he should have proceeded with the case which he could do only by forwarding the application to the Special Judge under S. 6.

The Encumbered Estates Act provides what is to be done by the Special Judge when he receives an application under S. 6. The argument that he ought to have proceeded from the stage he has reached before has no force, because all the previous proceedings must be considered to have been cancelled and he had received the application again. Had the amendment been made by the Special Judge himself there might have been some force in the applicant's argument, but in this case it was made by the Collector. Section 8 provides that on receiving the application under S. 6 the Special Judge shall call upon the applicant to file a

written statement containing full particulars respecting his public and private debts, the nature and extent of his proprietary rights and the names and addresses of his creditors. Section 9 then enjoins on the Special Judge that he should issue a notice calling upon all persons having claims in respect of the private debts to present to the Special Judge within three months of the date of the publication of notice, a written statement of their claims. Section 11 provides that the Special Judge shall publish a notice in the manner specified in S. 9 specifying the property mentioned by the application under S. 8 or by any claimant under S. 10, and any person having a claim to the property mentioned in such notice shall within a period of three months from the date of the publication of notice in the gazette make an application to the Special Judge stating his claim. It is just possible that the applicant may have incurred debts between the period the case was consigned to the record room and the starting of the proceedings again, that is between 10th October 1938 and 18th October 1939. These creditors will have no opportunity of putting in their claims if notices are not published under S. 9, and these claims can be preferred only within three months of the date of the publication.

It is also possible that there may have been a change of title in the property of the applicant. Under S. 11 claims to property can be made within three months of the publication of notice and if no notices are issued these claimants will have no opportunity of putting in their claims. The former notices under Ss. 9 and 11 were published long ago. We are therefore of opinion that it is absolutely necessary that notices under Ss. 9 and 11 be published again. It is argued that sub-sec. (5) provides that amendment should be made in accordance with the provisions of the Code of Civil Procedure and under the Code of Civil Procedure when a suit is dismissed and is restored again, the proceedings start from the stage they had reached before. The sub-section provides that the amendment will be made in accordance with the provisions of the Code and provides nothing more. It is not prescribed that the subsequent procedure will also be in accordance with the Code of Civil Procedure. We are of opinion that the view taken by the lower Court is quite correct and notices under Ss. 9 and 11 should be published again. We therefore dismiss this application with costs.

D.S./R.K. *Application dismissed.*

A. I. R. 1941 Oudh 226

BENNETT AND GHULAM HASAN JJ.

Raj Bahadur Singh — Appellant

v.

Nar Singh Misra — Respondent.

Appeal No. 23 of 1937, Decided on 13th December 1940.

(a) Civil P.C. (1908), S. 100—Findings of fact.

Finding that a mortgage deed had not been executed by the executant as guardian of a minor is a finding of fact and not open to challenge in second appeal. The finding that the minor had not been benefited by the mortgage executed by the guardian is equally a finding of fact which is not assailable in second appeal. [P 228 C 2]

(b) Hindu law — Alienation — Guardian — Mortgage of minor's property by guardian not in capacity of guardian does not bind minor—Mortgage not for benefit of minor—Mortgagee will have no locus standi to sue on mortgage.

Where a guardian has mortgaged minor's property not in the capacity of a guardian but on his own account the mortgage is not binding on the minor. Moreover, if the mortgage executed by guardian is not for the benefit of the minor, the mortgagee derives no title from the mortgage and has no locus standi to sue on the mortgage. [P 228 C 2; P 229 C 1]

(c) Transfer of Property Act (1882), S. 91 (a) —Voluntary payment does not confer right of subrogation.

An officious or voluntary payment carries with it no right of reimbursement or of subrogation: 2 I A 131 (P C) and 36 Cal 193, *Rel. on.* [P 229 C 1]

(d) Transfer of Property Act (1882), S. 92, as amended by amending Act 20 of 1929—Para. 3 of S. 92 whether retrospective *(Quære)*.

Whether para. 3 of S. 92, which was introduced in the Transfer of Property Act by the Amending Act 20 of 1929, is retrospective in its operation. [P 229 C 2]

P. N. Chaudhri — for Appellant.

N. Banerji — for Respondent.

Judgment. — This is an appeal against the judgment and decree dated 13th September 1937, passed by our learned brother, Ziaul Hasan J., allowing the appeal and decreeing the plaintiff's suit for possession of the plots in dispute under S. 12 (2), Oudh Courts Act. A short pedigree is given below to elucidate the facts giving rise to this appeal:

JUBRAJ SINGH

Bisheshwar Singh Bachchi Kuar, widow	Pratap Singh
Anant Bahadur Singh	
Raj Bahadur Singh (defendant 1 appellant)	
Bhairon Baksh Singh (defendant 2)	Sheo Baran Singh (defendant 3).

Jubraj Singh, the ancestor of the defendants executed a usufructuary mortgage deed of certain plots of land to Nidhan Kurmi for a sum of Rs. 1000 (Ex. 2). This property is mentioned in list A of the plaint. On 15th July 1913, Anant Bahadur Singh and defendants 2 and 3 executed jointly a bond for Rs. 465 in favour of Ram Nath Kurmi, who is admittedly the grandson of Nidhan Kurmi (Ex. 3). It appears that Anant Bahadur Singh died some time between 1913 and 1919. On 22nd August 1919, an unregistered bond was executed by Mt. Bachchi Kuar, the grandmother of defendant 1, jointly 'along with defendants 2 and 3 in favour of Ram Nath Kurmi for Rs. 750 (Ex. 4). This was stated to be in lieu of the previous bond (Ex. 3) and a cash sum of Rs. 75. Again on 30th June 1923, the previous bond (Ex. 4) was renewed by Mt. Bachchi Kuar and defendants 2 and 3 by the execution of another bond (Ex. 5) for Rs. 800 in favour of the same Ram Nath. In the judgment of our learned brother Mt. Bachchi Kuar is mentioned as the mother of defendant 1, but as a matter of fact she was the grandmother. Ram Nath made a sub-mortgage of the rights descended to him from his grandfather under Ex. 2, the mortgage deed of 11th December 1891, to Bhagirath, the brother of the plaintiff. On 5th August 1927, Mt. Bachchi Kuar executed a possessory mortgage of certain property described in list B of the plaint in favour of the plaintiff for Rs. 1800. The money due under the mortgage deed (Ex. 2) for Rs. 1000 and the bond (Ex. 5) for Rs. 800 was made payable under this mortgage. The mortgage deed is (Ex. 1).

On 19th March 1935, the plaintiff instituted the suit out of which the present appeal arises for the recovery of possession as mortgagee over the plots mentioned in list B of the plaint on the allegation that the plots in question were in his possession on the basis of the mortgage deed dated 5th August 1927 (Ex. 1) since he had paid the mortgage money amounting to Rs. 1800 to Ram Nath Kurmi and that in November 1934 defendant 1, appellant before us, had forcibly dispossessed him from those plots. The plaintiff also claimed mesne profits to the extent of Rs. 50 against defendant 1. The alternative relief claimed in the plaint was that in case the mortgage deed (Ex. 1) was held not binding on defendant 1, then a decree for the mortgagee possession over the plots mentioned in list A of the plaint be passed in favour of the plaintiff on the ground that he had discharged the prior mortgage deed of 1891 in good faith, and that defendant 1 had benefited by that payment. Defendants 2 and 3 substantially admitted the plaintiff's claim, but alleged that the plaintiff was not entitled to recover possession of the plots given in list A of the plaint in any case. Defendant 1 contested the suit. He denied all the deeds and bonds referred to above, excepting the mortgage deed (Ex. 2), dated 11th December 1891 executed by his great-grandfather. He denied that Mt. Bachchi Kuar was his guardian, and asserted that he being a minor was not bound by the deeds executed by her who was not his guardian and that the said deeds were not executed for his benefit. There was also a denial in regard to the intelligent execution of the deed by Mt. Bachchi Kuar, who was alleged to be an illiterate aged woman with defective sight and hearing.

The trial Court held that Mt. Bachchi Kuar did not execute the mortgage deed (Ex. 1) in favour of the plaintiff in the capacity of a guardian. It further held that Ex. 1 was not valid and binding as against defendant 1 and that the same had not been executed for his benefit. Lastly, the trial Court held that the plaintiff could not be subrogated to the position of the prior mortgagee Nidhan Kurmi by paying Ram Nath and was not entitled to claim the possession of property either of list A or list B. In the same connexion, it found that Ram Nath had made a sub-mortgage of his rights to Bhagirath and the plaintiff had not proved that Bhagirath was dead nor that he was either an heir or transferee of Bhagirath. The lower appellate Court after considering the entire evidence on the record and the circumstances of the case, recorded a finding that neither from the terms of the mortgage deed (Ex. 1) nor from the surrounding circumstances it appears that Mt. Bachchi Kuar executed the mortgage deed as guardian of Raj Bahadur Singh and mortgaged his property to the appellant on his behalf. The lower appellate Court further found that the mortgage deed was not executed for the benefit of defendant 1. In regard to the consideration of Rs. 1000 of Ex. 2, the prior mortgage, its finding was that the said sum of Rs. 1000 was not exclusively payable by defendant 1, but was equally binding on defendants 2 and 3 as well, who were the heirs and successors of Jubraj Singh. Although the plaintiff had pleaded an oral partition between defendant 1 on the one hand, and defendants 2 and 3 on the other hand, and the effect was admitted by de-

fendants 2 and 3 in their written statement, yet it was denied by defendant 1.

The lower appellate Court held that there was absolutely no evidence to prove the alleged partition. In this view of the matter, the finding of the lower appellate Court was that defendant 1 derived no benefit from the mortgage (EX. 1) so far as its consideration of Rs. 1000 was concerned. As regards the second item of Rs. 800 the lower appellate Court found that this debt was barred by time and Mt. Bachchi Kuar had no right whatever to acknowledge the liability with regard to this debt. In the result the lower appellate Court found that EX. 1, executed by Mt. Bachchi in favour of the plaintiff on behalf of defendant 1—the basis of the suit —was not binding upon defendant 1. Upon the question whether the plaintiff was entitled to subrogation within the meaning of S. 92, T. P. Act, the lower appellate Court agreed with the view taken by the trial Court and held that the payment made by the plaintiff to Ram Nath was wholly unauthorized as he had transferred his mortgagee rights to Bhagirath, who had not been proved to be dead. Further, the lower appellate Court held that the plaintiff was not one of those persons mentioned in Ss. 91 and 92, T. P. Act, and as such not entitled to subrogation. The plaintiff preferred a second appeal to this Court. Our learned brother, Zia-ul-Hasan J., set aside the finding of the Courts below to the effect that EX. 1 had not been executed by Mt. Bachchi Kuar as guardian of defendant 1. He was of opinion that this was a technical ground upon which the suit should not have been thrown out. He also came to the conclusion that though Mt. Bachchi Kuar described herself as the owner of the mortgaged property, yet this was a pure mistake on the part of the person drafting the deed and felt justified in assuming that the deed in favour of the plaintiff was intended to be executed by her not personally but as guardian of defendant 1.

As regards the finding of the Court below that defendant 1 had not been benefited by the mortgage deed (Ex 1), the learned Judge was of opinion that this point was wholly irrelevant for the purposes of the suit in which the plaintiff only wants to be subrogated to the position of the prior mortgagee, and is not suing for the enforcement of his mortgage. Lastly on the question of law he held that the plaintiff was entitled to subrogation as the case comes within the purview of S. 91 (a), T. P. Act. In other words, he is a person who has an interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same. The learned Judge observed that the plaintiff being a subsequent mortgagee of the land had undoubtedly an interest in the mortgaged property and was thus entitled to redeem the prior mortgage under S. 91 and as such he is entitled to subrogation under S. 92 of the Act. In the result the appeal was allowed and the plaintiff was decreed possession of the plots originally mortgaged by Jubraj Singh with Nidhan Kurmi: *vide* list A of the plaint. As regards the first point, we are of opinion that the finding arrived at by the Court below to the effect that EX. 1 had not been executed by Mt. Bachchi Kuer as guardian of defendant 1, was a finding of fact supported by evidence on the record and was not open to challenge in second appeal. There was therefore no legal ground to reverse that finding in second appeal under S. 100, Civil P. C.

As regards the second point, our learned brother did not express any opinion on the merits of the finding arrived at by the Courts below that defendant 1 had not been benefited by the mortgage (EX. 1) executed by his grandmother in favour of the plaintiff. We must, however, hold that the finding on the question of benefit to the minor is equally a finding of fact which is not assailable in second appeal. We are further of opinion that the position that the question of benefit is not relevant for the purposes of the case is not legally correct. If EX. 1 is not binding upon defendant 1 either because Mt. Bachchi Kuar had no right in law to execute such a deed on his behalf or on the ground that defendant 1 received no benefits thereunder, the position in law would be that the plaintiff will derive no title from EX. 1 and will consequently have no locus standi to maintain the suit. The recital in EX. 1 shows that Mt. Bachchi Kuar treated herself as the owner of the property sought to be mortgaged and described herself as such. The deed made no mention of the fact that the property sought to be mortgaged belonged to the minor, viz., defendant 1. Sir Dinshah Mulla in his well-known work on Hindu law (1940 Edition, p. 570, para. 528) says :

> The natural guardian of a Hindu minor had power, in the management of his estate, to mortgage or sell any part thereof in a case of necessity or for the benefit of the estate.

Further at p. 571, para. 529 runs thus :

> The natural guardian has power to enter into contracts and to do all other acts which are rea-

sonable and proper for the protection or benefit of the minor's property and for the advantage of the minor.

Further at page 572 the following passage occurs:

No act done by a person who is the guardian of a minor binds the minor, unless the act was done by him in his capacity of guardian. It is a question of fact in each case whether a particular act done by a person was done by him in his capacity of guardian or, on his own behalf and on his own account. In the former case, the act binds the minor, provided it was otherwise within the power of the guardian; in the latter case, it does not.

Having regard to the finding of the lower Courts which we have accepted as final and binding upon us in second appeal, we are satisfied that Ex. 1 is not binding on defendant 1 and consequently confers no rights whatsoever upon the plaintiff to claim any relief on the basis thereof. The only other question which remains for decision is whether the plaintiff could in the circumstances of the present case, be regarded as a person entitled to redeem the property within the meaning of cl. (a) of S. 91, T. P. Act. It is true that according to receipt (Ex. 7) dated 4th May 1928, the plaintiff is alleged to have paid Rs. 1000 to Ram Nath, who issued the receipt (Ex. 7) to him. This payment in our opinion must be regarded in the circumstances of the case to be purely voluntary and the plaintiff-respondent can derive no advantage therefrom. An officious or voluntary payment carries with it no right of reimbursement or of subrogation. In 2 I A 131[1] it was observed by their Lordships of the Privy Council:

It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay. It is well settled that there is no such obligation in the case of a voluntary payment by A of B's debt.

In a leading case on the subject, 36 Cal 193,[2] referred to approvingly by their Lordships of the Judicial Committee in 1940 O W N 83,[3] it was held by Mookerjee J. that

that principle is, that subrogation as a matter of right, is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon its estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debt of the succession. Anyone who is under no legal obligation or liability to pay the debt, is a stranger, and if he pays the debt, he is a mere volunteer.

Having regard to the view enunciated in the above cases, we are of opinion that the plaintiff is not subrogated to the rights of the prior mortgagee. It may also be pointed out that our learned brother, Zia-ul-Hasan J. was not quite correct in stating that the plaintiff being a subsequent mortgagee of the land had undoubtedly an interest in the mortgaged property and was thus entitled to redeem the prior mortgage under Ss. 91 and 92 of the Act. We have examined the record and we find that although some of the plots are common to the two deeds, Exs. 1 and 2, yet some altogether different property has been mortgaged under Ex. 1 which is the basis of title of the plaintiff-respondent.

It has also been argued on behalf of the defendant-appellant that para. 3 of S. 92, T. P. Act, which was introduced in the Transfer of Property Act by the Amending Act 20 of 1929 is retrospective in its operation and consequently the plaintiff-respondent is not entitled to subrogation in the absence of a registered instrument executed by the mortgagor. On the other hand, it has been contended on behalf of the plaintiff-respondent that the mortgage (Ex. 1) was executed in 1927 long before the Amending Act of 1929 was passed and must be governed by the old law and that in any case S. 92 has no retrospective effect. Reference has been made in this connexion to Mulla's Transfer of Property Act (Edn. 2, 1936, p. 512), 1938 O W N 401[4] and to a decision of their Lordships of the Judicial Committee in 1940 O W N 83.[3] In the view that we have taken we do not consider it necessary to express any opinion on this point. The result therefore is that we allow the appeal, set aside the judgment and decree passed by our learned brother, restore the decree of the two lower Courts and dismiss the plaintiff's suit with costs in all the Courts.

D.S./R.K. *Appeal allowed.*

1. ('75) 2 I A 131: 23 W R 305: 15 Beng L R 208: 3 Sar 477: 3 Suther 186 (P C), Ram Tuhul Singh v. Bisheswar Lall Sahoo.
2. ('09) 36 Cal 193: 1 I C 913: 5 C L J 611, Gur Deo Singh v. Chandrika Singh.
3. ('40) 27 A I R 1940 P C 38: 186 I C 1: 67 I A 82: I L R (1940) 1 Cal 291: I L R (1940) Kar P C 82: 1940 O W N 83 (P C), Janki Nath v. Pramatha Nath.
4. ('38) 25 A I R 1938 Oudh 127: 174 I C 714: 13 Luck 761: 1938 O W N 401 and 489 (F B), Kundan Lal v. Faqir Baksh.

A. I. R. 1941 Oudh 230

THOMAS C. J. AND GHULAM HASAN J.

Lala Gulab Chand, Plaintiff and another, Defendant—Appellants

v.

Lala Manni Lal and others — Defendants—Respondents.

First Appeal No. 32 of 1937, Decided on 18th December 1940, against decree of Civil Judge, Mohanlalganj, Lucknow, D/- 7th January 1937.

(a) Hindu law — Joint family — Family business — Debt incurred for carrying on family business is inseparable part of family property.

Debt incurred for carrying on the family business is a necessary and inseparable part of the family property. [P 234 C 1]

(b) Hindu law — Joint family — Family business—Business of Hindu after his death becomes joint family business in hands of his male issue—Joint ownership so created is family partnership created by operation of law.

In Hindu law a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In the hands of the male issue it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a contract but a family partnership created by the operation of law. [P 234 C 2]

(c) Evidence Act (1872), S. 34—Existence of sufficient evidence to prove that books of account were regularly kept in course of business —Entries are relevant under S. 34.

Where there is sufficient evidence on the record to prove that books of account were regularly kept in the course of business the entries made therein are relevant under S. 34 : 8 I C 81; 6 M I A 88 (P C) and 13 I C 678, *Ref.* [P 235 C 1]

(d) Hindu law — Joint family — Ancestral nucleus—Question of loss or profit in going concern is immaterial in establishing existence of ancestral nucleus.

The question of loss or profit in a going concern is of little consequence in so far as it is necessary to establish the existence of an ancestral nucleus. [P 235 C 2]

(e) Hindu law — Joint family property — Ancestral nucleus left by deceased inherited by sons — Subsequent acquisitions by any one of them should be presumed to be joint family property.

Where a Hindu at the time of his death has left ancestral nucleus, which was inherited by his son along with his brothers the subsequent acquisitions made by the son must be deemed in law to be joint family property in the absence of any proof to the contrary. It is not necessary to trace and connect amounts invested by person inheriting ancestral nucleus with ancestral nucleus. [P 235 C 2; P 238 C 1]

(f) Hindu law — Joint family property—Mere fact of Hindu making will in respect of his property does not raise presumption that property is self-acquired.

Although the conduct of the alienor of the property treating the property as his self-acquired property and disposing of it by means of a will may be taken into consideration along with other circumstances of the case, yet the mere fact of a Hindu making a will in respect of his property does not raise the presumption about the property being his self-acquired property : A I R 1930 Oudh 39, *Expl.* [P 237 C 2]

(g) Hindu law — Joint family property—Even in absence of ancestral nucleus property acquired by joint labour of members is presumed to be joint family property.

In order to constitute joint family property it is not necessary to have any ancestral nucleus. It is open to the members of the joint family to acquire property either by joint labour or by any other means and enjoy the same as joint family property, and in the absence of an indication to the contrary it will be presumed to be joint family property. Once the character of property as joint family property is established, no matter how acquired, it follows that the male issue of the acquirers will get a right in it by birth : *Case law referred.* [P 239 C 2]

(h) Hindu law — Joint family property—Alienation of, by one member — He or his male descendant is not estopped from challenging alienation on ground that previously that member dealt with that property as his self-acquired property.

Where a member has alienated joint family property he or his male descendant is not estopped from challenging that alienation on the ground that at some previous time that member dealt with the property as his self-acquired property. In any case the admissions by that member are not binding on his male descendant who claims independently under the law. [P 240 C 1]

(i) Hindu law — Partition — Son born after partition can claim by birth interest in property allotted to father.

Even if the son is born after the disruption of the joint family property by partition he is entitled to claim by birth an interest in the property allotted to his father on partition. [P 240 C 2]

(j) Custom—Digambari Jains — There is no custom that father is absolute owner of ancestral property.

There is no custom among the Digambari Jains of India by virtue of which a father is the absolute owner of the ancestral property. [P 241 C 1]

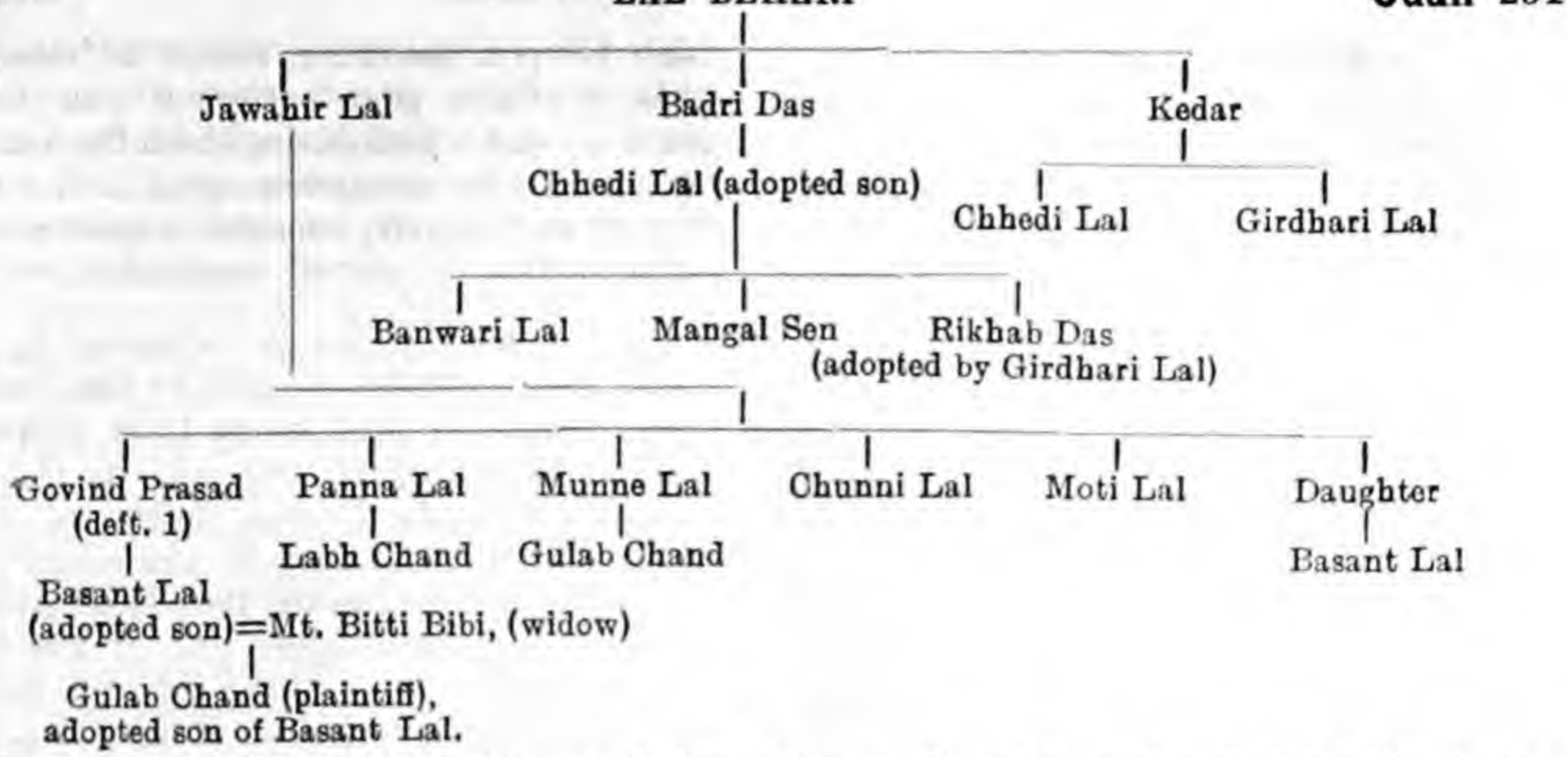
(k) Custom—Custom should not be extended by analogy.

The custom set up should be strictly proved and should not be extended by analogy. [P 241 C 2]

M. Wasim and A. P. Nigam — for Appellants.

Rajeshwari Prasad and G. D. Khan — for Respondents.

Judgment. — This is a first civil appeal by the plaintiff against the judgment and decree dated 7th January 1937, passed by the civil Judge of Mohanlalganj at Lucknow, dismissing the plaintiff's suit. In order to fully appreciate the controversy between the parties, it is necessary to set out the following pedigree:



The pedigree given in the judgment of the trial Court was supplemented by the learned counsel appearing on behalf of the plaintiff-appellant and the addition of names thereto was not disputed on behalf of the defendants-respondents. The plaintiff's case was that Jawahir Lal, his ancestor, died some time in August 1885, leaving moveable and immovable properties, cash and ancestral family business. Govind Prasad being the eldest male member of the family came into possession of the properties left by Jawahir Lal and continued the family business with the help of joint funds and his brothers associated with him as members of a joint Hindu family in the family business until the year 1910, when a partition took place between him and his two surviving brothers Panna Lal and Munne Lal. Govind Prasad had no issues, and he adopted in 1911 his sister's son, Basant Lal, whom, according to the custom prevalent among Digambar Jains, to which community Govind Prasad belonged, he was entitled to adopt. Basant Lal died issueless on 31st December 1921 and his widow Mt. Bitti Bibi adopted the plaintiff-appellant in 1922 under an oral authority given to her by Basant Lal to adopt. Basant Lal was joint with his adoptive father Govind Prasad, and so was the present plaintiff. The property possessed by Govind Prasad was jointly owned by the plaintiff and Govind Prasad as members of the joint Hindu family. The other material allegations in the plaint are that one Mt. Aminunnissa and others had executed in 1928 a mortgage deed in favour of Govind Prasad in respect of village Babupur, district Sitapur, and village Mubarkapur, district Lucknow, and that in 1932 she obtained a decree for redemption of the property mortgaged on payment of Rs. 12,203-4-0. Govind Prasad was dissatisfied with the decision and preferred an appeal to the Chief Court of Oudh challenging the amount as inadequate. While the appeal was pending, he (Govind Prasad) executed a deed of assignment of his mortgagee rights under the decree aforesaid to Lala Narain Das for a sum of Rs. 12,703-4-0 (Ex. 21). This deed recites the facts of the mortgage and the deed of further charge executed by Mt. Aminunnissa in favour of Govind Prasad and also refers to her having obtained a decree against Govind Prasad. The details of consideration to be found in this deed are as follows:

Allowed deduction to the vendee on account of the amount received before the execution of this deed and paid to Manni Lal, son of Kedar Nath, caste Vaish, resident of Mashakganj, Lucknow City, from whom three houses situated in Mashakganj, Lucknow, have been purchased for constructing Dharamshala	Rs. 7500-0-0
Allowed deduction to the vendee on account of the amount received before the execution of this deed and deposited with Lala Manni Lal, son of Kedar Nath, caste Vaish, residents of Mashakganj, Lucknow, for purchase of land for constructing Dharamshala	Rs. 5000-0-0
Received in cash at the time of registration	Rs. 203-4-0
Total ...	Rs. 12,703-4-0

It is stated by the plaintiff that defendant 3, Kamta Prasad, an old servant and confidant of Govind Prasad, took undue advantage of the influence which he wielded over him (his master), and having colluded with Manni Lal, defendant 2, who was his partner in the silver lace business and with Shambhu Krishna Narain, defendant 5, who was indebted to him, made Govind

Prasad defendant 1, accept the amount of redemption decreed by the lower Court and relinquish the balance. Govind Prasad fell seriously ill after the filing of the said appeal in the Chief Court and was unable, according to the plaintiff, to understand his affairs or even to move about. Taking advantage of his illness and of his incapacity to understand his affairs, Kamta Prasad in collusion with defendants 2 and 5 induced Govind Prasad to execute a deed of assignment of his mortgagee rights in favour of Narain Das, who was the maternal uncle of defendant 2, on 22nd July 1933 (Ex. 21). Further out of the consideration of Ex. 21 Govind Prasad purchased three houses from Manni Lal, defendant 2, on the same date (*vide* Ex. 62), and out of the second item of consideration set out in Ex. 21 (namely Rs. 5000) he obtained a sale deed of two houses in muhalla Mashakganj, Lucknow for Rs. 2000 from Shambhu Krishna Narain, defendant 5, and his brothers, on 11th August 1933 : *vide* Ex. 63.

Thereafter on 17th August 1933, Govind Prasad executed a deed of trust, (Ex. B-1), which covered four out of the five houses purchased by him as stated above, the mortgagee rights against Mt. Saghir-un-nissa in village Jan Nagar, district Sitapur, and certain other lands, and Rs. 3000 which had been deposited in cash in trust for the construction of a dharamshala with Manni Lal, defendant 2, and appointed himself and defendants 2 to 7 as the trustees. On the same date, namely 17th August 1933, Govind Prasad executed a sale deed (Ex. B-2) in favour of Kamta Prasad, defendant 3, in respect of one of the three houses purchased by Govind Prasad from Manni Lal under the sale deed of 22nd July 1933 (Ex. 62). This house therefore does not form part of the trust property. The plaintiff states that the effect of these alienations is to convert the ancestral property of the plaintiff and defendant 1 into the separate property, as it were, of defendant 1 alone, and that the object of securing these alienations by the defendants concerned was to obtain a control over these properties under the guise of trustees of a dharamshala, which was going to be constructed at muhalla Mashakganj, Lucknow, under the supervision of defendants 2 and 3. The deed of trust and the sale deed dated 17th August 1933, executed by Govind Prasad were challenged as being devoid of legal necessity and not binding on the joint family consisting of the plaintiff and defendant 1. It is further stated in the plaint that defendant 1, upon becoming aware of the true state of affairs, gave notices to the defendants 2, 3 and 5 prohibiting them from interfering with the properties noted in the deed of trust and actually executed a deed of cancellation (Ex. 18) on 12th September 1933.

Items 1 to 5 of the list attached to the plaint are properties covered by the deed of trust. Item 6 is outside the trust property and is a house which was sold by Govind Prasad to Kamta Prasad, defendant 3, as stated above. According to the allegations in the plaint it was stated that defendants 2, 3 and 5 had demolished one of the two houses noted at No. 1 of the list and partly demolished the two houses noted at No. 2 of the list and appropriated some of the materials. Defendant 3 was occupying one of the houses noted at No. 1 of the list along with his family without paying any rent. The damage caused by the demolition of the houses aforesaid was estimated to be Rs. 3000 which defendants 2, 3 and 5 were liable to pay. Defendant 3 was liable to pay rent at Rs. 20 per month as compensation from 22nd July 1933 till the date of the delivery of possession, and the amount of total rent up to the date of the suit came to Rs. 75. The plaintiff prayed for a decree for Rs. 3000 on account of damages for demolition and materials of the houses against defendants 2, 3 and 5, and a decree for Rs. 75 against defendant 3. He also prayed for possession against defendants 2, 3 and 5 in respect of a house noted at No. 1 in the list and for possession of the house noted at No. 6 against defendant 3. A declaration was sought by the plaintiff that all the properties noted at Nos. 1 to 5 were owned and possessed by the joint family of the plaintiff and defendant 1, and the deed of trust was void and ineffectual.

Defendants 4, 6 and 7 were impleaded in the case as they were made trustees in the deed of trust. Defendant 1, Govind Prasad, put in a written statement supporting the plaintiff's case. Defendants 2, 3 and 5 contested the suit while defendants 4, 6 and 7 did not put up any defence and proceedings were ex parte against them. The defence of the contesting defendants was a denial of the adoption of Basant Lal by Govind Prasad or the adoption of the plaintiff by Mt. Bitti Bibi. The adoption was also challenged upon the ground that a sister's son could not be adopted under the Hindu law. The joint ancestral character of the property was also denied and it was stated by

the defendants that Jawahir Lal did not leave any property, except a house and some household effects after his death, that Jawahir Lal died actually in a state of indebtedness and left no running business after him; on the contrary whatever property was possessed by Govind Prasad was acquired by him by his personal efforts and was treated by him as his self-acquired property. The plaintiff therefore had no right whatever to question the deed of trust or the sale deed executed by Govind Prasad.

The contesting defendants further denied the allegations of fraud and undue influence made by the plaintiff. Govind Prasad, it was alleged, had contemplated the construction of a dharmashala and the defendants had agreed to become the trustees and took upon themselves the duty of building the dharamshala considering it as a charitable act. The demolitions were alleged to have been brought about after consultation among the trustees, to which Govind Prasad was a consenting party, and were not done with a view to injurying the property but done as an act of management of the trust property. As regards the liability to pay the rent in respect of the house occupied by defendant 3, the latter was willing to pay rent at Rs. 5 per mensem. A further defence put forward was that under a custom prevalent among the Digambar Jains of India a father was absolute owner of the ancestral property and he could make a transfer as he pleased. In any case, it was stated that the extent of the property covered by the trust deed was less than one-fifth of the property owned by Govind Prasad and the trust in respect thereof was therefore valid and binding. Lastly it was pleaded that the sale could be questioned only by Govind Prasad and not by the plaintiff. In replication the plaintiff stated that under a custom prevalent among the Digambar Jains of India a sister's son could be legally adopted and further the plaintiff had the right to maintain the suit as a validly adopted son. Upon these pleadings the following issues were framed by the trial Court:

1. Is the property in suit joint and ancestral property of the plaintiff? 2. Was Basant Lal adopted by Govind Prasad? If so, is the adoption of a sister's son valid by virtue of the custom prevailing among Jains? 3. Was the plaintiff adopted by Mt. Bitti Bibi under an authority from Basant Lal? If the authority is not proved is there a custom among Jains entitling a widow to adopt? 4. Were the trust deed and the sale deed executed under 'undue influence' and 'fraud as alleged? 5. Does a father become an absolute owner of the ancestral property by virtue of a custom amongst Jains? 6. Is the property covered by the trust deed less than one-fifth of the entire property in the hands of Govind Prasad? If so, is the trust in respect of it valid? 7. Is the sale deed without consideration? 8. Is the suit maintainable? 9. To what relief is the plaintiff entitled? 10. Is the suit bad for misjoinder of causes of actions and parties?

Upon issue 1, which is the main issue in the case, the trial Court found that the property in suit was not the joint and ancestral property of the plaintiff. Issues 2 and 3 were found in the affirmative and in favour of the plaintiff. Issue 4 was considered unnecessary. Issue 5 was found in the negative. Issue 6 was not pressed. Under issue 7 the Court held that the sale deed was with consideration and recorded the opinion that, whether it was so or not, the plaintiff could not question it unless he succeeded in showing that he had any interest in the property. Under issue 8 it was held that the suit was not maintainable by the plaintiff. Issue 10 was decided against the defendants and under issue 9 the Court in view of its finding on issue 1 mentioned above dismissed the suit. The plaintiff has preferred this first civil appeal against the dismissal of the suit. It may be stated at the outset that the findings upon issues 2 and 3 recorded in favour of the plaintiff were not contested by the learned counsel appearing on behalf of the defendants-respondents. Similarly, the finding on issue 6 was also not pressed on behalf of the defendants-respondents. The sole question which was argued before us on behalf of the plaintiff-appellant was confined to the finding on issue 1 as to the joint and ancestral character of the property in dispute, while on behalf of the defendants-respondents the finding recorded adversely to them under issue 5 was re-agitated before us. No further points were argued before us either on behalf of the plaintiff or on behalf of the defendants.

We shall therefore propose to deal with the principal and the only question raised on behalf of the plaintiff-appellant. It has been argued on behalf of the plaintiff-appellant that there is satisfactory and reliable evidence on the record to show the existence of an ancestral nucleus at the time of the death of Jawahir Lal and if the existence of the nucleus is established then the presumption must be raised that the subsequent acquisitions by Govind Prasad constituted ancestral property and consequently Govind Prasad had no authority to alienate the properties in the manner he did. The second position taken up is that even if Govind Prasad did not inherit any properties from

Jawahir Lal or any family concern carried on by him in his lifetime, Govind Prasad started a family business for the first time upon the death of his father and associated his two brothers, Panna Lal and Munne Lal and the acquisition made by him must be considered to have been made by the joint labour and exertions of the three brothers, who treated it as a joint family property and upon that footing effected a partition in the year 1910. The property thus being joint family property Basant Lal, and after him his son, the present plaintiff, must be deemed to have acquired an interest in the joint family property by the mere incident of birth. The property therefore must be regarded as a joint family property of Govind Prasad and the present plaintiff, in which case Govind Prasad was not competent to execute either a deed of trust or a sale of the property.

Paragraph 20 of the written statement states that Jawahir Lal did not leave any immovable property excepting a house, nor did he leave any moveable property excepting the household effects. He left many debts and the said house was sold under the same debt, and Govind Prasad started a gota shop with his own labour and by borrowing money and made great improvements. After some time, a partition was effected between the three brothers and the mess and business of every person became separate which state of things still continues. Paragraph 20 of the replication filed by the plaintiff controverts the averment that Jawahir Lal left only a small property and says that Jawahir Lal had a gota (silver and gold lace) shop and his ugahi business was also flourishing well. Besides he carried on other money-lending business also and had sufficient moveable and immovable property, cash, ornaments and jewellery. It is correct that for carrying on the said various business, he often used to borrow money from others as is done in every business but such debt is a necessary and inseparable part of the family property. The evidence relied on on this part of the case consists of the evidence of Govind Prasad himself as P. W. 8. Govind Prasad no doubt was an interested witness and supported the plaintiff's case as will appear from his written statement. It is also true that several unsuccessful attempts were made by the plaintiff before the trial Court to transpose Govind Prasad, defendant 1, to the array of the plaintiff on the ground that the plaintiff's case was identical with that of defendant 1: *vide* the application, dated 6th February 1934.

This was strenuously opposed by the defendants and ultimately by an order dated 18th February 1936, the trial Court rejected the plaintiff's prayer holding that the transposition of Govind Prasad as a plaintiff would re-open the whole case. Despite the identity of interest between the plaintiff and defendant 1, as is shown by their conduct in the proceedings, it is necessary for us to examine the evidence of Govind Prasad minutely and estimate its true value in conjunction with the documentary evidence and the circumstances established from the materials on the record. (After considering evidence his Lordship concluded.) Having carefully considered the evidence of Govind Prasad and Ram Dass, we are inclined to accept the evidence of Govind Prasad upon this point in preference to the evidence of Ram Dass, and hold that the partnership in the gota and salma shop was formed by Jawahir Lal in his own lifetime with Chhedi Lal and not by Govind Prasad with Chhedi Lal after Jawahir Lal's death. In Hindu law, a business is a distinct heritable asset. Where a Hindu dies leaving a business, it descends like other heritable property to his heirs. If he dies leaving male issue, it descends to them. In the hands of the male issue, it becomes joint family business, and the firm which consists of the male issue becomes a joint family firm. The joint ownership so created between the male issue is not an ordinary partnership arising out of a contract, but a family partnership created by the operation of law: *vide* Mulla's Hindu Law (Edn. 9, p. 257, para. 234).

Reference has also been made on behalf of the plaintiff-appellant to certain account books. These are Exs. 43 to 46. As a matter of fact the original books are Exs. 127 to 129. Exs. 127 and 128 are called daybooks from Sambat 1941 to Sambat 1952, corresponding to 1884 A. D. to 1895 A. D. Exhibit 129 is a day book of Sambat 1967 corresponding to 1910 A. D. These are bulky books. The plaintiff, therefore, filed extracts from these daybooks which are Exs. 43 to 46. Exhibit 43 begins from Sambat 1941, which corresponds to 1885 and goes on to Sambat 1949 corresponding to 1893 A.D. The entry dated 21st February 1885, mentioned in this document shows a deposit of Rs. 77-3-0 by Govind Prasad in the accounts. It further shows that Rupees 49-4-0 were deposited in the interest account. The details of Rs. 49-4-0 are not given in the extract but they are given in the original

daybook (Ex. 127). There are various sums entered on different dates received from various persons on account of interest due from them. It is argued on the strength of this entry that Jawahir Lal, who was alive on this date, used to carry on money lending business and that it is this money lending business which descended to Govind Prasad and his other sons after his death in August 1885. In other words, Govind Prasad did not start any independent money lending business but only continued the business already carried on by his father.

The learned civil Judge has held that there is no evidence to show that the entries in these books were made in a regular course of business and therefore under S. 34, Evidence Act, the account books are not proved. He has relied in support of this finding on two cases, 8 I C 81[1] and 13 I C 678.[2] We do not agree with the opinion of the learned trial Judge upon this point and hold that there is sufficient evidence on the record to prove that these books of account were regularly kept in the course of business and the entries made therein are therefore relevant under S. 34, Evidence Act. P. W. 8 in his evidence proves that Exs. 127 to 129 are the khatas of his business and that they were kept in the regular course of business. P. W. 9, Gulab Chand makes a similar statement. These witnesses were not cross-examined on the point. The defendants' own witness, D. W. 8, Jia Lal, also admits in cross-examination that Govind Prasad's bahikhatas were kept in a regular manner. It was held in 8 I C 81[1] following a decision of their Lordships of the Judicial Committee in 6 M I A 88[3] that it is essential in every case, where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business. They need not be written up from moment to moment, or from day to day. In 6 M I A 88[3] at p. 98, their Lordships were pleased to observe :

> It is perfectly true that the regular proof of books and accounts requires that the clerks who have kept those accounts or some person competent to speak to the facts, should be called to prove that they have been regularly kept and to prove their general accuracy.

The view taken in 13 I C 678[2] by the Calcutta High Court did not find favour with their Lordships of the Judicial Committee on appeal as will appear from the judgment in appeal in 45 I A 73.[4] Another attack upon Ex. 43 was that there was nothing to show that it related to the account of Jawahir Lal's business. Although the name of Jawahir Lal is not expressly mentioned in the book, yet we are satisfied that the relevant entry referred to must be taken to relate to Jawahir Lal's business as it is nobody's case that Govind Prasad had started any independent business during the lifetime of Jawahir Lal. Having carefully considered the evidence on the record and the circumstances set out above, we are clearly of opinion that Jawahir Lal carried on partnership business both with B. Nem Das and Chhedi Lal during his lifetime and that this partnership business descended upon all his sons as a heritable asset and was continued by them after his death until a partition took place between them in 1910. It is true that in the case of Babu Nem Das the business resulted in a loss as will appear from Ex. B-1/D. W. 1, but there is no reason to think that this loss was not temporary and in the ordinary course of business. In any event we are of opinion that the question of loss or profit in a going concern is of little consequence in so far as it is necessary to establish the existence of an ancestral nucleus. We are also satisfied from the evidence referred to above that Jawahir Lal carried money lending and ugahi business. We further find that he possessed property which he acquired and subsequently employed in the business.

We therefore start with the initial fact that Jawahir Lal at the time of his death in August 1885 left ancestral nucleus which was inherited by Govind Prasad along with his brothers. In this view of the matter the subsequent acquisitions made by Govind Prasad must be deemed in law to be joint family property in the absence of any proof by the defendants-respondents to the contrary. Reliance has been placed on behalf of the plaintiff-appellant on a decision of their Lordships of the Judicial Committee in 10 M I A 490[5] at pages 505 and 506, where their Lordships observed :

> Upon the facts, it must be admitted that the evidence falls far short of proof that the ancestral property contributed in any material degree to the acquisition of the funds employed in trade which formed the bulk of the property in dispute. The family was, however, an undivided family and

1. ('10) 13 C L J 139 : 8 I C 81, Hingu Miya v. Heramba Chandra.
2. ('12) 15 C L J 621: 13 I C 678, Bibi Imambandi v. Matasuddi.
3. (1854-57) 6 M I A 88: 1 Sar 500 (P C), Dwarka Doss v. Jankee Doss.
4. ('18) 5 A I R 1918 P C 11 : 47 I C 513 : 45 Cal 878:45 IA 78 (PC), Imambandi v. Haji Mutsaddi.
5. (1863-66) 10 M I A 490: 2 Sar 177 (P C), Rampershad Tewarry v. Sheochurn Doss.

there was a nucleus of ancestral property. It may be further admitted that Deenanath laid the foundation of the future fortune of the family. But there is no proof that he kept as separate, or treated as separate, that property which he acquired at Agra. On the other hand, it is shown that many years before his death he associated his brothers with himself as partners and that thenceforward they carried on business together each contributing by his exertions to the increase of the common stock . . . There is nothing prima facie improbable in the hypothesis that he brought his earlier gains voluntarily into the common stock, making them the capital on which he and his brothers were to trade. All future gains being made by their joint exertions, would, according to the general principle of Hindu law, be the joint property of the family whilst undivided and be partible as such on a partition. There is no proof of any special contract (and the proof of such lay on the defendants) which impressed the character of partnership as distinguished from joint or separate property in the Hindu sense of these terms, upon the property in question.

In another case decided by their Lordships of the Privy Council in 29 ALL 244,[6] the facts were that upon the death in 1849 of a Hindu, a head of a joint family governed by the Mitakshara law, his property devolved upon his three sons, who remained joint until 1866, when they partitioned the property. There was nothing to show that any of them then had any separate property. At that time, one of them had two sons and another son was born to him after the partition. The father and these three sons lived together jointly and acquired other property. In 1894, the father died leaving a will by which he gave a small allowance and a residence to each of his younger sons, and left all the rest of his property to his eldest son describing it as his self-acquired property. In a suit brought by the two younger sons against their brother to set aside the will, the validity of which depended on the question whether the property was ancestral or self-acquired, the Judicial Committee held that the share taken on partition by the father of the plaintiffs and defendant was ancestral property in which from their birth his sons acquired an interest; that there thus being a nucleus of ancestral property the onus was on the defendants to show that the property was self-acquired and not purchased with ancestral funds.

The case in 29 ALL 244[6] was followed by a Bench of this Court in 1 Luck 1[7] in which it was held that where it is proved or admitted that the family was possessed of a nucleus, the property acquired subsequently must be held to be joint family property. In another case in 10 Luck 61,[8] it was observed that once it is held that the family of the plaintiff was joint and there was nucleus of joint ancestral property, then the party which asserts that a certain property is his exclusive property must prove that fact. Reference may also be made to an unreported case decided by a Bench of this Court, of which one of us was a member, which is now pending before their Lordships of the Privy Council, Privy Council Appeal No. 21 of 1937.[9] The case in 10 M I A 490[5] was strongly relied upon in this case. It was remarked that here the amount of nucleus was not required to be appreciable nor was it required that proof of considerable funds derived from ancestral property being employed in the business should be given. The question of jointness of the family, the existence of ancestral nucleus, the acquisition of the property by the joint efforts of all the members of the family and the blending of the profits with the joint family funds are considered together and the cumulative effect of the evidence is regarded as establishing the jointness of the property: *vide* pp. 339 and 340 of the printed paper book of that Privy Council appeal.

It has been argued strenuously on behalf of the defendants-respondents that having regard to the evidence on the record the plaintiff has not been able to show anything more than Rs. 160, which Govind Prasad recovered from Inayat Husain on account of the mortgage executed in favour of Jawahir Lal, which may be regarded as constituting an ancestral nucleus, but this sum of Rs. 160 cannot possibly be considered to form the nucleus with which the subsequent acquisitions were made by Govind Prasad. The argument in effect amounts to this that the ancestral nucleus established in a case should bear a reasonable proportion to the subsequent acquisitions and that it should be sufficiently large to raise a presumption that the subsequent earnings must have been made out of or with the aid of the ancestral nucleus, but, in the present case, the acquisitions made in 1925 and 1929 by Govind Prasad could not possibly be

6. ('07) 29 All 244 : 34 I A 65: 4 A L J 227 (P C), Lal Bahadur v. Kanhaiya Lal.
7. ('26) 13 A I R 1926 Oudh 77 : 91 I C 976 : 1 Luck 1 : 3 O W N 40, Abhaidat Singh v. Ragho Indar Partab Sahi.
8. ('34) 21 A I R 1934 Oudh 293 : 149 I C 244 : 10 Luck 61 : 11 O W N 528, Madho Tewari v. Mata Din Tewari.
9. Privy Council Appeal No. 21 of 1937, Bhuru Mal v. Jagannath.

traced to the sum of Rs. 160 received in 1889 so as to impress all the future acquisitions of Govind Prasad with the character of ancestral property. Reference has been made to Sir Dinshah Mulla's celebrated work on Hindu Law (Edn. 9, 1940) at p. 255. The passage runs thus:

When a nucleus of joint family property is proved or admitted a presumption arises that the whole of the property of the joint family is joint including any acquisition by a member of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired. Such being the presumption, if any member of the family claims any portion of the property as his separate property the burden lies upon him to show that it was acquired by him in circumstances which would constitute it his separate property. He may do so by showing that the income of the existing ancestral property was employed in other ways. If he adduces no evidence, the presumption that the property was joint family property, must prevail.

Reliance has also been placed on the following cases: A I R 1937 Mad 436,[10] A I R 1939 Sind 145,[11] 6 O W N 963,[12] 16 Lah 714,[13] A I R 1931 Lah 593[14] and 44 C W N 892.[15] A I R 1937 Mad 436:[10] This is a single Judge decision of the Madras High Court, where the law was laid down as follows:

Where there is a nucleus of joint family property, the onus will no doubt be on the father in the first instance to prove that the acquisition of the properties which he claims to be his separate property was not made out of the income from the joint family property. But where it is clear that the income from the joint family property is not sufficient even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property.

This case is clearly distinguishable from the present case in view of the finding of fact at which we have arrived on the question of nucleus. Further, no evidence has been adduced by the defendants-respondents to discharge the onus of proof that the subsequent acquisitions were not made out of the income of the joint family property. A I R 1939 Sind 145:[11] This case is inapplicable because there was no question of any ancestral nucleus involved in the case. 6 O W N 963:[12] This case has also no bearing upon the question of the existence of an ancestral nucleus. The only remark relied upon in this case is at page 966 of the report to the following effect:

The fact of a Hindu making a will in respect of his property raises the presumption about the property being his self-acquired property and there is no presumption in favour of its being ancestral.

We are of opinion that although the conduct of the alienor of the property treating the property as his self-acquired property and disposing of it by means of a will may be taken into consideration along with other circumstances of the case, yet, at the same time we cannot help thinking that the proposition referred to above is too widely stated. 16 Lah 714:[13] It was held in this case that a manager of a joint Hindu family, even though he be the father of the other coparceners, cannot alienate joint family property except for family necessity, or with the consent of the coparceners if they are adults. It was also held that such an alienation by him is not void but voidable. The learned Judges also proceeded to record the finding that the property in dispute was not ancestral, although, in the view of the law which they took in the case, it was not necessary to do so. It appears that the only ancestral property was a residential house which did not yield any income and that the rest of the property possessed by the alienor was his separate property. It also appears that the alienor had professional income. It was found in that case that the money required for the purchase of the house—the subject-matter of alienation—was raised by the donor by loan from certain persons and no portion of the income of the property of the residential house, owned by the donor, was utilized for the acquisition and construction of the house in question. In these circumstances, it was held that there was no substantial nucleus of the ancestral property, the income of which could be held to be joint of the alienor and his sons. A I R 1931 Lah 593:[14] This was a suit for partition of three houses and some moveables, which were alleged to be coparcenery property between two brothers. The houses had been acquired by the father at different times. It was found that the father had received Rs. 1347 from the ancestral estate. The father was employed in the

10. ('37) 24 A I R 1937 Mad 436 : 169 I C 325 : (1937) 1 M L J 364, Sandanam Pillai v. Somasundaram Chettiar.
11. ('39) 26 A I R 1939 Sind 145 : 183 I C 67 : ILR (1939) Kar 573, Hollaram Verhomal v. Dwarkadas Kodumal.
12. ('30) 17 A I R 1930 Oudh 39 : 123 I C 849 : 5 Luck 400 : 6 O W N 963, Brij Kunwar v. Sankata Prasad.
13. ('35) 22 A I R 1935 Lah 867 : 159 I C 474 : 16 Lah 714 : 37 P L R 831, Imperial Bank of India, Jullunder v. Mt. Maya Devi.
14. ('31) 18 A I R 1931 Lah 593 : 133 I C 437 : 32 P L R 450, Hari Singh v. Gurbakhsh Singh.
15. ('40) 44 C W N 892, Parimal Kumar Sen v. Surendra Lal Sen.

Canal Department and retired as a Zilladar. It was held upon the evidence in the case that the purchase of the three houses by the father was made with the aid of his private earnings, and the alleged nucleus of Rs. 1347 did not afford any assistance in acquiring those houses. It was remarked at page 594 that

> the mere existence of a proved nucleus does not justify a conclusion that all later acquisitions were made with the help of this. The sufficiency or otherwise of such a nucleus can and should be gone into by the Courts.

This observation was made on the strength of a decision of a Divisional Bench of that Court. 44 C W N 892:[15] This case is a single Judge decision of the Calcutta High Court. The learned Judge observed at p. 893:

> It is perfectly true that when possession of a nucleus of joint family property is admitted or proved, an acquisition made by a member of the family in his own name is to be presumed to be a joint family property. But this must mean that the joint property was such as might constitute a nucleus in law,

and he relied on certain decisions of the Calcutta High Court in support of this assertion. After referring to an observation of Suhrawardy J. quoted by him he proceeded to say:

> But when if it be held that the existence of any joint property, however small, would raise a presumption in favour of the plaintiff and would throw the burden on to the defendants to establish that it was self-acquisition, it may be said that the fact that the property was too small and did not yield any appreciable income out of which acquisitions could be made, would be a circumstance sufficient for the purpose of rebutting the presumption.

Having considered these decisions carefully, we are of opinion that neither of the cases cited on behalf of the defendants-respondents is directly applicable to the facts and circumstances of the present case. On the other hand, the decision of their Lordships of the Judicial Committee in 10 M I A 490[5] referred to above, which has been followed in the cases cited above, directly supports the plaintiff's case. The ratio decidendi in our opinion underlying that case is the proof of the existence of ancestral nucleus and not its utilization for subsequent acquisitions. That principle has not been dissented from by their Lordships of the Judicial Committee in any case brought to our notice.

The other argument advanced on behalf of the plaintiff-appellant is that even if the existence of an ancestral nucleus, whether sufficient or otherwise, is not established from the evidence on the record to impress the character of joint family property upon the acquisitions made, it is clear that Govind Prasad started an independent business of his own in which all his brothers associated with him, and upon partition on 13th December 1910, Govind Prasad got Rs. 9827-14-9 as his one-third share as against his two brothers: *vide* Exs. 45 and 46. It is stated that on 22nd January 1889, Govind Prasad purchased some land benami in the name of Shambhu Nath: *vide* Ex. 29. Shambhu Nath executed a sale deed on 8th August 1901, in favour of Govind Prasad of the land purchased by him and then built a house on this land: *vide* Ex. 76. This house constituted the residential house of Govind Prasad. Kamta Prasad (D. W. 9) states that the land on which the house in question stands was purchased by Govind Prasad in the name of Shambhu Nath and that Govind Prasad is now living in that house. This house which was purchased in 1889 was treated as the joint family property of Govind Prasad and his brothers and was partitioned amongst themselves in equal shares in 1910, as the entry in Ex. 46 will show.

Upon these facts it has been strenuously argued on behalf of the plaintiff-appellant that even though there was no ancestral nucleus in existence at the time of the death of Jawahir Lal in 1885, yet Govind Prasad carried on business along with his brothers and all the brothers contributed to the family gains by their joint labour and exertions. The property thus obtained by Govind Prasad in the partition of 1910 must be considered to be joint family property, in which his adopted son Basant Lal and subsequently the grandson, namely the present plaintiff, acquired an interest by birth. It has however been contended on behalf of the defendants-respondents that the property obtained by Govind Prasad on partition in 1910 constituted his separate self-acquired property and since Basant Lal had not been adopted by that time, nor had the plaintiff been introduced into the family as an adopted son, neither of them could claim to have acquired any interest by birth. Reference may be made in this connexion to Sir Dinshah Mulla's celebrated work on Hindu Law (Edn. 9, 1940) at p. 236. Paragraph 220 lays down:

> Property, according to the Hindu law, may be divided into two classes, namely (1) joint family property and (2) separate property.
>
> Joint family property may be divided according to the source from which it comes into: (1) ancestral property (Ss. 223 to 225); and (2) separate property of coparceners thrown into the common coparcenary stock (S. 227).

Property jointly acquired by the members of a joint family with the aid of ancestral property is joint family property. Property jointly acquired by the members of a joint family without the aid of ancestral property may or may not be joint family property; whether it is so or not is a question of fact in each case (S. 228).

The term 'joint family property' is synonymous with 'coparcenary property.'

'Separate' property includes 'self-acquired' property (Ss. 222, 231).

Paragraph 221 at page 237 lays down :

The following are the main incidents of joint family or coparcenary property : (a) it devolves by survivorship, not by succession (S. 229); (b) it is property in which the male issue of the coparceners acquires an interest by birth.

Paragraph 228, clause (3) latter portion at page 247, runs thus :

In the absence of any proof of partnership, property jointly acquired by the members of a joint family without the aid of joint family property is, as stated above, to be presumed to be joint. But is it also to be presumed to be joint family property? It was at one time held by the High Court of Bombay that property jointly acquired without the aid of joint family property was not joint family property and that the male issue of the joint acquirers did not acquire an interest in it by birth, unless it was thrown into the common stock.

Reference is made to 9 Bom 438[16] at p. 445 in the foot-note. The paragraph proceeds:

'In later cases however it has been held that such property must be presumed to be joint family property' and reference in the foot-note has been made to 50 Bom 443[17] and 10 Bom L R 175,[18] 'and this has been followed in Lahore,' reference being made to 9 Lah 470.[19]

Reference has also been made to a case in 25 Mad 149,[20] where the original nature of the Mitakshara doctrine of the joint family property has been discussed by that distinguished Judge, Bhashyam Ayyangar. The first question formulated by the learned Judge at p. 152 was whether the property in question forms the joint family property of the plaintiff and defendant 1, having been acquired by their joint labour and exertions and that as such it is liable to partition between them. The case before him was sought to be distinguished in 10 M I A 490[5] on the ground that the business in the Privy Council case was carried on by and on behalf of all the members of the joint family, while in the case before him the plaintiff and defendant 1 were only two out of five brothers, who, with their father, constituted an undivided Hindu family. At p. 155 after referring to Mr. Mayne's opinion founded in 9 Bom 438[16] suggesting a doubt as to whether their male issue would by birth alone acquire a right in such property, the learned Judge observed :

If the joint acquirers intended to hold the property so acquired as co-owners and not as joint family property in the Mitakshara sense of that expression, this view would be perfectly sound. But, if, as supposed, the property was acquired by all the members of the undivided family, by their joint labour, it would, in the absence of any indication of intention to the contrary, be owned by them as joint family property and in that case their male issues, who, by their birth, become members of such undivided family, necessarily acquire a right by birth in such property.

In A I R 1936 Mad 19[21] it was held that when members of a joint family live together and acquire properties together by their joint exertions, in the absence of an indication to the contrary, such property would be joint family property wherein the male issue would acquire a right by birth. The same view was taken by the same learned Judge, who decided the above case in A I R 1936 Mad 19,[21] in A I R 1937 Mad 29,[22] where he observed :

In order to constitute joint family property it is not necessary to have any ancestral nucleus. It is open to the members of the joint family to acquire property either by joint labour or by any other means and enjoy the same as joint family property, and in the absence of an indication to the contrary it will be presumed to be joint family property. Once the character of property as joint family property is established, no matter how acquired, it follows that the male issue of the acquirers will get a right in it by birth.

The case in 32 Bom 479[23] decided by Beaman J. was relied upon in this case. In the latter case, in an exhaustive and learned judgment the learned Judge described in detail the distinguishing features in (1) joint property, (2) joint family property and (3) joint ancestral property. He held that

there must have been a nucleus of joint family property before ancestral joint family property can come into existence, because the word ancestral connotes descent and therefore pre-existence. But because it is true that there can be no joint ancestral family property without a previous nucleus of joint family property it is not true that there cannot be joint family property without a pre-existing nucleus, for that would be indentifying joint family property, with ancestral joint family property. He further held that where there is ancestral joint

16. ('85) 9 Bom 438, Chatturbhooj Meghji v. Dharamsi Naranji.
17. ('26) 13 AIR 1926 Bom 408 : 97 I C 820 : 50 Bom 443 : 28 Bom L R 637, Haridas Narayan Das v. Devkuvarbai Mulji.
18. ('08) 10 Bom L R 175, Laldas Narandas v. Motibai.
19. ('28) 15 AIR 1928 Lah 224 : 109 I C 779 : 9 Lah 470 : 29 P L R 685, Sanwal Das v. Kure Mal.
20. ('02) 25 Mad 149 : 11 M L J 353, Sudarsanam Maistri v. Narasimhulu Maistri.
21. ('36) 23 AIR 1936 Mad 19 : 162 I C 668, Amirdhan v. Valliammai.
22. ('37) 24 AIR 1937 Mad 29 : 168 I C 408, Krishnamurthi v. Seetamma.
23. ('08) 32 Bom 479 : 10 Bom L R 184, Karsondas Dharamsey v. Gangabai.

family property, every member of the family acquires by birth an interest in it, which cannot be defeated by individual alienation or disposition of any kind. This is equally true of joint family property. Further that where property is admitted or proved to be joint family property, it is subject to exactly the same legal incidents in every respect as property which is admitted or proved to be ancestral joint family property. Further, this class of property in India differs radically in origin and essential characteristics from the joint property of the English law.

We are therefore of opinion that the contention raised on behalf of the plaintiff-appellant, that even in the absence of a finding about the existence of an ancestral nucleus the property should be held to be the joint family property of Govind Prasad inasmuch as it was acquired by the joint labour and exertion of all the three brothers in which his adopted son and grandson, acquired interest by birth, is correct. Reference has been made on behalf of the defendants-respondents to three wills made by Govind Prasad on 17th December 1925 (Ex. B-3/D.W.2) on 9th March 1927 (Ex. B-2/D.W.1) and on 29th July 1929 (Ex. B-33) in support of the fact that Govind Prasad treated the property as his own self-acquired property and that he should not be allowed to go back upon the recitals in those wills. We do not think that either Govind Prasad, or the present plaintiff, is estopped from challenging the alienations in dispute on the ground that at some previous time Govind Prasad dealt with the property as if it were his own self-acquired property. In any case the admissions made by Govind Prasad are by no means binding upon the plaintiff-appellant, who claims independently under the law. The recital in Ex. B-3/D.W. 2 shows that Govind Prasad calls himself the absolute owner of the property in his possession since the date of the partition. Whether it is a wrong statement of fact or it is a wrong inference of law drawn by Govind Prasad as regards the character of the property in his possession, it is scarcely necessary to say. It is clear however that the statement is in no way binding upon the plaintiff-appellant.

Exhibit B-33 shows that the recitals made therein were introduced with a definite design to deprive the plaintiff-appellant of his rights in the property and to dispose of it as self-acquired property. It appears that Govind Prasad got offended with the plaintiff because the plaintiff did not behave properly towards his teacher and went away to live with his natural father Munne Lal. This fact is proved from the evidence not only of P. W. 8, Govind Prasad, but also P. W. 9, Gulab Chand and Mt. Bitti Bibi examined on commission. The conduct of the plaintiff may well have caused legitimate offence to Govind Prasad and this may have been one of the reasons which led him to make the said will.

It has been strenuously contended on behalf of the defendants-respondents that if Basant Lal had been adopted before the partition in 1910, he would have participated in the one-third share of his father on allotment by partition, but since Basant Lal was born after the disruption of the joint family property, he could not have claimed by birth an interest in the property allotted to his father on partition, and that his father alone was the owner of that property which was separate property. Learned counsel has not been able to cite any authority directly upon this point in support of this contention, and having regard to the view clearly enunciated by Sir Dinshah Mulla in his book on Hindu law and the various authorities referred to by us, we are unable to accept that contention. Our finding therefore is firstly that there was an ancestral nucleus handed down from the time of Jawahir Lal to his sons and the subsequent acquisitions must be presumed to be joint family property. We also find that Govind Prasad carried on business along with his two brothers and acquired property by joint labour and exertions, which they partitioned in the year 1910, and that both Basant Lal and the present plaintiff would be entitled to a share in that property by the mere incident of birth. The trial Court remarked under issue 1 as follows:

> It is true that if properties are purchased and acquired with the assistance of the ancestral property they would also acquire a status of ancestral property. The plaintiff was required to trace and connect the amounts invested by defendant 1 with such amount and business which might have been left by Lala Jawahir Lal on his death. But I do not find sufficient evidence on the record for it.

We do not agree with the trial Court that having proved an ancestral nucleus it was the further duty of the plaintiff to trace and connect the amounts, invested by defendant 1, Govind Prasad, with the properties which may have been left by Jawahir Lal on his death. No such duty in our opinion, is cast upon the plaintiff, as we have already observed in view of the decision of their Lordships of the Judicial Committee in 10 M I A 490.[5] We are therefore unable to uphold the decision of the trial Court upon issue 1, which is the main issue in the case.

The learned counsel on behalf of the defendants-respondents has contested the finding of the trial Court on issue 5. The trial Court has negatived the existence of the custom. The plea as regards the custom was not raised in the written statement by the defendants. It was raised for the first time on 4th January 1934, in oral pleadings before the lower Court. Mr. Makund Behari Lal appearing on behalf of the defendants stated:

> By virtue of the custom among the Digambari Jains of India a father is the absolute owner of the ancestral property.

We agree with the trial Court that the custom set up by the defendants has not been established. The witnesses on the point are D. Ws. 3, 5 and 7. D. W. 5, Sarup Chand states in examination-in-chief :

> Among Jains, a father is the absolute owner of his property, whether self-acquired or ancestral. A son has no right in it in the lifetime of his father. Such is the custom amongst the Jains.

Sarup Chand himself is an Oswal Swetambar Jain. He says that Agarwals and Oswals are two different communities and he is not on visiting terms with Agarwals. He admits that he made no enquiries from Agarwals, nor from Digambar Jains, as he is not on visiting terms with them. He also admits that he did not enquire from Munne Lal as he was an Agarwal and he had no connexion with him. We are of opinion that the evidence of this witness was rightly rejected by the trial Court as worthless. D. W. 7, Bechu Lal, states that Chhedi Lal was the son of Kedar Nath and he was an Agarwal Jain. He also says that he and Govind Prasad are of the same family.

D. W. 3, Ram Dass, has admitted in his statement that Chhedi Lal's father had a shop for wholesale business and Chhedi Lal had partitioned with his father. We therefore find that far from there being any custom clothing a Digambar Jain with absolute ownership of ancestral properties Chhedi Lal actually obtained a share on partition with his father. Two witnesses produced on behalf of the plaintiff, Ganga Ram (P. W. 10) and Shekhar Chand (P. W. 11), who are both Digambar Jains, rebut the custom. Ganga Ram states that he filed a suit for partition against his father and got a share on partition through Court. Shekhar Chand gives instances of Digambar Jains who obtained shares on partition from their fathers in the ancestral property. We are clearly of opinion that the custom is not proved.

Two decisions were relied upon in support of the custom. Exhibit B-53 is a decision of Mr. Jwala Prasad, subordinate Judge, dated 19th August 1899 who held that according to the custom of the Swetambar Jains, to which community the defendant belonged, a father had absolute power to alienate his ancestral property. Exhibit B-54 is another decision of Mr. Jwala Prasad dated 27th August 1900 in appeal in another case where he held that according to the custom a Jain father had absolute power to alienate the ancestral property. It has not been shown whether the custom as established in this case related to Digambar Jains. Reliance has been placed on behalf of the defendants-respondents on a case in 5 O W N 515.[24] This case related to the Oswal community. It was observed that the Oswals are a tribe who could have customs abrogating the law. Under a custom which is binding on such Jains as belong to the Oswal tribe the father in a joint family has a right to alienate the ancestral property as he wishes and where such father alienates a house for the purposes of religion both by a will and by a deed of trust the alienation cannot be challenged by his adoptive son.

In a case in 14 Luck 483[25] it was remarked by a Bench of this Court that the Jains are divided into two main sects of Swetambaris and Digambaris and that while the Oswal and Srimal are branches of the Swetambari sub-sect, Agarwal and Khandelwal are the main divisions of the Digambari sect. The custom pleaded in the case was definitely confined to the Digambar Jains. The decision in 5 O W N 515[24] relates to the Oswals and not to the Agarwals. Consequently, that decision has no bearing on the present case. The observation in 5 O W N 515[24] to the effect that the distinction between Digambari Oswals and Swetambari Oswals is a distinction of religious rites and has no bearing on their personal law, does not help the case of the defendants-respondents. It is a well-settled principle of law that the custom set up should be strictly proved and should not be extended by analogy. The custom pleaded in the present case was a specific custom applicable to Digambar Jains. This custom has in our opinion not been satisfactorily established. We therefore hold in agreement with the opinion of the trial Judge that the aforesaid custom is not proved.

24. ('28) 15 A I R 1928 Oudh 348 : 110 I C 180 : 5 O W N 515, Milap Chand v. Mt. Mohni Bibi.
25. ('39) 26 A I R 1939 Oudh 113 : 180 I C 129 : 14 Luck 483 : 1939 O W N 234, Nemi Chand v. Santosh Chand.

The result is that we allow the appeal with proportionate costs, set aside the judgment and decree of the trial Court and grant reliefs (b) and (c) to the plaintiff in terms of the prayer made in the plaint. As regards the relief (a) mentioned in the plaint the trial Court did not express any opinion in view of its finding on issue 1 which we have reversed. Paragraphs 12 and 13 of the plaint which related to relief (a) of the plaint were denied by the defendants in para. 26 of the written statement who repudiated their liability to pay any damages. The plaintiff in paras. 26 and 27 of his replication reiterated his claim against the defendants. Issue 9 framed by the trial Court must be considered to cover the point relating to relief (a) of the plaint. As we have already stated, this has not been decided. We therefore remand the case to the trial Court for a determination of the question of the liability of the defendants-respondents in regard to the above-mentioned matter.

D.S./R.K. *Case remanded.*

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(28) A. I. R. 1941 Oudh 242

BENNETT AND YORKE JJ.

Hari Saran Das — Judgment-debtor — Appellant

v.

Har Kishan Das — Decree-holder — Respondent.

Exn. of Decree Appeal No. 1 of 1940, Decided on 10th December 1940, against order of Civil Judge, Gonda, D/- 22nd December 1939.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 7 (3)—S. 7 (3) does not bar execution of all decrees—Bar under S. 7 (3) is limited to decrees on private debt incurred after order under S. 6 of the Act — Decree based on liability for unliquidated damages or public debt is not barred — Decree for costs being one based on unliquidated damages its execution is not barred by S. 7 (2) and (3).

Section 7 (3) cannot be read as meaning that execution of all decrees is barred pending the proceedings under the Act merely because such execution would interfere with the scheme of the Act. The bar under S. 7 (3) is limited to decrees obtained on the basis of any private debt incurred after the passing of the order under S. 6 of the Act and since the word 'debt' in S. 2 does not include a liability for unliquidated damages, there is no bar in the case of decrees obtained on the basis of a liability for unliquidated damages, nor are decrees passed on the basis of a public debt barred. [P 243 C 1, 2]

A decree for costs being a decree passed on the basis of unliquidated damages and not one passed on the basis of a private debt within the meaning of S. 2 its execution is not barred by S. 7 (2) and (3) : AIR 1940 All 245, *Not approved.* [P 243 C 2; P 244 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934 as amended in 1939), S. 9A—Enactment of S. 9A indicates that appointment of receiver was not repugnant to Act as it stood prior to section 9A.

The enactment of S. 9A indicates that there was no repugnancy to the appointment of a receiver in the Act as it stood prior to the enactment of section 9A : A I R 1938 All 80 and A I R 1936 All 495 (FB), *Disting.* [P 244 C 1]

(c) U. P. Encumbered Estates Act (25 of 1934 as amended in 1939), Ss. 7 (3) and 9A — S. 7 (3) does not contemplate execution of decree through medium of receiver (Per *Bennett J.*; *Yorke J.* doubting).

Section 7 (3) does not allow execution through the medium of a receiver in the case of decrees obtained on the basis of a private debt incurred after the passing of the order under S. 6 of the Act. [P 244 C 2 ; P 245 C 1]

M. Wasim, B. P. Misra and K. M. Shameem—for Appellant.

Niamatullah and G. D. Khare—for Respondent.

Bennett J.—This is an appeal against an order passed by the learned civil Judge of Gonda on 22nd December 1939, in execution proceedings. The appellant, Hari Saran Das alias Satgur Prasad, made an application on 5th September 1935, under S. 4, Encumbered Estates Act, and an order under S. 6 was passed on the same date. He was engaged in litigation at the time, and more than two years later, namely on 21st December 1937, a sum of Rs. 5700 odd was awarded against him in an appeal to the Privy Council the decree-holder being the respondent in the present appeal, Har Kishan Das. The civil Judge of Gonda whose order is appealed against was also the Special Judge dealing with Hari Saran Das's application under the Encumbered Estates Act. The decree-holder, Har Kishan Das, applied on 6th September 1939, to the civil Judge for execution of his decree. It was said in the application that since the decree was passed after the application under the Encumbered Estates Act it was not affected by it. The decree-holder asked that the profits of certain villages might be attached and a receiver appointed.

The judgment-debtor filed an objection on the ground that no order for execution of any decree could be passed in view of the provisions of sub-ss. (2) and (3) of S. 7, Encumbered Estates Act. The civil Judge was of opinion that these provisions did not apply, as the decree had not been obtained on the basis of a private debt incurred after the passing of the order under S. 6. No debt existed before the passing of the decree. Debt is defined in S. 2 as including "any pecuniary liability except a liability for unliquidated damages." The costs of a suit, he observed,

as long as they remain unascertained, are unliquidated damages. They become a debt as soon as they are ascertained and this takes place when the decree is passed. So a decree for costs must be treated as a decree passed on the basis of unliquidated damages. The judgment-debtor possessed no property except that shown in the list published under S. 11, and there was a danger that the whole of this property might be absorbed in liquidation of his debts under the Encumbered Estates Act. The Special Judge was of opinion that the appointment of a receiver would not interfere with the scheme for the liquidation of those debts, as there should be a surplus from which the decree might be satisfied, if the scheme was properly managed. In these circumstances he considered it just and convenient to appoint a receiver and he appointed one.

In appeal against this order, the judgment-debtor contends that the execution of the decree in this way is barred by S. 7 (3), that the decree for costs being for an ascertained amount does not constitute a liability for unliquidated damages, and that the appointment of a receiver is not justified. The main argument of the learned counsel for the appellant is however that it would be contrary to the scheme of the Encumbered Estates Act to allow execution by a decree-holder outside the scope of that scheme, and that a decree-holder who has obtained his decree after the initiation of proceedings under the Encumbered Estates Act must wait until the landlord ceases to be subject to the disabilities mentioned in S. 7 (3), this argument being supported by reference to the provisions of S. 44 (3) which exclude for the purpose of limitation the period from the date of the decree to the date when the Collector declares that the landlord ceases to be so subject.

It is certainly the case that a decree-holder must wait where execution is barred by S. 7 (3), but I do not read this sub-section as meaning that execution of all decrees is barred pending the proceedings under the Encumbered Estates Act. Had that been the meaning, it would not have been difficult for the Legislature to make such a clear-cut provision, but the bar is limited to decrees obtained on the basis of any private debt incurred after the passing of the order under S. 6. According to the definition in S. 2 the word 'debt' does not include a liability for unliquidated damages, so that there is no bar in the case of decrees obtained on the basis of a liability for unliquidated damages. There is also no bar in the case of decrees passed on the basis of a public debt. I cannot therefore agree with the contention that the execution of all decrees is barred merely because such execution would interfere with the scheme of the Act. No doubt difficulties might arise in executing decrees against proprietary rights in land mentioned in the notice published under S. 11, but I am not satisfied that they are insuperable. In the present case at least it does not appear that there should be any conflict of jurisdiction or interest. I might also point out that sub-ss. (2) and (3) of S. 7 clearly do not altogether bar the execution of all decrees; they bar the execution only of certain decrees against property mentioned in the notice under S. 11, other than proprietary rights in land, and against proprietary rights in land mentioned in that notice. There is no bar to execution by the arrest and detention of the judgment-debtor, and there is no bar to execution against property not mentioned in the list under section 11.

It was argued that once damages are liquidated they become liquidated damages and can no longer be regarded as unliquidated within the meaning of the definition of 'debt' in S. 2. Reference was also made to a single Judge case of the Allahabad High Court, A I R 1940 ALL 245,[1] in which it was observed that liability for costs is incurred when a suit is brought. It was held in that case on the basis of this observation that a decree for costs obtained during the pendency of proceedings under the Encumbered Estates Act could not be executed against the property referred to in S. 7 (2) and (3). With all respect I doubt whether these propositions are sound. In Halsbury's Laws of England, Vol. 10, Edn. 2, p. 85 it is said :

> Damages are termed unliquidated when they have not been assessed beforehand by the parties or some statute, in which case the jury are at liberty, subject to the rules governing the measure of damages to award such damages as they think fit.

In the case of costs in an appeal it can hardly be said until the appeal is decided and orders have been passed about costs that there is any debt at all. It is no doubt true in one sense that a liability to have costs awarded against him is incurred by every appellant when the appeal is preferred, but the measure of this liability cannot be ascertained until the decree is passed, and the passing of a decree for damages does

1. ('40) 27 AIR 1940 All 245 : 188 I C 638 : 1940 A L J 117, Md. Bashirullah Khan v. Collector, Shahjahanpur, Court of Wards.

not, in my opinion, make it any the less a decree for unliquidated damages. It was also contended for the appellant that the appointment of a receiver could not be justified in view of the omission in the Encumbered Estates Act, prior to the amending Act of 1939, to make any provision for such appointment, and the contention was supported by reference to a ruling of a Bench of the Allahabad High Court in A I R 1938 ALL 80[2] that the Special Judge exercising jurisdiction under this Act has no power to appoint a receiver in terms of O. 40, Civil P. C. Reference was made in this case to a Full Bench case, 1936 A L J 605,[3] in which it was held that a mortgagor under a simple mortgage is entitled to remain in possession of the property till it is actually sold in satisfaction of the mortgage decree, and that a receiver cannot be appointed of the mortgaged property so as to remove the mortgagor from possession of such property.

In the present case, however, the appointment of a receiver has been made by the civil Judge in execution of a decree, and not by a Special Judge in proceedings under the Encumbered Estates Act. Moreover the amending Act of 1939 has made special provision in a new S. 9A, for the appointment of a receiver, and though that section is not applicable here, its enactment may be thought to indicate that there was no repugnancy to the appointment of a receiver in the Act as it stood previously. The learned counsel for the respondent argued that execution by the appointment of a receiver does not amount to execution against any of the landlord's proprietary rights in land mentioned in the notice under S. 11, and that in any event in proceedings under the Encumbered Estates Act the land remains with the landlord in the first instance; the rent is paid to him and is moveable, not immovable property. A number of rulings were cited in support of this contention. In 46 ALL 924[4] it was held by the Allahabad High Court that when a receiver is appointed in execution proceedings he is put into the position of the judgment-debtor and there is no transfer of the property from the judgment-debtor to him. A similar view was taken in A I R 1934 ALL 605.[5] In 47 ALL 385,[6] it was held by their Lordships of the Privy Council that where an appellant's interest in certain villages was a right to future maintenance it could not be attached and sold, but a receiver could be appointed to realize the rents and profits, with direction to pay thereout a sufficient and adequate sum for the maintenance of the appellant and his family, and to apply the balance, if any, to the liquidation of the debt.

Learned counsel for the appellant referred to the definition of immovable property in the General Clauses Act as including 'benefits to arise out of land,' and argued that benefits such as rent constitute immovable property until they are actually paid, and that therefore the appointment of a receiver for the purpose of realizing rent amounts to execution against proprietary rights in land, one of those rights being the right to collect rent. I am of opinion that it was not intended by S. 7 (3) to allow execution through the medium of a receiver in the case of decrees obtained on the basis of a private debt incurred after the passing of the order under S. 6. I base this view principally on the new S. 9A, which provides (in certain circumstances) for the appointment of a receiver of the landlord's proprietary rights in land. Although this section has been recently added, it indicates, I consider, what is implied by the appointment of a receiver. In the present case the receiver has been appointed "to take possession over the villages." In my opinion this means that he is to have the same power as a receiver appointed under S. 9A would have. For these reasons, I do not consider that there is any force in the contention put forward by the learned counsel for the respondent on this point. But for the reasons which I have given earlier, I also cannot agree with the learned counsel for the appellant that the decree under consideration was a decree obtained on the basis of a private debt. I would find therefore that the civil Judge rightly held that S. 7 (3) was not applicable and I would dismiss this appeal with costs.

Yorke J.— I am fully in agreement with my learned brother on the first point, and therefore have no hesitation in concurring in the order dismissing the appeal. As however I feel some doubt as to the soundness of the view that a receiver cannot be

2. ('38) 25 AIR 1938 All 80 : 173 I C 922 : 1937 A L J 1316, Rajendra Singh v. Uma Prasad.
3. ('36) 23 AIR 1936 All 495:163 I C 481:1936 A L J 605 : 58 All 949 (FB), Anandi Lal v. Ram Sarup.
4. ('25) 12 AIR 1925 All 72 : 81 I C 741 : 46 All 924, Kirtarth Gir v. Mathura Prasad Ram.
5. ('34) 21 AIR 1934 All 605 : 150 I C 665 : 1934 A L J 770, Manohar Singh v. Hakim Riazuddin.
6. ('25) 12 AIR 1925 P C 176 : 87 I C 295 : 47 All 385 : 52 I A 262 (P C), Rajindra Narain Singh v. Mt. Sundar Bibi.

appointed in execution proceedings in a case to which S. 7 (2) and (3) apply and it is not necessary to decide that point in the present appeal, I prefer to reserve the decision of that point until it comes up in a case in which it must necessarily be decided.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 245

YORKE AND AGARWAL JJ.

Mool Chand — Defendant — Applicant

v.

Phool Chand — Plaintiff — Opposite Party.

Privy Council Appeal No. 13 of 1940, Decided on 23rd December 1940, application for leave to appeal to His Majesty in Council.

Civil P. C. (1908), S. 109 (c) — High Court entertaining application for revision under sec. 115, Civil P. C., against decree passed in terms of award — Case does not involve decision on matter of general public importance and case cannot be certified to be fit one under S. 109 (c).

A case should be certified to be a fit one to appeal to His Majesty in Council under S. 109 (c) only when it is of wider importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit not only to the people who were directly involved in the litigation but also to the public at large, that is to say, the matter must be one of wider public importance and not a matter only of importance to the parties concerned : A I R 1940 Oudh 378, *Foll.*

[P 246 C 1]

Their Lordships of the Privy Council have already themselves clearly recognized that an application in revision under S. 115 might be competent in cases of decrees passed in terms of award provided only that such application was one raising definitely a question of jurisdiction or of its illegal or irregular exercise. Hence, where High Court has allowed revision and if this matter should go to their Lordships of the Privy Council, the point for decision before them will be whether the application in revision was rightly held by High Court to raise a question of jurisdiction. The decision on that point would not be a decision on a matter of general public importance, and therefore this particular ground is not one on which High Court should be justified in granting a certificate.

[P 246 C 2; P 247 C 1]

Niamatullah and Balram Kriskna Mathur — for Applicant.

M. Wasim — for Opposite Party.

Order. — This is an application under S. 109 (c), Civil P. C., for a certificate that the case is a fit one for appeal to His Majesty in Council. The application has arisen out of the following circumstances: In a certain partition in a business family the burden of the losses on certain transactions in connection with silver bars was left upon the sons of one Manna Lal, Phool Chand and Moolchand, the parties to the present application. In 1933 Phool Chand and Moolchand sought to effect a partition among themselves. In this partition, Phool Chand asserted that the whole burden of the losses on these particular silver bars must be borne by Moolchand. A suit having been filed the parties appointed a Mr. Rajeshwari Prasad arbitrator, and this gentleman prepared a preliminary award which was adopted by the Court and a preliminary decree passed on 30th March 1935. The arbitrator Mr. Rajeshwari Prasad then took up the work of making preparation for a final decree. On 4th May 1936, he filed his award which put the whole loss on these silver bars on to Moolchand. The parties were present when the award was filed, ten days were allowed for objection and the case came up on 16th May. On that date Phool Chand filed no objection and Moolchand was absent. The Court accordingly ordered that a final decree be passed in terms of the award.

Three days later on 19th May 1936, Moolchand filed objections, alleging that he had been ill on 16th May, thus accounting for his absence, and further alleging that he was entitled to five days' extension of limitation under S. 12, Limitation Act, read with Art. 158, that being time requisite for obtaining a copy of the award. The civil Judge accepted this application, set aside his first decree and admitted the objections and proceeded to consider them. On 10th September 1936, he allowed the objections of Mool Chand and remitted the award to the arbitrator for reconsideration. The arbitrator proceeded to reconsider his award in the light of the remarks made by the Court and to file a modified award with respect only to this matter of the silver bars. This modified award was filed on 2nd November 1936. Objections were in due course filed on both sides, but these were disallowed, and on 4th February 1937, a second decree was passed by the Court in terms of the modified award. Arising out of these proceedings no less than four applications in revision under S. 115, Civil P. C., were filed. Phool Chand filed an application No. 1 against the order setting aside the first award. He also filed an application No. 7 against the order of 10th September 1936, remitting the award to the arbitrator for reconsideration, and he also filed an application No. 61 against the decree of 4th February 1937. Moolchand filed a single application against the decree of 4th February 1937.

In this Court it was conceded that applications Nos. 1 and 7 were really against

interlocutory orders and therefore not maintainable, but the points contained in those applications were pressed on application No. 61. On the date of hearing Moolchand was not present and his application corresponding to Phool Chand's application No. 61 was not pressed. The case was argued ex parte as Moolchand, although he had appointed no less than three counsel, did not put in an appearance. One of the counsel was away in Lahore and the other two had not received any instructions. By our order of 10th May 1940,* we held that the Court had in the first instance acted with material irregularity in restoring the case to the stage of hearing of objections after it had once made a final decree. Secondly, we held that it had acted without jurisdiction in remitting the award to the arbitrator for reconsideration in a case where none of the conditions giving it jurisdiction to make such an order remitting the award were present. In these circumstances we held that the first award was entitled to finality and we restored the order decreeing the suit in terms of the original award. It is for permission to appeal to His Majesty in Council against this order that the present application is filed.

The first point for consideration relates to the conditions in which such an application under cl. (c) of S. 109 is to be granted. The question was considered very recently in 1940 O W N 632,[1] in which it was held that a case should be certified to be a fit one to appeal to His Majesty in Council under this clause only when it is of wider importance and the principle, when finally decided by their Lordships of the Privy Council, would be of benefit not only to the people who were directly involved in the litigation but also to the public at large, that is to say the matter must be one of wider public importance and not a matter only of importance to the parties concerned. The question is whether the present case satisfies those requirements. Learned counsel for the applicant has, in his application, given a large number of grounds on which it is said that the case is a fit one, but he has really pressed the application seriously on two points only. His main ground, he says, is that the High Court has no jurisdiction to entertain an application in revision under Section 115 against a decree passed in terms of an award. Therefore this Court had no jurisdiction to entertain an application against the final decree of 4th February 1937, in the present case. This ground is based ultimately on the decision of their Lordships of the Privy Council in 29 I A 51.[2] The head-note runs as follows :

> The object of the Civil Procedure Code is to secure the finality of an award. When it has been duly made on a reference in a suit and the Court has refused to set it aside or correct or modify it, the Court must pass a decree thereon. Under Section 522, that decree is not appealable except in so far as it may be in excess of or not in accordance with the award. Error in law, even upon the point whether the referred suit was competent does not vitiate an award. An application in revision under S. 622 is also incompetent, and if in effect to set aside an award, is subject also to the Limitation Act, Sch. II, Art. 158 and S. 12.

The particular remark in the judgment of their Lordships on which reliance is placed occurs at p. 60 where it was said :

> Their Lordships are inclined to agree with the view of Clarke J. that in the case of an award revision would be more objectionable than an appeal. If an application in revision were admissible in a case like the present, the finality of any award would be open to question. Their Lordships however are of opinion that such an application is incompetent.

Later on in this judgment after some further remarks their Lordships said:

> The Subordinate Judge does not appear to have exercised a jurisdiction not vested in him by law, or to have failed to exercise the jurisdiction so vested, or to have acted in the exercise of his jurisdiction illegally or with material irregularity.

It is suggested that their Lordships will have to decide, if this matter is allowed to go to them or if on a petition for special leave they should allow it to go to them, whether an application in revision under S. 115 is competent at all in cases of decrees following upon awards of an arbitrator. It appears to us to be perfectly clear from the very case upon which reliance is placed (the other cases quoted are cases only founded upon *Ghulam Jilani's case*[2]) that their Lordships themselves clearly recognized that an application in revision might be competent provided only that such application was one raising definitely a question of jurisdiction or of its illegal or irregular exercise. Learned counsel for the opposite party is, in our opinion, correct in saying that even if this matter should go to their Lordships of the Privy Council, the point for decision before them will not be the general point suggested by learned counsel but only the question whether or no a revision lay to this Court

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* See A I R 1940 Oudh 405.

1. ('40) 27 A I R 1940 Oudh 378 : 189 I C 93 : 15 Luck 716 : 1940 O W N 632, Musaheb Khan v. Raj Kumar Bakshi.

2. ('02) 29 Cal 167 : 29 I A 51 : 6 C W N 226 : 8 Sar 154 : 25 P R 1902 (P C), Ghulam Jilani v. Muhammad Hussan.

in the circumstances of the present case, that is whether the present application in revision was rightly held by this Court to raise a question of jurisdiction. The decision on that point would not be a decision on a matter of general public importance, and therefore this particular ground is not one on which we should be justified in granting a certificate.

Learned counsel for the applicant concedes that that is his main point. His first further point to which he has drawn our attention is the question whether the civil Judge had jurisdiction to pass his first decree dated 16th May 1936, in terms of the award before the expiry of the time allowed by S. 12 read with Art. 158, Limitation Act. Even however if we were to concede for the purposes of this application that it might be that the civil Judge had not got jurisdiction so to do and that he was right in setting aside his first decree and restoring the case to the stage of hearing of objections, that would not have affected the ultimate decision of the case. The crucial point in the case was whether the civil Judge had jurisdiction to remit the award. Learned counsel contends that he had authority to remit the award. The decision at which we arrived was that in the circumstances which were present, namely that none of the points stated in para. 14 of Sch. 2 was present so as to clothe him with jurisdiction to remit the award, his order remitting the award was an order made without jurisdiction. This question is raised in grounds 5 and 6 stated in the application. It will be sufficient to say that we do not consider that these grounds raise a question of wider importance such as is necessary to justify us in granting a certificate. We accordingly reject this application with costs. There is a certificate for Rs. 150 on the file. The time occupied was however only about two hours. We accordingly assess the counsel's fee at Rs. 75.

D.S./R.K. *Application rejected.*

*** (28) A. I. R. 1941 Oudh 247**

YORKE AND GHULAM HASAN JJ.

H. Hunter — Applicant

v.

Chaudhri Ehsan Husain and others — Opposite Party.

Privy Council Appeals Nos. 8, 6, 7, 8 and 12 of 1939, Decided on 20th January 1941; applications for leave to appeal to His Majesty in Council.

*** Limitation Act (1908), S. 12 (3) — Application for leave to appeal to Privy Council—Time requisite for obtaining copy of decree and judgment should be excluded.**

A party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment: A I R 1926 All 286 ; A I R 1935 All 258; A I R 1939 Lah 43 and A I R 1925 Sind 60, *Dissent.* ; A I R 1925 Mad 1241 ; A I R 1922 Pat 255 ; A I R 1932 Cal 587 and A I R 1924 Bom 399, *Approved.* [P 248 C 1]

R. B. Lal — for Applicant.

I. A. Abbasi — for Opposite Party.

Order.—These are five applications arising out of the judgment of a Bench of this Court, of which one of us was a member, reported in 1939 O W N 420.[1] That was a judgment in eight appeals arising out of two suits, Nos. 2 and 3 of 1935 filed on the original side of this Court but transferred to and decided by a civil Judge specially deputed to hear them. One of these was a suit by trustees to recover possession of a trust estate and the other was an administration suit. Of the present applications No. 3 is an application by Mr. H. Hunter, defendant in the trust suit. That suit was dismissed by the trial Court but the appeal was successful and the suit was decreed by this Court. The valuation is much in excess of Rs. 10,000 and therefore the applicant of this application, No. 3, is entitled to the grant of the certificate asked for. Applications Nos. 6, 7, 8 and 12 are applications by parties to the administration suit. The administration suit was decreed in part by the trial Court which gave directions to the trustees how to administer the trust and adjudicated upon the rights of the various creditors who were defendants to the suit. By our decree in appeal we varied the decree of the lower Court so as to include the applicant of application No. 3, Mr. H. Hunter, among the creditors in respect of whom the Court below will pass a final decree showing the claims and liabilities of the various beneficiaries. It is not in dispute that the valuation of all these appeals is in excess of Rs. 10,000, and it follows that as we have varied the decree of the lower Court by our decree in appeal, the applicants are all, subject to any other objections, entitled to the grant of the certificate prayed for.

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1. ('39) 26 A I R 1939 Oudh 161 : 181 I C 155 : 14 Luck 548: 1939 O W N 420, Matinuzzaman Khan v. H. Hunter.

In the case of the applicants of applications Nos. 6, 7 and 8 no objection has been raised. In the case of the application of Chaudhri Sharafuzzaman No. 12, it is contended that the application is barred by limitation, on the ground that the application was filed after the period of 90 days allowed under Art. 179, Limitation Act. In calculating the period of limitation, the office has allowed the period occupied in the obtaining of copies of the decree and the judgment. It is pointed out that O. 45, R. 3 does not require that a copy of the judgment be filed along with an application for leave to appeal to the Privy Council, and it is contended that S. 12, Limitation Act, does not permit this time requisite for obtaining a copy of the decree and the judgment to be excluded.

Had it even been shown that this was a correct view of the law we should, we think, have been bound to take into consideration the admitted practice of the office of the Court in making allowance for the time occupied in obtaining these copies, and to have applied S. 5, Limitation Act. On a careful consideration, however, of the terms of S. 12, Limitation Act, and the cases quoted at the bar with reference to this section, we are of opinion that the practice of the office of this Court is founded on a correct view of the law and that a party who seeks leave to appeal to the Privy Council is entitled, in computing the period of limitation prescribed for such an application, to have the time requisite for obtaining a copy of the decree and a copy of the judgment on which it is founded excluded in computing for purposes of limitation the period which has elapsed from the date of the judgment. On behalf of the opposite party reliance has been placed particularly on two Allahabad cases and a Lahore case. In A I R 1926 ALL 286[2] it was held that

sub-section (3) of S. 12 does not apply to a case of an application for leave to appeal to His Majesty in Council, and so such an applicant is not entitled to exclude the time for obtaining a copy of the judgment of the High Court.

This decision was based on the view that the language of sub-s. (3) when contrasted with that of sub-s. (2) clearly contemplated the exclusion from the scope of sub-s. (3) of the case of an application for leave to appeal. Further, the learned Judges took note of the fact that the rules of the Allahabad High Court did not make it necessary that the applicant should, at the time of filing his application for leave, file also a copy of the judgment on which the decree was founded. The same view was taken by another Bench of the Allahabad High Court in 57 All 751.[3] In Lahore in A I R 1939 Lah 43,[4] a Division Bench held that

in computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the judgment cannot be excluded.

The view taken in this judgment also was that

the wording of sub-ss. (2) and (3) of S. 12, Limitation Act, is so unambiguous that it is not necessary to refer to any authorities at all.

It was considered that sub-s. (3) had no reference to applications for leave to appeal but referred only to actual appeals or applications for review of judgment. The same view was taken by the Sind Judicial Commissioner's Court in 78 I C 953.[5] On behalf of the applicants, it is pointed out that the decisions quoted appear to lose sight of the fact that the wording with which sub-s. (3) begins repeats exactly the words with which sub-s. (2) closes. Sub-ss. (2) and (3) run as follows :

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

It is to be noted that although sub-s. (2) relates to the computation of the period of limitation prescribed for (1) an appeal, (2) an application for leave to appeal and (3) an application for a review of judgment, the time which is to be excluded is stated to be the time requisite for obtaining a copy of the decree, sentence or order, (1) appealed or (2) sought to be reviewed. There is no mention in these closing words of the decree, sentence or order "sought to be appealed from" or "from which leave to appeal is sought," that is to say that the enactment under the words "appealed from" has lumped together cases of (1) an appeal and (2) an application for leave to appeal. The

2. ('26) 13 A I R 1926 All 286 : 92 I C 897 : 24 A L J 349, Wilayati Begum v. Firm Jhandu Mal-Mithu Lal.

3. ('35) 22 AIR 1935 All 258 : 157 I C 170 : 57 All 751 : 1935 A L J 291, Gaekwar Baroda State Railway v. Muhammad Habib-ullah.

4. ('39) 26 AIR 1939 Lah 43 : 179 I C 912 : I L R (1939) Lah 156 : 41 P L R 152, Punjab Co-operative Bank Ltd., Amritsar v. Punjab National Bank, Ltd., Amritsar.

5. ('25) 12 AIR 1925 Sind 60 : 78 I C 953 : 17 S L R 306, Nur Mahomed v. Hassomal.

argument proceeds, as we think, logically that the words "appealed from" or "sought to be reviewed" in sub-s. (3) of this section must properly be interpreted as carrying the same meaning which they carried in sub-s. (2), and it will follow that the words "appealed from" are sufficient to cover not only an appeal but also an application for leave to appeal. We are of opinion that there is much force in this argument. The view suggested is the view which is apparently held in at least four of the High Courts in India. In 48 Mad 939[6] it was held that

in the case of an application for leave to appeal to the Privy Council the time requisite for obtaining a copy of the judgment appealed against can, under S. 12 (3), Limitation Act, be excluded in calculating limitation.

Their Lordships pointed out that in any case this was a very reasonable position, because a proper application for leave to appeal could not be drawn up, unless the party or his pleader had before him a copy of the judgment. The reasoning upon which the interpretation of the section was based is the same reasoning which has been put before us. The same view was taken by the Patna High Court in A I R 1922 Pat 255[7] and 59 Cal 251[8] also supports the applicant's contention. In that case a learned Judge of the Calcutta High Court in delivering judgment on an application for leave to appeal remarked :

I also think that, under S. 12, a party in a case such as this is entitled to the time required to obtain a copy of the judgment.

That the same is the practice in Bombay is shown in 48 Bom 442.[9] In the judgment of one of the Judges at p. 446 we find the remark :

Deducting the time requisite for obtaining the copy of the judgment it would appear that according to the period of limitation prescribed by Act 26 of 1920 for such an application, the application should have been filed by 2nd July 1921.

It is clear from this remark which is confirmed by a remark in the judgment of the learned Chief Justice at p. 443 where he says: "allowing for the time required for obtaining the copy of the judgment, the three months expired on 3rd July 1921," that in the Bombay High Court the practice is that S. 12 (3) is read as enabling an applicant for leave to appeal to exclude in computing the period of limitation for his application the time requisite for obtaining a copy of the judgment on which it is founded. In our opinion the view taken by the High Courts at Madras, Bombay, Calcutta and Patna is preferable to that which has been taken by Allahabad, Lahore and Sind, and it is moreover in accordance with the practice current in this Court. We have no hesitation in holding that application No. 12 is not barred by limitation. We order accordingly that the necessary certificates as required by O. 45, Civil P. C., be granted to the applicants of these five applications.

D.S./R.K. *Order accordingly.*

6. ('25) 12 A I R 1925 Mad 1241 : 90 I C 601 : 48 Mad 939: 49 M L J 418, In re Secy. of State.
7. ('22) 9 A I R 1922 Pat 255 : 66 I C 88 : 1 Pat 429: 3 P L T 289, Mahabir Prasad v. Jamuna Singh.
8. ('32) 19 A I R 1932 Cal 587 : 139 I C 236 : 59 Cal 251: 36 C W N 127, Commissioner of Income-tax, Bengal v. Shaw Wallace & Co.
9. ('24) 11 A I R 1924 Bom 399 : 80 I C 862 : 48 Bom 442: 26 Bom L R 395, Nagindas Motilal v. Nilaji Moroba Naik.

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(28) A. I. R. 1941 Oudh 249

AGARWAL J.

Sheo Nath and others — *Debtors-objectors* — *Applicants*

v.

Tirbeni Shankar — *Decree-holder* — *Opposite Party.*

Civil Revn. Appln. No. 149 of 1939, Decided on 13th January 1941, against order of Dist. Judge, Unao, D/- 31st August 1939.

U. P. Encumbered Estates Act (25 of 1934, as amended by Act 11 of 1939), S. 46 — S. 46 is not retrospective.

Section 46 is not retrospective and therefore a second appeal can lie only in respect of appellate orders or decrees passed after the amending Act came into force and not to those passed before it, and therefore a revision with respect to an appellate order passed before the amending Act came into force, cannot be treated as second appeal even though the revision were filed after the amending Act came into force : A I R 1940 Oudh 335 (F B), *Rel. on.* [P 250 C 1]

Syed Mohammad — for Applicants.

Mohammad Ayub — for Opposite Party.

Order. — This is an application for revision of an order of the District Judge of Unao upholding an order of the Special Judge second grade under the U. P. Encumbered Estates Act. The order of the District Judge was passed in appeal on 31st August 1939 and this revision was filed on 6th October 1939. The Encumbered Estates Act was amended by Act 11 of 1939 which came into force on 30th September 1939. Under the law as it stood before the amendment an appeal against any decree or order of a Special Judge second grade lay to the District Judge under S. 45. Under S. 46 the order of the appellate Court was final. It was held by a Full Bench in 1940 O A 468[1]

1. ('40) 27 AIR 1940 Oudh 335 : 189 I C 265 : 15 Luck 612 : 1940 O W N 645 : 1940 O A 468 (FB), Ali Mohammad v. Khwaja Khalil Ahmad.

that the finality given to appellate orders in S. 46 could not be challenged by appeal or revision. The revision was therefore incompetent.

Under the amendment, a second appeal has been provided from an appellate decree or order of the District Judge on certain grounds. I have been asked by the learned counsel for the applicant to treat this revision as a second appeal. It was held in the Full Bench case above referred to that the amended Act 11 of 1939 had no retrospective effect. The learned counsel for the applicant says that this revision was filed after the Act had come into force and so the application for revision can be treated as a second appeal. The decree of the appellate Court was passed before Act 11 of 1939 came into force and the opposite party acquired certain rights under it. As remarked in the Full Bench case, the advantage gained by a party cannot be taken away by the provision of a second appeal after 30th September 1939. I think a second appeal can lie only in respect of appellate orders or decrees passed after the amending Act came into force and not to those passed before it. I therefore hold that no revision lay and I cannot treat the revision as a second appeal. The application is rejected with costs.

G.N./R.K. *Application rejected.*

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(28) A. I. R. 1941 Oudh 250

THOMAS C. J.

Emperor

v.

Bishun Narain — Accused.

Criminal Reference No. 49 of 1940, Decided on 23rd January 1941; reference made by Sessions Judge, Unao, D/- 12th December 1940.

Motor Vehicles Act (1939), S. 112 — Words "This Act" do not include convictions under old Act of 1914 and such convictions should not be taken into account in imposing fine under section 112.

Section 134 of the present Act repeals the Motor Vehicles Act of 1914 and there is no saving clause in the present Act. Hence the words "this Act" do not include convictions under the old Act of 1914 and previous convictions of an accused under that Act cannot be taken into account in imposing a fine under S. 112 of the present Act. [P 250 C 2]

Assistant Government Advocate—for the Crown.

Iqbal Ali, with accused in person—for Accused.

Order. — This is a reference under S. 438, Criminal P. C., by the learned Sessions Judge of Unao recommending that the fine of Rs. 100 imposed on the accused be reduced to Rs. 20. Bishun Narain, motor driver of motor lorry No. 171 of Unao, was convicted under S. 112 of Act 4 of 1939 (Motor Vehicles Act) for breach of R. 79 (viii), Motor Vehicles Rules of 1940, for carrying passengers in excess. He was entitled to carry 31 passengers, but was caught carrying 46 passengers of whom four were children. The learned Sub-divisional Magistrate of Hasanganj who tried the case sentenced the accused to a fine of Rs. 100 in view of his three previous convictions, or in default to undergo simple imprisonment for three months. The accused filed a revision against his conviction and sentence, and the learned Sessions Judge has referred the case to this Court as in his opinion the fine of Rs. 100 under S. 112, Motor Vehicles Act of 1939, is illegal. The section is as follows:

> Whoever contravenes any provision of this Act or of any rule made thereunder shall, if no other penalty is provided for the offence, be punishable with fine which may extend to twenty rupees, or if having been previously convicted of any offence under this Act he is again convicted of an offence under this Act, with fine which may extend to one-hundred rupees.

Section 134 of the said Act repeals the Motor Vehicles Act of 1914 and there is no saving clause in Act 4 of 1939. The question for consideration is whether the three previous convictions of the accused under the Act of 1914 can be taken into account in this case. If so, the imposition of fine of Rs. 100 is correct. If not, the maximum amount under S. 112 is Rs. 20 only. The learned Assistant Government Advocate has conceded that the previous convictions cannot be taken into consideration in view of the wordings of S. 112. The words are

> if having been previously convicted of any offence under this Act, he is again convicted of an offence under this Act.

The applicant had three previous convictions under the old Act. In my opinion the words "*this Act*" do not include convictions under the old Act. I therefore accept the reference and reduce the fine from Rs. 100 to Rs. 20. I must point out for the benefit and future guidance of the learned Magistrate who tried this case, that the accused seems incorrigible and the fine which is imposed on him probably will be paid by the owner of the motor lorry. It is no punishment to the accused. The proper course for the Magistrate was to cancel the accused's licence for a period of at least six months, and if this accused is brought up again for an offence under the Motor Vehicles Act, the Magistrate will do well to cancel his licence either for a period of one year or six months.

N.K./R.K. *Reference accepted.*

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(28) A. I. R. 1941 Oudh 251

ZIAUL HASAN AND YORKE JJ.

Pt. Tribeni Prasad Tewari—Plaintiff — Applicant

v.

Mt. Rukmin Devi and others — Defendants — Respondents.

Civil Misc. Appln. No. 328 of 1939, Second Appeal No. 35 of 1938, Decided on 13th November 1940.

Civil P. C. (1908), O. 41, R. 11 and Ss. 151 and 152—Second appeal from decree of District Judge dismissed under O. 41, R. 11—Jurisdiction to amend decree lies with District Judge and not with High Court.

Where a second appeal is filed to the High Court from the decree of the District Judge and the High Court dismisses the appeal under O. 41, R. 11, the decree of the District Judge is left intact. Consequently, the jurisdiction to amend the decree lies with the District Judge and not with the High Court: 21 Bom 548; A I R 1932 Pat 238; A I R 1933 Nag 117; A I R 1928 All 679 and A I R 1914 P C 66, *Rel. on.* [P 251 C 2; P 252 C 1]

B. K. Dhaon — for Applicant.

Akhtar Husain — for Opposite Party No. 2.

Order.—This is an application for amendment of an appellate decree of the learned District Judge of Lucknow in so far as it awards costs to the appellant in that Court against the present applicant, who was respondent 9 in his Court. The suit was one for partition of joint family property brought by one Pandit Tribeni Prasad Tewari and the present applicant was defendant 8. It was decreed and one of the defendants, namely Sheo Dulare, defendant 2, appealed against that decree to the learned District Judge. This appeal was allowed and the appellant awarded costs against "the answering respondents 1, 4 and 9." A second appeal was filed in this Court on 12th January 1938, but it was dismissed under O. 41, R. 11, Civil P. C., on 12th August 1938. On 24th April 1939, the present applicant applied to the District Judge for amendment of the decree but this application was dismissed on 25th April 1939. The learned counsel for the applicant contends that as the applicant put in no defence in the trial Court and did not oppose the appeal in the Court of the District Judge, she ought not to have been saddled with the costs of the appeal. On behalf of the opposite party, it is urged that the jurisdiction to amend the decree in question was with the District Judge and that this Court has no jurisdiction to amend it as by the dismissal of the appeal under O. 41, R. 11, Civil P. C., the decree of the District Judge was left intact. In support of this argument he relies on the cases in 21 Bom 548,[1] 11 Pat 409,[2] A I R 1933 Nag 117,[3] 50 ALL 608[4] and 36 ALL 350.[5] The learned counsel for the applicant, on the other hand, places reliance on the cases in 24 Cal 759,[6] 22 Mad 293,[7] 95 I C 649[8] and 30 ALL 290.[9] After considering the above cases, we are inclined to accept the view adopted in the cases relied on by the opposite party. In 36 ALL 350,[5] their Lordships of the Judicial Committee observed:

> The order dismissing the appeal for want of prosecution did not deal judicially with the matter of the suit and could in no sense be regarded as an order adopting or confirming the decision appealed from. It merely recognized authoritatively that the appellant had not complied with the conditions under which the appeal was open to him and that therefore he was in the same position as if he had not appealed at all.

We are of opinion that this remark applies with equal force to a dismissal of an appeal under O. 41, R. 11, Civil P. C. We are also in complete agreement if we may say so with respect with what Fazl Ali J. says in 11 Pat 409[2] at p. 414 where he has drawn a distinction between Rr. 11 and 37 of O. 41 of the Code. We may mention that in second civil appeal No. 484 of 1925 an application for the amendment of the decree of the first appellate Court was made to this Court in a case in which a second appeal to this Court was dismissed for failure to make good the deficiency in the court-fee and the Hon'ble Chief Judge by his order dated 1st December 1927 dismissed the application for amendment, remarking:

> The appeal to this Court was dismissed because the appellant refused to make good the deficiency that he was obliged to make good by law. In those circumstances the decree of the lower Court stands as it is. This Court has no concern with the matter being in exactly the same position as though no appeal had been filed before it.

This decision adopts the view taken by their Lordships of the Privy Council in 36 ALL 350.[5] We are therefore of opinion that by dismissing the appeal under O. 41, R. 11,

1. ('97) 21 Bom 548, Bapu v. Vajir.
2. ('32) 19 AIR 1932 Pat 238 : 138 I C 903 : 11 Pat 409 : 13 P L T 484, Batuk Prasad v. Ambika Prasad.
3. ('33) 20 AIR 1933 Nag 117 : 142 I C 143, Sheolal v. Mohammad Ismail.
4. ('28) 15 AIR 1928 All 679 : 108 I C 564 : 50 All 608 : 26 A L J 407, Deoki v. Jwala Prasad.
5. ('14) 1 AIR 1914 P C 66 : 23 I C 649 : 36 All 350 (PC), Abdul Majid v. Jawahir Lal.
6. ('97) 24 Cal 759, Uma Sundari Devi v. Bindu Bashini.
7. ('99) 22 Mad 293, Munisami Naidu v. Munisami Reddi.
8. ('26) 95 I C 649, Bhagwati Devi v. Sanker Lal.
9. ('08) 30 All 290: 1908 A W N 109: 5 A L J 584, Asma Bibi v. Ahmad Husain.

this Court neither confirmed nor varied the decree of the lower appellate Court but allowed it to remain as it was and it was therefore the Court of the District Judge which could amend the decree. As noted above, an application was made to the learned Judge to amend the decree but it was dismissed on the merits. We are also not satisfied that the applicant was not one of the answering respondents in the lower appellate Court. It is admitted that she engaged a counsel in that Court and the record shows that her counsel was present on no less than four hearings of the appeal. Three of these hearings were necessitated on account of an application for the substitution of names of the heirs of a party who had died. The decree of the learned District Judge was passed on 30th November 1937 and the applicant's name was clearly included among the answering respondents against whom costs were awarded to the appellant. The applicant however took no steps to bring the matter to the notice of the learned Judge till 24th April 1939, and as we have already said, the application for amendment was dismissed by the learned Judge on the merits. The application is dismissed with costs.

D.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 252

BENNETT J.

Kazim Husain — Plaintiff — Appellant

v.

Mt. Mangala Devi and another — Defendants — Respondents.

Second Civil Appeal No. 358 of 1937, Decided on 6th January 1941, against order of 1st Civil Judge, Kheri, D/- 3rd June 1937.

U. P. Agriculturists' Relief Act (27 of 1934), S. 33 — Debtor must be agriculturist at date of loan as well as at date of suit.

For the purpose of S. 33 an agriculturist debtor must be an agriculturist at the date of the loan as well as at the date when the suit is brought.

[P 253 C 1]

M. Wasim — for Appellant.

R. B. Lal and M. M. Lal — for Respondent 2.

Judgment. — This is a second civil appeal from the judgment and decree passed by the learned first civil Judge of Kheri, on 3rd June 1937 setting aside in first appeal the order passed by the learned Additional Munsif of Kheri decreeing the suit brought by a debtor for accounts under S. 33, Agriculturists' Relief Act. The suit was brought by Khan Sahib Syed Kazim Husain against two brothers, Seth Pearey Lal and Seth Ram Swarup for a settlement of account in respect of a loan transaction evidenced by a mortgage deed dated 21st June 1928, executed by him in their favour. The defendants contested the suit, alleging that the plaintiff was not an agriculturist within the meaning of the Act. Seth Pearey Lal died during the pendency of the appeal and his widow Mt. Mangala Devi has been brought on the record in his place. Orders relating to the substitution of Seth Pearey Lal's representatives were passed by Hamilton J. in March and October 1939. There has been some argument by counsel on the construction to be placed upon these orders, but they were construed by the office to mean that Mt. Mangala Devi should be substituted for her deceased husband Seth Pearey Lal, and I can see no reason to think that this was not Hamilton J.'s intention. From his order of 3rd October 1939, this is, I consider, quite clear.

The only questions that fall to be determined in this second appeal are firstly whether for the purpose of S. 33, an agriculturist debtor must be an agriculturist at the date of the loan as well as at the date when the suit is brought; and secondly whether the appellant was assessed to an amount of income tax for the years 1927-28 and 1928-29, which debarred him from taking advantage of the Agriculturists' Relief Act as an agriculturist. The Munsif found that the appellant was an agriculturist both when the loan was advanced and also when the suit was brought, though he held that it was not necessary that he should have been an agriculturist when the loan was advanced. The civil Judge on the other hand held that it was necessary that the appellant should have been an agriculturist at the time when the loan was advanced, and that he was not an agriculturist at that time because in the years stated he was assessed to an amount of income-tax which exceeded the local rate payable on the land held by him. The civil Judge accordingly set aside the Munsif's order decreeing the appellant's suit and dismissed it with costs. The civil Judge thought that it would be very anomalous if a debtor who was taking advantage of the provisions of S. 33 was not an agriculturist at the date when the money was lent. He pointed out that under the provisions of Chap. 5 of the Act a creditor has to maintain regular accounts in respect of loan transactions and that under S. 34, penalties are imposed upon the creditor who fails to maintain

such accounts. If it was not necessary for a debtor to be an agriculturist at the time of the transaction the creditor would be in a difficult position. He might advance money to a person who was not at the time of the loan an agriculturist and in that case he would not be required to maintain regular accounts under S. 32. But the debtor might subsequently at any time become an agriculturist and then the maintenance of regular accounts would at once become necessary.

I agree with the Court below that difficulties might ensue on any other view being taken, but I think quite apart from this aspect of the matter that it is implied in the Act that the debtor must be an agriculturist at both dates. It is true that there is an express provision to this effect only in Chaps. 2 and 3 of the Act. In S. 8 (Chap. 2) it is provided that no person shall be deemed to be an agriculturist for the purposes of this chapter unless he was an agriculturist both at the time of the advance of the loan as well as at the date of the suit. In S. 24 (Chap. 3) it is provided that no application under Ss. 11 and 12 shall be filed unless the applicant is an agriculturist at both these dates. It has been argued that the absence of any such provision in Chaps. 4 and 5 suggests that the Legislature did not intend that the same principle should be applied to cases falling under these chapters. Chap. 4 relates to rates of interest and Chap. 5 to maintenance of accounts. It has been held by the Allahabad High Court in I L R (1937) ALL 514[1] and by this Court in 1939 O W N 752[2] that for the purpose of S. 30 the loan must have been taken by a person who was an agriculturist at the time of the loan. This, in my opinion, is also clear from the reference to the word "loan" in that section and in Ss. 28 and 29 which also fall in Chap. 4. According to the definition in S. 2 "loan" means an advance to an agriculturist. The word "loan" is not specifically used in S. 33, but the section provides that an agriculturist debtor may sue for an account of money lent or advanced to, or paid for, him by any person, and this implies a loan transaction. There is no reason therefore why the same principle should not be applied in the case of S. 33 as in the case of section 30.

1. ('37) 24 A I R 1937 All 297 : 168 I C 655 : ILR (1937) All 514 : 1937 A L J 363, Bireshwar Das Bapuli v. Uma Kant Pandey.
2. ('39) 1939 O W N 752:183 I C 517, Phool Chand v. Shyam Behari Misra.

The other question for consideration is whether the appellant should be held debarred from the benefits of the Agriculturists' Relief Act by reason of the fact that he was assessed to an amount of income-tax at the time of the loan which would preclude his being deemed to be an agriculturist, when actually there is some reason to think that he was not assessed to income-tax in his personal capacity, but only in the capacity of manager of the estate of his sister-in-law and minor son. It is not disputed that the appellant was assessed to such income-tax and paid the income-tax assessed in the years 1927-28 and 1928-29, and that if such assessment and payment were made in his personal capacity he would be debarred by the definition of "agriculturist." It is contended however that he paid this income-tax not in respect of his personal liability, but in respect of the liability of the estate of which he was manager. This contention is based on an order passed by the income-tax officer on the appellant's application in 1935. Admittedly, this application was made in view of the suit brought the following year under S. 33, Agriculturists' Relief Act, it being realized that for the purpose of this Act it was necessary to show that the income-tax had not been paid by the appellant in his personal capacity.

The order of the income-tax officer shows that some inquiry was made and that some property was recorded in the names of the sister-in-law and minor son under the guardianship of the appellant. It was ordered that the appellant's name should be removed from the general index register and notice should be issued to the lady and minor son. The civil Judge considered the argument advanced before him that this order of the income-tax officer cancelled all previous assessments on the appellant in his personal capacity. He considered also the argument advanced on the other side that s. 35, Income-tax Act, fixes a period of one year for rectification of mistakes in assessment. He was of opinion that there had been no rectification of the mistake made in the years 1927-29 and that there could be no rectification of the mistake. The order of the Income-tax Officer merely showed how the appellant was to be dealt with in future. The civil Judge also thought that it was not conclusively proved that the income which had been returned by the appellant did not relate to him personally, as a witness whom he himself produced admitted that he carried on money lending business.

Learned counsel for the appellant argued first of all from the provisions of Ss. 22 and 38, Income-tax Act of 1922 under which notices were issued by the Income-tax Officer. Under S. 38 (2) the Income-tax Officer may require any person whom he has reason to believe to be a trustee, guardian, or agent to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent and of their addresses. He suggests that the Income-tax Officer must have known of the appellant's position as he sent him a notice under this section. I do not think that such an inference can be drawn or that it would show that the appellant was actually assessed to income-tax not in his personal but in a fiduciary capacity. Admittedly he did not furnish the Income-tax Officer with any return under S. 38 (2). He merely furnished a return of his income, and admittedly did not indicate in any manner that the income was not his personal income. The Income-tax Officer in these circumstances naturally concluded that the income was his personal income and assessed him accordingly.

There can be no doubt whatever therefore that whether the income was derived from his personal property or from other property, the appellant was personally assessed to income-tax on it. Apart from this, as the civil Judge pointed out, it is not conclusively proved that the income declared could not have related to the appellant. A portion of the income declared by him represented interest on war bonds of a value of Rs. 6000. Learned counsel could not say whether this property was his own or that of his sister-in-law and minor son. It is also clear from the mortgage on which the suit was brought that he was engaged in his personal capacity in transactions of some magnitude. The mortgage deed in respect of which accounts were sought under S. 33 was executed by the appellant for Rs. 20,000 on 21st June 1923. I am not altogether satisfied on these facts that the appellant acted in good faith in making a return solely on his own account, and subsequently several years later claiming that he had made it in another capacity. I see no reason therefore to dissent from the view taken by the learned civil Judge and I accordingly dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 254

YORKE AND AGARWAL JJ.

Deputy Commissioner, Kheri, Manager, Court of Wards, Mahewa Estate—
Appellant

v.

Dr. Ram Kumar Saxena—Respondent.

First Appeal No. 81 of 1937, Decided on 23rd December 1940, against order of Special Judge, First Grade, Kheri, D/- 20th April 1937.

(a) Limitation Act (1908), S. 19 — Letter written by general agent of debtor at his request is acknowledgment — Fact that agent had no authority under mukhtarnama to make acknowledgment is immaterial.

A letter written by the general agent of the debtor at his request is a valid acknowledgment. The fact that the general agent had no authority under the mukhtarnama to make an acknowledgment is immaterial because he must be deemed to have authority independently of the mukhtarnama when the letter is written at the debtor's desire : A I R 1927 Oudh 613, *Foll.* [P 256 C 1]

(b) Interest — Interest on price of medicines supplied by doctor—Doctor's practice to charge interest at certain rate does not amount to usage — Nor does mention thereof on bill amount to contract — No notice claiming interest given—Interest can be claimed only under S. 61, Sale of Goods Act, on price of medicines but not on amount charged as visiting fees.

A creditor can claim interest (1) on the ground of agreement; (2) on the basis of a statute and (3) on the ground of usage. A medical practitioner's practice to charge a certain rate of interest does not amount to usage. Nor does mere writing upon the bill that interest at certain rate will be charged amount to a contract and where no notice is given that interest will be claimed from the date of demand until payment the medical practitioner cannot claim interest under the Interest Act on the price of medicines supplied by him. He can claim it only under S. 61, but that claim does not extend to the amount charged as visiting fees: A I R 1940 Oudh 257, *Rel. on*; A I R 1936 Oudh 52, *Ref.* [P 256 C 2; P 257 C 1]

H. S. Gupta—for Appellant.

M. Wasim and Siraj Husain—for Respondent.

Judgment. — This is an appeal under S. 45, Encumbered Estates Act. The respondent is a medical practitioner in Lakhimpur. He brought a suit on 25th April 1935 against the Deputy Commissioner of Kheri, manager of the Court of Wards, Mahewa Estate, for recovery of Rs. 3263-8-0, price of medicines supplied by him to Thakur Jai Indra Bahadur Singh, Taluqdar of Mahewa, and his fee for medical attendance and Rs. 1693-8-9 interest, total Rs. 4957-0-9. After the suit was brought an application under S. 4, Encumbered Estates Act, was made on behalf of Thakur Jai Indra Bahadur Singh. The respondent preferred a claim of the amount in suit on 3rd January 1936 which

was allowed by the Special Judge. The Deputy Commissioner of Kheri has preferred this appeal. The plaintiff Dr. Ram Kumar Saxena had stated in the plaint that Rs. 1764-3-0 were due to him on account of the price of medicines and his fee up to the end of 1929, and the Raja incurred a further liability of Rs. 1059-2-9 in 1930, of Rs. 221-11-0 in 1931, of Rs. 79-1-0 in 1932 and of Rs. 138-13-6 in 1933, for the price of medicines and fee. He relied on three documents to save limitation: (1) Ex. 2 dated 6th April 1930 alleged to have been written by one Sheo Ratan Lal, agent of Raja Jai Indra Bahadur Singh in his favour. (2) A letter written by one Ishuri Prasad, Raja's Peshkar on 2nd July 1932 and (3) a letter written by Mr. Mac Gregor, the manager of the estate, dated 9th June 1933. The plaintiff also claimed interest at the rate of 1 per cent. per mensem. The lower Court allowed interest at 6 per cent. per annum and decreed the rest of the suit holding that the letters relied on by the plaintiff saved limitation. The findings of the lower Court are challenged in appeal.

There are only two points before us. (1) Whether the suit is within time and (2) to what interest is the plaintiff respondent entitled? We take first the point of limitation. It is argued by the learned counsel for the appellant that the plaintiff sent a notice under S. 17, Court of Wards Act, to the manager of the Court of Wards on 13th October 1934, and he stated in it that only Rs. 13-8-6 were due to him in respect of the years 1932 and 1933 and so he could not now turn round and say that the payments made in 1932 and 1933 were in respect of the liabilities incurred by Raja Jai Indra Bahadur Singh in previous years. The plaintiff keeps day book and ledger. It appears that in the year 1932 the balance of the previous year was brought forward and after adding to it the price of the medicines and the fee in 1932 all the sums paid were deducted from the total amount. The same was done in the year 1933. The accounts do not show that the payments made in 1932 and 1933 were credited towards the debit entries of those years only. The fact that the plaintiff in his notice under S. 17, Court of Wards Act, mentioned that only Rs. 13-8-6 were due to him for the years 1932 and 1933 is not sufficient to show that he had appropriated the payments made in those years towards the debit entries of those years. There is no other evidence on the point, and we think that it is not proved that the plaintiff had appropriated the payments made in 1932 and 1933 towards his fee and price of medicines supplied by him in these years. The point is not material. The plaintiff has claimed Rs. 1764-3-0 in respect of the years before 1930. The defendant had incurred a liability of Rs. 1805-13-0 in the year 1929 and of Rs. 1879-5-0 in the year 1928. If both these sums be added, the plaintiff was entitled to much more than Rs. 1764-3-0 even after deducting the payments of Rs. 120 and Rs. 84-15-0 made in the years 1932 and 1933. The plaintiff relies on an acknowledgment made on 6th April 1930 and if it is proved his claim in respect of Rs. 1764-3-0 will be within time. We first proceed to see whether the letter dated 6th April 1930 is a valid acknowledgment. It purports to be written by one Sheo Ratan Lal who was appointed a mukhtar of Raja Jai Indra Bahadur Singh with other persons under a mukhtarnama dated 4th January 1929. The letter runs thus:

> Dear Doctor Sahib, — The Raja Sahib has received your letter. As the estate is very short of money these days the Raja Sahib expresses his inability to pay the money. No doubt when the money is received something will be paid. I hope you shall kindly excuse the delay, in payment. Arrangements are being made for money and orders for making collections have also been passed.

It is argued by the learned counsel for the appellant that this document is not genuine, that it does not show that it relates to the debt in suit and that Sheo Ratan Lal had no authority to make any acknowledgment on behalf of the Raja. The plaintiff states that he wrote a letter to the Raja asking for his money and he received a reply Ex. 2. Sheo Ratan Lal states that the plaintiff had submitted his accounts to the estate in 1930 and he wrote Ex. 2 under the order of the Raja. We see no reason to disbelieve this witness. He is no doubt not in the service of the Raja, but it does not necessarily follow from it that he is hostile to him. We hold that this document is genuine. It is a clear acknowledgment of liability. It is argued that it has not been shown that it relates to the debt in question. The plaintiff states that he had claimed his entire money in his letter and he had received this reply. It has not been shown to us that the letter sent by the plaintiff was summoned but the Raja who was examined after the plaintiff did not deny to have received the letter and there is nothing to show that the Raja owed any other money to the plaintiff when this letter, Ex. 2 was written. It is said that Sheo Ratan Lal had admitted that the Raja owed money to the plaintiff under some pronotes in 1930.

It does not appear from this statement that the Raja owed money on 6th April 1930 when Ex. 2 was written. We think that this letter referred to the plaintiff's money due on account of his fee and the price of medicines. Rupees 200 were paid in this account on 19th June 1930 and Rs. 350 on 17th July 1930. It appears from these payments that they were made as promised on behalf of the Raja in the letter Ex. 2. We think that taking all the circumstances into consideration this letter Ex. 2 related to the debt in suit.

The other point is whether Sheoratan Lal had any authority to make a valid acknowledgment on behalf of the Raja. Sheoratan Lal states that he wrote this letter under the instructions of the Raja. The Raja of course denies it but he is an interested person. We have held the document to be genuine and if it is so, Sheoratan Lal would not have written in it that the Raja expressed his inability to pay the money, without his instructions. We think that the letter was written under the instructions of the Raja. It was held in A I R 1927 Oudh 613,[1] that a letter written by the general agent of the debtor at his desire is a valid acknowledgment. We hold that the letter was written at the request of the Raja and so it was a valid acknowledgment binding on him. It has been argued on behalf of the appellant that Sheoratan Lal had no authority under the mukhtarnama to make the acknowledgment. As the letter was written at the desire of the Raja so he had authority independently of the mukhtarnama. We hold that this letter is a valid acknowledgment.

The other acknowledgment relied on by the plaintiff-respondent is a letter, Ex. 3 written by one Ishuri Prasad. The date of this letter is in question but we think it is dated 2nd July 1932, and not 2nd January 1932. There is a reference in this letter to a letter that was despatched a day before to the Secretary for taking necessary proceedings. This secretary could only be the secretary of the trust which the Raja had created for paying his debts. The trust was created in May 1932 and so the letter could not be dated 2nd January. Ishuri Prasad, the scribe, who is the Peshkar of the Raja has been produced to prove it. We see no reason to disbelieve him. He states that he wrote it under the instructions of the Raja. He was only a Peshkar and he could not write that letter on his own authority. It is argued that it is not shown that this letter relates to the debt in question. The plaintiff holds a promissory note executed by the Raja but it is dated 27th September 1932. It is said that Sheoratan Lal admitted that the Raja owed money in 1930 under some promissory notes to the plaintiff. There is nothing to show that these promissory notes were outstanding in 1932. We think that this letter related to the debt in question. Ishuri Prasad has stated that the letter referred to the entire money due to plaintiff, that is the price of medicines and also the promissory note etc. He is probably not right in saying that it related to promissory note also. But even if it does relate to both, it would be a valid acknowledgment in respect of the debt in question as well as in respect of the promissory note. In this letter it was written that a letter had been despatched to the secretary for taking necessary proceedings and that he would complete the papers according to the doctor's wishes or he would arrange for payment of the money. This amounts to an acknowledgment and we think that as the letter was written at the desire of the Raja by Ishuri Prasad, so it is a valid acknowledgment. We do not consider it necessary to discuss whether Ex. 5 is a valid acknowledgment or not because the plaintiff's suit was within time by reason of the two acknowledgments which we have held to be valid. The suit was instituted within three years of the second acknowledgment which was within three years of the first.

The remaining question is one of interest. The learned civil Judge has relied on 11 Luck 575.[2] The law in regard to interest has subsequently been laid down in 1940 O W N 395.[3] A creditor can claim interest (1) on the ground of agreement, (2) on the basis of a statute and (3) on the ground of usage. The plaintiff did not base his case on contract or usage. He says that under the practice of his shop, he charges interest at 1 per cent. His practice does not amount to usage. The mere writing on the bills that interest at 1 per cent. will be charged cannot amount to a contract. The Interest Act is applicable only when a notice is given that interest will be claimed from the date of demand until the time of payment. No such notice

1. ('27) 14 A I R 1927 Oudh 613 : 100 I C 784 : 4 O W N 275, Ram Prasad v. Santdin.

2. ('36) 23 A I R 1936 Oudh 52 : 159 I C 117 : 11 Luck 575 : 1935 O W N 1217, Parshadi Lal v. Brij Mohan Lal.

3. ('40) 27 A I R 1940 Oudh 257 : 187 I C 849 : 15 Luck 550 : 1940 O W N 395, Madan Theatres Ltd. v. Narayan Das.

was given in this case. The plaintiff can therefore claim interest only under S. 61, Sale of Goods Act for the price of medicines supplied; no other statute is applicable. Out of the amount claimed the price of medicines is Rs. 2313-8-0. We allow interest on this amount from 6th October 1933, till the date of the application at 6 per cent. per annum. The result is that we modify the decree of the lower Court to this extent only that the respondent will get interest on Rs. 2313-8-0 only at 6 per cent. per annum and not on Rs. 3263-8-0. The claim is allowed for rupees 3263-8-0 with interest on Rs. 2313-8-0 at the rate of 6 per cent. per annum from 6th October 1933, till the date of application that is 3rd January 1936, and thereafter at the rate of Rs. 3-8 per cent. per annum till realization. Parties will receive and pay costs according to their success and failure in both Courts.

G.N./R.K. *Decree modified.*

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(28) A. I. R. 1941 Oudh 257

AGARWAL J.

Daya Shankar—Defendant—Appellant

v.

Badri Prasad and another—Plaintiffs — Respondents.

Second Rent Appeal No. 35 of 1937, Decided on 13th January 1941, against order of Dist. Judge, Unao, D/- 20th January 1937.

(a) U. P. Stayed Arrears of Rent (Remission) Act (18 of 1939), S. 3—Words 'which have been stayed' in S. 3 do not include proceedings not stayed by Court's order.

The words 'which have been stayed' in S. 3 do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been under S. 2, U. P. Act 4 of 1937. [P 258 C 1]

(b) U. P. Land Revenue Act (3 of 1901), S. 36—Landlord can recover rent from date on which exproprietary tenancy arises.

A landlord is entitled to recover rent from the date the exproprietary tenancy arises. The new zamindar becomes liable to pay revenue from the date of his purchase and if it has been realized from the former zamindar the latter can recover it: 8 All 189 (F B); 12 O C 35 and 15 O C 45, *Rel. on.* [P 258 C 2]

(c) Oudh Rent Act (22 of 1886), Ss. 19 and 19A Remission of revenue does not by itself entitle tenant to remission of rent unless so ordered by Collector.

The remission of revenue does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered. [P 259 C 1]

R. B. Lal and M. M. Lal — for Appellant.

Haider Husain — for Respondent 1.

Judgment. — This second appeal arises out of a suit for arrears of rent brought by respondent 1, Badri Prasad, against the appellant Daya Shankar and respondent 2, Mt. Gomti. The suit was in respect of the years 1341, 1342 and 1343F. The Assistant Collector dismissed the suit for Kharif 1341F but decreed it in full for Rabi 1341 and 1342 and allowed the defendants Rs. 13-8-0 on account of remission of rent for the year 1343. He also allowed past interest at the rate of 9 per cent. per annum and future interest at the rate of 3½ per cent. There was an appeal to the District Judge, Unao, by the plaintiff and the defendants filed cross-objections. The appeal was allowed to this extent that the claim for 1341 Kharif was also decreed. The cross-objections were dismissed. An appeal to this Court was filed on 16th April 1937 by one of the defendants. The grounds taken were that the plaintiff was not entitled to recovery of rent for Kharif 1341F and that remission of rent ought to have been allowed for the years 1341, 1342 and 1343. It was also pleaded that the plaintiff ought not to have been awarded any interest and that the appellant was entitled to a credit of Rs. 72-12-0 paid by him towards land revenue and expenses for Kharif 1341F. An application was filed on 17th December 1940, that a further ground be added to the grounds of appeal that the plaintiff's suit was not maintainable at all in consequence of S. 2 of Act 4 of 1937 and Act 18 of 1939 passed after the filing of the appeal. The first point which I have to consider is whether the plaintiff's suit is not maintainable under Acts 4 of 1937 and 18 of 1939. Act 4 of 1937 received the assent of the Governor of the United Provinces on 21st September 1937, and was published under S. 75, Government of India Act, on 25th September 1937. Section 2 of this Act provides:

Notwithstanding anything contained in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or the Civil P. C., 1908, all proceedings in suits and applications of the classes specified in the schedule to this Act, pending on the date when this Act comes into force, or instituted during the period this section remains in force, shall be stayed for such period as this section shall remain in force. . .

When this Act was in force another Act (18 of 1939) was passed. It received the assent of the Governor of the United Provinces on 30th January 1940, and was published in the U. P. Gazette on 17th February 1940. Section 3 of this Act provides:

Notwithstanding anything contained in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or any other Act for the time being in force but subject to the provisions of S. 5, all suits or applications for the recovery of arrears of rent which have been stayed under the provisions of the U. P. Stay of Proceedings Act, 1937 (Act 4 of 1937) shall be dismissed, and no Court shall entertain any suit or

application for the recovery of arrears of rent which if instituted or made during the period in which the U. P. Stay of Proceedings Act is in force would have been stayed under the provisions of that Act.

It is contended on behalf of the appellant that when Act 4 of 1937 came into force his appeal was pending and so the suit ought to have been dismissed under s. 3 of Act 18 of 1939. It was contended on behalf of the appellant that an appeal is a proceeding in the suit but the respondents contested this point. I think it is not necessary to decide the point. Under S. 3 of Act 18 of 1939, only those suits or applications will be dismissed which have been stayed under the provisions of Act 4 of 1937. This suit or the appeal was never stayed by any order of the Court. It is argued that the appeal ought to be considered to have been stayed automatically without any order being passed. I think the words "which have been stayed" in S. 3 of Act 18 of 1939 do not include those cases in which the proceedings were not stayed by any order of the Court though they ought to have been under S. 2 of Act 4 of 1937. Had the Legislature meant it, the words would have been "which have been stayed or ought to have been stayed." Act 4 of 1937 is no longer in force and no stay can be made now. I think that the provisions of S. 3 of Act 18 of 1939 cannot apply to this suit and that the ground taken by the appellant subsequent to the filing of the appeal has no force.

I now proceed to the appellant's grounds originally mentioned by him in his memorandum of appeal. The first two grounds are in respect of the rent for Kharif 1341, the claim about which was dismissed by the trial Court but allowed by the learned District Judge. The plaintiff purchased the plots in question at an auction sale on 27th October 1933. He obtained possession on 17th November 1933. Mutation of names in favour of the plaintiff was effected on 27th April 1934. The defendants were held to be exproprietary tenants of the plots in question on 18th July 1934 and a rent of Rs. 144-2-9 was fixed. The appellant's contention is that as mutation of names in favour of the plaintiff was effected after the expiry of Kharif 1341, so he is not entitled to rent for that fasal. Section 36, Land Revenue Act, provides that the rent fixed shall be payable from the date the exproprietary tenancy arose and subject to the law of limitation as to arrears of rent and save as provided by S. 41, Agra Tenancy Act, or S. 35B, Oudh Rent Act, shall not be liable to enhancement or abatement for a period of ten years except by an order of a settlement officer under section 87.

It has been argued on behalf of the appellant that the tenant's liability to pay rent does not begin from the date the exproprietary tenancy arises but that no enhancement or abatement for a period of ten years can be made from that date. I see nothing in the wording of this section to put that interpretation upon it. The point has been decided by the Allahabad High Court and by this Court. It was held by a Full Bench of the Allahabad High Court in 8 ALL 189[1] that a landlord is entitled to recover rent from the date the exproprietary tenancy arises. Their Lordships observed that the tenancy was created by the plaintiff's purchase of the original landlord's interest and the rent when fixed under the statute which provides the means for determining the rent payable, becomes the rent which is to be paid during the whole tenancy, or the rent of the land held by the tenant during the whole of his tenancy and as soon as that has been fixed the landlord can put his remedy in force if the tenant fails to pay the debt. In 12 O C 35[2] and 15 O C 45[3] it was held that a zamindar's right to claim rent against an exproprietary tenant at the rate fixed by the revenue Court accrues not merely from the date on which the rent is so fixed but from the date on which the exproprietary tenancy arises. It is argued on behalf of the appellant that the late zamindar is liable to pay revenue as long as his name remains in the khewat and it would be very unfair if he is made liable for the rent. This argument has no force. The new zamindar becomes liable to pay revenue from the date of his purchase and if it has been realized from the former zamindar the latter can recover it. I see no reason to go contrary to the law laid down by the Allahabad High Court and this Court. I therefore think that the learned District Judge was justified in decreeing the suit for Kharif 1341F.

Grounds 3 and 4 of the memorandum of appeal relate to the remissions of rent for the year 1341F. It was said that there was remission in the land revenue and so there should be a corresponding remission in rent also. Reliance is placed on Ss. 19 and 19A,

1. ('86) 8 All 189 : 1886 A W N 52 (F B), Mahadeo Prasad v. Mathura.
2. ('09) 12 O C 35 : 1 I C 689, Hardeo Bakhsh Singh v. Sri Pargash Singh.
3. ('12) 15 O C 45 : 15 I C 189, Bhan Partab Sahi v. Sheo Dat Bahadur.

Oudh Rent Act. The evidence of the patwari shows that no remission was allowed to exproprietary tenants. It was said that the khetauni for 1341 shows that revenue was remitted, but that does not by itself entitle the tenants to get remissions of rent unless so ordered by the Collector or the Assistant Collector specially empowered. It is not shown that there was any such order. These grounds therefore have no force. Grounds 5 and 6 relate to the remissions in 1342 and 1343. The lower Courts have allowed remissions in 1343 and the evidence of the patwari shows that there was no remission allowed to exproprietary tenants in 1342. These grounds have no force. Ground 7 relates to interest. The lower Courts had discretion in awarding interest and I see no reason to differ from them. The last ground is that the appellant paid Rs. 72-12-0 on account of revenue in Kharif 1341 and he should get credit for that amount. I see no reason to allow that amount to the defendant in this case. If he has paid anything on account of revenue, he can bring a fresh suit. The appeal has no force and I dismiss it with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 259

GHULAM HASAN J.

Mahabir Singh and others —
Defendants — Appellants
v.
Thakur Tirbhawan Bahadur Singh —
Plaintiff — Respondent.

Second Rent Appeal No. 30 of 1937, Decided on 25th November 1940, against order of Dist. Judge, Rae Bareli, D/- 22nd December 1936.

Landlord and tenant — Rent suit — Question of proper rent raised and decided — Decision operates as res judicata in subsequent suit.

Where in a case no plea is raised as regards the rate of rent and no specific issue is framed and the Court decrees the suit at a certain rate of rent, the decision no doubt does not constitute as res judicata in a subsequent suit; but where the question has been pointedly raised and embodied in the form of a specific issue as to the proper rate of rent, then the decision arrived at by the Court upon such issue operates as res judicata in subsequent suits for rent : A I R 1927 Oudh 32, *Disting.* [P 260 C 1]

B. K. Dhaon — for Appellants.

Haider Husain — for Respondent.

Judgment.—This is a second rent appeal against the judgment and decree dated 22nd December 1936 passed by the District Judge of Rae Bareli upholding the decree of the Assistant Collector, first class, of that place decreeing the suit of the plaintiff-respondent. The plaintiff-respondent sued for arrears of rent under S. 108 (2) of the Oudh Rent Act, against the defendants-appellants for the year 1342 Fasli at the rate of Rs. 318-12-6. The defendants-appellants contested the suit on the ground that the rent was Rs. 302 per year and not Rs. 318-12-6 as claimed by the plaintiff-respondent. The defendants-appellants also claimed certain remissions. The learned Assistant Collector framed specific issues on both the points and held that the rate of rent was Rs. 318-12-6 and that this matter was res judicata between the parties. He further held that the defendants were not entitled to any remission. After allowing deductions for the payment of rent the suit was decreed for Rs. 223-13-0 with costs and future interest. The defendants appealed but their appeal was dismissed by the lower appellate Court.

The defendants have now come up to this Court in second appeal. In the memorandum of appeal filed in this Court both the grounds relating to the rate of rent and the remissions have been raised. Learned counsel for the appellants however has stated that he does not propose to press grounds Nos. 3 and 5 which relate to the question of the remission of rent, as his clients being thekadars are not entitled to any remissions. The only question that has been raised on behalf of the defendants-appellants is that the lower Courts were wrong in deciding that the rate of rent was Rs. 318-12-6 and that the matter was res judicata between the parties. I am of opinion that there is no force in this appeal.

It has been argued that the rate of rent originally fixed in the lease was Rs. 302 and that there is absolutely no evidence on the record that this rate of rent has been enhanced to Rs. 318-12-6. It has also been urged that the previous decisions upon which reliance has been placed by both the Courts below do not operate as res judicata in so far as the rate of rent is concerned. It appears that there was a suit for arrears of rent for the years 1337 and 1338 Fasli filed by the plaintiff against the defendants on 13th November 1930. The rate of rent claimed in this case was Rs. 318-12-6 according to the recent settlement. The defendants did not question this rate in the written statement. The suit was decreed at the rate claimed by the plaintiff on 29th June 1931. There was a specific issue framed in the case, namely what was the correct annual rent of the mahal in question? Upon this

issue the learned Assistant Collector observed as follows :

The plaintiff has filed a copy of the notice of the settlement officer at the last settlement which makes it clear that the pukhtadars are liable to pay Rs. 318-12-6 as rent and cesses for the whole year to the superior proprietor. Learned counsel for defendant 1 admits this, so that issues 1 to 3 are thus disposed of.

Then again in 1934 a suit under S. 61, Oudh Rent Act, for the ejectment of the defendants was filed by the plaintiff. In that suit also there was a specific issue framed upon the point having been raised by the defendants whether the rent was Rs. 302 or Rs. 318-12-6. The Assistant Collector decided on 29th September 1934 that the rent was Rs. 318-12-6 and accordingly decreed the suit. The defendants went up in appeal to the District Judge but did not press the point as regards the rate of rent. The appeal was dismissed by the District Judge on 31st January 1935. These two decisions, in my opinion, are binding upon the defendants-appellants and it is no longer open to them to reagitate the same question. Where in a case no plea is raised as regards the rate of rent and no specific issue is framed and the Court decrees the suit at a certain rate of rent, the decision would no doubt not constitute as res judicata in a subsequent suit, but where the question has been pointedly raised and embodied in the form of a specific issue as to the proper rate of rent, then the decision arrived at by the Court upon such issue will be res judicata in subsequent suits for rent. Reference may be made in this connexion to Mulla's Code of Civil Procedure (Edn. 10, 1934) at p. 45, heading C, "Rate of rent or area for which rent is payable," where this matter is discussed with reference to various authorities which are given at the foot-note.

Reliance is placed in this connexion upon a decision in A I R 1927 Oudh 32,[1] where it has been held that liability for rent is a recurring liability and, therefore, a suit for rent at a certain rate for certain years is not barred by reason of a decision in a previous suit for rent allowing a different rate for previous years. I am of opinion that this case has no application to the facts of the present case. In that case, the Court had decreed the rent which had been fixed by the Settlement Officer, although in a former suit it had been decided that the rent was reduced. It was held that the cause of action in the subsequent suit was different from that in the former suit. That case therefore is not one of that class of cases in which a specific issue as regards the rate of rent has been framed by the Court and determined. Neither the lease nor the khetauni for 1342 Fasli, the period in suit, has been filed in the case. I have no doubt whatever that the notice issued by the Settlement Officer fixing the rent at Rupees 318-12-6 in the third settlement was sent to the defendants. I am, therefore, satisfied that the rent fixed for the land in dispute was Rs. 318-12-6 and not Rs. 302. I am also of opinion that the previous decisions referred to above are res judicata between the parties and are binding upon the defendants-appellants. The result is that the appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

1. ('27) 14 A I R 1927 Oudh 32 : 98 I C 77 : 3 O W N Sup 313, Ram Harakh v. Special Manager, Court of Wards, Ajudhia Estate.

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* (28) A. I. R. 1941 Oudh 260

BENNETT AND GHULAM HASAN JJ.

Messrs. Dinshaw & Co. — *Appellant*

v.

Income-tax Officer, Lucknow — *Respondent.*

Misc. Appeal No. 7 of 1940, Decided on 17th December 1940, against order of Thomas C. J., D/- 3rd October 1939.

***Companies Act (1913), Ss. 229 and 230— Company assessed under S. 23 (4), Income-tax Act, on estimated income— Order not being appealed against becoming final — Assessment cannot be reopened in liquidation proceedings.**

A judgment-debt and an assessment for taxes do not stand on the same footing. The reason for allowing the Court to go behind the judgment in insolvency proceedings to see if there is a real debt is to prevent fraudulent judgments. This is not the case with assessment for taxes. Hence where a company has been assessed under S. 23 (4), Income-tax Act, on the basis of the estimated income of the previous year and the order of assessment is not appealed against, the assessment becomes final and cannot be challenged or reopened in liquidation proceedings : (1899) 2 Q B D 145, *Rel. on*; A I R 1935 Oudh 451, *Dissent.* [P 261 C 1, 2; P 262 C 2]

S. S. Nigam — for Appellant.

Ram Pershad Varma — for Respondent.

Judgment.—This is a first appeal under S. 202, Companies Act, and S. 12 (1), Oudh Courts Act, from the order of the learned Chief Judge dated 3rd October 1939, allowing a claim for income-tax by the Income-tax Officer, Lucknow, against Dinshaw & Co., (Bankers) Ltd., (in liquidation), Lucknow. The Income-tax Officer claimed a sum of Rs. 2131-4-0 as income-tax for the year

1934-35. Of this sum Rs. 1625 was income-tax, Rs. 406-4-0 surcharge and Rs. 100 penalty. The firm of Dinshaw & Co. came under liquidation on 15th October 1935. The firm had been assessed to pay income-tax, surcharge and penalty as stated above before this date. No assessment return had been sent to the Income-tax Department, and a notice to produce accounts was not complied with. Consequently, S. 23 (4) of the Act was applied and assessment was made on the basis of the estimated income of the previous year. No appeal was preferred against the order of assessment, which accordingly became final as against the firm. When the firm came under liquidation no objection was taken for some years to the assessment. It was said by the Official Liquidator that the amount would be paid when funds were available. It was only when another person was appointed Official Liquidator in 1939 that an attempt was made to reopen the assessment.

The facts are stated in the proof of claim by the Income-tax Officer submitted by the legal adviser to the Income-tax Department in an application dated 2nd October 1939. The claim was disputed by the Official Liquidator on the ground that the assessment was not equitable, no income having in fact accrued to the assessee for the year in question, and that in these circumstances it was open to him to ask for further enquiry by the Court into the claim. He filed a statement of accounts showing that a loss had actually accrued. Objection was taken to this statement by the Income-tax Department on the ground that it was not an audited statement of accounts, and furthermore that it was not prepared in accordance with the provisions of the Income-tax Act. The order of the learned Chief Judge appealed against shows the arguments put forward on each side. On behalf of the Income-tax Department, it was contended that the assessment having become final it could not be challenged or reopened in liquidation proceedings, reliance being placed on an English decision, (1899) 2 Q B D 145.[1] The Official Liquidator relied on a previous decision of this Court in 1935 O W N 791,[2] which supported his contention. The learned Chief Judge dissented from the view taken by his predecessor in this case, observing that the latter's attention had not been invited to the English case in (1899) 2 Q B D 145.[1] He was of opinion that a judgment-debt and an assessment for taxes do not stand on the same footing. The reason for allowing the Court to go behind the judgment in insolvency proceedings to see if there is a real debt is to prevent fraudulent judgments. The learned Chief Judge therefore held that the assessment could not be reopened.

Learned counsel for the appellant referred first of all to the provisions of S. 229, Companies Act, as showing that in the winding up of an insolvent company the same rules shall prevail with regard to debts provable as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent. He conceded that there was nothing in the Insolvency Act or in the Companies Act on the precise point under consideration. He next referred to an English case, (1892) 2 Q B D 633,[3] and in particular to the following observations of Lord Esher, M. R. on pages 635 and 636:

> As a matter of law the judgment therefore stands as a good judgment against John Fraser, and it cannot be questioned by him in any Court, except the Court of Bankruptcy. But when it is sought to obtain a receiving order against him in respect of the judgment-debt, the Court of Bankruptcy has to exercise its discretion, and for the exercise of that discretion one rule of conduct is to be found in S. 7, Bankruptcy Act, 1883, which provides that 'if the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition.' The question is, whether the registrar had not a discretion under S. 7, and whether he has rightly exercised that discretion. The mere fact that there is a judgment for the debt does not prevent the registrar from saying that there is no good petitioning creditor's debt. The Court of Bankruptcy can go behind the judgment, and can inquire whether, notwithstanding the judgment, there was a good debt.

The provision in the Provincial Insolvency Act which most corresponds with the provisions of S. 7, English Bankruptcy Act, is S. 50 which provides that where the receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such enquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt. We consider that in deciding whether such an enquiry should be made the

1. (1899) 2 Q B D 145 : 68 L J Q B 761 : 80 L T 504 : 47 W R 523 : 6 Manson 256 : 4 Tax Cas 79, In re Calvert.
2. ('35) 22 A I R 1935 Oudh 451 : 156 I C 708 : 1935 O W N 791, Income-tax Officer, Lucknow v. Lucknow Sugar Works, Ltd.
3. (1892) 2 Q B D 633 : 67 L T 401 : 9 Morrell 256, In re Fraser.

Court should act on the principles that have found favour in England. The question for consideration in this case is whether an income-tax assessment stands on a different footing from a judgment. This question was considered in the case of this Court already cited, 1935 O W N 791,[2] and it was held in that case that no distinction should be drawn between a judgment-debt and an income-tax assessment. It was observed that the circumstances in that case showed that the assessment had been made on an estimated income without the accounts being looked into, and that it was the duty of the Court of Bankruptcy to protect the interests of the entire body of creditors and to see that a debt claimed to be entered in the schedule is valid and properly binding on the estate.

There was, however, this difference between this case and the case under consideration that in the former case the audited accounts for the year in question had been produced by the Official Liquidator and had been examined by the Government advocate, who had nothing to say against their correctness. The accounts showed that the company had not made any profit during that year: on the contrary, it had incurred a substantial loss. In the present case, although accounts have been produced they have not been audited and no balance sheet has been produced. Learned counsel for the appellant invited our attention to the last part of the judgment in (1899) 2 Q B D 145.[1] It was held in this case that the rule that on a proof for a judgment-debt the Court of Bankruptcy will go behind the judgment and ascertain whether there is a provable debt, does not apply to a proof for assessed taxes. It was said in this case by Wright J.:

> It seems to me that this assessment is not like a judgment, nor within the principle which is applied to judgments. It is absolutely necessary in order to prevent fraudulent proofs and fraudulent bankruptcies to adopt the rule that judgments should not of themselves be conclusive. That rule appears to be founded on necessity. Here there is no such necessity. It is quite inconceivable that a man should act in the way that is suggested he might act in order to spite his creditors. But if he did, I am not sure that the bankruptcy law is not strong enough to reach the case within certain limits of time—possibly as a fraudulent preference of the Crown. If not within those limits of time, I should think very likely on common law principles it might be possible for the Court to deal with the matter. In the case of an assessment there is no question of consideration as there is in the case of a judgment: there is a mere administrative assessment with a special mode of appeal provided which must be followed. I cannot think it possible that it is competent to the Bankruptcy Court, on the invitation of the trustee in bankruptcy or of the debtor, to reopen questions of that kind on a motion to expunge. It is quite impossible to conceive that it would be competent for me sitting here to go into the question of the rateable values of a union or of a parsih, or any question of that sort. That seems to me to be a case which is analogous to the case in which I am at present invited to act. I think the application fails and must be dismissed with costs; but my decision will not interfere with any application the debtor may be advised to make to the Inland Revenue under the Board of Trade Regulations of May 1888.

Learned counsel for the appellant has relied upon the fact that there is in England a special provision which would entitle a debtor to go behind the assessment, namely that contained in the Board of Trade Regulations referred to. It is provided in these regulations that where income tax is outstanding under certain schedules (one of which would be applicable to the present case) the Inland Revenue authorities will, on receipt of an affidavit by the debtor, with a certificate by the official receiver or trustee setting out that the debtor has made no income taxable under such schedule, forego all claim to payment of the tax. He argues that the English law laid down in (1899) 2 Q B D 145[1] should not be followed in India because there is no provision in India corresponding to the Board of Trade Regulations referred to. The decision in (1899) 2 Q B D 145[1] was not however based on the fact that another remedy was open to the debtor. It was clearly held that a distinction should be drawn between an assessment and a judgment because there was good reason in the case of judgments to allow them to be reopened—a reason which did not apply in the case of assessments. The fact that another remedy is allowed by English law is not therefore in our opinion a reason for holding that different principles should be applied by a Court acting under the provisions of S. 50, Provincial Insolvency Act, from those accepted as applicable to S. 7, English Bankruptcy Act.

Reference was made by this Court in 1935 O W N 791[2] to another case, (1907) 2 K B 23,[4] where it was remarked with reference to an enquiry into a judgment-debt that it is sufficient to show miscarriage of justice, that is to say, that for some good reason there ought not to have been a judgment. The former learned Chief Judge who decided the case in 1935 O W N 791[2] observed after this quotation from (1907) 2 K B 23[4] that the circumstances showed that the assessment

4. (1907) 2 K B 23 : 76 L J K B 644 : 97 L T 69: 14 Manson 91 : 51 S J 344 : 23 T L R 384, In re Van Laun, Ex parte Chatterton.

had been made on an estimated income without the accounts being looked into. It is clear however that the income-tax department was not at fault for the learned Chief Judge observed :

There is no doubt that the income-tax authorities were within their rights in making the assessment on an estimated income when the company had failed to file the return of its income within the prescribed time. It is equally clear that the assessment made by the income-tax department was binding on the company.

So also in the present case there can be no question that the procedure followed in making the assessment was correct and that the firm of Dinshaw & Co. was alone responsible for the assessment being made as it was made without an examination of the accounts. In these circumstances it seems to us impossible to say that there was a miscarriage of justice, or that the assessment that was made ought not to have been made. It is clear that so far as the assessee was concerned there was no miscarriage of justice, and that the assessment could only have been made in the way in which it was made. A special procedure is provided by the Income-tax Act for assessment of income-tax, and the appellant's contention is not only that the assessment can be reopened in insolvency proceedings, but that a fresh enquiry should then be made by the insolvency Court and a different procedure followed. If this were allowed, it is argued for the respondent—and we think the argument has force—it would be possible to reopen in the same way the question of other liabilities incurred by the assessee prior to his adjudication as an insolvent.

Section 230, Companies Act, provides that in winding up there shall be paid in priority to all other debts all revenue, taxes, cesses and rates, whether payable to the Crown or to a local authority, due from the company. If in insolvency proceedings an assessment of income-tax were allowed to be reopened at the instance of the official liquidator or official receiver in the interest of the creditors, there is no reason why the liability of an assessee in respect of revenue, cesses or rates should not also be reopened. His liability for revenue, cesses, or rates is determined by special enactments and his assessment therefore may be governed by special procedure, but it would seem on the argument advanced for the appellant that his liability would be open to determination by the insolvency Court on different principles and procedure. We should be reluctant to hold that this was legally possible. We do not think that any enlargement of the scope of interference with what has been finally decided so far as the insolvent is concerned should be allowed. There should be interference in our opinion only if there is reason to think that the assessment arrived at is vitiated by fraud. There is no such suggestion in the present case, and we agree with the view taken in (1899) 2 Q B D 145[1] that fraud is ordinarily out of the question in a case of this kind. On this view, it is not necessary to consider whether there was or was not an actual loss incurred by the assessee in the year 1933-34. This question was examined by the learned Chief Judge who came to the conclusion that if certain items were deducted from the expenditure side, as it was contended they should be deducted, then no loss was incurred. We accept the view taken by the learned Chief Judge that the case of a judgment debt stands on a different footing from that of an assessment, interference being allowed in the case of the former only because of the possibility of fraud. We see no reason therefore to allow this appeal and we dismiss it with costs.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 263

YORKE AND AGARWAL JJ.

Hari Saran Das—Defendant — Appellant

v.

Har Kishan Das — Plaintiff — Respondent.

Misc. Appeal No. 52 of 1940, Decided on 14th January 1941, against order of Addl. Civil Judge, Lucknow, D/- 14th August 1940.

Civil P. C. (1908), O. 22, R. 10—Compromise between *N* and *S*, two rival claimants for property left by mahant providing that *N* shall own property for his lifetime and after his death *S* shall be owner—*N* obtaining decree for possession and mesne profits against *S* — *N* dying — Decree for mesne profits held did not become part of estate vested in *S* and *N's* heir or legatee could be substituted in *N's* place.

According to a compromise between two rival claimants, *N* and *S* to the property left by a mahant it was provided that *N* should remain owner and in possession of the immovable property, taluqdari and non-taluqdari for his lifetime. After *N's* death *S* should own and possess the entire moveable and immovable property, taluqdari and non-taluqdari. *N* obtained a decree against *S* for possession and mesne profits. *N* subsequently died during the proceedings for ascertainment of mesne profits :

Held that *N* was the absolute owner of the rents and profits which had been realized during his lifetime. *N's* interest in the decree for mesne profits did not cease on his death and did not become part

of the estate vested in *S*. Hence *N's* heir or legatee could be substituted for *N* and proceed with ascertainment of mesne profits. [P 266 C 1]

M. Wasim and B. P. Misra — for Appellant.

Niamatullah, G. D. Khare, Karta Krishna and Rameshwar Dayal — for Respondent.

Judgment. — This is an appeal from an order of the Additional Civil Judge of Lucknow, allowing the respondent's application under O. 22, R. 10, Civil P. C. There is a history behind this case, and it is necessary to mention it in order to understand the points in question. There is in the city of Lucknow an Udasi shrine to the mahant of which valuable taluqdari property and certain other property, moveable and immovable belong. Sant Rain Das was the mahant of the shrine. He died on 8th January 1922. Har Narain Das claimed the property as his chela. The mother of Sant Rain Das and the appellant Hari Saran Das alias Satgur Prasad were his rival claimants. The dispute was compromised by an agreement dated 20th January 1922, which, in substance, provided that Har Narain Das should hold the properties for life and Satgur Prasad alias Hari Saran Das should be the remainderman. In 1924 Hari Saran Das induced Har Narain Das to enter into an agreement dated 25th November 1924, whereby the whole of the properties were released to Hari Saran Das on certain terms. Under this agreement, Hari Saran Das in addition to the immovable property obtained possession of the cash at the banks and estate treasuries together with the proceeds of war bonds and other moveables. Har Narain Das brought a suit No. 1 of 1927 against Hari Saran Das impugning the agreement dated 25th November 1924, on the ground that it had been obtained from him by the fraud and undue influence of Hari Saran Das. That suit was decided by Pullan J. of this Court on 29th November 1927. The deed of 25th November 1924 was set aside, the plaintiff was held entitled to the possession of the immovable properties and the cash and moveables of Sant Rain Das. The cash and moveables were found to be worth Rs. 1,83,000. It was also held that the plaintiff was entitled to mesne profits from the date of the agreement, 25th November 1924.

There was an appeal to a Bench of this Court and it was held that the plaintiff was entitled to mesne profits not from the date of the agreement but from the date of the suit. There was a further appeal to the Privy Council and the judgment of the first Court in regard to mesne profits was restored. Har Narain Das obtained possession under the decree and also executed his decree for Rs. 1,83,000 by attachment and sale of Hari Saran Das's interest in the property as remainderman. Hari Saran Das filed an objection that his interest as remainderman could not be attached. This objection was disallowed by the civil Judge. Hari Saran Das then appealed to this Court on 25th August 1933 and during the pendency of the appeal, Har Narain Das, the decree-holder died. The question then arose between one Har Kishen Das and Hari Saran Das whether the former could be substituted as the respondent in the appeal. Har Kishen Das's contention was that he was the chela legatee of Har Narain Das and so he could be substituted in his place. Hari Saran Das's contention was that the rights of the decree-holder had passed to himself and so it could not be executed. The chief Court found in favour of Hari Saran Das by upholding his contention that the sum of Rs. 1,83,000 vested in him. There was an appeal to the Privy Council and it was held that that sum passed to the legatee or legal heir of Har Narain Das and not to Hari Saran Das. The decision of the Privy Council that Har Narain Das was entitled to mesne profits from the date of the agreement was given in 1932. After it Har Narain Das applied for ascertainment of those mesne profits. When Har Narain Das died on 26th December 1933, Har Kishen Das applied under O. 22, R. 3, Civil P. C., that he be substituted in place of Har Narain Das. That application was opposed by Hari Saran Das but has been allowed by the lower Court. The defendant Har Saran Das has appealed from that order.

The argument of the learned counsel on behalf of the appellant is that Har Narain Das's interest in the decree in question ceased on his death, and the said decree became part of the estate vested in the appellant. We have to decide whether the decree for mesne profits passed by the Privy Council devolved on the death of Har Narain Das on his heir or legatee or it became part and parcel of the estate vested in Hari Saran Das. The important clauses of the agreement dated 20th January 1922 are given in the judgment of the Privy Council in which it was decided that the sum of Rs. 1,83,000 devolved on the legal heirs or legatees of Har Narain Das. That case is reported in 1938 O A 87.[1] The following relevant clauses of the agreement are reproduced below :

1. ('38) 25 AIR 1938 P C 98: 173 I C 412: 32 S L R 40 : 1938 O A 87 (PC), Har Kishen v. Satgur Pd.

2. The first party Mahant Har Narain Das shall remain owner and in possession of the immovable property, taluqdari and non-taluqdari for his life-time without the power of transfer in any form.
4. After the death of Mahant Har Narain Das the first party Satgur Prasad alias Hari Saran Das shall own and possess the entire moveable and immovable property, taluqdari and non-taluqdari.
9. As to the moveable property it has been settled that Mahant Har Narain Das the first party shall be owner of the whole except the property specified below.

These clauses were interpreted by the Chief Court and their Lordships of the Privy Council. The question of mesne profits was also discussed by the Chief Court and the Privy Council. It is argued that the question of mesne profits was not before the Courts and so they could not come to a decision about them which could bind the parties. Hari Saran Das in reply to the application for ascertainment of mesne profits stated that the judgment of the Chief Court dealt not only with moveable and immovable properties directly and specifically referred to in the family arrangement dated 20th January 1922, but also dealt with mesne profits and cash which had either been decreed to Mahant Har Narain Das or in respect of which the claim was still pending and the judgment operated as res judicata. It was held by the Chief Court that the decree for moveables could not be executed against Hari Saran Das because the rights of the original decree-holder had passed along with the rest of the property to Hari Saran Das. It was also held that the right to mesne profits together with the estate out of which they arose had, on the death of Har Narain Das come into the ownership and possession of Hari Saran Das. The Privy Council observed that they could not accept the view of the Chief Court as to the nature of a life estate in immovable property and they discerned no merits in the novel doctrine propounded by the Chief Court that a tenant for life of immovables had only a limited interest in the rents and profits which had accrued in his life time and is not complete owner thereof. Accordingly, if there is res judicata it is against the appellant. At least we have the pronouncement of the Privy Council on the agreement of 20th January 1922.

Their Lordships observed that "the entire moveable and immovable property taluqdari and non-taluqdari" in cl. 4 of the agreement could not, in their opinion, be stretched to cover all property whatsoever which Narain Das might acquire or which he might possess at the time of his death. It was also observed that it was not part of the purpose of the agreement to constitute Hari Saran Das, the general heir of Narain Das, still less so to do this as to defeat the latter's right to leave the smallest legacy by will or to deal with accrued rents and profits as in his life time he might desire. The words "moveable and" in cl. 4 were construed to mean that they referred to property in existence at the time of the agreement. It appears from the judgment of the Privy Council that Hari Saran Das was owner only of the moveables which existed at the time of the agreement and that Har Narain Das was owner of the rents and profits which accrued in his life time. It was also held that Har Narain Das could transfer immovable property subsequently acquired by him by will or transfer inter vivos, and that Har Narain Das was full owner of Rs. 1,83,000 which he could dispose of by will and if he did not his heir-at-law would succeed him. There is no reason to distinguish that sum from the rents and profits which had not only accrued due to Har Narain Das but had also been realised though not by him in his life time. We think that the point in question before us is covered by the Privy Council decision.

The learned counsel for the appellant has relied on 7 O W N 128.[2] This case was relied on by the Chief Court in the judgment reported in 11 O W N 917[3] which was set aside by the Privy Council in 1938 O A 87.[1] The argument of the learned counsel for the appellant is that in that case the arrears of rent due to the widow of a taluqdar who was a life estate holder were held after her death to have passed to the estate and not to her personal heirs. We think it would not be safe in this case to rely on the cases of Hindu widows or the widows of taluqdars. In this case the right of Har Narain Das came into existence under the deed of 20th January 1922 and not under any statute. Moreover, it appears that in 7 O W N 128[2] the learned Judges of this Court decided the case as if the rights of a Hindu widow were in question. It was subsequently held in this Court in 7 O W N 173[4] in respect of the same taluqdar's widow, that her rights were not those of a Hindu widow but

2. ('31) 18 A I R 1931 Oudh 66 : 125 I C 161 : 5 Luck 608 : 7 O W N 128, Sarnam v. Bisheshar Bakhsh Singh.
3. ('34) 21 A I R 1934 Oudh 337 : 150 I C 425: 11 O W N 917, Hari Saran Das v. Har Kishen Das.
4. ('30) 17 A I R 1930 Oudh 225 : 122 I C 614 : 7 O W N 173, Bisheshar Bakhsh v. Jang Bahadur.

those of a taluqdar's widow and those rights were laid down in the Oudh Estates Act. It was observed that the provisions of the Oudh Estates Act would apply whether the taluqdar's widow was a Hindu, a Mahomedan or a Christian. The peculiarities of the estate of a taluqdar's widow do not appear to have been brought to the notice of their Lordships in the case in 7 O W N 128.[2] The decision in that case was based on a dictum of their Lordships of the Judicial Committee in 10 I A 150,[5] which was a case of a Hindu widow.

In 7 O W N 128[2] it was held that a creditor of a taluqdar's widow cannot attach the arrears of rent due to her which were not realized by her in her lifetime. But that is not the position here. In the present case Har Narain Das obtained a decree for mesne profits against Satgur Prasad on the ground that he was in wrongful possession of the property. Har Narain Das was certainly entitled to the rents and profits of the property which accrued in his lifetime and which were realized by Hari Saran Das from the tenants. Har Narain Das could make a transfer of the decree for mesne profits inter vivos and there was no reason why he could not make a will in respect of them. This was so held by the Privy Council. The rents had been realized by the defendant and so they had ceased to be part of the estate. We think we need not discuss the cases of Hindu widows cited before us, and that on the interpretation of the agreement dated 20th January 1922, put on it by their Lordships of the Privy Council, Har Narain Das was the absolute owner of the rents and profits which had been realised in his lifetime and he could transfer them by gift or by transfer inter vivos. The lower Court has held that Har Kishen Das is the chela and legatee of Har Narain Das. The will was made on 8th December 1931, when there was no subsisting decree for mesne profits but it made Har Kishen Das owner not only of the moveables and decrees in existence at the time of its execution but also of those which might be acquired subsequently. This finding has not been challenged before us. We therefore hold that Har Kishen Das as the heir-at-law and legatee of Har Narain Das is entitled to be substituted in place of Har Narain Das and to proceed with the application for determination of mesne profits. We accordingly dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

5. ('84) 10 Cal 324 : 10 I A 150 : 13 C L R 418 : 4 Sar 459 (PC), Isri Dutt v. Mt. Hunsbutti Koerain.

(28) A. I. R. 1941 Oudh 266

BENNETT J.

Sobha Ram — Accused—Applicant

v.

Emperor.

Criminal Refs. Nos. 47 and 48 of 1940, Decided on 7th January 1941, made by Dist. Magistrate, Gonda.

Motor Vehicles Act (1939), S. 132 — U. P. Motor Vehicles Rules (1940), R. 2 (g) — Honorary Special Magistrate has jurisdiction to try offence punishable under the Act.

Rule 2 (g) presumably means that wherever the word "Magistrate" occurs in the rules it must be understood to mean a stipendiary Magistrate. The rules however do not deal with the trial of offences under the Act. The honorary special Magistrate has therefore jurisdiction to try offence punishable under the Act. [P 266 C 2; P 267 C 1]

Government Advocate — for the Crown.

Order.—These are two references by the District Magistrate of Gonda recommending that the conviction of one Sobha Ram in two cases under S. 112, Motor Vehicles Act, read with R. 79 (viii), Motor Vehicles Rules, 1940, be set aside and a re-trial by a stipendiary Magistrate ordered. Sobha Ram was convicted by an Honorary Special Magistrate and an application in revision was filed before the District Magistrate on the ground that only a stipendiary Magistrate is empowered to try cases under the Motor Vehicles Act. This contention was based on the definition of the word "Magistrate" in the rules framed by the Local Government under the Motor Vehicles Act. The District Magistrate accepted the contention, considering that the Honorary Magistrate had no jurisdiction in view of this definition. I am not satisfied that the Honorary Special Magistrate had no jurisdiction. Rule 2 (g), U. P. Motor Vehicles Rules, 1940, merely provides that :

In these rules, unless there is anything repugnant in the subject or context, "Magistrate" means a stipendiary Magistrate.

This presumably means that wherever the word "Magistrate" occurs in the rules it must be understood to mean a stipendiary Magistrate. The rules do not deal with the trial of offences under the Act. Section 132 of the Act provides that no Court inferior to that of a Presidency Magistrate or a Magistrate of the second class shall try any offence punishable under the Act or any rule made thereunder. The mere fact that the offence of which Sobha Ram was convicted in each case was made an offence by Rule 79 (viii), Motor Vehicles Rules, is no reason for holding that the Magistrate trying the

case must be a Magistrate such as is defined in those rules. In my opinion, the definition can only mean that the word "Magistrate" means a stipendiary Magistrate where this word is used in the rules. I am not therefore prepared to accept these references. I reject them and direct the records to be returned.

D.S./R.K. *References rejected.*

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(28) A. I. R. 1941 Oudh 267

BENNETT J.

Gaya Prasad and others—Applicants

v.

Emperor.

Criminal Revn. No. 128 of 1940, Decided on 6th January 1941, against order of Sess. Judge, Barabanki, D/- 18th September 1940.

Penal Code (1860), S. 332—Accused dragging patwari to a house, asking him to make certain entries in his papers and on his refusal beating him—Offence under S. 332 is committed.

A person who drags a patwari to a house, asks him to make certain entries in his official records and beats him on his refusal to do so must be deemed to have intended to prevent or deter the patwari from discharging his duties as a public servant and thereby committed an offence under S. 332. The fact that the patwari had not got his official papers with him at the time he was assaulted makes no difference. [P 268 C 1]

Dr. J. N. Misra — for Applicants.

Government Advocate — for the Crown.

Order. — This is an application in revision against the order of the Sessions Judge of Bara Banki dated 18th September 1940, maintaining with a slight modification in sentence the order of the Special Magistrate convicting the applicants under Ss. 332, 147 and 341, I. P. C., and sentencing them to six months' rigorous imprisonment under S. 332 and fines of Rs. 15 and Rs. 5 respectively under Ss. 147 and 341. The applicants were convicted on the complaint of a patwari named Noor Mohammad made before a Magistrate on 15th September 1939. His story was that on the afternoon of 14th September while he was doing *partal* work, the applicants came and told him that he was required by the mukhia in an adjoining village about a furlong away. The patwari refused to go with them, and they then dragged him to the house of the mukhia Aharwadin. There they demanded that he should make entries in his papers to the effect that a particular grove belonged to the applicant Gaya Prasad. The patwari refused to do this without receiving orders from the Court (that is, the revenue Court). Thereupon he was beaten and kicked by the applicants. A police enquiry followed under the orders of the Magistrate, and the trial commenced in December 1939. A written statement was filed by the applicants on 27th January 1940, in which they denied the charge and alleged that a quarrel had occurred between them and the patwari because the latter had made some disparaging remarks about the sister of one of the applicants. The quarrel had ended in a compromise entered into on the same day, namely the 14th September.

When the patwari was cross-examined on 2nd March 1940, a document, Ex. A-1, purporting to be this compromise, was put to him. He denied that it bore his signature. Two defence witnesses were produced to support it, but they were not believed by the trial Court. The learned Sessions Judge agreed with the view taken by the Magistrate about this document, particularly because it was not produced until 2nd March. There is a further reason for doubting the genuineness of the document, namely, that it does not appear to have been produced before the police who investigated the patwari's complaint. A number of witnesses were produced to support the complaint and the Magistrate believed their evidence in preference to the witnesses produced to support the defence story. The learned Sessions Judge also came to the conclusion that the prosecution story was true. He reduced the sentence of one year's rigorous imprisonment imposed by the Magistrate to six months' rigorous imprisonment.

Three points have been put forward in this revision application. The first is that no offence was committed under S. 332; the second that the finding of the Courts below as regards the compromise was not justified, and that a further enquiry should have been made into the allegations about this compromise: and thirdly it is submitted that the sentence under S. 332 is excessive. With regard to the first point, the Magistrate has observed that the applicants interfered with a Government servant in the discharge of his public duties, and on the facts found by him there can be no doubt that this observation was justified. The question for consideration is whether such interference constitutes an offence under S. 332. An offence under S. 332 is committed when a person voluntarily causes hurt to any person being a public servant in the discharge of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant. It is said on behalf of the

applicants that the patwari had not got his official papers with him at the time when he was assaulted, but I am unable to see that this makes any difference. A duty may be negative as well as positive. It was the patwari's duty not to make entries in his official records under pressure from an interested party which he would not otherwise have made. It appears to me therefore that by interfering with the patwari in this way and by dragging him to the mukhia and beating him, the applicants intended to prevent or deter the patwari from discharging his duties as a public servant. I have not been referred to any authority which would cover the facts of this particular case, but in my opinion there can be doubt that on the facts found an offence was committed under S. 332.

As regards the contention that the lower Courts were not justified in the finding arrived at by them in regard to the compromise, I see no reason to think that the finding was not justified. It is certainly curious that the document was not produced before 2nd March 1940, and if actually it had been executed on 14th September 1939, it is hardly likely that the patwari would have made the complaint which he did make on the following day. There is nothing to indicate why, after putting his signature to such a document, he should have decided to make a complaint. Although the injuries caused to the patwari were not serious, I do not consider the sentence of six months' rigorous imprisonment under S. 332 excessive for an assault on a public servant. I see no reason therefore to interfere and I dismiss this application.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 268

THOMAS C. J.

Debi Singh and others — Accused — Applicants

v.

Emperor through Raj Kumar Singh — Complainant — Opposite Party.

Criminal Revn. Appln. No. 184 of 1940, Decided on 2nd January 1941, to revise order of District Magistrate, Hardoi, D/- 9th August 1940.

Criminal P. C. (1898), S. 439 — Chief Court's practice—Application under S. 439 is not entertained except on special grounds, unless it has previously been made to Sessions Judge having concurrent jurisdiction — Wrong advice by counsel is no "special circumstance" entitling application to Chief Court without previous application to Sessions Court.

The Chief Court is precluded except on special grounds from entertaining an application for revision of the appellate order passed by the District Magistrate by reason of uniform practice of the Court refusing to entertain an application in revision where the applicant has not gone in revision to the Sessions Court which has concurrent jurisdiction. The advice given by the counsel that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicant to file the application in the Chief Court in the first instance: 1937 O W N 1044; AIR 1933 All 283; A I R 1927 All 829; A I R 1927 All 834 and 10 O W N 733, *Rel. on.* [P 268 C 2; P 269 C 1]

Akhlaque Husain — for Applicants.
Har Narain Das — for Opposite Party (Raj Kumar Singh).

Order. — This is an application in revision against an appellate order of the learned District Magistrate of Hardoi dated 9th August 1940 upholding the conviction of the applicants. The applicants were convicted by a Bench of Honorary Magistrates, second class, Hardoi, under S. 379, I. P. C., and sentenced to a fine of Rupees 20 each. They appealed against their conviction to the learned District Magistrate of Hardoi who dismissed it on 9th August 1940, but reduced the sentence to a fine of Rs. 10 each. The application for revision in this Court was filed on 14th October 1940. A preliminary objection has been taken by the learned counsel for the opposite side that this Court is precluded from entertaining the present application by reason of the uniform practice prevailing in this Court refusing to entertain an application in revision where the applicants have not gone in revision to the Court of Session, which has concurrent jurisdiction. In support of his contention the learned counsel has relied on a decision of mine reported in 1937 O W N 1044[1] and also on the decisions of the Allahabad High Court reported in 55 ALL 261,[2] AIR 1927 ALL 829[3] and AIR 1927 ALL 834.[4] These decisions undoubtedly support the objection raised by the learned counsel for the opposite party. On the other hand the learned counsel on behalf of the applicants has relied on the following decisions: 41 ALL 587,[5] 54 ALL 331[6]

1. ('37) 1937 O W N 1044: 171 I C 167: 38 Cr L J 1024, Raja Ram v. Emperor.
2. ('33) 20 A I R 1933 All 283 : 145 I C 726 : 34 Cr L J 1048: 55 All 261: 1933 A L J 119, Emperor v. Muhammad Hashim.
3. ('27) 14 A I R 1927 All 829 : 102 I C 352 : 28 Cr L J 544, Nathe Singh v. Emperor.
4. ('27) 14 A I R 1927 All 834 : 101 I C 603 : 28 Cr L J 475, Sukhraj Singh v. Emperor.
5. ('19) 6 AIR 1919 All 258: 50 I C 827: 20 Cr L J 347: 41 All 587: 17 A L J 800, Emperor v. Mansur.
6. ('32) 19 A I R 1932 All 125 : 137 I C 686 : 33 Cr L J 528 : 54 All 331 : 1932 A L J 39, Emperor v. Balkrishna Sharma.

and 50 Cal 423.[7] Kendall J. in the cases reported in A I R 1927 ALL 829[3] and A I R 1927 ALL 834[4] refused to entertain an application because the applicant had not gone in revision to the Sessions Judge even though there had been an appeal to the District Magistrate. It is not necessary for me to discuss the cases of other High Courts in a case like this when the uniform practice of this Court is not to entertain an application in revision where the applicant has not gone in revision to the Sessions Judge. In 10 O W N 733[8] Raza J. held that

the Oudh Chief Court is precluded from entertaining an application for revision by reason of the practice of the Court refusing to entertain an application in revision where the applicant has not gone in revision either to the Sessions Judge or to the District Magistrate.

In the case reported in 1937 O W N 1044,[1] I observed that "no special grounds were shown to me for entertaining the application for revision." In the present case, the applicant, Debi Singh, has to-day filed an affidavit in which it is stated that after the dismissal of the appeal by the District Magistrate he was informed by his counsel that the application for revision of the District Magistrate's order would lie in the Chief Court and that there was no limitation for filing such an applicatibn. I do not for a moment think that the counsel would have told Debi Singh that "there was no limitation for filing such an application," but in any case I am of opinion that the advice given by the counsel to Debi Singh that the application for revision would lie in the Chief Court is not "a special circumstance" which would entitle the applicants to file the application in this Court. The objects of laying down the rule that an application in revision to the lower Court is an essential step in the procedure, are to prevent the time of the High Court from being wasted by frivolous applications and to obtain an expression of opinion by a Court of superior jurisdiction such as that of the Sessions Judge in case the matter should eventually come before the High Court. I am therefore of opinion that I am precluded from entertaining the present application and I dismiss it.

N.K./R.K. *Application dismissed.*

7. ('23) 10 A I R 1923 Cal 674 : 77 I C 990 : 25 Cr L J 526 : 50 Cal 423, Abdul Matlab v. Nanda Lal.
8. ('33) 10 O W N 733 : 147 I C 797 : 35 Cr L J 475, Ajudhia Singh v. Emperor.

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(28) A. I. R. 1941 Oudh 269

GHULAM HASAN AND AGARWAL JJ.

Abdul Aziz and others — Appellants

v.

Nawab Khan and others—Respondents.

First Appeal No. 121 of 1940, Decided on 28th January 1941, against the order of Special Judge, first grade, Unao, D/- 17th July 1940.

Court-fees Act (1870), Sch. 1, Art. 1 and Sch. 2, Art. 11 or Art. 17—Appeal though purporting to be against order amending decree, in substance one against amended decree under S. 14 (5), U. P. Encumbered Estates Act—Sch. 1. Art. 1 applies and ad valorem court-fee is payable.

In an appeal which merely purports to be an appeal against the order amending decree but is really directed against the amended decree passed by the Special Judge under S. 14, U. P. Encumbered Estates Act, the memorandum of appeal cannot come under the descriptions in Art. 11 or Art. 17, Sch. 2 and therefore it must come under the description in Art. 1 of Sch. 1 of the Act, the court-fee payable consequently being ad valorem : AIR 1937 Oudh 501 ; AIR 1938 Oudh 86 and AIR 1938 All 97 (F B), *Rel. on;* AIR 1934 All 100; AIR 1933 Rang 264 and AIR 1941 Oudh 60, *Disting.*

[P 270 C 1; P 271 C 1]

Nasir Ullah Beg — for Appellants.

Order. — This is an office report in First Civil Appeal No. 121 of 1940 to the effect that the appellants must pay ad valorem court-fee on Rs. 6035, which is the amount of the amended decree after deducting Rs. 1365, the amount of the original decree passed by the learned Special Judge under S. 14, Encumbered Estates Act, against the appellants. The office reports that the order appealed against is a decree and not an order incapable of execution and not having the force of a decree. The memorandum of appeal is directed against an order dated 17th July 1940, amending the decree in Encumbered Estates Act, Suit No. 46 of 1936 passed by the Special Judge, first class, Unao. The valuation of the appeal is stated to be Rs. 6035 and the court-fee of only Rs. 3 has been paid. Ad valorem court-fee on Rs. 6035 is Rs. 477-8-0. Consequently, there is a deficiency of Rs. 474-8-0 in court-fee. The facts are that originally the learned Special Judge passed a decree for Rs. 1365 with future interest and proportionate costs against the appellants on 14th December 1939. The creditors thereafter applied to the Court for the amendment of the decree in view of the explanation, which has been added to sub-s. (5) of S. 14, U. P. Encumbered Estates Act. The learned Special Judge ordered as follows :

In the result the decree in case No. 3 relating to Ex. D-5 (mortgage) is amended and in place of the decree for Rs. 1365 I decree the claim on basis of Ex. D-5 for Rs. 7400 with proportionate costs and

future interest at 4½ per cent. per annum from date of application.

A decree was prepared in pursuance of the above judgment. The appellants' counsel has filed the copy of the judgment as well as the copy of the amended decree along with the memorandum of appeal. In appeal the amended decree for Rs. 7400 minus Rs. 1365, the amount of the original decree, has been challenged. Upon these facts, it appears to us that the appeal in substance is really directed against the amended decree passed by the learned Special Judge though the memorandum of appeal merely purports to appeal against the order amending the decree. We have no doubt whatever that the object of the appeal is to get rid of the amended decree which involves the setting aside of the decree for Rs. 6035 passed by the learned Special Judge. The case, therefore, in our opinion, clearly falls under Art. 1 of Sch. I, Court-fees Act. It has been held in 1937 O W N 890[1] that where in an appeal against a simple money decree passed by a Special Judge under S. 14 (7), U. P. Encumbered Estates Act, the appellants want a reduction in the amount of interest decreed by the lower Court, the appeal is governed by Art. 1 of Sch. I, Court-fees Act, and court-fee must be paid ad valorem on the amount of interest disputed by the appellants.

A similar view has been taken in 1938 O W N 135[2] where it was held that having regard to the definition of 'decree' contained in Civil Procedure Code and to the provisions of S. 14 (7), U. P. Encumbered Estates Act, the decision of the Special Judge is a decree though the amount that may be due to the opposite party yet remains to be fixed and hence ad valorem court-fee is payable in an appeal against such order. A similar view has been taken in a Full Bench decision of the Allahabad High Court in 1938 O W N 88,[3] where it was held that in an appeal against a decree passed by the Special Judge under S. 14, U. P. Encumbered Estates Act, the memorandum of appeal cannot come under the descriptions in Art. 11 or Art. 17, Sch. II, Court-fees Act, 1870, and therefore it must come under the description in Art. 1 of Sch. I of the Act, the court-fee payable, consequently, being ad valorem.

Learned counsel for the appellants concedes that the object of the appeal is no doubt to obtain a cancellation of the amended decree for Rs. 6035 in an indirect way, but argues that his appeal is only directed against the order passed by the learned Special Judge and not against the decree and as such the court-fee paid is sufficient. In support of his contention he relies on A I R 1934 ALL 100[4] and A I R 1933 Rang 264.[5] Neither of these two cases has any bearing upon the present case. In the former case an order had been passed by the lower Court under S. 152, Civil P. C., amending the plaint and the preliminary decree and correcting the misdescription of the property, which had crept in the plaint and in the decree. A revision was filed against the said order. A preliminary objection was raised on behalf of the respondents that as an appeal lay against the amended decree no revision was entertainable. It was held that the revision was not directed against the amended decree but against the order. No question whatever about court-fee was involved in the case. In the latter case, it was held that a decision given under S. 152, Civil P. C., granting an application for amendment of a decree is an order and not a decree and hence an application to set aside such an order is governed by Art. 181 and not Art. 164, Limitation Act. The question in that case arose in connexion with the point of limitation and had no reference whatever to the question of court-fee. Apart from this, both the above cases are distinguishable from the facts of the present case. In the present case an amended decree has actually been passed and the result of allowing the appeal would be to set aside the amended decree. There is no doubt that the decree passed by the Special Judge is under the provisions of S. 14, U. P. Encumbered Estates Act, wherein it is specifically stated that such a decree shall be deemed to be a decree of a civil Court of competent jurisdiction.

Reference has also been made on behalf of the appellants to a decision of this Court in 1940 O W N 862.[6] That case in our opinion is inapplicable. That was a case of miscellaneous appeal under S. 45, U. P. Encumbered Estates Act, against the decision of two issues framed in the creditor's claim under S. 14 of the Act. Under S. 45 as it then stood

1. ('37) 24 AIR 1937 Oudh 501 : 171 I C 78 : 1937 O W N 890, Baijnath Singh v. Tulshi Ram.
2. ('38) 25 AIR 1938 Oudh 86 : 172 I C 941 : 1938 O W N 135, Jagat Jit Singh v. Munnoo Bibi.
3. ('38) 25 AIR 1938 All 97 : 173 I C 853 : I L R (1938) All 230 : 1937 A L J 1373 : 1938 O W N 88 (FB), Jagdish Pratap v. Udai Pratap.
4. ('34) 21 A I R 1934 All 100 : 147 I C 633, Shujaatmand Khan v. Govind Behari.
5. ('33) 20 A I R 1933 Rang 264 : 145 I C 823, Lawrence v. Dewan Singh.
6. ('41) 28 A I R 1941 Oudh 60 : 190 I C 814 : 1940 OWN 862, Rameshwar Bakhsh v. Govind Prasad.

an appeal could be brought against "any decision, decree or order" of a Special Judge. The word "decision" was, however, deleted and after the words "or order" the words "finally disposing of the case" were inserted by the U. P. Encumbered Estates (Amendment) Act 11 of 1939 in both sub-ss. (1) and (2) to S. 45 of the Act. There was no decree in that case passed by the Special Judge and it was held that the appeal, being an appeal against a decision under S. 14, U. P. Encumbered Estates Act, fell within the scope of Art. 11 of Sch. 2, Court-fees Act, and a court-fee of Rs. 3 was sufficient. In the present case we hold that the appeal is to all intents and purposes against the amended decree passed by the Special Judge and consequently an ad valorem court-fee is payable. We accept the office report and direct that the appellants shall pay the deficiency of Rs. 474-8-0 within six weeks from to-day.

N.K./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Oudh 271

BENNETT J.

Pt. Pratap Narain and others —
Accused — Applicants
v.
Pt. Ram Kumar and others —
Complainant — Opposite Party.

Criminal Ref. No. 38 of 1940, Decided on 21st November 1940; reference made by Sess. Judge, Fyzabad, D/- 28th September 1940.

Criminal P. C. (1898), S. 139A—S. 139A does not contemplate merely that there shall be examination of such evidence as may be adduced by parties—Magistrate should call for such further evidence, if any, as may appear necessary.

When provision is made for an enquiry by a Magistrate it is not contemplated merely that there shall be an examination of such evidence as may be adduced by the parties. A Magistrate is expected to exercise his common sense and call for such further evidence, if any, as may appear necessary.: A I R 1929 All 220, *Expl.* [P 272 C 2]

Mahabir Prasad—for Applicants.

Hargovind Dayal—for Opposite Party.

Order.—This is a reference by the learned Sessions Judge of Fyzabad recommending that the order of a Magistrate making his order under S. 133, Criminal P. C., absolute be set aside and "the case be remanded to the Court below for final enquiry according to law." It appears that an application was made on 20th September 1939 by Ram Kumar and others under Ss. 133 and 107, Criminal P. C., against Pratap Narain and others to the effect that they were obstructing a public way. The Sub-divisional Magistrate before whom the application was preferred sent it to the Tahsildar for enquiry and report. A written statement and documents were filed before the Tahsildar and the latter after enquiry submitted a report to the Sub-divisional Magistrate on 30th October 1939, to the effect that the plot through which the alleged path passes was recorded as "banjar qabil zaraet" and that there was no record to show that there was ever a public way. He recommended that the papers be filed. A further application was then made by Ram Kumar to the Sub-divisional Magistrate, requesting the latter to make a local inspection. A local inspection was made by the Magistrate on 30th November, when he recorded a somewhat brief inspection note to the effect that it appeared from his inspection that the path was a public way by which people went to and from certain places. He then issued notice to the opposite party, (that is, the present applicants) under S. 133. On 18th December, they asked that the written statement and documents filed before the Tahsildar might be considered to have been filed in the present suit before the Sub-divisional Magistrate. This was allowed. Thereafter the Sub-divisional Magistrate recorded oral evidence produced by the parties, this consisting of four witnesses on each side, and passed an order on 17th May 1940, to the effect that he was satisfied by this evidence that the plot was a public pathway, and he accordingly directed the opposite party (Pratap Narain etc.) to remove the obstruction of which the applicants (Ram Kumar etc.) had complained.

There is no reference either in the Magistrate's order or elsewhere on the record to the provisions of S. 139A, Criminal P. C. This section provides that where an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of any way, the Magistrate shall on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, and if he does so, the Magistrate shall, before proceeding under S. 137 or S. 138, inquire into the matter. If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down under S. 137 or S. 138 as the case may require. The learned Sessions Judge has referred the case to this Court on the application of Pratap

Narain etc., considering that the Magistrate acted illegally in proceeding under S. 137 without first proceeding under S. 139A. The Magistrate submitted an explanation in which he states that when the opposite party (Pratap Narain etc.) first appeared in his Court they adopted the written statement already filed by them and relied upon the documents filed therewith. He went through their evidence and was convinced that there was no substantial and reliable evidence in support of their denial of the right of public way. As a result of this, he deemed it incumbent to proceed under S. 137. In order to avoid duplication of procedure, he did not record any formal order under S. 139A that the documentary evidence relied upon by Pratap Narain was not substantial.

It is clear from this explanation that the oral evidence which was recorded by the Magistrate and which is on the record was recorded under the provisions of S. 137, and not under the provisions of S. 139A. It further appears that the Magistrate did not take any evidence in the proceedings which he appears to consider were proceedings under S. 139A. He merely examined the written statement and the documents filed with it. In their written statement, Pratap Narain etc., denied the existence of a public way, and the documents which they filed showed that there was no record of the existence of any such public right of way. Consequently, it does not appear that the Magistrate had very much to go upon in coming to a finding under S. 139A adverse to them. In any case it appears to me to be impossible to hold that these proceedings amounted to an enquiry under S. 139A. Learned counsel for the complainants has referred to a ruling of the Allahabad High Court in A I R 1929 ALL 220[1] in which it was held that a Magistrate has absolute discretion as to how far he will go or upon what materials he will act in considering whether the person proceeded against seems likely to have such a case in support of his denial as may make it seem unfitting for the criminal Court to proceed. In this case the Allahabad High Court was of opinion that it had not been shown that the Magistrate had not made the enquiry prescribed by S. 139A. At the same time it was observed that the enquiry referred to under S. 139A is clearly something to be kept quite distinct from the formal enquiry which may have to be held later under S. 137 if the Magistrate finds that there is no prima facie reliable evidence in support of the denial of the existence of any public way. Further, it was observed by the single Judge who decided the case that he did not think that he would be justified in interfering on the ground that the Magistrate had not held any enquiry under S. 139A. Even if he did not hold such an enquiry, no objection had been taken by the opposite party to the enquiry which proceeded under S. 137, and the Magistrate had found as the result of an enquiry much more searching than it was incumbent on him to have held under S. 139A, that there was in fact no reliable evidence in support of the denial.

I have considered the latter observation with special reference to the facts of the present case. As I have mentioned, evidence was produced by Pratap Narain, etc. to show that there is no entry in the records of a public right of way, and whatever the value of this negative evidence may be it must be taken into consideration as it was taken into consideration by the Tahsildar who held the initial enquiry. Secondly, it appears from the sketch map on the record that there is a pucca road to the north of plot No. 439/1, (corresponding now to No. 516), the plot of Pratap Narain, etc. through which the path in question is said to pass, and that the path joins this pucca road. It also appears that there are other plots to the south and south-west of this plot, which belong to other persons who are presumably interested in the question whether a public path passes through their plots. I understand that according to the allegations of the complainants the same path passes through these plots also. It does not appear whether these other persons admit or not that there is a public right of way through their plots. When provision is made for an enquiry by a Magistrate it is not contemplated merely that there shall be an examination of such evidence as may be adduced by the parties: a Magistrate is expected to exercise his common sense and call for such further evidence, if any, as may appear necessary. In this particular case, it would appear to be advisable to ascertain the attitude of these other persons who presumably are also interested in the question and who may be affected by the orders passed. In any event it appears to me to be impossible to hold that a proper enquiry was held by the Magistrate under S. 139A. I accordingly accept this reference, set aside the order

1. ('29) 16 A I R 1929 All 220 : 116 I C 786 : 30 Cr L J 670 : 1929 A L J 385, Manohar Singh v. Emperor.

passed by the Magistrate, and direct that an enquiry be made in the first instance under the provisions of S. 139A by such other Magistrate as the District Magistrate may direct, orders being passed thereafter by the Magistrate according to his finding under this section.

D.S./R.K. *Reference accepted.*

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(28) A. I. R. 1941 Oudh 273

FULL BENCH

YORKE, BENNETT AND GHULAM HASAN JJ.

Mahant Hari Saran Das — Plaintiff — Appellant

v.

Dhani Ram and others — Defendants Respondents.

Second Rent Appeal No. 37 of 1937, Decided on 5th March 1941, against order of the Dist. Judge, Unao, D/- 3rd February 1937.

(a) U. P. Stayed Arrears of Rent (Remissions) Act (18 of 1939), S. 3—Act is not ultra vires.

The U. P. Stayed Arrears of Rent (Remissions) Act, 18 of 1939, is not ultra vires of the Provincial Legislature : A I R 1941 F C 16, *Rel. on.* [P 274 C 2]

(b) U. P. Stay of Proceedings (Revenue Courts) Act (4 of 1937), S. 2 — Word "applications" in S. 2 so far as Oudh Rent Act is concerned refers to applications relating to ejectment—Effect of first proviso to S. 2 stated.

The word 'applications' in S. 2 only refers to applications in connexion with ejectment. It clearly does not refer to applications in execution cases. The effect of the first proviso to S. 2 is that the section does not apply to suits in respect of rents for Rabi 1344F., or subsequent years. It follows that S. 2 operates to stay all proceedings in suits and execution of decrees in respect of all instalments prior to Rabi 1344F. [P 274 C 2]

(c) U. P. Stayed Arrears of Rent (Remissions) Act (18 of 1939), S. 3 — Scope and effect of S. 3 stated—Appeal in suit for recovery of arrears of rent prior to Rabi 1344F., stayed under S. 2, U. P. Stay of Proceedings (Revenue Courts) Act, 4 of 1937—Appeal is liable to dismissal by reason of S. 3 of Act 18 of 1939.

Section 3 of Act 18 of 1939 operates to dismiss all suits for arrears of rent stayed under Act 4 of 1937 or which, if instituted, would have been stayed, that is to say, all suits for arrears of rent prior to Rabi 1344F. It also operates to dismiss all applications for the recovery of arrears of rent that is so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalment for Rabi 1344F. Therefore although the U. P. Stay of Proceedings (Revenue Courts) Act does not prohibit in express terms the prosecution of an appeal in a suit relating to arrears of rent prior to Rabi 1344F., it is rendered infructuous by the U. P. Stayed Arrears of Rent (Remissions) Act and therefore is liable to dismissal inasmuch as even should the appeal be allowed to proceed and the plaintiff-appellant be successful in his appeal he will be unable to institute or prosecute any application for execution of his decree. [P 275 C 2 ; P 276 C 1]

(d) U. P. Stay of Proceedings (Revenue Courts) Act (4 of 1937), S. 2 — Suits stayed by Act are automatically stayed without Court's order : 1941 O W N 262=A I R 1941 Oudh 257=193 I C 150, *OVERRULED.*

All suits provided by the Act to be stayed are stayed automatically, and no order of the Court is necessary : 1941 O W N 262=A I R 1941 Oudh 257=193 I C 150, *OVERRULED.* [P 276 C 1]

B. P. Misra — for Appellant.

S. N. Srivastava — for Respondents 2 and 3.

Judgment. — This is a Full Bench reference on a point of law made by a Bench of this Court to which Second Rent Appeal No. 37 of 1937 was referred by the Hon'ble Chief Judge sitting singly for decision under S. 14 (2), Oudh Courts Act. The matter arises out of a suit under the provisions of S. 108 (2), Oudh Rent Act, for arrears of rent for Rabi 1340 to 1343F. The defendants pleaded payment and claimed certain remissions. This defence was upheld by the trial Court, which on 26th October 1936, decreed the plaintiff's claim for only Rs. 14.2.0 out of Rs. 158 and odd. The plaintiff went in appeal to the District Judge. On 3rd February 1937, the District Judge upheld the trial Court's decision in the matter of remissions, but held that the plea of payment had not been substantiated and he, therefore, decreed the claim for a considerably larger sum than that decreed by the trial Court.

In a second appeal before the Hon'ble Chief Judge, it was contended that the appeal was liable to dismissal under the provisions of S. 3, U. P. Stayed Arrears of Rent (Remission) Act, 18 of 1939. The appeal was instituted in this Court on 4th May 1937, and during the subsistence of the U. P. Stay of Proceedings (Revenue Courts) Act, 4 of 1937, the appeal was treated as stayed. The contention put forward before the Bench on behalf of the respondents was that the effect of S. 2 of that Act was to stay the appeal, and that in consequence the effect of the provisions of S. 3 of Act 18 of 1939 was to dismiss the suit in toto. For the opposite party it was contended that the sections did not have this effect and that Act 4 of 1937 did not affect appeals but only suits and those proceedings (in execution) which are specifically mentioned in the section, and in consequence S. 3 of Act 18 of 1939 could not operate to bring about a dismissal of the suit in toto. It was further contended that in

any case Act 18 of 1939 was ultra vires of the Provincial Legislature. The following two questions of law were therefore referred for decision to this Full Bench, namely :

(1) Whether in the circumstances of the present case the appeal filed by the plaintiff-appellant is liable to dismissal in view of the provisions of S. 3, U. P. Act 18 of 1939 read with S. 2, U. P. Act 4 of 1937 ? (2) Whether the U. P. Act 18 of 1939 is or is not ultra vires of the Provincial Legislature?

As regards the second of the two questions raised, no arguments have been addressed to us, it being conceded that in the light of a decision of the Federal Court reported in 1941 O A 159[1] there can be no room for doubt as to the powers of the Provincial Legislature to legislate on the subject. We may quote from the headnote of this decision in this connexion. It runs as follows:

Per *Gwyer C. J.*:

The general descriptive words in item 21, List II of Sch. 7 to Government of India Act include the collection of rents; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Legislation with respect to the remission of rents is legislation with respect to a matter included in item 21. The U. P. Regularization of Remissions Act, 1938, is an Act with respect to the remission of rent and it was within the competence of the U. P. Legislature to enact it.

Per *Varadachariar J.*:

The U. P. Regularization of Remissions Act, 1938, intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Government, and was intra vires of the U. P. Legislature.

Per *Sulaiman J.*:

When the question is whether any impugned Act is within any of the three lists or in none at all, it is the duty of Courts to consider the Act as a whole and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation. In pith and substance the U. P. Regularization of Remissions Act is an Act not only with respect to 'the relation of landlord and tenant' or 'the collection of rents', but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands.

It may be said that in pith and substance Act 18 of 1939 relates to depriving the landholders of their rights to collect arrears of rent relating to all the years prior to Rabi 1344 F. We can see no ground on which it can be held, if the United Provinces Regularization of Remissions Act, 1938, is not ultra vires, that none the less Act 18 of 1939 is ultra vires of the Provincial Legislature. We would therefore answer this question by saying that in our opinion the U. P. Stayed Arrears of Rent (Remission) Act, 18 of 1939, is not ultra vires of the Provincial Legislature. As regards the first question, the first point for consideration is whether the words "proceedings in suits" in S. 2, U. P. Stay of Proceedings (Revenue Courts Act), 4 of 1937, include appeals. This section runs as follows :

Notwithstanding anything contained in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or the Code of Civil Procedure, 1908, all proceedings in suits and applications of the classes specified in the schedule to this Act, pending on the date when this Act comes into force (25th September 1937), or instituted during the period this section remains in force, shall be stayed for such period as this section shall remain in force, all attachments of moveable property made in connexion with such suits and applications shall be withdrawn, all judgment-debtors detained in prison in execution of decrees and orders passed in such suits and applications shall be released, and all sales of immovable property in connexion with such suits and applications shall be stayed.

Suits and applications under the Oudh Rent Act referred to in the schedule of this Act are suits and applications under Ss. 52, 53A, 54, 60 (1), 61 (1), 62 (1), 62A (1) and 108, sub-ss. (2) (with some exceptions), (3), (3a), (4), (5a) and (8). Matters which fall under S. 108 are suits, while the rest relate almost entirely to ejectment. So far as the Oudh Rent Act is concerned, the word 'applications' could only refer to applications in connexion with ejectment. It clearly does not refer to applications in execution cases. Those are dealt with separately under the references to attachments of moveable property, detention of judgment-debtors in prison and sales of immovable property made in connexion with 'such' suits, that is suits of the classes specified in the schedule. Section 2 has three provisos, and roughly speaking it may be said that the effect of proviso 1 is that the section does not apply to suits in respect of rents for Rabi 1344 F., or subsequent years. It follows that the section operates to stay all proceedings in suits and execution of decrees in respect of all instalments prior to Rabi 1344 F. It would seem that unless the words 'proceedings in suits' are sufficiently comprehensive to cover appeals, the section as it stands does not interfere with the disposal of appeals arising out of decrees in suits of the classes specified in the schedule.

On behalf of the respondent, contending that the appeal has been stayed under Act 4 of 1937 (and must therefore fail on account

1. ('41) 28 A I R 1941 F C 16 : 192 I C 138 : 1941 O A 159, United Provinces v. Mt. Atiqa Begam.

of the provisions of the subsequent Act), reference has been made to some cases in which it has been held that "suits" include appeals. It is pointed out that it has been held in connexion with S. 10, Civil P. C., that the word "suits" includes "appeals." Section 10, Civil P. C., provides that

> no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties . . . .

It has been held that where there has been a previously instituted suit and that suit is pending disposal even in second appeal, an application for stay under S. 10, Civil P. C., may be made, that is, the word "suit" has not been interpreted strictly as referring only to a suit in the course of its trial in the original Court. We do not think that any very sound inference can be drawn from the wider meaning of the word "suit" in this particular instance because, obviously, the decision in such a suit, if that suit were not treated as still pending while it was in the course of appeal, would have to operate as res judicata for a subsequent suit and thus be equally a bar to the trial of the same matter in the subsequent suit. In this connexion reference has been made to a case reported in A I R 1923 Cal 716[2] where, according to the headnote, it was held that "suits" in S. 10 include 'appeals,' but that the section is not applicable where the suits are for distinct and different debts. In that case Rankin J. remarked :

> I think that the reference at the end of the section to 'His Majesty in Council' shows that for this purpose 'suits' include appeals.

The learned Judge, however, went on to hold that S. 10 had no application to that case so that the remark was in a sense obiter. In the same way however and for the same reasons it has been held in a decision of the Chief Court of Sind reported in A I R 1939 sind 329[3] that in S. 10, which is closely connected with S. 11, 'suits' must include appeals, but the foundation for this view is that the section itself refers to suits pending before His Majesty in Council and such suits could not be other than appeals. It does not appear to us in any way to follow that because for the purposes of S. 10, Civil P. C., 'suits' include appeals, the words 'proceedings in suits' in S. 2, U. P. Stay of Proceedings (Revenue Courts) Act, 4 of 1937, also include appeals. Prima facie, there are two grounds on which it can be argued that these words 'proceedings in suits' in S. 2 of Act 4 of 1937 do not include appeals. First this is a special Act depriving plaintiffs in suits, both pending and decreed, of their legal rights under the ordinary law of the land and it may be said that the expressions used in such an Act must be construed strictly. Secondly, it is to be noticed that the Legislature was not content to rely on the words "all proceedings in suits" as wide enough to cover proceedings in execution, and it has gone on to define separately those proceedings subsequent to decrees in suits of the classes mentioned, which were to be stayed during the period while the section remained in force. Coming to S. 3 of Act 18 of 1939, we have to note that the wording of this section differs very considerably from the wording of S. 2 of Act 4 of 1937. This section provides that :

> Notwithstanding anything contained in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or any other Act for the time being in force, but subject to the provisions of S. 5 (which section excludes from the application of the Act tenants liable to pay more than Rs. 500 as rent per annum, or assessed to income-tax in the year 1937 or to a local rate in excess of Rs. 25 in the year 1344 F) all suits or applications for the recovery of arrears of rent which have been stayed under the provisions of the U. P. Stay of Proceedings (Revenue Courts) Act, 4 of 1937, shall be dismissed and no Court shall entertain any suit or application for the recovery of arrears of rent which, if instituted or made during the period in which the U. P. Stay of Proceedings (Revenue Courts) Act, 4 of 1937, is in force, would have been stayed under the provisions of that Act.

This section does not affect suits for ejectment possibly because nothing of the kind was necessary in view of the provisions of the U. P. Tenancy Act. It operates to dismiss all suits for arrears of rent stayed under Act 4 of 1937 or which, if instituted, would have been stayed, that is to say, all suits for arrears of rent prior to Rabi 1344 F. It also operates to dismiss all applications for the recovery of arrears of rent that is so far as the Oudh Rent Act is concerned, all applications for execution of decrees for arrears of rent already instituted or which might have been instituted relating to the same instalments prior to the instalment for Rabi 1344 F. As regards this only the first of the two arguments available with reference to Act 4 can be adduced for favour of a strict interpretation of the word "suits." In this connexion we are unable to accede to the argument which found favour with Agar-

2. ('23) 10 AIR 1923 Cal 716 : 75 I C 231 : 27 C W N 772, Jamini Nath v. Midnapur Zamindary Co.

3. ('39) 26 AIR 1939 Sind 329 : 186 I C 533 : ILR (1940) Kar 15, Badaldas Jethmal Firm v. Gurdinomal Narumal Firm.

wal J. in a case reported in 1941 O A 218.[4] In that case it was held that

under S. 3 of Act 18 of 1939 only those suits or applications will be dismissed which have been stayed under the provisions of Act 4 of 1937,

and that as those particular suits or appeals had never been stayed by any order of the Court they were not affected by S. 3 of Act 18 of 1939. We are of opinion that where it is provided by the Act that all suits shall be stayed, all such suits are stayed automatically, and no order of the Court is necessary. On the other hand the effect of this section seems to us to be such that the question put must be answered affirmatively and the appeal held liable to dismissal. The suit relates to arrears of rent for the years Rabi 1340 to 1343 F. and even should the appeal be allowed to proceed and the plaintiff-appellant be successful in his appeal the position will arise, in view of the provisions of these two Acts and particularly of Act 18 of 1939, he will be unable to institute or prosecute any application for execution of his decree, since that decree relates to arrears of rent and to instalments prior to Rabi 1344 F. All suits and proceedings in execution by attachment of moveable property and arrest of judgment-debtors as well as sales of immovable property in respect of such instalments of arrears of rent were stayed and have been dismissed and can no longer be instituted. It follows that although in express terms the prosecution of such an appeal has not been prohibited by the earlier Act, by the later Act it is rendered infructuous and by implication therefore is to be taken to be liable to dismissal. Our answer to the first question is therefore that the appeal is liable to dismissal.

G.N./R.K. *Answer accordingly.*

4. ('41) 28 A I R 1941 Oudh 257 : 193 I C 150 : 1941 O W N 262 : 1941 O A 218, Daya Shankar v. Badri Prasad.

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(28) A. I. R. 1941 Oudh 276

AGARWAL J.

Ram Sagar — Plaintiff — Applicant

v.

Ram Nath and another — Defendants — Opposite Party.

Application No. 57 of 1939, Decided on 10th December 1940, against judgment and decree of Munsif (as Judge of Small Cause Court), Dalmau at Rae Bareli, D/- 5th May 1939.

(a) Limitation Act (1908), S. 14 — Applicability — Collector under U. P. Village Panchayat Act, S. 71 (1) (a) cancelling jurisdiction of panchayat — Not S. 14 but S. 71 (2), U. P. Panchayat Act, applies.

Where the Collector passed an order under S. 71 (1) (a), Panchayat Act, cancelling the jurisdiction of the panchayat to entertain a suit on a promissory note and then a suit is filed, but after the period of limitation, the delay cannot be excused under S. 14, Limitation Act, there being a special provision in the Panchayat Act : A I R 1927 All 181, *Foll.* [P 276 C 2]

(b) Limitation Act (1908), S. 29 — Applicability — S. 29 applies only when special or local law prescribes period of limitation.

Section 29 is applicable when the special or local law prescribes a period of limitation for any suit. It does not apply when there is no period of limitation prescribed by the Local Act. [P 277 C 1]

D. N. Bhattacharji — for Applicant.

Siraj Husain and Ganesh Prasad — for Opposite Party.

Judgment.—This is an application under S. 25, Provincial Small Cause Courts Act, against the judgment and decree of the Munsif of Dalmau exercising Small Cause Court powers. The applicant brought a suit on a promissory note dated 26th February 1936, on 10th February 1939, before a village panchayat. The Collector acting under S. 71 (1) (a), U. P. Village Panchayat Act, cancelled the jurisdiction of the panchayat on 16th February 1939. The applicant filed his suit again on 30th March 1939. His contention was that he came to know of the Collector's order only on 24th March 1939, and had no knowledge of the proceedings in his Court. The Small Cause Court dismissed the suit on the ground that it was barred by limitation even if the period between 10th February and 16th February 1939 be excluded. The suit is prima facie barred by time. The applicant relies on S. 14, Limitation Act. There is a special provision in S. 71, cl. (2), Panchayat Act, that when an order has been passed by the Collector under sub-s. (1) in respect of any suit, the plaintiff may institute a suit for the same relief in the civil Court and the period from the date of the institution of the suit before the panchayat to the date of such order shall be excluded in computing the period of limitation for the fresh suit. I think there being a special provision in the Local Act, S. 14, Limitation Act, will not apply. Lindsay J. observed in A I R 1927 ALL 181[1] that S. 14, Limitation Act, could not be applied because S. 71, sub-s. (2), Village Panchayat Act, provided a special rule of limitation which must derogate from the provisions of the general rule embodied in S. 14, Limitation Act. The

1. ('27) 14 A I R 1927 All 181 : 98 I C 1050, Firm Ram Lochan Ram Lachhmi Prasad v. Jagat Narain.

learned counsel for the applicant has relied on S. 29, Limitation Act. It is applicable when the special or local law prescribes a period of limitation for any suit. Here no period of limitation has been prescribed by the Panchayat Act. I think this section is not applicable. It is true that there is some hardship on the plaintiff but I cannot override the provisions of law owing to it. I see no force in this application and reject it with costs.

N.K./R.K. *Application rejected.*

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(28) A. I. R. 1941 Oudh 277

GHULAM HASAN J.

Dr. Mrs. Elsie C. Griffin Edward — Decree-holder — Applicant

v.

William Ainslie Cannon Howard, Judgment-debtor and another, rival-decree-holder — Opposite Party.

Civil Revn. Appln. No. 98 of 1940, Decided on 18th December 1940, from order of First Addl. Judge of Small Cause Court, Lucknow, D/- 7th September 1940.

(a) Civil P. C. (1908), Ss. 63 and 73—Decree by *L* against *W* from Additional Judge, Small Causes — *L* applying for execution by attachment of *W's* salary—Decree by *E* against same judgment-debtor in Court of Small Causes — Application by *E* for attachment of *W's* salary under O. 21, R. 48—Subsequent application by *E* under Ss. 63 and 73—*E* held entitled to rateable distribution from date of application for execution and not from date of application under Ss. 63 and 73.

One *L* obtained from the Court of the Additional Judge, Small Causes, a decree against *W* and applied on 31st August 1939, before the Additional Judge, Small Cause Court, for execution of his decree by attachment of the salary of the judgment-debtor. The salary was sent to the Additional Small Cause Court Judge sometime in May 1940. *E* also obtained a decree against the same judgment-debtor from the Court of the Judge Small Causes. On 31st August 1939, *E* applied for execution of the decree against the judgment-debtor by attachment of his salary under O. 21, R. 48. The accountant general duly received the order of attachment but intimated to the Court that the money could not be sent until the order of attachment issued by other Courts previously had been fully complied with. Subsequently, on 22nd July 1940, *E* filed an application before the Judge, Small Cause Court, purporting to be under sections 63 and 73:

Held that *E* was entitled to share in the rateable distribution from the date of her application for execution, namely 31st August 1939, and not from 22nd July 1940, when she made the application purporting to be under Ss. 63 and 73: 13 O C 291; A I R 1938 Oudh 12; A I R 1936 Cal 723 and A I R 1938 Lah 754, *Rel. on.* [P 278 C 1]

(b) Provincial Small Cause Courts Act (1887), S. 25—Unjust order of lower Court under S. 73, Civil P. C., was interfered with by High Court under S. 25.

Generally speaking the revisional powers of the High Court under S. 25, Small Cause Courts Act, should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. [In the particular case High Court interfered under S. 25 with unjust order of lower Court under S. 73, Civil P. C.] [P 279 C 1]

K. P. Srivastava — for Applicant.

Ram Nath — for Opposite Party 2.

Order. — This is an application under S. 25, Small Cause Courts Act, arising out of execution proceedings. The facts, in so far as they are material for the purposes of the present application, are as follows: It appears that Lala Kishori Lal held a decree against William Ainslie Cannon Howard, Assistant Superintendent, Government Central Press, Allahabad, which he had obtained from the Court of the Additional Judge, Small Causes, Lucknow. Lala Kishori Lal applied on 31st August 1939, before the Additional Judge, Small Cause Court, for execution of his decree by attachment of the salary of the judgment-debtor. After a somewhat unusual delay due to the fact that the salary of the judgment-debtor had been attached at the instance of various other decree-holders, the salary was sent to the Additional Small Cause Court Judge sometime in May 1940. Dr. Mrs. Elsie C. Griffin Edward also obtained a decree for Rs. 795-4-6 against the same judgment-debtor from the Court of the Judge Small Causes. On 31st August 1939, she applied for execution of the decree against the judgment-debtor by attachment of his salary under O. 21, R. 48, Civil P. C. In answer to this attachment the Office of the Accountant-General, United Provinces, wrote on 9th October 1939, as follows:

Until the money liable to attachment from the officer's monthly pay in execution of other orders of attachment previously received in this office has been correctly recovered no action can be taken on the Court's orders referred to above. The recovery in respect of the above orders will commence after the orders of attachment issued previously have been fully complied with.

Subsequently on 22nd July 1940, Dr. Edward filed an application before the Judge, Small Cause Court, purporting to be under Ss. 63 and 73, Civil P. C., stating that she had got the salary of the judgment-debtor attached in her decree but since the salary had already been attached in the decree of Lala Kishori Lal, the salary attached had not been received by the Court. She therefore prayed that either she

should be allowed to share in the rateable distribution of the salary realised in the Court of the Additional Small Cause Court Judge or that the entire salary should be sent for from that Court and distributed by the Court in which her own execution application was pending. Counsel for Dr. Edward stated before the Court that if the file was transferred to the Additional Small Cause Court Judge, it would facilitate matters. Thereupon, the learned Judge of the Court of Small Causes transferred the file to the Additional Judge and the application for rateable distribution to be disposed of there. This order was passed on 7th August 1940. The learned Additional Judge has held that Dr. Edward is no doubt entitled to share in the assets under S. 73, Civil P. C., but that her right to rateable distribution arose only after 22nd July 1940, when she applied for rateable distribution, and that she is not entitled to share in the rateable distribution from the date of her application for execution. Aggrieved by that decision she has filed the present application to which the judgment-debtor and the contesting decree-holder Lala Kishori Lal are parties.

The only question that arises for determination before me is whether the applicant is entitled to share in the rateable distribution from the date of her application for execution, namely 31st August 1939, or only from 22nd July 1940, when she made the application purporting to be under Ss. 63 and 73, Civil P. C. I am of opinion that this application should succeed. Upon the facts of the case stated above, it must be held that the case is covered by S. 63 read with S. 73, Civil P. C. The order of attachment was made under O. 21, R. 48, Civil P. C., which runs as follows :

> Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or disbursing officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of S. 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and upon notice of order to such officer as the Government may. . . . . appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

I do not agree with the contention raised on behalf of the opposite party that there was no attachment in this case. There is no doubt whatever that the order of attachment was actually issued by the Court in pursuance of the provisions of O. 21, R. 48, and that the Office of the Accountant-General duly received the order of attachment but intimated to the Court that the money could not be sent until the order of attachment issued by other Courts previously had been fully complied with. It cannot be said that because the Office of the Accountant-General postponed the remission of the salary to a later date there was no effective attachment. The attachment in my opinion became complete and effective as soon as the notice of the order issued by the Court was served upon the disbursing officer who accepted it. Section 63, Civil P. C., lays down :

> (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

According to S. 63, the proper course would have been to send the entire amount of attachment to the Small Cause Court Judge as he was undoubtedly higher in grade and possessed higher pecuniary jurisdiction than the Additional Small Cause Court Judge. However, the applicant's counsel agreed to have the execution application sent to the Additional Small Cause Court Judge as he thought that it would expedite disposal. That fact however cannot deprive the applicant of the right to share in rateable distribution under S. 73, Civil P. C. It may be mentioned that the money is still lying in the Court of the Additional Small Cause Court Judge and has not been withdrawn by the contesting decree-holder. It has been held by a Bench of the Judicial Commissioner's Court in 13 O C 291[1] that the object of S. 73, Civil P. C., is twofold, firstly, to prevent unnecessary multiplicity of execution proceedings and to obviate the necessity of each and every decree-holder separately attaching and separately selling the property, and secondly to secure an equitable administration of the property by putting all the decree-holders upon the same footing and making the property rateably divisible among them.

In 1937 O W N 1040[2] it was held that where attachment of the same property has been

1. ('10) 13 O C 291 : 8 I C 372, Mohan Lal v. Humayun Jah.
2. ('38) 25 AIR 1938 Oudh 12 : 171 I C 222 : 1937 O W N 1040, Ram Raohhpal Shiam Lal Firm v. Gur Narain Brothers.

made by different Courts at the instance of different decree-holders of the common judgment-debtor, S. 73, Civil P. C., does not require the transfer of decrees to the Court where the process of realization takes place as a condition precedent to an application under S. 63 of the Code and therefore a fortiori it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. If the process of realization takes place in the Court of an inferior grade, it is the duty of such Court to send the sale proceeds to the superior Court which, under S. 63, Civil P. C., is the proper Court to distribute the assets. The case in 13 O C 291[1] and the case in AIR 1936 Cal 723[3] were followed in this case.

Reference may also be made to a comparatively recent decision of the Lahore High Court in AIR 1938 Lah 754[4] in which after a discussion of the various authorities it was held that S. 73 is to be read together with S. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to rateable distribution under S. 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets. In view of these decisions, it is not necessary for me to refer to other decisions in support of the same proposition.

Learned counsel on behalf of the opposite party has contended that this Court should not interfere with the decision of the Court below under S. 73, Civil P. C., in revision, save in very exceptional circumstances and has relied on certain cases in support of that proposition. Generally speaking, it is no doubt true that the revisional powers of this Court under S. 25 of the Small Cause Court should be exercised in exceptional circumstances to correct palpable errors and to prevent miscarriage of justice. I am however of opinion that the facts of this case clearly justify interference with the order of the lower Court in the ends of substantial justice. I therefore hold that the applicant is entitled to rateable distribution from the date of her application for execution of the decree, namely 31st August 1939. I allow the application, set aside the order of the lower Court and direct that the applicant should be allowed to share in the rateable distribution from 31st August 1939. The applicant will get her costs in this Court as well as in the Court below.

D.S./R.K. *Application allowed.*

3. ('36) 23 A I R 1936 Cal 723 : 166 I C 178 : ILR (1937) 1 Cal 391 : 40 C W N 1307, Surendra Kumar v. Jamini Kumar.

4. ('38) 25 A I R 1938 Lah 754 : 179 I C 376 : 41 PLR 91, Simla Banking and Industrial Co. Ltd., Lahore v. Indo Swiss Trading Co. Ltd., Calcutta.

(28) A. I. R. 1941 Oudh 279

YORKE AND BENNETT JJ.

In the matter of the assessment of Messrs. Kanhaiya Lal Umrao Singh.

Civil Ref. No. 5 of 1940, Decided on 6th December 1940, made by Commissioner of Income-tax, Central and United Provinces, Lucknow.

(a) Income-tax Act (1922), Ss. 66 (2), 27 and 23 — Reference under S. 66 on point of law in connexion with proceedings under S. 27 — Assessee cannot take matter back to S. 23 and contend that original procedure was wrong which debarred assessee's right of appeal.

In a reference under S. 66 (2) which raises only a point of law in connexion with the proceedings under S. 27 it is not open to the assessee to take the matter back to the stage of the proceedings under S. 23 and contend that the original procedure adopted by the Income-tax Department was wrong, which debarred the assessee to file a regular appeal : A I R 1931 Rang 194 (F B) and A I R 1937 P C 133, *Rel. on.* [P 280 C 2; P 281 C 1]

(b) Income-tax Act (1922), S. 66 (2) — Question of law.

The sufficiency of evidence is no doubt a question of fact but the question whether there is evidence at all from which an inference could be drawn is a question of law : A I R 1932 Oudh 164, *Rel. on ; Case law referred.* [P 281 C 2]

(c) Income-tax Act (1922), S. 23 — Burden of proof that accounts asked for are not maintained lies on assessee—Income-tax Officer is entitled to disbelieve improbable statements and ask for further proof to show that accounts demanded are not maintained.

In the case of an assessment under the Act the only person who is saddled with knowledge of all facts in regard to the maintenance of accounts is the assessee himself. The burden of proof in the first instance is always on him to establish that accounts asked for are not maintained and his attempt to establish that point may always be met by reliance upon circumstances indicating that the evidence given or led by him cannot be relied upon. The Income-tax Officer is entitled to disbelieve improbable statements and to ask for something more to be produced by the assessee which will satisfy the Income-tax Officer and the Assistant Commissioner that accounts demanded are not, in fact, maintained : A I R 1931 Rang 194 (F B) and AIR 1930 All 49 (F B), *Rel. on.* [P 282 C 1]

Ram Prasad Varma — for Commissioner of Income-tax.

Niamat Ullah and M. H. Kidwai—for Assessee.

Yorke J. — This is a reference under S. 66, para. 2, Income-tax Act of 1922, made by the Commissioner of Income-tax, Central and United Provinces upon an application by the assessee, that is the firm Kanhaiya Lal Umrao Singh of Lucknow. The point of law which has been referred for decision to this Court is whether there were any materials upon which the Assistant Commissioner of Income-tax could find that a head office set of accounts was in existence. This reference has arisen in the following circumstances: The assessee, a firm consisting of five brothers who are members of a joint Hindu family, carries on a number of businesses and admittedly has derived income from: (1) landed property, (2) a brick and lime factory, (3) lime and surkhi business at Gorakhpur, (4) contract work consisting of; (a) public works department contract, (b) paper mills contract, and (c) cycle stand contract at the industrial exhibition which was being held at Lucknow in the year for which the assessment was made, that is 1937-1938, and (5) a rice mill at Rupaidih in the Bahraich district. In accordance with the procedure prescribed by the Income-tax Act notice was given to the assessee under S. 22 (4) of the Act to produce the head office account relating to all these businesses, that being not among the various books of account which the assessee had produced in response to a first notice under the same section. In response to this notice the assessee denied the existence of any such account and made the reply that the deposits shown in the personal account which found place in the accounts of each of the different businesses came from his private chest of which no accounts were kept. He also denied keeping any accounts relating to his expenditure on the construction of the house property.

The Income-tax Officer in view of this non-production and having regard also to the omission from any accounts of an item of Rs. 1418 made to one Girdhari Lal Sarraf and an item of Rs. 160 received from Sri Ram Hari Ram of Cawnpore and the non-production of a stock book relating to the Rupaidih Rice Mill proceeded to apply S. 23 (4) of the Act and to make the assessment to the best of his judgment. It is argued in this case that in the circumstances which were present the assessment should have been made under S. 23 (3). It was, in fact, made under S. 23 (4) and against such an assessment the assessee had no right of appeal. He therefore took the procedure which is permitted by the law and made an application to the Income-tax Officer under S. 27 of the Act. This section provides that

> where an assessee '. . . satisfies the Income-tax Officer that he was prevented by sufficient cause . . . from complying with the terms of the notices issued under sub-s. (4) of S. 22, or sub-s. (2) of S. 23 the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of S. 23.

The Income-tax Officer, who was not the same Income-tax Officer by whom the original assessment under S. 23 (4) had been made, was not satisfied as required by S. 27, and he therefore refused to make a fresh assessment. Against this order an appeal was filed to the Assistant Commissioner of Income-tax under the provisions of S. 30 (1) of the Act. The Assistant Commissioner went into the facts of the case as shown by the original assessment statement and the subsequent order under S. 27 and he held on circumstantial evidence that the head office accounts in respect of which notice had been issued did exist and therefore that the assessee had not been prevented by sufficient cause from complying with the terms of the notice to produce them. He accordingly dismissed the appeal. Upon this, a further application was made to the Income-tax Commissioner under S. 33 read with S. 66 (2), Income-tax Act, asking the Income-tax Commissioner to revise the order of the Income-tax Officer and the Assistant Commissioner and hold that the assessee was prevented by sufficient cause from complying with the notice, and in the alternative to make a reference to this Court on certain questions of law. The learned Income-tax Commissioner not being prepared to make an order under S. 33 (2) setting aside the decision of the Income-tax Officer and the Assistant Commissioner of Income-tax, has referred to this Court the question stated earlier and has further stated as he is required to do, his own opinion which is that the Assistant Commissioner's finding that a head office set of accounts was in existence was supported by ample materials and fully justified.

We have listened to a very lengthy argument upon this reference. On behalf of the assessee an attempt is really made to take the matter back to the stage of the proceedings under S. 23 it being contended that the income-tax officer had no evidence before him on which he could hold that the head office account and other accounts asked for by him by means of notice did exist, and therefore it was his duty to have made the assessment under S. 23 (3), thereby permitting

the assessee to file a regular appeal against the assessment and so permitting the appellate officer to examine the whole case upon the merits. That procedure is clearly not open to us upon this reference, which raises only a point of law in connexion with the proceedings under S. 27. Coming to these proceedings learned counsel for the assessee puts forward the contention that there must be positive and not merely circumstantial evidence upon which it can be found that the head office accounts do exist and have been withheld. He contends, as is contended in the application made under Ss. 33 and 66 to the Income-tax Commissioner, that, in fact the assessee who is a thekedar or a contractor maintains no head office accounts. He says that accounts are maintained of each of the separate businesses, the ordinary procedure being that the firm makes advances to the local managers of each of these businesses of which accounts have to be maintained and takes from them sums of money whenever they have any surplus. In each of these businesses what is called a personal account is maintained which apparently shows the payments by the proprietor as well as those made to him. It is said that if money is required for one business it is taken from the surplus available in another business either direct, or, if that surplus has been transferred to the treasure chest maintained at Lucknow from that treasure chest. The firm has a bank account but by no means all the money of the firm goes into the bank account. On the contrary, as stated in para. 17 of the application,

> the assessee does not keep the entire money or capital in the bank. The entire money consists of the capital at home with Kanhaiya Lal reserved for emergency, the capital in the account books (that is of the separate businesses) and the capital at the bank.

This method of keeping accounts makes it impossible for the firm to know how they stand financially at any given moment except by looking into the safe kept by Kanhaiya Lal to see how much money is there, into the bank book and the account books of the different businesses to see what is available in any of these. It is further said in argument that so far as the construction of house property is concerned none was constructed in the assessment year although the statement on oath of a member of the firm (not Kanhaiyalal) was extraordinarily vague on this point. It is further said that so far as such construction in the past has been concerned no accounts were maintained. It is clear from this that it was possible for the assessee to conceal his profits in other businesses either by transferring the profits of those businesses to house construction or by using for that purpose money taken from the treasure chest, that is the home capital of which no accounts are maintained. So much for the explanation which has been given to us. The main line of argument put before us for the applicant is that the circumstances on which reliance was placed by the Assistant Commissioner do not amount to evidence at all, and that it was the duty of the Income-tax Department to have led evidence of some kind to prove the existence of these accounts. It is said that if they were not prepared to do so, the assessment should have been made under S. 23 (3), an argument which is not strictly relevant to the present reference. As regards the circumstantial evidence the argument appears to be that the circumstances relied upon are of too vague a nature and lead to nothing more than a suspicion that there is a set of head office accounts maintained by the firm. Learned counsel has referred us in the course of his argument to two cases only. In A I R 1929 Cal 37,[1] it was held that

> the proper effect of a proved fact is a question of law and the question whether a tenancy is permanent or precarious is a legal inference from facts and not itself a question of fact.

We do not doubt that the question which has been referred to us is not a simple question of fact. The sufficiency of evidence is no doubt a question of fact but the question whether there is evidence at all from which an inference could be drawn is, we think, (in the light of the cases put before us) a question of law, but this does not take us very far in the present case. On the point that positive evidence must be led to prove the existence of head office accounts reliance was placed on A I R 1923 P C 13,[2] in which it was held that

> the affirmative proposition is not established by showing that the witnesses who depose to a contradictory negative proposition are not reliable. If there is a conflict of evidence on a point, it would be perfectly legitimate to take into consideration the circumstantial evidence with a view to show that evidence of the first class of witnesses was true and that of the second false.

This proposition of law is not however strictly applicable to the present case because in the case of an assessment under

1. ('29) 16 AIR 1929 Cal 37 : 116 I C 378 : 56 Cal 738: 33 C W N 211, Kamal Kumar Datt v. Nandalal Dubey.
2. ('23) 10 A I R 1923 P C 13 : 71 I C 632 (P C), Saratkumari Dasi v. Amulyadhan Kundu.

the Income-tax Act the only person who is saddled with knowledge of all facts in regard to the maintenance of accounts is the assessee himself. The burden of proof in the first instance is always on him to establish that accounts asked for are not maintained, and his attempt to establish that point may always be met by reliance upon circumstances indicating that the evidence given or led by him cannot be relied upon.

On behalf of the Income-tax Department it has been pointed out that the above proposition sought to be relied upon would really have rendered the Income-tax Department helpless in cases where the assessee denies the existence of accounts which are demanded from him, and it is contended that that is not a sound view. The Income-tax Officer is, it is said, and we think rightly entitled to disbelieve, improbable statements and to ask for something more to be produced by the assessee which will satisfy the Income-tax Officer and the Assistant Commissioner that such accounts are not in fact maintained. The learned counsel has further pressed the point that this is not a case of a reference in regard to the proceedings under Ss. 22 and 23 but a reference arising only out of the decision of the Income-tax Officer and the Assistant Commissioner under Ss. 27 and 31 of the Act. He has referred to a well-known case of the Rangoon High Court, a decision which was approved by their Lordships of the Privy Council in a subsequent case: A I R 1937 P C 133.[3] The case in question is 9 Rang 281.[4] In that case it was held that :

> The question whether an assessment made by the income-tax officer under S. 23 (4), Income-tax Act, is valid or not is not a question of law that arises or can arise out of an order of the Assistant Income-tax Commissioner passed under S. 31 and consequently such a question cannot be made the ground for an order by the High Court under S. 66 (3) requiring the Commissioner to state a case.

In the course of this judgment reference was made to a passage in the judgment in 7 Rang 635[5] where it was said :

> It has, however, been held that the question whether there was any evidence on which an Assistant Commissioner or a Commissioner could come to a finding of fact is a question of law.

Further on, in this case, reference was made to the case in 9 Rang 21[6] in which it was held that in that case the sole question of law that could arise was :

> Was there any evidence upon which the Assistant Commissioner could find that there was no sufficient cause preventing the assessee from producing the Shan States account on 20th November 1919 ?

The decision in that case is reproduced in the headnote at page 21 which runs as follows :

> Where there is evidence upon which the Assistant Commissioner can find that there was no sufficient cause preventing an assessee from producing the accounts he was required to produce under S. 22 (2), Income-tax Act, and upon that ground refuses to cancel the assessment made under S. 23 (4) there is no question of law that can be referred to the High Court under section 66.

The learned Chief Justice at page 300 of 9 Rang 281[4] goes on to say :

> In the circumstances of that case I think that what was there held to be the sole question of law that could arise was correctly stated, but I wish to add that, of course, in a proceeding under S. 27 the onus lies upon the assessee, and if the assessee fails to produce any evidence in support of his application that the assessment made under S. 23 (4) should be cancelled that in itself would provide material upon which the income-tax officer would be justified in basing a refusal to cancel the assessment that had been made under S. 23 (4). On the other hand, if the assessee adduced evidence in support of his application under S. 27 the weight to be attached to that evidence is a matter for the income-tax officer to determine.

Applying the dicta of this case strictly to the present case we might almost have been prepared to agree that there was really, as has been urged by the learned counsel for the Income-tax Department, no scope for the present reference. We find from the record of the proceedings before the Assistant Commissioner under S. 27 that only one witness was called for the assessee, namely Benarsi Lal, one of the five brothers. It is clear, however, that he is not the witness who should have been produced because the application made to the Income-tax Commissioner himself shows that the one person who must have special knowledge of this question of head office accounts which might otherwise be described as accounts relating to the capital at home, was Kanhaiya Lal, as mentioned in para. 17 of the application. Kanhaiya Lal could and should have been produced in the witness-box and have submitted himself to cross-examination so that the income-tax officer might be satisfied of the truth of his statement. If he did

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3. ('37) 24 AIR 1937 P C 133 : 167 I C 793 : I L R (1937) Nag 191 : 64 I A 102 : 31 S L R 284 (P C), Commissioner of Income-tax, U. P. & C. P. v. Badridas Ramrai Shop, Akola.
4. ('31) 18 A I R 1931 Rang 194 : 133 I C 81 : 9 Rang 281 (F B), Abdul Bari Chowdhury v. Commissioner of Income-tax, Burma.
5. ('30) 17 A I R 1930 Rang 4 : 122 I C 898 : 7 Rang 635 (S B), Commissioner of Income-tax v. E. M. Chettyar.
6. ('31) 18 A I R 1931 Rang 97 : 132 I C 557 : 9 Rang 21 (S B), Commissioner of Income-tax, Burma v. Chettyar Firm.

not choose to do so, then the dicta of the learned Chief Justice in 9 Rang 281[4] would be applicable.

Assuming however for the purposes of the present reference that no question of onus or of the application of this particular dictum to the present case arises, then we may go back to answer on the merits the point of law which has been referred to us by the learned Income-tax Commissioner. Before doing so, we should however preface the few remarks we have to make by emphasising that the question for our consideration is not the sufficiency of the evidence or materials or the presence or the absence of positive evidence but merely the question whether there was or was not any evidence positive or circumstantial, or any materials upon which the Income-tax Officer and the Assistant Commissioner could hold that a head office set of accounts of the assessee was in existence. On the question of the value of circumstantial evidence and the right to draw an inference from the whole of the circumstances of the assessee's business we may refer to A I R 1930 ALL 49[7] in which it was held by a Full Bench of the Allahabad High Court with reference to Ss. 23 (2) and 23 (4) that

even when an assessee denies the existence of accounts or documents, the Income-tax Officer can presume the existence of such accounts or documents.

By one of the learned Judges it was held that

the answer to the question whether the Income-tax Officer may presume the existence of such accounts or documents must depend entirely on the circumstances of the case.

On the point that we are not entitled to go into the question whether the evidence before the Income-tax Officer is sufficient or not we may refer first to A I R 1932 Oudh 164,[8] in which it was held that

the question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further, whether the evidence before the Income-tax Officer is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact.

This is, of course, not a case directly applicable except on the general proposition that sufficiency of evidence is not a matter which is open to us on a reference on a point of law. In the same connexion we may refer to s. 114, Evidence Act, and there-

7. ('30) 17 A I R 1930 All 49 : 126 I C 801 : 1930 A L J 1 (F B), In the matter of Lachhman Prosad.
8. ('32) 19 A I R 1932 Oudh 164 : 137 I C 732, Muzaffar Ali Khan v. Commissioner of Income-tax, U. P.

with to several cases which have been quoted to us. In A I R 1937 Lah 721,[9] it was held that

no burden is imposed on the Income-tax authorities to prove by 'positive evidence' that the accounts are unreliable.

The same principle emerges from A I R 1914 Mad 118[10] in which it was held that

the High Court cannot interfere on a finding of fact simply because that finding rests on no positive evidence in the case but on probabilities and circumstances as disclosed by the evidence.

The same view is expressed in A I R 1938 Lah 209,[11] in which it was held that :

The word 'evidence' as used in sub-s. (2) of S. 23, Income-tax Act, is not confined to direct evidence but it is comprehensive enough to cover circumstantial evidence.

We are in full agreement with the view that particularly in cases where the giving of positive evidence by a department about facts which are in the special knowledge of the opposite party is almost out of question materials which come within the description of circumstantial evidence or general probabilities such as are to be regarded under the provisions of S. 114, Evidence Act, are evidence or materials upon which the Court can come to a finding just as properly as it could upon positive evidence. When the present case is looked at from this point of view, it is clearly impossible to hold that there were not really any materials upon which the Assistant Commissioner could find that a head office set of accounts was in existence. We have it stated that the assessee's firm conducts a number of separate businesses. We have it that the money goes into what may be called the bank or treasure chest maintained by Kanhaiya Lal at home and comes out of that treasure chest just as it goes into and comes out of the bank with which the firm has an account. We have it that a sum of Rs. 1413 was paid to one Girdhari Lal Sarraf, and it is said that this sum of money was previously borrowed from the same gentleman by pawning ornaments, and a sum of Rs. 160 was received from a Cawnpore firm. The receipt and payment of the larger sum and the receipt of the smaller sum appear nowhere in the accounts which have been produced and it is plainly incredible that

9. ('37) 24 A I R 1937 Lah 721: 177 I C 36 : I L R (1938) Lah 10: 39 P L R 1028, Ganga Ram Balmokand v. Commissioner of Income-tax.
10. ('14) 1 A I R 1914 Mad 118 : 24 I C 709, Ramaswamy Iyer v. Ganapathia Pillai.
11. ('38) 25 A I R 1938 Lah 209 : 181 I C 476 : 40 P L R 585, Paras Dass Munna Lal v. Commissioner of Income-tax, Punjab, North West Frontier and Delhi Provinces.

this money found no place in any accounts at all. Similarly, it is impossible to believe that while carrying out construction of houses on his own account the assessee kept no accounts to show what moneys went out for that purpose.

It is true, as stated in the application made to the Commissioner of Income-tax, that the Assistant Commissioner in his appellate order under S. 31 (3) has used rather involved language, but it seems to us that that order does show that there were materials, circumstantial in the main, upon which it was possible to find that a head office set of accounts was, in fact, being maintained, with the necessary corollary that no sufficient cause existed for the failure to produce those accounts when called upon by notice so to do. The main piece of circumstantial evidence upon which the Assistant Commissioner relied has been set out more clearly in the order of the Commissioner himself, namely the fact that large sums of surplus money were continually flowing between the private chest and the individual businesses and that to keep control of such a flow of money the maintenance of a head office set of accounts was quite essential; moreover, bearing in mind that the individual businesses of the assessee were all controlled by means of accounts maintained upon a satisfactory basis so completely unbusiness-like a method of controlling the whole of the family business could not be believed to exist having regard to the common course of natural events, human conduct and public and private business, in their relation to the facts of this particular case. We are not called upon or entitled to come to any finding on the sufficiency of the materials which were available to the Assistant Commissioner. That is a pure question of fact. On the question of law, we have no hesitation in holding that there were materials upon which the Assistant Commissioner could find that a head office set of accounts was in existence. We decide the reference accordingly under S. 66 and order that the assessee shall bear the costs of the Income-tax Department of this reference. We fix the fee of the learned counsel for the Income-tax Department at Rs. 250.

N.K./R.K. *Reference answered.*

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(28) A. I. R. 1941 Oudh 284

YORKE AND AGARWAL JJ.

Mt. Bashiran — Plaintiff — Appellant

v.

Mohammad Husain and others — Defendants — Respondents.

First Appeal No. 70 of 1937, Decided on 7th January 1941, against the decree of civil Judge, Bahraich, D/- 30th January 1937.

(a) Mahomedan law—Gift—Hiba-bil-ewaz—Gift of land by husband to wife in lieu of dower debt—Donor stating in deed that he put donee in possession at date of execution of deed and that he had no concern left with gifted land and donee would enjoy all rights therein—Bona fide intention to divest in praesenti is established—Gift is not invalid for non-delivery of possession.

In the case of a gift by the husband to his wife in lieu of her dower debt the statement by the donor in the duly executed and registered deed of gift that the donor had put the donee in possession and occupation of the gifted land from the date of the execution of the deed and that the donor stipulated and reduced it to writing that he had no concern of any sort left in the land gifted and all his rights therein would be enjoyed by the donee is sufficient to show the bona fide intention of the donor to divest himself in praesenti of the gifted property and to confer it upon the donee and therefore the gift is not invalid merely because possession was not delivered: 28 All 489 (P C) and A I R 1932 P C 13, *Rel. on.* [P 285 C 2; P 286 C 1]

(b) Evidence Act (1872), Ss. 21 (1) and 32—Marriage—Proof—Statement by wife as to her marriage with her husband before it was disputed is admissible.

Inasmuch as a wife has special means of knowledge about her marriage a statement by her describing herself to be the wife of her husband is admissible in evidence and can be proved by her where the statement was made before her marriage with her husband was disputed. [P 287 C 1]

(c) Evidence Act (1872), S. 68 — Attesting witness unable to prove document—Deed can be proved by other evidence.

Under S. 68 what is necessary is that an attesting witness if available should be called in evidence. If he is not able to prove the document there is no bar to its being proved by other evidence. [P 287 C 1]

(d) Mahomedan law — Marriage — Proposal and acceptance need not be in any particular form—Evidence that wife gave her consent and husband agreed to dower constitutes sufficient proposal and acceptance — After long lapse, formalities of marriage should be presumed to have been complied with.

Mahomedan law does not prescribe that the proposal and acceptance of marriage should be made in any particular form. Evidence that the wife gave her consent to the marriage and the husband agreed to the dower constitutes sufficient proposal and acceptance. Moreover, after the lapse of a long time after the marriage all the formalities required should be presumed to have been complied with. [P 287 C 2]

(e) Mahomedan law — Marriage — Acknowledgment —Man acknowledging woman as his wife—Presumption of marriage is raised—Direct evidence of marriage adduced but not believed —Effect of presumption is not lost—Burden of rebutting presumption is still on opposite party.

An acknowledgment by a Mahomedan that a certain woman is his wife raises a presumption of marriage between the parties: A I R 1920 Oudh 128, *Rel. on.* [P 288 C 1]

Even if direct evidence of marriage is adduced and the Court disbelieves it, the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption. A I R 1929 Cal 682, *Rel. on.* [P 288 C 2]

S. Mohammad Hafeez — for Appellant.

M. Wasim and Ali Hasan — for Respondents 1 to 3.

Judgment.—This appeal arises out of a suit brought by the plaintiff-appellant, Mt. Bashiran, for possession over certain plots of land measuring 30·49 acres and other reliefs. Her case is that she was married to one Ghulam Mohammad in the year 1907 and that he made a gift of these plots in her favour on 20th February 1935. Ghulam Mohammad died in the month of July 1935 and after his death she was dispossessed from the plots by the defendants in the month of August 1935 though she had obtained possession under the deed of gift. Defendants 1 to 4 are the heirs of her husband's brother, Tassaduq Husain. She stated that the plots were under-proprietary muafi free of rent and if she is not held to be an under-proprietor, she was entitled to possession as the sole heir of Ghulam Mohammad and that in any case she was entitled to one-fourth as her legal share and a decree for the remaining three-fourths on the ground that she was entitled to possession over it as her dower amounting to Rs. 2100 remained unpaid. She also claimed Rs. 250 on account of mesne profits.

The suit was contested by defendants 1 to 3, the sons of Tassaduq Husain, brother of Ghulam Muhammad. They stated that the plaintiff was not married to Ghulam Muhammad and the connexion between Ghulam Muhammad and the plaintiff was illegal. They also pleaded that Ghulam Muhammad remained ill from the beginning of 1935 and the deed of gift, if executed in favour of the plaintiff, was invalid as Ghulam Muhammad at the date of its execution was suffering from marz-ul-maut and was under the influence of the plaintiff and her well-wishers and that the land in question was not transferable and so the plaintiff could acquire no rights. The learned civil Judge held that the plaintiff's marriage with Ghulam Muhammad was not proved, that Ghulam Muhammad did execute the deed of gift in favour of the plaintiff, but as it was not followed by delivery of possession, it was invalid. He further held that it was not proved that when the deed of gift was executed Ghulam Muhammad was suffering from marz-ul-maut. The plea of the defendants that the plaintiff got it executed through undue influence was held not proved and the land was held to be transferable. As a result of his findings he dismissed the suit.

The plaintiff has contended in appeal that her marriage was proved and the gift was valid. The findings on the issues decided by the lower Court in favour of the plaintiff have not been challenged before us. We have therefore to determine two points: (1) whether the deed of gift was valid and (2) whether the plaintiff was married to Ghulam Muhammad. The deed of gift (Ex. 1) dated 20th February 1935, is a registered document which has been held by the lower Court to be duly executed. It has also been held that the donor was not suffering from marz-ul-maut when he executed it, and that it was not obtained through undue influence. It is said that as possession was not delivered under it, it was not valid. Ordinarily, a gift by a Mahomedan must be accompanied by delivery of possession of the property gifted. It is stated in this document that the donor made the gift in favour of his wife Bashiran in lieu of her dower debt. We shall discuss later on whether the plaintiff was the married wife of Ghulam Muhammad and whether any dower was due to her. We assume for the present that the plaintiff was married to Ghulam Muhammad and her dower was due from him. If this is so it was not a pure gift but was a hiba bil ewaz. In 33 I A 68[1] it was held by the Privy Council that under Mahomedan law the holder of property may alienate it by a deed of gift accompanied by delivery of the thing given so far as it is capable of delivery or by a deed of gift coupled with consideration in which case although delivery of possession is unnecessary, yet actual payment of consideration must be proved and also a bona fide intention on the part of the donor to divest himself in praesenti of the property and to confer it upon the donee. The other authorities on the point are

1. ('06) 28 All 439: 33 I A 68: 3 A L J 405: 9 O C 196 (P C), Chaudhri Mehdi Hasan v. Muhammad Hasan.

Baillie's Muhammadan Law and Mulla's Muhammadan Law. The relevant portion in Baillie's Muhammadan Law at p. 123 is:

> The transaction which goes by the name of hiba bil ewaz in India is therefore in reality not a proper hiba bil ewaz but a sale and has all the incidents of the latter contract. Accordingly possession is not required to complete the transfer of it though absolutely necessary in gift.

Mulla is also of the same opinion (*vide* para. 141, Edn. 11). The words in the deed of gift that the donor had put the donee in possession and occupation of the land gifted from the date of its execution show the bona fide intention of the donor to divest himself in praesenti of the property and to confer it upon the donee. It is also stated in the deed that the donor stipulated and reduced it to writing that he had no concern of any sort left in the land gifted and that all the rights which he had would hereafter be enjoyed by the donee. We think that the gift is not invalid for the reason that possession was not delivered. There is also the evidence of the plaintiff that three days after the execution of the deed (when it was probably returned from the registrar's office) the document was handed over to her. We see no reason to disbelieve this statement of the plaintiff. In 59 I A 1[2] it was held that where a Mahomedan executed a deed of gift of immovable property in favour of his wife which declared that he had delivered possession over it to her as absolute owner and the deed was handed to and retained by her but there was no mutation of names, the gift was valid though the donee had not obtained actual possession until after her husband's death.

Reliance was placed on a statement made by the plaintiff on 10th August 1935, after her husband's death which took place in July 1935. She stated that the muafi land which was in the name of Ghulam Muhammad who died 15 days before, be entered in her name in the patwari's papers as she was the heiress. It is argued that she claimed the property on the ground of her being an heiress and not under the gift. We think that it was merely due to ignorance that the plaintiff claimed mutation on the ground of her being an heiress, and that there was no reason for the donor to keep the plaintiff ignorant of the deed of gift. The respondents have produced some pattas and qabuliats to prove their possession but they are all of August 1935 after Ghulam Muhammad had died. They also produced the village patwari to prove that the plaintiff was never in possession of these plots but it is not necessary for the plaintiff to have obtained actual possession. There was sufficient delivery of possession to make the gift valid.

Now we have to consider whether any dower of the donee, the plaintiff, was outstanding against the husband, the donor. For this we shall first have to consider whether there was any valid marriage between the plaintiff and Ghulam Muhammad. The plaintiff has produced documentary and oral evidence to prove the factum of marriage. P. W. 20, Muhammad Abid Ali, produced a register of marriages which shows that the plaintiff was married to Ghulam Muhammad on 28th November 1907. He stated in examination in chief that he had entered the details of the marriage in the register but in cross-examination he stated that the entry in question was in the handwriting of his son. He was 60 years old in 1936 and so at the time of the marriage he must have been about 31 years old. His son at that time could not have been sufficiently old to make an entry in the register. The plaintiff's other witness, P. W. 21, Irshad Ali Khan, stated that the son of this witness who is said to have made this entry is 30 years old now. If this is so, he was only a baby in arms at that time. The entry does not show that it is in the handwriting of a boy. The entries in the register do not appear to have been made from day to day but it appears that they have been copied from some other book. The witness Abid Ali admits that he would not have been able to depose about the plaintiff's marriage if the registers had not been before him. We think that the evidence of this witness and the register are not worthy of reliance. But there is other evidence on this point. Mumtaz, P. W. 11, states that he learnt from his mother, Tassaduq Husain and Ghulam Muhammad that the plaintiff was the wife of Ghulam Muhammad.

Irshad Ali Khan, P. W. 21, states that the marriage was performed in his presence, that he was a witness to the nikah and that the dower fixed was Rs. 2100. Mohammad Baksh, P. W. 22, Ghulam Nabi, P. W. 23, and the plaintiff herself state the same. The plaintiff executed two sale deeds, one on 17th December 1908 and the other on 18th December 1908 [Exs. P. W. 2/30 (ought to be P. W. 1/30) and P. W. 2/31] and in both of them she described herself as the wife of

2. ('32) 19 A I R 1932 P C 18 : 136 I C 885 : 6 Luck 556 : 59 I A 1 (P C), Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam.

Ghulam Muhammad. The lower Court has refused to rely on these documents on the ground that they are admissions of the plaintiff herself. Under S. 21, cl. (1), Evidence Act, an admission may be proved by or on behalf of the person making it when it is of such a nature that if the person making it were dead it would be relevant as between third parties under S. 32. Under S. 32 a statement relating to the existence of any relationship by blood, marriage or adoption between the persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised, is relevant. The plaintiff had special means of knowledge about her marriage with Ghulam Muhammad and therefore her statement is admissible and can be proved by her. There is nothing to show that there was any dispute about the plaintiff's marriage with Ghulam Muhammad in 1908.

The next document relied on on behalf of the plaintiff is a copy of a mortgage deed dated 21st September 1915 (Ex. 27). This document was executed by Ghulam Muhammad, his brother Tassaduq Husain, father of the respondents 1 to 3, Mt. Jangala, wife of Tassaduq Husain, and the plaintiff herself. Almost double of the property now in question was mortgaged under that deed. The plaintiff was described in the deed as the wife of Ghulam Muhammad. One of the defendants, Nazir, had identified Mt. Bashiran, plaintiff at the time of registration. The lower Court's objection is that this document has not been duly proved. The document purports to be witnessed by Ambika Prasad and Sant Baksh and to have been scribed by Suraj Prasad. Ambika Prasad was produced and he stated that he did not recollect anything about the deed. Sant Baksh and Suraj Prasad are dead. The plaintiff produced the mortgagee Mahabir Prasad, P. W. 16, Ghulam Nabi, P. W. 23 and herself to prove it.

The learned civil Judge appears to be of the opinion that a mortgage deed can be proved only by an attesting witness. Under S. 68 what is necessary is that an attesting witness if available should be called in evidence. If he is not able to prove the document there is no bar to its being proved by other evidence. The document has been proved by the evidence of the plaintiff, Ghulam Nabi and Mahabir Prasad. There is also a proviso to S. 68, Evidence Act, that it is not necessary to produce an attesting witness when the document is not a will and is registered unless its execution is specifically denied by the executors. This was not done in this case. We therefore think that this document was duly proved. It goes a long way to prove the plaintiff's case. The plaintiff was described in this document as the wife of Ghulam Muhammad and the document was also executed by Ghulam Muhammad himself and his brother Tassaduq Husain, father of respondents 1 to 3. This document goes to show that Ghulam Muhammad acknowledged the plaintiff as his wife and she consented to it. In the deed of gift also Ghulam Muhammad stated that the donee was his wife whom he married approximately 22 years ago. It is argued that according to the evidence produced by the plaintiff, the marriage took place in 1907 but according to the deed of gift it would be somewhere about the year 1913. We think that Ghulam Muhammad had no correct idea of the date of his marriage with the plaintiff and hence the mistake. The learned civil Judge has criticized the evidence of the plaintiff's witnesses on the ground that there are certain contradictions in their statements and they have deposed about the details of the plaintiff's marriage and not of others. Contradictions after a lapse of about thirty years are natural. Considering the documentary evidence above discussed, we think there is no reason to disbelieve the plaintiff's witnesses on whom we have relied.

The learned civil Judge has also remarked that it was not proved that there was a proposal on behalf of one party to the marriage and acceptance on behalf of the other. Irshad Ali Khan, P. W. 21, has stated that the plaintiff gave her consent to the marriage and Muhammad Baksh, P. W. 22, has stated that Ghulam Muhammad agreed to the dower. We think this was sufficient proposal and acceptance. The Mahomedan law does not prescribe that the proposal and acceptance should be made in any particular form. Moreover, under the circumstances of the case and after the lapse of such a long time, all the formalities required should be presumed to have been complied with. More than two male persons were present at the time of the marriage and so the objection of the learned civil Judge on that ground has no force. The learned civil Judge has also remarked that Ghulam Muhammad was the "tabalchi" of the plaintiff and so it seemed improbable that he married her. We do not think there is anything improbable in it. It is also said that Ghulam

Muhammad had another wife. But there was nothing to bar him from taking a second wife. We think that the evidence on the record proves the marriage. Besides this the mortgage deed (Ex. 27), and the deed of gift (Ex. 1), contain acknowledgments by Ghulam Muhammad that the plaintiff was his wife.

Under the Mahomedan law, acknowledgment of a man is valid with regard to five persons, his father, mother, child, wife and mowla: *vide* Baillie's Muhammadan Law, p. 407 and Ameer Ali's Mahomedan Law, Vol. 2, p. 230. In 60 I C 147[3] it was held that though an acknowledgment may be open to the objection that it might have been made from ulterior motives, to conceal what might otherwise have been a result of shame it is sufficient in the eye of the Mahomedan law to invest the woman with the status of a married wife and the subsequent born children with the status of legitimacy, unless the marriage is shown to have been legally impossible. There is nothing in this case to show that there could not be a legal marriage between the plaintiff and Ghulam Muhammad. By reason of these acknowledgments a presumption in favour of the marriage is raised. The learned civil Judge has held that the presumption is a weak one because the evidence to prove the marriage is not satisfactory. We hold that there is satisfactory evidence to prove the marriage and if there is any presumption at all by reason of the acknowledgment, the burden of proof is shifted to the other side. The evidence on behalf of the respondents on these points consists of the statement of Mohammad Zahir, respondent, Shabrati, D. W. 11, Maqbool Ahmad, D. W. 9, Ashraf Ali, D. W. 7, and Chammi Khan, D. W. 5. Mohammad Zahir states that Ghulam Muhammad never married the plaintiff. He is an interested witness. Shabrati states that Ghulam Muhammad was not married to the plaintiff but she had illicit connexion with him and that he asked Ghulam Muhammad either to leave the plaintiff or to marry her but he refused to marry her. He admits that Ghulam Muhammad contracted illicit connexion with the plaintiff about 20 years ago. Maqbool Ahmad also states that he asked Ghulam Muhammad to marry the plaintiff but he refused. Ashraf Ali states that Ghulam Muhammad had illegal connexion with the plaintiff and that Tassaduq Husain had told him that Ghulam Muhammad had not married her. Chammi Khan states that Ghulam Muhammad told him that he would not marry the plaintiff but would keep her as his mistress. It appears from the evidence of these witnesses that there was connexion between Ghulam Muhammad and the plaintiff, but we think that their evidence is not sufficient to rebut the presumption raised by reason of the acknowledgment. The learned civil Judge did not rely on the presumption raised by their long cohabitation as husband and wife on the ground that the plaintiff was a prostitute but he has given no reason for not relying on the presumption raised by reason of the acknowledgment made by the husband. It was held in A I R 1929 Cal 682[4] that if direct evidence of marriage is adduced and the Court disbelieved it, the effect of presumption arising from the acknowledgment is not lost and the failure does not absolve the opposite party from disproving or proving the impossibility of marriage and thereby rebutting the presumption.

After considering all the evidence, we are of opinion that the marriage of the plaintiff with Ghulam Muhammad is proved. It is also proved that the dower was fixed at Rs. 2100. There is nothing to show that the dower was ever paid and so it was outstanding when the deed of gift in favour of the plaintiff was executed. The result of our findings is that the plaintiff is entitled to a decree for possession of the entire property and to mesne profits from August 1935 when she was dispossessed till the date she gets possession. The appeal is allowed and the plaintiff will get her costs in both Courts on the relief for possession. She will be entitled to have a final decree for mesne profits under O. 20, R. 12, Civil P. C.

G.N./R.K. *Appeal allowed.*

3. ('20) 7 A I R 1920 Oudh 128 : 60 I C 147, Muhammad Ali Khan v. Ghazanfar Ali Khan.

4. ('29) 16 A I R 1929 Cal 682 : 125 I C 311, Ahasanulla v. Nejabatali.

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(28) A. I. R. 1941 Oudh 288

YORKE AND AGARWAL JJ.

Mt. Sardar Jahan and others —
Defendants — Appellants

v.

Mt. Afzal Begam — Plaintiff —
Respondent.

First Appeal No. 77 of 1937, Decided on 23rd December 1940, against decree of Civil Judge, Lucknow, D/- 8th May 1937.

(a) Advancement—There is no presumption of advancement in India—Source of money flowing from husband and property standing in wife's name—Transaction is benami—Property standing in Mahomedan wife's name—No presumption that it belongs to her husband—Test whether transaction is benami—Source of money is not sole criterion—Slight quantity of evidence may suffice but it must be definite—Evidence as to source of money not convincing — Evidence given and withheld open to adverse criticism — Court must rely on surrounding circumstances, position of parties, their relation to one another, motive governing their action and their subsequent conduct including their dealings with disputed property — Wife unable to prove moneys expended to be her own — She can fall back on plea of advancement—Burden to prove transaction benami is on person asserting it to be so.

There is no presumption of advancement in India and therefore a purchase of property by a husband in the name of his wife unexplained by other proved or admitted facts must be regarded as a benami transaction by which the beneficial interest in the property remains in the husband although the ostensible title is in the wife. Once it is established that the source of money flowed from the husband and the property stood in the name of the wife the transaction must be regarded as benami and the wife a mere benamidar. But there is no presumption that a property standing in the name of a Mahomedan wife belongs to her husband and is not her property. [P 291 C 2]

In deciding whether a transaction is benami or not the source from which the money comes is no doubt a valuable test but it cannot be regarded as a sole and conclusive criterion. Even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose but something definite must be shown to establish that. If the evidence on neither side is wholly convincing as to the fundamental criterion, namely the source of the purchase money, and the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property, and although the doctrine of advancement in favour of wife or child does not apply in India the relationship is a circumstance which should be taken into consideration in determining whether the transaction is benami or not. [P 291 C 2]

There is nothing to prevent the wife from falling back on the plea of advancement in case she is unable to satisfy the Court that the moneys expended were her own. Section 82, Trusts Act, makes it clear that once it is shown that the property stands in the name of the wife, the burden of proof of establishing all the facts necessary to lead to the inference that the transaction was benami lies upon the person asserting it to be so: *Case law relied on.* [P 291 C 1]

(b) Benami—House standing in Mahomedan wife's name—In reply to municipal notice husband stating house to belong to his wife—Municipality addressing all communications to wife —No motive for husband to conceal his ownership shown—Husband's statement and conduct held strong evidence that purchase of house was for wife's benefit.

The Mahomedan husband at a time when there was no motive for him to conceal his own ownership of his house which stood in the name of his wife in response to a notice from the Municipal Board replied that the house in question belonged to his wife and that correspondence should be addressed to her. Such correspondence as followed was all addressed to the wife :

Held that inasmuch as there was no necessity for the husband to make the assertion to the Municipal Board, his act must be taken as strong evidence to support the wife's case that the house in question, if purchased from the money of her husband was purchased for her benefit : ('32) 19 A I R 1932 P C 13, *Rel. on.* [P 292 C 2 ; P 293 C 1 ,2]

Mohammad Ayub and P. N. Bhatt — for Appellants.

Anant Prasad Nigam and Jagat Bahadur Srivastava — for Respondent.

Judgment. — Jafar Ali now represented by appellants 1 to 6 and Mt. Wazir Khanam appeal from the judgment of the civil Judge, Lucknow, decreeing the plaintiff, Mt. Afzal Begam's claim for partition of the properties of her late husband, Abid Ali Khan, and also for Rs. 375 on account of dower debt. The relationship of the parties appears from the very short pedigree which follows :

RAMZAN KHAN

Abid Ali Khan =Mt. Afzal Begam (plaintiff)	Jafar Ali Khan (deft. 1)	Mt. Wazir Khanam (deft. 2)
	Appellants 1 to 6.	

Abid Ali Khan died in August 1935, leaving as his heirs the plaintiff and defendants 1 and 2. The plaintiff's share in her husband's property is one-fourth, Jafar Ali's one-half, and Mt. Wazir Khanam's one-fourth. Mt. Afzal Begam instituted the present suit for partition of the properties left by her husband and also to recover her dower debt, alleging that the amount of dower fixed was Rs. 50,000 which was also customary dower, but that she was only suing to recover Rs. 10,000. Numerous defences were taken. The defendants alleged that Ramzan Khan, father of the parties, had left cash and immovable properties which were thus ancestral properties. They further alleged that Abid Ali Khan had left two houses and two plots of land, also cash amounting to Rs. 50,000 and silver ornaments to the value of Rs. 21,849 in addition to the properties mentioned in the plaint. They denied that the amount of dower was Rs. 50,000 and alleged that it was actually Rs. 500 and that this was the customary dower in the family. At a later stage in the case, the plaintiff's claim in respect of dower was reduced to Rs. 500, and hence the decree for

Rs. 375. In reply to the allegation that Abid Ali Khan had left two houses the plaintiff put in a replication stating that the two houses purchased in 1907 and 1927 and claimed by the defendants, as having been inherited from Abid Ali Khan, were her own property. A specific issue was framed on this point, namely issue 7 which originally ran as follows :

Was Abid Ali Khan the owner of the properties mentioned in items 2 to 4 of the list A filed with the written statement ? If so, to what effect ?

It subsequently emerged that these properties stood in the name of the plaintiff and on 6th April 1937, the issue relating to these houses was re-framed as follows :

Issue 7 (a) : Did Abid Ali Khan acquire properties 2 and 3 of list A of the written statement 'benami' in the name of the plaintiff ?

It is only the question raised in this issue which is in issue in this appeal. The learned civil Judge held that neither the plaintiff, who alleged that she had purchased the houses and rebuilt them from the money received by her monthly from her husband on account of 'kharch pandan,' nor the defendants, who had alleged that the money spent in connexion with the houses belonged to Abid Ali Khan and the houses were purchased benami in the name of the plaintiff, had been able to substantiate the case set up by them. He held that the defendants had not been able to prove that the money spent in connexion with the acquisition of the houses and rebuilding them belonged to Abid Ali Khan, and on this finding the case put forward by the defendants must necessarily fail. He went on, however, to discuss the position which would have arisen if he had been able to hold that the defendants had proved that the money belonged to Abid Ali Khan. In this connexion he held that though the source of the purchase money was a valuable test in determining whether the purchase was "benami," it was not the only matter to be taken into consideration, and the question had to be considered in the light of all the surrounding circumstances and facts. He remarked that Abid Ali Khan had no very good motive for purchasing these houses "benami" in the name of his wife. Secondly, he took note of the fact that Abid Ali Khan had in 1919, long after the first purchase of 1907, asserted that the house which had been purchased in 1907 did not belong to him but to his wife, and thirdly he took note of the fact that Abid Ali Khan had been acquiring other properties in his own name, from which it was reasonable to suppose that if he took some small properties in his wife's name, it was not with the object of surrounding the purchase with an atmosphere of secrecy, but with the object of benefiting his wife. The learned civil Judge considering these facts remarked that

although there is no presumption of advancement applicable in India, yet certainly advancement can be inferred from the circumstances of the present case.

We have listened to a fairly lengthy argument on this question whether in the circumstances of the case the inference drawn by the learned civil Judge is sound. We may note that in this argument the original finding of the learned civil Judge that the defendants failed to prove that the money spent in connexion with the acquisition of the houses and rebuilding them belonged to Abid Ali Khan was to some extent lost sight of. The position in regard to the burden of proof in cases of this kind is free from doubt. It has been stated clearly by their Lordships of the Privy Council in A I R 1926 P C 77[1] that

the person who alleges that property conveyed on another belonged to himself must prove his allegation and prove it beyond reasonable doubt.

On the other hand there is no doubt that there is no presumption of advancement in India. In 13 M I A 232[2] at p. 247 it is said :

There is authority for the propositions that the criterion of these cases in India is to consider from what source the purchase money comes; that the presumption is, that purchase made with the money of *A*, in the name of *B*, is for the benefit of *A*; and that, from the purchase by a father, whether Mahomedan or Hindu, in the name of his son, you are not at liberty to draw the presumption which the English law would draw, of an advancement in favour of that son.

Reliance was placed on this case in the subsequent cases in 52 I A 286[3] at p. 289 where it is said :

There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a 'benami' transaction by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India.

The decisions on the subject have been summarized in a case of this Court, 8 O W N

1. ('26) 13 A I R 1926 P C 77 : 96 I C 142 : 4 Rang 518 (PC), Maung Po Kin v. Maung Po Shein.
2. ('70) 13 M I A 232 : 4 Beng L R 1 : 13 W R 1: 2 Suther 279 : 2 Sar 522 (PC), Moulvi Syad Azhar Ali v. Mt. Bebee Altaf Fatima.
3. ('25) 12 A I R 1925 P C 181 : 88 I C 327 : 48 Mad 605 : 52 I A 286 (PC), Lakshmiah Chetty v. Kothandrama Pillai.

349[4] at pp. 487 and 488. The learned Judge concluded his discussion by remarking,

> once it has been established that the source of money of the transaction flowed from the husband and that the transaction stood in the name of the wife then it followed upon the strength of the rulings cited above that the transaction was a benami one and the wife was a mere benamidar.

Learned counsel for the appellants contends that in the present suit it is apparent, though not very expressly stated by the learned civil Judge, that he was of opinion that the plaintiff had failed to establish satisfactorily that she had purchased the houses and rebuilt them from her savings out of the money given to her by her husband as "kharch pandan" or pin money or pocket money. He contended that this very statement of the plaintiff involved the admission that these moneys came to the plaintiff from her husband Abid Ali Khan. If therefore it was not established that these moneys were received by her as pocket money and thereby became her own, and that it was from this source that she incurred the expenditure necessary for the purchase and rebuilding of these houses, it follows that on her own admission the source of the money was Abid Ali Khan, that is the houses were purchased and rebuilt from the money of Abid Ali Khan.

Learned counsel contended that in these circumstances it was not really open to the plaintiff to fall back on the plea of advancement, that is that these properties had been purchased by Abid Ali Khan for her benefit. In any case he put forward the plea that once it was shown that the source of the money was Abid Ali Khan the burden lay on the plaintiff to show that Abid Ali Khan had made these purchases and rebuilt the houses for her benefit. As regards this question of pleading, it does not appear to us that there was anything to prevent the plaintiff from falling back on the plea of advancement in case she was unable to satisfy the Court that the moneys expended were her own. What is more important still is that whatever the pleadings of the plaintiff in her replication might have been, it seems to us that, given the fact that the properties stood in the name of the plaintiff, the burden, as stated in one of the cases quoted above, lay upon the defendants to establish the correctness of their allegation that these properties had been purchased benami for the benefit of Abid Ali Khan.

Learned counsel for the appellants contended that one of the cases relied upon by the lower Court, A I R 1924 Cal 467,[5] was more favourable to him than it was to the plaintiff. He evidently lost sight of a number of propositions of law which are laid down in this case: *vide* the headnote. The first proposition laid down was :

> There is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her 'stridhan' property.

It would seem to be equally obvious that there is no presumption that a property standing in the name of a Mahomedan wife belongs to her husband and is not her property. The second proposition laid down is:

> The burden of proof lies upon the person who asserts that the apparent is not the real state of things.

The proposition on which he has relied is the third proposition laid down, namely:

> As benami transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose.

On the other hand, the Judges went on to say that :

> The person who impugns its apparent character must not rely however solely on probabilities. He must show something definite to establish that it is a sham transaction on the principle that the burden of proof lies upon the person who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things.

They go on to point out that "the most important test to be applied in these cases is the source whence the consideration came," but further on they remark that :

> If the evidence on neither side is wholly convincing as to the fundamental criterion, namely the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property. The doctrine of advancement in favour of wife or child does not apply in India but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is benami or not.

On behalf of the respondent in this connexion reliance was placed on the case in 1 O W N 710[6] in which the learned Additional Judicial Commissioners took into consideration the effect of S. 82, Trusts Act (Act II of 1882). The argument put forward is that in the light of that section the bur-

4. ('31) 18 A I R 1931 Oudh 177 : 136 I C 642 : 8 O W N 349, Mohammad Azim Khan v. Mohammad Saadat Ali Khan.

5. ('24) 11 A I R 1924 Cal 467 : 82 I C 934 : 39 C L J 140 : 28 C W N 181, Bhuban Mohini Dasi v. Kumud Bala Dasi.

6. ('25) 12 A I R 1925 Oudh 248 : 82 I C 832 : 1 O W N 710, Mt. Raj Kunwari v. Mt. Rani Mahraj Kunwar.

den of proof now lies upon a person alleging a transaction to be benami to establish not only that the consideration was paid or provided by another person but also that it appears that the person who provided the consideration or paid it did not intend to pay or provide such consideration for the benefit of the transferee. Section 82, Trusts Act, runs as follows :

Where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

As this section is worded, it appears that in order that a transfer should be held to be benami and the transferee compelled to hold the property for the benefit of the person who has paid or provided the consideration, not only must it be shown that the consideration was paid or provided by another person but it must also be shown that "it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee," that is there is some burden on the person claiming that a transfer was benami to show, by evidence or by circumstances or by subsequent conduct or however it may be possible to show anything of the kind, that there was no intention on the part of the person who paid or provided the consideration to do so for the benefit of the transferee. This is the reverse of the proposition urged on behalf of the appellants. In 10 W N 710[6] quoted above, the learned Additional Judicial Commissioners further remarked:

A party cannot be relieved from the burden of proving the benami nature of the transaction by merely showing that a large proportion of the consideration was paid by the real purchaser. The burden is greatly enhanced by the length of time that has passed since the transaction impugned.

They went on to say (*vide* the headnote):

Section 82, Trusts Act, appears to throw the burden of proving that a transaction is benami on the party alleging it, whereas previously to that enactment the position may well have been that plaintiff who came into Court with the proof that he had paid the consideration money himself would have been able to throw the burden of proving that the transaction was not benami on the other side.

At pages 721 following the learned Addl. Judicial Commissioners discussed the case law on this subject, and the proposition stated above is one of those laid down in this discussion. With great respect, we are in full agreement that section 82, Trusts Act, though it may not have really altered the burden of proof, has made it much clearer than it was before that the burden of proof of establishing all the facts necessary to lead to the inference that a transfer was benami lies upon the person asserting it to be so. As remarked in a single Judge Madras case, A I R 1934 Mad 671,[7]

in deciding the question whether or not a particular transaction is benami, the source from which the money comes is no doubt a valuable test, but to regard it as a sole and conclusive criterion is clearly wrong.

The learned Judge held that, in a case where the husband purchased property in the name of his junior wife, the moneys for the purchase coming from his purse, with a view to defeat the claims of his elder wife and her son, the transaction far from being benami was intended to be real. It is in the light of these pronouncements that we have to consider the facts on the record. For the appellants reliance has been placed on the allegation that in 1907 Abid Ali Khan had a motive for purchasing this property benami in view of the fact that he was always exposed to the danger of a suit by his employer in respect of the property of which he was a manager. Such a suit was instituted in 1912. Any force that there might be in such an argument is completely lost when account is taken of the date of the purchase and account is also taken of the fact that Abid Ali Khan purchased other properties in his own name. Secondly, it has been urged that Abid Ali Khan was originally only a literate servant or munshi getting Rs. 7 a month each from two different employers. That may be the case but it certainly appears that this form of employment was by no means his only source of income, vide for example the statement of Jafar Ali Khan that "Abid Ali Khan's income had no limit." Reliance has further been placed on the fact that the evidence of the plaintiff herself showed that she knew very little about how much money she had at any given time, that is how her alleged savings from "kharch pandan" grew and how they were expended.

On the other hand, on behalf of the respondent strong reliance is placed on the fact that no less than twelve years after the first purchase, at a time when there is no evidence to show that Abid Ali Khan had any motive for concealing his own ownership of this property he in response to a notice received from the Municipal Board replied that the house in question belonged to his wife and that correspondence should be

7. ('34) 21 A I R 1934 Mad 671 : 153 I C 478 : 67 M L J 541, Thulasi Ammal v. Official Receiver, Coimbatore.

addressed to her. Such correspondence as followed was all addressed to the plaintiff. It is easy to say that the subsequent treatment of the property had to be consistent with the form in which the purchase had been made, but this statement by Abid Ali Khan seems to go further than mere consistency.

Then again on behalf of the respondent it is argued that there was a motive for Abid Ali Khan to purchase this property for the benefit of his wife in or about 1907. Abid Ali Khan's father Ramzan Khan died in 1889 or 1890 and at some subsequent date (the date is very uncertain) it appears that the plaintiff had a quarrel with her husband and sued him for maintenance and got a decree. It is by no means unlikely that Abid Ali Khan would have made such a purchase for the benefit of his wife to take the place of this maintenance which had been adjudged to her by the Court, particularly if, as appears, they were subsequently reconciled. The fact that Abid Ali Khan did acquire other property worth something like Rs. 41,000 does not appear to be in dispute. Learned counsel for the respondent contends that if all these facts are taken into consideration the action of Abid Ali Khan in connexion with house No. 1, purchased in 1907, in 1919 is comparable to the action of Baqar Ali referred to in the decision of their Lordships of the Privy Council in 8 O W N 1378[8] at p. 1891. In that case a deed which was subsequently alleged to evidence a benami transaction was on the occasion of Abid Jahan's marriage in 1914 placed on a tray and sent for the inspection of her father-in-law, and this was held by the learned Judges of the Chief Court to be conclusive of Baqar Ali's intention. Their Lordships remarked

> the sending of the deed for the inspection of the lady's father-in-law, which the Chief Court held to be established, was clearly a representation of the intention that the property was hers, and their Lordships agree with the learned Judges in the conclusion to which they came.

The two acts are not, of course, quite upon the same footing, but there not seeming to have been any necessity for such an assertion on the part of Abid Ali Khan in 1919, his act must be taken as strong evidence to support the plaintiff's case that the house in question, if purchased from the money of Abid Ali Khan, was purchased for her benefit. No special circumstances have been shown in regard to the purchase of the second house on 3rd March 1927, but it was reasonable to hold that if the first purchase was intended for the benefit of the wife the second was also so intended. In our opinion on the evidence on the record the learned civil Judge was fully justified in coming to the conclusion that from the evidence on the record, so far from it appearing that Abid Ali Khan did not intend to pay or provide the consideration for the benefit of the transferee, the only reasonable inference was that he did intend to do so for her benefit. The learned civil Judge rightly held that these two houses were not the property of Abid Ali Khan and therefore necessary to be brought into the hotchpot for partition along with the other properties in respect of which partition was claimed but that they were the personal property of the plaintiff. No other point has been argued before us. On the only point argued this appeal fails and is accordingly dismissed with costs.

G.N./R.K. *Appeal dismissed.*

8. ('32) 19 AIR 1932 P C 13 : 136 I C 385 : 6 Luck 556 : 59 I A 1 : 8 O W N 1378 (P C), Mohammad Sadiq Ali Khan v. Fakr Jahan Begam.

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* * (28) A. I. R. 1941 Oudh 293

FULL BENCH

YORKE, BENNETT AND AGARWAL JJ.

In re B. Lakhshmi Shanker and another — Applicants.

Testamentary Case No. 1 of 1940, Decided on 28th March 1941.

** (a) Succession Act (1925), Ss. 229 and 230— Executor disputing validity of will must accept or renounce his executorship before validity of will is adjudicated upon on application for letters of administration by another person.

The conditions which justify a grant of letters of administratoin must be satisfied before anyone but an executor may be admitted to prove the will and one of the conditions laid down in Ss. 231, 232 and 234 is in effect that the executor renounces or fails to accept the executorship. Therefore, an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under S. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person : 19 Bom 128; ('20) 7 A I R 1920 Cal 874 and ('26) 13 A I R 1926 Mad 605, *Expl., and Disting.* [P 294 C 1; P 295 C 1]

(b) Succession Act (1925), Ss. 229 and 224 — Citation cannot be issued to an executor on application by another executor.

Where several executors are appointed probate may be granted to them all simultaneously or at different times. It is open therefore for an executor to apply for probate after probate has been already granted to another executor. There is no provision for the issue of a citation to an executor on an application by another executor. Section 229 only comes into operation on an application for letters of administration. [P 294 C 2]

(c) Succession Act (1925), Ss. 231, 232 and 234—Word 'prove' is used in ordinary meaning of establishment by evidence—It does not mean subsequent taking of letters of administration—English law is not applicable.

The word 'prove' in Ss. 231, 232 and 234 is used primarily in its ordinary meaning and therefore the words, "the will be proved" in S. 231, and "to prove the will" in Ss. 232 and 234 mean the establishment of the validity of the will by evidence, but not the subsequent taking of letters of administration, this corresponding to the taking of probate in the case of an executor. And a construction which is at variance with the ordinary meaning of the words used should not be read into these sections merely because there is a distinction in English law between a citation to propound and prove will and a citation to take probate. There is no such distinction in the Indian Act : ('24) 11 A I R 1924 Cal 864, *Rel. on.* [P 296 C 2]

L. S. Misra, Md. Ayub, A. P. Nigam, J. L. Srivastava and Ram Krishna Srivastava — for Applicants.

M. Wasim, A. K. Zahur, Bishun Singh, Nazir-uddin, Hakimuddin, Rajeshwari Parshad and Md. Sadiq — for Non-applicants.

Judgment. — The question referred to the Full Bench is :

Is it implied by Ss. 229 and 230, Succession Act, that an executor who disputes the validity of a will appointing him as such must accept or renounce his executorship under S. 229 before the validity of the will is adjudicated upon on an application for letters of administration by another person?

The question arises out of an application for letters of administration in respect of a will executed by Kunwar Ram Shankar on 8th October 1935. Kunwar Ram Shankar died on 8th March 1937. By this will he appointed his elder son, B. Baijnath Shankar, sole executor. The applicants for letters of administration are his second son, B. Lakshmi Shankar, and the minor son of B. Baijnath Shankar under the guardianship of B. Lakshmi Shankar. A caveat was entered by B. Baijnath Shankar who alleged that the will of 8th October 1935, was revoked by a later will of 16th August 1936. The applicant prayed that citation might be issued to B. Baijnath Shankar under S. 229, Succession Act, calling upon him to accept or renounce his executorship. He objected to the issue of such a citation on the ground that it would be premature, representing that it should not issue until the applicants have established that the will of 8th October 1935, is the last will and testament of Kunwar Ram Shankar.

The referring order shows that different views have been taken by the Bombay High Court on the one hand and the Calcutta and Madras High Courts on the other, but the facts in the cases cited are not parallel to those in the present case. In 19 Bom 123[1] the Bombay High Court considered the effect of the reply of an executrix to a citation that she did not renounce the executorship and held that this did not amount to an acceptance. They did not consider whether the citation had issued prematurely. In 47 Cal 838[2] the Calcutta High Court held that letters of administration should not have been granted without issue of a special citation to the executor to accept or renounce his executorship, but added the obiter dictum that the executor was not bound to accept or renounce his executorship unless and until the validity of the will was established. In the Madras case in A I R 1926 Mad 605[3] the Madras High Court no doubt held that an executor may challenge the genuineness of a will and at the same time claim probate if it is proved to be genuine, but this was a case where a will was propounded by one executor and disputed by another. Section 229 did not apply to the facts of that case. Under S. 224 where several executors are appointed probate may be granted to them all simultaneously or at different times. It is open therefore for an executor to apply for probate after probate has been already granted to another executor. There is no provision for the issue of a citation to an executor on an application by another executor. Section 229 only comes into operation on an application for letters of administration. It appears therefore that there is no Indian authority directly on the point under consideration.

Sections 231, 232 and 234 show in what cases and to whom letters of administration may be granted. Section 231 provides that if an executor renounces or fails to accept an executorship within the time allowed the will may be proved and letters of administration may be granted to the person who would be entitled to administration in case of intestacy. Section 232 provides that where no executor has been appointed, where an executor is legally incapable or refuses to act or has died, or where an executor dies after proving the will but before administering the estate a universal or a residuary legatee may be admitted to prove the will and letters of administration with the will annexed may be granted to him. Section 234 provides that where there

1. ('95) 19 Bom 123, Motibai v. Karsandas Narayandas.
2. ('20) 7 A I R 1920 Cal 874 : 60 I C 974 : 47 Cal 838, Sarojini Dasi v. Rajlakshmi Dasi.
3. ('26) 13 A I R 1926 Mad 605 : 94 I C 73, Venkataramier v. Govindarayalier.

is no executor and no residuary legatee or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or another legatee having a beneficial interest or a creditor, may be admitted to prove the will, and letters of administration may be granted to him or them accordingly. Admittedly, it would be under this section that letters of administration would be granted in the present case, if at all.

It will be observed that in all these cases it appears to be implied that the conditions which justify a grant of letters of administration must be satisfied before anyone but an executor "may be admitted to prove the will." In S. 231 one of the conditions is that the executor renounces or fails to accept the executorship; in S. 232 one of the conditions is that the executor refuses to act; and S. 234 includes cases where the executor declines to act. No distinction would appear to be intended for this purpose between absolute renunciation of an executorship, failure to accept an executorship and refusal to act. No one is given any locus standi, any power to take any steps to prove the will unless and until one of the conditions laid down in these sections is satisfied, and it certainly seems to be implied that the person who proves the will shall be entitled to letters of administration. On a consideration only of the terms of these sections we should therefore be disposed to answer the question which has been referred in the affirmative.

This conclusion might also be supported by the argument that there is nothing in the Act which indicates that any other procedure is contemplated. If the other view be adopted, it would be necessary for the Court first of all to determine on the application of a non-executor whether the will was proved, and then to ascertain before proceeding further whether the condition which alone would justify a grant of letters of administration to a non-executor was satisfied. We find it very difficult to believe that such a procedure was intended. Learned counsel for B. Baijnath Shankar has referred to the provisions of English law, but we have not been able to find any English authority which is directly on the point. The Succession Act provides only for the issue of a general citation under S. 283 (1) (c) calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate of letters of administration, a special citation under S. 229 calling upon the executor to accept or renounce his executorship, and a citation under S. 235 calling on the next of kin to accept or refuse letters of administration where the question of a grant of letters of administration to a legatee other than a universal or residuary legatee is under consideration. In English law a citation may issue calling upon anyone concerned, including an executor to propound a will.

In (1853-55) 164 E R 1195,[4] the testatrix died on 19th April 1859, leaving one will dated 15th March 1853, wherein she appointed the Rev. J. Bewsher residuary legatee; and another dated 15th March 1857, wherein she appointed Williams executor. Mr. Bewsher propounded the will of 1853 and cited the executor and parties interested in the will of 1857 to propound and prove it if they thought fit to do so. A legatee named Mrs. Ball propounded it. Its validity was contested by Newsher on the ground of the deceased's insanity, but the will was held valid. The Court was moved to grant letters of administration with the will annexed to Mrs. Ball and objection was taken to this on the ground that the executor and residuary legatee named in the will had not been cited. It was argued that they had been cited to propound and to prove the will and had failed to do so and therefore under S. 16, Probate Act, 1858, the executor not having appeared on a citation to take probate, the right to the executorship had ceased. It was said by the Court (Sir C. Cresswell):

> I do not think that in the citation you speak of the term 'prove' is used according to the meaning or spirit of this section. There is a difference between being cited to propound and prove a will, and being cited to take probate. I cannot make the grant to Mrs. Ball until Mr. Williams has renounced or has been cited to take probate.

Learned counsel has argued on the basis of this authority that the words, "the will be proved" in S. 231, and "to prove the will" in Ss. 232 and 234 do not mean the establishment of the validity of the will by evidence, but rather the subsequent taking of letters of administration, this corresponding to the taking of probate in the case of an executor. We have considered whether this construction can be placed on the word "prove" in the sections of the Succession Act under consideration. It would no doubt be possible to hold that it means "take probate" in cases where probate is granted to

4. (1853-55) 164 E R 1195, Bewsher v. Williams,

an executor, but it could only mean "take letters of administration" by analogy. We very much doubt whether this was the intention, particularly as the language of sections 231, 232 and 234 does not in our opinion support this construction. It would be necessary to hold that where one of these sections says that a legatee may be admitted to prove the will and letters of administration may be granted to him, the meaning is that he may be allowed to take letters of administration and letters of administration be granted him, which is tautologous.

It has been suggested that the words "may be admitted to prove the will" in S. 232 cannot mean "be allowed to establish the will by evidence," but must have some other meaning, because the contingency referred to in clause (c) of that section is that "the executor dies after having proved the will" and therefore no further proof is necessary. But the words have also to be considered in connexion with the two previous contingencies referred to in cls. (a) and (b), in which it would certainly be necessary for the legatee to establish the validity of the will by evidence. No doubt where the will has already been proved by the executor it would not be necessary for the legatee to do more than produce the "probate" (as defined in the Act). It may also be that the words "to prove the will" mean more than merely to establish the validity of the will by evidence; they may mean "to do whatever may be necessary to obtain probate or letters of administration," as the case may be; but that would in most cases include establishing the will by evidence. So that it does not appear possible to hold that wherever these words are used they refer to a stage subsequent to the establishing of the validity of the will by evidence.

It has also been suggested that it would be anomalous if an executor who has disputed a will propounded by another executor is allowed subsequently to claim probate jointly with him, and yet be barred from asserting his right as executor under a will which has been successfully propounded by a legatee. But it is to be noted that in the former case the successful executor is not displaced by the unsuccessful executor; he merely becomes a joint executor with him, while if an executor who has disputed a will propounded by a legatee is allowed subsequently to obtain probate he ousts altogether the legatee, although the latter has won his case and the executor has lost it.

We were referred to some observations of the Calcutta High Court in 51 Cal 745[5] which are pertinent in considering whether the provisions of the Indian Succession Act should be interpreted in the light of English law. In this case the question under consideration was whether an executor who had renounced his executorship could thereafter apply for probate. The Calcutta High Court observed (at page 758):

> A person intermeddling with the estate of the deceased is no doubt liable to account for his dealings with the estate. It appears that in England the Court may compel such an executor to take out probate so as to represent the estate. It is unnecessary for us to consider in the present case whether the law is the same in this country as no one applied for compelling the appellant to take out probate. We may however observe that the practice in England has grown up under different conditions and is regulated by different statutes, and the practice there need not necessarily be followed by us here.

Further on he said (at page 759):

> It has been contended before us on the analogy of English cases decided under 20 & 21 Vict., Ch. 77, S. 79, that it is open to the executor to retract his renunciation so long as no fresh grant of administration has been made to some other person.
>
> It seems to have been held in England that the old practice was not abrogated by the statute and the Court is not itself concluded, but may permit a retraction of an executor's renunciation in a fit case . . . . It is fruitless to endeavour to interpret the rules relating to procedure under the Indian Act by reference to what has been decided with regard to another statute in England on different considerations even if the language of the two statutes had been the same.

We do not consider that we should read into the sections of the Indian Succession Act under consideration a construction which is at variance with the ordinary meaning of the words used merely because there is a distinction in English law between a citation to propound and prove a will and a citation to take probate. We can find no such distinction in the Indian Act. We hold that the word "prove" in Ss. 231, 232 and 234 of that Act is used primarily in its ordinary meaning and we accordingly answer the question which has been referred to us in the affirmative.

K.S./R.K. *Reference answered.*

5. ('24) 11 A I R 1924 Cal 864 : 84 I C 154 : 51 Cal 745, Brojo Lal v. Sharajubala Debi.

(28) A. I. R. 1941 Oudh 297

BENNETT AND GHULAM HASAN JJ.

N. Mirza Mohd. Sadiq Ali Khan — Judgment-debtor — Appellant

v.

N. Fakhr Jahan Begam — Decree-holder — Respondent.

Exn. of Decree Appeal No. 26 of 1939, Decided on 12th December 1940, against order of Civil Judge, Lucknow, D/- 30th March 1939.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 7 (2) and (3) — Sub-ss. (2) and (3) do not apply to proceedings on application under S. 144, Civil P. C.

The proceedings on an application under S. 144, Civil P. C., are not proceedings in execution to which the provisions of sub-ss. (2) and (3) would be applicable, but rather proceedings to which the provisions of cl. (b) of sub-s. (1) must be applied. [P 298 C 2]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 2 (a) — Decree for costs reversed on appeal — Claim for refund of amount of costs deposited is not claim for unliquidated damages.

A claim for the refund of amount of costs awarded by a decree, which is subsequently reversed in appeal cannot be considered a claim for unliquidated damages. [P 299 C 1]

(c) U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (b) — Decree for costs passed before, but reversed in appeal after, order under S. 6—Debt cannot be said to have been incurred prior to order under S. 6.

When a person is said to be under a pecuniary liability the meaning is that he is at that time under a definite pecuniary obligation, and not that there is merely a possibility of a pecuniary obligation arising at some future time. Hence where a decree for costs passed before, but reversed on appeal after Collector's order under S. 6, the liability for costs is not incurred when the suit is brought but when the decree is reversed in appeal. Hence the debt cannot said to have been incurred prior to Collector's order under S. 6: ('40) 27 A I R 1940 All 245, *Dissent*. [P 299 C 2]

Mukund Behari Lal and Akhtar Husain — for Appellant.

J. Jackson and Abid Husain — for Respondent.

Judgment. — This is an execution of decree appeal against the order of the learned civil Judge of Lucknow dated 30th March 1939, on an application under S. 144, Civil P. C. The circumstances under which this application was made are these: Nawab Fakhr Jahan Begam instituted a contribution suit against Nawab Mirza Mohammad Sadiq Ali Khan and others, and the suit was decreed on 1st September 1932. An appeal to this Court was allowed with costs on 4th March 1934. The decree of this Court was executed against Nawab Fakhr Jahan Begam for costs and Nawab Fakhr Jahan Begam deposited the decreed costs amounting to Rs. 7824-8-6. This amount was paid to the decree-holder, Nawab Sadiq Ali Khan, on 29th January 1935. Thereafter Nawab Fakhr Jahan Begam and others preferred two appeals to the Privy Council against the judgment and decree of the Chief Court. Their Lordships of the Judicial Committee allowed these appeals with costs, setting aside the decree appealed against and restoring the decree of the trial Court. Nawab Fakhr Jahan Begam accordingly made an application to the civil Judge under S. 144 claiming a refund of the sum of Rs. 7824-8-6 paid to Nawab Sadiq Ali Khan together with interest at 6 per cent. per annum from 9th January 1935, the date when the amount was deposited by her in Court.

Prior to the appeal to the Privy Council Nawab Sadiq Ali Khan had made an application under S. 4, Encumbered Estates Act. An order was passed by the Collector under Section 6 of this Act on 4th November 1935. Objection was taken by Nawab Sadiq Ali Khan to the application under S. 144 on the ground that the claim was barred by Ss. 7 and 13, Encumbered Estates Act. Against this Nawab Fakhr Jahan Begam contended that her claim was for unliquidated damages and was therefore excluded from the operation of the Encumbered Estates Act, her claim not being a debt within the meaning of S. 2 (a) of that Act and further that as no liability on the part of Nawab Sadiq Ali Khan existed at the date of the application under S. 4, the provisions of the Encumbered Estates Act did not apply to the case. The civil Judge considered that the application under S. 144 gave rise to the following issues :

1. Is the application for restitution maintainable ?
2. If so, is it barred by the provisions of S. 13, Encumbered Estates Act ?
3. Is the appellant entitled to get any and what interest ?

The civil Judge considered first of all whether the claim for refund constituted a liability for unliquidated damages. He observed that the liability related to an amount which was undoubtedly definite and certain, this amount being the sum of Rs. 7824-8-6 which Nawab Sadiq Ali Khan had to pay Nawab Fakhr Jahan Begam. It was therefore in his opinion a debt within the meaning of clause (a) to S. 2 of the Act. But he considered at the same time that the liability of Nawab Sadiq Ali Khan to pay interest on this sum was a liability for unliquidated damages as the extent of the liability could not be ascertained until the

rate of interest was fixed. The civil Judge thought however that these questions were of little importance in view of the provisions of S. 7 of the Act. He thought that sub-s. (1) of S. 7 had no application, as the reversing decree of the Privy Council was passed long after the order of the Collector of 4th November 1935. He said :

> Sub-sections (2) and (3) to S. 7 will be applicable to the present case as the pecuniary liability in question arose subsequent to the passing of the order by the Collector. By virtue of these sub-sections the amount restituted to the applicant cannot be executed against any of his property until the cessation of disabilities enumerated in S. 44 fo the Act.

At the same time the civil Judge saw no reason why the application should not be allowed. He pointed out that S. 7 contains nothing which prohibits the execution of a decree against the person of the party liable, nor does it contain anything he observed, which may be said to prevent the institution of proceedings in respect of an order or decree which came into being only after the passing of the order by the Collector under S. 6 of the Act. It is therefore obvious, he concluded, that the Collector's order

> and the factum of the pendency of the suit under the Encumbered Estates Act cannot stand in the way of the applicant in filing the present application.

He accordingly answered issue 1 in the affirmative. The learned civil Judge also held that the application was not barred by the provisions of S. 13, Encumbered Estates Act, as no cause of action had accrued at the time when the claims contemplated by Ss. 10 and 11 of that Act could have been made. The cause of action arose only in April 1938, when the reversing decree was passed by their Lordships of the Privy Council. On issue 3 the civil Judge held that the appellant was entitled to interest from 29th January 1935, and not from the date of the deposit of the money, namely 9th January 1935. Interest could only be allowed in his opinion from the date of the withdrawal. He allowed interest at the rate of 3½ per cent. The order passed by the civil Judge on the application was that the opposite party, that is Nawab Sadiq Ali Khan, should deposit Rs. 7824-8-6 with interest at 3½ per cent. per annum from 29th January 1935 within two months from the date of the order with costs of the application. In default of such deposit, he would be required to pay future interest at the rate of 3½ per cent. per annum until payment.

In appeal against this order, it has been contended on behalf of Nawab Sadiq Ali Khan first of all that the civil Judge was in error in holding that the provisions of sub-ss. (2) and (3) and not the provisions of sub-s. (1) of S. 7 were applicable. This contention has not been opposed by the learned counsel for the opposite party, Nawab Fakhr Jahan Begam. Sub-sections (2) and (3) of S. 7 impose a bar to the execution of decrees against the landlord's property when those decrees have been obtained on the basis of any private debt incurred after the passing of the order under S. 6. Clause (b) of sub-s. (1) of S. 7 provides that no fresh suit or other proceedings, other than an appeal, review, or revision against a decree or order shall be instituted in respect of any debts incurred before the passing of the order under S. 6. It is argued that the proceedings on an application under S. 144 are not proceedings in execution to which the provisions of sub-ss. (2) and (3) would be applicable, but rather proceedings to which the provisions of cl. (b) of sub-s. (1) must be applied. We think that this contention is sound. We have then to consider whether the proceedings under S. 144 are in respect of a debt incurred before the passing of the order under S. 6. It is argued on behalf of the appellant that the debt was incurred when the litigation between the parties commenced and not when the decree was passed by the Privy Council reversing the decree of this Court. In support of this argument, we were referred to a recent single Judge ruling of the Allahabad High Court in 1940 A W R 155.[1] The facts in this case were somewhat different as the High Court confirmed the decrees of the lower Courts and there was therefore no reversal of the order passed about costs. The head notes to the case read :

> A decree for costs against a landlord is a decree for pecuniary liability incurred by him and is a private debt.
>
> Where the decree of costs was passed by the lower Courts long before passing of the Encumbered Estates Act but the High Court's decree for costs was passed after the passing of orders under S. 6 on the application of the landlord, held, the decree cannot be executed.

The argument of the learned counsel for the appellant was based mainly, however, on an observation in the judgment that "liability for costs is a pecuniary liability and is incurred when a suit is brought." We were also referred to a decision of the Board of

1. ('40) 27 A I R 1940 All 245: 188 I C 633: 1940 A L J 117: 1940 A W R 155, Bashirullah Khan v. Collector, Shahjahanpur.

Revenue in 1937 R D 444.[2] The facts in this case, which were quite different, may be seen from the headnote which reads :

Where a pre-emptor of a vendee of a zamindari on payment of a certain sum of money takes possession but on appeal to the High Court the vendee wins and recovers possession of the property without paying the money that he owes to the pre-emptor, then this money which the vendee has to pay to the pre-emptor is part of his debts within the meaning of S. 2 (a), Encumbered Estates Act. Eventually, if the vendee applies under the Encumbered Estates Act, any proceedings which the pre-emptor might be taking under S. 144, Civil P. C., for the recovery of his money shall be stayed.

We do not think that this ruling is of any assistance in the present case because no proceedings had been taken under the Encumbered Estates Act at the time when the vendee became liable to pay the money to the pre-emptor, and there was therefore no reason, if the vendee subsequently applied under the Encumbered Estates Act why the pre-emptor should not claim his money in those proceedings. We have given full consideration to the ruling of the Allahabad High Court, but with all respect we are unable to agree with the dictum that the liability for costs is incurred when the suit is brought. We do not think in the present case that the costs awarded by the Privy Council can be considered a claim for unliquidated damages. We agree with the Court below on this point. On the view which we take it is unnecessary to consider whether the claims for interest on the costs would amount to a claim for unliquidated damages. We are of opinion that this appeal must be dismissed because the debt incurred by Nawab Sadiq Ali Khan had not been incurred prior to the Collector's order under S. 6. The debt was incurred in our opinion when the order was passed by their Lordships of the Privy Council and not when the suit was first instituted.

According to the definition in Sec. 2, Encumbered Estates Act, debt includes any pecuniary liability except a liability for unliquidated damages and the question for consideration is whether any pecuniary liability was incurred by Nawab Sadiq Ali Khan when the suit against him was brought. No doubt there is a possibility of a party to a suit being made liable to pay costs to the other party, but we do not consider that this liability is incurred when the suit is brought. We think, if we may say so, that the view which was taken in the Allahabad case may have been founded on an erroneous conception of the word 'liability.' The definition of the word 'liability' in the Shorter Oxford English Dictionary would appear to draw a distinction between the legal and the colloquial implications of the word. The legal implication is "legally subject to" while in the wider colloquial sense the word may be used as meaning "subject to the possibility of." We consider that when a person is said to be under a pecuniary liability the meaning is that he is at that time under a definite pecuniary obligation, and not that there is merely a possibility of a pecuniary obligation arising at some future time. For these reasons we cannot agree that a pecuniary liability is incurred when a suit is brought. We are clearly of opinion that in the case of costs the liability is not incurred until the suit is decided and orders passed about costs. We may also point out that the consequences of holding otherwise in the present case would be anomalous, since when the amount under consideration was withdrawn by Nawab Sadiq Ali Khan he was in the position of a creditor and Nawab Fakhr Jahan Begam was in the position of a debtor; the debt that existed then was the debt of the latter and not of the former. This also in our opinion indicates that the debt of Nawab Sadiq Ali Khan could not have existed at that time or at the earlier date when the suit was instituted. It could not have come into existence prior to the order of the Privy Council in 1938. For these reasons we do not consider that there is any force in this appeal which we accordingly dismiss with costs.

D.S./R.K. *Appeal dismissed.*

2. ('37) 1937 R D 444, Ram Adhar Pathak v. Indradeo Singh.

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(28) A. I. R. 1941 Oudh 299

YORKE AND BENNETT JJ.

Mahant Hari Saran Das —
Judgment-debtor — Applicant
v.
Har Kishan Das — Decree-holder —
Opposite Party.

Review Appln. No. 13 of 1940, Decided on 18th March 1941.

(a) U. P. Encumbered Estates Act (25 of 1934), S. 2 (2)—Costs declared and ascertained constitute debt—They are unliquidated damages so long as they are unascertained.

Once costs have been declared and ascertained they constitute a debt. A decree for costs is a decree passed on the basis of unliquidated damages, costs being unliquidated damages so long as they remain unascertained. And in the case of costs in an appeal it can hardly be said until the appeal is decided and orders have been passed about costs that

there is any debt at all : ('41) 28 A I R 1941 Oudh 242, *Rel. on;* ('38) 25 A I R 1938 Oudh 169, *Expl.* [P 300 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 7 (1) (b), (2), (3) — Scope of cl. (b) of sub-s. (1) and sub-ss. (2) and (3) explained.

Different considerations apply in cases falling under cl. (b) of sub-s. (1) from cases to which sub-ss. (2) and (3) are applicable. Clause (b) of sub-s. (1) refers only to proceedings for the recovery of debts incurred before the passing of the order under S. 6; sub-ss. (2) and (3) bar the execution of decrees obtained on the basis of private debts incurred after the passing of the order. [P 301 C 1]

M. Wasim — for Applicant.

Order. — This is an application under O. 47, R. 1 and S. 114, Civil P. C., praying for review of our decision in an execution of decree appeal, 1941 O W N 103,[1] on the ground that the decision conflicts with the earlier decision of this Court in 1938 O W N 722.[2] It is asked that the question whether a decree for costs or mesne profits comes within the definition of "debt" in the U. P. Encumbered Estates Act may be referred to a Full Bench if we are not prepared to follow the earlier decision.

In 1941 O W N 103[1] we concurred in the view of the civil Judge that a decree for costs is a decree passed on the basis of unliquidated damages, costs being unliquidated damages so long as they remain unascertained. And we also observed that in the case of costs in an appeal it can hardly be said until the appeal is decided and orders have been passed about costs that there is any debt at all. The applicant, Hari Saran Das had made an application under section 4, Encumbered Estates Act, on 5th September 1935, and an order under S. 6 was passed on the same day. On 21st December 1937, a sum of Rupees 5700 was awarded against him by the Privy Council on account of costs in an appeal. The decree-holder, Har Kishan Das, attempted to execute his decree for costs and was met by the objection that since the decree was passed after the order under S. 6, Encumbered Estates Act, it could not be executed against either the judgment-debtor's proprietary rights in land or against any of his other property the provisions of sub-ss. (2) and (3) of S. 7 of the Act being relied on. It was necessary on this objection to decide whether the Privy Council decree had been obtained on the basis of a private debt incurred after the passing of the order under S. 6. As the word "debt" is defined as including any pecuniary liability except a liability for unliquidated damages, we held that the decree had not been obtained on the basis of a private debt.

In 1938 O W N 722[2] another Bench of this Court, referring to the definition of "debt" in S. 2 (2) of the Act, observed :

> The words 'any pecuniary liability' are wide enough in our opinion to include not only the costs payable to the second appellant by the decree, but also mesne profits claimed by and awarded to him. Those profits cannot, in our judgment, be said to be 'unliquidated damages' as their amount was fixed after enquiry by Court.

The facts in 1938 O W N 722[2] were these. Two pre-emption suits were instituted by Basdeo and Brijmohan respectively against Raja Birendra Bikram Singh of Payagpur. They were dismissed in the lower Courts, but decreed by this Court and the plaintiffs deposited certain sums in Court and thus obtained possession of the property pre-empted by them. The Raja did not withdraw the money but preferred appeals to the Privy Council which were allowed. The pre-emption money deposited in Court had been obtained by borrowing. Basdeo had borrowed from Badri Das and Brij Mohan from Pyare Lal. They were each sued by their respective creditor. Badri Das obtained a decree against Basdeo for Rs. 23,469 odd and Pyare Lal a decree against Brij Mohan for Rs. 9500. In execution of these decrees, they were allowed by the subordinate Judge to withdraw the greater part of the pre-emption money deposited in Court. The order permitting this withdrawal was set aside by this Court on the application of the Raja on 29th January 1936. Applications were then made by the Raja under Ss. 144 and 151, Civil P. C., praying that Badri Das and Pyare Lal be ordered to refund the money withdrawn by them. The applications were opposed and one of the pleas taken by Pyare Lal was that the proceedings against him should be stayed as he had made an application under S. 4, Encumbered Estates Act. This plea was accepted by the civil Judge and the Bench of this Court held that the proceedings had been properly stayed under S. 7 of that Act.

The sums decreed to Badri Das and Pyare Lal were based on the amounts advanced by them to Basdeo and Brij Mohan and the amounts which they withdrew in execution were amounts deposited by the latter for the purpose of pre-emption. They withdrew money which it was subsequently held they were not entitled to withdraw

1. ('41) 28 AIR 1941 Oudh 242 : 192 I C 300 : 1941 O W N 103, Hari Saran Das v. Har Kishan Das.
2. ('38) 25 AIR 1938 Oudh 169 : 175 I C 169 : 1938 O W N 722 : 14 Luck 106, Badri Das v. Birendra Bikram Singh.

and by so doing they each incurred a pecuniary liability, that is a debt in respect of the sum withdrawn. The application under S. 4, Encumbered Estates Act, was made after this withdrawal and sub-ss. (2) and (3) of S. 7 were in no way applicable in 1938 O W N 722.[2] As was held by a Bench of this Court of which one of us was a member, in 1941 O W N 126[3] proceedings on an application for restitution under S. 144, Civil P. C., are proceedings to which the provisions of cl. (b) of sub-s. (1) must be applied; that is, if the debt is incurred prior to the order under S. 6. In 1941 O W N 126[3] it was held that since an order for costs had been passed by an appellate Court subsequent to that order cl. (b) of sub-s. (1) had no application and the proceedings under section 144 could continue. It was also held that the costs awarded by the Privy Council on appeal in that case did not constitute a claim for unliquidated damages since they had been ascertained. Clause (b) was held not to apply because the liability was incurred when the costs were awarded, not when the suit was brought. But in 1938 O W N 722[2] cl. (b) applied. The debt was incurred before the passing of the order under S. 6 and therefore the proceedings under S. 144 were properly stayed.

Different considerations apply in cases falling under cl. (b) of sub-s. (1) from cases to which sub-ss. (2) and (3) are applicable. Clause (b) of sub-s. (1) refers only to proceedings for the recovery of debts incurred before the passing of the order under S. 6: sub-ss. (2) and (3) bar the execution of decrees obtained on the basis of private debts incurred after the passing of the order. We were dealing in 1941 O W N 103[1] with the execution of a decree obtained subsequent to the order; while in 1938 O W N 722[2] the question for consideration was whether proceedings under S. 144 should be stayed in respect of a debt incurred before the passing of the order.

When it was said by this Court in 1938 O W N 722[2] that "the words 'any pecuniary liability' are wide enough to include the costs payable to appellant 2" the reference was to the Raja's claim for costs under the decree obtained by him in appeal to the Privy Council, (the Raja being appellant 2 referred to) which decree, we understand, had been obtained before Pyare Lal's application under the Encumbered Estates Act. But the Raja was not proceeding directly in execution of that decree; Pyare Lal was not a party to that decree; it had been obtained against Brij Mohan. Proceedings were taken against Pyare Lal under S. 144 because Pyare Lal had withdrawn the money deposited by Brij Mohan and it had been held that the withdrawal was not justified and that the money should be rateably distributed among the pre-emptor's creditors. The question whether the costs awarded to the Raja by the Privy Council constituted a debt did not in our opinion enter into the matter, those costs having been awarded against Brij Mohan and not against Pyare Lal, and the liability of the latter arising in quite a different way. The observation on which the applicant relies was not therefore in our opinion quite relevant to the case and may be considered obiter. But we in no way dissent from the view that once costs have been declared and ascertained they constitute a debt. Whether a decree for costs has been obtained on the basis of a debt is a different question.

It is unnecessary for us to consider the further question whether an application of this kind lies under O. 47, R. 1 and S. 114. We find that there is no inconsistency between the decisions in the two cases and no reason therefore to reconsider our decision in 1941 O W N 103[1] or to refer the question whether a decree for costs comes within the definition of 'debt' to a Full Bench. We accordingly reject the application.

K.S./R.K. *Application dismissed.*

3. ('41) 28 AIR 1941 Oudh 297:192 I C 272 : 1941 OWN 126, Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam.

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(28) A. I. R. 1941 Oudh 301

BENNETT AND GHULAM HASAN JJ.

Inderjit — Plaintiff—Appellant

v.

Kanhaiya Lal and another — Defendants — Respondents.

Second Appeal No. 293 of 1937, Decided on 20th January 1941, against order of Dist. Judge, Hardoi, D/- 15th April 1937.

(a) U. P. Land Revenue Act (3 of 1901), S. 111—Decision of revenue Court on question whether objection is barred as not having been made within prescribed time cannot be questioned by civil Court.

The question whether an objection is barred as not having been made within the time prescribed by S. 111, is essentially a question for the revenue Court to decide and it is not open to the civil Court to question the decision of the revenue Courts on this point. The only circumstance in which the civil Court would be justified in questioning the order passed by the revenue Court under S. 111 (1) (b) is where the civil Court finds that the question

raised is not a question of proprietary title: ('25) 12 A I R 1925 All 818, *Rel. on*; *Case law referred.* [P 303 C 2; P 304 C 1]

(b) U. P. Land Revenue Act (3 of 1901), S. 111 —Time for filing objection can be extended.

The revenue Court can extend time fixed by S. 111 for filing objection: ('14) 1 A I R 1914 Oudh 343; ('26) 13 A I R 1926 Oudh 309 and 17 R D 640, *Rel. on.* [P 304 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 111 —Question of proprietary title.

The question of a claim to separate ownership of certain *sir* lands in a holding is a question of proprietary title: 2 U D 343; *Rel. on.* [P 304 C 1]

K. P. Misra — for Appellant.

H. N. Das — for Respondents.

Judgment.—This is a second civil appeal against the order of the learned District Judge of Hardoi dated 15th April 1937, upholding the judgment and decree passed by the learned Munsif of Hardoi dated 17th December 1936, dismissing the plaintiff's suit. The suit was brought by Inderjit in consequence of an order passed by the Commissioner in a partition case on 11th February 1935. Inderjit had applied for partition on 23rd June 1934, and proclamation had issued under S. 110, Land Revenue Act. Thereafter on 13th May 1935, partition proceedings had been drafted, Inderjit filed an objection on 4th June, against the provision made in the partition proceedings for the partition of the *sir* land. The provision was that the *sir* of each cosharer would go with his patti and that compensation would be given in cash from non-statutory tenancy and other statutory tenancy land. The objection was disallowed by the partition officer, and an appeal against his order was dismissed by the Deputy Commissioner on 10th September 1935. In second appeal the Commissioner allowed the objection, considering that it raised a question of proprietary title, and ordered the objector under S. 111 (1) (b), Land Revenue Act, to establish his claim in a civil Court by instituting a suit within three months. Inderjit accordingly filed a suit for a declaration that he owned half the *sir* land mentioned in lists A, B and C attached to the plaint.

The suit was contested on various grounds, including the ground that the order of the Commissioner was ultra vires. The Munsif dismissed the suit holding that the order under S. 111 could be assailed in the civil Court, that the Commissioner's order was ultra vires and therefore the civil Court had no jurisdiction to try the suit. He further held that there was no cause of action for instituting a suit with respect to the *sir* land mentioned in list B attached to the plaint because this *sir* land was not included in the partition and therefore the Commissioner's order did not apply to it. It was apparently realised by the plaintiff Inderjit that so far as the *sir* land in list B was concerned, it was incorrectly stated in the plaint that the cause of action accrued on 11th February 1936, the date of the Commissioner's order, because in the lower appellate Court he filed an application for amendment of this paragraph of the plaint so as to show that the cause of action with regard to the *sir* land in list B arose in 1933.

The lower appellate Court agreed with the view taken by the Munsif that the Commissioner's order was invalid, that it was open to the civil Court to consider whether it was valid or invalid and that as it was invalid there was no proper cause of action with regard to the property in lists A and C. As regards the application for amendment of the plaint in regard to the property in list B, the District Judge observed that the application for amendment was very belated, and that in view of the decision with regard to the property in lists A and C that the suit was not maintainable in the civil Court, it was not desirable to let the case proceed with respect to the property in list B. He did not, however, allow the application for amendment. Four questions arise for decision in this appeal: (1) Whether the civil Court was competent to question the order of the revenue Court under S. 111, Land Revenue Act. (2) If so, whether the lower Courts correctly held that the order of the Commissioner was invalid because objection had been taken by the plaintiff after the time contemplated by S. 111. (3) Whether the plaintiff's objection did in fact raise a question of proprietary title. (4) Whether if the appeal is allowed on the above points, the appellant should be allowed to amend his plaint so as to alter the cause of action in regard to the property in list B.

On the first point the lower appellate Court has relied on a decision of the Judicial Commissioner's Court in 17 O C 224.[1] This is undoubtedly an authority which supports the view taken by the lower appellate Court. It was said in that case that when the jurisdiction of the civil Courts is invoked they must satisfy themselves that all the conditions and qualifications annexed to the grant of jurisdiction have been strictly complied

1. ('14) 1 A I R 1914 Oudh 115 : 25 I C 316 : 17 O C 224, Mukhtar Ahmad v. Barati Lal.

with. It must be made clear that the question of title which they are invited to decide has been raised by an objection filed in the revenue Court within the time provided by S. 110 of the Act, and it must be shown that the conditions laid down in S. 111, sub-s. (1), cls. (a) and (b) have been satisfied. We have been referred to other cases bearing on this question, some of which support the appellant and some of which are against him. Reference was made to another decision of the Judicial Commissioner's Court in 24 O C 143,[2] but the question did not directly arise in that case. It was only said that the competence of a civil Court to decide the question of title depends upon the choice exercised by the revenue Court. If the latter Court passes an order under cl. (a) or cl. (b), a civil Court has authority to try and decide the question of title but it is a condition precedent that such an order be made.

In a case of this Court in 4 O W N 1196[3] it was said that the jurisdiction of the civil Courts in matters relating to partition is expressly ousted, except in so far as is provided by the provisions of S. 111, Land Revenue Act, and the conditions and qualifications annexed to the grant of jurisdiction must be strictly complied with. In 5 O W N 1062[4] it was observed by a single Judge of this Court that where a statute confers jurisdiction upon a tribunal of limited authority, the conditions and qualifications under which jurisdiction has to be exercised must be directly complied with, and a revenue Court is not entitled to entertain an objection raising a question of proprietary title, if not filed at the proper time. Reference was made in this case to 17 O C 224,[1] and the principle laid down in that case was accepted as correct. The learned Judge said that he would be prepared to hold that a revenue Court is not entitled to entertain an objection raising a question of proprietary title if not filed at the proper time. The question came up before this Court again in 7 O W N 586,[5] but here as in some other cases also, the question primarily considered was whether the revenue Court was justified in passing an order under S. 111, Land Revenue Act, when the provisions of that section had not been strictly complied with in regard to the time within which the objection should have been made.

It can however be said that it appears to have been assumed in this and in some other cases that it was open to the civil Court to consider whether the order of the revenue Court was legally valid. On the other hand, there is a ruling of the Allahabad High Court in AIR 1925 ALL 818[6] which supports the view that it is not open to the civil Court to question the validity of the order of the revenue Court on the ground that the provisions of S. 111 had not been complied with. In this case no objection was taken after issue of the formal notice of the application for partition, but when steps were taken to draft the partition, proceedings under S. 114, Land Revenue Act, a definite and specific objection was made. The Assistant Collector held that this was an objection which ought to have been presented under S. 110, Land Revenue Act, and he refused to entertain it. The Collector in appeal directed the application to be entertained notwithstanding that it was not raised within the period limited by the proclamation under S. 110.

It was observed by a Bench of the Allahabad High Court that the question whether the objector Parsiddhan Rai should have been permitted to make the objection when he allowed the period limited by the proclamation under S. 110, Land Revenue Act, to expire, was essentially one for the revenue Courts to decide. It was also said that the Collector seemed to have dealt with the matter very sensibly. There appears to be no case of this Court in which it has been expressly held that a civil Court is either competent or incompetent to consider the question, but the competency of the civil Court has certainly been assumed in cases where the validity of the revenue Court's order has been examined. We should ourselves be inclined to agree with the Allahabad High Court in A I R 1925 ALL 818[6] that the question whether an objection is barred as not having been made within the time prescribed by S. 111, is essentially a question for the revenue Court to decide and that it is not open to the civil Court to question the decision of the revenue Court on this point. The only circumstance in which in our opinion the civil Court would be justified in questioning the order passed by the revenue Court under S. 111 (1) (b) is

2. ('21) 8 A I R 1921 Oudh 132 : 63 I C 272 : 24 O C 143, Ram Lakhan Singh v. Rampal Singh.
3. ('28) 15 A I R 1928 Oudh 101 : 107 I C 333 : 4 O W N 1196, Ram Sidh Singh v. Bakoodas.
4. ('29) 16 A I R 1929 Oudh 67 : 114 I C 806 : 4 Luck 270; 5 O W N 1062, Ram Sumran v. Sarjoo Pershad.
5. ('30) 17 A I R 1930 Oudh 371 : 127 I C 28 : 6 Luck 93 : 7 O W N 586, Mt. Dhanpati Kuer v. Kandhaiya Bakhsh Singh.
6. ('25) 12 AIR 1925 All 818 : 86 I C 1033, Parsiddhan Rai v. Dhaneshar Rai.

where the civil Court finds that the question raised is not a question of proprietary title.

We have however considered whether it was correctly held by the lower appellate Court in the present case that the order of the Commissioner was invalid by reason of the fact that the objection was made after the time contemplated by S. 111. We have already referred to some cases in which it was held that the revenue Court can extend the time fixed by S. 111. This was also held by the Court of the Judicial Commissioner in 1 O L J 81[7] where it was said that a revenue Court acting under S. 114, Land Revenue Act, is not precluded from dealing with an objection filed beyond the time fixed by it for filing objections, if it has not upto that time taken any action under that section. Similarly, in A I R 1926 Oudh 309[8] it was held that in partition proceedings where an objection is raised after the appointed time but before the Court has taken any steps under S. 113 a revenue Court is not precluded from dealing with it, and if it does decide it the decision will be taken to be under S. 111. Again in 17 R D 640[9] it was held that where in partition proceedings an objection raising a question of proprietary title is not raised at an earlier stage, but is put forward at a very late stage, the period for filing objections can be extended for good cause. We are very doubtful whether in view of these pronouncements we should be justified in holding that the order of the Commissioner was invalid in the present case on the ground that the objection had not been made within the proper time. It is clear that the revenue Courts have discretion to extend the time, and as we have said we do not think that their decision on this point should be questioned in a civil Court. We are of opinion that in the present case at least there is no sufficient reason to hold that the order is invalid. We are unable therefore to agree with the lower appellate Court on this point.

On the question whether the objection does in fact raise a question of proprietary title, we have been referred to a clear ruling by the Board of Revenue in 2 U D 343[10] that the question of a claim to separate ownership of certain *sir* lands in a muafi holding is a question of proprietary title, and in view of this ruling we see no reason to doubt that the question raised in the present case is a question of proprietary title, as was the opinion of the Commissioner. There remains the question whether, as on these findings it will be necessary to allow the appeal and remand the suit, the application of the appellant for amendment of the plaint in regard to the *sir* land in list B should be allowed. In the circumstances, we consider that it should be allowed. We accordingly allow this appeal, set aside the orders passed by the lower Courts and remand the suit to the trial Court for decision on the merits after amendment by the appellant of the plaint with regard to the property in list B. Costs hitherto incurred in this Court and in the Courts below will abide the result.

D.S./R.K. *Suit remanded.*

7 ('14) 1 AIR 1914 Oudh 343 : 23 I C 965 : 1 O L J 81, Kali Persad v. Mt. Thakur Dei.
8. ('26) 13 AIR 1926 Oudh 309 : 92 I C 903, Budhan Singh v. Kalka Singh.
9. ('33) 17 R D 640, Jagdeo Singh v. Banaphal Pandey.
10. 2 U D 343, Din Dayal v. Ram Narain.

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(28) A. I. R. 1941 Oudh 304

BENNETT J.

Mt. Girja Wati and others — Applicants

v.

Qudratullah Khan — Opposite Party.

Civil Ref. No. 20 of 1940, Decided on 21st February 1941, made by Chief Inspector of Stamps, U. P., Allahabad, D/- 25th November 1940.

U. P. Agriculturists' Relief Act (27 of 1934 as amended by Act 9 of 1937), S. 33—Suit under S. 33—Appeal—Ad valorem court-fee on amount challenged should be paid.

On an appeal arising from a suit under S. 33 the appellant must pay ad valorem court-fee on amount challenged : ('40) 27 A I R 1940 All 504 (F B); ('37) 24 A I R 1937 All 792 and ('38) 25 A I R 1938 All 467, *Foll.* [P 305 C 1]

M. M. Lal and R. N. Shukla — for Applicants.

H. K. Ghose — for the Crown.

Order. — This is an application under sub-s. (1) of S. 6B, Court-fees Act, by the Chief Inspector of Stamps, United Provinces. It arises out of a suit brought under S. 33, Agriculturists' Relief Act. In appeal to the civil Judge of Hardoi the appellants challenged the amount of Rs. 123-1-0 decreed by the trial Court against them and further claimed that they should themselves have been awarded a sum of Rs. 739-12-0. They valued their appeal at Rs. 200 plus Rs. 123-1-0 and paid a total court-fee of Rs. 19-12-0. The Inspector of Stamps reported that they were liable to pay a court-fee of Rs. 86-4-0 on an ad valorem basis on the total amount of Rs. 862-13-0, that is Rs. 123-1-0 decreed against the appellants and Rs. 739-12-0 claimed by them. The civil Judge did not agree with the Inspector and in his order holding that the court-fee paid was sufficient he referred to the amendment intro-

duced in S. 33, Agriculturists' Relief Act, by Act IX of 1937. Sub-section (3) of this section now provides that court-fee payable on a plaint in a suit under sub-s. (1) shall be that prescribed by Sch. 6. The civil Judge appears to have considered that this provision applied also to appeals, though he did not expressly say so.

The Chief Inspector of Stamps in his application referred to a recent case of the Allahabad High Court in 1940 O W N 1130[1] in which it was held that a suit under S. 33, Agriculturists' Relief Act, is a suit for accounts and an appeal against a decree passed in such a suit is governed by S. 7 (iv) (b), Court-fees Act. It had previously been held by the same High Court in 1937 A L J 1194[2] that such a suit was not a suit for a declaration, but a suit for an account of money and should be so valued; and in 1938 A L J 708[3] that an ad valorem fee should be charged on an appeal in a suit under S. 33 on the amount involved therein. The question for consideration is whether the amendment in S. 33 affects the amount of court-fee payable on appeals against decrees passed under that section. It is contended that the words 'plaint in a suit' should be liberally construed so as to include a memorandum of appeal. There is however no authority which would support this contention, and on the other hand it has been held that in appeals in redemption suits brought under the Agriculturists' Relief Act ad valorem court-fee must be paid and not the fee payable on an application under that section. It has also been held that in S. 296, U. P. Tenancy Act of 1939, the word 'suit' does not include appeals. I am of opinion therefore that the application of the Chief Inspector of Stamps must be allowed and that the appellants must be required to pay ad valorem fee on the total amount challenged by them. I accordingly grant a declaration that the proper court-fee has not been paid in this case and that the deficiency amounts to Rs. 86-4-0 less the sum of Rs. 19-12-0 paid, that is Rupees 66-8-0.

G.N./R.K. *Application allowed.*

1. ('40) 27 A I R 1940 All 504: 191 I C 337 : I L R (1940) All 762: 1940 O W N 1130: 1940 A L J 689 (F B), Harendra Shankar v. Khiali Ram.
2. ('37) 24 A I R 1937 All 792: 172 I C 653: I L R (1937) All 965 : 1937 A L J 1194, Anis Begam v. Shyam Sunder Lal.
3. ('38) 25 A I R 1938 All 467 : 177 I C 76 : I L R (1938) All 686 : 1938 A L J 708, Pahlad Singh v. v. Niadar Singh.

(28) A. I. R. 1941 Oudh 305

BENNETT AND GHULAM HASAN JJ.

Municipal Board, Lucknow —
Plaintiff — Appellant

v.

Lala Ramji Lal — Defendant —
Respondent.

Appeal No. 3 of 1937, Decided on 3rd January 1941, against order of Zia-ul-Hasan J., *Reported in A. I. R. 1937 Oudh 31.*

Transfer of Property Act (1882), Ss. 3 and 100 — Constructive notice — Principle applies to arrears of taxes which form charge under Municipalities Act on property sold at auction sale — Person who buys property is presumed to know law applying to his case — Municipality is entitled to follow property in hands of purchaser who cannot be heard to say that he presumed taxes to have been paid.

It must be presumed that a person who buys house property situated in a municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. [P 307 C 2]

The principle of constructive notice should be applied to arrears of taxes which form a charge under the Municipalities Act on the property sold at an auction sale. [P 307 C 1]

It is incumbent on a would-be purchaser to make an enquiry before making a bid, whether any municipal taxes are outstanding against the property. No duty is placed on a municipality to ascertain what auction sales of the property situated in the municipality are taking place and then intimate them to intending purchasers to what municipal charges the property is subject. Unless and until some intimation is given to the municipality, it cannot be expected to know what auction sales are in contemplation. If the purchaser omits to make the enquiry he is considered either to have wilfully abstained from making it or to have been grossly negligent in not making it. The municipality is entitled to follow the property in the hands of the transferee who does not care to make any inquiry as to whether payment of taxes was in arrears. [P 308 C 1, 2]

The purchaser is not entitled to presume that the taxes have been paid : ('15) 2 A I R 1915 Cal 478, *Rel. on* ; ('39) 26 A I R 1939 All 687 and ('40) 27 A I R 1940 All 456, *Discussed.* [P 307 C 2]

K. P. Misra — for Appellant.

R. K. Bose — for Respondent.

Bennett J. — This is an appeal under S. 12 (2), Oudh Courts Act, against the order passed by Zia-ul-Hasan J. on 20th August 1936, setting aside in second appeal the order of the learned Subordinate Judge, Lucknow, dated 25th January 1935, confirming the order of the learned Munsif, South Lucknow, dated 10th October 1934, decreeing the appellant's suit. The suit was brought by the Municipal Board of Lucknow against Lala Ramji Lal to recover a sum of Rs. 48-4-0 on account of house and water taxes due for

the period from 1st April 1931 to 31st May 1932. The house in respect of which these taxes were due had been purchased by Ramji Lal at a court sale in execution of a decree obtained by him against Abdullah, the former owner of the house. The auction took place in March 1932, and the sale to Ramji Lal was confirmed in May 1932. The defence put forward by Ramji Lal was that he was not liable to pay these taxes as they were due for a period prior to his purchase. This defence was not accepted either by the trial Court or by the learned Subordinate Judge in first appeal. It was however allowed by Zia-ul-Hasan J. in second appeal. Zia-ul-Hasan J. first referred to S. 177, U. P. Municipalities Act of 1916, which reads as follows :

> All sums due on account of a tax imposed on the all annual value of building or lands or of both shall, subject to the prior payment of the land revenue (if any) due to His Majesty thereupon be a first charge upon such buildings or lands.

It was in view of this provision that the Municipal Board claimed a charge over the house purchased by Ramji Lal for the arrears in suit. Zia-ul-Hasan J. then considered the effect of S. 100, T. P. Act, under which it is necessary for the enforcement of a charge against any property in the hands of a person to whom it has been transferred for consideration that he had notice of the charge. It was contended by the Municipal Board that Ramji Lal should be deemed to have had constructive notice of the charge in view of the provision in S. 3, T. P. Act, which reads :

> A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made or gross negligence, he would have known it.

Ramji Lal did not claim that he had made any enquiry or search at the municipal office to discover whether or not any arrears of taxes were due in respect of the house, and the questions for consideration were whether he wilfully abstained from making an enquiry or search which he should have made, or whether there was gross negligence on his part in not making such enquiry or search. Zia-ul-Hasan J. answered these questions in the negative. He pointed out that in the bye-laws of the Lucknow Municipal Board house and water taxes are payable in advance, and the Municipalities Act gives very wide powers to Municipal Boards for their recovery. He thought that in view of these provisions, it should be very seldom that any taxes should fall in arrears. He therefore did not consider that it was incumbent on a would-be purchaser to make any enquiry about arrears holding that it would be stretching the doctrine of constructive notice too far to say that in every case in which a person wants to bid for property liable to municipal taxes he ought to make inquiries, before making a bid, whether any municipal taxes are outstanding against the property. Reference was made to the case in 42 Cal 625,[1] in which a purchaser was held to have had constructive notice of the municipal taxes due in respect of the property sold, but Zia-ul-Hasan J. did not think that the ruling in this case was applicable, both because it was not known whether the Calcutta Municipal Act that was in force at the time the ruling was given was or was not similar in its provisions to the U. P. Municipalities Act of 1916, and also because the purchaser in that case was the mortgagee himself who had foreclosed the mortgaged property and was therefore presumably acquainted with the existence of the arrears.

Learned counsel for the Municipal Board first drew our attention to a ruling given by a Bench of the Allahabad High Court in I L R (1939) ALL 885.[2] In this case it was held that S. 100, T. P. Act, as amended by Act 20 of 1929, does not apply to auction sales or auction purchasers. The word "transfer" in S. 100, T. P. Act, must be read as defined in S. 5 of the same Act and the definition would not, it was held, include an execution purchase. Moreover, S. 2 (d) provided that nothing in the Act shall apply to any transfer in execution of a decree, save as provided by S. 57 and Chap. 4 of the Act, and while S. 100 is in Chap. 4 it does not refer to auction sales. Section 100 can therefore have no application to the case of an execution decree, and it is not necessary that the purchaser should have had notice of the charge. Learned counsel conceded that this view had been dissented from in the following year by another Bench of the Allahabad High Court, namely in 1940 A L J 560.[3] In this case it was observed that the amendment to S. 100 introduced no change in the law as it stood before the amendment. It

1. ('15) 2 A I R 1915 Cal 478 : 27 I C 261 : 42 Cal 625 : 21 C L J 177 : 19 C W N 37, Akshoy Kumar v. Corporation of Calcutta.
2. ('39) 26 A I R 1939 All 687 : 185 I C 597 : I L R (1939) All 885 : 1939 A L J 849, Indra Narain v. Muhammad Ismail.
3. ('40) 27 A I R 1940 All 456 : 191 I C 148 : I L R (1940) All 669 : 1940 A L J 560, Municipal Board, Cawnpore v. Roop Chand.

was held that S. 100 applies to transfers by auction sale in execution of decrees and therefore a bona fide purchaser takes property he buys free of all charges of which he has had no notice actual or constructive. It will appear therefore that while in 1939 the Allahabad High Court held that no question of notice arises in such cases because S. 100, T. P. Act, has no application to an auction sale, in 1940 the view taken was that S. 100 applies equally to transfers by auction sale as to transfers by act of parties, and, therefore it becomes necessary to consider whether a bona fide purchaser at such a sale has had notice, actual or constructive. On the view which we take of the primary question under consideration in this case, namely whether the auction purchaser Ramji Lal had or had not constructive notice of the charge upon the house it is not necessary to consider which view of the Allahabad High Court should be followed. After careful consideration we have come to the conclusion that the principle of constructive notice in the case of a transaction relating to immovable property which is required by law to be and has been registered by a registered instrument, should be applied to arrears of taxes which form a charge under the Municipalities Act on property sold at an auction sale.

Learned counsel for the respondent Ramji Lal based his arguments largely on certain observations of the Allahabad High Court in 1940 A L J 560.[3] It was observed in that case :

> If for instance the charge is created by a registered document then the purchaser would be held to have constructive notice of that charge inasmuch as a prudent purchaser would, in ordinary course, search the registers before effecting the purchase. There is no register, so far as we know, of arrears of taxes or of charges in respect thereof. It has not been shown that the Municipality of Cawnpore intimate to the public in the 'Press' or by other publication a list of the properties which are charged in respect of arrears of taxes. There is nothing upon the record to justify the conclusion that the defendants could have demanded any information from the municipality in regard to charges on immovable property within the municipal limits.

It has not been suggested in the present case that the respondent could not have ascertained by enquiry from the municipal authorities whether there were or were not any arrears of taxes due in respect of the house. But even if any difficulty had been experienced by him or was likely to be experienced by him in obtaining such information directly from the municipal authorities, that would not, in our opinion, be a valid defence. Rule 19 of the Municipal Account Code provides for the affixation to the assessment list of fly-leaves containing cols. 5 to 13 of Form 3 appended to that Code. This form clearly shows what arrears are due. There are bye-laws of the Lucknow Municipality regulating inspections and the giving of copies of municipal records and documents, and although permission has to be given by the Executive Officer, it may be presumed that where a house is being sold in execution of a civil Court decree permission would be given. If on application being made permission was refused and the would-be purchaser could not otherwise obtain the necessary information, constructive notice could not of course be imputed to him. It appears to us, however, that no difficulty would have been experienced by the respondent in ascertaining whether there were any arrears of taxes in respect of this house. It was also observed in 1940 A L J 560[3] :

> No intending purchaser is bound to presume that the taxes upon the property which he contemplates purchasing have not been paid in the ordinary course in the absence of any special intimation by the Municipality. If there has been negligence in the present instance it has been on the part of the Corporation of Cawnpore. They should have taken steps long ago to recover the arrears of taxes from defendant 1 and they certainly should have taken steps to intimate and proclaim at the auction sale to intending purchasers that they held a charge over the property in respect of these arrears.

With the greatest respect we are unable to accept this view. In our opinion, the question is not whether an intending purchaser is bound to presume that the taxes have not been paid, but whether he is entitled to presume that they have been paid. We do not think that he is. We have given full consideration to the observation of the learned single Judge of this Court that in view of the wide powers given to Municipal Boards for the collection of taxes it should be very seldom that any taxes should fall in arrears. It is, we think, well known that despite these wide powers taxes do fall into arrears very often. We need only refer in this connexion to the annual resolution of the Local Government on Municipal Administration and Finances, which shows how much collections fall below the demand.

It must be presumed that a person who buys house property situated in a municipality is acquainted with the law by which a charge is imposed on that property for the payment of taxes. Whatever negligence

the Corporation of Cawnpore may have been guilty of in the Allahabad case, we are unable to find that there was any negligence on the part of the Lucknow Corporation in the present case, apart from their failure to recover the arrears of taxes from the judgment-debtor to whom the house previously belonged. We doubt whether the duty should be placed on a corporation to ascertain what auction sales of the property situated in the municipality are taking place, and then intimate them to intending purchasers to what municipal charges the property is subject. Unless and until some intimation is given to the corporation, it cannot, we think, be expected to know what auction sales are in contemplation. In these circumstances we consider that when a charge has been expressly imposed in the Municipalities Act upon property for the payment of municipal taxes, the municipality is entitled to follow the property in the hands of a transferee who has not cared to make any enquiry as to whether payment of the taxes is in arrears. We have considered the Calcutta case already referred to, 42 Cal 625,[1] and we do not think that there is sufficient reason for distinguishing that case from the case under consideration. Zia-ul-Hasan J. observed that we do not know whether the Calcutta Municipalities Act that was in force at the time the ruling was made was or was not similar in its provisions to the U. P. Municipalities Act, 1916. The Calcutta Municipal Act then in force was, as appears from the judgment in that case, the Act of 1899. The judgment also shows that S. 228 made the consolidated rate a first charge on the premises and that it reads as follows :

> The consolidated rate, due in respect of any building or land, shall, subject to the prior payment of the land revenue, if any, due to the Government thereupon, be a first charge upon the said building or land and upon the moveable property, if any, found within or upon such building or land and belonging to the person liable for such rate.

There is no substantial difference between the provisions of this section and the provisions of S. 177, U. P. Municipalities Act of 1916. The facts in the Calcutta case were somewhat different from those in the present case, but we see no reason why the same principles in regard to constructive notice should not be applied. It has been argued that there was not in the present case either a wilful abstention from an enquiry or search which ought to have been made, or gross negligence. But we have to consider the meaning of these expressions in the light of Expln. 1 to S. 3, T. P. Act. This explanation shows that where no enquiry has been made in respect of any transaction relating to immovable property which is required by law to be and has been effected by a registered instrument, the person guilty of the omission is considered either to have wilfully abstained from making it or to have been grossly negligent in not making it, and we see no reason to differentiate between an enquiry into a transaction relating to immovable property in respect of which there has been or should have been registration, and an enquiry which it was equally his duty to make in the case of arrears of municipal taxes. For these reasons we are unable to uphold the view taken by Zia-ul-Hasan J. and we accordingly allow this appeal with costs, set aside the decree of the single Judge of this Court and restore the decrees of the Courts below.

N.K./R.K. *Appeal allowed.*

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* (28) A. I. R. 1941 Oudh 308

BENNETT AND GHULAM HASAN JJ.

S. Hasan Abbas Ali Khan — Applicant

v.

Abdul Rahman, Official Receiver — Opposite Party.

Civil Revn. Appln. No. 1 of 1938, Decided on 10th March 1941, to revise order of Dist. Judge, Lucknow, D/- 9th April 1938.

*** (a) Provincial Insolvency Act (1920), Sections 27 and 41 — Time limited for applying for discharge runs from date of final order and not from date of original order of adjudication.**

Where an order of the insolvency Court specifying the period within which an application for discharge is to be made is challenged originally by way of appeal to the District Judge and later by a revision petition to the High Court, the period should be reckoned from the date of the order of the High Court and not from the date of the original order as that order is not a final order : 11 All 267 (F B); ('21) 8 A I R 1921 Cal 699; ('26) 13 A I R 1926 P C 93 and ('27) 14 A I R 1927 P C 25, *Applied*. [P 309 C 2; P 310 C 1]

(b) Provincial Insolvency Act (1920), Ss. 41, 43 and 27—Court has jurisdiction to extend time fixed even after expiry of such time but before order of annulment is passed.

A Court has jurisdiction to extend the time originally fixed under S. 27 for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43 : ('38) 25 A I R 1938 Oudh 122 (F B), *Foll.* [P 310 C 2]

Habib Ali Khan — for Applicant.

Order. — This is an application made under proviso 1 to S. 75, Provincial Insolvency Act, and arises out of an appellate order passed by the District Judge of Luck-

now upholding the order of the Small Cause Court Judge sitting on the insolvency side. The order in question was one of annulment of an order of adjudication on account of the insolvent's failure to file an application for discharge within the time fixed by the Court. The facts are that the applicant applied for insolvency on 18th April 1933, and was adjudged an insolvent on 7th February 1935. The debts in the application were shown to be Rs. 12,069. The learned Judge on the insolvency side ordered that the applicant should pay Rs. 100 per mensem towards his debt. None of the creditors came forward to prove his debt except one, who tendered proof of a debt of Rs. 136 due to him from the insolvent on 7th March 1935. The applicant appealed against the order directing him to pay Rs. 100 per mensem to the District Judge but his appeal was dismissed. The matter was carried further in revision to this Court and a Bench of this Court set aside the order about the payment of Rs. 100 per mensem by the insolvent on 19th February 1937. The time for filing an application for discharge expired on 7th February 1936, when the insolvent's revision application was pending in this Court. The applicant applied for discharge on 27th February 1937, in which he stated that the unpaid debts amounted to Rs. 2465 only out of the original debts of Rs. 12,069 shown in the application. On the same date the applicant also applied under S. 27, Provincial Insolvency Act, for an extension of time on the ground that the applicant had been busy in conducting his appeal to the District Judge and the revision in this Court against the order directing him to pay Rs. 100 per mensem. The applicant further stated that he was under a bona fide impression that the application for discharge would be premature till the appellate Courts had passed orders upon his appeal and the revision application. The learned Judge on the insolvency side disposed of both the applications by a single order, refused the application for extension of time and passed an order annulling the adjudication under S. 43, Provincial Insolvency Act. Reliance was placed in support of its decision on 4 O W N 993,[1] where it was held that the provisions of S. 43 are mandatory and a Court is not free to enlarge the time fixed after the expiry of the period.

The learned District Judge in appeal held that the time of one year limited for discharge must be reckoned from the date of the original order of adjudication and cannot be reckoned from 19th February 1937, the date of the order passed by a Bench of this Court in revision. As regards the power to extend time under S. 27, Provincial Insolvency Act, the learned District Judge held that although a Court had the power to extend the time even after the expiry of the period fixed in the order of discharge, yet upon the merits of the matter he did not wish to interfere with the order of the insolvency Judge refusing to extend the time and passed an order of annulment of adjudication as the insolvent, although possessed of sufficient means, had not paid anything to the creditors since he was declared insolvent.

The insolvent has now come up to this Court and it has been argued on behalf of the applicant that the order passed by the lower Courts is not according to law. The official receiver has not appeared in this Court to support the order of the lower appellate Court. The first point that arises for determination is whether the period of one year specified in the order of discharge should be reckoned from 7th February 1935, the date of the order, or from 19th February 1937, the final order, of the Bench in revision. We are of opinion that the order of the Insolvency Court specifying the period of one year within which an application for discharge was to be made was not a final order as the same was challenged originally by way of an appeal to the District Judge and later by a revision petition to this Court. In the circumstances it is the final order passed by the Bench on 19th February 1937, which should be deemed in law to furnish the starting point of the limitation for an application of discharge. In 11 ALL 267[2] it was held by a Full Bench of the Allahabad High Court that the effect of S. 579—O. 41, R. 35 of the present Civil Procedure Code—is to cause the decree of the appellate Court to supersede the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it. Order 42, R. 1, Civil P. C., makes the provisions of O. 41 applicable to appeals from appellate decree. In 34 C L J 415[3] the learned Judges observed :

> If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone; if, on the other hand, it is affirmed by the appel-

1. ('27) 14 AIR 1927 Oudh 506 : 105 I C 912 : 2 Luck 757 : 4 O W N 993, Amjad Ali v. Md. Ali.

2. ('89) 11 All 267 (F B), Muhammad Sulaiman Khan v. Muhammad Yar Khan.

3. ('21) 8 AIR 1921 Cal 699 : 70 I C 6 : 34 C L J 415, Sashikanta Acharyya v. Sarat Chandra Rai.

late Court, it is equally dead and gone, though in a different way, namely by being merged in the decree of the superior Court which takes its place for all intents and purposes, both the decrees cannot exist simultaneously. The balance of judicial opinion is in favour of the view that when time is fixed by the lower Court for payment of money and the decree of the lower Court is confirmed on appeal, the time for payment runs from the date of the decree of the appellate Court, though the latter decree does not expressly provide that the time for payment should be calculated from the date of the appellate decree.

Their Lordships of the Judicial Committee in 53 I A 197[4] in a case of mortgage held that where there has been an appeal from a preliminary mortgage decree under O. 34, R. 4, sub-r. (1), and the appellate Court has not extended the time for payment, the period of three years within which, under the Limitation Act, 1908, Sch. 1, Art. 181, an application for a final decree under O. 34, R. 5, sub-r. (2) must be made, runs from the date of the decree of the appellate Court, and not from the expiry of the time for payment fixed by the preliminary decree. This view was confirmed by their Lordships of the Privy Council in another case, 54 I A 52.[5] It was held in the latter case that the jurisdiction of the appellate Court in the appeal is not affected by the Limitation Act. The learned District Judge has sought to draw a distinction between orders and decrees passed under the Code of Civil Procedure and an order passed under the provisions of the Provincial Insolvency Act specifying the time within which an insolvent must apply for discharge. We are of opinion that the principle enunciated in the above decisions is one of universal application and cannot be held to exclude from its purview orders passed under the Provincial Insolvency Act. In this view of the matter the application for discharge was perfectly within time and the order passed by the Courts below must therefore be set aside.

As regards the second point whether the Insolvency Court had the jurisdiction to extend time under S. 27, Provincial Insolvency Act, even after the expiry of the period originally fixed in the order of discharge the matter is now concluded by a Full Bench decision of this Court in 1938 O A 263[6] where it was held, overruling the decision in 4 O W N 993[1] relied upon by the Insolvency Court, that a Court has jurisdiction to extend the time originally fixed under S. 27, Provincial Insolvency Act, for an application by the debtor for discharge, after the expiry of that time but before an order of annulment is passed under S. 43, Provincial Insolvency Act. This point appears to have been conceded by the learned District Judge. In the view which we have taken no question of extension of time to the applicant for applying for discharge really arises, though we have no doubt whatever that we should be perfectly prepared to extend the time to the applicant upon the facts of this case. The applicant has filed an affidavit, which has not been rebutted by the official receiver, that a substantial portion of his debts has been paid off by the sale of certain property and that only a debt of Rs. 2465 remains unpaid. We further find that only one creditor came forward to prove a debt of Rs. 136 only and this debt, we understand, has not yet been paid.

We allow the application, reverse the order of the learned District Judge and grant an order of discharge to the applicant subject to the condition that he shall pay up the debt of Rs. 136 due to the creditor concerned within two months from today. No order as to costs.

K.S./R.K. *Application allowed.*

4. ('26) 13 AIR 1926 PC 93 : 98 IC 499 : 53 IA 197 : 6 Pat 24 (P C), Jowad Husain v. Gendan Singh.

5. ('27) 14 AIR 1927 P C 25 : 100 I C 22 : 8 Lah 253 : 54 I A 52 (P C), Fitzholmes v. Bank of Upper India.

6. ('38) 25 AIR 1938 Oudh 122 : 174 I C 607 : 14 Luck 22 : 1938 O W N 377 : 1938 O A 263 (F B), Fazal Azim v. Umanath Bakhsh Singh.

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(28) A. I. R. 1941 Oudh 310

THOMAS C. J.

Shib Sharma (Shiva Sharma)
Accused — Appellant
v.
Emperor.

Criminal Appeals Nos. 6 and 7 of 1941, Decided on 13th February 1941, against order of Sessions Judge, Lucknow, D/- 2nd January 1941.

(a) Penal Code (1860), S. 153A — Prosecution under S. 153A for publishing book — Preface is no guide of accused's intention — Intention should be judged from language of book and circumstances in which it was published—Language calculated to produce or promote feelings of enmity or hatred — Writer must be presumed to have aforesaid intention — Intention can also be gathered from author's speeches—Book by a Hindu containing passages from Mahomedan scriptures written with intent to ridicule Prophet and his religion falls within mischief of Section 153A.

In a prosecution under S. 153A for publishing a book the preface of the book is no guide with regard to the intention of the accused person. The intention has to be judged primarily by the language of the book and the circumstances in which it was published. If the language is of a nature cal-

culated to produce or to promote feelings of enmity or hatred the writer must be presumed to intend that which his act was likely to produce. The writer's intention can also be gathered from the speeches delivered by him. [P 313 C 2; P 314 C 1, 2]

Where a Hindu author collects a number of passages from the Mahomedan scriptures which may be perfectly right and harmless in their proper setting, but when disconnected or detached, may seem scurrilous, indecent and highly objectionable, and publishes them in a book with the intention of ridiculing the Prophet and his religion and to promote feelings of enmity or hatred between the Hindus and Mahomedans the author falls within the mischief of S. 153A: ('27) 14 AIR 1927 All 654, *Rel. on;* ('27) 14 A I R 1927 Lah 590, *Dissent., and held not overruled by* ('27) 14 A I R 1927 Lah 594. [P 313 C 1; P 315 C 1]

(b) Evidence Act (1872), S. 14 — Prosecution under S. 153A, Penal Code—Previous conviction for similar offence can be taken into account under S. 14.

In a prosecution under S. 153A, Penal Code, the previous conviction of the accused for a similar offence can be taken into consideration under S. 14, Evidence Act. [P 314 C 2]

(c) Penal Code (1860), S. 295A — S. 295A is not retrospective — Book falling under S. 153A reprinted with author's permission — Book originally written and printed before S. 295A — Author's conviction under S. 295A is justified.

It is true that S. 295A is not retrospective in its effect, but where a book falling within the purview of S. 153A is reprinted and republished with the permission of the author the conviction of the author under S. 295A is justified even though the book may have been originally written and printed before S. 295A came into force. [P 315 C 1]

H. G. Walford and Shankar Sahai — with the Appellant in person.

Assistant Government Advocate — for the Crown.

Judgment.—Shib Sharma (Shiva Sharma) and Sham Lal have been convicted by the learned Sessions Judge of Lucknow, under Ss. 153A and 295A, Penal Code, and each of them has been sentenced to one year's rigorous imprisonment under each section, the sentences of each accused to run concurrently. The charge against Shib Sharma was that he wrote the book Ex. 1 called "Chaman Islam ki Sair" which was printed and published at Lucknow in 1939 and which book contained objectionable passages quoted in Exs. 7 and 7A and also other passages contained in the book against the Muslim religion and that thereby he promoted feelings of enmity or hatred between the Muslim and Hindu subjects of His Majesty, and thus he was guilty of an offence under S. 153A, Penal Code. The further charge against him was that by writing this book Ex. 1 and allowing it to be published he insulted the religion and the religious beliefs of the Mussalmans and that he did this with a deliberate and malicious intention of outraging the religious feelings of the Mussalmans and thus he was guilty of an offence under S. 295A, Penal Code. The charge against Sham Lal, accused, was to the same effect, excepting that he published the book which was written by Shiv Sharma. It may be made clear that the charge against Shib Sharma is in respect of the whole book Ex. 1 and Exs. 7 and 7A are six particularly most objectionable passages which form the basis of the charge.

Shib Sharma is the head preacher of the Arya Samaj in this province and Sham Lal is a seller mainly of Arya Samajist books. It may be mentioned that Ex. 1 is the third edition. It was first published in 1922 and the second edition was published in 1928 and the third edition (Ex. 1) was printed from the second edition of 1928 at the Shukla Printing Press in 1939. The book was proscribed and the accused's prosecution was sanctioned on 7th September 1939. A complaint was filed in the Court of the District Magistrate of Lucknow against the two accused on 11th September 1939, when warrants were ordered to be issued. Sham Lal was arrested on 4th March 1940, and Shib Sharma presented himself in Court on 8th April 1940: *vide* the evidence of P. W. 12, B. Ajodhia Prasad Singh, second officer. The accused Shib Sharma made a fiery speech in Amir-ud-Daula Park, Lucknow, on 31st December 1939, at which some police officers were present. It is strange that the police did not know his whereabouts or arrest him on that date when there was a warrant of arrest against him. The accused Sham Lal admitted having published the book at the Shukla Printing Press. He stated that his intention was not to promote or attempt to promote feelings of enmity or hatred between Muslim and Hindu subjects of His Majesty and that he published it with the permission of Shib Sharma because there was a demand for it. He further stated that he was only an ordinary scholar of Hindi and could not read Hindi very well.

The accused Shib Sharma has made a lengthy statement and has also filed a written statement, Ex. D1. His account of how he came to write the book is that one Parmanand, who was a student at Agra, used to discuss other religions. He asked him (Shib Sharma) to write a collection of references, criticising passages in the Musalman scriptures so that he might have material for debating with the Mussalmans. He wrote such a collection of references and gave it to Parmanand who printed it in the form of a book without his (Shib Sharma's)

permission. When the book was read over to him in the Magistrate's Court, he found that there had been changes in the printed book from what he had written in the collection of references. He further stated that he was not responsible for what was published because Parmanand had taken the copyright and published it. In brief his defence is that he did not write the book with any malicious intention of outraging the religious feelings of the Mussalmans or to promote feelings of enmity or hatred between Hindus and Mussalmans. His object in writing the book was the preservation of his own religion and to prevent conversion of his religionists to Mahomedanism and further it was to help Arya Samajist preachers to argue and discuss religion with Mussalmans.

It is conceded by the learned counsel on behalf of Shib Sharma that the accused wrote the book, and on behalf of Sham Lal it is also conceded that he got the third edition in 1939 printed at the Shukla Printing Press. The evidence shows that 1000 copies were printed. The appeal of Shib Sharma has been argued by Mr. Walford and of Sham Lal by Mr. H. D. Chandra. Both the counsel have not criticised the evidence of the prosecution, but have taken their stand on legal grounds. No copy of the first edition has been filed by the prosecution. Exhibit 3 is the second edition and Ex. 1, as I have said, is the third edition. The six objectionable passages which are quoted in Exs. 7 and 7A were picked out by Nazir Ahmad, P. W. 6, who has studied Muslim theology and is a scholar in Arabic and Persian and the entries which find place in the remarks column are his observations. Mr. Walford has contended that the passages quoted in Exs. 7 and 7A are from the Holy Kuran and the correct references of paras and pages are given in front of the passages, that anyone who read the whole passages would know that they were correct passages and that there was nothing objectionable, that the book was printed in Hindi which would not be read by the Mussalmans and the idea of the author was to enlighten his own brethren and prevent them from accepting the Mahomedan religion, that the comment, if any, was a fair comment, and not malicious, that the first edition was published in the year 1922 and the Government did not proscribe the book or order the accused's prosecution. It therefore must be presumed that the accused was not guilty under S. 153A, Penal Code.

With regard to S. 295A, I. P. C., it was urged that as the book was written in 1922 when this section did not exist in the Penal Code, and as there was no evidence that Ex. 1 was published with the permission and knowledge of the accused, therefore the accused's conviction under this section was illegal. It was further urged that there was no evidence to show that Ex. 1 was the true copy of the first edition. Before dealing with the evidence in the case, I may mention that on 31st December 1939, a conference of the Arya Samaj was held in Amir-ud-Daula Park, Lucknow. There were a large number of persons present as it was the annual conference of the Arya Samaj and speeches were made. Shiv Sharma spoke at the meeting and said that he had written "Chaman Islam ki Sair." This he said when he was criticising the Mussalmans. The above fact is proved by the evidence of P. W. 1, Chandra Shekhar Soti, Sub-Inspector. The speech was taken down by Mukhtar Ahmad Naik, P. W. 2, and is Ex. 4. Exhibit 5 is its duplicate. The speech undoubtedly was inflammatory and likely to cause bad blood between Hindus and Mahomedans, but I have no concern with it in this case excepting for the fact that Shiv Sharma bragged about writing "Chaman Islam ki Sair."

The learned Sessions Judge has not dealt with each passage in Ex. 7 separately because he did not think it advisable to do so as it would only tend to give it further publicity. In my opinion he has adopted the correct course. I am myself not going to analyse each passage for fear of giving it further publicity which will certainly promote feelings of enmity or hatred between Hindus and Mahomedans. I may just quote one or two passages. Now coming to the evidence of the prosecution, the two most important witnesses to whose evidence reference may be made are P. W. 5, Abdus Salam and P. W. 6, Nazir Ahmad. Abdus Salam is a teacher in theology in Darul Muballighin, which is a religious institution in Lucknow. He has read thoroughly Mishkat and Minhaj, which are religious books. He stated that he had "Chaman Islam ki Sair" read through and in his opinion the book as a whole was very painful to the Mussalmans and insulted the religion and the founder of the religion and that it was calculated to excite the anger of Mahomedans. With regard to the passages Exs. 7 and 7A, the witness stated that they were painful to Mahomedans and insulted the Prophet and that Mishkat and Minhaj were

misquoted. P. W. 6, Nazir Ahmad, is a political pensioner and a scholar in Arabic and Persian. He has studied Muslim theology. He filed the passages mentioned in EXS. 7 and 7A. In his opinion the whole book is insulting to Mahomedans and provocative to them. The witness further stated that the passages given in col. 2 were either totally wrong or have been distorted so as to change the meaning. They were objectionable and insulting to the religion and the Prophet. They were likely to create bad blood. The first passage in EX. 7 is as follows :

Hazrat ne apni bibi ke nahaye hue tasle ke pani se wazoo kiya halanki istri janabi thi (bhog karai hue thi). Bibine kaha pani napak hai. Hazrat ne farmaya pani ne bhog nahin karaya hai. Safa 11, Para 31.

There can be no doubt in my mind that by reading this passage one would understand that the Prophet was willing to use for religious ablution water polluted by his wife's bathing. In Muslim law a woman is "Janabi" when she has sexual intercourse with her husband and the literal meaning of the word "Janabi' is polluted. No Mussalman will ever use such polluted water for *wazoo*. The second passage is that

Hazrat Aisha used to go to the tomb of the Prophet and Abu Bakr without clothes, and she would say that one is my husband and the other is my father, there is no occasion for me to be modest.

The note of the author, that is the accused Shib Sharma, is that

at the time of becoming a widow Aisha was 18 years old. How far was it proper for her to go naked there at such an age?

Hazrat Aisha is one of the first ten persons who gave the teaching of the Prophet to others and is considered most beloved of all Mussalman women among at least the Sunni Mussalmans. The learned counsel on behalf of Shib Sharma tried to show that some other Mahomedan authors have also said that she used to go naked. In my opinion the word "Saub" which has been used in Mishkat means either a chadar or clothing. What the author of EX. 1 has done is to have collected a number of passages which may be perfectly right and harmless in their proper setting, but when disconnected or detached may seem scurrilous, indecent and highly objectionable. Any Mahomedan who reads the passages given in EXS. 7 and 7A must feel them highly painful and excite his anger and disgust. There can be no doubt that misinterpretation of Mishkat and Minhaj must be highly painful and displeasing to the Mussalmans. The learned Sessions Judge in his judgment points out that Vishnu Sarup, an Arya Samajist preacher, who was examined on behalf of the defence, when being cross-examined on his interpretations of the scriptures and when supporting them with such reason as he could find, suddenly objected that some of his answers may be very displeasing to the Maulvis who were present in Court at the time of the trial and he might be murdered.

The main question for consideration is what was the intention of the author who wrote the book. Was it merely an easy book of reference as is urged by the learned counsel or was it written to promote feelings of enmity or hatred ? Before I discuss this point I may dispose of the argument of the learned counsel that there was no evidence that the accused was the author of these passages. I cannot compliment the prosecution for their conduct of this case because there are a good many gaps left which could have easily been filled. This argument is really based, because there is no copy of the first edition on the record or any evidence to show that the book was not available. I am informed by Mr. Ghosh, the learned Assistant Government Advocate, that there is no difference between EX. 1 and EX. 3. In his written statement, EX. D1, Shib Sharma does not say anything about any alteration in the book. Nor does he say that it was published without his permission. He simply stated that it was written in Hindi so that the Mussalmans should not try to read it, but that it should only come into the hands of Arya Samajists and Hindus. He further stated that the Mussalmans frequently insult the Hindu religion and that he wrote this book of reference as a means of refuting the Muslim religion. P. W. 7, Manna Lal, who is a printer in the Shukla Printing Press stated as follows :

Exhibit 3 also was printed at my press. Prem Shankar Varma got it printed. He has now died. When we printed this first a copy was sent to the District Magistrate. Exhibit 3 was printed as far as I remember from a very old book.

I have no reason to suppose that EX. 3 was not a true copy of the first publication. I am therefore of opinion that EX. 1 is the true copy of EX. 3. If there had been any difference or addition and alteration between EXS. 1 and 3 the accused would have pointed it out. I therefore hold that the accused Shib Sharma is the author of the passages contained in EXS. 7 and 7A. In order to prove the innocent intention of the accused the learned counsel referred me to the preface of the book which is harmless.

In my opinion the preface can be no guide with regard to the intention of an accused person. The intention has to be judged primarily by the language of the book and the circumstances in which the book was published. If the language is of a nature calculated to produce or to promote feelings of enmity or hatred in my opinion the writer must be presumed to intend that which his act was likely to produce. The accused who is a missionary may be entitled to a certain latitude in respect of re-expression of religious opinions, but it cannot for a moment in this case be said that the book was written in a spirit of fair and honest criticism without any malicious intention of producing any hatred. In my opinion if the intention of the accused was harmless he would have taken care to quote the full passages, and not only the objectionable portions. The learned counsel relied on the case in A I R 1927 Lah 590.[1] The case is commonly known as "*Rangila Rasul case*" in which it was held that

> Section 153A was intended to prevent persons from making attacks on a particular community as it exists at the present time and was not meant to stop polemics against deceased religious leaders however scurrilous and in bad taste such attacks might be.

This case was decided on 4th May 1927, and is a decision of a single Hon'ble Judge of that High Court. There is another case reported in the same volume, that is A I R 1927 Lah 594.[2] It was decided on 6th August 1927 and is a Bench decision and the Hon'ble Judges have placed a different interpretation on S. 153A. It is true that the single Judge case reported at page 590,[1] was not brought to their notice. Mr. Ratanlal in his commentary on the Law of Crimes, Edn. 15, p. 682, says that the *Rangila Rasul case*[1] was overruled by the Bench decision in which it was decided that a scurrilous vituperative and foul attack on a religion or on its founder would come within the purview of S. 153A. I do not think that the case has been clearly overruled because there is no reference of the judgment in the *Rangila Rasul case.*[1] The *Rangila Rasul case*[1] was expressly dissented from by Dalal J. in the case reported in A I R 1927 ALL 654[3] in which the learned Judge stated as follows :

> The learned counsel who argued this revision showed me a copy of a judgment of an Honourable Judge of the Lahore High Court on a similar book 'Rangila Rasul' issued in the Punjab. Possibly the judgment was cited as both books appeared to have been issued in prosecution of the same Hindu propaganda. With all respect to the learned Judge, I am not prepared to agree with the nice distinction he has drawn between a book which may hurt the feelings of Mahomedans and a book which may cause feelings of enmity or hatred between different classes of His Majesty's subjects.

Now follows the most important and pertinent portion of the judgment.

> Speaking for myself I look at such a matter not as a somewhat learned Judge of a High Court, but as a common or ordinary citizen of a town in India. I would place myself in the position of a Mahomedan who honours his Prophet, and then consider what my feelings would be towards a Hindu who ridiculed that Prophet, not out of any eccentricity but in the prosecution of a propaganda started by a class of persons who are not Mahomedans. In such a position from the hatred of the author I would, as an ordinary man, proceed to hatred of the class to which the author belonged and which instigated the author. There cannot be the slightest doubt that the writing such as that of the book before me . . . . will certainly promote feelings of enmity and hatred between Hindus and Mahomedans,

and this is exactly the view which I take of the present case. There can be no doubt that the passages quoted in Exs. 7 and 7A must be highly painful to the Mahomedan who reads or hears them and must excite his anger and disgust. In one of the passages there is a clear suggestion that the Prophet was a debauch and of infamous character. Shib Sharma's pleas that he wrote the book in Hindi so that it should not come into the hands of the Mussalmans and that for 19 years, (that is when the book was published), the Government did not take any action, are in my opinion useless and of no avail. The learned Sessions Judge in his judgment has made reference that the accused was previously prosecuted and convicted for similar offences in respect of another book written by him. This he has done in order to gather the intention of the author. It was suggested by the accused's learned counsel that the learned Judge should not have taken the accused's conviction into consideration. In my opinion, the learned Judge under S. 14, Evidence Act, was justified in doing so and even if we exclude his previous conviction from consideration, there is enough material on the record to uphold his conviction. The accused's intention can also be gathered from the speech which he made on 31st December 1939, at Amir-ud-Daula Park. An attempt was made by the accused's learned counsel to explain away these passages and some

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1. ('27) 14 AIR 1927 Lah 590 : 103 I C 769 : 28 P L R 514 : 28 Cr L J 721, Raj Paul v. Emperor.
2. ('27) 14 AIR 1927 Lah 594 : 104 I C 234 : 28 Cr L J 794 : 28 P L R 497, Devi Sharan Sharma v. Emperor.
3. ('27) 14 AIR 1927 All 654 : 104 I C 225 : 28 Cr L J 785 : 50 All 157 : 25 A L J 846, Kali Charan Sharma v. Emperor.

evidence was also produced on behalf of Shib Sharma to explain these passages. In my opinion the learned Sessions Judge was right in rejecting the evidence of those witnesses.

After giving careful consideration to the evidence in the case and the circumstances I am of opinion that the intention of the accused was to ridicule the Prophet and his religion and to promote feelings of enmity or hatred between the Hindus and Mahomedans. I do not for a moment believe that the book was written for reference for Arya Samaj missionaries. It was next contended that the conviction under S. 295A, I. P. C., was illegal. The book as I have said, was first published in the year 1922, and S. 295A was introduced by the Criminal Law (Amendment) Act (25 of 1927) which came into force on 22nd September 1927. This section was introduced owing to the agitation following the decision of the "*Rangila Rasul case*[1] to which reference has already been made. It is true that the section has no retrospective effect, but if Shib Sharma's connexion with Sham Lal accused is proved, his conviction under S. 295A is perfectly legal. Sham Lal stated that he published the book at the instance of Shib Sharma. The learned Sessions Judge has relied on this statement. The learned Assistant Government Advocate has, and in my opinion, rightly conceded that this statement of Sham Lal cannot be used against the co-accused. It was suggested that Sham Lal hardly knew Hindi and he did not know the contents of the book. I am not prepared to accept Sham Lal's statement when he says that he did not know the nature of the book. He is a seller of Arya Samajist books and there is evidence to show that he is a regular attendant at all Arya Samaj conferences: *vide* the statement of D. W. 2, Pt. Kali Charan. He is a worker of the Arya Samaj and sells books at their conferences. It is inconceivable that he would have printed the book without the permission of the author. It was in the interest of the author and his co-religionists that the book should be printed. I am of opinion that Sham Lal's connexion is established beyond doubt with Shib Sharma. Both the accused have rightly been convicted under Ss. 153A and 295A, I. P. C., and I dismiss their appeals. They were on bail. They are present in Court and are taken into custody. Their bail bonds are cancelled.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 315

YORKE AND GHULAM HASAN JJ.

Belahri Co-operative Society —
Defendant—Appellant

v.

Puttu Lal and others — Plaintiffs —
Respondents.

Second Appeal No. 2 of 1937, Decided on 28th January 1941, against order of civil Judge, Kheri, D/- 30th September 1936.

(a) Co-operative Societies Act (1912), Ss. 23 and 24—Construction of S. 23 — S. 23 refers to debts due from Society to third persons—Aforesaid debts have no reference to debts of outgoing members due to Society itself.

The words "the debts of a registered society as they existed at the time when he ceased to be a member" in S. 23 clearly refer to the debts due from the Society to third persons and it is with regard to these debts that the liability of a past member is confined in the section to a period of two years from the date of his ceasing to be a member and no further. The debts referred to in the section have no reference whatever to the debts of the outgoing members due to the Society itself. This construction is supported by S. 24 and para. 167 (ii) in Chap. 14 of the General Instructions, printed in the Manual for Co-operative Societies in the United Provinces (1923) Volume 1: ('35) 22 A I R 1935 Lah 947, *Rel. on*; ('36) 23 A I R 1936 Lah 901, *Expl.* [P 317 C 2]

(b) Co-operative Societies Act (1912), S. 43, Rules under, R. 20 (7) (i), (ii) and (iii) and R. 20 (8) (iii) — R. 20 (7) (i), (ii) and (iii) refers to defects of procedure which do not invalidate award.

Rule 20 (8) (iii) makes it clear that the provisions of R. 20 (7) (i), (ii) and (iii) refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities. [P 318 C 1, 2]

(c) Co-operative Societies Act (1912), S. 43, Rules under, R. 20 (12) (i)— Award antedated, made after expiry of time fixed for making it without obtaining extension of time involving procedural defects — Award even if invalid on aforesaid grounds can be set aside only by appeal under R. 20 (12) (i).

Even if an award is invalid on the ground that it was antedated or had been made after the expiration of the time fixed for making the award without obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting it aside is by means of an appeal to the Assistant Registrar under R. 20 (12) (i). [P 318 C 2]

(d) Co-operative Societies Act (1912), S. 43, Rules under, R. 20 (1)—First reference pending —Second reference is incompetent.

There can be no second reference while the first reference is pending and has not terminated. [P 319 C 1]

(e) Co-operative Societies Act (1912), S. 43, Rules under, R. 20 (12) (ii)—Authorities of Co-operative Societies acting beyond scope of Act or otherwise without jurisdiction — Civil Court

is competent to entertain suit questioning aforesaid acts.

The bar of jurisdiction of a civil Court created by R. 20 (12) (ii) is not absolute but limited only. The civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction: *Case law relied on.*

[P 321 C 1]

H. D. Chandra — for Appellant.

K. P. Misra — for Respondents.

Judgment. — This second appeal has been referred by a learned single Judge of this Court for decision to a Bench of two Judges under S. 14 (2), Oudh Courts Act. The appeal is by the defendant and is directed against the decree dated 30th September 1936, passed by the civil Judge of Kheri setting aside the decree passed by the Additional Munsif of Kheri and decreeing the plaintiffs' suit. The facts out of which this appeal has arisen are as follows: The plaintiffs-respondents four in number became members of the defendant society known as Belahri Co-operative Society in Kheri District some time in 1919. Some time before 1925 the defendant society borrowed rupees 1615-8-0 from the Central Bank of Gola. The debt not having been paid, the bank obtained a decree on 30th March 1926, against all the members of the society including the present plaintiffs-respondents. In the course of execution proceedings taken by the bank against the society a compromise was effected between the bank and the plaintiffs on 12th March 1927, whereby the liability of the plaintiffs to the bank was apportioned. Under this compromise the plaintiffs were made liable to pay rupees 889-10-0 to the bank. The plaintiffs' liability inter se was separated as follows:

Puttu Lal	...	Rs. 309- 8-0
Suraj Prasad	...	Rs. 157-10-0
Bhagwan Din	...	Rs. 212- 8-0
Kunwar Chandra	...	Rs. 210- 0-0
Total		Rs. 889-10-0

In spite of this compromise the bank took out execution of the entire decree against the plaintiffs. The application was rejected by the Munsif of Kheri and the order of dismissal was upheld by this Court on appeal. The plaintiffs ceased to be members of the society on 2nd May 1929. After the plaintiffs had severed their connexion with the society, the latter applied to the Registrar, Co-operative Societies, to appoint an arbitrator to settle the disputes between them and the plaintiffs. Mr. Mohammad Ahmad Siddiqi, Inspector of the Co-operative Societies, was appointed an arbitrator and made his award on 7th February 1930, under which he rejected the claim of the society. In September 1933, the society passed a resolution asking for the appointment of a fresh arbitrator to settle the dispute with the plaintiffs. The Registrar of the Co-operative Societies appointed Mr. Puttu Lal Bisaria, Circle Inspector, as the sole arbitrator in the case. Mr. Bisaria also rejected the claim of the society by his award dated 17th February 1934. On 12th March 1935, the society preferred an appeal to the Assistant Registrar of the Co-operative Societies and the latter set aside the order and decreed the claim of the society on 10th April 1935.

The plaintiffs thereupon instituted a suit on 10th January 1936, in the Court of the Munsif of Kheri for a declaration that the decision of the Assistant Registrar be set aside as being ultra vires. The cause of action is alleged in the plaint to have accrued on 10th April 1935, the date of the decision of the Assistant Registrar. The ground of the claim as put forward in the plaint was that the decision of Mr. Mohammad Ahmad Siddiqi, the first arbitrator, had become final by reason of the fact that no appeal had been preferred against his award to the Assistant Registrar as provided by R. 20 (12) (i) of the rules framed by the Local Government under S. 43, Co-operative Societies Act (2 of 1912). The principal defence to the suit was that as the decision of the Assistant Registrar of Co-operative Societies in appeal against the award of Mr. Bisaria had become final under R. 20 (12) (ii), U. P. Co-operative Societies Rules, the civil Court had no jurisdiction to try the suit. The learned Munsif framed the following two main issues in the case:

1. Is the order of the Assistant Registrar, Co-operative Societies, ultra vires and not binding on the plaintiffs as alleged? 2. Is the suit not maintainable in this Court?

On issue 1 the learned Munsif held that the order of the Assistant Registrar (Ex. 1) is perfectly valid and legal. In dealing with this issue the learned Munsif held that the award of Mr. Mohammad Ahmad Siddiqi the first arbitrator, was not valid and binding and for the reasons mentioned by the Assistant Registrar in his order (Ex. 1) accepted the opinion of the Assistant Registrar. These reasons were that the arbitrator did not record evidence of the parties, that he made the award after the expiration of the period fixed by the Registrar and without obtaining any extension of time and that the award had not been communicated to

the parties. He also held that the award was alleged to have been made on 7th February 1930, while the proceedings of the case continued till 22nd February 1930, and hence the award was antedated. He agreed with the opinion of the Assistant Registrar that the award was of no legal effect, that the society was perfectly justified in asking for a fresh reference to another arbitrator and that the decision of the Assistant Registrar was therefore perfectly valid and binding upon the parties. It was also contended on behalf of the plaintiffs that their liability for the debts of the society had ceased in 1934 when the second reference to arbitration was made inasmuch as by virtue of S. 23, Co-operative Societies Act, their liability for the debts of the society as they existed at the time when they ceased to be members could continue for two years only, namely, up to 1931. The learned Munsif repelled this contention and held that S. 23, Co-operative Societies Act, refers to the debts due by the society to third persons and not to the debts due to the society by its members. As regards issue 2, the finding of the learned Munsif was that the bar of jurisdiction of a civil Court created by R. 20 (12) (ii), Co-operative Societies Rules, was not absolute but limited only. He was of opinion that the jurisdiction of a civil Court is barred only when the order of the Registrar or the decision of an arbitrator is in accordance with the provisions of the Co-operative Societies Act and the rules made thereunder. If the order was not in consonance with the provisions of the Act or if the authorities of the Co-operative Societies had exercised power which was not vested in them by the Co-operative Societies Act, it was open to the parties to challenge the validity of such an order by means of a suit for declaration in a civil Court. Upon these findings the suit was dismissed. In appeal by the plaintiffs the learned Civil Judge of Kheri held that the award of Mr. Mohammad Ahmad Siddiqi was inoperative and did not require the filing of an appeal to set it aside. He disagreed with the learned Munsif about the interpretation of S. 23, Co-operative Societies Act, and expressed the opinion that S. 23 relates to those cases also in which a past member is liable to the society for the debts due from the society to third persons and that this liability was discharged after two years of the termination of the plaintiffs' membership.

According to the learned Civil Judge there was therefore no dispute touching the business of the society as contemplated by R. 20 and consequently the arbitration proceedings of Mr. Bisaria were perfectly invalid and inoperative and the decision of the Assistant Registrar in appeal based on an invalid arbitration was equally inoperative and not binding upon the plaintiffs. The result was that he set aside the decision of the learned Munsif and decreed the suit. The defendant then preferred a second appeal to this Court which originally came up before a learned single Judge of this Court, who in view of the public importance of the questions involved referred it for decision by a Bench of two Judges under S. 14 (2), Oudh Courts Act.

Learned counsel appearing for the defendant-appellant has argued three points before us : Firstly, it is contended that the interpretation put upon S. 23, Co-operative Societies Act, by the lower appellate Court is erroneous. Secondly, he has contended that the award of Mr. Mohammad Ahmad Siddiqi was a nullity and the order of the Assistant Registrar on appeal in the second reference to the arbitration of Mr. Bisaria is valid and binding upon the parties. Thirdly, his argument is that the suit for cancellation of the order of the Assistant Registrar is not maintainable in a civil Court. We have heard learned counsel of both parties at great length. We are of opinion that the first contention put forward on behalf of the appellant is well founded and must be accepted. Section 23, Co-operative Societies Act, 1912, runs thus :

> The liability of a past member for the debts of a registered society as they existed at the time when he ceased to be a member shall continue for a period of two years from the date of his ceasing to be a member.

We have no doubt whatever, upon a plain construction of the language used in this section that the words "the debts of a registered society as they existed at the time when he ceased to be a member" clearly refer to the debts due from the society to third persons and it is with regard to these debts that the liability of a past member has been confined in the section to a period of two years from the date of his ceasing to be a member and no further. In our opinion the debts referred to in the section have no reference whatever to the debts of the outgoing members due to the society itself. A reference to S. 24, Co-operative Societies Act, 1912, also supports the above construction. According to S. 24 the estate of a deceased member shall be liable for a period of one year from the time of his decease for

the debts of a registered society as they existed at the time of his decease. A further corroboration of this view may be found in para. 167 (ii) in Chapter 14 of the General Instructions, printed in the Manual for Co-operative Societies in the United Provinces (1923), Vol. 1, which is to the following effect :

The liquidator should also bear in mind the provisions of Ss. 23 and 24 of the Act in determining contributions. A past member is liable only for such debts of his society as were contracted while he was still a member, and he remains liable for such debts only for two years from the date on which he ceased to be a member. If, therefore, the society came under liquidation after more than two years from the date on which he ceased to be a member, he would not be liable to pay any contributions. Similarly, the estate of a deceased member remains liable only for one year from the date of the deceased member's death and for such debts of the society as existed at the time of his death.

A similar construction was placed upon the language of S. 23 in A I R 1935 Lah 947[1] where it was held that though S. 23 limits the liability of a past member for the debts of the registered society, there is no limitation either in the Act or in the rules under the Act for a debt of a past member due to a registered society. The decision in A I R 1936 Lah 901,[2] while dissenting from the decision taken in A I R 1935 Lah 947,[1] upon another point, did not touch the question of the interpretation of S. 23 of the Act which did not arise in that case. As regards the second contention put forward on behalf of the appellant, it has been argued that the award of Mr. Mohammad Ahmad Siddiqi must be disregarded as a nullity by reason of the fact that he had violated the imperative provisions of R. 20 (7) (i), (ii) and (iii). Rule 20 (7) (i) requires an arbitrator to record the evidence of parties. Rule 20 (7) (ii) requires that a copy of the award shall be given to each party. Rule 20 (7) (iii) requires that the arbitrator shall give an award within the time fixed by the Registrar : provided that no award shall be invalid by reason of its being given after the expiry of the time fixed, if an application for extension is made and granted previously or subsequently by the Registrar. Rule 20 (8) (iii), however, lays down that no award shall be invalid by reason of its not complying with the provisions mentioned above or by reason of other irregularities. This rule seems to indicate that the provisions of Rule 20 (7) (i), (ii) and (iii) refer merely to defects of procedure and do not invalidate the award by reason of such defects or irregularities. Rule 20 (12) (i) and (ii), however, clinches the matter as far as the present question goes. It runs :

(12) (i). Any party considering itself aggrieved by the award of an arbitrator or arbitrators may appeal to the Registrar within one month of the date of the award and the Registrar shall pass such order as he deems fit : Provided that the time taken in obtaining a copy of the award shall be excluded in counting the period of one month.

(ii). A decision of an arbitrator or arbitrators under these rules if not appealed against within the said period and an order of the Registrar shall as between the parties of the dispute, not be liable to be called in question in any civil or revenue Court and shall in all respects be final and conclusive.

By a correction slip dated 2nd January 1924 the words "the date of the award" in R. 20 (12) (i) have been replaced and substituted by the words "the communication of the award." It is admitted that no appeal was filed by the society against the award of Mr. Mohammad Ahmad Siddiqi to the Registrar as required by the aforesaid rule and by the operation of R. 20 (12) (ii) the decision of Mr. Mohammad Ahmad Siddiqi not having been appealed against became final and conclusive between the parties. According to Ex. 1 Mr. Mohammad Ahmad Siddiqi was required to give his award by 15th January 1930. The case remained with him till a report was made by the supervisor of the society and the bank to the Assistant Registrar in May 1931. The case was not traced till 1932 when Mr. Mohammad Ahmad Siddiqi submitted the award along with his explanation. The papers were again misplaced and were not traced till 26th January 1934 when it was discovered that the award had been made on 7th February 1930 rejecting the claim of the society. We, however, find that the second reference to the arbitration was made in September 1933 and no attempt was made to prefer an appeal either in 1932 when the award came to the notice of the society or in 1934 when the award was re-discovered. In any view of the matter, we are of opinion that even if the award of Mr. Mohammad Ahmad Siddiqi was invalid on the ground that it was ante-dated or had been made after the expiration of the time fixed for making the award and without obtaining any extension of time or because it was inoperative on the ground of certain procedural defects and irregularities, the proper course for setting aside the award was by means of an appeal to the Assistant Registrar as provided by Rule 20 (12) (i). Further, we are of opinion

1. ('35) 22 A I R 1935 Lah 947, Dhanpal v. Anjuman Dahi Alo Mahar.
2. ('36) 23 A I R 1936 Lah 901 : I L R 1937 Lah 92, Anjuman Dehi v. Kehar Singh.

that the second reference to the arbitration of Mr. Bisaria in September 1933 while the dispute was still pending before Mr. Mohammad Ahmad Siddiqi, assuming that he had not decided the matter by then and the award is ante-dated, was not competent, and consequently all subsequent proceedings based upon that reference must be disregarded as of no legal effect upon the rights of parties. The position seems to us to be perfectly clear. Rule 20 (1) runs as follows :

> Any dispute touching the business of a registered society between members or past members of a society or persons claiming through a member or past member or between a member or a past member or persons so claiming and the committee or any officer or between two or more registered societies, shall be referred in writing to the Registrar.

If the award of Mr. Mohammad Ahmad Siddiqi was valid, then the dispute had determined and there was no dispute left touching the business of the society between the past members and the society which could be referred to the Registrar within the meaning of R. 20 (1) of the Co-operative Societies Rules. If, however, the award was invalid on any grounds whatsoever, then it should have been set aside by means of an appeal and the arbitrator should have been asked to make a fresh award. There could, however, be no second reference while the first reference was pending and had not terminated. In this connexion an alternative argument has been put forward before us on behalf of the respondents that assuming that a second reference to arbitration was competent the award of Mr. Bisaria, dated 17th February 1934, became final inasmuch as no appeal was filed against it until more than a year after, namely on 12th March 1935. An appeal against a decision of an arbitrator must be filed according to the provisions of R. 20 (12) (i) within one month from the communication of the award. There is no evidence, however, on the record to show that the appeal to the Assistant Registrar was filed within time. We do not think it necessary to express any opinion upon this latter point. As regards the question of jurisdiction of the civil Court to entertain the present suit reference has been made on behalf of the appellant to A I R 1924 Lah 418,[3] A I R 1935 Lah 330,[4] A I R 1935 Lah 947,[1] 44 I C 353,[5] A I R 1926 Nag 379,[6] 40 ALL 89[7] and 44 Bom 582.[8]

A I R 1924 Lah 418[3]: In this case the plaintiff sued for a declaration that certain bonds alleged to have been executed by him in favour of the co-operative society, called the Zamindara Bank, Sherpur Kalan, were forgeries. The defence of the society was that the civil Court had no jurisdiction to hear and determine the suit and that the only remedy open to the plaintiff was by way of a reference to the Registrar, who could either decide the case himself or refer it to an arbitrator. The plea was given effect to by the trial Court but was negatived by the District Judge. The learned Judges of the Lahore High Court restored the decision of the trial Court holding that the plaintiff's suit was not maintainable in the civil Court. This decision was based upon R. 18 of the rules made by the Punjab Government under the Co-operative Societies Act of which cl. (g) is more or less similar to R. 20 (12) (ii) of the Rules framed by the U. P. Government. It was held that by the substitutional remedy provided under R. 18 in the shape of a reference to the Registrar in the matter of a dispute between a member and a society the common law remedy by an action in a civil Court has by necessary implication been taken away. A I R 1935 Lah 330,[4] (col. 2): This was a case in which a society had gone into liquidation and the liquidator had held the plaintiff liable to pay a certain amount as a past member of the society. The suit for a declaration that he was not liable for the said amount as a contribution due from him was dismissed on the ground that under S. 42, sub-s. (2), cl. (d), Co-operative Societies Act, the liquidator had jurisdiction to decide the amount of the contribution due from him and the civil Court was held to have no jurisdiction to go into the matter.

A I R 1935 Lah 947[1]: In this decision it was held that in a dispute concerning the business of a co-operative society the only remedy open to the member is to appeal to Registrar; the jurisdiction of the civil Courts to impugn the award is barred. The

3. ('24) 11 A I R 1924 Lah 418 : 71 I C 722, Zamindara Bank, Sherpurkalan v. Suba.
4. ('35) 22 A I R 1935 Lah 330, Muhammad Barkat Ali v. Anjuman Imdad Qarza.
5. ('18) 5 A I R 1918 Oudh 112 : 44 I C 353, Beni Madho Singh v. Tahsildar of Unao.
6. ('26) 13 A I R 1926 Nag 379 : 94 I C 40 : 24 N L R 5, Sadasheo v. S. N. Fadnavis.
7. ('18) 5 A I R 1918 All 419 : 42 I C 968 : 40 All 89 : 15 A L J 863, Mathura Prasad v. Sheobalak Ram.
8. ('20) 7 AIR 1920 Bom 62 : 57 I C 423 : 44 Bom 582 : 22 Bom L R 732, Ganpat Ramrao v. Krishnadas Padmanabh.

case reported in A I R 1924 Lah 418,[3] quoted above was relied on. This decision was however dissented from by a Division Bench of the Lahore High Court in A I R 1936 Lah 901.[2] In this case the execution of an award settling the dispute between the society and its members was held by the executing Court as time-barred and the society again referred the same dispute to arbitration and obtained an award. It was held that the dispute between the society and its member was determined by the first award and the subsequent dispute referred by the society to arbitration was one which under the rules made under S. 43 could only be decided by the execution Court, for it related wholly to the discharge of the award. It was held that the second award was one which could not be passed within the scope of the Act and the rules made under it and a suit could lie to have it declared void. Reliance was placed by the learned Judges on two decisions of their own Court in A I R 1932 Lah 53[9] and A I R 1935 Lah 631.[10] In the former case the award of the Deputy Registrar was declared invalid by the civil Court as the submission of the dispute to the Registrar for decision was not within the rules framed under the Act. In the latter case the awards made by the arbitrator were transferred for execution to the civil Court. The decree was held by the Court to be fully satisfied and the execution proceedings came to an end. The society thereupon referred the matter again to the Registrar and an award was made. In a suit filed for a declaration that the arbitration proceedings and the award were ineffectual, it was held that the matter could not be referred to arbitration again as the dispute had ended by the order of the executing Court, and the civil Court had no jurisdiction to entertain the suit for a declaration.

44 I C 353,[5] A I R 1926 Nag 379,[6] 40 ALL 89[7] and 44 Bom 582,[8] were cases where the liquidator had made certain orders of contribution against the members during the course of winding up of the society, and it was held that the civil Court had no jurisdiction to entertain the suit by those members to have the orders declared null and void under cl. (6) of S. 42, Co-operative Societies Act of 1912. Reference has been made by the learned counsel for the respondents to a decision of the Lahore High Court in A I R 1933 Lah 442[11] where it was held that the liquidator has power to determine the contribution to be made by a member, but he has no power to determine whether a particular person is a member or not, and if a person disputes his membership, the dispute can be decided by a civil Court. Reference has also been made on behalf of the respondents to A I R 1939 Lah 40,[12] A I R 1932 Cal 317,[13] A I R 1940 Cal 198[14] and A I R 1940 ALL 482.[15]

It was held in A I R 1939 Lah 40[12] that where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the person aggrieved to bring a suit to that effect but such objections cannot be taken in the execution proceedings, started in pursuance of the award, the objector's remedy being an appeal to the Registrar. A I R 1932 Cal 317[13]: In this case the society not only purported to acquire all the preference shares but proceeded to so modify its regulations as to make itself a "pure type society," that is to say to adopt a new constitution on the footing that it had no preference shareholders, and no members other than the registered societies who held ordinary shares. The plaintiff filed a suit for a declaration that the resolution passed by the society was ultra vires and illegal. It was held that the plaintiff's cause of action was not withdrawn from the Courts by R. 22 of the rules made under S. 43 (1) of the Act, which was to the effect that "any dispute touching the business of a registered society between members . . . . shall be referred in writing to the Registrar." A I R 1940 Cal 198[14]: In this case it was held that where an award by an arbitrator appointed under the rules of the Co-operative Societies Act was without jurisdiction or there was violation of the rules regulating the arbitration in matters of substance, a civil Court could

9. ('32) 19 A I R 1932 Lah 53 : 133 I C 883 : 32 P L R 780, Mohammad Sharif v. Union Bank, Ltd.
10. ('35) 22 A I R 1935 Lah 631 : 161 I C 248 : 38 P L R 355, Hira Nand v. Anjuman Imdad-i-Qarza.
11. ('33) 20 A I R 1933 Lah 442 : 144 I C 264 : 14 Lah 703 : 34 P L R 717, Mukand Lal v. Malhotra Bank, Hafizabad.
12. ('39) 26 A I R 1939 Lah 40 : 180 I C 242 : 41 P L R 225, Balwant Singh v. Anjaman Imdad Bahami Qarza.
13. ('32) 19 A I R 1932 Cal 317 : 139 I C 506 : 59 Cal 1165 : 36 C W N 414, Ramendra Nath v. Balurghat Central Co-operative Bank, Ltd.
14. ('40) 27 A I R 1940 Cal 198 : 188 I C 213 : I L R (1940) 1 Cal 82 : 70 C L J 492, Chatra-Serampore, Co-operative Credit Society v. Gopal Chandra.
15. ('40) 27 A I R 1940 All 482 : 192 I C 337 : 1940 A L J 588, Arya Co-operative Bank Society v. Shiv Charan.

certainly declare it to be a nullity. A I R 1940 ALL 482[15]: In this case a dispute arose whether a certain person was the representative of a deceased member of a Co-operative Society who owed money to it. The Registrar referred the matter to an arbitrator. The arbitrator passed a personal decree against the person. Thereupon he brought the suit for a declaration that the personal decree was null and void and that the property attached in execution of it was not liable for attachment. It was held that the suit was maintainable and the arbitrator had no jurisdiction to pass a personal decree.

Having regard to the trend of authorities cited above we are of opinion that a civil Court is perfectly competent to entertain a suit in all cases where it can be shown that the act of the authorities of the Co-operative Societies is not within the scope of the Act or is otherwise without jurisdiction. It may also be mentioned that the plaintiffs' liability to the Bank has already been apportioned by means of a compromise entered into between the Bank and the plaintiffs and it would not be consonant with the principles of justice, equity and good conscience to saddle the plaintiffs with the liability for the same amount twice over. We maintain the decree of the lower appellate Court and dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 321

BENNETT J.

Padam Singh — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 157 of 1940, Decided on 23rd January 1941, from order of Sessions Judge, Unao, D/- 21st October 1940.

(a) Criminal P. C. (1898), S. 117 (3)—Scope—Action under section can be taken against person standing surety for persons subject to inquiry under S. 107 in spite of order quashing inquiry proceedings after conviction of accused under S. 302, I. P. C., as that order merely amounts to termination but not cancellation altogether of the proceedings.

Certain persons were required to furnish security under S. 117 (3) of the Code. The applicant stood surety for them. During the proceedings against these persons under S. 107 a person was murdered by them for which they were all convicted under S. 302, Penal Code, and the Magistrate before whom the proceedings under S. 107 were pending considered after murder that no purpose would be served by continuing the proceedings and he accordingly passed an order quashing them:

Held that the Magistrate did not by his order cancel those proceedings altogether. He merely terminated them and an action could be taken under S. 117 (3). [P 322 C 2]

(b) Criminal P. C. (1898), Ss. 514 and 537 — Absence of evidence and finding—Effect—Forfeiture of surety bond without recording reasons based on evidence is merely an irregularity falling under Section 537.

The proper course for a Magistrate proceeding to pass an order under S. 514 is to come to a finding based on some evidence that the bail bond executed by the surety has been duly forfeited and then only to issue a notice to show cause why the penalty should not be realised from him. But the omission to record the grounds of proof not occasioning a failure of justice or prejudice to the surety, is the defect in the procedure which is merely an irregularity of the kind referred to in S. 537 of the Code. [P 323 C 1]

A person stood surety for persons against whom proceedings under S. 107 were pending. These persons were found guilty of an offence involving breach of the peace during such pendency. The Magistrate without recording the grounds of proof that the bonds had been forfeited issued notice to show cause why penalty should not be realized from the surety:

Held that the Magistrate did not act without jurisdiction merely because he failed to record the reasons for holding that notice should be issued to the surety. [P 323 C 1, 2]

(c) Criminal P. C. (1898), S. 514 — Delay in proceedings — Magistrate can take steps to forfeit recognizance under S. 107, even after conviction of person concerned of offence involving breach of peace.

The mere fact that no immediate action under S. 514 is taken against surety of the person under recognizance to keep the peace on the conviction of such person of an offence involving breach of the peace is no bar to the taking of such proceedings at a subsequent time. The Magistrate can proceed to take steps to forfeit the recognizance, although he had omitted to do so at the time of the conviction of the person concerned: 26 All 202; ('26) 13 A I R 1926 Sind 180 and ('22) 9 A I R 1922 All 503, *Rel. on*; 18 Ind Cas 403, *Not foll.* [P 323 C 2]

Akhlaque Husain — for Applicant.

Government Advocate — for the Crown.

Order. — This is an application in revision against the order of the learned Sessions Judge of Unao summarily dismissing an application in revision against an order passed by the District Magistrate of Unao modifying an order forfeiting certain security bonds passed by the sub-divisional Magistrate of Unao. The order of the sub-divisional Magistrate, dated 12th April 1940, shows that three persons, namely Bachani, Ganga Bishun and Suraj Bakhsh Singh, were required to furnish security under S. 117 (3), Criminal P. C., on 20th November 1937 pending the completion of an enquiry under sub-s. (1) of that section. Each of them executed a bond for Rs. 1000, and the present applicant Padam Singh stood surety for each of them in this amount. It is

stated that during the proceedings against these three persons under S. 107 a man named Sundar Lal was murdered by them and that they were all convicted under S. 302, Penal Code. Bachani is said to have been hanged, and the other two to have been either transported or sentenced to imprisonment. Learned counsel for the applicant states that the conviction of the other two was not under S. 302, but it is so stated in the Magistrate's order. It is not disputed that they were all found guilty of an offence involving a breach of the peace. No action was taken at the time for the forfeiture of the bonds. The Magistrate before whom the proceedings under S. 107 were pending considered after Sunder Lal's murder that no purpose would be served by continuing the proceedings and he accordingly passed an order quashing them, meaning by this, I understand, that he was not going on with them further. The case against the three men for the murder of Sunder Lal was pending at the date of this final order on 21st March 1938, in the S. 107 case. Bachani, Ganga Bishun and Suraj Bakhsh Singh are said to have been convicted on 19th November 1938.

Proceedings for the forfeiture of the bonds were taken on an application by the brother of the murdered man made on 31st August 1939. The question of taking action for the forfeiture of these bonds had apparently not been considered previously. The application was ordered to be put up with the connected file, that is the file under S. 107 and notice was issued to Padam Singh on 24th February 1940. This notice contained full details of the bonds and the reasons why Padam Singh was being called upon to show cause why they should not be forfeited. Padam Singh put forward three grounds against the forfeiture of the bonds, none of which has been pressed in this application in revision. The first was that he was not liable because he had filed an application under the Encumbered Estates Act. The Magistrate was clearly justified in holding that this did not protect him. Secondly, it was contended that the bonds had not been stamped at the time of execution. The Magistrate observed that the court-fee stamps had been supplied after execution of the bonds and that this could not make the bonds invalid. Thirdly, Padam Singh said that he did not understand the meaning of the bonds. The Magistrate disbelieved this, and there has been no contention to the contrary in this Court.

A number of legal points have however been put forward on behalf of the applicant. It is sought to show that there were legal defects in the procedure which invalidated the order. Before considering these objections it should be mentioned that there was an appeal to the District Magistrate against the order requiring Padam Singh to pay Rs. 3000, that is Rs. 1000 in respect of each of the bonds forfeited, and that the District Magistrate reduced the amount from Rs. 3000 to Rs. 2000, taking into consideration his financial position. The first contention advanced on behalf of the applicant is that no action could be taken under S. 117 (3) because the previous proceedings in the case under S. 107 had been quashed by the final order in those proceedings passed on 21st March 1938. I do not think that there is any force in this contention. The Magistrate did not by his order cancel those proceedings altogether. He merely terminated them. He did not and he could not pass an order setting them aside as if they had never been taken. Secondly, it has been contended that the forfeiture of the bonds is invalid because there was no preliminary enquiry or order under S. 514, Criminal P. C. This section provides that when it is proved to the satisfaction of the Court by which a bond under the Code has been taken that such bond has been forfeited, the Court shall record the grounds of such proof and may call upon any person bound by such bond to pay penalty thereof, or to show cause why it should not be paid.

In the present case the Magistrate did not record the grounds of proof that the bonds had been forfeited. He sent for the record of the case under S. 107 and satisfied himself from it that proceedings in that case had been dropped because Bachani, Ganga Bishun and Suraj Bakhsh Singh were being prosecuted for the murder of Sunder Lal, committed while those proceedings were pending. Probably, though the record does not show this, he had also before him some evidence to show that they had all been convicted in this case. There is no reason for holding in these circumstances that the Magistrate was not justified in thinking that the bonds had been forfeited, and the only question for consideration is whether the subsequent proceedings were vitiated by his omission to record the grounds for coming to this conclusion. On this point I have been referred to two rulings of the Patna High Court. In the first, A I R 1922 Pat 242,[1] it was

1. ('22) 9 AIR 1922 Pat 242: 67 IC 830: 23 Cr L J 478 : 3 P L T 381, Kishan Narayan v. Emperor.

held that where there has been a failure to carry out the express provisions of S. 514, the Magistrate acted without jurisdiction in failing to record proof before he issued notice to show cause and the proceedings should be set aside on this ground. The judgment in the case mentions that the petitioners had been in no way prejudiced by the procedure adopted, and the learned Judge only allowed the application because there had been a failure to carry out the express provisions of the law with the result that in his opinion the Magistrate acted without jurisdiction.

In the second case, AIR 1929 Pat 643,[2] it was held that the proper course for a Magistrate proceeding to pass an order under S. 514 is to come to a finding based on some evidence that the bail bond executed by the surety has been duly forfeited, and then only to issue a notice to show cause why the penalty should not be realized from him. It cannot be said in the present case that the Magistrate had no evidence before him that the surety bonds had been forfeited. He had at least before him the record of the proceedings under S. 107 which showed why those proceedings had been dropped. With all respect for the authorities relied upon I am unable to agree that in the present case the proceedings were vitiated by the failure of the Magistrate to record his reasons for coming to a prima facie conclusion that the bonds had been forfeited. He had clearly good reasons to think that they had been forfeited; this is not disputed. When Padam Singh appeared before him he did not dispute the facts stated in the notice which was issued to him, that is that he had stood surety for these persons and that these persons had been found guilty of an offence involving a breach of the peace during the pendency of the proceedings against them under S. 107. The objections which are now being raised were not raised by Padam Singh when notice was issued to him. He did not object to the procedure nor did he dispute the facts. The applicant not being prejudiced and the omission to record the grounds of proof not occasioning a failure of justice, the defect in the procedure was merely an irregularity of the kind referred to in S. 537, Criminal P. C. In support of this view, I would refer to a ruling of a Bench of this Court in 1939 O W N 960[3] where a similar contention that a conviction under the Motor Vehicles Act was invalidated by a defect in the summons was rejected. I do not consider that the Magistrate acted without jurisdiction merely because he failed to record the reasons for holding that notice should be issued to the applicant. Thirdly, it is contended that proceedings for the forfeiture of a bond can be taken only by the Court which convicts the person who has furnished the bond at the time of his conviction. In support of this contention reference was made to the case in 18 I C 403.[4] This was a Full Bench case of the Punjab Chief Court. The headnote reads :

> If, in convicting a person of an offence involving the forfeiture of a bond for keeping the peace, a Magistrate, who has knowledge of the fact that the person before him has, by his conduct, forfeited his bond, does not make any order for forfeiture, he must be taken to have decided not to take action on the bond in respect of that particular breach of the peace, and he cannot thereafter reconsider and add to his order by directing forfeiture of the recognizance.

To the contrary effect is a ruling of the Allahabad High Court in 26 ALL 202[5] where it was held that the mere fact that no immediate action under S. 514, Criminal P. C., is taken against a person under recognizances to keep the peace, or against his surety, on the conviction of the former of an offence involving a breach of the peace is no bar to the taking of such proceedings at a subsequent time. Similarly, in a case of the Judicial Commissioner's Court of Sind, AIR 1926 SIND 180,[6] it was held that there is no objection to a Magistrate proceeding to take steps to forfeit the recognizance, although he had omitted to do so at the time of the conviction of the person concerned. It has also been argued that the proceedings should have been started while the interim order was in force. No direct authority has been referred to in support of the argument, and I am clearly of opinion that there is no force in it. In another Allahabad case, 44 ALL 657,[7] it was held that where proceedings for the forfeiture of a bond for keeping the peace have been commenced before the expiry of the period for which the bond was given, the fact that such period has expired is no bar to their continuance. It was sought from

2. ('29) 16 A I R 1929 Pat 643: 122 I C 532: 31 Cr L J 420: 11 P L T 572, Zulmi Kahar v. Emperor.
3. ('40) 27 A I R 1940 Oudh 77: 184 I C 742: 41 Cr L J 92: 1939 O W N 960, Emperor v. Abdul.
4. ('13) 13 P R 1913: 14 Cr L J 67: 18 I C 403: 39 P L R 1913 (F B), Emperor v. Mawaz.
5. ('03) 26 All 202 : 1903 A W N 237, Emperor v. Raja Ram.
6. ('26) 13 A I R 1926 Sind 180: 92 I C 742: 27 Cr L J 326: 20 S L R 95, Jeomal v. Emperor.
7. ('22) 9 A I R 1922 All 503: 68 I C 847: 23 Cr L J 623 : 44 All 657 : 20 A L J 623, Emperor v. Uma Datt Misir.

this ruling to argue that proceedings should have been started before the expiry of the period, but I do not consider that this conclusion is warranted.

It has further been argued that action should not have been taken in the present case against Padam Singh at the instance of a private person who was merely interested in gratifying his spite against him. But action was not taken by the Magistrate with this object. The brother of the murdered man brought to his notice the fact that no action had been taken to forfeit the bonds and the Magistrate presumably considered that it was in the public interest that such action should be taken, the matter previously having been overlooked. Lastly it has been argued that the amount which Padam Singh has been required to pay is very large and that it will bear hardly on him as he is already financially embarrassed. The District Magistrate took his financial position into consideration in reducing the amount from Rs. 3000 to Rs. 2000 and I see no reason to reduce it further. I can find no good ground therefore for interfering with the order passed and I dismiss this application.

N.K./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 324

GHULAM HASAN J.

Beni Madho — Defendant — Appellant

v.

Ram Nath — Plaintiff — Respondent.

Second Appeal No. 256 of 1937, Decided on 6th January 1941, against order of Addl. Civil Judge, Lucknow, D/- 29th January 1937.

(a) Specific Relief Act (1877), S. 22—Findings on which trial Court refused specific performance set aside on appeal and specific performance decreed — No question of interference with discretion of trial Court arises.

Where the basic findings which ultimately led the trial Court to dismiss the suit for specific performance are set aside on appeal by the appellate Court and specific performance is decreed, no question of interference by the appellate Court with the exercise of discretion by the trial Court arises : 10 A L J 498, *Expl.*; ('30) 17 A I R 1930 All 166 and ('28) 15 A I R 1928 Oudh 224, *Disting.*

[P 326 C 2]

(b) Specific Relief Act (1877), S. 22—Scope—Inadequacy of price, possibility of litigation for possession or existence of family idols are no grounds to refuse decree for specific performance of contract of sale.

When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of counsel without the slightest suggestion of the vendor having been imposed upon and when there was ample time and opportunity for him to resile from the position taken up by him and either to refuse to sell the property to original purchaser or to sell it to some other person for a higher price, the mere inadequacy of price cannot be a sufficient ground of itself to refuse specific performance: 5 Cal 192 and ('33) 20 A I R 1933 Mad 736, *Rel. on.*

[P 327 C 1]

So also the mere fact that the plaintiff in a suit for specific performance of a contract of sale might have to face litigation in obtaining possession of the property cannot be any reason for refusing specific performance of the contract, nor can the existence of the family idols of which the defendant had agreed to give possession to the plaintiff be an insuperable bar to a decree for specific performance being made in favour of the plaintiff.

[P 327 C 2]

Haidar Husain and Ramapat Ram — for Appellant.

L. S. Misra — for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for specific performance of a contract of sale which was dismissed by the trial Court whose decision on appeal has been reversed by the lower appellate Court which has decreed the suit against the defendant-appellant. It is no longer disputed that the defendant Beni Madho contracted to sell his house situate in Yahiaganj, Lucknow, to one Hakim Shiam Lal on 27th April 1935. Beni Madho had filed a suit for possession of certain property against Hakim Shiam Lal in the Court of the Subordinate Judge of Budaon. He had also filed an application in forma pauperis along with the plaint which was opposed by Hakim Shiam Lal, who contested the same on the ground that the defendant was possessed of a house in Yahiaganj in Lucknow, which he had not included in the schedule of property, and that the defendant was possessed of sufficient means to pay the court-fees. Hakim Shiam Lal offered to purchase the said house himself for Rs. 500. Beni Madho agreed to sell the house and further agreed that he would deliver possession of the house if the plaintiff deposited the money in Court. He also promised to execute the sale deed within a fortnight provided the money was deposited in Court by Shiam Lal within that time. On 28th September 1935, Shiam Lal put forward Ram Nath, the present plaintiff, as the purchaser for the same house on the same terms on which Beni Madho had agreed to sell it to him (Shiam Lal). Ram Nath, who was present in Court, supported this statement of Shiam Lal and offered to deposit the sum of Rs. 500 that very day subject to the condition that the amount was not to be withdrawn by Beni Madho till possession was delivered to Ram Nath. Beni Madho accepted this condition. It was also agreed

between Beni Madho and Ram Nath that the costs of the execution of the sale deed would be borne in equal shares by them but the entire costs of the registration of the sale deed would, in the first instance, be paid by Ram Nath and the sum of Rs. 500 in deposit would be paid to Beni Madho after deducting the costs of registration. The Subordinate Judge of Budaon before whom these proceedings took place ordered that the sale deed as agreed between Ram Nath and Beni Madho should be completed on 12th October 1935. On 12th October 1935, Beni Madho did not appear with the result that his application to sue in forma pauperis was dismissed for default. No sale deed having been executed by Beni Madho in favour of Ram Nath in pursuance of the contract of sale, Ram Nath filed the present suit against Beni Madho to enforce specific performance of the contract of sale. The contract of sale was alleged to have been embodied in Exs. 1, 2 and 3 which contained the original offer of Hakim Shiam Lal, the subsequent substitution of Ram Nath as a purchaser in place of Hakim Shiam Lal and the acceptance by Beni Madho of the terms of the sale referred to above.

Beni Madho contested the suit on the ground that the house in suit belonged to his mother who had constructed it and that he was therefore not in a position to deliver the possession of the house. It was also alleged that the plaintiff did not pay in advance the expenses of registration with the result that he was unable to execute the sale deed on 12th October 1935, the date fixed for the disposal of the application for permission to sue in forma pauperis. Beni Madho also asserted that the sale consideration agreed upon between the parties was Rs. 520 and not Rs. 500. The value of the house was alleged in the written statement as being over Rs. 2000. It was also alleged that there were certain family idols placed in a portion of the house to which the public had access. In regard to these family idols, the plaintiff had asserted in the plaint that the defendant had agreed to put the plaintiff in possession of the same. The trial Court held that the plaintiff duly deposited the sum of Rs. 500 by tender in Court and also held that the sale consideration agreed upon between the parties was Rs. 500 and not Rs. 520 as alleged by the defendant. The trial Court however held that the plaintiff did not tender to the defendant the costs of the execution and registration of the deed within the time fixed and having failed to comply with the terms of the contract he was not entitled to a decree for specific performance. As regards the defendant's plea that he was unable to deliver possession of the house because it belonged to his mother, the trial Court held that this fact was no bar to the maintainability of the suit. According to the trial Court, the defendant had contracted to sell and at the time of the contract he was fully aware of the rights of his mother and if he chose to enter into it with his eyes open he could not be permitted to resile from the contract on that ground. The trial Court finally held that the term relating to the delivery of possession over the house by the defendant as a condition precedent to his obtaining the sale consideration was one which could not be performed by the defendant. In this connection, it was observed by the trial Court that the house was the ancestral property of the defendant and the mother had obviously a right of residence and therefore the defendant could not be expected to deliver possession. Reading the terms of the contract in the light of the provisions of Ss. 15 and 22, Specific Relief Act, the trial Court was of opinion that the contract was of such a nature that specific performance could not be granted. The suit was therefore dismissed.

In appeal the lower appellate Court has confirmed the finding of the trial Court as regards the amount of the sale consideration but it has disagreed with the finding that the plaintiff did not pay the costs of registration of the deed in time to the defendant. After considering the evidence on the record, the lower appellate Court came to the definite conclusion that the plaintiff had offered Rs. 20 to the defendant to meet the initial expenses of registration but the defendant refused to take it without any reason. The lower appellate Court has also found that the defendant was the owner of the house and the evidence regarding the construction of the house by his mother was neither reliable nor satisfactory. A further contention was raised on behalf of the defendant before the lower appellate Court that the term that the defendant was not entitled to withdraw the sum of Rs. 500 till he delivered possession of the house to the plaintiff was a condition precedent to the execution of the sale deed, and since that condition was not and could not be complied with no sale deed could be executed. The lower appellate Court however held that the condition for the withdrawal of the price from the Court before the delivery of possession to the

plaintiff was not a condition precedent and did not and could not affect the transaction of sale. It also found that the defendant was in a position to deliver the possession of the house. Having regard to the findings at which the lower appellate Court arrived, it held that Ss. 15 and 22, Specific Relief Act, did not help the defendant's case. As regards the price of the house, the lower appellate Court remarked that the transaction was entered into between the parties before the Subordinate Judge of Budaon and there could be no question of the plaintiff or Hakim Shiam Lal overreaching the defendant. The parties entered into the transaction with the advice of their counsel who were present in Court at the time. The appeal was therefore allowed and the suit decreed with costs.

In this second appeal preferred by the defendant to this Court two points have been urged on his behalf. The first point is that the trial Court had perfect discretion under S. 22, Specific Relief Act, to refuse a decree for specific performance of the contract and that the lower appellate Court should not on appeal have interfered with the exercise of discretion by the trial Court. Reference has been made in support of this contention to 10 A L J 498,[1] A I R 1930 ALL 166[2] and 5 O W N 35.[3] Section 22, Specific Relief Act, lays down that the jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief, merely because it is lawful to do so; but the discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles, and capable of correction by a Court of appeal. The section itself stresses the necessity on the part of the Court to exercise its discretion in a sound and reasonable manner and not in an arbitrary fashion. That a Court of appeal is competent to intervene and correct the wrong done to a party if the exercise of the discretion has been arbitrary, is clearly recognised by the latter portion of the section itself. Even in the case cited by the learned counsel for the defendant-appellant, namely A I R 1930 ALL 166,[2] it was held following a decision of the Calcutta High Court in A I R 1926 Cal 1237[4] that the discretion to grant or refuse specific performance can be exercised in second appeal. The trial Court in refusing to decree the suit for specific performance was influenced by the fact that the plaintiff had not paid the registration expenses before the date fixed for the execution of the sale deed and the further fact that the condition for the withdrawal of the price from the Court before the delivery of possession was a condition precedent to the execution of the sale deed. Its decision did not rest upon any express finding of hardship upon an examination of the various circumstances of the case. The basic findings referred to above, which ultimately led the trial Court to dismiss the suit for specific performance, were set aside on appeal by the lower appellate Court. Consequently, no question of interference by the lower appellate Court with the exercise of discretion by the trial Court arose. In 10 A L J 498[1] there was a finding of the lower Courts that the contract of sale conferred undue advantage on the plaintiff and caused hardship to the defendant which was not anticipated at the time when the contract was made. The learned Judge observed that the case was similar to those mentioned in Illus. (e), (h) and (j) of S. 22 and that he would not be justified in interfering with the discretion vested in the Courts below under S. 22 which they had exercised not arbitrarily but on reasonable grounds.

The case in A I R 1930 ALL 166[2] is a wholly different case and has no application to the present case. There it was held that specific performance of an agreement to sale of land against a subsequent purchaser where the latter is entitled to a right of pre-emption against the person seeking to enforce the agreement for sale, cannot be enforced. The case in 5 O W N 35[3] related to an order of the trial Court in the matter of awarding costs and has no bearing whatever upon the present case. In the second place, it has been argued that the circumstances of the present case bring the case within cl. 1 read with Illus. (d) and cl. 2 read with Illus. (e) of S. 22, Specific Relief Act, and it is argued that the specific enforcement of the contract would give the plaintiff an unfair advantage over the defendant and would also involve hardship upon him which he did not foresee. The first circumstance pointed out in this connection is that though the land upon which the house stands belonged to the defendant's father, yet, it was constructed by his mother and being the streedhan property it must devolve not upon

1. ('12) 10 A L J 498 : 17 I C 732, Balla Mal v. Chunni Lal.
2. ('30) 17 AIR 1930 All 166 : 122 I C 740, Dayal Singh v. Mahabir Singh.
3. ('28) 15 AIR 1928 Oudh 224 : 107 I C 881 : 5 O W N 35, Bishun Narain v. Mazharul Haq.
4. ('26) 13 AIR 1926 Cal 1237 : 98 I C 193 : 44 C L J 162, Habibur Rahman v. Ali Azhar.

the defendant but on his sister who is alive. I have already upheld the finding of the lower appellate Court on this point to the effect that the house belongs to the defendant and has not been proved to belong to his mother. There can, therefore, be no question of any hardship upon the defendant as it is his house which is being sold and not the house belonging to his mother.

The second circumstance pointed out is that the value of the house is much more than the sale consideration agreed upon between the parties. The lower appellate Court has already disposed of this contention and I agree with its conclusion. The parties in this case were dealing at arms length. The contract took place in presence of the Court and both parties were represented by counsel who gave their help and advice in the negotiation of sale and the preparation of the draft sale deed (EX. 6). When a contract of sale has been entered into deliberately and solemnly by the vendor with open eyes in the presence of the Court and with the advice of counsel without the slightest suggestion of the vendor having been imposed upon, a Court of equity will not be entitled to interpose its aid on the ground of inadequacy of price. Reference may be made in this connexion to a decision of their Lordships of the Judicial Committee in 5 Cal 192[5] where it was held that a party seeking to set aside a transaction on the ground of inadequacy of consideration must show such inadequacy as will involve the conclusion that he either did not understand what he was about, or was a victim of some imposition. The following passage at p. 196 of the report may also be quoted with advantage as being fully apposite to the case:

> The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case in L R 2 Scot Ap 6[6] in which Lord Westbury very shortly and clearly stated the law upon this subject. He says: The transaction having been clearly a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration, but it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about, or was the victim of some imposition.

It was similarly held in A I R 1933 Mad 736[7] that persons who have entered into contract to carry out certain things should not be allowed lightly by Court to break their given word on the ground of mere technical pleas or imaginary hardship. In the absence of adequate grounds, specific performance should not be refused. It was observed in this case that the term "hardship on the defendant" used in S. 22 (2), Specific Relief Act, is used in the sense of some collateral hardship and not merely the diminution of the purchase money. The illustrations which are all based on English law clearly show this and the term hardship is used in the same sense as it is used in English law (*vide*, Fry on Specific Performance, Chap. 6). From the circumstances established in the present case, it is difficult to see how the plaintiff obtained any unfair advantage over the defendant or in what manner the performance of the contract would involve any hardship on the defendant which he could not have foreseen. It has been stated on behalf of the defendant appellant that his client was interested in undervaluing his property so as to evade the payment of the court-fees and therefore had no alternative but to accept the offer of Rs. 500, which had been made by Hakim Shiam Lal. It is admitted that there was a prior encumbrance of Rs. 700 upon this house and the offer to purchase the house for Rs. 500 subject to the prior encumbrance was made on 27th April 1935. The defendant agreed to sell the house on the same terms to Ram Nath on 28th September 1935, nearly five months after. There was ample time and opportunity for the defendant to resile from the position taken up by the defendant and either refuse to sell the house to Ram Nath or to sell it to some other person for a higher price. Lastly it has been contended that the house being in the possession of Mt. Bittan, the sister of the defendant, the plaintiff might have to face litigation in obtaining possession of the house. Whether this is so or not, I cannot hold that this can be any reason for refusing specific performance of the contract, nor can the existence of the family idols of which the defendant had agreed to give possession to the plaintiff be an insuperable bar to a decree for specific performance being made in favour of the plaintiff. Reference has been made in course of the arguments on behalf of the defendant-appellant to the provisions of S. 15, Specific

5. ('77) 3 Cal 192 : 1 C L R 107 : 3 Sar 760 (P C), Administrator-General of Bengal v. Juggeswar Roy.
6. L R 2 Scot Ap 6, Tennent v. Tennent.
7. ('33) 20 A I R 1933 Mad 736 : 145 I C 1023:65 M L J 491, Moideen Rowther v. Chaturbuja Das Kushal Das & Sons.

Relief Act. This section deals with the specific performance of a part of the contract, where the part unperformed is large. Having regard to the findings in the present case, no question of the applicability of S. 15, Specific Relief Act, can possibly arise. The appeal therefore fails and is dismissed with costs.

N.K./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 328

THOMAS C. J. AND GHULAM HASAN J.

Sheoambar Ban — Deft. 1 — Appellant.

v.

Mohan Ban, Plaintiff and another, Defendant 2 — Respondents.

Civil Misc. Appeal No. 63 of 1940, Decided on 16th January 1941, against order of civil Judge, Gonda, D/- 4th November 1940.

(a) Civil P. C. (1908), O. 40, R. 1 — Where property is in medio receiver may be appointed.

Where there are rival claimants to the property in dispute and the property has been in medio, i. e., has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it is eminently a case for the appointment of a receiver : 1936 O W N 466 ; ('37) 24 A I R 1937 Oudh 280 ; ('39) 26 A I R 1939 Oudh 61 ; ('39) 26 A I R 1939 Oudh 94 ; ('39) 26 A I R 1939 Oudh 229 and ('28) 15 A I R 1928 P C 49, *Expl.*; (1850-53) 4 H L 1031, *Rel. on.* [P 331 C 1]

(b) Practice — Duty of Court—Interim order —During decision of interim questions in suit Court should not express opinion on merits of claims of either party.

While deciding interim questions arising in a suit it is undesirable to express any opinion one way or the other as regards the merits of the claim of either party to the property in dispute as there is a chance of running the risk of the opinion being used in such a way as to prejudice the case of either party. [P 331 C 1]

(c) Receiver — Appointment of — Appellate Court's power of interference with trial Court's discretion.

Where the trial Court, with whom the discretion under O. 40, R. 1, Civil P. C., primarily vests, has not been shown to have exercised such discretion in an arbitrary fashion, illegally or improperly, appellate Court will not interfere with the exercise of such discretion. [P 331 C 1]

M. Wasim and K. M. Shamim—for Appellant.
S. N. Roy and K. L. Nigam—for Respondent 1.
B. N. Roy — for Receiver.

Thomas C. J. — This is an appeal by defendant 1 against the order dated 4th November 1940, passed by the civil Judge of Gonda for the appointment of a receiver in a pending suit between the parties. The plaintiff-respondent filed a suit on 18th September 1940, for a declaration that he is the mahant of math Srinagar, pargana and district Gonda, and is the heir of Mahant Rajendra Ban, deceased, and in the capacity of mahant and heir he is entitled to get possession and occupation of certain properties in the district of Gonda, a list whereof was attached to the plaint. He also prayed for a decree for possession in respect of certain pukhtadari land in village Anchalapur in the district of Bahraich. The ground of the plaintiff's claim was that there is an ancestral math of the Nihang Faqirs of Ban Sanyasi class in village Srinagar, pargana and district Gonda existing from Shahi times. According to the plaintiff the mahant of this sect had always been a Nihang Goshain. Mahant Rajendra Ban, the last mahant of the said Asthan, having died on 16th-17th March 1940, without leaving any disciple, the plaintiff claimed to be the nearest heir, both legally as well as according to a custom, to the deceased mahant according to a pedigree set out at the foot of the plaint. The plaintiff further alleged that on 6th September 1940, the Visnami and Sanyasi Faqirs assembled at the Math and in the presence of respectable persons admitted him to be a competent person for the mahantship and to be the nearest heir of the deceased mahant Rajendra Ban. The aforementioned Faqirs conferred on him the tilak and chadar (token of mahantship) and declared him as the mahant of the said math. The appellant, who is defendant 1, filed a written statement contesting the claim. The appellant denied the pedigree set up by the plaintiff in so far as his connexion with the founder of the math and the successive mahants was concerned. The appellant on the other hand claimed exclusive right to succeed as the mahant and alleged that on the 13th day ceremony a bhandara of the deceased Mahant took place and he had been properly selected as the mahant of the said Asthan after due ceremonies. There was another defendant impleaded in the case as defendant 2 but he does not appear to have filed any written statement and although notice has been served on him in the present appeal he has not put in appearance. He did not turn up in the trial Court in spite of service. He has been impleaded as defendant 2 in the case because he filed an application for mutation in May 1940 in the revenue Court.

The plaintiff filed an application on 19th September 1940, for the appointment of a receiver. The ground of the application was that the appellant had no right of any sort in the property of the Asthan. He was neither a Goshain nor was he entitled to succeed as the mahant of Asthan Srinagar under law or custom. The plaintiff asserted

that his own title to the property was unassailable. It was further stated that upon the death of the deceased mahant the Sub-Divisional Officer of Tarabganj visited the Asthan and locked up all the moveables except some articles and that the Tahsildar of Gonda subsequently prepared a list of all the articles. It was alleged that many of these articles were found missing when another Tahsildar subsequently visited the Asthan. A cycle was alleged to have been given by the appellant to the patwari of village Srinagar and a motor-car had been given away to one Pandit Raj Kishore Upadhyay. Fifty thousand bricks out of four lakhs lying in the kiln, which had been started by the deceased mahant, were said to have been removed from the kiln. There were many decrees and debts which were likely to become time-barred if necessary proceedings were not taken in time and there was a large amount of money in fixed deposit of the Allahabad Bank which was to mature on 2nd December 1940, and the math was liable to suffer loss if the deposit was not renewed. The immovable property situate in Gonda had been attached by the Deputy Commissioner in connexion with the arrears of revenue and was still under attachment. The appellant had taken possession of the pukhtadari land in village Anchalapur, district Bahraich, and was misappropriating the income of that property. The appellant was possessed of no property and it would be difficult to realize any mesne profits from him in the event of a decree being passed in the plaintiff's favour.

A written reply was filed in answer to this application by the appellant in which the allegations were generally denied, particularly those relating to the disposal of the bicycle and the motor-car and the removal of the bricks. The appellant asserted that he was in possession of the entire moveable and immovable property owned by the Asthan since the death of the deceased mahant, except some moveable property, which had been locked up by the Sub-Divisional Officer, and he continued to remain in possession, making collections and paying Government revenue until 1st June 1940, when the Deputy Commissioner of Gonda attached all the property in Gonda district under S. 150, Land Revenue Act, leaving undisturbed the possession of the appellant over certain *sir* and khudkasht lands. The appellant had further obtained mutation in regard to the villages situate in Tahsil Utraula, district Gonda, and the pukhtadari rights in Bahraich district. He had further been in possession and occupation of the math and had been conducting all arrangements for the worship of the math. The right of the plaintiff to obtain an order for the appointment of a receiver was emphatically denied.

The learned civil Judge after hearing both parties allowed the application and appointed one Mr. Jwala Prasad Sinha as receiver over the entire properties belonging to the math and directed him to take possession at once from the Deputy Commissioner. The receiver was directed to deposit the valuables in some bank or in the treasury and the other moveables in the nazarat. He was further directed to make proper arrangements for the custody of the live stock and manage the zamindari properties in accordance with the rules of the Court of Wards. He was allowed ten per cent. as his remuneration over the actual collections in addition to the expenses of management. The learned Judge held that there was no reliable evidence of the appellant's possession over the property since the death of the deceased Mahant and there was very great danger of the income of the property being spent over the litigation instead of over the purposes for which the endowment exists. He was of opinion that both the claimants in the case were of the mendicant class having no property in their possession and the loss, if caused by waste and mismanagement, will not be liable to be compensated. We understand that the receiver has taken possession of the property in dispute with the exception of village Anchalapur and some *sir* lands being still in the possession of the applicant, cash in the bank and moveable property in the math.

We have heard learned counsel on both sides at some length and we are of opinion that the order of the lower Court appointing a receiver should be maintained. Mahant Rajendra Ban, the deceased mahant, died on 17th March 1940. (His Lordship after referring to certain disputes in connexion with the property, proceeded.) The position therefore is that at the time of the death of the deceased mahant on 17th March 1940 neither of the parties was in possession of the property in dispute and the possession, if any, exercised by the defendant-appellant was in no sense a possession in his own right, nor can it be said that it was peaceable or undisturbed because it is clear from the circumstances of the case that the Sub-divisional Officer upon finding that the deceased

Mahant had left no disciple took immediate action in locking the moveables and prevented the scramble by allowing the defendant-appellant to perform the kriya karma ceremonies of the deceased mahant and for the aforesaid purposes to make certain collections of the rent. It is also clear that in view of the rival claims having been put forward in the mutation Court the revenue authorities anticipated a scramble for forcible possession and consequently recommended attachment of the property with a view to securing the realization of the Government revenue, and this attachment accordingly took place on 1st June 1940. Neither party having been in possession of the property from 17th March 1940 till 1st June 1940 when the attachment took place, the property must be considered to have been in medio and the possession of the Deputy Commissioner must therefore be deemed to be the possession of the rightful owner of the property. The observations of Lord Cranworth in 4 H L 1031,[1] so often quoted in cases arising under O. 40, R. 1, Civil P. C., are fully applicable to the circumstances of the case. It was observed in the said case :

> In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of interim protection of the property. Where indeed the property is as it were in medio in the enjoyment of no one, the Court can hardly do wrong in taking possession. It is the common interest of all parties that the Court should prevent a scramble. Such is the case when a receiver of a property of a deceased person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration. No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the enjoyment, the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong.

Reference was made on behalf of the defendant-appellant to 1936 O W N 466,[2] 1937 O W N 197,[3] 1938 O W N 1153,[4] 1939 O W N 59,[5] 1939 O W N 615[6] and 55 I A 131.[7] It was held in 1936 O W N 466[2] that the question whether a receiver should be appointed cannot be decided on the rulings but according to the circumstances of each case. It was further held that in order to succeed in getting a receiver appointed the plaintiff must show that prima facie he has the title and that the defendant has no title. In that case the mutation Courts in Oudh and Lahore had decided the matter in favour of the defendant. It was held therefore that the Court could not at that stage decide the entire case by holding that the revenue Courts were wrong and prima facie the defendant had no title and that the plaintiff had title. The decision in the original suit reported in 1936 O W N 466[2] came up in appeal before a Bench of this Court and is reported in 1937 O W N 197.[3] It was held, confirming the decision, that the appointment of a receiver is a matter entirely within the discretion of the trial Judge and unless it can be shown by the applicant that the trial Judge has not exercised a judicial discretion in the matter, he cannot succeed in an appeal filed by him against the order of the trial Judge rejecting his application for the appointment of a receiver. It was also held that where the defendant in a suit has been put in possession of the properties in dispute by the revenue Courts after contest on the ground of his prima facie title to them, it would not be just and convenient for the Court to deprive him of that possession and to appoint a receiver in his place to manage the property.

The case in 1938 O W N 1153[4] was a case in which the defendant had been in peaceable possession for about 15 years without objection on behalf of anybody and it was held therefore that it would not be in the interests of justice to deprive him of his possession at the instance of a plaintiff who bases his claim on a custom denied by the defendant. It was further ruled that in matters which lie within the discretion of the trial Court such as under O. 40, R. 1, Civil P. C., the appellate Court should not interfere with the trial Court's discretion unless that discretion has been exercised illegally and improperly. The two cases reported in 1939 O W N 59[5] and 1939 O W N 615[6] are wholly inapplicable as in both those cases there had been a decision on the merits deciding the rights of the parties in the property concerned and there could be no question of the appointment of a receiver in such a case. The case in 55 I A 131[7] was a case in which their Lordships of the Judicial Committee

1. (1850-53) 4 H L C 1031, Owen v. Homan.
2. ('36) 1936 O W N 466 : 161 I C 838, Ali Raza Khan v. Nawazish Ali Khan.
3. ('37) 24 AIR 1937 Oudh 280 : 166 I C 983 : 1937 O W N 197, Ali Raza Khan v. Nawazish Ali Khan.
4. ('39) 26 AIR 1939 Oudh 61 : 178 I C 725 : 1938 O W N 1153, Bidurramji v. Kesho Ramji.
5. ('39) 26 AIR 1939 Oudh 94 : 179 I C 245 : 1939 O W N 59, Bisheshar Singh v. Jadunath Singh.
6. ('39) 26 AIR 1939 Oudh 229 : 14 Luck 666 : 1939 O W N 615, Ali Raza v. Nawazish.
7. ('28) 15 AIR 1928 P C 49 : 55 I A 131 : 55 Cal 720 (P C), Benoy Krishna v. Satish Chandra.

upheld the order of the High Court discharging the order of the trial Court appointing a receiver in respect of the properties which had been in the mahant's possession and enjoyment for a considerable number of years and were his self-acquired properties. Their Lordships observed that the order of the trial Judge appointing a receiver over properties, which had been in the possession of the defendant for a long time as his self-acquired properties, was not altogether within the principles of a judicial exercise of discretion, and although the order of the trial Court is no doubt discretionary in such a case yet that discretion is liable to interference if it is not in accordance with the principles on which judicial discretion must be exercised. If the appellate Court in such a case concludes that proper discretion was not used by the Court below, it is free to exercise its own discretion in the matter.

As regards the merits of the claim of either party to the property in dispute, we consider it obviously undesirable to express any opinion one way or the other without running the risk of its being used hereafter in such a way as to prejudice the case of either party. It is enough for our purposes to state that the questions raised by both parties as regards their title to the property in dispute are serious questions to be tried at the hearing of the case and it would be extremely unwise to prejudge the matter at this stage of the case. There is no doubt however that in a case such as the present where there are rival claimants to the property in dispute and the property has never been in the possession of any of the parties to the suit since the death of the deceased owner and the situation is fraught with the possibility of waste and mismanagement, it would eminently be a case for the appointment of a receiver. We are further of opinion that the trial Court, with whom the discretion under O. 40, R. 1, Civil P. C., primarily vests, has not been shown to have exercised such discretion in an arbitrary fashion, illegally or improperly. The result therefore is that we uphold the order of the lower Court and dismiss the appeal with costs. In addition to the directions given by the trial Court in its order we direct that as regards the property entered in list E of the plaint the receiver shall renew the fixed deposit in the Allahabad Bank in the name of the lower Court for a period of one year in the first instance, and further the cash certificates shall remain invested as before. The interim order dated 25th November 1940 passed by us is discharged, excepting in so far as it relates to the furnishing of the security by the receiver and the rate of remuneration allowed to him.

N.K./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 331

YORKE AND AGARWAL JJ.

Pt. Mohan Lal and another —
Plaintiffs — Appellants
v.
Pt. Ram Dayal and others —
Defendants — Respondents.

First Appeal No. 55 of 1937, Decided on 26th February 1941, against order of Civil Judge, Kheri, D/- 15th January 1937.

(a) Hindu law — Joint family—Ancestral property—Property inherited from maternal grandmother is not ancestral — Brothers take it as tenants-in-common.

Property inherited by the brothers in a joint Hindu family from their maternal grandmother is not ancestral property. The brothers take it as tenants-in-common and not as joint tenants : ('37) 24 A I R 1937 P C 233, *Rel. on* ; 25 Mad 678 (P C), *Disting.* [P 333 C 2]

(b) Hindu law — Joint family—Family can be joint without joint family property — There is presumption of joint family but no presumption of joint family property without nucleus—Burden to prove separation is on party alleging it.

Under the Hindu law, there can be a joint family without any joint family property. There is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. The burden to prove termination of joint family is on the party alleging the same : ('26) 13 A I R 1926 Mad 273, *Rel. on.* [P 333 C 2]

(c) Hindu law — Joint family—Brothers forming joint family—One of them taking ornaments of his wife and utensils got by him in his first marriage when leaving family for service — He cannot be said to have separated even if he took some joint family property with him along with aforesaid articles.

Where one of the brothers forming a joint Hindu family takes his wife's ornaments and the utensils which he got in his first marriage along with him when leaving for service it cannot be said that he separated from the family even if he takes away some joint family property with him. [P 334 C 1]

(d) Hindu law — Joint family—Members can have separate property — Fact of their keeping their earnings separate is not enough to show separation.

The members of a joint Hindu family can have separate property and the fact that they used to keep their earnings separately is not enough to show that thay had separated. [P 334 C 2]

(e) Hindu law — Joint family — Separation—Each case depends on its own facts — Brothers in service—Fact of their living separately affords little evidence of separation.

For determining separation of a joint Hindu family each case must be decided according to its circumstances. The fact of the members of a joint family living separately at places where they happened to be posted on account of their being in service affords very little evidence of separation : ('28) 15 A I R 1928 Oudh 509, *Ref.*; ('34) 21 A I R 1934 Lah 707, *Disting.* [P 334 C 2]

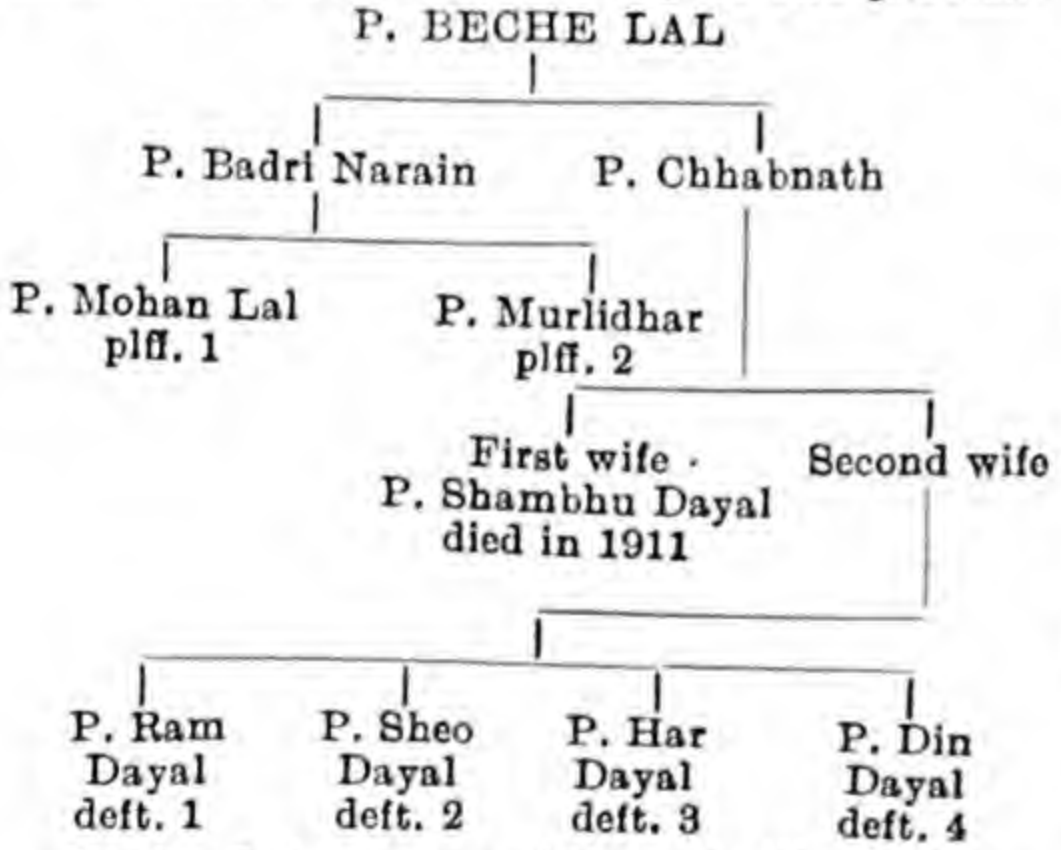
(f) Hindu law — Joint family — Member acquiring separate estate—Person alleging amalgamation of separate estate with joint family property must show unequivocal intention on part of member acquiring separate estate to amalgamate it with joint estate — Question depends on intention to be inferred from evidence adduced.

Where it is shown that property has been acquired as a separate estate by a member of a joint family and it is alleged that he had chosen thereafter to amalgamate that separate estate with the joint estate, it is for the person so alleging to show that there was an unequivocal intention on the part of the person who acquired the property to amalgamate it with the joint estate. The question depends upon intention which must be inferred from all the evidence which is adduced : 18 Cal 341 (P C), *Disting.*; ('33) 20 A I R 1933 Oudh 482, *Rel. on* ; *Case law referred.* [P 335 C 2]

L. S. Misra — for Appellants.

H. S. Gupta — for Respondents.

Judgment.—This appeal arises out of a suit brought by the plaintiffs-appellants for partition of a house in Lakhimpur. They claimed that they and their father had contributed Rs. 6780-13-0 and the defendants' father Rs. 2493 in its construction, and the shares in the house were in proportion to the amounts contributed by them. The lower Court held that the plaintiffs' share was one-half only. The following genealogical table shows the relationship of the parties :



Beche Lal was a resident of village Kutahar in the Shahjehanpur district. He married Mt. Munni, daughter of Kanhai and Mt. Maina, in Lakhimpur and went to live there. One Makhan had made a gift of kachcha house in Lakhimpur to his sister Mt. Maina. Beche Lal lived in that house and died about the year 1880 leaving two sons, Badri Narain who was then in service in Bhinga estate, and Chhabnath who was at that time six years old. These two brothers inherited the kachcha house of Mt. Maina, their maternal grandmother. Chhabnath entered service in 1895 in the education department and went to Ghazipur. Badri Narain was also in Government service. Chhabnath died on 21st October 1913, and Badri Narain in July 1914. Chhabnath's son Shambhu Dayal from his first wife had predeceased him in 1911. The plaintiffs' case is that Badri Narain and Chhabnath were separate and not members of a joint Hindu family after 1895 when Chhabnath entered service, that there was no ancestral property and each brother was separate owner of his earnings, that in 1908, the major portion of the house in question was built on the site of the old kachcha house and some other land taken from the Mahewa estate, that Badri Narain spent Rs. 3415 and Chhabnath Rs. 2493 on the construction and that further constructions were made in 1912 and 1913 by the plaintiffs at a cost of Rs. 3365-13-0. The plaintiffs claim that as their father and the defendants' father were separate each was owner in proportion to the amount contributed by him over the construction of the house.

The defendants' case is that Badri Narain and Chhabnath were both members of a joint Hindu family and the house was built in 1908 with joint capital and even if Badri Narain spent more than half the money, it was never his intention that the house be not considered to be joint family property, that after the death of Chhabnath, Badri Narain realized Rs. 4000, the insurance money and provident fund of Chhabnath and so even if he had spent more than half over the house he had been paid off and that if the plaintiffs' father had spent more money, the defendants' father and their deceased brother Shambhu Dayal spent more time over the supervision and on that ground also the plaintiffs were not entitled to more than a half-share. The plaintiffs' allegation that the constructions in 1912 and 1913 were made by them with their own money was not admitted by the defendants, and it was said that the defendants' father had also contributed towards those constructions. The learned Civil Judge framed six issues :

1. Were Badri Narain and Chhabnath members of a separated Hindu family?

2. If it be found that the family was joint, then was it the intention of the parties that the property

in suit should belong to the members in proportion to their contributions?

3. If it be found that the family was separate, then are the plaintiffs entitled to a share in the house according to their contributions?

4. What is the amount of contribution made by the plaintiffs' father and the plaintiffs in the house in suit?

5. Can the plaintiffs not claim a share of the house equal to their contributions for reasons alleged?

6. To what relief are the plaintiffs entitled?

He held that Badri Narain and Chhabnath were members of a joint Hindu family. He decided issues 2 and 3 in favour of the defendants and held that it was not proved that excepting the amount of Rs. 3415 spent by Badri Narain, anything more was spent on the house by Murlidhar himself. These findings are challenged in appeal. The first point which arises for our decision is whether Badri Narain and Chhabnath were members of a joint Hindu family when the house in question was built, that is from 1908 to 1913. The learned counsel for the appellants took pains to show that there was no ancestral property and Beche Lal was in strained circumstances when he died, but it does appear from Exs. A-51 and A-52 the wajib-ul-arz of village Naurangabad and extract from the khasra kishtwar of that village respectively that Beche Lal and one Lala Kurmi got three kathal trees and a grove under an order dated 20th July 1869. It was also contended on behalf of the respondents that the house received by Badri Narain and Chhabnath from Mt. Maina, their maternal grandmother, was ancestral property. Reliance was placed on 25 Mad 678[1] for the proposition that two brothers who inherited property from their maternal grandfather took it as joint tenants with benefit of survivorship and not as tenants in common. That case was distinguished by the Privy Council in A I R 1937 P C 233[2] and it was held that the estate which is inherited by a father from his maternal grandfather cannot be held to be ancestral property in which his son has an interest jointly with him. The above is discussed in Mulla's Hindu Law, Edn. 9 at pages 240 and 241 :

It is submitted that the decision in the earlier case must be confined to its own facts, and it was not necessary there to decide, nor was any opinion expressed on the precise question whether the property which a Hindu inherits from his maternal grandfather is ancestral property in the technical sense. Should this question arise hereafter, it will have to be answered in accordance with the decision in the later case.

In this case the property was inherited from a maternal grandmother and not from a maternal grandfather. Mulla at page 241 has observed :

Excluding the doubtful case of property inherited from a maternal grandfather, it may be said that the only property that can be called ancestral property is property inherited by a person from his father, father's father or father's father's father.

We are of opinion that the old kachcha house inherited by the two brothers from Mt. Maina was not ancestral property and the two brothers got it as tenants-in-common and not as joint tenants. We therefore hold that the only immovable property which can be called ancestral in the possession of the two brothers was that obtained under the order dated 20th July 1869, that is a share in three kathal trees and a grove. The point whether the two brothers had any joint property or not is not of any importance because it is not necessary for a joint family to have joint family property also. Mulla's Hindu Law, S. 212, cl. 2 runs as follows :

The joint undivided family is the normal condition of Hindu society. An undivided family is ordinarily joint not only in estate but also in food and worship. The existence of joint estate is not an essential requisite to constitute a joint family and a family which does not own any property may nevertheless be joint.

It was held in 49 Mad 98[3] that under the Hindu law, possession of joint family property is not a necessary requisite for the constitution of a joint family. Dr. Gour in his Hindu Code, Edn. 3, Art. 1174, p. 590 says:

The strength of the family lies in the joint family property. Without such property a joint family is conceivable but then this jointness would have no meaning, since such families may possess certain personal rights in common but they are comparatively of little account. The importance of a joint family therefore lies in the fact that it possesses all its property in common. As such, members have mutual rights and obligations with reference to it. But while Hindu law postulates and presumes the existence of joint family, it does not either postulate or presume the existence of joint family property.

We are of opinion that there can be a joint family without any joint family property and there is a presumption of joint family though there may not be a presumption of joint family property without a nucleus. The burden of proof was on the plaintiffs to establish that the joint family of Badri Narain and Chhabnath terminated in 1895 when Chhabnath entered service.

1. ('02) 25 Mad 678 : 29 I A 156 : 12 M L J 299 (P C), Venkayyamma Garu v. Venkataramanayyamma Bahadur Garu.
2. ('37) 24 A I R 1937 P C 233 : 169 I C 1 : 64 I A 250 : I L R 1937 All 655 : 31 S L R 590 (P C), Muhammad Husain v. Kishva Nandan.
3. ('26) 13 A I R 1926 Mad 273 : 93 I C 662 : 49 Mad 98 : 50 M L J 413, Janakiram Chetty v. Nagamony Mudaliar.

The plaintiffs' counsel stated in the trial Court that he alleged separation on the ground that there was no ancestral property in the family and Badri Narain had his own earnings and he simply brought up Chhabnath and got him educated and employed and after employment Chhabnath remained separate from Badri Narain with his wife and children and never contributed anything towards the funds of Badri Narain. It was admitted that there was no occasion for partition and so no partition was ever effected. There was admittedly no partition even of the small joint property, the kathal trees and the grove, which the two brothers had.

The plaintiffs have relied on some oral and documentary evidence to prove that the two brothers were separate. Murlidhar, plaintiff, stated that there was partition of the family moveable property between Badri Narain and Chhabnath. He further stated that his father handed over all the property belonging to his uncle Chhabnath and aunt at the time of the latter's departure to Ghazipur where he was posted in the year 1895, and later on when they came back to Lakhimpur they kept their belongings with them and that was the only partition which was effected between his father and uncle. He admitted that there was never any division between his father and uncle in the way that the property was divided half and half between them and that his father gave away the ornaments which he had given to his aunt at the time of her marriage and also the utensils which his uncle had got in his first marriage at Kheri, when he left for Ghazipur. If Chhabnath took away the ornaments of his wife and the utensils which he had got in his first marriage when he left for service it cannot be said that he became separate from his elder brother. He took away his own property and even if he had taken some joint family property when he went to take up service in another district, it cannot be said that he had separated. The plaintiff Murlidhar also stated that if two members of a family live at different places and earn their own independent livelihood and if they do not mix their incomes, they form a separate family in spite of the fact that before they began to earn, they lived together and formed a joint family and it was only in this sense that he said that his father and the latter's brother were separate. This statement of the plaintiff does not show that the two brothers had separated. (Their Lordships went through the plaintiff's evidence and proceeded.) Reliance is placed on several letters of Chhabnath to show that the two brothers kept their money separately. The members of a joint family can have separate property and the fact that these two brothers used to keep their earnings separately is not enough to show that they had separated. Murlidhar plaintiff himself admits that the second marriage of Chhabnath was performed by Badri Narain from the place where he was posted at the time. The statement of Mt. Mulloo, mother of the defendants (and second wife of Chhabnath), shows that after marriage she went to live with Badri Narain and after living for four months there went to Chhabnath. This shows that the marriage was after Chhabnath had joined service. Reliance is placed on the statement of Mt. Mulloo that the crop of the grove used to be divided and the sale proceeds of the kathal trees used to be divided half and half. She states that she came to know of the grove only since the Janao ceremony of Ram Dayal, that is since 1912. It does not appear from her statement that the crop of the grove of the kathal trees used to be divided in the lifetime of Badri Narain and Chhabnath. Reliance is placed on the case in 5 O W N 992.[4] In that case it was held that if persons belonging to a Hindu family have been living for a long time separate from one another and their property has also been separately dealt with, it would not be necessary to ask for evidence of separation. Each case must be decided according to its circumstances. In the present case the two brothers were both Deputy Inspectors of Schools and hence they had to be at the places where they were posted. Under these circumstances their living separately affords very little evidence of separation. The other case relied on by the learned counsel for the appellants is that in A I R 1934 Lah 707.[5] In that case it was held that if it is proved that some family property is divided, the presumption would be that the entire family property was partitioned. This case has no bearing because it is not proved that there was any division of any family property. After considering all the evidence and the circumstances we are of opinion that the finding of the lower Court that Badri Narain and Chhabnath were members of a joint Hindu family is correct.

4. ('28) 15 A I R 1928 Oudh 509 : 112 I C 387 : 5 O W N 992 : 4 Luck 138, Durga v. Lal Bahadur.
5. ('34) 21 A I R 1934 Lah 707 : 154 I C 684, Kanshi Ram v. Duni Chand.

The second point which we have to consider is whether the house in question was the joint family property of Badri Narain and Chhabnath or they were owners of it in proportion to the amount contributed by each. The defendants' case is that the two brothers Badri Narain and Chhabnath had blended their separate incomes for constructing the house in question and therefore it was joint family property. It is laid down in Mulla's Hindu Law para. 227 that property which was originally separate or self-acquired property of a member of a joint family may become family property if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. It appears from the evidence of Murlidhar himself that the relations between his father and Chhabnath were more than human and Badri Narain was ready to sacrifice his son for the sake of his brother and there was no hitch in spending money by his father over his brother. Correspondence between Badri Narain and Chhabnath and other evidence to which we will refer also shows that the relations between the two brothers were cordial. (Their Lordships discussed the evidence and proceeded.) Exhibits A62 and A63 show that the total municipal tax assessed on the house is Rs. 5-8-0 out of which Rs. 2-12-0 were paid by the defendants and Rs. 2-12-0 by the plaintiffs in the year 1936-37 in respect of the big house. The same appears from Exs. A64 and A65 to have been paid in respect of the stable and the building over it.

Reliance is placed on 18 Cal 341[6] but that case is quite distinguishable. In that case one of two brothers of a Mitakshara family had been born deaf and dumb and the elder brother's action was such for some years as to recognize that his brother had a joint interest in the family property. It was held that the elder brother did not thereby waive his rights which accrued to him in consequence of his brother's disqualification. The inference which their Lordships of the Privy Council drew was that the elder brother treated the younger as a member of the family and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. The learned counsel for the appellants has also referred to A I R 1934 ALL 701,[7] 10 O W N 1021,[8] 4 O W N 667,[9] 50 Mad 582,[10] 2 O L J 237[11] and A I R 1929 Lah 468.[12] In the Allahabad case it was held that to make the acquisitions of two brothers joint, it must be proved that they had thrown them into a joint stock. In the present case we held that the two brothers and the plaintiffs threw their earnings into a joint house intending to make it a joint family property. In 10 O W N 1021[8] it was held that if it is shown that property has been acquired as a separate estate by a member of a joint family and if it was alleged that he had chosen thereafter to amalgamate that separate estate with the joint estate, it was for the person so alleging to show that there was an unequivocal intention on the part of the person who acquired the property to amalgamate it with the joint estate and the question is one which depends upon intention and that intention must be inferred from all the evidence which is adduced. We accept the principle of that case and are of opinion that the intention of the parties in this case was to amalgamate their joint income and convert it into a joint family property.

In the case reported in 4 O W N 667,[9] superstructures were raised by a member of a joint Hindu family on a site belonging to the joint family. It was held that in the absence of evidence to the effect that the joint family funds contributed to the money with which the superstructures were raised and in the absence of evidence to the effect that the member in question deliberately made a gift of his self-acquisitions in favour of the joint family as a whole, the principle of self-acquisitions becoming joint family property when the member who made the acquisitions has thrown them into the common stock is not applicable. It does appear in this case that all the members had made gifts of their money in favour of the joint family. The case in 50 Mad 582[10] is similar to the last case mentioned above. The principle laid down in 2 O L J 237[11] is the same as in

6. ('91) 18 Cal 341 : 18 I A 9 : 5 Sar 676 (P C), Lala Muddun Gopal Lal v. Khikhindu Koer.

7. ('34) 21 A I R 1934 All 701 : 151 I C 388, Gauri Shankar v. Gopal Das.
8. ('33) 20 A I R 1933 Oudh 482 : 146 I C 1005 : 10 O W N 1021, Jot Singh v. Jangu Singh.
9. ('27) 14 A I R 1927 Oudh 335 : 103 I C 746 : 4 O W N 667, Kali Prasad v. Chandrika Prasad.
10. ('27) 14 A I R 1927 Mad 676 : 102 I C 290 : 50 Mad 582 : 52 M L J 571, Periakaruppan Chetty v. Arunachelam Chetty.
11. ('15) 2 A I R 1915 Oudh 24 : 30 I C 216 : 2 O L J 237, Narendra Bahadur Singh v. Haji Abdul Haq.
12. ('29) 16 A I R 1929 Lah 468 : 119 I C 239, Thanesher Pershad v. Ram Chand.

the Allahabad case. In A I R 1929 Lah 468,[12] the father was in Government service and the son, a petition writer, and there was no nucleus. The father built a house and it was held that the son had no interest in it. That case is distinguishable because it was found in that case that the father and son had no common fund and had not pooled their incomes. We are of opinion that the house in question which was built partly in 1908 and partly in 1912 and 1913 was joint family property and the members were not sharers in it according to their contributions. The plaintiffs have only one-half share in it. We think the judgment of the lower Court is correct and we dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 336

AGARWAL J.

Inderdawan Singh — Objector — Appellant

v.

Jairaj Singh and others — Decree-holders — Respondents.

Exn. of Decree Appeal No. 41 of 1939, Decided on 25th February 1941, against order of Civil Judge, Fyzabad, D/- 22nd April 1939.

Civil P. C. (1908), O. 21, R. 15—Several joint decree-holders—Payment to one does not bind others unless he represents them in some way.

A payment by the judgment-debtor to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or the other: ('27) 14 A I R 1927 Pat 329, *Expl.* [P 336 C 2]

S. N. Srivastava — for Appellant.

H. H. Zaidi for Haider Husain — for Respondents.

Judgment.—This is an execution appeal. The respondents Jairaj Singh and others obtained a decree for costs against the appellant Inderdawan Singh and others. Inderdawan Singh preferred an objection under S. 47, Civil P. C., that he had paid the entire decretal amount to one of the decree-holders Biphraj Singh. The lower Court held that the payment made to Biphraj Singh, even if proved, could not give a discharge in respect of the judgment debt, nor could it amount to the entire satisfaction of the decretal amount. He ordered the decree for the full amount to be executed against the appellant Inderdawan Singh. It is argued in appeal that Bhipraj Singh, one of the decree-holders, could give a valid discharge in respect of the entire decretal amount and reliance is placed on A I R 1927 Pat 329.[1] In that case the payment was made to the karta of the joint family, and so it was held to be binding on all the other decree-holders who were members of the family. There is one passage in the judgment of Ross J. which gives support to the argument of the appellant's counsel. That passage is:

> Under O. 21, R. 15 any one of joint decree-holders can execute the whole decree. Consequently the judgment-debtor was entitled as the decree was a joint decree, to look for a valid discharge to any one of the joint decree-holders who executed the decree.

This observation must be considered to be made in connexion with the facts of that case. If his Lordship meant to hold that in other cases payment made to one joint decree-holder discharges the debt of all the decree-holders I most respectfully dissent from him. I hold that the payment made by the judgment-debtors to one of several joint decree-holders is not binding on others, unless the decree-holder to whom the payment is made represents the other decree-holders in some way or the other. I agree with the lower Court that the payment made to Bhipraj Singh was not binding on the other decree-holders. It has not been argued before me that Bhipraj Singh represented the entire body of decree-holders. I however think that payment, if proved, is binding on Bhipraj Singh himself, if he could give a valid discharge of his own share. These points have not been gone into by the lower Court. I allow the appeal and direct the lower Court to determine whether the payment has been proved or not, and if proved whether Bhipraj Singh could, under the law, give a valid discharge of his share, and if it comes to the finding that he could, the decree to the extent of his share should be considered satisfied. The payment made to Bhipraj Singh is not binding on other decree-holders, and the appeal against them except the portion allowed above is dismissed. Parties to bear the costs of the appeal.

G.N./R.K. *Order accordingly.*

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1. ('27) 14 AIR 1927 Pat 329 : 103 I C 75 : 8 P L T 708, Jhakhri Gope v. Phagu Mahto.

(28) A. I. R. 1941 Oudh 337

GHULAM HASAN AND AGARWAL JJ.

Secretary of State for India —
Plaintiff — Appellant
v.
Kanhaiya Lal and others —
Defendants — Respondents.

First Appeal No. 63 of 1937, Decided on 25th November 1940, against order of Addl. Civil Judge, Hardoi, D/- 20th February 1937.

(a) Crown—Escheat — Burden of proof is on Crown and not on party in possession.

In a suit by the Government for ejectment of the defendant on the ground of escheat, it lies upon the Crown to prove at least prima facie that the deceased died without heirs and it cannot rely upon the want of title of the party in possession : 12 M I A 448 (P C) and ('16) 3 A I R 1916 Mad 209, *Rel. on.* [P 339 C 1]

(b) Evidence Act (1872), S. 32 — Statements by deceased during his lifetime that there was in his family no person alive whether near or remote cannot be construed as meaning that deceased left no heir.

The number of heirs who are entitled to succeed to the property of the deceased Hindu is very large. Hence the statements made by a deceased Hindu in his lifetime that in his family there was no person alive whether near or remote cannot be construed as meaning that the deceased left no heir to his property. [P 339 C 1, 2]

(c) Hindu law — Succession — Bandhus — Father's father's daughter's son's son.

A person would come in in the order of succession among Bandhus if he is the father's father's daughter's son's son. [P 340 C 2]

(d) Hindu law — Marriage—*L*, son of *N*, from second wife not belonging to family of *M* — *L's* marriage with *M's* son's daughter is not invalid.

The marriage of *L*, the son of *N* from his second wife, who did not belong to the family of *M* to *K* who was the son's daughter of *M* is certainly not within the prohibited degrees of marriage as *K* is not a sapinda of *L* in any sense of the term. [P 340 C 2]

H. S. Gupta — for Appellant.

L. S. Misra and S. R. Srivastava; *Raj Kumar Srivastava ; and K. N. Tandon* — for Respondents 2; 1 & 2; and 16 to 19 and 24, respectively.

Judgment. — This is a first civil appeal against the judgment and decree dated 20th February 1937, passed by the additional civil Judge of Hardoi dismissing the plaintiff-appellant's suit for possession and mesne profits. Originally the plaintiff was described as the Secretary of State for India in Council through the Deputy Commissioner, Hardoi, but the title of the suit has subsequently been changed into the United Provinces through the Deputy Commissioner, Hardoi. The plaintiff sued for possession and mesne profits of certain landed properties and a house mentioned in Sch. A annexed to the plaint on the allegation that one Sundar Lal, a kayastha by caste, and a resident of Shahabad, who was the owner of these properties, died issueless in 1891, leaving a widow, Mt. Indrani, who obtained possession of all his properties as his only heir. Mt. Indrani died on 13th February 1933. During her lifetime she made several mortgages and sales of the property in her possession in favour of various transferees, who have been impleaded in the suit. These transfers commenced from 1911 and ended with 1931 and are enumerated in para. 4 of the plaint. Defendants 3 to 24 were impleaded as transferees from Mt. Indrani. Defendant 1 was impleaded on the ground that he held a mortgage dated 8th January 1915, from Mt. Indrani. He also relied on EX. A-2 which he called a deed of family arrangement, whereby he alleged that Mt. Indrani had given the entire property to him after her death. Defendant 2, who is the contesting defendant in the case, asserted that he was an atma-bandhu of Sundar Lal and was entitled to succeed to the property left by him.

The plaintiff's case was that Sundar Lal died issueless and upon the death of his widow, Mt. Indrani, which took place on 13th February 1933, as there was no heir, the property devolved upon the plaintiff by right of escheat. Upon her death, disputes arose in the mutation proceedings, which were adjusted in this way that defendant 1 secured mutation over 8 annas 6 pies share and defendant 2 over 7 annas 6 pies share of the properties mentioned in Sch. A, except certain properties mentioned in para. 4 of the plaint as items 4, 5, 6, 12 and 13. The plaintiff challenged the various transfers made by the widow as being without any authority and without any legal necessity. The plaintiff therefore claimed actual and proprietary possession over the properties in Sch. A and mesne profits from the date of Mt. Indrani's death up to the date of the suit amounting to Rs. 3051. He also claimed mesne profits from the date of the suit. Defendants 13 to 15 did not put in any appearance. Other defendants appeared and denied the allegations of the plaintiff. Defendant 23 filed a written statement but later absented himself and proceedings were ex parte against him. As has already been stated above, defendant 1 pleaded that he had received the property by virtue of the deed of family settlement between him and Mt. Indrani and therefore he could not be

ousted from its possession. Defendant 2 set up his rights as an atma-bandhu of Sundar Lal and as such he claimed to be the next heir to the property left by him. The other defendants who were transferees pleaded that the transfers made to them had been made for legal necessity and benefit of the estate and consequently those transfers were valid and binding upon the plaintiff in case he was entitled to inherit the properties of Sundar Lal. Defendants 3, 16 to 19 and 24 further alleged that Mt. Indrani had received the properties under an oral will of Sundar Lal, whereby she became an absolute owner and consequently all the transfers made by her were valid and binding. The trial Court framed the following issues :

1. Was there no heir of Sundar Lal at the time of Mt. Indrani's death and did the property in suit vest in the plaintiff by escheat as alleged?

2. (a) Was Mt. Indrani in possession of the said property as an absolute owner? (b) Did Sundar Lal make any oral will as alleged?

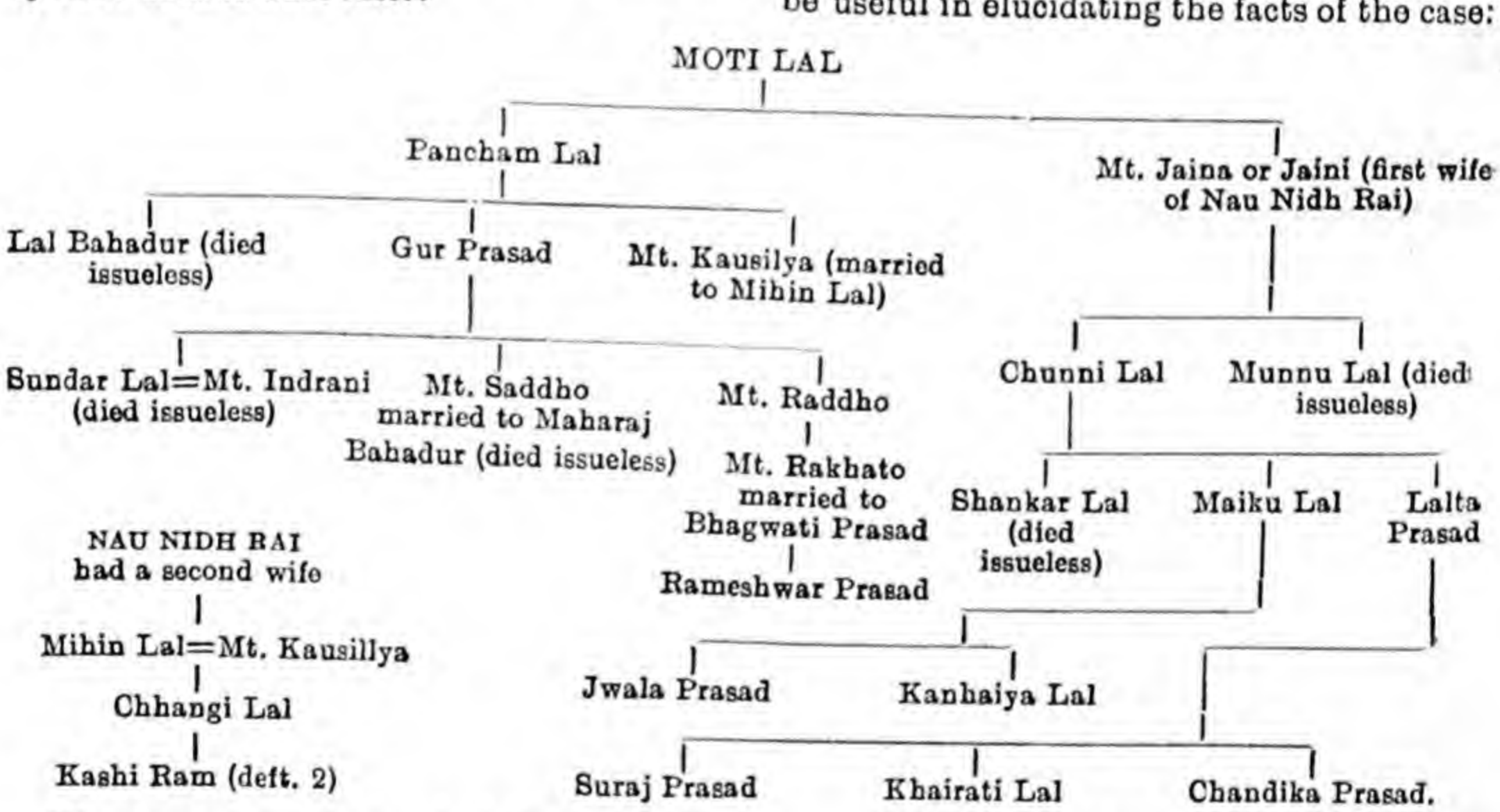
3. Did Indrani make the transfers in suit for legal necessity and benefit of the estate as alleged? If so to what effect?

4. Has the plaintiff got no right to impugn the transfers of Mt. Indrani?

5. Did defendant 1 get any portion of the property under any family arrangement as claimed by him? If so to what effect?

6. To what relief and mesne profits, if any, is the plaintiff entitled and against which of the defendants?

Upon issue 1 which was the principal issue in the case the trial Judge found that the plaintiff upon whom the initial burden of proving that Sundar Lal died absolutely heirless lay had utterly failed to make out from any reliable evidence that there was no heir of Sundar Lal living. He also came to the finding that defendant 2 was the atma-bandhu of Sundar Lal. Upon issue 2 the trial Court held that Mt. Indrani was not in possession of the property as an absolute owner and that Sundar Lal made no oral will in her favour. Upon issue 3 its finding was that it was not proved that there was any legal necessity for the deeds of transfer executed by Mt. Indrani in favour of the various transferees. It found on issue 4 that the plaintiff was entitled to impugn the transfers by Mt. Indrani provided the plaintiff could prove his right to Sundar Lal's property by escheat. The plea of family settlement embodied in issue 5 was negatived and the result was that the plaintiff's suit was dismissed with costs. The plaintiff has now preferred a first appeal to this Court. The following pedigree will be useful in elucidating the facts of the case:



We may state at the outset that we have given a somewhat complete pedigree from the evidence on the record. We may, however, state that the plaintiff does not admit that Mt. Kausilya was the sister of Gur Prasad or that she was married to Mihin Lal. It is also denied by the plaintiff that Naunidh Rai had married a second wife from whom he had a son, Mihin Lal. The main question arising for determination before us is whether the plaintiff has given satisfactory evidence to show that upon the death of Mt. Indrani, the widow of Sundar Lal, there is no heir and consequently the property must escheat to the Crown. It has been conceded by the learned counsel ap-

pearing on behalf of the plaintiff-appellant that it is the duty of the plaintiff to prove, at least prima facie, that Sundar Lal died without heirs. In 12 M I A 448[1] it was held by their Lordships of the Judicial Committee that in an ordinary suit in the nature of an ejectment the Government was in the position of a plaintiff and it could only recover by strength of its own title. It was also held that the defendant in such a case was entitled to defend his possession not only by proof of his own title, but by setting up any jus tertii that might exist. This case was followed by the Madras High Court in 31 I C 590[2] referred to by the learned counsel on behalf of the plaintiff appellant, where it was held that in a suit by the Government for ejectment of the defendant on the ground of escheat, it lies upon the Crown to prove at least prima facie that the deceased died without heirs, and it cannot rely upon the want of title of the party in possession.

Learned counsel appearing on behalf of the respondents, while conceding the soundness of the proposition regarding the onus, urges that having regard to the fact that both parties have given oral and documentary evidence in this case, the question of onus becomes purely academic. In any case, we shall now proceed to consider as to how far the plaintiff has succeeded in discharging the onus of proof which prima facie lay upon him. Reliance has been placed on behalf of the appellant upon two documents, Exs. A1 and A2. Exhibit A1 is a deed of mortgage executed by Mt. Indrani in favour of Babu Kanhaiya Lal on 8th January 1915. In the preamble of this document Mt. Indrani recites that her deceased husband often told her that there was no person living in his family, "*mere khandan men koi shakhs zinda nahin hai.*" Exhibit A2, dated 12th August 1915, is described as a will executed by Mt. Indrani in favour of Babu Kanhaiya Lal, son of Umrao Bahadur. The deed states that Umrao Bahadur is the real brother of the brother-in-law of her deceased husband. It recites that the husband of Mt. Indrani used to say in his lifetime in course of conversation that in his family there was no person alive, whether near or remote. Upon the strength of these two recitals it has been argued on behalf of the plaintiff-appellant that it must be held that Sundar Lal left no heir to his property. We regret we are unable to agree with this contention. According to the Hindu law there are three classes of heirs recognized by the Mitakshara, namely: (a) Gotraja Sapindas, (b) Samanodakas, and (c) Bandhus.

The number of heirs, who are entitled to succeed to the property of the deceased Hindu, is indeed very large as will be found in any book on Hindu law. In these circumstances, we do not think that the two recitals aforementioned can possibly be construed as statements ascribed to Sundar Lal showing that he intended to mean that he had considered the entire list of Bandhus, who might be entitled to succeed to his inheritance and that he did not find any heir in his family. (After considering certain evidence his Lordship proceeded). We have considered the evidence of these two witnesses and are satisfied that they are not reliable and trustworthy. The learned trial Judge, who heard the evidence of these witnesses, regarded their testimony as worthless and did not believe them. In agreement with the view taken by the trial Court about the testimony of these witnesses, we hold that no reliance whatsoever can be placed upon the evidence of these witnesses, and the plaintiff has hopelessly failed in discharging the onus of proof which admittedly lay upon him. In other words, it has not been satisfactorily established that Sundar Lal died without leaving any heirs.

We may also refer to a document, Ex. 26, upon which reliance was placed on behalf of the plaintiff-appellant. Ex. 26 is the statement of one Kale Khan, defendant 16 in the present case, in the mutation proceedings which took place on the death of Mt. Indrani in 1933. This witness stated in those proceedings that as far as he knew there was no heir of Sundar Lal and that Kashi Ram was not an heir of Sundar Lal. He further stated that Mt. Indrani had told him that there was no heir of Sundar Lal. The witness further says that he used to ask from any passer-by who met him in the bazar, Court or street about the heir of Mt. Indrani but nobody told him that Mt. Indrani had any heir. He says that if he had known that there was any heir of Mt. Indrani then he would have got the sale deed executed by her after consulting the pleader. Later on, however, he says that if any of the heirs of Mt. Indrani is forthcoming, it will have no effect on his sale deed. This witness was examined as D. W. 9 on his own behalf in order to prove his sale deed. He

1. ('67-69) 12 M I A 448: 1 Beng L R 44: 10 W R 31 : 2 Sar 382 : 2 Suther 160 (P C), Gridhari Lal Roy v. Bengal Government.
2. ('16) 3 AIR 1916 Mad 209: 31 IC 590, Secy. of State v. Subraya Karantha.

stated in his deposition that he did not make any enquiries at the time of the first sale deed whether Sundar Lal had or had not any heir. He was questioned in cross-examination on behalf of the plaintiff whether he had stated in the Tahsil that on enquiries he had learnt at the time of the first sale deed that Mt. Indrani had no heir, but the witness stated that he did not remember. He was confronted with the previous statement (Ex. 26) but in spite of that being read over to him he did not remember the statement which he had previously made. We are satisfied that the evidence of this witness is worthless upon the point and no reliance can be placed upon it. His statement was disbelieved by the mutation Court also.

This in our opinion is quite sufficient to dispose of the appeal and it is not necessary for us to pursue the matter further and determine the question whether defendant 2 is or is not the atma-bandhu of the deceased Sundar Lal. As however defendant 2 has produced evidence in proof of his title as atma-bandhu of Sundar Lal, which evidence has been accepted by the trial Court, we deem it proper to record our own finding upon it. We must state at the outset that there is no documentary evidence in the real sense of the term in support of the case put forward by defendant 2. Reference has been made to two documents, Exs. B1 and B2. Exhibit B1 is the statement of Inda Khan in the mutation case of 1933 and Ex. B2 is the statement of Gur Din in the same case. Without referring to the evidence itself we may observe that these statements are not admissible in evidence. Learned counsel on behalf of defendants-respondents sought to make them admissible under S. 32 (5), Evidence Act. We are however of opinion that these statements are not admissible as they were made after the controversy had arisen. The aforesaid statements are not admissible under S. 33, Evidence Act, either as the proceedings in the two cases, namely the mutation case and the present case, are not between the same parties. It has not been shown on behalf of the defendants-respondents whether the statements can be admissible under any other provision of the Evidence Act. We must therefore eliminate from consideration, Exs. B1 and B2.

We now proceed to consider the only other evidence on the record in proof of the defendant's case. This consists of the oral evidence of D. W. 2 Mt. Lalta Kuar, D. W. 3 Lalta Prasad and D. W. 4 Kalka Prasad. (After considering the evidence his Lordship proceeded). Having carefully considered the evidence of these three witnesses, we are satisfied that defendant 2 is an atma-bandhu of Sundar Lal as was alleged by him. It was questioned on behalf of the plaintiff-appellant that defendant 2 did not come in as an heir entitled to succeed Sundar Lal. We have already held that the pedigree put forward by defendant 2 and denied by the plaintiff is established to our satisfaction, namely that Mihin Lal was the son of Nau Nidh Rai from a second wife, that Mihin Lal was married to Mt. Kausilya and that defendant 2 is the son of Chhangi Lal, who was the son of Mt. Kausilya. Having regard to the above finding, it necessarily follows that defendant 2 would come in in the order of succession among Bandhus being the father's father's daughter's son's son. Reference may be made in support of this proposition to the order of succession among Bandhus given by Mulla in his well-known work on Hindu law (Edn. 9, 1940) at p. 63 at No. 23. In these circumstances it will not be correct to say that Sundar Lal died without any heir. Next it has been faintly contended that the marriage of Kausilya with Mihin Lal was neither valid nor proper. This point has no force. This point was not raised in the pleadings but only at the stage of argument before the trial Court. Mihin Lal was the son of Nau Nidh Rai from his second wife, who did not belong to the family of Moti Lal and his marriage to Kausilya, who was the son's daughter of Moti Lal, is certainly not within the prohibited degrees of marriage. Reference may be made in this connexion to Mayne's Hindu Law and Usage (Edn. 8, p. 156, Art. 108). This passage runs as follows:

> He should marry a girl who is non-sapinda with himself. She is called his sapinda who has particles of the body of some ancestor, etc., in common with him. Non-sapinda means not his sapinda. Such a one he should marry. Sapinda relationship arises between two people through their being connected by particles of one body.

It is clear that Mt. Kausilya was not a sapinda of Mihin Lal in any sense of the term. Consequently, there could be no prohibition of marriage between the two persons. An attempt was made in the lower Court to establish from the evidence of D. W. 2 that such a marriage was prohibited by custom. D. W. 12 was questioned at the end of his cross-examination and his answer was that maternal cousins could not marry each other in the clan of Srivastavas. We are of opinion that this statement is insuffi-

cient to prove the alleged custom and in any case it certainly cannot apply to the case of Mihin Lal and Mt. Kausilya, as Mihin Lal was not the son of Mt. Jaina herself who was Kausilya's father's sister. The only question that now remains for us to notice is whether certain transfers made by Mt. Indrani were for legal necessity or not. This question was the subject-matter of issue 3, upon which the trial Court recorded a finding against the defendants. In this Court Mr. K. N. Tandon, the learned counsel appearing on behalf of respondents 16 to 19 and 24, has in addition to supporting the judgment and decree of the trial Court challenged the finding on issue 3. We do not propose to enter into that question, as we are of opinion that that question does not really arise in view of the conclusion at which we have arrived upon the main point in the case. The result is that the appeal fails and is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 341

BENNETT AND GHULAM HASSAN JJ.

Gokul Prasad—Defendant — Appellant

v.

Thakurain Mahadei Kuar — Plaintiff — Respondent.

Second Appeal No. 290 of 1937 and Civil Misc. Appln. No. 186 of 1941, Decided on 25th March 1941, against order of District Judge, Gonda, D/- 14th April 1937.

(a) Civil P. C. (1908), O. 41, R. 27 (1) (b) and (c) (Oudh) — For additional evidence in appeal essential conditions of R. 27 must be satisfied— Conditions of R. 27 (1) (b) and (c) held not satisfied.

In order to entitle the appellant to produce additional evidence in the appeal the essential conditions required by O. 47, R. 27 must be satisfied.

[P 342 C 2]

The appellant sought to produce two judgments in appeal as additional evidence alleging that the matters in appeal were concluded by the aforesaid judgments under Ss. 10 and 11, Civil P. C., as the points involved in the case were materially and substantially in issue in the two judgments. The judgments were available and could have been produced one before the trial Court and both before the lower appellate Court. But no attempt was made or reason given for their non-production at that stage, nor was the plea under Ss. 10 and 11, Civil P. C., raised in the lower Courts or in the memo of appeal.

Held that conditions of R. 27 (1) (b) and (c) were not satisfied and hence the documents could not be admitted : ('31) 18 AIR 1931 P C 143, *Rel. on.*

[P 343 C 1]

(b) Civil P. C. (1908), O. 13, R. 10 — Mere summoning of record does not ipso facto make entire record evidence in case — During inspection Court coming across important document throwing light on question at issue or being helpful in ascertaining truth — Court must take proper proceedings to have document brought on record and proved according to law before using it as evidence.

The power to send for the record of another case and to inspect the same does not carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection of the record the Court comes across an important document which in its opinion either throws important light on the question at issue or is of material assistance in ascertaining the truth, it is open to the Court to adopt proper proceedings to have the document brought on the record and proved according to law before such document could be used as evidence in the case. Mere summoning of the record does not render the entire record ipso facto evidence in the case : 9 N L R 11; ('27) 14 AIR 1927 Lah 69; ('29) 16 AIR 1929 Lah 78 and ('31) 18 AIR 1931 Lah 119, *Rel. on.*

[P 343 C 2]

(c) Fraud — Decree — Active concealment of proceedings from defendant resulting in decree against him is clear fraud and vitiates decree.

An active concealment of proceedings from the defendant resulting in a decree being passed against him is clear fraud and vitiates the decree.

[P 344 C 2]

(d) Civil P. C. (1908), S. 100 — Finding on question of fraud is one of fact.

A finding on the question of fraud being clearly one of fact cannot be challenged in second appeal.

[P 344 C 2]

Sri Ram and Lekh Ram — for Appellant.

M. H. Kidwai — for Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for a declaration filed by the plaintiff-respondent, which was dismissed by the trial Court but has been decreed by the lower appellate Court in appeal. The plaintiff-respondent brought a suit for a declaration that the decree dated 20th April 1926, passed by the Subordinate Judge of Bahraich against her in favour of the defendant-appellant is null and void on the ground of fraud and collusion. The plaintiff is the daughter of one Baijnath and has two brothers, Mohan Lal (not a party to the suit) and Gokul Prasad, the defendant-appellant. Baijnath got the plaintiff, Mt. Mahadei Kuar, married some time in 1887 to one Kanhaiya Lal while she was only 11 years old. Kanhiya Lal made a registered will on 20th September 1889, by virtue of which the plaintiff became the absolute owner of the property left by her husband. Kanhaiya Lal died on 24th September 1889. Kanhaiya Lal had another wife Mt. Bhagwan Dei when he married Mt. Mahadei. Bhagwan Dei died in 1916. Mt. Mahadei's allegation was that Gokul Prasad filed a suit for maintenance against her in

1934 and that in that suit he (Gokul Prasad) in replication alleged that he had obtained a declaratory decree in respect of the property owned and possessed by Mt. Mahadei on 20th April 1926, in the Court of the Subordinate Judge of Bahraich. Gokul Prasad filed a copy of this decree and a copy of the written statement purporting to have been filed by Raj Bahadur, general agent of Mt. Mahadei, on her behalf in that suit. Mt. Mahadei alleged that she came to know for the first time about the aforesaid decree and the written statement on 13th April 1934, that Gokul Prasad had filed a suit in 1926 to the effect that he was the reversioner of the property by virtue of a certain oral agreement between Baijnath and Kanhaiya Lal to the latter's property and that this agreement had been admitted on behalf of Mt. Mahadei in that suit. The plaintiff's case was that she was an old pardanashin lady who was not literate and could only sign her name in Nagri and that Raj Bahadur, her general agent, used to do *pairvi* in her case on her behalf, that she used to sign papers at the instance of Raj Bahadur whom she fully trusted, and that Raj Bahadur having colluded with Gokul Prasad had made a false admission of his claim and had got a decree passed against her by practising fraud. She denied the alleged agreement by virtue of which Gokul Prasad claimed her husband's property as a reversioner. The plaintiff imputed fraud both to Gokul Prasad and to Raj Bahadur.

The defendant, Gokul Prasad, denied all the allegations, and asserted that the plaintiff was fully aware of the suit of 1926 and the decree passed in that case and pleaded that the suit was not maintainable and was barred by the principle of res judicata. The plea of limitation was also raised in the case. The trial Court held that the decree of 1926 was not obtained by fraud or collusion. It further held that the plaintiff knew of the decree from the very beginning and consequently the present suit filed by her on 14th April 1936, was barred by time. The suit was therefore dismissed. The learned District Judge in appeal set aside the findings of the trial Court and decreed the suit. The defendant thereupon preferred a second appeal to this Court.

An application under O. 41, R. 27 Civil P. C., was filed by the defendant-appellant praying for the admission of two judgments in appeal. One of these judgments was passed by a learned single Judge of this Court in second Civil Appeal No. 139 of 1935 on 23rd September 1936, in a suit for maintenance brought by the defendant-appellant against the plaintiff-respondent. The other document is also a judgment passed by the Munsif of Qaiserganj, Bahraich, on 18th March 1937 in another maintenance suit. It appears to us to be necessary to dispose of this application before dealing with the appeal. It is stated in this application that by virtue of the two judgments sought to be filed in the case the matter is concluded by Ss. 10 and 11, Civil P. C., as the points involved in this case were materially and substantially in issue in the two cases decided by the two judgments. Having heard learned counsel in support of the application, we are of opinion that no case has been made out for the production of additional evidence in the appeal.

As regards the judgment of the Chief Court, which is sought to be filed in the case, it may be noted that the suit in that case had been decreed by the trial Court on 18th May 1934, and the decision of the trial Court was confirmed by the lower appellate Court on 7th March 1935. The present suit was filed on 14th April 1936, and the written statement was filed on 11th May 1936. The judgment of the Chief Court was delivered on 23rd September 1936. No attempt was however made by the defendant to file the aforesaid judgment before the trial Court in the present case and no plea under S. 10 or S. 11, Civil P. C., was raised on the basis of this judgment. The present suit was dismissed on 30th November 1936, by the trial Court and was decreed in appeal on 14th April 1937. The other judgment, namely the judgment of the Munsif of Qaiserganj, Bahraich, which was passed on 18th March 1937, could have been filed before the lower appellate Court in the present case but no attempt was made to produce it. In the memorandum of appeal filed in this Court the pleas raised in the application have not been referred to. The application itself does not state reasons why these documents were not produced in the lower Courts after they were available. In order to entitle the appellant to produce additional evidence in the appeal the essential conditions required by R. 27 of O. 41, Civil P. C., must be satisfied.

We are of opinion that the requirements of O. 41, R. 27 (1) (b) and (c) have not been satisfied in the present case. According to sub-cl. (b) of R. 27 (1) which was added by the Chief Court, it is obligatory on the party seeking to produce additional evidence in appeal to show that the evidence sought to

be produced after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, nor is the case governed by sub-clause (c) of R. 27 of O. 41, Civil P. C., which requires that the appellate Court can admit the document only if it requires the production of the document to enable it to pronounce judgment or for any other substantial cause: *see* 58 I A 254.[1] We therefore see no reason whatever to admit the additional documentary evidence in appeal and reject this application. This disposes of the pleas under Ss. 10 and 11, Civil P. C., raised on behalf of the defendant-appellant for the first time before this Court.

As regards the merits of this appeal, it has been contended on behalf of the defendant-appellant that neither fraud nor collusion had been proved in the case. It is also contended that the lower appellate Court was not justified in holding that the procedure of the trial Court in summoning the record of the suit of 1926 for inspection was not warranted. So far as the latter contention is concerned, it appears that the defendant-appellant had filed a copy of the written statement of Mt. Mahadei (EX. A-12) filed in the suit of 1926 on her behalf by her agent, Raj Bahadur, and in order to prove this and other documents he had summoned the record. The trial Court discovered in the record a summons issued to Swami Dayal, another agent of Mt. Mahadei, which according to the report made on it had been served. Swami Dayal, who was produced by Mt. Mahadei in the present case, was not questioned either on her behalf or on behalf of the defendant whether he had received any summons and whether it bore his signature and whether he had informed Mt. Mahadei of the suit. The learned District Judge recorded the opinion that the trial Court was not justified in using the summons of Swami Dayal as evidence in the case and consequently excluded it from consideration in coming to the finding upon the main question in the case. We are satisfied that the decision of the lower appellate Court upon this point is correct. Order 13, R. 10 (1), Civil P. C., lays down :

> The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

This shows that it is open to the Court either of its own motion or on the application of any party to the suit to send for the record of a case and inspect the same. Sub-clause (3) of R. 10 of O. 13, Civil P. C., runs as follows :

> Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in the suit.

It is clear that the record had been sent for for the specific purpose of proving certain documents. The summons to Swami Dayal was not one of the documents which was intended to be proved as no copy of the summons had been produced in the case. Further, the summons was inadmissible in evidence without proof of the signature of Swami Dayal as required by S. 67, Evidnce Act. Section 35, Evidence Act, does not render the summons admissible inasmuch as the signature of Swami Dayal purporting to have been made by him on the back of the summons cannot be said to be an entry in any public or official book, register or record and made by a public servant in the discharge of his official duty. That being so, it is quite clear that the trial Court was not justified in using the summons as evidence in the case and relying upon it in support of its findings. The power to send for the record of another case and to inspect the same does not in our opinion carry with it the power to treat the whole of the record or a part thereof as evidence in the case. If upon inspection of the record the trial Court came across an important document as the summons in the present case, which in its opinion either threw important light on the question at issue or was of material assistance in ascertaining the truth, it was open to that Court to adopt proper proceedings to have the document brought on the record and proved according to law before such document could be used as evidence in the case. Mere summoning of the record does not however render the entire record ipso facto evidence in the case.

In 18 I C 857[2] the lower appellate Court sent for and inspected the record apparently behind the backs of the parties, attached the whole record to the file of the case and used as substantive evidence for the purpose of adjudicating upon the appeal. It was held that the procedure was clearly irregular. It was further held that S. 165, Evidence Act, 1872, and O. 13, R. 10, Civil P. C., 1908, are intended to arm the Court with a power of

1. ('31) 18 AIR 1931 P C 143: 132 I C 721: 10 Pat 654 : 58 I A 254 (P C), Parsotim Thakur v. Lal Mohar Thakur.

2. ('13) 9 N L R 11: 18 I C 857, Punja v. Bhadu.

initiative in getting at the truth. But the act of sending for a document under S. 165, Evidence Act, or for a record under O. 13, R. 10, does not ipso facto make such document or record evidence in the case. If the Court finds in the document or record so sent for relevant evidence, or a guide to relevant evidence to be found somewhere else, proceedings must be adopted, if such evidence may be properly admitted at that stage, to have it brought into the trial according to the provisions of law. A similar view has been taken by the Lahore High Court in A I R 1927 Lah 69,[3] A I R 1929 Lah 78[4] and A I R 1931 Lah 119.[5]

As regards the first contention, the learned District Judge upon a consideration of the evidence and the circumstances in the case came to the conclusion that Mt. Mahadei had no knowledge of the institution of the suit in 1926, that she was neither informed by Swami Dayal, who was her general agent, of the service of any summons of the suit, nor by Raj Bahadur, another general agent. He also found that the written statement, purporting to have been filed on her behalf by Raj Bahadur, did not bear her signature and was not filed within her knowledge or under her instructions. He further found that Ex. A-12, the application filed by Raj Bahadur to abide by the oath of Gokul Prasad, was not proved to bear the signature of Mt. Mahadei, nor were the particulars of that application explained to her. The statement of Raj Bahadur, who was examined on behalf of the defendant was disbelieved and the statement of Mt. Mahadei plaintiff was believed by the learned District Judge. Raj Bahadur in his evidence admitted that Mt. Mahadei did not sign the application, Ex. A-12, in his presence, but that he gave the application to one Jugul Kishore to take it to her and obtain her signature thereon. His finding in effect was that Mt. Mahadei was totally ignorant of the suit of 1926 and the decree which followed. As regards the antenuptial agreement between Kanhaiya Lal and Baijnath set up in the suit of 1926 to the effect that Gokul Prasad would succeed as a reversioner upon the death of Mt. Mahadei to the property left by Kanhaiya Lal, the learned Judge came to the conclusion upon a consideration of the entire circumstances of the case that such an agreement was not established. His final conclusion was that Mt. Mahadei had been deliberately kept in the dark about the suit of 1926 and the decree against her was obtained fraudulently. It cannot be denied that active concealment of the proceedings of 1926 resulting in a decree being passed against the plaintiff is clear fraud and vitiates the decree. The finding of the lower appellate Court on the question of fraud is a clear finding of fact which cannot be challenged in second appeal. There is no substance in this appeal, which is accordingly dismissed with costs.

G.N./R.K. *Appeal dismissed.*

3. ('27) 14 A I R 1927 Lah 69: 98 I C 881, Phullu v. Ghulam Nabi.
4. ('29) 16 A I R 1929 Lah 78: 111 I C 361, Abdul Ghani v. Faqir Muhammad.
5. ('31) 18 A I R 1931 Lah 119 : 131 I C 374 : 31 P L R 926, Maya Dhari v. Chuni Lal-Panna Lal.

(28) A. I. R. 1941 Oudh 344

GHULAM HASAN J.

Sanwaley Rai — Defendant — Applicant

v.

Sant Rai—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 130 and Second Appeal No. 274 of 1938, Decided on 10th February 1941, from order of Munsif, Ramsanehighat at Barabanki, D/- 26th February 1938.

Civil P. C. (1908), Ss. 151 and 152—Lapse of time is no bar for correction of errors under Ss. 151 and 152—Case decided and decree satisfied — Error creeping into record accidently or by design—Court though functus officio can in appropriate case correct error — Only restriction upon power to correct is in cases of rights of third party if they have crept in.

Lapse of time, however considerable, is no bar to the correction of errors either under S. 151 or under S. 152, and although after the case has been decided and the decree has been satisfied the Court becomes functus officio, yet it does not debar the Court, in appropriate cases, to rectify an error which has crept into its record either by accident or by design : ('29) 16 A I R 1929 Mad 830; ('24) 11 A I R 1924 Oudh 408; ('34) 21 AIR 1934 Oudh 352; ('35) 22 AIR 1935 Oudh 92 and ('32) 19 AIR 1932 All 587, *Rel. on* ; ('40) 27 A I R 1940 Oudh 298, *Disting.*; (25) 12 A I R 1925 All 556, *Not approved.* [P 348 C 1, 2]

The only limitation upon the exercise of such a power by Court is in cases where third parties have acquired rights under the erroneous judgment in interval : (1892) A C 547, *Rel. on.* [P 348 C 1]

In the mortgage deed the whole of the plot of land was mortgaged. The plaintiff who was the mortgagor's successor in interest brought a redemption suit with the intention of redeeming the entire plot wrongly stated in the plaint that only half of the plot was mortgaged. The mortgagee who filed the original mortgage deed which was written in a language with which both the parties were unacquainted, either deliberately or unconsciously asserted that only half the plot was mortgaged. The mortgagor after the redemption decree in 1911 got possession over the entire plot though on paper only half the plot stood apparently redeemed by the said decree, and as possession over

the entire plot remained with him, the mistake about incorrect description, on paper, of the property redeemed did not come to his knowledge till he was dispossessed in 1927, and even later till 1936 when his suit for possession failed on the ground of a formal defect :

Held that the mistake was one of a clerical nature arising from an accidental slip or omission and could be corrected under S. 152, and in the circumstances it could not be said that the mortgagor was guilty of such negligence as to debar him from claiming the relief to which he was equitably entitled. [P 347 C 1 ; P 348 C 1, 2]

S. D. Misra — for Applicant.

B. K. Dhaon — for Opposite Party.

Order. — This is an application for revision under S. 115, Civil P. C., directed against the order of the Munsif of Ramsanehighat at Barabanki, allowing the application of the opposite party for amendment of the plaint, judgment and decree of the redemption suit No. 223 of 1911. The facts are as follows : One Ajudhia Rai executed in Aghan 1285 Fasli a possessory mortgage in favour of Ram Adhin Rai of the entire plot No. 1863 situate in village Hoalpur, tahsil Hydergarh, district Barabanki, for Rs. 48. The area of the plot was described in the mortgage deed as 1 bigha 16 biswas and 18 dhurs. On 26th May 1911, Ajudhia Rai brought a suit for redemption against Sanwley Rai and Ram Lal, sons of Ram Adhin Rai, the mortgagee, in the Court of the Munsif of Ramsanehighat, district Barabanki. In the plaint (Ex. A1) the plaintiff described himself as the owner of plot No. 1863 measuring two bighas and stated that he had mortgaged half the plot to Ram Adhin Rai, the deceased father of the defendants. In para. 2 of the plaint the date of the mortgage deed was incorrectly stated as Bhadon 1285 and the amount of the mortgage money was similarly wrongly stated as Rs. 32. The mortgage property was also misdescribed as half of plot No. 1863 measuring two bighas. In para. 5 the plaintiff claimed a relief for redemption of half the plot No. 1863 measuring two bighas.

Ram Lal and Sanwley Rai, the defendants, admitted in para. 1 of their written statement that the plaintiff was the proprietor of the entire plot No. 1863 and further stated that the plaintiff had mortgaged half of plot No. 1863 measuring two bighas to Ram Adhin Rai, the father of the defendants. The defendants, however, in para. 2 gave the correct date of the mortgage as Miti Aghan Sudi Tij, 1285 Fasli and alleged that the amount of the mortgage money was Rs. 48 and not Rs. 32 and that the plaintiff had agreed to pay Rs. 60 at the time of the redemption. A deed of further charge dated 30th December 1882 was also set up. Along with this written statement the defendants filed the original mortgage deed. On 21st July 1911 an application for amendment of the plaint was filed by Ajudhiya Rai bearing his thumb impression through Pandit Bisheshwar Nath, pleader, in which it was stated that the plaintiff admitted that the mortgage deed, which was filed by the defendants along with their written statement, was the correct mortgage deed dated Miti Aghan Sudi Tij, 1285 Fasli. Accordingly he prayed that para. 1, letter *(jim)* and para. 3 and the relief paragraph be so amended as to contain a prayer that the property mortgaged in the deed be redeemed on payment of Rs. 60.

It is quite clear from the application for amendment that it was carelessly drawn up and did not accurately point out what specific additions and deletions the plaintiff desired to make in each paragraph of the plaint. There is no doubt, however, that the real intention of the plaintiff was to obtain redemption of the entire plot No. 1863 mortgaged by him upon payment of the entire mortgage money. No amendment of the plaint was, however, made as desired by the plaintiff. The learned Munsif decreed the suit of half the share in plot No. 1863 upon payment of Rs. 451-8-0 on 22nd July 1911 (*vide* Ex. A2). The order-sheet shows that redemption was granted of the entire plot No. 1863 and not half. The order-sheet is initialled by the Munsif. A decree (Ex. A3) was prepared in pursuance of the judgment. Exhibit A-4 is the warrant of dakhal dehani, which also states that possession was delivered over half the plot. Ajudhia Rai died and was succeeded by his son Sant Rai. A suit was brought by Sanwley Rai alone—his brother Ram Lal having died—against Sant Rai under S. 127, Oudh Rent Act, on the ground that Sant Rai had taken unlawful possession in 1924 over half the plot No. 1863, which had not been decreed to him. The suit was decreed on 19th February 1927 (Ex. A-5).

In 1936 Sant Rai brought a suit in civil Court against Sanwley Rai claiming possession over half the plot No. 1863 of which he had been dispossessed on the allegation that his father had redeemed the entire plot and Sanwley Rai had taken wrongful possession of half the plot. The suit was dismissed on 20th September 1936 (Ex. 7) and a decree (Ex. A-6) followed. Sant Rai filed an appeal against the aforesaid dismissal of his suit

but withdrew the suit on 8th January 1937, with liberty to bring a fresh suit. The ground of withdrawal was that Sant Rai had discovered a mistake in the description of the mortgaged property, which had crept into the plaint, judgment and decree of the redemption suit and which was repeated in the present suit which was therefore liable to dismissal for a formal defect. Instead of filing a fresh suit Sant Rai filed an application on 11th September 1937, before the Munsif of Ramsanehighat, district Bara Banki, under Ss. 151 to 153, Civil P. C., praying for amendment of the plaint, judgment and decree (Exs. A-1, A-2 and A-3) of the redemption suit No. 223 of 1911. The application was strenuously opposed by Sanwley Rai on the ground that it was barred by time and by the principle of res judicata, that it was not entertainable as the Court had become functus officio after the satisfaction of the entire decree was recorded and that there was no mistake of any accidental or clerical nature which could be amended.

The learned Munsif framed issues and in an elaborate judgment held against Sanwley Rai on all the points. Sanwley Rai preferred an appeal to the Additional Civil Judge of Bara Banki, who dismissed it by an order dated 16th August 1938, holding that the appeal against an order under S. 152 was not maintainable. Sanwley Rai filed a second civil appeal on 7th October 1938 in this Court against the order of the Additional Civil Judge. On the same date he filed the present revision application under S. 115, Civil P. C., against the order passed by the Munsif of Ramsanehighat at Bara Banki. The second appeal and the revision application have therefore been connected as they arise out of the same facts. Learned counsel on behalf of the applicant, Sanwley Rai, has conceded that the second appeal is not maintainable and has therefore argued only the revision application.

Three points have been argued before me. In the first place, it has been contended on behalf of the applicant that there was no clerical or arithmetical error and the learned Munsif had no jurisdiction to order amendment under S. 152, Civil P. C. It has also been contended that the decree for redemption of half the plot No. 1863 having been satisfied the Court had become functus officio and there was no further jurisdiction to correct the error, if any. Lastly it has been urged that the mistake arose through the negligence of the mortgagor and after a lapse of 26 years the learned Munsif should not have allowed amendment to the prejudice of the applicant. Having heard parties at considerable length, I am satisfied that the order of the lower Court is perfectly correct and must be maintained.

It is obvious from a narration of facts given above that the equities of the case are admittedly on the side of the opposite party and in favour of the amendment being made. Learned counsel on behalf of the applicant concedes that his client undoubtedly obtained the entire amount of the mortgage money, including the amount due on the further charge. His argument however is that the application for amendment does not strictly fall within the purview of S. 152, Civil P. C., and consequently the Court had no jurisdiction to order the amendment. I do not agree with this contention. It seems to me clear that the intention of Ajudhia Rai was clearly to obtain redemption of the entire plot No. 1863 in the litigation of 1911 and not half of it. The mortgage deed was written in Kaithi, a language with which both the mortgagee and the mortgagor were unacquainted. Ajudhia Rai admittedly was illiterate and the allegations in the plaint filed by him clearly showed that it was recklessly drawn up without any attempt to ascertain the accurate particulars of the mortgage deed. It is also clear that the mortgagee, while admitting the mortgagor to be the owner of the entire plot No. 1863, either deliberately or unconsciously asserted that only half the plot was mortgaged. The mortgagee filed the original mortgage deed, which had all along been in his possession. He definitely asked not only for the payment of the principal money secured by the mortgage but also the money due on the deed of further charge. In these circumstances it was the obvious duty of the mortgagee to have come to Court with clean hands and to point out the error in the description of the property mortgaged. If the mortgagor was careless in drafting of the plaint which contained incorrect particulars of the mortgage deed, the mortgagee was equally to blame for not disclosing the true facts to the Court. In these circumstances it does not behove the mortgagee or his successor-in-interest now to take refuge behind technical pleas notwithstanding the fact that the mortgagee's claim against the entire mortgaged property had been fully satisfied by the decree for redemption.

It appears that soon after the decree of redemption of 1911 the mortgagor mortgaged half of plot No. 1863 with possession with

one Sukhpal for a sum of Rs. 200 and one-fourth of it with Lotan for a sum of Rs. 99 and the remaining one-fourth with Jagannath for a sum of Rs. 100. These mortgages were subsequently redeemed on payment of the principal money. This shows that possession was with the mortgagees otherwise the redemption on payment of the principal only was not possible. The learned Munsif has held upon documentary and circumstantial evidence that the mortgagor after redemption decree got possession over the entire plot No. 1863, though on paper only half the plot stood apparently redeemed by the said decree, and as possession over the entire plot remained with him, the mistake about incorrect description, on paper, of the property redeemed did not come to his knowledge till he was dispossessed in 1927, and even later till 1936 when his suit for possession failed on the ground of a formal defect. I see no reason to dissent from this conclusion of the learned Munsif. Under these circumstances the learned Munsif was perfectly justified in treating the mistake as one of a clerical nature arising from an accidental slip or omission.

Reference has been made on behalf of both parties to 11 O L J 227.[1] This was a case in which the pre-emptor brought a suit for pre-emption against a vendee and in describing the property in the plaint he did not exempt certain plots which had been expressly exempted from the sale deed. A decree was eventually passed in terms of the plaint and was confirmed on appeal by the late Court of the Judicial Commissioner of Oudh. Subsequently an application was made that the plots which were not the subject-matter of the sale were by mistake treated throughout the trial of the suit for pre-emption as if they also were sold under the sale deed on the basis of which the suit for pre-emption was brought. The error committed in the pleadings was repeated in the decree and the pre-emptor under the colour of the decree tried to dispossess the applicant from those plots. The learned Additional Judicial Commissioner expressed the view that either the mistake arose from an accidental slip or omission or the pre-emptor deliberately but erroneously included such property within his suit for pre-emption as was not the subject-matter of the sale to which the suit related. He held that if the first alternative was correct, S. 152 would apply, and if the second alternative was the right one to adopt, then the pre-emptor was guilty of fraud on the Court and once the fraud was brought to the notice of the Court it could not be allowed to stand. Under S. 151, Civil P. C., the Court has the inherent power to act *ex debito justitiae* and to do that real and substantial justice for which it alone exists. The result was that the amendment was granted. It was also observed that the mere fact that the description of the property is erroneous will not attract the application of the provisions of S. 152, Civil P. C., and it must be shown that the error is a natural consequence of an accidental slip or omission. In my opinion this case, lends full support to the case of the opposite party and does not help the applicant in any way.

In 11 O W N 550[2] it was held that under Ss. 151 and 152, Civil P. C., the Court can amend the plaint, judgment and the decree, where by a mistake the hadbast number of the village is shown as the khasra number of the plot mortgaged, and the mistake is repeated in the judgment of the Court and the preliminary and the final decrees. A similar view was taken in 1935 O W N 31[3] by a Bench of this Court, where it was held that where by a mistake of the plaintiff the property in dispute has been wrongly described in the plaint and the preliminary and final decrees, the Court has power to correct the mistake by amending the plaint and the decrees. It was held in A I R 1932 ALL 587[4] that the language of S. 152 was wide enough to cover the correction of mistakes made by the parties themselves. There is no doubt that S. 152 applies in terms to the amendment of the decrees and not to the amendment of the plaint, sale certificate and dakhalnama, but the power of the Court to make corrections necessary for the ends of justice is not confined only to powers exercisable under S. 152. Extensive powers may be exercised also under Ss. 151 and 153. The case in 1940 O W N 213[5] relied upon by learned counsel on behalf of the applicant is a converse case and has no application to

1. ('24) 11 A I R 1924 Oudh 408 : 80 I C 838 : 11 O L J 227, Sheo Darshan Singh v. Mata Din Singh.

2. ('34) 21 A I R 1934 Oudh 352 : 150 I C 791 : 8 Luck 734 : 11 O W N 550, Shiam Lal v. Mt. Moona Kuar.

3. ('35) 22 A I R 1935 Oudh 92 : 153 I C 378 : 10 Luck 496 : 1935 O W N 31, Ram Chandra v. Jamna Prasad.

4. ('32) 19 A I R 1932 All 587 : 139 I C 491 : 54 All 800 : 1932 A L J 784, Aziz Ullah Khan v. Court of Wards, Shahjahanpur.

5. ('40) 27 A I R 1940 Oudh 298 : 186 I C 667 : 1940 O W N 213, Sheo Narain v. Lachhman Prasad.

the facts and circumstances of the present case. In that case the learned Judge of the lower Court had found in a long and careful judgment that there was no error arising from an accidental slip or omission in the judgment and decree and refused to allow the amendment. A Bench of this Court refused to interfere in revision with the discretion exercised by the lower Court.

As regards the second point, I agree with the lower Court that although after the case has been decided and the decree has been satisfied the Court becomes functus officio, yet it does not debar the Court, in appropriate cases, to rectify an error which has crept into its record either by accident or by design. The only limitation upon the exercise of such a power by Court may be found in cases where third parties have acquired rights under the erroneous judgment in the interval as has been laid down by Lord Watson in the well-known case in 1892 A C 547[6] at p.560. Learned counsel on behalf of the applicant relies upon a dictum of Daniels J. in A I R 1925 ALL 556[7] where he observed that when a decree for money had been finally satisfied and discharged, the Court is functus officio and can no longer entertain an application for amendment under S. 152, Civil P. C. This observation goes beyond the view taken by Sulaiman J., the other member of the Bench, who only observed that under S. 152, Civil P. C., the Court has power, under the peculiar circumstances of any case, to refuse the application for amendment of decree if it feels inclined to do so. The Court is not bound to grant the application in every case. This dictum of Daniels J. was not approved in A I R 1929 Mad 830.[8] I therefore hold that this contention has no force. As regards the third point, I have already referred at some length to the conduct of the mortgagee in contributing to the mistake. I am also satisfied that the mortgagor having obtained possession over the entire plot No. 1863 after the redemption decree of 1911 laboured all along under the impression that the decree for redemption obtained by him related to the entire plot and this impression continued till 1927 or even later till 1936, as appears from his conduct. In the circumstances it cannot be said that the mortgagor was guilty of such negligence as to debar him from claiming the relief to which he is equitably entitled. It is well settled that lapse of time, however considerable, is no bar to the correction of errors either under S. 151 or under S. 152, Civil P. C. Having regard to all the circumstances of this case I am satisfied that the order of the lower Court directing amendment of the plaint, judgment and decree is eminently just and reasonable, and no interference with the decision of the lower Court in its exercise of discretion under S. 115 is called for. The application fails and is dismissed with costs. The connected appeal stands dismissed, but without costs.

G.N./R.K. *Application dismissed.*

6. (1892) 1892 A C 547 : 62 L J P C 24 : 1 R 1 : 67 L T 722, Hatton v. Harris.
7. ('25) 12 AIR 1925 All 556 : 88 I C 396 : 23 A L J 518, Pitam Lal v. Balwant Singh.
8. ('29) 16 AIR 1929 Mad 830 : 123 I C 355, Munuswami v. Jagannadha.

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(28) A. I. R. 1941 Oudh 348

GHULAM HASAN J.

Mirza Mohammad Kazim Husain — Plaintiff — Appellant

v.

Mt. Nadri Begam and another — Defendants — Respondents.

Second Appeal No. 455 of 1937, Decided on 26th February 1941, against order of Civil Judge, Fyzabad, D/- 15th September 1937.

(a) Registration Act (1908), Ss. 17 and 28 — Whether law of registration complied with — Intention of parties must be looked to — Gift deed—No collusion between donor and donee—Registration of deed cannot be challenged as defective in law.

In determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided : ('36) 23 A I R 1936 P C 91, *Rel. on.* [P 351 C 1]

In the absence of any collusion between the donor and the donee the registration of the deed of gift cannot be challenged as being defective in law: ('24) 11 A I R 1924 Mad 281, *Rel. on.* [P 351 C 1]

The entire property, with the exception of plot No. 885, which was the subject-matter of the deed of gift, was situate in Bikapur and plot No. 885 to which the donor's title was said to be doubtful was alleged to have been fictitiously inserted in the deed so as to obtain registration in Fyzabad :

Held that in the absence of anything to show that there was no intention on the part of the donor to vest the property in the donee it could not be held that the inclusion of plot No. 885 in the deed of gift was a mere device to evade the Registration Act. Even if the title of the donor to that plot was doubtful, it could not lead to the inference that he was guilty of any fraud in including the same in the deed of gift : ('21) 8 A I R 1921 P C 8, *Rel. on.* [P 351 C 1]

(b) Civil P. C. (1908), S. 100 — Finding that gift was in lieu of dower debt is binding in second appeal.

A finding that the deed of gift was executed in lieu of a dower debt of Rs. 2000 out of Rs. 14,000 which was fixed at the time of marriage must be accepted as binding in second appeal. [P 351 C 2]

(c) Mahomedan law — Gift — Hiba-bil-iwaz — Validity—Actual payment of consideration and donor's bona fide intention to divest himself in præsenti of property and confer it on donee must be established—Adequacy of consideration is immaterial—Delivery of possession is not at all necessary — Declaration in gift deed as to delivery of possession to donee is sufficient to establish delivery of possession even if it be necessary.

In the case of a hiba-bil-iwaz, only two conditions are necessary to establish the validity of the transaction, (1) actual payment of consideration (iwaz), and (2) a bona fide intention on the part of the donor to divest himself in præsenti of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be actually and bona fide paid. Delivery of possession, although essential in the case of a simple gift, is not at all necessary in the case of a hiba-bil-iwaz. A declaration by the donor in the gift deed that he has delivered possession of the property to the donee is binding upon the heirs and representatives of the donor and is quite sufficient to establish delivery of possession even if it were necessary to do so. Consequently the facts that no mutation was either claimed or obtained by the donee in the lifetime of the donor and that possession remained with the donor till his death are wholly irrelevant in the case of a hiba-bil-iwaz : 11 All 460 (P C) and ('32) 19 A I R 1932 P C 13, *Rel. on.* [P 351 C 2; P 352 C 1]

(d) Mahomedan law — Gift — Hiba-bil-iwaz — In spite of gift donor treating property as his own and mortgaging same — Aforesaid change of donor's intention held did not destroy donee's interest.

Where in spite of the gift in the form of a hiba-bil-iwaz the donee deals with the property as his own and mortgages the same, this change of intention on the part of the donor does not destroy the interest of the donee. [P 352 C 2]

H. Husain — for Appellant.

Akhlaque Husain — for Respondents.

Judgment. — This is a plaintiff's appeal arising out of the dismissal of his suit by the lower appellate Court. The facts giving rise to this appeal may be briefly stated. One Mirza Dilawar Husain had two wives, Ahmadi Begam and Nadri Bagam. From his first wife he had three sons, one of whom is the present plaintiff-appellant and the other is defendant 2 in the case, the third son having predeceased his father. From his second wife, who is defendant 1 in the case, he had several children, whom it is not necessary to mention for the purposes of the present appeal. The plaintiff's allegation was that his mother, Ahmadi Begam, was the original owner of the property in dispute. Ahmadi Begam died in 1914 leaving her husband and three sons, named Jafar Husain, Kazim Husain and Abid Husain. The husband succeeded to the one-fourth share and the three sons to equal shares in the remainder of the inheritance under the Mahomedan law. On 27th June 1924, Mirza Dilawar Husain executed a deed of gift (Ex. 3) of two annas share out of the sixteen annas in favour of his three sons from Ahmadi Begam and delivered possession to them. On the same date he executed another deed of gift (Ex. A5) in favour of his second wife, Mt. Nadri Begam, defendant 1 in lieu of her dower debt, in respect of the remaining two annas share inherited by him. Mirza Dilawar Husain died on 24th January 1935. The plaintiff challenged the deed of gift executed in favour of defendant 1 as being invalid on the ground that it was neither followed by possession nor was it properly registered. It was further challenged on the ground that it was not meant to transfer the property to defendant 1 and that it was fictitiously executed in order to defeat and defraud the creditors to whom Mirza Dilawar Husain was deeply indebted. The plaintiff, therefore, claimed that defendant 1 had no right in the property conveyed to her by the gift and consequently all the heirs of Mirza Dilawar Husain were entitled to legal shares therein. The plaintiff tried to obtain mutation of names in respect of his share in the said property on the death of Mirza Dilawar Husain but the revenue Court ordered mutation in favour of defendant 1 who set up the deed of gift in her favour. The plaintiff thereupon brought the suit out of which the present appeal arises for possession of a 1/24th share claiming 1/48th share by inheritance and 1/48th share of defendant 2 which he claimed on the basis of an oral gift from him.

Defendant 2 supported the plaintiff's claim. Defendant 1 defended her title to the two annas share in the property in suit as a donee from Mirza Dilawar Husain. She further put the alternative case that she was entitled to retain possession of the property in lieu of her dower debt of Rs. 14,000. She denied the oral gift by defendant 2 in favour of the plaintiff and pleaded an estoppel. The trial Court decreed the suit holding that the execution of the alleged deed of gift (Ex. A5) was not proved and that its genuineness and validity had not been established. It, however, held that the plaintiff had not established that the deed of gift was executed in order to defraud the creditors. The oral gift by defendant 2 in favour of the plaintiff was held established. Upon the question of dower the finding of the trial Court was that the dower of defendant 1 was fixed at Rs. 105 only and that she was

in possession of the property left by Mirza Dilawar Husain and that she was entitled to remain in possession of this property till this dower debt was paid off. The plaintiff's suit for possession was decreed on condition of the plaintiff's paying to defendant 1 the proportionate amount of dower due. Defendant 1 appealed and the lower appellate Court held that the deed of gift executed in her favour was satisfactorily proved and it was genuine and valid. It further held that the amount of dower of defendant 1 was Rs. 14,000 as stated in the deed of gift and not Rs. 105 as held by the trial Court. The finding on the question of the oral gift by defendant 2 in favour of the plaintiff was also set aside for the reason that possession did not accompany the oral gift. The result on the findings was that the plaintiff's suit was dismissed.

The plaintiff has preferred this second appeal against the aforesaid dismissal of his suit. The first question that has been argued before me on behalf of the appellant is that the lower appellate Court was not justified in stating that the execution of the deed of gift (Ex. A5) was not disputed by the plaintiff. It is contended that the finding of fact of the trial Court upon the point of execution being in favour of the plaintiff, it was the duty of defendant 1 who had filed the appeal before the lower appellate Court, to get that finding set aside and there was no occasion for the plaintiff to concede the point of execution. The lower appellate Court appears to have referred to the two deeds of gift, namely Exs. 3 and A5. The execution of Ex. 3 had not been questioned in the trial Court and as both the deeds of gift were executed and registered on the same day by the same executant and attested by the same witnesses it is not in the slightest degree unlikely that the execution of Ex. A5 may also have been conceded before the lower appellate Court. There is nothing whatever to show that the above statement of fact in the judgment of the lower appellate Court is wrong. I am quite prepared, however, to determine this question and record a fresh finding under the powers vested in this Court by S. 103, Civil P. C. I have heard learned counsel for the appellant on this point and have carefully considered the evidence of D. W. 3, Saiyid Raza Husain, who was produced to prove the execution of Ex. A5. D. W. 3 is one of the attesting witnesses to the deed and swears that Mirza Dilawar Husain executed the deed of gift (Ex. A5) and signed it in his presence. I do not see any reason whatever for not believing the evidence of this witness. In my opinion the evidence of this witness fully establishes the execution of the deed of gift (Ex. A5).

The second point that has been raised before me on behalf of the plaintiff-appellant is that the deed of gift was not properly registered within the meaning of Ss. 17 and 28, Registration Act. It is contended that the entire property, with the exception of plot No. 885, which was the subject-matter of the deed of gift, was situate in Tahsil Bikapur and plot No. 885 was fictitiously inserted in the deed so as to obtain registration in Fyzabad. It is urged that plot No. 885 did not belong to Mirza Dilawar Husain and the inclusion of this plot in the deed of gift was a fraud upon registration. I am of opinion that this contention is devoid of substance. It appears that one Mirza Fazal Husain originally obtained a lease of plot No. 885 for building a house from the Nazul under a deed of lease dated 19th November 1904 (Ex. 1). Fazal Husain transferred this plot by a sale deed (Ex. 2) on 5th November 1909, in favour of Ahmadi Begam for Rs. 25. This deed recites that the transferor sold a house which had fallen down along with the right of occupancy in the land. A perusal of Ex. 1 will show that the rights of the lessee under the lease were heritable inasmuch as it is clearly stated therein that the right of Government to resume the land arose only if the owner died heirless. It is further provided in the lease that the owner of the building situate on the land will have the right to transfer the materials of the building as well as the right of occupancy in the land, but he shall not be entitled to transfer the land itself. In other words what was prohibited by the lease was the transfer of ownership of land which undoubtedly vested in the lessor but not in the lessee. As I have already stated Fazal Husain did not purport to transfer anything more than what he was entitled to do under the strict terms of the lease granted to him. He did not transfer any rights of ownership in the land. What was transferred was a mere right of occupancy in the land along with the house which had fallen down. There can be no question therefore that Ahmadi Begam acquired the same rights under the sale which the original lessee Fazal Husain himself possessed, and it cannot be said by any stretch of reasoning that Mirza Fazal Husain violated any of the essential conditions of the lease in exe-

cuting the sale deed in favour of Ahmadi Begam.

It is urged on behalf of the appellant that, according to the terms of the lease, land along with the building was liable to resumption by the Government if the building fell down or was allowed to fall in a state of disrepair by the owner or his transferee or in case no new building was constructed within a period of three years from the date of the demolition of the first building. The house must be deemed to have fallen down in 1909 as the sale deed (Ex. 2) undoubtedly shows. It is clear however that the Government has not chosen to exercise a right of resumption up to this time and that the land is still in the possession of the lessee's representatives. In any view of the case, whether the lessee possessed the right of transfer or not, it is a matter on which there may be a reasonable doubt. It does not follow that parties to the deed of gift were prompted by any motives of fraud in including plot No. 885 in the deed. It has been held by their Lordships of the Judicial Committee in 63 I A 169[1] that in determining whether the requirements of the law as to registration have been complied with, the intention of the parties is the criterion by which the matter must be decided. It cannot be said in the present case that there was no intention on the part of the donor to vest the property in the donee and consequently it cannot be held that the inclusion of plot No. 885 in the deed of gift was a mere device to evade the Registration Act. Assuming for a moment that the title of Mirza Dilawar Husain to plot No. 885 was doubtful, it cannot lead to the inference that he was guilty of any fraud in including the same in the deed of gift. At any rate, there is nothing whatever to suggest any collusion between the donor and the donee or to show that defendant 1, a pardanashin lady, who paid a valid consideration for the deed of hiba-bil-iwaz in her favour, was a privy to any such imaginary fraud. In the absence of any collusion between the donor and the donee the registration of the deed cannot be challenged as being defective in law : *see* A I R 1924 Mad 281.[2] Reference may be made to the observations of their Lordships of the Privy Council in 48 I A 127[3] at p. 133 which appear to apply fully to the facts of the present case. Their Lordships observed :

> In coming to the conclusion that this appeal must be dismissed, their Lordships' judgment rests on the view that none of the parties ever intended that the one-kauri share in mauza Kolhua should vest in Udit or should pass by the mortgage from him to the mortgagee. This case differs *toto cælo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security.

I am satisfied that the deed of gift cannot be impugned on the ground that it was a fraud upon registration. Lastly, it has been contended that the deed of gift is invalid on the ground that there was no bona fide intention on the part of the donor to part with the ownership of the property. It is not disputed that the deed of gift was executed in lieu of a dower debt of Rs. 2000 out of Rs. 14,000 which was fixed at the time of the marriage. The finding of the lower appellate Court upon this part of the case must be accepted as binding. The transaction evidenced by the deed of gift is a hiba-bil-iwaz, a term well understood in Mahomedan law. In the case of a hiba-bil-iwaz, it has been laid down in a series of cases by their Lordships of the Judicial Committee, that only two conditions are necessary to establish the validity of such a transaction, (1) actual payment of consideration (iwaz), and (2) a bona fide intention on the part of the donor to divest himself in præsenti of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be actually and bona fide paid. It is not denied that the first condition is fully satisfied in the present case. As regards the second condition, it is urged that no mutation was either claimed or obtained by the donee in the lifetime of the donor and that possession remained with the donor till his death. Both these circumstances in my opinion are wholly irrelevant in the case of a hiba-bil-iwaz. It is well-settled that delivery of possession, although essential in the case of a simple gift, is not at all necessary in the case of a hiba-bil-iwaz. The deed of gift contains a declaration by the donor that he has delivered possession of the property to the donee. We have also from the evidence of defendant 1 herself that the donor handed over the deed to her.

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1. ('36) 23 A I R 1936 P C 91 : 161 I C 29 : 63 I A 169 : 59 Mad 539 (P C), Venkatarama Rao v. Sobhanadri Appa Rao.
2. ('24) 11 A I R 1924 Mad 281 : 77 I C 464 : 46 M L J 12, Lakshmikantaraju v. Jagannatharaju.
3. ('21) 8 A I R 1921 P C 8: 60 I C 833: 48 I A 127:. 48 Cal 509 (P C), Biswanath Prashad v. Chandra Narayan Chowdhuri.

The declaration in the deed as regards the delivery of possession is binding upon the heirs and representatives of the donor and is quite sufficient to establish delivery of possession even if it were necessary to do so: *see* 16 I A 205[4] and 59 I A 1.[5] Had Mirza Dilawar Husain been alive, he would have been estopped from challenging the deed of gift on the ground of absence of delivery of possession or non-divestment of his interest in the property gifted. The plaintiff as his heir is in no better position and must be held bound by the declaration made by the donor. The lower appellate Court rightly observes that the donee was admittedly a pardanashin lady and it was but natural that her husband should manage the property on her behalf as long as he lived. The absence of mutation is fully explained in the evidence of D. W. 1, Muzaffar Husain, a witness related to both parties. He stated that on being asked to mutate the property in favour of his wife, Mirza Dilawar Husain said that if he did so he would lose his lambardari dues. He however acknowledged the fact that he had gifted the property. The witness further stated that mutation on the basis of EX. 3 was also not effected for the same reason. It is also pointed out on behalf of the appellant that even after the gift Mirza Dilawar Husain carried on litigation in his own name and reference is made to EXS. 20 to 24. This action of Mirza Dilawar Husain was perfectly natural in the circumstances as mutation stood in his name and no mutation had been made in favour of his wife.

Another circumstance pointed out in this connexion is that there was a family settlement in the year 1928 between Mirza Dilawar Husain and his three sons from his first wife, whereby it was agreed that defendant 2 was to get the entire share in patti Ahmadi Begam in village Tendwa and he was to relinquish his share in other villages in the said patti in favour of other cosharers in lieu thereof. To this settlement defendant 1 was not a party and it is argued therefore that had she possessed any interest in the deed of gift, she would not have been ignored in the family settlement. In this connexion EX. A3, a deed of release, executed by defendant 1 on 13th June 1929, is also referred to. It appears from EX. A3 that defendant 2 wanted to mortgage village Tendwa, which had been allotted to him under the family settlement for satisfying certain debts but the mortgagee was not prepared to take the mortgage from him in view of the interest of defendant 1 in the village under the deed of gift executed in her favour by Mirza Dilawar Husain. The deed recites that defendant 1 had no objection to the family settlement that had been arrived at and she claimed no share in village Tendwa which defendant 2 intended to mortgage. The obvious motive of this deed of release was to afford satisfaction to the mortgagee against any claim which defendant 1 might advance on account of the deed of gift in her favour.

There is no statement whatever in this deed of release that the deed of gift was a fictitious transaction not intended to pass any title to her. On the other hand, the fact that it became necessary to obtain a deed of release from her in respect of her share in village Tendwa proves that defendant 1 was regarded as possessed of an interest in the property by virtue of the deed of gift. The execution of this deed of release in my opinion far from showing that it was not given effect to on the other hand leads to a contrary inference. The lower appellate Court believed the evidence of D. W. 1, who stated that in lieu of the release of her share in Tendwa she had got extra share in other villages along with other cosharers, that her husband represented her in the family settlement and her interests were fully safeguarded by him. This evidence stands unrebutted and there is no reason to doubt the veracity of this statement. Lastly it is pointed out that in spite of the gift Mirza Dilawar Husain dealt with the property as his own, and he along with his two sons made a mortgage of Solepur on 2nd December 1930 (vide EX. 10). There is nothing whatever to show that this mortgage was brought home to defendant 1. In any case, even if she was aware of it, this change of intention on the part of Dilawar Husain does not destroy the interest of defendant 1 in the property which was the subject-matter of the gift. Solepur is only one of the four villages in dispute and as has been pointed out on behalf of defendant 1 it may well be that the mortgagee under EX. 10 was satisfied that the share of the mortgagors was an ample security for the satisfaction of his claim.

Having given my best consideration to the entire evidence and the circumstances

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4. ('89) 11 All 460: 16 I A 205: 5 Sar 433 (P C), Muhammad Mumtaz Ahmad v. Zubaida Jan.

5. ('32) 19 A I R 1932 P C 13: 136 I C 385: 59 I A 1: 6 Luck 556 (P C), Mohammad Sadiq Ali Khan v. Fakhr Jahan Begam.

of the case I am of opinion that the finding of the lower appellate Court as regards the genuineness and validity of the deed of gift in favour of defendant 1 is perfectly correct and must be maintained. Learned counsel on behalf of the appellant frankly concedes that the evidence to support the plea that the deed of gift was a fraud upon the creditors is very slender. In view of the above finding it is scarcely necessary to pursue the alternative point whether defendant 1 is entitled to retain possession of the property in lieu of her dower debt. The question is purely one of academic interest and need not be dealt with. I therefore confirm the judgment and decree of the lower appellate Court and dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 353

GHULAM HASAN J.

Har Bux Singh—Plaintiff—Appellant

v.

Mt. Shanti Devi — Defendant — Respondent.

Second Appeal No. 420 of 1937, Decided on 26th November 1940, against order of Civil Judge, Sitapur, D/- 12th August 1937.

Will—Construction — Will made by Thakur providing that his widow shall be absolute owner of his property but in case of her unchastity being found by Court, that property shall go to next reversioner — Re-marriage of widow held did not amount to act of unchastity.

A testator who was a Thakur by caste made a will in which he stated that his widow should be the malik kamil (absolute owner) of the property and should have all powers of transfer. He further provided that as long as she would remain chaste and stay in her house she would continue to be in possession as an owner. In the event, however, of unchastity being established in Court the next reversioners of the testator should be entitled to get equal shares in his inheritance. The widow remarried :

Held that in the absence of any words in the will implying a restriction on re-marriage, it would be neither reasonable nor proper to extend the word "unchastity" so as to include re-marriage.

[P 355 C 1]

M. Wasim — for Appellant.

K. P. Misra — for Respondent.

Judgment.—This is a second civil appeal against a judgment and decree dated 12th August 1937, passed by the civil Judge of Sitapur, allowing the appeal and setting aside the decree dated 17th March 1937, passed by the Munsif of that place decreeing the plaintiff's claim. The plaintiff-appellant, who is admittedly the next reversioner of one Durga Bakhsh Singh, brought the suit out of which this appeal has arisen for recovery of possession over the property in dispute. The plaintiff's allegation was that Durga Bakhsh Singh, the original owner of the property, died in June 1931 leaving behind him his infant daughter and the defendant, his widow. Durga Bakhsh Singh executed a will on 16th June 1931, in favour of the defendant in respect of his property conferring upon her an absolute estate. It was alleged in the plaint that according to the will the defendant was liable to forfeit all her rights in the property of her deceased husband on her becoming unchaste. It was further alleged that the defendant had become unchaste and so she lost all her rights in her husband's property. It was pleaded that in any case the widow had re-married and her re-marriage was alone sufficient to divest her of the rights of the property in suit under law and under the terms of the will. According to the plaintiff, the daughter was excluded from inheritance on the basis of a custom. In these circumstances the plaintiff claimed possession of the property against the defendant.

The defence was a denial of the plaintiff's claim. The plea of unchastity was emphatically denied. The allegation of re-marriage was admitted but it was pleaded that re-marriage did not deprive the defendant of her rights in the property in dispute under the will. The custom of the exclusion of daughter from inheritance was also denied. The defendant asserted that under the terms of the will she had become the absolute owner of the property and the condition about the reversion of the property on her becoming unchaste was void in law. The trial Court held in favour of the exclusion of daughter from inheritance on the ground of custom. It also held that the condition laid down in the will about the reversion of the property to the reversioner was not illegal. It, however, held that the defendant was proved to be unchaste and further that the very fact of her re-marriage was sufficient to divest her of her rights in the property. Upon these findings the trial Court decreed the plaintiff's suit.

The lower appellate Court in appeal has confirmed the finding on the point of custom. It also upheld the view of the trial Court to the effect that the condition attached in the will for reversion of the property in case of the unchastity of the widow could not be considered to be bad in law in view of the provisions of S. 134, Succession Act. As regards the plea of unchastity, the lower appellate Court found that

the defendant was not proved to be leading an unchaste life before her second marriage. It further found that the marriage contracted by the defendant after the death of her husband could not be considered to be an act of unchastity on the part of the widow so as to disentitle her of her rights conferred by the will of her deceased husband. In the result, therefore, the appeal was allowed and the claim of the plaintiff was dismissed. The plaintiff has now come up to this Court in second appeal. The memorandum of appeal challenges the decision of the lower appellate Court both on the ground of unchastity and also on the ground that the act of a second marriage itself was included in and covered by the term "unchastity" as used in the will of Durga Bakhsh Singh, and that upon a proper interpretation of the will the lower appellate Court should have held that the defendant-respondent was entitled to retain the property only in case she remained chaste and a widow.

Learned counsel appearing on behalf of the plaintiff-appellant has frankly conceded that he is unable to contest the finding of fact arrived at by the lower appellate Court that the plea of unchastity had not been substantiated. Indeed this finding could not be challenged in second appeal as it was concluded by a finding of fact which was fully supported by the materials on the record. The only question therefore which has been urged before me on behalf of the plaintiff-appellant is that the fact of re-marriage having been admitted the lower appellate Court should have, upon a proper construction of the will of Durga Bakhsh Singh, come to the conclusion that re-marriage was tantamount to unchastity and was sufficient to destroy the right of the defendant-respondent under the will, EX. 1, executed by Durga Bakhsh Singh on 16th June 1931. The will recites the fact of the testator's illness of which he died a few days after the execution of the will and mentions that he has a daughter four months old from his legally married wife, the defendant-respondent, for whom he expresses feelings of love and affection. It is stated in the will that the defendant-respondent is to be the malik kamil (absolute owner) of the property and shall have all powers of transfer. Then follow the relevant words, which are the subject-matter of interpretation in the present case. They are as follows:

Jab tak woh nekchalni se apne makan men baithi rahegi malikana qabiz wa dakhil aur mutsarrif rahegi, darsurat badchalni adalat se sabit hone par manmuqir ke qaribi haqdar bahisas masavi mere matruka ke pane ke mustahaq honge.

i. e. "As long as she will remain chaste and stay in her house she will continue to be in possession as an owner. In the event however of unchastity being established in Court the next reversioners of the testator shall be entitled to get equal shares in his inheritance." It has been argued before me that in order to place a proper construction upon the words quoted above it is necessary to put oneself in the testator's arm-chair and to ascertain his intentions and feelings at the time of executing the will. It is said that re-marriage according to Thakurs is an act which is looked upon by the Thakur clan not only with the greatest disfavour but is considered to be a heinous offence almost amounting to unchastity or immorality. It is further stated that *makan men baithi rahegi* necessarily implied that the wife would continue to occupy the house as the widow of the deceased, which clearly negatived a case of re-marriage. I regret I cannot accept this contention. It appears from the plaint that the age of the defendant-respondent is given as 24 on the date of the plaint, namely 19th October 1936. Durga Bakhsh Singh died in June 1931 shortly after making the will so that the defendant-respondent became a widow at the age of 19. It appears that the defendant-respondent contracted a second marriage with Dip Singh in 1933 and a daughter was born to her in 1935. The defendant-respondent has been continuing to reside in her deceased husband's house since the re-marriage along with Dip Singh and has not left her residence at any time.

It is a well settled rule that the intention of the testator must be gathered from the language used in the will. Looking to the language used in the deed, it appears to me to be quite clear that in the first portion of the passage quoted above the testator laid down that his widow shall remain chaste. The defeasance clause is to be found in the latter portion of the passage quoted above, which is to the effect that when she is found to be unchaste by a Court of law, then and then only, upon such a finding being arrived at by a Court, she will be liable to forfeit the absolute right conferred upon her by the will, and the next reversioner of the testator will be entitled to succeed to the property. The actual word used in the defeasance clause is 'badchalni,' which means unchastity, misconduct, immorality. I do not think that it can be

seriously contended that the word 'badchalni' as used in the defeasance clause should be so construed as to embrace within its purview the case of a re-marriage sanctioned by law. It is no doubt true that generally speaking re-marriage is repugnant to the notions of a Thakur living in a village, but to say that a re-marriage, which is now sanctioned by the Hindu Widows' Re-marriage Act (15 of 1856), should be branded as an act of misconduct or unchastity, would carry with it its own refutation. Having regard to the language used in the will itself, I am inclined to think that when the testator laid down chastity as a condition precedent to his wife's retaining an absolute interest in his will, the idea of a re-marriage was never in his contemplation.

If the testator really intended to exclude his wife from getting his property in case she re-married, there was nothing to prevent him from stating in the will that she will be liable to forfeit her right on re-marriage. It is not an uncommon thing to find in numerous instruments the provision that a female beneficiary under an instrument will be liable to be divested of her right upon re-marriage or upon marrying a particular person or a member of a particular family, caste or clan. If the idea of re-marriage is looked upon with such abhorrence by the Thakurs as to be tantamount to unchastity according to the contention put forward on behalf of the plaintiff appellant, then I am of opinion that there was still greater reason on the part of Durga Bakhsh Singh to have introduced into the will, in addition to the ground of unchastity, the disqualifying ground of re-marriage as well. The omission of the word "re-marriage" as a ground for divesting the widow of her absolute rights in the will in my opinion can be more reasonably attributed to the fact that such a ground never crossed his mind. If the contention raised on behalf of the plaintiff-appellant were accepted, one would have to import into the will another disqualifying condition which the testator did not either think fit to impose or it never entered his head. In any view of the matter, I am satisfied that in the absence of any words in the will implying a restriction on re-marriage it would be neither reasonable nor proper to extend the word "unchastity" so as to include re-marriage.

An argument has been put forward on behalf of the defendant-respondent that in the present days of social advancement re-marriages are not considered offensive to Hindu sentiments any longer and in fact numerous marriages of child widows among high caste Hindus take place in the country every day. It is contended that the Hindu Widows' Re-marriage Act, itself legalises a marriage amongst the Hindus and that this Act was passed with the definite object stated in the Preamble that the marriage of Hindu widows will tend to the promotion of good morals and public welfare. I do not think it is necessary to introduce into the question of a plain construction of the will any such considerations prevalent either among a certain section of the Hindu community or considerations which may have induced the Legislature to pass the Hindu Widows' Re-marriage Act (15 of 1856). The question before me can be decided upon an interpretation of the actual words used in the will itself. Reference was made in this connexion to a case reported in 59 Cal 142,[1] where the question involved before their Lordships of the Judicial Committee was whether on a true construction of certain leases executed by a Hindu in favour of his daughter the latter took an absolute estate or an estate for life. In addition to certain conditions laid down in the leases it was also stated that the daughter had to reside in a certain village. Their Lordships observed that the condition as to continued residence in the village was clearly of no binding effect. In the present case even if the condition about the continued residence in the house of Durga Bakhsh Singh had been violated, though that is not the case here, that condition could not have the effect of destroying the right of the widow. I therefore hold that the only reasonable construction which can be placed upon Ex. 1, the will in question, is that re-marriage of the defendant did not have the effect of destroying the right conferred upon the defendant-respondent under the will. I agree with the decision of the lower appellate Court on this point and dismiss this appeal with costs.

D.S./R.K. *Appeal dismissed.*

1. ('31) 18 A I R 1931 P C 179 : 134 I C 648 : 59 Cal 142 : 58 I A 270 (P C), Sarajubala Debi v. Jyotirmoyee Debi.

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(28) A. I. R. 1941 Oudh 355

AGARWAL J.

Mahant Janki Prasad

v.

Government of United Provinces.

Second Appeal No. 457 of 1937, Decided on 6th December 1940, against order of Civil Judge, Fyzabad, D/- 30th September 1937.

(a) Tort — Secretary of State — Suit against, for recovery of costs of punitive police—Suit is maintainable.

The Secretary of State can be sued only in respect of those matters for which the East India Company could have been sued. [P 356 C 2; P 357 C 1]

The words "liabilities incurred" in S. 42 of 21 and 22 Victoria, Chap. 106, by which the Government of India was transferred to her late Majesty, cover acts of tort : 5 Bom H C R App 1, *Rel. on.* [P 357 C 1]

Suit for the recovery of the costs of punitive police alleged to have been illegally levied on the plaintiff is one in tort and is maintainable against the Secretary of State : 40 Cal 452, *Rel. on.*; *Case law referred.* [P 357 C 1]

(b) Civil P. C. (1908), S. 80 — Words "cause of action" should not be construed in narrow sense.

The words "cause of action" under S. 80 should not be construed in a narrow sense as the object of S. 80 is merely to inform the defendant substantially of the ground of complaint : ('34) 21 A I R 1934 Pat 701 and 24 Mad 279, *Rel. on* ; ('28) 15 A I R 1928 Cal 74, *Expl.* [P 358 C 1]

(c) Jurisdiction—Civil Courts—Bar of jurisdiction of—When statute provides particular remedy general remedy in civil Court becomes barred — Remedy for recovery of amount paid under Government Notification under Police Act, as compensation to injured in riot is by way of revision to Commissioner or Local Government and not by suit in civil Court.

When a statute provides a particular remedy a general remedy in the civil Court becomes barred. [P 358 C 1]

A suit in respect of the amount realised from the plaintiff on account of compensation paid to the person injured in a riot, under the Government Notification under the Police Act is not maintainable in the civil Court by virtue of S. 15A, Police Act. Even if it is maintainable it is maintainable only on the ground of material irregularity in the proceedings of the Magistrate. [P 358 C 2]

(d) Police Act (1861), S. 15A, Cl. (2)—"After such inquiry" — Inquiry by Deputy Collector under supervision of District Magistrate who sanctioned assessment recommended by Deputy Collector after full consideration of evidence for and against is sufficient inquiry of District Magistrate.

An inquiry was made by the subordinate of the District Magistrate, but under his supervision and he sanctioned the assessment recommended by the Deputy Collector after fully considering it together with the evidence made in its support and the objections made against it :

Held that this was a sufficient inquiry by the District Magistrate. [P 358 C 2]

(e) Police Act (1861), S. 15—"Inhabitant," meaning explained.

A person who derives his income from some kothris within the area of a town and those kothris are not wakf property is an "inhabitant" of the town within the meaning of S. 15. [P 358 C 2]

S. N. Srivastava — for Appellant.

H. K. Ghosh — for Respondent.

Judgment. — This second appeal arises out of a suit brought by the appellant, Mahant Janki Prasad for recovery of Rs. 675 principal and Rs. 76-5-0 interest from the Government of the United Provinces through the Collector of Fyzabad. The suit has been dismissed by both the Courts below. A Hindu-Muslim riot took place in Ajodhia on 27th March 1934. By notification No. 232P/VIII/219 dated 7th April 1934, the Local Government promulgated an order declaring that Ajodhia had been found to be in a disturbed and dangerous state and that from the conduct of the inhabitants thereof, it was expedient to increase the strength of the regular local police cadre. This was done under S. 15, cl. (1), Police Act (5 of 1861). This proclamation was to remain in force for a period of six months but it was later on extended for another six months. It was ordered that the cost of the force should be realized from the Hindu inhabitants of the town and they would be liable to pay compensation to the Mahomedans who were injured. The plaintiff was made to pay Rs. 208 on account of the costs of the punitive police and Rs. 242 on account of compensation, total Rs. 450 on 17th January 1936. Later on, on 24th March 1936, he was made to pay Rs. 225 more, Rs. 121 on account of compensation and Rs. 104 on account of costs of the punitive police. The lower appellate Court has held that the plaintiff did not give notice as required by S. 80, Civil P. C., in respect of the item of Rs. 225 paid by him on 24th March 1936, and so the suit in respect of it was not maintainable. It was further held that the District Magistrate's order that the plaintiff should pay Rs. 208, the cost of the punitive police, was valid. On these findings the suit was dismissed in toto. It has been argued before me by the learned Assistant Government Advocate that the suit was not maintainable at all as no action could be brought in the civil Court in respect of an act of the State. He has relied on the cases in 7 O W N 1209,[1] 27 Bom 189,[2] 28 Bom 314[3] and 1936 O W N 1140.[4]

It is a settled rule of law that the defendant can be sued only in respect of those

1. ('31) 18 AIR 1931 Oudh 29: 128 I C 77: 5 Luck 157 : 7 O W N 1209, Mata Prasad v. Secy. of State.
2. ('03) 27 Bom 189 : 5 Bom L R 30, Jehangir M. Cursetji v. Secy. of State.
3. ('04) 28 Bom 314 : 6 Bom L R 65, Shivabhajan Durga Prasad v. Secy. of State.
4. ('37) 24 A I R 1937 Oudh 209 : 165 I C 834 : 12 Luck 657 : 1936 O W N 1140, Kanhaiya Lal v. Secy. of State.

matters for which the East India Company could have been sued. It was so held in the rulings cited above by the Assistant Government Advocate. Under 21 and 22 Victoria, Chap. 106, the Government of India was transferred to her late Majesty and by S. 42 it was provided that all the bonds, debentures and other debt of the said company in Great Britain and all the territorial debts and other debts of the said company, and all sums of money, costs, charges and expenses which if this Act had not been passed would after the time appointed for the commencement thereof have been payable by the said company out of the revenues of India in respect of or by reason of any treaties, covenants, contracts, grants or liabilities then existing and all expenses, debts and liabilities which after the commencement of this Act shall be lawfully contracted and incurred on account of the Government of India and all payments under this Act shall be charged and chargeable upon the revenues of India alone as the same would have been had this Act not been passed and such expenses, debts, liabilities, and payments as last aforesaid had been expenses, debts and liabilities lawfully contracted and incurred by the said company.

It was held in 5 Bom H C R App 1[5] that the words "liabilities incurred" cover acts of tort. The act complained of by the plaintiff in this case is an act of tort and so the Government can be sued in my opinion. The present case is on all fours with that of 40 Cal 452.[6] That was also a case for the recovery of the costs of punitive police alleged to have been illegally levied from the plaintiff and it was held that the suit was maintainable against the Secretary of State. The cases cited by the learned Assistant Government Advocate are distinguishable. In 7 O W N 1209[1] the plaintiff had sued the Secretary of State for his being improperly detained in jail. It was observed that one of the functions of Government in this country as a sovereign power is to take cognizance of offences coming to its knowledge and to order the trial of such persons in accordance with law. In the case reported in 27 Bom 189[2] the plaintiff had sued the Secretary of State for defamation on the allegation that there was a resolution of the Bombay Government that he was guilty of misconduct as a public servant. It was held that the plaintiff held his office at the pleasure of the sovereign and the power of dismissal included powers of censure. In 28 Bom 314[3] the principle of law enunciated above in 5 Bom H C R App 1[5] was recognized. The case in 1936 O W N 1140[4] was also of a dismissal of a public servant. I may also mention the case in A I R 1934 Bom 277[7] in which it was held that there are three exceptions in respect of which the Secretary of State can be made liable although the acts may be acts of State. One of those exceptions is when it can be shown that benefit has resulted to Government from a tort of one of its servants. This exception is applicable in this case. I therefore hold that the defendant can be sued by the plaintiff for the money.

The first point argued by the learned counsel for the appellant is that the lower Court was wrong in dismissing his claim for Rs. 225 on the ground that no notice under S. 80, Civil P. C., was given. The assessment was first made on 22nd December 1934, but a fresh assessment was made on 16th January 1936. It was on account of the latter assessment that the plaintiff was required to pay Rs. 225 in addition to the sum previously paid by him. The plaintiff gave notice under S. 80, Civil P. C., on 26th February 1936. It was stated in the notice that the District Magistrate had by a notification dated 16th January 1936, demanded payment of a further sum of Rs. 225 in addition to the sum realized for the police and compensation purposes. The relief mentioned in the notice was that it be declared that the plaintiff was not liable for the taxes referred to above as assessed in a sum of Rs. 675 and that a decree for payment of Rs. 450 with interest be passed. It is to be noted that the payment of Rs. 225 was made after this notice dated 16th February 1936. The lower Courts have held that as the plaintiff had not made the payment when the notice was given, it was not a valid notice in respect of this item. In 24 Mad 279[8] three joint owners of land sued to recover a sum of money paid as water rates which they alleged had been illegally levied from them by Government in respect of faslis 1302 and 1303. Notice of the suit was given in respect of 1302 F' alone. It was held

5. (1862) 5 Bom H C R App 1, Peninsular and Oriental Steam Navigation Co. v. Secy. of State.
6. ('13) 40 Cal 452 : 18 I C 112 : 17 C L J 216 : 17 C W N 315, Kailash Chandra Nag v. Secy. of State.
7. ('34) 21 A I R 1934 Bom 277 : 152 I C 947 : 58 Bom 660 : 36 Bom L R 568, Municipal Corporation of Bombay v. Secy. of State.
8. ('01) 24 Mad 279 : 11 M L J 117, Secy. of State v. Perumal Pillai.

that the notice was not invalid and that the words "cause of action" under S. 424 corresponding to S. 80, should not be construed in a narrow sense as the object of the section is merely to inform the defendant substantially of the ground of complaint. I think the principle is applicable to this case also. The plaintiff had informed the defendant that the amount of Rs. 450 had been wrongly realized from him and also that he was not liable to pay Rs. 225 which had been assessed. The same principle was held in A I R 1934 Pat 701.[9] The learned Assistant Government Advocate has relied on 54 Cal 969.[10] I think there is nothing against the plaintiff in that case. The principle laid down in the Madras and Patna rulings was approved but it was stated that the cause of action should be stated with some precision. In this case the plaintiff had stated his cause of action with precision; I think that the lower Courts were wrong in dismissing this part of the plaintiff's claim on the ground that the notice given under S. 80 was not valid.

The lower Courts have dismissed the plaintiff's claim for recovery of Rs. 242 realized from him on account of compensation to be paid to the Mahomedans, on the ground that the remedy of the plaintiff lay only in making a revision to the Commissioner of the Division or the Local Government. Section 15A, cl. 4 of the Police Act, provides that every declaration or assessment made or order passed by a Magistrate of the district under sub-s. (2) shall be subject to revision by the Commissioner of the Division or the Local Government, but save as aforesaid shall be final. When a statute provides a particular remedy a general remedy in the Civil Court becomes barred. The appellant's learned counsel has relied on the case in A I R 1924 P C 175.[11] In that case it was held that proceedings of an assessing authority are subject to being quashed in the ordinary Courts of law if they have been tainted by a fundamental irregularity. The same was held in A I R 1926 Cal 1064.[12] Reliance is placed on A I R 1926 Cal 279.[13] In that case also, it was observed that where the Legislature has set up a special tribunal for the purpose of deciding certain matters such matters shall be heard by that tribunal and that tribunal alone. On the interpretation of the enactment in that case it was, however, held that it was not the intention of the Legislature to set up the Commissioner as the person finally to decide the point before the Court. Section 15A, cl. 4 of the Police Act, clearly provides that subject to revision by the Commissioner or the Local Government the order of the Magistrate shall be final. I therefore think that a suit in respect of the amount realized from the plaintiff on account of compensation was not maintainable in the Civil Court. Even if it is maintainable, it is maintainable only on the ground of material irregularity in the proceedings of the Magistrate. It is argued on behalf of the appellant that under S. 15A of the Police Act the assessing authority is the District Magistrate alone but in this case the assessment was made by his subordinate and that the assessment could be made only in respect of an inhabitant of Ajodhia which the plaintiff was not. The words in S. 15A, cl. (2) are to the effect that the Magistrate of the district after such inquiry as he may deem necessary can assess the amount of compensation to be paid by the inhabitants. The words "after such inquiry" are very material. It appears that in this case the inquiry was made by the subordinate of the District Magistrate, but under his supervision, and he sanctioned the assessment recommended by Mr. Day, Deputy Collector, after fully considering it together with the evidence made in its support and the objections made against it. I think this was a sufficient inquiry of the District Magistrate.

As regards the other point the word "inhabitant" has been defined in S. 15 of the Police Act and under the definition is included persons who themselves or by their agents or servants occupy or hold land or other immovable property within such area and landlords who themselves or by their agents or servants collect rents direct from ryots or occupiers in such area notwithstanding that they do not actually reside therein. In this case it has been found by both the Courts below that the plaintiff derived income from some kothris within the area of Ajodhia. It has also been found that those kothris are not wakf property. I am bound by these findings in second appeal. I therefore hold that neither of the two objections of the plaintiff have any

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9. ('34) 21 A I R 1934 Pat 701 : 155 I C 1099 : 14 Pat 283 : 16 P L T 129, Sourendra Mohan Sinha v. Secy. of State.

10. ('28) 15 A I R 1928 Cal 74 : 107 I C 360 : 54 Cal 969, Kessoram Poddar & Co. v. Secy. of State.

11. ('24) 11 A I R 1924 P C 175: 80 I C 1023 : 51 I A 241 : 51 Cal 802 (P C), Secretary of State v. Jatindra Nath.

12. ('26) 13 A I R 1926 Cal 1064 : 98 I C 334 : 53 Cal 561, Mahabunnissa Bibi v. Secretary of State.

13. ('26) 13 A I R 1926 Cal 279 : 90 I C 700 ; 52 Cal 943, Nasaruddin Mandal v. Ananth Nath.

force. As there has been no material irregularity, the plaintiff cannot come to the Civil Court in regard to the assessment. The lower Courts have dismissed the suits in respect of Rs. 208 on account of the cost of the punitive police on the ground that the action of the District Magistrate was legal. The plaintiff before me challenges the validity of the Magistrate's proceedings on the ground that the assessment was not made by the District Magistrate and that he was not an inhabitant of Ajodhia. I have discussed both these points and decided them against the plaintiff. The lower Courts' decree refusing to award Rs. 208 to the plaintiff is quite correct. The plaintiff's claim in respect of Rupees 225 which he paid on 24th March 1936 has not been decided on the merits. It has been thrown out by the lower Courts on the ground that the plaintiff did not give any valid notice in respect of that amount. I have held above that the notice was valid. I, therefore, allow the appeal to this extent, that the lower Court's order dismissing the claim in respect of Rs. 225 is set aside and the case remanded to the first Court through the appellate Court for decision on the merits. Costs in this Court relating to this amount will abide the result. The appeal in other respects is dismissed with costs.

N.K./R.K. *Case remanded.*

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(28) A. I. R. 1941 Oudh 359

BENNETT AND GHULAM HASAN JJ.

Emperor

v.

Bhagi and others — Accused Respondents.

Criminal Appeal No. 515 of 1940, Decided on 22nd April 1941, against order of Sessions Judge, Fyzabad, D/- 11th June 1940.

(a) Penal Code (1860), S. 302 — Accused *B*, *P* and *M* charged with murder of *D* by spear and lathis—During *B's* absence from village, his wife contracting illicit intercourse with *D* — Nevertheless on his return *B* affecting friendship with *D* and on night of murder taking him to keep watch over jarhan crop in which *B* also had interest—Some time after midnight, *D's* brother hearing cries of "thief" from direction of *B's* and *M's* houses, going there with others, finding *B* striking the alleged thief with lathi and *P* and *M* kicking him — *B* did not stop beating at once but when he did so the alleged thief was found dead—Corpse then discovered to be of *D*—On *P's* arrest information given by him leading to discovery of blanket stained with human blood from heap of straw at back of his house, spear-head belonging to *B* from sugarcane field and chadar belonging to *B* found buried in mud of tank — Stains of blood found in jarhan field though they were not discovered near house of accused where dead body was found—43 injuries found on *D's* body, large number of incised wounds, incised punctured wounds and abrasions, ruptures of lung, spleen and kidney — Certain injuries found on person of *M* and blood stains on his shirt though stains could not be proved as of human blood—Circumstantial evidence held established guilt of *P* and *M* under S. 302 beyond reasonable doubt.

The accused *B*, *M* and *P* were charged with murder of *D*. During *B's* absence from the village his wife had contracted an illicit connexion with *D* and on the death of *B's* brother, his widow also contracted illicit connexion with *D*. Nevertheless, on his return home, *B* affected friendship with *D* and so the latter had confidence in him. On the night of the murder one of the accused *B* took the deceased *D* to keep watch over the jarhan crop in which *B* had an interest and which was at some distance to the north of *B's* house. Sometime after midnight *D's* brother heard a cry of "thief" from the direction of the houses of *B* and *M* which were situated to the north of his house. He and others went there and found *B* striking a man with a lathi, while *P* and *M* were kicking him. They were saying that they had caught a man who had been lifting the thatch with a view to enter the house. *D's* brother and the others who had come up asked *B* to stop beating him. *B* did not stop immediately and when he did the man was found to be dead. It was then discovered that he was *D*. There was however no sign of any one having tried to lift the thatch of *M's* house. The report of the Civil Surgeon showed that *D* was about 35 years of age. No less than 43 injuries were found on his body. There were a large number of incised wounds, incised punctured wounds, abrasions, mostly on the legs, thighs and arms and head. There were ruptures of the left lung, peritoneum, spleen, and left kidney. Death had probably occurred from shock and hæmorrhage the injuries having been caused a little time before death. On being arrested *P* gave some information to the police officer and various articles were discovered with his assistance. There were (1) a blanket stained with human blood from a heap of straw at the back of his house, (2) a spear-head from a sugarcane field, (3) a chadar and angocha which were found buried in the mud of a tank. Of these, the chadar was identified as that of *D* and the spear-head as that of *B*. Certain injuries were found on the person of *M* and some blood stains on his shirt, though it could not be proved whether the stains were of human blood or not. Blood stains were found in the jarhan field though there were no stains where the body was discovered near the house of the accused :

Held that the circumstantial evidence in the case left no reasonable doubt about the guilt of *M* and *P* under S. 302 and that it could be safely inferred therefrom that *D* was killed in the jarhan field and the dead body then was removed near the house of the accused who raised a false cry of having caught a thief and beat him in order to hide their treacherous crime : 14 Luck 635, *Applied*. [P 366 C 2]

(b) Penal Code (1860), S. 302—It is unsafe to argue that criminal would not have acted in any particular way after committing murder.

In a murder case it is always unsafe to argue that a criminal would not have acted in any particular manner after committing a murder.

[P 364 C 2]

(c) Evidence Act (1872), Ss. 25 and 8 — Confession—Self-exculpatory statement relating to some fact which if true negativing offence alleged to be confessed—Statement is not confession — Accused *B*, *P* and *M* charged with murder of *D* —First report of offence made by *D's* brother — Shortly after aforesaid report, *M* also reporting that he and *B* found thief lying behind his house under tree and that *B* had struck him with lathi — Thief was then found dead and corpse identified as that of *D* — *M* could not say who killed *D* — He came to report against *D* that *D* had tried to break into house to commit theft — He came at *B's* request to make report lest they be implicated—*M's* report held admissible under S. 8—Report held not confession within S. 25.

A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed : ('39) 26 A I R 1939 P C 47, *Rel. on.* [P 365 C 1]

The accused *B*, *P* and *M* were charged with having committed murder by intentionally causing the death of a man *D* with spears and lathis. The first report in the case was made by the brother of the deceased. A short time after the aforesaid report *M* voluntarily made a report to the effect that he and *B* had found a thief lying on the ground under the nim tree behind his house and that *B* had struck him with a lathi. It was then found that the thief had died and the corpse was identified as that of *D*. *M* could not say who had killed *D*. He had called the chaukidar and come with him to the police station to make the report against *D* that he had tried to break into the house to commit theft. He had come at the request of *B* and also of one other person: "otherwise we will be implicated":

Held that *M's* voluntary report was of an exculpatory nature and did not amount to a confession within the meaning of S. 25. The report was admissible under S. 8. [P 365 C 1, 2]

(d) Penal Code (1860), S. 302 — Murder premeditated, brutal and without immediate provocation — Death sentence is justified.

In the case of a brutal, premeditated and treacherous murder committed without any immediate provocation the extreme penalty of the law is justified. [P 366 C 2]

(e) Penal Code (1860), S. 302—Lapse of time since murder is no reason for not passing capital sentence.

The length of time elapsing since the murder was committed is no reason why the capital sentence should not be passed. [P 366 C 2]

Government Advocate — for the Crown.

Ali Hasan — for Accused 2 and 3 (Pandohi and Musai).

Judgment.—This is a Government appeal under S. 417, Criminal P. C., against the acquittal on 30th May 1940, by Mr. Ali Hammad, Sessions Judge of Fyzabad, of three men named Bhagi alias Bhagirath. Pandohi, and Musai on a charge under S. 302, Penal Code. On the admission of the appeal it was ordered by this Court that non-bailable warrants for the arrest of the accused should be issued under S. 427, Criminal P. C. Pandohi and Musai have been arrested, but it has not been found possible to arrest Bhagi. The hearing of this appeal has been delayed on this account. As the District Magistrate has reported that there is little prospect of his arrest in the near future the appeal has been heard against Pandohi and Musai. Pandohi is Bhagi's brother, and Musai is his cousin.

The accused were charged with having committed murder by intentionally causing the death of a man named Binda with spears and lathis on the night between 18th and 19th November 1939. The first report in the case was made at the Musafirkhana police station in the Sultanpur district at 10 A. M., on 19th November by Sat Narain, brother of the deceased Binda. Sat Narain and his brother lived in Keshopur, some six miles from this police station. Sat Narain's story was that the previous night while he, his brother Binda and his nephew, Tung Nath were warming themselves by a fire Bhagi came and asked Binda to accompany him to keep watch over a jarhan crop. Binda was reluctant to go, but on being pressed agreed. Some time after midnight Sat Narain heard a cry of "thief" from the direction of the houses of Bhagi and Musai, which as the sketch plan Ex. 17 shows, are situated to the south of Sat Narain's house. He and others went there and found Bhagi striking a man with a lathi, while Pandohi and Musai were kicking him. They were saying that they had caught a man who had been lifting the thatch with a view to enter the house. Sat Narain and the others who had come up asked Bhagi to stop beating him. Bhagi did not stop immediately, and when he did the man was found to be dead. It was then discovered that he was Binda.

The report then proceeded to indicate a motive for the crime. During Bhagi's absence from the village his wife had contracted an illicit connection with Binda, and on the death of Harkhu, Bhagi's brother, his widow also contracted illicit connexion with Binda. Nevertheless, on his return home Bhagi affected friendship with Binda and so the latter had confidence in him. The report suggested that Bhagi had asked Binda the previous night to assist him in watching the jarhan crop merely as a pretext to get him away from his house, and had then killed him in the field, where there were stains of blood. The sketch plan Ex. 17, it may be mentioned, shows the jarhan field at some distance to the north of Binda's house. There were also traces of blood, the report

continued, from the field up to Bhagi's house. Consequently, Sat Narain suspected that Bhagi, Pandohi and Musai had killed Binda and then had raised a false cry of thief. The report also showed that Sat Narain had been unable to procure men to bring the body with him and added that his relative Ranchhor and the chaukidar would bring it after they had collected men. The evidence of Ranchhor (P. W. 8), who is Binda's son-in-law, and the chaukidar, Debi Din (P. W. 4) shows that they brought Binda's body to the police station and that they were accompanied there by Bhagi and Musai. An entry (Ex. 13) in the police station general diary shows that Bhagi and Musai helped to carry the corpse there.

A report (Ex. 12) was made at the police station at 10.45 A. M. by Musai, the contents of which were corroborated by Bhagi. The report was recorded in the general diary by the head constable Mahadeo Singh (P. W. 15) who had recorded Sat Narain's report. Musai's report was to the effect that he and Bhagi had found a thief lying on the ground under a nim tree behind his house and that Bhagi had struck him with a lathi. It was then found that the thief had died and the corpse was identified as that of Binda. Musai could not say who had killed Binda. He had called the chaukidar and come with him to the police station to make this report against Binda that he had tried to break into the house to commit theft. He had come at the request of Bhagi and also of one Sukhnandan Brahman—"otherwise we will be implicated."

It is noted after this entry in the general diary that as a report had already been made against Bhagi and Musai under S. 302, Penal Code, they were taken into custody and their persons examined and searched. A fresh abrasion was found on Bhagi's right elbow and what appeared to be blood-stains were found at two places on Musai's shirt. On their admission in jail two abrasions were noted on Bhagi's elbow and one abrasion on the middle of Musai's left thigh. The head constable explained that he did not record Musai's report on the prescribed form as in his opinion it did not amount to a report either of a cognizable or of a non-cognizable offence. We may mention here that the Sessions Judge held that this report was inadmissible. For reasons which we shall give later, we cannot concur in this view. The post mortem examination was performed by the Civil Surgeon of Sultanpur in the afternoon of 20th November. His report and evidence show that Binda was about 35 years of age. No less than 43 injuries were found on his body. There were a large number of incised wounds, incised punctured wounds, and abrasions, mostly on the legs, thighs, arms and head. There were ruptures of the left lung, peritoneum, spleen and left kidney. Death had probably occurred from shock and hæmorrhage, the injuries having apparently been caused a little time before death.

No Sub-Inspector was present at the police station when the report was made and the head constable sent a constable (not a witness) to the village. The second officer M. Abdul Majid arrived at the police station within an hour. He prepared an inquest report and sent the corpse to the mortuary at Sultanpur. He took possession of Musai's shirt. He then went to the village which he reached about 4 P. M. He prepared the plan Ex. 17. He searched the joint house of Bhagi and Pandohi and recovered therefrom a lathi and a kurta. He also took a lathi from Musai's house. He examined the jarhan field where it was suspected that Binda had been murdered and found what he thought was blood stained earth some of which he took into his possession. He did not find any blood stains near the house of the accused. There was no sign of any one having tried to lift thatch of Musai's house. He was unable to find Pandohi and he deputed constables to arrest him. The station officer, M. Bashir Ahmad, took over charge of the investigation on the morning of 20th November, M. Abdul Majid remaining in the village with him until the 22nd. Pandohi appears to have been arrested shortly after the arrival of the station officer. Pandohi gave some information to the station officer and various articles were discovered with his assistance. These were: (1) a blanket, Ex. 5 from a heap of straw at the back of his house: (2) a spearhead, Ex. 11 from a sugar-cane field: (3) a chadar, Ex. 3 and angocha Ex. 6 which were found buried in the mud of a tank. Of these, Mt. Dropadi (P. W. 6) wife of Binda, identified the chadar as that of her husband, and a witness named Nand Kumar (P. W. 16) identified the spearhead as that of Bhagi. There were eleven small holes in the chadar which appeared to have been caused by sharp pointed instrument. These and some other articles, thirteen altogether, were sent to the Chemical Examiner who found blood stains on eight of them by the spectroscopic test and blood stains on the remaining five by the benzidine test,

though not by the spectroscopic method. They were all sent on to the imperial serologist who found five articles stained with human blood; the blood stains on four others were disintegrated and he could not determine their origin; no blood was detected on the remaining four.

Of the five articles found to be stained with human blood two were articles of clothing taken from the deceased. The third was earth taken from the alleged scene of the murder; the fourth was the kurta taken from the house of Bhagi and Pandohi, and the fifth was the blanket, Ex. 5 which had been taken from the same house. The prosecution suggestion is that the body had been carried in this blanket from the jarhan field to the place where it was found. The Chemical Examiner had detected bloodstains on Musai's shirt, but the Imperial Serologist could not determine their origin as the bloodstains were disintegrated.

As regards the motive for the crime we, have the evidence of Binda's brother Sat Narain and Bhagi's wife Mt. Mendia. From the evidence of Sat Narain, it appears that on Harkhu's death his widow Mt. Chhutka went to live with her brother-in-law Bhagi. Sat Narain stated in the Magistrate's Court that there was no dharrua form of marriage between the two while in the Sessions Court he stated that there was, but this discrepancy on a minor point is not sufficient to discredit his evidence about their relations. It would appear, therefore, that Bhagi had strong reason for enmity with Binda in that Binda had deprived him not only of his own wife, Mt. Mendia but also had intrigued with the woman Mt. Chhutka whom he had taken to live with him after his brother's death. Mt. Mendia herself fully supported the prosecution allegation of illicit intercourse between her and Binda stating that she was turned out of her husband's house because of this illicit connexion which resulted in her pregnancy. She admitted that she had given out at the time that a man named Sukhnandan was responsible for her pregnancy but said that she had done this at the instance of Binda. We have no doubt that this evidence establishes the existence of a motive. The Sessions Judge was of opinion that the prosecution had failed to establish any motive. He said that there was no legal evidence to bring home the connexion of the deceased with Mt. Chhutka. We have, however, the definite evidence of Sat Narain on this point. He was not cross-examined about it and there is no apparent reason why his evidence should be rejected.

To support the allegation that Bhagi came and took Binda away on the night of 18th November on the pretext that he required his assistance in watching the field there is the evidence of Sat Narain, Binda's brother and Tung Nath his nephew, as well as that of Mt. Dropadi, Binda's wife. The Sessions Judge disbelieved this story because he did not think that it was proved that Bhagi had any interest in this jarhan field. The accused Bhagi and Pandohi denied that they had joint cultivation in it with Binda, and it was admitted that the patta was in the name only of Binda and his brother Sat Narain. Moreover, the prosecution witness Jiawan admitted that the jarhan crop had been harvested by Sat Narain.

On the other hand, there is evidence that Bhagi had an interest in the crop. It was not stated by Sat Narain in the first information report that they had a joint interest in this field but in his evidence he said that all three accused had at various times kept watch over the crop there. He was not cross-examined particularly with regard to their interest in the crop. The crop had been harvested and had been stacked in the field, and if Bhagi had an interest in it, it was not unnatural that he should have suggested keeping watch over it. The Sessions Judge thought that there was a contradiction in Sat Narain's evidence about Bhagi going on previous occasions with Binda to the field. Bhagi is said to have returned to his village from abroad the previous Kunwar and "according to his own showing he used to come every two or three years." The Sessions Judge thought it impossible to reconcile this with Sat Narain's statement that Bhagi used to go in previous years with Binda to keep watch over the field. We do not think that there is contradiction because it is quite possible that Bhagi did go with Binda and others whenever he re-visited his village. We can find no good reason to reject the story that Binda was taken away by Bhagi on the night of 18th November on this pretext. According to the evidence of Sat Narain, Bhagi asked this witness to lend him a tatti of straw and the witness allowed him to take his tatti. Bhagi promised to supply Binda with a blanket. A tatti of straw was found in the jarhan field, and the prosecution suggestion is that the blan-

ket supplied by Bhagi was the one recovered from his house (Ex. 5).

The Civil Surgeon deposed that death probably occurred two hours after the last meal, and on the evidence that the deceased took his last meal about 7 or 7-30 P. M., the Sessions Judge concluded that the murder was committed about 10 or 10-30 P. M. It might, we think, have been committed rather earlier than this, as Bhagi is said by Sat Narain to have come for Binda about two and half hours after nightfall, and the evidence of Mt. Dropadi shows that he came not long after Binda had taken his evening meal. It is not possible to fix the time of the discovery of the corpse with any certainty, but it was no doubt in the early hours of the following morning. Sat Narain gives the time as about 1-30 A. M. but it may have been later. As no blood stains were found between the jarhan field and the place where the corpse was lying it would appear that bleeding had ceased before it was removed from the field. The statement by Sat Narain in his report that there were blood stains between the two places was not confirmed by the investigating officers.

The Sessions Judge entirely rejected the story that the corpse was found behind the house of the accused together with the story that they themselves had drawn attention to it by raising a cry of thief and beating and kicking it. He said that the story of the body being brought to this place was "ab initio improbable and appears to be a pure fiction." He was of opinion that the absence of bloodstains proved that it was false. If, he said, the murder was committed between 10 and 10-30 P. M., there must have been some effusion of blood when the body was brought to the kulia—lane between the houses of the accused—since blood remains fluid for some time after death and rarely begins to coagulate until four hours and sometimes not until twelve hours after death. We do not think that there is any force in this argument because it may very well be that the body was not brought to the kulia until more than four hours after death. Moreover, if it was carried there in a blanket it is quite possible that no bloodstains would have been found either in the kulia or at the place where the body was alleged to have been dragged. We are quite unable therefore to agree with the Sessions Judge that the absence of blood stains at these places throws any doubt on the prosecution evidence that the body was found behind the houses of the accused. A criticism of the Sessions Judge about this blanket which we are entirely unable to follow is based on the fact that "it contains no small holes made with some sharp pointed instrument." The Sessions Judge remarked that

> if the blanket was really in the use of the deceased at the time he was murdered then it must have contained such holes as are said to have been noticed in other articles of the deceased.

No doubt this would be so if the deceased kept the blanket round his body while he was being attacked, but, in our opinion, it is extremely unlikely that he would have done so. In any event as we do not know the exact circumstances of the attack upon him it cannot be said that if he was using the blanket it must have been pierced by the sharp pointed instrument or instruments which caused some of his injuries. Before considering other criticisms of the Sessions Judge we may first refer briefly to some other prosecution evidence. The witness Sahtu deposed that some time prior to the alarm of thief he had seen the three accused together with a fourth man whom he did not recognize, carrying a bundle and coming from the north towards the south. He accosted them and recognized the voice of Bhagi replying. He also recognized all three accused from their appearance. Another witness, Sarju Din (P. W. 3) stated that as he was going to his jarhan field that night he saw the three accused going in the same direction. He went with them part of the way. The chaukidar, Debi Din, (P. W. 4) deposed that Musai had come to him two gharis before sunrise and told him that his house had been broken into by four thieves, that he and his cousins Bhagi and Pandohi had seized one of them and the others had escaped. He had beaten the man who had been caught. He asked Debi Din to accompany him to the police station to make a report. Debi Din went back with him and found the dead body of Binda lying in front of Bhagi's door. Finally, there is the evidence of a witness named Durga Din (P. W. 11) who stated that he went to Bhagi's house on hearing that thieves had been there and questioned Bhagi. Bhagi had replied : "*Jo kuch hona tha woh ho gaya*" which may be translated : " What had to be has taken place."

The Sessions Judge rightly, we think, rejected these stories of Sahtu and Sarju Din. Sahtu admitted that he did not tell Sat Narain what he had seen when the body of Binda was found. Jiawan said that Sahtu told him and as Jiawan is his nephew

it is possible that he did. But Sahtu admitted that Bhagi had got him outcasted, so that in any case we should not be inclined to rely on this witness, and to some extent our distrust of him must be extended to his nephew Jiawan. The Sessions Judge held that Sarju Din was unreliable because he

did not disclose his knowledge to the police prior to 20th November 1939, when his statement was recorded by the second officer.

This appears to be incorrect as the second officer deposed that he did not record the statement of anyone on the 20th. It was the station officer (as his evidence shows) who recorded the statement of this witness. But this does not affect the criticism and we agree with the Sessions Judge that the evidence of Sarju Din is of no value. The Sessions Judge rejected the evidence of Debi Din and Durga Din about the finding of the body near Bhagi's house in view of the absence of blood stains there. We do not consider that this is a sufficient reason and apart from this no reason has been shown why these witnesses should not be believed. Debi Din was not cross-examined at all about Musai coming to him and asking him to accompany him to the police station to make a report, and Durga Din was not cross-examined about his talk with Bhagi. We do not however lay much stress on Durga Din's story. On the other hand, we regard the evidence of the chaukidar, Debi Din, as very important since it very definitely corroborates the prosecution story as to the manner in which the body was found and even if the report made by Musai at the police station is rejected as inadmissible we should still have to consider whether that story could be reconciled with the innocence of the accused. Debi Din was only cross-examined very briefly about the presence of Sat Narain and Sahtu at the place where the body was lying when he went there on the information given to him by Musai. He lives in another village about a mile from Keshopur and no reason whatever has been suggested for his making a false statement.

The Sessions Judge also thought that the medical evidence disproved the prosecution story, as it indicated that the injuries appeared to have been caused a little before death. He thought that if the victim had been beaten after death injuries caused by such beating would have been noticed by the Civil Surgeon. But the question whether any of the injuries might have been caused after death was not put to the Civil Surgeon whose attention was no doubt directed primarily to the more important injuries which must have been caused before death. He simply made a statement about the injuries generally that they appeared to have been caused a little before death. We do not consider that this is sufficient to disprove the prosecution story. It was a dark night and the accused were only pretending to beat and kick the man, that is, if the prosecution story is believed. The Sessions Judge has also said that it is not at all likely that

the accused would have been prepared to incur the risk of detection and to get themselves involved in further troubles by removing the dead body close to their house even if they had committed the crime. In any case, they would have created some sort of evidence to indicate that the house of Musai was visited by burglars.

With regard to this criticism we would first of all observe that it is always unsafe to argue that a criminal would not have acted in any particular manner after committing a murder. Individuals vary in their mentality and the mental condition of a man who has just committed a murder is rarely quite normal. Apart from this we do not think there is anything improbable in what the accused are alleged to have done. If we accept the prosecution evidence that Bhagi had good reason to dislike Binda, and if we also accept the prosecution evidence that he came and took Binda away that night, he must have known that suspicion would naturally fasten on him and he and his relatives may well have thought that the best solution would be to allege an attempted burglary and an attack by them on one of the burglars, his identity at the time being unknown to them. No doubt they would have made this defence stronger by creating some sort of evidence to show that there had been an attempt to break into the house, but their failure to take this precaution is just what might be expected in the circumstances. It is rare to find that a man who has just committed murder thinks of everything that common sense might suggest to a person who can reflect on the position calmly and dispassionately. We come now to the all-important question whether the report, Ex. 12, made by Musai at the police station is admissible. All that the Sessions Judge said to justify his rejection of it was :

Exhibit 12 cannot be said to be the first information report recorded under S. 154 or S. 155, Criminal P. C. It was not even signed by Musai. It is therefore inadmissible in evidence under S. 8, Evidence Act. The fact that Musai went to the

thana along with the dead body and in the company of the chaukidar is by itself of no importance and cannot add strength to the story.

In our opinion there is nothing in this criticism which renders the report inadmissible and the learned counsel for the accused has not attempted to argue that there is. The report was not regarded by the police as the report of an offence on which any action was desired or was necessary. The head constable who recorded it was not asked to explain his reasons for this view, but we may note two possible reasons. The first is that it was a report against a man who was dead; the second is that, as the report itself shows, it was made by way of defence and possibly by way of reply to the report already made by Sat Narain. So far as S. 8, Evidence Act, is concerned, it is under that section that the report would be admissible, if at all. It is, however, necessary to consider whether the report is inadmissible under S. 25, Evidence Act, as a confession made to a police officer, or under S. 162, Criminal P. C., as a statement made to a police officer in the course of an investigation. The learned defence counsel has not contended that it is a confession, but he has contended that it is a statement to a police officer in the course of an investigation. We have, however, considered whether the report should be excluded as being of the nature of a confession and we are clearly of opinion that it should not. It contains the statement: "I do not know who killed Binda and with what instrument." It was clearly of an exculpatory nature as the following passage shows:

Sukhnandan Brahman of Keshopur and Bhagi Ahir asked me to go to the thana along with the corpse and make a report against Binda that orahi (lifting thatch with a bamboo and thus making a passage for committing theft) was used, otherwise we will be implicated. Hence Bhagi and I have come to make a report.

It was recently held by their Lordships of the Privy Council in A I R 1939 P C 47[1] that no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. And they added:

Moreover a confession must either admit in terms the offence, or at any rate all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e. g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession.

Their Lordships proceeded to consider the definition of "confession" in Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime, and they observed:

The definition is not contained in the Evidence Act, 1872; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed' the crime.

It was argued strongly that the statement was made in the course of the investigation into Binda's murder and it was pointed out in support of this argument that Sat Narain's report had been recorded three quarters of an hour before and that the second officer had returned to the police station before the statement was made. It was also suggested that Musai and Bhagi had already been taken into custody, though the entry in the diary indicates that they were taken into custody and their persons searched immediately after the report was made. The evidence of the head constable, Mahadeo Singh, shows that the second officer was present when the report was made, but not a single question was put either to him or to the second officer suggesting that Musai was examined during the course of an investigation which had already commenced. In fact the second officer was not questioned at all about the report, either in examination-in-chief or in cross-examination, and it would appear that he returned to the police station just when the report was about to be recorded. The position would be quite different if after the report of Sat Narain had been recorded the head constable or the second officer had called up Musai and Bhagi and examined them. There is nothing to indicate that this was done, and, on the contrary, the report itself shows that it was a voluntary report made with a definite object. We have also the evidence of the chaukidar that Musai had come to the police station in order to make the report. We have, therefore, no hesitation in finding that the report was not made in the course of the police investigation and in holding that it is admissible.

The accused were not examined in a very satisfactory way. In the Magistrate's Court both Pandohi and Musai denied killing Binda, said they did not know how he had died and alleged that they had been implicated as a result of enmity with Sat Narain.

1. ('39) 26 A I R 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : 18 Pat 234 : 66 I A 66 : I L R (1939) Kar P C 123 (P C), Pakala Narayana Swami v. Emperor.

In the Sessions Court Pandohi said he did not cultivate any jarhan field jointly with Sat Narain or Binda as was alleged by the prosecution. He denied that he had handed over the blanket to the Sub-Inspector. He said that he was on bad terms with Sat Narain, Jiawan and Sahtu, and that the other witnesses deposed against him under police influence. Musai also denied in the Sessions Court his joint cultivation of the jarhan field; he denied that there was any injury on his person when he was arrested and he denied that the shirt taken from his person belonged to him. As regards the prosecution witnesses he made the same statement as Pandohi. The accused should have been questioned by the Sessions Judge in regard to other points. No question for instance was put to Musai either about his alleged visit to Debi Din two gharis before sunrise or about his subsequent report at the police station.

It is quite clear, however, that the accused, possibly on the advice of their counsel, had no desire to put forward in Court by way of defence the story which they had originally imagined would be a good defence. And the reason is clear. On the medical evidence that Binda had died several hours before his body was discovered, it was impossible to allege that he had been attacked as he was trying to break into Musai's house. Therefore, the story was manifestly false and if pressed would not help the accused at all, but on the contrary would be extremely prejudicial to them. So, it was presumably decided to say nothing more about this story and contend that the report was inadmissible.

The Sessions Judge found that the presence of blood stains in the jarhan field showed that the murder was committed there and we concur. But, we cannot agree with him that the accused had no motive for the crime, that Binda is not proved to have been taken away by one of them on the night of the murder, and that the body was not carried to the vicinity of their houses and discovered there in the manner alleged by the prosecution. We consider that the evidence establishes the contrary beyond reasonable doubt. The Sessions Judge referred to the ruling in (1939) O W N 700[2] that:

> Where a charge of murder is based purely on circumstantial evidence that evidence must point conclusively to the guilt of the accused and must practically exclude the possibility of the murder having been committed by other persons.

We are of opinion that the circumstantial evidence in this case satisfies this test, for, if the accused were not concerned in the murder of Binda we cannot imagine any explanation which will account for their subsequent conduct. Musai's report fully supports the prosecution evidence about the discovery of the body. The case against Musai is further strengthened by the injuries on his person and the presence of blood stains on his shirt, though it could not be proved whether the stains were of human blood or not. Against Pandohi there is the fact that he produced a blanket which was found to be stained with human blood. The Chemical Examiner's report shows that there were ten blood stains on this blanket and that the largest was six inches in length. In our opinion, the evidence is such as to leave no reasonable doubt about the guilt of Musai and Pandohi. While it does not exclude the possibility of others also being guilty it definitely indicates that they were concerned in the murder.

We accordingly allow the Government appeal, set aside the order of acquittal passed by the Sessions Judge, and convict Musai and Pandohi on the charge under S. 302, Penal Code. As the murder was brutal, apparently premeditated and treacherous, and there was no immediate provocation, there is no reason why the extreme penalty of the law should not be imposed, except such reason as may be found in the length of time that has elapsed since the murder was committed. This, we think, is no reason why the capital sentence should not be passed. We express no opinion on the question whether it should be carried out. We therefore sentence Musai and Pandohi under S. 302 to be hanged by the neck until they are dead.

In conclusion we note that there are two apparent mistakes in the judgment of the lower Court. The Sessions Judge observed in dealing with the time of death that:

> the medical evidence disclosed that semi-digested food was found in the stomach of the deceased which fact affords an indication to the effect that the deceased was alive two or three hours before his death.

Presumably the Sessions Judge intended to say that the deceased died two or three hours after he had last taken food. Secondly in discussing the evidence of Jiawan the Sessions Judge remarked that:

> The witness has no hesitation in saying that Sahtu did tell Binda what he had seen shortly after it was discovered that the victim was Binda.

2. ('39) 14 Luck 635 : 183 I C 307 : 40 Cr L J 764: 1939 O W N 700, Emperor v. Mendai.

The Sessions Judge apparently meant to say that Jiawan had no hesitation in saying that Sahtu had told him, Jiawan what he had seen.

G.N./R.K. *Appeal allowed.*

*** (28) A. I. R. 1941 Oudh 367**

BENNETT AND GHULAM HASAN JJ.

Baijnath — Applicant

v.

Ram Narain and others —

Opposite Party.

Civil Revn. Appln. No. 89 of 1940, Decided on 18th March 1941, from order of Munsif, Havali, Lucknow, D/- 21st September 1940.

*** (a) Civil P. C. (1908), O. 9, R. 9 and S. 115 — Propriety of order under O. 9, R. 9 restoring application cannot be raised in appeal from decree in suit—Order is open to revision under S. 115: 10 O W N 1316=('33) 20 A I R 1933 Oudh 331=143 I C 222, *OVERRULED.***

The propriety of an order under O. 9, R. 9, restoring an application cannot be raised in an appeal from the decree passed in suit. The order of restoration being a case decided within the meaning of S. 115 is open to revision : ('25) 12 A I R 1925 All 610 (FB) and ('31) 18 A I R 1931 All 294 (FB), *Rel. on* ; ('33) 20 A I R 1933 All 118, *Not approved;* 10 O W N 1316=('33) 20 A I R 1933 Oudh 331=143 I C 222, *OVERRULED.* [P 368 C 1]

(b) Civil P. C. (1908), O. 9, R. 9—Application for permission to sue as pauper dismissed for default of appearance — Applicant present in Court on day of hearing but failing to appear as he did not hear case being called out and filing application for restoration on same day—Application held should be restored.

On the dismissal of his application for permission to sue in forma pauperis for default of appearance the applicant filed an application under O. 9, R. 9 for restoration stating that he was present and attended in Court on the day of hearing but failed to appear as he did not hear the case being called out :

Held, that the application should be restored under O. 9, R. 9 : ('28) 15 A I R 1928 All 301, *Rel. on.* [P 369 C 1]

(c) Civil P. C. (1908), O. 9, R. 9 and S. 151— Court not finding sufficient cause under O. 9, R. 9—It may still restore application or suit to correct palpable mischief *(Obiter).*

Even though a Court may find that there is not sufficient cause within the meaning of O. 9, R. 9, still the Court may restore the suit or application in the ends of justice to correct palpable mischiefs. [P 368 C 2]

Govind Behari Lal — for Applicant.

Imtiaz Ali Sufi — for Opposite Party 1.

Order. — This is an application in revision under S. 115, Civil P. C., against certain orders passed by the learned Munsif of Havali, Lucknow, restoring a case which he had dismissed because the applicant failed to attend in Court when the case was called out. The applicant, Ram Narain, had applied for permission to sue as a pauper under O. 33, R. 1, Civil P. C., and 24th August 1940, was fixed for hearing this application. Ram Narain did not attend when the case was called out. The application was opposed by one of the opposite parties, Baijnath, who is the applicant in the present revision application, and the application was dismissed under O. 9, R. 8. An application for restoration was made by Ram Narain the same day. Ram Narain alleged that he was present in the Court compound from 10 A.M. and explained that he did not attend the Court when the case was put up for hearing because he did not hear the case called out. He filed an affidavit and produced two witnesses to support it. The Munsif did not consider that the witnesses, who stated that Ram Narain had been present in the Court compound from 10 A. M., were reliable because they contradicted each other as to what Ram Narain had done that morning though both agreed that he had been in the compound. The learned Munsif held that there was not a sufficient cause for restoration because it was Ram Narain's own fault if he did not hear the case called out, that is we understand he did not consider that there was sufficient cause for the non-appearance of Ram Narain within the meaning of O. 9, R. 9, Civil P. C. He added however :

But in the interest of justice I am of opinion that the case be restored on payment of costs to the contesting opposite party.

He accordingly allowed Ram Narain's application and restored the case to its original number on payment by Ram Narain of Rs. 10 as costs. These costs were paid. It is contended by Baijnath in this application in revision that the Munsif had no jurisdiction to set aside the order dismissing Ram Narain's application, apart from the provisions of O. 9, R. 9. Having held that there was no sufficient cause made out for the non-attendance of Ram Narain, the Munsif acted, it is argued, without jurisdiction, or, at any rate, with material irregularity in restoring the case.

The first question for consideration is whether an application in revision lies. On this point we have been referred to various authorities. In A I R 1933 Oudh 331[1] it was held by a single Judge of this Court that an application against an order for restoration of a suit under O. 9, R. 9 cannot be enter-

1. ('33) 20 A I R 1933 Oudh 331 : 143 I C 222 : 10 O W N 1316, Mohiuddin Ahmad v. Hanuman Persad.

tained for the simple reason that the validity of such an order could be attacked under S. 105 in an appeal from the final decree passed in the suit. In A I R 1933 ALL 118[2] a similar view was taken by a Bench of the Allahabad High Court. In this case a suit had been restored by an Assistant Collector who had originally dismissed it under O. 9, R. 8. It was said that that order could be set aside by the Assistant Collector either under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by S. 151. The order was not appealable to the District Judge and, therefore, no revision lay to the High Court.

A different view had, however, been taken previously by a Full Bench of the Allahabad High Court in A I R 1931 ALL 294.[3] It was said by the Full Bench in this case that under S. 105 (1), Civil P. C., the propriety of the order setting aside an ex parte decree cannot be set forth as a ground of objection in the memorandum of appeal from the decree ultimately passed in the suit, and that where an order sets aside an ex parte decree there is a case decided and not merely an interlocutory order during the pendency of of the suit. Consequently the High Court is entitled to interfere in revision. The same view had been taken by a Full Bench of the Allahabad High Court in an earlier case, A I R 1925 ALL 610.[4] We are of opinion that the question whether the application was properly restored could not be raised in an appeal from a decree passed in the suit, and therefore there was a case decided within the meaning of S. 115 and an application in revision lies.

The second question for consideration is whether the Munsif was justified in passing an order which must have been passed under S. 151, Civil P. C., when he was not justified on his own admission in passing the order under the provisions of the law which applied to such a case, namely O. 9, R. 9. In most of the cases to which we were referred on this point, the question was whether a Court has power, apart from the provisions of O. 9, R. 13, to set aside an ex parte decree passed by itself. In 43 Mad 94[5] it was held that a Court has no such power. Similarly, in A I R 1930 Cal 488[6] it was said that if no case is made out to satisfy R. 13 of O. 9, it is not open to the Court to enlarge the rule by taking recourse to S. 151 and that where the Court invokes its inherent jurisdiction under S. 151 in these circumstances it is an instance of a decree being set aside irregularly, the Court purporting to exercise powers which it does not possess. A similar view was taken by the Allahabad High Court in A I R 1937 ALL 691[7] where it was also remarked that no revision lies to the High Court under S. 115 from an order passed under O. 9, R. 13 refusing to set aside an ex parte decree, as the person aggrieved could appeal against that decree. That however is not the position in the present case. We have already referred to the observation of the Allahabad High Court in A I R 1933 ALL 118[2] that an order under O. 9, R. 8 could be set aside either under O. 9, R. 9 or under the inherent jurisdiction vested in Courts by S. 151. It has also been recently held by a member of this Bench in 1940 O W N 1086[8] that the proposition that where an alternative remedy is provided the Court is precluded from exercising its inherent jurisdiction under S. 151 is too wide and does not take into account cases of special and exceptional character which may demand the exercise of the equitable jurisdiction in the ends of justice to correct palpable mischiefs.

We are not prepared to hold in the present case that the Munsif had no power to restore the application. We are not indeed satisfied that he was justified in the view that there was no sufficient cause for restoration, that is under O. 9, R. 9. It was held in A I R 1928 ALL 301,[9] that no order of dismissal in default should have been passed till the end of the day when the Court was rising, because there could be no default until the Court rose for the day.

In the present case we know that Ram Narain was present at the Court on the day fixed for the hearing of his application because he applied for restoration of the case that very day. It is not stated at what time the application for restoration was made, and this, we think, should have been noted

2. ('33) 20 A I R 1933 All 118 : 143 I C 307 : 1932 A L J 1100, Panna Lal v. Basdeo.
3. ('31) 18 A I R 1931 All 294 : 133 I C 129 : 53 All 612 : 1931 A L J 377 (FB), Radha Mohan v. Abbas Ali.
4. ('25) 12 A I R 1925 All 610 : 90 I C 180 : 48 All 175 : 24 A L J 56 (F B), Ram Sarup v. Gaya Prasad.
5. ('20) 7 AIR 1920 Mad 640 : 53 I C 847 : 43 Mad 94 : 37 M L J 599 (F B), Neelaveni v. Narayana Reddi.
6. ('30) 17 AIR 1930 Cal 488 : 128 I C 94 : 52 C L J 524 : 34 C W N 419, K. B. Dutt v. Shamsuddin Shah.
7. ('37) 24 AIR 1937 All 691 : 172 I C 72 : 1937 A L J 831, Ghaznavi v. Gurcharan Singh.
8. ('41) 28 AIR 1941 Oudh 91 : 192 I C 332 : 1940 O W N 1086, Badri Persad v. Ambika Persad.
9. ('28) 15 A I R 1928 All 301 : 108 I C 576 : 26 A L J 382, Ram Shankar v. Ram Narain.

by the Court below. Nor did the Court below note the time when the case was dismissed. It is possible that Ram Narain was not present in the Court compound when the case was originally called out, the case having been taken early in the day. It is also possible that the case was not called out in such a way that every one in the compound could hear. A third possibility is that Ram Narain had gone away temporarily, as litigants may no doubt sometimes be obliged to. The Munsif did not discuss the question how it was that Ram Narain failed to hear the case called out. He did not find that Ram Narain was not present in the compound at the time: he merely said that it was the applicant's fault that he did not hear the case being called out. That is not a satisfactory way of dealing with the matter. In any event we are of opinion that since Ram Narain was present and attended in Court on the date fixed the Court below was justified in restoring the case. We do not consider that there is any good ground for interference with the orders passed and we accordingly dismiss this application with costs.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 369

BENNETT AND GHULAM HASAN JJ.

Chhedi Singh and another — *Defendants* — *Appellants*

v.

Ram Singh and others — *Plaintiffs* — *Respondents.*

Second Appeal No. 324 of 1937, Decided on 23rd January 1941, against decree of Civil Judge, Sultanpur, D/- 30th April 1937.

(a) Deed—Construction—Gift deed—Intention of donor should be ascertained from language used in deed — Such intention must be effectuated as nearly as may be consistent with personal law of donor — Ordinarily, under Hindu law persons of same relationship take per capita.

The cardinal rule of construction of deeds is to ascertain the intention of the donor as disclosed from the language used in the deed. Such intention should be effectuated so far and as nearly as may be consistent with the law to which the donor was subject. [P 371 C 1, 2]

Under the Hindu law ordinarily persons of the same relationship to the deceased take per capita, that is, the estate of the deceased is divided into as many shares as the number of heirs, each heir taking one share. Therefore, in the absence of any special indication in a deed of gift itself, that the donor intended the donees who are of the same relationship to take per stirpes and not per capita, it must be presumed that he did really intend to divide the property per capita upon the parties. [P 371 C 2]

(b) Deed—Construction—Language clear and unambiguous—Conduct of parties is irrelevant in ascertaining intention of grantor.

Where the language of the deed is clear and free from ambiguity any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point : *Case law referred.* [P 372 C 1, 2]

Akhtar Husain for Bhagwati Nath — for Appellants.

P. N. Chaudhri — for Respondents 1 to 3.

Judgment. — This is a second civil appeal against the judgment and decree dated 30th April 1937, passed by the learned Civil Judge of Sultanpur setting aside in first appeal the judgment and decree dated 22nd January 1937, passed by the learned Munsif of Amethi at Sultanpur, dismissing the plaintiffs' suit. The suit was brought by the four sons of one Gaya Din Singh against the two sons of Hanuman Bakhsh Singh who was the son of Pirthipal Singh, brother of Gaya Din Singh, for possession over certain property. The pedigree material to the case is given below :

JODHAI SINGH

Gaya Din Singh	Pirthipal Singh	Raghubar Dayal Singh	Daljit Singh = Mst. Dilao Kuar, widow
	Hanuman Bakhsh Singh	Janga Singh	
	Kalika Singh (Defendant 2)	Chhedi Singh (Defendant 1)	
Anant Bahadur Singh alias Antoo Singh (Plaintiff 3)	Rajapat Singh (Plaintiff 4)	Prayag Singh (Plaintiff 2)	Ram Sarup Singh (Plaintiff 1).

The dispute between the parties relates to the property of Raghubar Dayal Singh who died in 1932. His son had predeceased him. There had been a separation among the sons of Jodhai Singh, each becoming owner of one-fourth share in his property.

On the death of Mt. Dilao Kuar, widow of Daljit Singh who died issueless Raghubar Dayal succeeded to the whole of Daljit Singh's share in the ancestral property as next reversioner, his brothers Gaya Din Singh and Pirthipal Singh being dead at that time. Raghubar Dayal Singh thus became the owner of a half share in the ancestral property. In addition he had acquired some other property. It is not disputed that the plaintiffs are the next reversioners of Raghubar Dayal Singh, and as such would be entitled to the whole of his property if no valid disposition of his property otherwise had been made by Raghubar Dayal Singh. It was on this basis that the suit was brought by the four sons of Gaya Din Singh, mutation having been effected on the death of Raghubar Dayal Singh in respect of a half share in the property in the names of the defendants Kalika Singh and Chhedi Singh. A copy of the order of the Assistant Collector in the mutation case is on the record. It shows that the case came before him on the basis of succession, and that the parties, namely the four plaintiffs on the one side and the two defendants on the other, were in possession in equal shares. Mutation was accordingly ordered on the basis of possession.

The defendant's case was that Raghubar Dayal Singh executed a will in 1928 providing that after his death the plaintiffs and the defendants should be owners in equal shares. Subsequently, on 17th October 1929, he executed a registered deed of gift to the same effect. The defendants obtained possession on the basis of this deed of gift, and therefore the plaintiffs were not entitled to any relief. A replication was filed by the plaintiffs to the effect that they had no knowledge about the execution of this deed of gift, and if any deed of gift were proved they did not accept it; it had not been acted upon and no right accrued to the defendants under it. During the proceedings of the case however, the plaintiffs' counsel admitted the genuineness of the deed of gift, EX. A-10, on which the defendants relied. The Munsif found that Raghubar Dayal Singh had executed the will as alleged in 1928, but the original will was not produced, only a copy, and the document had not been registered. The loss of the original was not proved and the copy could not therefore be admitted in evidence. Moreover, the Munsif thought that the deed of gift amounted to a revocation of the will. The Munsif found that under the deed of gift the plaintiffs and the defendants were each given a moiety in the property of Raghubar Dayal Singh, and they took possession accordingly during his lifetime. On this finding he dismissed the plaintiffs' suit.

In first appeal the civil Judge apparently accepted the finding that the will had not been proved, and thereafter considered certain arguments put forward with regard to the deed of gift. Unfortunately, he has referred in numerous places in his judgment to the will where apparently he intended to refer to the deed of gift. We take it however that he found that the will was invalid and that the deed of gift was valid. He agreed with the Munsif that the defendants were entitled to the property gifted to them by Raghubar Dayal Singh, but did not agree with him that Raghubar Dayal Singh had gifted his property to the parties in equal shares, that is, a half share to the four plaintiffs and the other half share to the two defendants. He observed that according to the deed of gift the donor gave his property to these six persons without indicating that he was giving a half share to the first four and the other half share to the other two. He could find no justification for the Munsif's construction that the donor was gifting his property per stirpes. In his opinion, in the absence of anything to the contrary, the gift must be taken to have been made per capita. He accordingly held that the plaintiffs were entitled to a two-third share and the defendants to a one-third share in the property gifted.

The civil Judge then considered a matter which had been brought to his notice namely that the deed of gift did not include all the property in dispute certain khatas being omitted. He thought however that these khatas were shamilat khatas the owenrship of which would go with the ownership of the parent khatas. There was however another khata No. 229 of Keshopur which was not a shamilat khata and which was not included in the deed of gift Consequently, the defendants were not entitled to possession of any portion of this khata, and the plaintiffs were entitled to a decree for possession of a half share in it, being already in possession of the other half. The civil Judge accordingly allowed the appeal of the plaintiffs in his Court, awarding them a decree for possession of a one-sixth share in respect of the entire property in dispute except as regards khata No. 229 of Keshopur in which they were given a decree for possession to the extent of a half share. The civil Judge did

not however express himself at all clearly, for he first said that he gave the plaintiffs a decree for possession of a one-sixth share in respect of the entire property in dispute, and added afterwards that he gave them a decree for possession to the extent of half share in khata No. 229. We have however no doubt that he intended to award a decree for possession of one-sixth share in the property in dispute excluding the property in Khata No. 229 of Keshopur in respect of which he awarded a decree for possession to the extent of a half share.

This second appeal has been preferred by the defendants Chhedi Singh and Kalika Singh. The grounds of appeal suggest that they rely rather on the will than on the deed of gift. The reason for this is clearly that under the will they were expressly entitled to a half share in the property, while the deed of gift, considered by itself, indicates rather that it was intended to give them only a third share. At the same time it was urged in one of the grounds of appeal that as the possession of the parties was in accordance with the deed of gift, the lower appellate Court was in error in holding that the gift must be taken to have been per capita. It was also contended by the appellants that S. 233K, Land Revenue Act, was applicable to the facts of the case, and that the plaintiffs should not have been awarded a half share in khata No. 229 of Keshopur. Cross-objections were filed by the respondents who contended that they should have been given a larger share in certain khatas which were not included in the deed of gift.

The principal question that arises for determination in this case is whether upon a construction of Ex. A-10, the deed of gift, the donor intended that the donees mentioned therein should take per stirpes as contended for on behalf of the defendants-appellants or per capita as contended for on behalf of the plaintiffs respondents. The learned Munsif accepted the contention of the defendants, while the learned civil Judge has accepted the contention of the plaintiffs. We have carefully considered the language of the deed of gift and we have no doubt whatever that the construction placed upon the deed by the lower appellate Court is perfectly justified and must be maintained. It is well settled that the cardinal rule of construction of deeds is to ascertain the intention of the donor as disclosed from the language used in the deed. It is also a well-understood rule of construction that such intention should be effectuated so far and as nearly as may be consistent with the law to which the donor was subject. It is clear from the circumstances that had the donor died without making any disposition of his property by a gift inter vivos, the plaintiffs alone would have been entitled to inherit his property to the exclusion of the defendants, inasmuch as under the Hindu law the plaintiffs, who are nephews of Raghubar Dayal, would come in in preference to the defendants who are the grandsons of another brother of Raghubar Dayal. It may be taken for granted that by executing the deed of gift and including the defendants therein as objects of his bounty in conjunction with the plaintiffs the donor wanted to avoid the exclusion of the defendants which would have inevitably resulted had he not chosen to make a gift. There is, however, no rational ground for thinking that the donor would wish to divide his property between the descendants of his two brothers per stirpes and not allow them to take a share equally. Under the Hindu law, persons of the same relationship to the deceased take per capita, that is, the estate of the deceased is divided into as many shares as the number of heirs, each heir taking one share, and the exception is confined only to two cases of sons, grandsons and great-grandsons of a deceased male Hindu on partition, and to sons' sons, daughters' sons, and daughters' daughters, succeeding to stridhan : *vide* Mulla's Hindu Law, p. 24, 1940 edition. Even if the defendants had been of the same relationship to the deceased as the plaintiffs, namely that if they had been also nephews instead of being grand-nephews, they would not have been entitled to take per stirpes under the Hindu law. There is, therefore, no good ground for holding, in the absence of any special indication in the deed of gift itself, that the donor intended the plaintiffs and the defendants to take per stirpes and not per capita. If the donor did really intend to divide the property per stirpes upon the parties, there was nothing to prevent him from expressing that intention in clear and unambiguous words. We are, therefore, of opinion that the contention advanced on behalf of the defendants-appellants has no substance and must be rejected. The learned Munsif on this part of the case observed:

> Further, it is clear from the sworn testimony of D. W. 1 that half of the property was gifted in favour of the plaintiffs and the other half was gif-

ted in favour of the defendants. Ex. A-4 which is the report of the Naib Tahsildar also shows that the plaintiffs and the defendants were in possession of half of the property of Raghubar Dayal Singh each during the lifetime of Raghubar Dayal Singh.

It has been urged on behalf of the defendants-appellants in this Court that the evidence of D. W. 1 and the conduct of the parties as evidenced by Ex. A-4 should be taken into consideration in interpreting the deed of gift. As regards the evidence of D. W. 1, we have no doubt whatever that that evidence is clearly excluded from consideration in view of the provisions of S. 92, Evidence Act. As regards the conduct of the parties, namely the possession of the property half and half by the plaintiffs and defendants during the lifetime of the donor, we are of opinion that as against the plain construction of the deed of gift which we have adopted, the so-called conduct, assuming that it were admissible to take it into consideration, affords no reliable or strong indication that such possession was in pursuance of the deed of gift or with the consent of the plaintiffs. Exhibit A-4 is the report of the Naib Tahsildar made to the Sub-Divisional Officer and Ex. 10 is the order of the Sub-Divisional Officer. It appears from both these documents that the application for mutation was made by the defendants upon the basis of succession and no claim was made on the basis of the deed of gift. The Naib Tahsildar reported that the parties were in possession of the property half and half and they were also the legal heirs of the deceased. The Sub-Divisional Officer agreeing with his report ordered mutation on the ground of possession. If the plaintiffs did not dispute the right of the defendants to a mutation of half the property in their favour on the ground that the deed of gift awarded the property to them half and half, it was scarcely necessary to go into the question of possession or legal heirship to the deceased. The very fact that evidence was recorded itself shows that the plaintiffs must have contested the right of the defendants to mutation of half of the property, although there are no other documents on the record to show what the position precisely was.

In this view of the matter, it is not necessary to consider whether the conduct of parties as shown by their possession of property half and half during the lifetime of the donor and after his death is admissible for the purpose of construing the deed of gift. We are nevertheless of opinion that where the language of the deed is clear and free from ambiguity, as in the present case, any consideration of the conduct of the parties with a view to ascertaining the intention of the grantor or the donor is beside the point. Reference may be made in this connexion to 34 Halsbury's Laws of England, p. 165, Para. 217, where it is stated that

> extrinsic evidence is not to be resorted to except for the purpose of proving a fact which makes intelligible something in the will which, without the aid of such evidence, would not be intelligible.

In the leading case in 27 I A 58,[1] it was laid down by their Lordships of the Judicial Committee that oral evidence of intention is inadmissible for the purpose either of construing the deeds or of proving the intention of the parties: *see* S. 92, Evidence Act, 1872. It was observed by Lord Davey:

> The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

These observations were made in an appeal from the Allahabad High Court and the question involved was whether the deed in question was a mortgage by conditional sale or an out and out sale with a condition of repurchase. This view was confirmed by their Lordships of the Privy Council in 44 I A 236.[2] In 61 I A 35[3] the question was whether in a mining lease executed by four shebaits of a family deity of the idol's interest in a village, one of them could alone maintain a suit against the lessee for a fourth share in the royalties reserved. Their Lordships answered the question in the negative. It was contended that the conduct of parties, after the lease was signed, in accordance with which each lessor for a time accepted separate payments of royalties, controls the stipulations in the lease, and vouches an agreement between parties to vary its terms. Their Lordships rejected the contention and observed:

> The facts do not support it. Nay, more: it sins against the familiar principle affirmed in *North Eastern Ry. Co.* v. *Hastings*,[4] that where the

1. (1900) 22 All 149 : 27 I A 58 : 7 Sar 601 (PC), Balkishen Das v. Legge.
2. ('17) 4 A I R 1917 P C 207 : 42 I C 642 : 45 Cal 320 : 44 I A 236 : 9 L B R 114 (PC), Maung Kyin v. Ma Shwe La.
3. ('34) 21 A I R 1934 P C 58 : 147 I C 884 : 61 Cal 313 : 61 I A 35 (PC), Baraboni Coal Concern, Ltd. v. Gokulananda Mohanta Thakur.
4. (1900) 1900 A C 260 : 69 L J Ch 516 : 82 L T 429 : 16 T L R 325.

words in a deed are clear, as they are in this case, the subsequent conduct of parties is an irrelevant consideration.

In a case decided by the Allahabad High Court in A I R 1935 ALL 729[5] it was held relying upon the authority of decisions in 27 I A 58[1] and 44 I A 236,[2] that so far as the interpretation of a document is concerned the subsequent conduct of the parties cannot be taken into account. It is not necessary to multiply authorities on the point. Reference has, however, been made on behalf of the defendants-appellants to 51 Cal 374=51 I A 1,[6] 38 I A 85,[7] A I R 1936 Nag 168[8] A I R 1938 Nag 434,[9] A I R 1932 Mad 689[10] and 1937 O W N 1084.[11] It was observed by their Lordships of the Privy Council in 51 Cal 374[6] at p. 382 that

the conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings,

but the question in the present case is whether the document is open to different meanings. In 38 I A 85[7] their Lordships held that under S. 92, Evidence Act, extrinsic evidence is admissible to show that a deed which was in form a deed of sale with a receipt for the consideration was in reality intended to operate as a deed of gift. In this case the Allahabad High Court had held that the defendants were precluded by S. 92 from giving such evidence, considering that it was evidence "to vary a deed the language of which is plain and unambiguous." Their Lordships merely observed that the decree appealed from could not be sustained and remitted the case to the High Court to be dealt with on the evidence.

The cases in A I R 1936 Nag 168,[8] A I R 1938 Nag 434[9] and A I R 1932 Mad 689[10] do not take us much further, as they merely lay down that where an ambiguous document is to be construed the Court is not confined to the narrow limits of its uncertain terms; it has to look wider and view the surrounding circumstances and gather the intention from the subsequent conduct and acts of the parties. In 1937 O W N 1084,[11] the question was whether the sale of certain land 'with external and internal rights' included the shamilat or village common land of which at the date of sale no division had been effected. Their Lordships held upon a construction of the language of the sale deed that the words "external and internal rights for ever" were quite appropriate to include a right in respect of the shamilat land and observed: "There could be no more emphatic words of divestiture." No doubt in the concluding portion of their judgment their Lordships expressed agreement with the view taken in 57 P R 1915[12] that the conduct of the vendor in quitting the village and showing no more interest in the property might be regarded as an important indication of the intention and they added:

In their Lordships' opinion regard may be had to such considerations in construing the unsophisticated conveyancing of which the deed before them is an example and to which it would be unreasonable to apply the rigid canons of interpretation appropriate to the finished products of Lincoln's Inn.

We are of opinion that the aforesaid observations must be read in the light of the facts and circumstances of the particular case decided by their Lordships. The above case, therefore, does not advance the case of the defendants-appellants at all. The ground of appeal taken by the appellants with regard to S. 233K, Land Revenue Act, was not pressed by their counsel. The position in regard to the property which was not expressly the subject of the deed of gift is not at all clear. The appellants argued in their seventh ground of appeal that a half share in khata No. 229 of Keshopur had been decreed arbitrarily to the respondents while the respondents claimed that they should have been given a larger share in the property in certain khatas which were not included in the deed of gift. Learned counsel were not able to throw much light on these points. Apparently, the mutation order related to the whole property of Raghubar Dayal, although the deed of gift did not expressly do so. Certain khatas are not referred to in the deed of gift, and the lower appellate Court, as already noted, thought that these were shamilat khatas which would go with the parent khatas which were included in the deed of gift. We do not, however, know what the parent khatas were,

5. ('35) 22 A I R 1935 All 729 : 156 I C 53, Mt. Dhanpatti v. Badri Singh.
6. ('24) 11 A I R 1924 P C 88: 80 I C 1031 : 51 Cal 374 : 5 Rang 175 : 51 I A 1 (P C), Ma Thaung v. Ma Than.
7. ('11) 33 All 340: 11 I C 398: 38 I A 85: 8 A L J 373 (P C), Hanif-un-nisa v. Faiz-un-nisa.
8. ('36) 23 A I R 1936 Nag 168: 164 I C 792: ILR (1936) Nag 60, Gangaram v. Mt. Kanchanbai.
9. ('38) 25 A I R 1938 Nag 434: 178 I C 293: ILR (1938) Nag 604, Narayan Sakharam v. Co-operative Central Bank, Malkapur.
10. ('32) 19 A I R 1932 Mad 689 : 137 I C 458, Appa v. Kachai Bayyan Kutti.
11. ('37) I L R (1937) Lah 662 : 31 S L R 646 : 169 I C 661 : 1937 O W N 1084 (P C), Aya Ram v. Rup Chand.
12. ('15) 2 A I R 1915 Lah 118 : 30 I C 100 : 57 P R 1915: 60 P L R 1916, Shahamad v. Ibrahim.

and counsel have not been able to say. We consider that in these circumstances the burden lay on the respondents to show that the mutation entry was wrong, and we are unable to find that they have succeeded in doing so. The position, however, with regard to khata No. 229 of Keshopur does seem to be different in that this khata is neither mentioned in the deed of gift nor is it a shamilat khata. It apparently stands by itself, and we are unable to see how the defendants-appellants could have obtained it by virtue of the deed of gift. We think, therefore, that so far as this khata is also concerned, the decree of the Civil Judge must be upheld. The result is that we maintain the decree of the lower appellate Court and dismiss the appeal and the cross-objections with costs.

K.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 374

BENNETT J.

Deputy Commissioner, Partabgarh, Manager, Court of Wards—Decree-holder — Appellant

v.

Mt. Shahzad Koer and another — Judgment-debtors — Respondents.

Execution of Decree Appeal No. 18 of 1938, Decided on 24th March 1941, against decree of Dist. Judge, Rae Bareli, D/- 23rd December 1937.

Oudh Rent Act (22 of 1886), S. 151 — Under S. 151 decree-holder must show that decree cannot be satisfied out of moveable property—But very little evidence is required to shift aforesaid burden—Decree-holder showing that there was reason to think that judgment-debtor had no moveable property and filing affidavit to that effect — Judgment-debtor must prove that he has moveable property — More than three years after decree judgment-debtor raising objection under S. 151 for first time—Objection vague and not supported by affidavit or offer to produce evidence to prove existence of moveable property — Objection held could not be allowed.

No doubt it is for the decree-holder to show in the first instance under S. 151 that satisfaction of the decree cannot be obtained against the moveable property, but very little evidence is required to shift the burden on to the judgment-debtor : Selected Decisions No. 12 of 1892, *Approved.* [P 375 C 2]

If the decree-holder shows that there is reason to think that the judgment-debtor had no moveable property, and files an affidavit to that effect it is for the judgment-debtor to prove that he has moveable property. The judgment-debtor however cannot be allowed to escape liability by putting forward for the first time more than three years after the decree an objection under S. 151 of a vague nature which is not supported either by an affidavit or by an offer to produce evidence of the existence of moveable property. [P 375 C 2 ; P 376 C 1, 2]

H. K. Ghosh — for Appellant.

Sri Ram for H. D. Chandra—for Respondents.

Judgment. — This is a second execution of decree appeal against the judgment and decree dated 23rd December 1937, of the learned District Judge of Rae Bareli dismissing an appeal against an order passed by an Assistant Collector of the first class of Partabgarh dated 20th July 1937. The history of the case dates back to 10th March 1932, when the Court of Wards, Dhingwas Estate obtained a decree for arrears of rent against Mt. Shahzad Kuar and Mt. Dilraj Kuar. Application for execution of this decree was made three times, namely in July 1932, in October 1933, and lastly on the 31st October 1934. The first application was for execution by rateable distribution and some amount was obtained. The second application was for attachment of immovable property and the judgment-debtors paid Rs. 40. The last application was for sale of the under-proprietary rights. A sum of about Rs. 333 was then due. An application was made by the judgment-debtors in January 1935, for appointment of a receiver and this application was dismissed.

22nd March 1935 was fixed for sale of the immovable property. On that date, however, an objection was preferred by the judgment-debtors. This was under S. 151, Oudh Rent Act. Under this section no process in execution of a decree for money shall issue against a judgment-debtor's immovable property, other than for attachment of that property, unless satisfaction of the decree cannot be obtained against his moveable property. It may be noted that there had been no previous suggestion by the judgment-debtors that they had any moveable property from which the decree might be satisfied. This objection was disallowed by the executing Court. The judgment-debtors appealed to the District Judge who dismissed their appeal. They then appealed to the Chief Court and this appeal was allowed. The judgment of the learned Judge of this Court who heard the appeal shows that it was first argued that the provisions of S. 152, Oudh Rent Act, were independent of the provisions of S. 151. This contention was not accepted. The learned Judge also held that the decree-holder was not entitled to sell the judgment-debtors' rights, that is, under-proprietary rights, without at least trying to obtain satisfaction of the decree against their moveable property, and that the Courts were not

justified in overruling the judgment-debtor's objection to that effect.

It was also argued that the principle of res judicata applied because the judgment-debtors had failed to put in an objection under S. 151, Oudh Rent Act prior to 22nd March 1935. It was held that the principle of res judicata would not apply in the absence of any order or decision of a Court on a point in issue. The question whether the decree-holder could proceed against the judgment-debtors' under-proprietary rights was never raised, much less decided. The case was accordingly sent back to the executing Court to proceed according to law. It appears from this order that the case was sent back to the executing Court to consider the objection of 22nd March 1935 on the merits. An affidavit was then filed by the decree-holder to the effect that the judgment-debtors had no moveable property. The order of the Assistant Collector dated 20th July 1937 shows that it was admitted by the Government Pleader in his Court that fresh process for the attachment of moveable property could not be legally issued. This was in view of the provisions of S. 145, Oudh Rent Act, more than three years having elapsed since the decree. The Government Pleader contended, however, that the immovable property under attachment could be sold if the decree-holder satisfied the Court that the judgment-debtors had no moveable property which could satisfy the decree. The Assistant Collector then referred to the provisions of S. 151 and observed that it appeared to be imperative that process for the attachment and sale of the moveable property should be issued in the first instance, the immovable property being liable to be sold only when the moveable property has not been able to satisfy the decree. Until process is issued for the attachment of moveable property and no such property has been obtained it could not be held with certainty that the judgment-debtors have no moveable property. There was no evidence before him to show that the judgment-debtors had not got enough moveable property to satisfy the decree. As it was too late to issue fresh process for the attachment of any moveable property, the application in execution was dismissed; that is, I understand, what the Assistant Collector meant when he said that the suit was dismissed.

The learned District Judge upheld this order, observing that it was the duty of the decree-holder to be on the look-out when he made his application for execution to see that the provisions of S. 151 were complied with. It was for the decree-holder to satisfy the Court that there was no moveable property with the judgment-debtors which could satisfy the decretal amount, and this could not be done unless the moveable property was brought to the notice of the Court and attached. The District Judge considered the argument that the condition laid down under S. 151 was satisfied by the production of the affidavit, but observed that the Assistant Collector had already taken this fact into consideration because he had said that there was no evidence to hold that the judgment-debtors had not got moveable property, and an affidavit by itself was not sufficient to prove the decree-holder's assertion.

It appears, therefore, that the principal question for consideration is whether the lower Courts rightly imposed the burden of showing that there was no moveable property from which the decree could be satisfied on the decree-holder, and in holding that this burden had not been discharged. Learned counsel for the respondents referred to a decision of the Board of Revenue, (Selected Decisions No. 12 of 1892[1]), in which it was held that before execution against immovable property can be had the decree-holder must either take out execution against both person and moveable property of the judgment-debtor or prove to the satisfaction of the Court that it would be useless to do so. It may be conceded that it is for the decree-holder to show in the first instance under S. 151 that satisfaction of the decree cannot be obtained against the moveable property, but in my opinion very little evidence is required to shift the burden on to the judgment-debtor. Under S. 101, Evidence Act, whoever desires any Court to give judgments as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist: and under S. 106 when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It cannot be doubted that whether a judgment-debtor has or has not moveable property from which a decree may be satisfied is a matter specially within his own knowledge, and if the decree-holder shows that there is reason to think that he has no such property, and files an affidavit to that

1. Selected Decisions No. 12 of 1892, Suraj Narain Singh v. Sheo Baran Pande.

effect, I consider that it is for the judgment-debtor to prove that he has such property. In the present case the judgment-debtors did not state in their application what property they had, nor did they ask for any enquiry to be made.

Learned Counsel for the respondents objected that the affidavit filed by the decree-holder was irregular since it had not been filed under O. 19, R. 1 or R. 2, Civil P. C. It appears to me, however, that it may be regarded as an affidavit filed to rebut the application made by the judgment-debtors on 22nd March 1935, the affidavit being required in view of the order passed by this Court on 17th July 1936. Under R. 2 of O. 19 the Court at the instance of either party may, upon an affidavit, order the attendance for cross-examination of the deponent. No application for examination of the decree-holder was made by the judgment-debtors, nor did they file any counter affidavit; nor had any affidavit been filed by them with their objection of 22nd March 1935. The circumstances of the earlier execution proceedings certainly suggest that the judgment-debtors had at that time no moveable property (apart from that from which partial satisfaction of the decree was obtained). In the two previous applications no suggestion had been made by the judgment-debtors that they could satisfy the decree from moveable property except to the small extent mentioned, and it may be argued that this raises a presumption that they possessed no such moveable property. It is also significant that they did not raise this objection until more than three years had elapsed since the passing of the decree. This and the way in which the objection was made suggest to my mind that actually they had no moveable property from which the decree might be satisfied, and that they were merely trying to take advantage of the fact that more than three years had elapsed. In my judgment the affidavit of the decree-holder considered with the previous history of the case was sufficient to shift the burden of proof from the decree-holder to the judgment-debtors, and therefore, the Courts below were not justified in holding that the application of the decree-holder for execution against the immovable property must fail because they had failed to prove that the judgment-debtors had not got moveable property.

I do not consider that the judgment-debtors should be allowed to escape liability by putting forward for the first time more than three years after the decree an objection under S. 151 of a vague nature which was not supported either by an affidavit or by an offer to produce evidence of the existence of moveable property. I accordingly allow this appeal, set aside the order of the lower Courts and direct that proceedings in execution against the immovable property shall now proceed on the application of 31st October 1934. The decree-holder is entitled to his costs in this Court and in the Courts below.

G.N./R.K. *Appeal allowed.*

(28) A. I. R. 1941 Oudh 376

BENNETT AND GHULAM HASAN JJ.

Firm Het Ram Padam Chand — Defendant — Appellant

v.

Firm Subhag Chand Rikhab Das and others, Plaintiffs and others, Defendants — Respondents.

Second Appeal No. 388 of 1937, Decided on 27th February 1941, against decree of District Judge, Lucknow, D/- 7th July 1937.

(a) Partnership Act (1932), S. 68—Firm registered—Persons shown to be members must be presumed to be actually members.

The registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it and in the absence of evidence to the contrary no further proof is necessary. The presumption is no doubt rebuttable. [P 378 C 1]

(b) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 7 and 2 (2), proviso 3 — Ss. 7 and 2 (2), proviso 3 are not inconsistent — Partners incurring loan—One partner agriculturist—Section 7 does not apply unless both are proved to be agriculturists — Onus held lay on partners.

There is no inconsistency between S. 2 (2), proviso 3 and the provisions of S. 7 because it is possible for one of the defendants in a suit for recovering an unsecured loan to be an agriculturist and for other defendants to be non-agriculturists if the latter had not joined with the former as principals in the loan transaction. Consequently, where the partners in a firm incur an unsecured loan and one of them is not an agriculturist, S. 7 cannot apply to suit to recover the loan. The onus in such a case is on the partners to prove that all of them are agriculturists. [P 378 C 2]

(c) Limitation Act (1908), S. 19 — Business letter — Name of partner in firm in heading is good signature.

The name of a partner of a firm in the heading of a business letter is a good signature for the purposes of S. 19 : *Case law relied on.* [P 380 C 1]

M. K. Seth — for Appellant.

H. D. Chandra — for Respondents 1 to 3.

Judgment.—This is a second civil appeal from the judgment and decree dated 7th July 1937 of the learned District Judge of

Lucknow, reversing in first appeal the judgment and decree dated 3rd November 1936, of the learned civil Judge of Mohanlalganj, Lucknow. The suit out of which the appeal arises was brought by the sons of Rikhab Das, proprietors of the firm Subhag Chand Rikhab Das, against the firm Het Ram Padam Chand represented by Mt. Phool Kuar, widow of Het Ram, Keshari Chand, son of Padam Chand, and Mt. Inder Kuar, widow of Padam Chand, to recover a sum of Rs. 3532-10-0, principal and interest on the basis of a bahikhata account.

The plaintiffs' case was that on 5th February 1931, one of the partners of this firm, namely Padam Chand, borrowed Rs. 2500 with interest at the rate of ten annas per cent. per mensem, agreeing to pay back the amount due to the plaintiffs at Lucknow. The plaintiffs are proprietors of the firm Subhag Chand Rikhab Das of Lucknow. The defendant firm were commission agents and grain merchants of Agra. It was said in the plaint that an accounting had taken place on 28th October 1932 when a sum of Rupees 2841-8-0 was found due from the defendants. The suit was alleged to be within limitation by reason of an acknowledgment made by Padam Chand on this date. Rikhab Das, proprietor of the plaintiff firm, died on 13th March 1934, Het Ram died in April 1934, and Padam Chand in December 1934. The suit was instituted on 1st October 1935.

Mt. Phool Kuar repudiated liability. She contended first of all that as she and her husband were agriculturists the suit should have been filed in the Agra Courts under S. 7, Agriculturists Relief Act. Secondly, she denied that Padam Chand was a partner of her husband Het Ram. She alleged that her husband had been on very friendly terms with Padam Chand's grandmother, and that being on this account well disposed towards Padam Chand himself he had allowed his shop to bear Padam Chand's name, although Padam Chand had no proprietary interest in it. It was further alleged by Mt. Phool Kuar that Padam Chand got possession of the papers of the business and murdered Het Ram. Padam Chand and his father Piarey Lal were prosecuted for the murder. Padam Chand died during the pendency of the case, while his father Piarey Lal was convicted. Mt. Phool Kuar also denied that her husband had any necessity to take any loan from Rikhab Das and alleged that any acknowledgment between Padam Chand and Rikhab Das was fictitious and collusive. Rikhab Das, it should be mentioned, was the father-in-law of Padam Chand.

The suit was not contested by the other defendants. The trial Court thought that the allegations of Mt. Phool Kuar were well founded. It held that no loan was taken from the plaintiffs by the firm as Padam Chand was not a partner; that it was not established that the firm was in existence at the time of the alleged acknowledgment by Padam Chand and therefore the suit was not within limitation; and that Het Ram and his widow were proved by certain khewats to be agriculturists. At the same time it held that the suit was rightly brought in the Lucknow Court if Padam Chand was held to be a partner of the firm as the contract for borrowing the money was entered into at Lucknow.

In first appeal the District Judge of Lucknow did not agree with the civil Judge about the non-existence of any partnership. He was of opinion that the certified copy of the registration of the firm was strong evidence of its existence. He also found that there was other evidence to show that the business was carried on both by Het Ram and by Padam Chand. He accepted the acknowledgment made by Padam Chand as an acknowledgment made by him on behalf of the firm. He did not think that the suit was barred by S. 7, Agriculturists' Relief Act, because there had been no allegation that Padam Chand was an agriculturist and if Padam Chand, not being an agriculturist, had joined with Het Ram in the loan, neither Het Ram nor his widow would be entitled to the benefits of the Act. The learned District Judge accordingly allowed the appeal against the decree of the civil Judge who had found that only the widow and the son of Padam Chand were liable. He passed a decree against defendant 1, Mt. Phool Kuar also. The learned counsel for the appellants has first of all referred to the allegation that Padam Chand had murdered Het Ram and that there had been illicit connexion between Het Ram and the grandmother of Padam Chand. There being no express finding on either point, we do not think that they affect the case. As the District Judge has observed, if on account of this alleged illicit connexion Het Ram was well disposed towards Padam Chand, it is just as likely that he would have actually made him his partner as that he would have allowed him to hold himself out as his partner. Learned counsel also referred to a finding in a previous case that no

partnership existed between Het Ram and Padam Chand, but it is conceded that this finding is not conclusive for the purpose of the present case.

It was strongly argued that the certificate of registration is of no evidentiary value because it is not proved that the application for registration bore Het Ram's signature. But we see no reason to reject the view taken by the District Judge on this point that the registration of a firm raises a presumption that the parties shown as members of the firm and registered as such are actually members of it. The presumption is no doubt rebuttable, but the appellant made no attempt to rebut it. If in fact Padam Chand was not Het Ram's partner, there might have been some indication of this in Het Ram's private accounts, but those accounts were not produced. Section 58, Partnership Act, provides that for the registration of a firm an application must be made to the Registrar in a certain form giving certain particulars, and the statement must be signed by all the partners, or their agents specially authorized in this behalf. Each person signing the statement must verify it in the manner prescribed. Section 59 provides that when the Registrar is satisfied that the provisions of S. 58 have been duly complied with, he shall record an entry of the statement in a register called the register of firms, and shall file the statement. Section 68 provides that a certified copy of an entry relating to a firm in the register of firms may be produced in proof of the fact of the registration of such firms, and of the contents of any statement, intimation or notice recorded or noted therein. We have given full consideration to the argument advanced by the learned counsel for the appellants that nevertheless it was necessary for the respondents to prove that the application for registration bore Het Ram's signature, but we are unable to accept it. In our opinion no further proof was necessary in the absence of any evidence to the contrary. It was also argued for the appellants that the respondents should have indicated in the pleadings that Het Ram's widow was not entitled to the benefit of S. 7, Agriculturists' Relief Act, because Padam Chand was not an agriculturist. They would then, it was submitted, have adduced evidence to prove that he was. All that the respondents did was to say that defendant 1 (Mt. Phool Kuar) was not an agriculturist, and that even if she was, the suit was not affected thereby. They did not indicate how it was not affected if she was an agriculturist. The answer to this argument is that the appellants could have obtained clarification of this plea from the respondents, if they considered it necessary and that in any case it was for them to establish that both the defendants were agriculturist if the plaintiffs did not admit that S. 7 was applicable.

We have considered the provisions of S. 7, Agriculturists' Relief Act. It is provided therein that every suit for recovering an unsecured loan in which the defendant, or where there are several defendants, any of the defendants, is an agriculturist, shall be instituted and tried in a Court within the local limits of whose jurisdiction the agriculturist defendant, or any of the agriculturist defendants, where there are more than one such defendants, actually and voluntarily resides. It might be thought, in view of this provision, that it would be sufficient to attract the operation of this section for one of several defendants to be an agriculturist. But it is provided in the third proviso of the definition of "agriculturist" in cl. (2) of S. 2 of the Act that if a non-agriculturist joins with an agriculturist in any transaction of loan, (save for the purpose of adding his name as security), the agriculturist shall not be considered as such for the purpose of that transaction. Consequently, it cannot be held that in the present case any of the defendants is an agriculturist for the purpose of S. 7, assuming that Padam Chand was not an agriculturist. There is no inconsistency between the proviso referred to and the provisions of Sec. 7, because it is possible for one of the defendants in a suit for recovering an unsecured loan to be an agriculturist and for other defendants to be non-agriculturists if the latter had not joined with the former as principals in the loan transaction. We are clearly of opinion that the onus lay on the appellants to prove that both Het Ram and Padam Chand were agriculturists, and that as they failed to do this, the appellants are not now entitled to a finding that the suit should have been brought in the Agra and not in the Lucknow Court.

We come now to a legal point which does not appear to have been put forward in the lower Courts, or indeed in this Court in the grounds of appeal. We have mentioned that according to the plaint limitation was saved by an acknowledgment made by Padam Chand on 28th October 1932. This acknowledgment was made in a letter Ex. 2. This

was denied by the appellants, but there was evidence to prove that this acknowledgment together with another acknowledgment, Ex. 1, and certain letters Exs. 14 and 15, had been written by Padam Chand, and it was held on this evidence that the acknowledgment in Ex. 2, had been proved. It is not disputed in this Court that Ex. 2 was written by Padam Chand, but it is argued that the acknowledgment is ineffective for the purpose of S. 19, Limitation Act, because it is not signed by Padam Chand. The material portions of Ex. 2 as translated read as follows:

Compliments of Het Ram Padam Chand of Agra to Shahji Saheb Sobhag Chand Ji Rikkab Das of Lucknow. We have copied out your account and are sending it to you. Please check it and enter it in debit and credit account. Payable to you Miti Katik Badi 7, 1988 Sambat . . . . 2640-9-0 interest at the rate of 10 annas up to Katik Badi 14,1989 Sambat . . . . 200-15-0 payable to you upto Katik Badi 14,1989 Sambat . . . . 2841-8-0.

The introductory words are repeated at the foot of the acknowledgment. Learned counsel for the appellants referred to certain authorities as showing that an acknowledgment is ineffective if not signed. In 15 Mad 380[1] where an acknowledgment had been made in a will it was held that the acknowledgment was ineffective for the purpose of S. 19, Limitation Act, because the will, although in the testator's handwriting, was not signed. In 34 ALL 464[2] certain acknowledgments in an account book were relied upon and it was said that they did not operate as an acknowledgment within the meaning of S. 19, Limitation Act, because the plaintiffs had failed to show that the accounts bore the signature of the defendants or their authorized agent. It does not appear whether it was proved in this case that the accounts were in the handwriting of the defendants or their authorized agent. In another Madras case, 41 Mad 446,[3] it was also held that the entries in the debtor's accounts could not be treated as an acknowledgment under S. 19 as they were not signed by the debtors.

Against this it is contended that it is customary in business circles in India to give the name of the firm only in such statements of accounts, and that this has been held by most of the High Courts to amount to signature for the purpose of S. 19. In 22 A L J 807[4] a Bench of the Allahabad High Court held that the name of a firm in the heading of a business letter is a good signature in law. Reference was made in this case to a previous decision of the Allahabad High Court, 1 ALL 683,[5] and to a decision of the Calcutta High Court, 6 Cal 340.[6] The Bombay High Court in 18 Bom 586[7] expressed a similar view where certain letters admitting a debt were written by the authority of the debtor, it being proved that this was the usual mode of signing and authenticating letters among the class to which the defendants belonged. In another Madras case, 43 I C 20[8] it was said that it is the custom and practice among Nattukottai Chetties not to sign their names at the foot of their letters but to begin them by saying that the letters are from such and such firm and that the name so written at the top is a sufficient 'signature' within the meaning of S. 19, Limitation Act. In 31 Cal 1043[9] money was lent on a hatchitta which bore at the head of it the name and signature of the debtor. Under an entry of certain date on the debit side written by the debtor himself and stating that a certain amount was due as interest on the principal sum, occurred the words "likhitan khod" or "writer self" also written by the debtor himself. It was held that this amounted to the signing of an acknowledgment within the meaning of S. 19, Limitation Act. Again in 5 Bom 89[10] it was held that an account was sufficiently signed where it was written by a debtor himself with his name at the top of the entry. Lastly the Rangoon High Court held in A I R 1935 Rang 160[11] that where an acknowledgment is written by a duly authorized agent it is sufficient for the purpose of S. 19 if he affixes thereto the name of his principal in any position, even by impressing it with a rubber stamp.

It will, therefore, appear that there is good authority for the view, which has

1. ('92) 15 Mad 380 : 2 M L J 42, Ramasami v. Muttusami.
2. ('12) 34 All 464 : 16 I C 146 : 10 A L J 1, Jaggi Lal v. Sri Ram.
3. ('18) 5 AIR 1918 Mad 238 : 44 I C 466 : 41 Mad 446 : 34 M L J 41, Palaniappa Chettiar v. Veerappa Chettiar.
4. ('24) 11 AIR 1924 All 855 : 80 I C 6 : 46 All 892 : 22 A L J 807, Uma Shankar v. Gobind Narain.
5. ('75-77) 1 All 683, Mathura Das v. Babu Lal.
6. ('81) 6 Cal 340 : 7 C L R 121, Mohesh Lal v. Busunt Kumaree.
7. ('94) 18 Bom 586, Gangadharrao Venkatesh v. Shidramapa Balapa Desai.
8. ('19) 6 A I R 1919 Mad 952 : 43 I C 20, Muthiah Chettiar v. Kuttayan Chetty.
9. ('04) 31 Cal 1043 : 9 C W N 83, Sadasook Agarwalla v. Baikanta Nath.
10. ('80) 5 Bom 89, Jekison Bapuji v. Bhowsar Bhoga Jetha.
11. ('35) 22 A I R 1935 Rang 160 : 156 I C 589 : 13 Rang 322, Vellayappa Chettyar v. Somasundaram Chettyar.

been pressed upon us by the learned counsel for the plaintiffs that the acknowledgment Ex. 2 written by Padam Chand, a partner in the firm Het Ram Padam Chand, constituted a valid acknowledgment for the purposes of S. 19, though it was not signed by him, and we accept it as such. There was some suggestion that even though there might have previously been a partnership between Het Ram and Padam Chand, that partnership had ceased to exist before the acknowledgment in question. The acknowment was made, however, some time before the registration of the firm of Het Ram Padam Chand on 30th September 1933, and in our opinion for the reasons which we have given it is proved that the partnership was in existence on that date. Finally the learned counsel for the appellants pointed out that the respondents asked in the plaint that a decree might be passed against the defendant firm, while no such decree has been passed either by the trial Court or by the lower appellate Court. The trial Court passed a personal decree against Padam Chand's widow and son, while the lower appellate Court added Mt. Phool Kuar as a judgment-debtor in the same terms. Learned counsel for the respondents concedes that they are entitled to proceed against the three defendants to the extent only of the assets of the firm and that the decree should, therefore, be against them only to this extent and not against them personally. We direct accordingly that the decree awarded against the three defendants be amended so as to operate against them in respect of the assets of the firm and not against them personally. In other respects the appeal is dismissed. We allow the respondents their costs in this appeal.

G.N./R.K. *Order accordingly.*

(28) A. I. R. 1941 Oudh 380

YORKE AND AGARWAL JJ.

Kirat Singh — Appellant

v.

Ram Saran and others — Respondents.

First Appeal No. 121 of 1937, Decided on 1st April 1941, from judgment of Special Judge, First Grade, Bara Banki, D/- 25th September 1937.

(a) Transfer of Property Act (1882), S. 77— Possessory mortgage — Certain amount calculated as profits which would accrue to mortgagee — Mortgagor undertaking to make up deficiency in profits at time of redemption — Mortgagor's undertaking held covered case of remissions — Deed though not "accountive" mortgagee held entitled to deficiencies in profits.

Under the possessory mortgage deed a certain sum of money was calculated as the amount of profits which would accrue annually to the mortgagee and it was provided that if the amount of profits fell short this would have to be made good by the debtor mortgagor at the time of redemption. The mortgagor contended that no rate of interest was fixed and therefore there could be no accounting and the provisions of S. 77 were applicable :

Held that the mortgagor's undertaking to make up deficiency in profits was wide enough to cover the case of remissions and although the deed was not "accountive" the mortgagee was entitled to recover the deficiencies in profits under the terms of the mortgage : ('25) 12 A I R 1925 Oudh 114; ('33) 20 A I R 1933 P C 136 and ('34) 21 A I R 1934 Oudh 220, *Rel. on.* [P 382 C 1; P 383 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), Ss. 4 and 14 (7)—Mortgage—Application under S. 4—Proceedings under Act ripening into decree under S. 14 (7) are for determining amount due from landlord and also for redemption of mortgaged property — Possessory mortgage — Certain amount calculated as annual profits — Mortgagor undertaking to make up deficiencies at time of redemption — Mortgagee creditor is entitled to have deficiencies determined and included in simple money decree under S. 14 (7).

In the case of a mortgage proceedings, under the Act ripening into a decree under S. 14 (7) besides being proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under S. 4 are also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the Act the debtor applicant institutes proceedings for redemption of all his mortgaged properties. [P 381 C 2; P 382 C 1]

Consequently, where in the case of a possessory mortgage a certain amount is calculated as annual profits to be appropriated by the mortgagee towards interest and the mortgagor undertakes to make up the deficiencies in profits at the time of redemption the mortgagee is entitled to have the deficiencies determined and included in the simple money decree passed under S. 14 (7). [P 382 C 1]

(c) Transfer of Property Act (1882), S. 76— Possessory mortgage—No provision for collection charges—Mortgagee not liable to account —Collection charges cannot be allowed.

In the case of a possessory mortgage collection charges may properly be added where the mortgagee is held liable to accounting under S. 76. Where however the mortgagee in possession is not liable to account to the mortgagor the mortgagee is not entitled to collection charges in the absence of a provision to that effect in the mortgage deed: ('34) 21 A I R 1934 Oudh 104 and ('35) 22 A I R 1935 P C 49, *Disting.* [P 383 C 2]

Akhtar Husain — for Appellant.

Ali Zaheer — for Respondents 1 to 4.

Judgment.—These are two first appeals from the judgment of the Special Judge, first grade, Bara Banki, in two claim cases under S. 14, Encumbered Estates Act, founded on the same document, Ex. 1, a possessory mortgage for Rs. 37,800 executed by

Kirat Singh applicant debtor on 27th January 1930. This document was executed by the debtor in favour of a number of persons in shares, Lala Dharam Das half, Ram Saran and Gur Saran a quarter and Avadh Behari a quarter. Dharam Das died in 1932 and his representatives were Mt. Shyama Kuer and Rameshwar. Kirat Singh filed an application under the Encumbered Estates Act in 1935 and separate claim cases were instituted one by Rameshwar Prasad relating to one-fourth share in this mortgage and the other by the remaining sharers of three-fourth, Ram Saran, Gur Saran, Avadh Behari and Mt. Shyama Kuer. Exactly the same questions arose in both cases on account of the terms of the mortgage deed, Ex. 1. The creditors claimed that under the deed a certain sum of money was calculated as the amount of profits which would accrue annually to the creditors, and there was a provision that if the amount of profits fell short (obviously that is for a reason not due to any default on the part of the possessory mortgagees), this would have to be made good by the debtor mortgagor. On the other hand, the mortgagor applicant contended that no rate of interest was fixed and therefore there could be no accounting and the provisions of S. 77, T. P. Act, were applicable. The learned Special Judge framed two issues only.

1. Are the plaintiffs (claimants) entitled to claim in respect of arrears of rent and on account of remissions ? If so, what amount ?

2. To what amount are the plaintiffs (claimants) entitled against the defendant-applicant ?

On issue 1 the learned Special Judge after a careful consideration of the terms of the mortgage deed, Ex. 1, came to the conclusion that although the deed was not ordinarily "accountive" vide para. 2 which provides that after the payment of Government revenue Rs. 1010, odd annually the mortgagees may continue to take the entire income in lieu of interest on the mortgage money, yet the debtor was liable to make good, by a species of accounting, any deficiency in the profits. On the other hand he rejected the claim for arrears of rent of three years holding that, as the property was not going to be redeemed, that is, it was not going immediately out of the hands of the mortgagees, they had their own remedy by taking proceedings to realise those arrears of rent. The first and main contention put forward on behalf of the appellant debtor is that the creditors were under the terms of the deed only entitled to realise any such deficiencies in the amount of profits at the time of redemption, and it is contended that the application under the Encumbered Estates Act by the debtor and the present proceedings in the claim cases of the creditors do not come within the scope of redemption proceedings. On the other hand it is certainly to be borne in mind that in certain respects the provisions of the Encumbered Estates Act override the ordinary provisions of the law. No doubt an application under the Encumbered Estates Act is not itself an application for the redemption of a mortgage but the result of an application under the Encumbered Estates Act is that the creditors have to file their claims under Ss. 9 and 10 of the Act and the Special Judge has to examine those claims and determine the amount, if any, due from the landlord debtor to the claimant creditor on the date of the application under S. 4. He has further under sub-cl. (7) of S. 14 to pass a simple money decree for such amount together with any costs which he may allow, etc., etc. The effect of these proceedings is laid down in S. 18 of the Act which provides that :

> Subject to the right of appeal or revision, the effect of a decree of the Special Judge under sub-s. (7) of S. 14 shall be to extinguish the previously existing rights, if any, of the claimant, together with all rights, if any, of mortgage or lien by which the same are secured and, where any decree is given by the Special Judge, to substitute for those rights a right to recover the amount of the decree in the manner and to the extent hereinafter prescribed.

A further consequence of such a decree and the sending of such a decree to the Collector is set out in S. 35 which provides that if at any time after the decrees granted by the Special Judge have been sent to the Collector under the provisions of S. 19 any person entitled to possession of any property under the provisions of this Act applies to the Collector to be put in possession of such property, the Collector shall deliver possession of such property to him.

As has been held in more than one case, among the persons entitled to possession after the transmission of the decree by the Special Judge to the Collector is included the applicant who becomes entitled to possession as against the mortgagee because the mortgagee rights come to an end the moment a decree under S. 14 (7) is passed. By analogy therefore proceedings under the Encumbered Estates Act ripening into a decree under S. 14 (7) are at the same time proceedings for the determination of the amount due from the landlord to the claimant on the date of the application under S. 4 and also proceedings for redemption of the mortgaged property. In effect by merely filing his application under the

Encumbered Estates Act the debtor applicant has instituted proceedings for redemption of all his mortgaged properties. In the light of these considerations, the arguments based on the wording of Para. 4 of Ex. 1 which makes such deficiencies as have been referred to earlier payable "at the time of redemption" have no force. That paragraph provides as follows :

If the present gross rental, which comes to Rs. 3412-4-0 and which stands entered in the patwari's papers of 1337 fasli, be reduced (*us se kam pare*, that is be reduced below that amount or come to be less than that amount) or be proved to be wrong, then I, the executant, shall be liable for the payment thereof and shall pay the same with interest at the rate of 1 per cent. per mensem at the time of redemption.

It appears to us to be quite clear that if any amount is payable to the creditors under this provision of the mortgage deed then that amount is to be determined and included in the simple money decree passed by the Special Judge under S. 14 (7), Encumbered Estates Act. Learned counsel for the appellant has argued that this paragraph cannot be interpreted so as to cover remissions of rent which under the orders of the Government amounted to eight annas in the rupee in 1338 fasli and seven annas in the rupee in subsequent years. He does not contend that it will not cover the erroneous statement of the recorded amount of profits contained in the paragraph. The actual gross rental entered in the patwari's papers for 1337 fasli was Rs. 3401-9-0 and it is not disputed that the difference between the higher and the lower of these two sums must be made good by the mortgagor. On the other hand it is contended that the provision in this paragraph is not wide enough to cover the case of remissions. We are unable to accept this contention. We are quite clear that by this paragraph the intention was to secure that the mortgagees would get a fixed annual profit of Rs. 3412-4-0 less the amount of Rs. 1010-15-8 which had to be paid as Government revenue. By the remissions the amount of the annual profits was reduced and there was a large deficit in the payment of interest. Under the terms of this paragraph, the appellant was clearly liable to make good the deficiency. Learned counsel has attempted to base an argument on S. 77, T. P. Act. Section 76, T. P. Act, provides in regard to the liabilities of a mortgagee in possession and lays down under Cl. (g) that

the mortgagee must keep clear, full and accurate accounts of all sums received and spent by him as mortgagee, and, at any time during the continuance of the mortgage give the mortgagor, at his request and cost, true copies of such accounts and of the vouchers by which they are supported.

Section 77 on the other hand provides that :

Nothing in S. 76, Cls. (b), (d), (g) and (h) applies to cases where there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money, or in lieu of such interest and defined portions of the principal.

The argument on behalf of the appellant seeks to read these two sections as leading to the conclusion that if under the terms of the mortgage there is to be no accounting on the part of the mortgagee, there can be no claim on the part of the mortgagee for such amounts as are referred to in para. 4 of the present deed, that is, he puts forward the argument that if by virtue of the terms of a mortgage deed the deed is not "accountive," to adopt the phrase used by the learned Special Judge, then there can be no accounting on either side. We do not think that the terms of Ss. 76 and 77, T. P. Act, lead to any such conclusion. Reference was made to several cases, but most of these are really in favour of the respondents and not of the appellant. In 28 O C 100[1] there were provisions in the preamble of the deed to the effect that neither the mortgagee should have any claim to interest against the mortgagor nor the mortgagor any for profits against the mortgagee and his heirs. On the other hand there were certain other terms under which (1) the mortgagor was to pay Rs. 109 annually to the mortgagee in addition to all the profits, (2) if the mortgagee had to advance takavi to the tenants, he could recover the amount at the time of redemption with interest at a specified rate, (3) if the profits of the mortgagee were decreased owing to increase of revenue, cesses and rates (the same provision is present in the deed Ex. 1 in the present case), then the mortgagee might demand the deficiency from the mortgagor every year, and if it was not made good, it would be payable at the time of redemption with interest at a specified rate. It was held that S. 77 and not S. 76, T. P. Act, was applicable to the case and that the mortgagee was not liable to render accounts. The conditions following the preamble, (that is the terms quoted above), it was held, merely set forth the various additional liabilities of the mortgagor, that is to say it is not inconsistent with the provisions of S. 77 that the mort-

1. ('25) 12 A I R 1925 Oudh 114 : 82 I C 406 : 28 O C 100, Sitla Sahai v. Shambhu Singh.

gagor should have imposed upon himself additional liabilities such as those which are stated in Paras. 4 and 6 of Ex. 1.

The decision of their Lordships of the Privy Council in 10 O W N 299[2] embodies the same principle although there were certain undertakings by the mortgagors in the nature of personal covenants both to pay the amount of the decrease of the profits and the like. Their Lordships agreed with the view of the two Courts in India that the mortgage deed was a contract within the meaning of S. 77, T. P. Act, 1882. They enforced the covenant entered into by the mortgagors but did not hold the mortgagees liable to accounting. Similarly, there is really nothing in 11 O W N 524[3] which leads to any different conclusion. That was a case in which in a mortgage deed the rate of interest was mentioned but none the less it was held that it did not follow that the parties intended that there was to be accounting. It was remarked that a question of this description is to be decided with reference to the terms of each deed. It seems to us clear that in the present case the creditors were not liable for any accounting to the mortgagors but the mortgagors contracted to make good to the mortgagees certain possible deficiencies. There is no force therefore in the contention that the debtor could not be made liable for the possible deficiencies and losses to the mortgagee indicated in paras. 4 and 6 of the deed because the mortgagee was not liable under the terms of the deed to account to the mortgagor. The only other point to which a reference has been made in these appeals is the remark at the end of the judgment immediately preceding the operative order where the Judge remarks:

In the statement hereto annexed collection charges are added to the extent of 10 per cent. of the collections. This the mortgagee is entitled to get in view of the rulings reported in 11 O W N 387[4] at p. 390 and 1935 O W N 261.[5]

It is not disputed on behalf of the respondents that collection charges should not have been added. The cases referred to by the learned Special Judge are cases of mesne profits. In such cases collection charges are allowable as they are in ordinary suits for profits under the provisions of the Land Revenue Act, and it may well be that collection charges may properly be added where the mortgagee is held liable to accounting under S. 76, T. P. Act. In the present case, however, the rights of the parties are fully set out in the mortgage deed, and that deed makes no provision for collection charges. With reference to these collection charges and in consequence in respect of the interest allowed on those collection charges therefore the present appeals must succeed. The effect of this modification is that the amount to be decreed to Ram Saran, Gur Saran and Avadh Behari will be reduced from Rupees 20,225-10-1½ to Rs. 19,436-7-1½. The amount decreed in the case of Mt. Shyama Kuer will be reduced to Rs. 13,194-9-11¼, while the decree in favour of Rameshwar Prasad will be for the same amount as that in the case of Mt. Shyama Kuer. Subject to this modification of the amounts decreed we dismiss the appeals and direct that the parties shall pay and receive costs in proportion to their success and failure.

G.N./R.K. *Order accordingly.*

2. ('33) 20 A I R 1933 P C 136 : 144 I C 1025 : 10 O W N 299 (P C), Bachchu Lal v. Mohammad Mah Chaudhri.
3. ('34) 21 AIR 1934 Oudh 220 : 148 I C 903 : 10 Luck 70 : 11 O W N 524, Mahmood Ali Khan v. v. Ali Mirza Khan.
4. ('34) 21 AIR 1934 Oudh 104 : 148 I C 880 : 9 Luck 456 : 11 O W N 387, Kazim Hussain v. Debi Dayal.
5. ('35) 22 AIR 1935 P C 49 : 154 I C 1 : 62 I A 53 : 62 Cal 499 : 1935 O W N 261 (P C), Secy. of State v. Saroj Kumar Acharjya.

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(28) A. I. R. 1941 Oudh 383

BENNETT J.

Sukhpal Dass — Applicant

v.

Kedarnath and others — Plaintiffs — Opposite Party.

Application No. 28 of 1939, Decided on 16th April 1941, from order of Civil Judge, Sitapur, D/- 3rd February 1939.

(a) Civil P. C. (1908), S. 151 — Remedy provided by Code—S. 151 cannot be invoked—Suit for partition of undivided share in revenue paying villages — Preliminary decree declaring plaintiff's share passed—No further action taken — Plaintiff cannot invoke S. 151 to have proclamation made in suit villages that he was entitled to share declared by preliminary decree since remedy by way of final partition decree is open.

No ground for action under S. 151 arises where a remedy is provided by the Code itself. Consequently where the plaintiff obtains a preliminary decree in a partition suit declaring his share in the undivided revenue paying villages in suit and takes no further action in the matter it is not open to him to invoke S. 151 to have a proclamation made in the suit villages to the effect that he was entitled to the share declared by the preliminary decree in as much as the remedy by way of a final partition decree is provided by the Code and also because a preliminary partition decree is of a declaratory nature and it is implicit in it that further proceed-

ings are required to complete the partition.
[P 384 C 2 ; P 385 C 1]

(b) Civil P. C. (1908), O. 20, R. 19 — Suit for partition of undivided share in revenue paying and other property—Preliminary decree decreeing suit for possession of plaintiff's share in certain properties — Form of decree held not proper—Decree held should have provided for further action by revenue authorities in respect of revenue paying property and further directions in respect of other property.

In a suit for partition of certain revenue paying and other properties according to the preliminary decree headed "preliminary decree in partition suit" the plaintiff's suit was decreed for possession of his share in certain properties :

Held that the decree should not have been prepared in the above mentioned form and that it should have made provision for further action to be taken by the revenue authorities in so far as the revenue paying land was concerned and should have given further directions in respect of the other property. [P 385 C 1]

S. N. Srivastava — for Applicant.

Beni Madho Mehrotra—for Opposite Party No. 1.

Order.— This application under Ss. 115 and 151, Civil P. C. arises from an order passed by the learned Civil Judge of Sitapur on 3rd February 1939, on an application by one Kedar Nath who had obtained a preliminary decree for partition. Kedar Nath was the son of one Debi Dayal. Debi Dayal had five brothers, one of whom died without issue. Kedar Nath sued after the death of his father Debi Dayal for partition of his share of the joint family property, this share amounting to one-fifth. A preliminary decree for a one-fifth share was passed by the Subordinate Judge of Sitapur on 30th November 1935 and this decree was upheld by a Bench of this Court in appeal on 22nd February 1938. No further action was taken by Kedar Nath on the preliminary decree apart from an application made by him under S. 151, Civil P. C. This was an application that proclamation might be made at his expense in the two villages in which he had been given a share. He asked that it might be proclaimed in these villages that he had obtained a decree for a fifth share in those villages. This application was allowed by the learned Civil Judge.

It is contended in the present application in revision that the order of the Civil Judge was not warranted by any provision of law and that S. 151, Civil P. C., should not have been invoked. The decree passed was of a declaratory nature and, therefore, it is submitted, the issue of a proclamation which is in the nature of an execution proceeding is irregular and without jurisdiction. It has been contended on the other side that Kedar Nath was entitled, if he so wished, not to proceed further with his preliminary decree. It was not obligatory on him, it is urged, to obtain a final decree partitioning the property. It had been declared that he was entitled to a one-fifth share and it was open to him, therefore, to require the tenants to pay him this share. And if this course was open to him it was also open to him to ask the Court to make a proclamation to this effect in the villages concerned. Learned counsel also contended that the provisions of S. 151 were applicable to such a case because there is no specific provision in the Code of Civil Procedure which provides for this contingency, and S. 151 empowers the Court to pass such orders as may be required where a remedy is necessary for the ends of justice.

Learned counsel conceded that he could not support this contention by any authority. He explained that his client did not wish to proceed further with the actual partition of the property as he could not find the requisite funds, but he could not explain why his client could not obtain funds by disposing of a portion of the share in respect of which he had obtained a preliminary decree. In my opinion, the order of the Court below cannot be supported. No ground for action under S. 151 arises where a remedy is provided by the Code itself, in this case a final partition decree. Under S. 54 where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of a share of such an estate the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf. Further under R. 18 of O. 20 it is provided that

> Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,
> (1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, ...
> (2) if and in so far as such decree relates to any other immovable property or to moveable property, the Court may, if the partition or separation cannot be conveniently made without further enquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

The property in the present case comes partly under cl. (1) and partly under cl. (2), but learned counsel for the opposite party

admits that the property in respect of which a proclamation is desired is revenue paying property to which the provisions of cl. (1) are applicable. The decree awarded by the Subordinate Judge is headed "preliminary decree in partition suit," but it has not been drawn up according to the provisions of R. 18 of O. 20. According to the decree the plaintiff's suit is decreed for possession of his fifth share in certain properties. His learned counsel conceded that the decree should not have been prepared in this form and that it should have made provision for further action to be taken by the revenue authorities in so far as the revenue paying land is concerned, and have given further directions in respect of the other property. Learned counsel for the opposite party conceded that the procedure adopted by his client was of a novel character for which he could find no precedent. I am clearly of opinion that S. 151 should not have been applied in such case and that the opposite party was not entitled to ask the Court to direct the making of a proclamation on his obtaining a preliminary decree in the partition suit. A preliminary partition decree is of a declaratory nature and it is implicit in it that further proceedings are required to complete the partition. In my view it is not open to a party to stop at this stage and ask the Court to assist him in some other manner to obtain the share to which it has been held he is entitled. There is no provision of law which would warrant such procedure and the proper procedure is provided in the Civil Procedure Code. I hold therefore that the Court below had no jurisdiction to pass this order. I accordingly allow this application with costs, set aside the order passed by the civil Judge and dismiss the opposite party's application.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Oudh 385

GHULAM HASAN J.

Raghubar and others — Accused Appellants

v.

Emperor.

Criminal Appeal No. 12 of 1941, Decided on 7th March 1941, against order of Assistant Sessions Judge, Sitapur, D/- 11th December 1940.

Penal Code (1860), Ss. 332, 323, 147 and 149 — Words "in discharge of his duty as such public servant" in S. 332—Meaning explained—Constable charged with duty of serving notices on witnesses in certain villages in case under S. 399, in which *J* was suspected by police whose attempts to arrest him had failed — Near one of villages while on his duty of serving notices constable seeing *J* in grove showing determination to arrest him — Before constable could do so accused persons emerging from grove and overpowering constable — Constable not possessed with warrant of arrest nor entrusted with duty of arresting *J*—Accused held guilty under Ss. 147, 323 and 149, but not under S. 332 —S. 54, Criminal P. C. held not applicable.

The words "in the discharge of his duty as such public servant" in the earlier portion of S. 332 mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office. [P 387 C 1]

A constable was charged with the duty of serving notices on witnesses in certain villages in a case under S. 399, in which *J* was suspected and wanted by the police whose attempts to arrest him had failed. While passing near one of the villages on his duty of serving notices the constable saw *J* in a grove and at once showed his determination to arrest *J*, but before he could do so he was assaulted and overpowered by the accused persons. The constable had no warrant of arrest in his possession at the time of the assault nor had he been entrusted with the duty of arresting *J* at the time when the assault was made upon him.

Held that the conviction of the accused under S. 332 could not be sustained and the accused were guilty under Ss. 147, 323 and 149 : 18 All 246, *Rel. on*; 6 I C 12, *Disting.* [P 388 C 1]

Held further that on the facts of the case S. 54, Criminal P. C., had no application especially because it could not be said that the constable acted suo motu in exercise of his powers under S. 54 : ('32) 19 AIR 1932 Pat 171, *Rel. on.* [P 387 C 2]

S. D. Misra and H. N. Misra — for Appellants and Appellants 2 to 6 respectively.

Assistant Government Advocate—for the Crown.

Judgment. — Angne, Sumer, Jangali, Kunwar and Maiku, pasis of village Chaturaia, police station Mahsoi, District Sitapur, have been convicted by the Assistant Sessions Judge of Sitapur under S. 147, Penal Code, and sentenced to one year's rigorous imprisonment. They have also been convicted under S. 332 read with S. 149, Penal Code, for assaulting and causing hurt to Basdeo Lal, a constable of thana Mahsoi, and sentenced to two years' rigorous imprisonment; both sentences to run concurrently. Raghubar Pasi of the same village, who was tried along with the other appellants, and also found guilty under S. 147 and sentenced to one year's rigorous imprisonment was found guilty under S. 332, Penal Code, as well and since he is a registered member of criminal tribes and had certain convictions he was sentenced to seven years' rigorous imprisonment under Sec. 23, Criminal Tribes Act, both sentences to run concurrently.

According to the prosecution it appears that Jangali accused was suspected of an

offence under S. 399 of the Penal Code, and was wanted by the police. Two attempts were made by the Mahsoi police to effect his arrest, one on 23rd June 1940, and the other on 30th June 1940, but they were unsuccessful. On the latter date Basdeo constable, in whose beat village Chaturaia lies was deputed to execute the warrant against Jangali but was unsuccessful. Certain identification proceedings were to be held in connection with the same case under S. 399, Penal Code, on 12th July 1940. Basdeo constable was deputed on 10th July 1940, to effect service on seven witnesses of that case. Out of the seven witnesses to be served two of them, namely Ganga Sahai lived in Bilahri and Bhagwan Din lived in village Tatraia while the remaining five lived in village Chaturaia. After leaving the police station the same day, namely on 10th July 1940, Basdeo constable proceeded to village Rampur and took Gobre, brother of the chaukidar, along with him — the chaukidar being absent—to village Bilahri and served Ganga Sahai. From there he took one Nakkhar and proceeded to village Tatraia in order to effect service on Bhagwan Din but could not find him. Thereupon, he proceeded to village Chaturaia where he effected service on five persons already mentioned. Basdeo constable proceeded back to Tatraia along with the two persons, Nakkhar and Gobre, in order to make another attempt to effect service on Bhagwan Din. While the party was returning to village Chaturaia and reached near the grove of Laltu Chamar, situate near village Tatraia, at about sunset the six appellants emerged from the grove and started belabouring the constable with lathis. The constable fell down and when a few persons from the neighbouring fields rushed upon hearing the cries, the six appellants fled away. After the assault the constable was removed to village Tatraia where he effected service on Bhagwan Din and then proceeded to village Ramshala in a cart and ultimately reached police station Mahsoi in the morning. He made the first information report (Ex. 1) and deposited his turban, kullah and shirt at the police station. The constable was examined by the Civil Surgeon on 12th July 1940. The constable had received ten injuries on various parts of his body and, in the opinion of the Civil Surgeon, they had been caused by a blunt weapon like a lathi. The injuries were of a simple character.

The accused denied the charge. The learned Assistant Sessions Judge relying upon the prosecution evidence found that all the six accused had used force in prosecution of the common object of assaulting the constable and were guilty of rioting under S. 147, Penal Code, and S. 332/149 Penal Code. The accused set up the plea of self-defence and produced some evidence in support of it but this was rightly rejected by the learned Assistant Sessions Judge.

The first question that falls to be determined is whether the prosecution has succeeded in establishing the offence under S. 332, Penal Code, against the accused. Basdeo constable (P. W. 1) admits in his evidence that if the accused had not beaten him, he would have arrested Jangali accused as he was wanted in the S. 399 case. P. W. 1 further states that when he reached the grove on seeing Jangali he asked his companions to come quietly with him as he would arrest Jangali. P. W. 2, Gobre, his companion, states that

> when we reached near the grove, we saw Jangali in the grove. The constable told me that he would arrest Jangali. Constable had a danda and we two were armed with lathis.

P. W. 3, Nakkhar, another companion, also states: "We saw Jangali and other accused coming out. The constable told us to arrest Jangali accused." Similarly P. W. 10 Mata Din states that Basdeo told him that he had come to arrest Jangali and to effect service on witnesses. A reference to the evidence of Abdul Hamid Khan, constable, (P. W. 8), shows that Basdeo constable was merely asked to effect service of bonds on witnesses and he was not given any warrant for arrest nor was he directed to effect any arrest. The above evidence in my opinion is sufficient to show that as soon as Basdeo saw Jangali in the grove, he at once showed a determination to arrest Jangali accused but before he could do so he was evidently overpowered by the appellants. The learned Assistant Sessions Judge has not referred to this portion of the prosecution evidence in the judgment. He however states that :

> It is in the evidence of the constable that at the time of assault the accused persons were saying that they would beat him in a way so as to make him incapable of doing pairvi in S. 399 case. Under these circumstances it is reasonable to infer that the six accused assaulted the constable with the intention that he may be deterred from performing his duty as a public servant. In my opinion all the ingredients of S. 332, Penal Code, have been established.

This important fact however does not find a place in the first information report, which was given by the constable himself. Having considered the evidence carefully,

I am satisfied that the prosecution has failed to establish the necessary ingredients of the offence under S. 332, Penal Code. Section 332, Penal Code, requires that the public servant must be acting in the discharge of his duty as such public servant at the time of the assault. To my mind it is quite clear from the evidence that Basdeo cannot be said to have been acting in the discharge of his duty if he intended or wanted to arrest Jangali when he was beaten. The constable had no warrant of arrest in his possession at the time of the assault, nor had he been entrusted with the duty of arresting Jangali at the time when the assault was made upon him. As a matter of fact he had been charged with the duty of serving notices on the witnesses in the various villages mentioned above. In order to bring the case within the purview of S. 332 it is necessary to establish that the public servant must be acting at the time as such public servant and in the particular matter discharging a duty imposed upon him as such public servant. In 18 ALL 246[1] it was held that the words "in the discharge of his duty as such public servant" in the earlier portion of S. 332, I. P. C., mean in the discharge of a duty imposed by law on such public servant in the particular case, and do not cover an act done by him in good faith under colour of his office.

In this case a warrant issued by a Magistrate for the arrest of an accused under Section 114, Criminal P. C., was sent to a certain thana for execution. It was copied at the thana into a book kept for the purpose and made over to a particular constable for execution. After the departure of the constable it was discovered that the accused lived in a village other than that where he was supposed to be. The officer temporarily in charge of the thana made a copy from the book at the thana, endorsed on the back the names of certain other constables and having signed the endorsement, sent them with this paper to arrest the accused. The constables arrested the accused, but as they were returning with him in custody, some of the friends of the accused, aided by the accused himself, attacked them, rescued the accused and caused hurt to the police. It was held that the police officers concerned in arresting the accused under the circumstances above described were not acting in the lawful discharge of their duty within the meaning of S. 332, I. P. C., so as to render the accused liable to conviction under that section; but, inasmuch as they were acting in good faith under the colour of their office, S. 99, I. P. C., applied and the accused and his associates might be properly convicted under Ss. 147 and 323, I. P. C. I am not aware whether the principle enunciated by Sir John Edge C. J. and Burkitt J. in the above decision has been departed from in any reported case. The above case was referred to in 7 M L T 386[2] and was distinguished on the facts.

Reference has been made by the learned Assistant Government Advocate to S. 54 and in particular to cls. (1), (3) and (9) of S. 54, Criminal P. C., and it has been argued that it was open to the constable to have arrested Jangali accused without a warrant by virtue of the powers conferred upon a police officer under this section. These clauses have clearly no application. Clause (3) applies to a case where the person has been proclaimed as an offender either under this Code or by order of the Provincial Government. As regards cl. (9) there is no case of requisition having been received from another police officer for the arrest of Jangali accused. As regards clause (1), it is perfectly clear from the evidence that Basdeo did not act under S. 54, Criminal P. C. He did not state that he wanted to arrest Jangali accused because he had been concerned in any cognizable offence or on account of the fact that a reasonable complaint had been made against him or credible information had been received by him, or any reasonable suspicion existed of Jangali having been concerned in any such cognizable offence. It appears that he did not act on account of the existence of any reasonable suspicion or belief in his mind against Jangali accused about his having been concerned in any cognizable offence. Since the constable had failed to effect the arrest of Jangali accused on a previous occasion he persumably purported to have acted under cover of the old warrant which admittedly was not in his possession. In any case it cannot be said from the facts of the present case that Basdeo acted suo motu in exercise of his powers under S. 54, Criminal P. C. In A I R 1932 Pat 171[3] it was held that if a constable in effecting an arrest specifies a certain power which proves to be wanting, resistance

1. ('96) 18 All 246 : 1896 A W N 48, Queen-Empress v. Dalip.

2. ('10) 7 M L T 386 : 6 I C 12, In re Mahomed Yakoob.

3. ('32) 19 A I R 1932 Pat 171 : 138 I C 844; 33 Cr L J 706: 13 P L T 135, Kartik Chandra v. Emperor.

to him or escape from his custody constitutes no offence. Where the constable purports to act under a warrant which is found to be invalid, and where there is no allegation by the constable in his deposition that he proceeded under S. 54 (1), S. 54 (1) does not apply.

It was further observed :

To hold that S. 54 applies in such cases without any intimation to the accused, and without any allegation by the constable in his deposition that he proceeded under the section would be to nullify salutary provisions contained in Part B, Ch. 6, Criminal P. C., relating to the execution of warrants of arrest.

In this view of the matter, the convictions of the appellants under S. 332/149 cannot be upheld and must be set aside. I am however of opinion that the assault on the constable was not justified and the appellants had no justification whatever to cause bodily injuries to him. The appellants are therefore punishable for the rioting which they committed with the common object of assaulting the constable and for further causing him bodily injuries. I maintain the convictions of the appellants under S. 147, Penal Code, but reduce their sentences to six months' rigorous imprisonment under that section. I further convict them under Ss. 323/149, Penal Code, and six months' rigorous imprisonment is awarded to them under these sections. The sentences under the two sections shall run concurrently. The learned Assistant Sessions Judge has distinguished the case of Raghubar from the other appellants on the ground that there was a previous conviction against him and that he was liable to the minimum punishment of seven years' rigorous imprisonment under S. 23 (1) (a), Criminal Tribes Act (6 of 1924). As I have acquitted Raghubar of the offence under S. 332, Penal Code and convicted him of an offence under S. 323 only, S. 23, Criminal Tribes Act, will no longer be applicable. Section 23 (1) (a), Criminal Tribes Act, lays down :

Whoever, being a member of any criminal tribe and having been convicted of any of the offences under the Indian Penal Code specified in Sch. I, is convicted of the same or of any other such offence shall, in the absence of special reasons to the contrary which shall be stated in the judgment of the Court, be punished, (a) on a second conviction, with imprisonment for a term of not less than seven years .....

Raghubar was previously convicted twice under S. 457 and once under S. 379, Penal Code. His present conviction does not fall under any of those sections nor under any of the other offences enumerated in Sch. I appended to the Criminal Tribes Act. The result therefore is that the appeal is partly allowed, the convictions of the appellants under S. 147 are maintained but the sentences are reduced to six months' rigorous imprisonment. The convictions under Ss. 332/149, Penal Code, are set aside and the appellants are convicted in lieu thereof of an offence under Ss. 323/149, Penal Code and sentenced to a period of six months. The sentences under Ss. 147 and 323, Penal Code, shall run concurrently. The conviction and sentence of Raghubar under S. 332, Penal Code read with S. 23, Criminal Tribes Act are set aside.

G.N./R.K. *Appeal partly allowed.*

(28) A. I. R. 1941 Oudh 388

BENNETT J.

Mt. Khemana — Complainant — Applicant

v.

Dularey — Accused — Opposite Party.

Criminal Revn. Appln. No. 161 of 1940, Decided on 6th March 1941, from order of Dist. Magistrate, Lucknow, D/- 11th November 1940.

(a) Criminal P. C. (1898), S. 528 (2) — Case transferred—Complainant cannot claim trial de novo as of right.

In the event of a transfer of a case under S. 528 (2) the complainant cannot claim trial de novo as of right. [P 390 C 1]

(b) Criminal P. C. (1898), Ss. 528 (2) and 17 — Sub-Divisional Magistrate ordering transfer of case—District Magistrate can set aside order and transfer case to other Court—Case reaching stage of defence and two of defence witnesses examined — Transfer at late stage in circumstances of case held not justified.

In view of Ss. 17 and 528 (2) a District Magistrate has power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court. There is nothing in S. 528 (2) which suggests that the discretion of the District Magistrate is fettered in any way : ('18) 5 A I R 1918 Mad 1122 and ('36) 23 A I R 1936 Sind 237, *Rel. on* ; ('28) 15 A I R 1928 All 546 ; 26 Mad 130 and 17 I C 414 (All), *Dissent.* [P 391 C 1]

The complainant filed an application under S. 380, Penal Code, alleging that her son-in-law who had access to her house had removed some gold ornaments from her house on 24th August 1939. This date was also mentioned in the first information report. The City Magistrate before whom the complaint was filed after preliminary enquiry transferred the case to the Bench of Honorary Magistrates which framed a charge against the accused in which 24th August was given as the date of the offence. Only one prosecution witness referred to 20th August as the date of the offence. In view of this evidence the complainant applied to amend the charge when the case had reached the stage of defence and two defence witnesses had already been examined. The application was, however, rejected. The complainant thereupon applied to the City Magistrate for transfer of the case from the Bench of Honorary Magistrates on the ground that they had refused to amend the charge :

Held that there was no sufficient reason for transferring the case at the late stage. If it was not

to be tried de novo it would have to be tried on the order of the City Magistrate by a Magistrate who had not seen any of the prosecution witnesses or some of the defence witnesses which was not satisfactory. [P 391 C 2]

Held further that it was questionable whether the Bench Magistrates would have been justified in altering the charge merely because one prosecution witness had indicated that the date entered in the charge was not correct. An error in stating the particulars in the charge was not necessarily fatal to the prosecution case. In case of such error the Court had to consider the effect of the provisions of S. 225, Criminal P. C. [P 391 C 2]

(c) Criminal P. C. (1898), S. 528 (2)—Issue of notice under S. 528 (2) is not obligatory on but discretionary with District Magistrate — Notice would delay further trial already delayed by transfer application—Notice held not necessary.

There is nothing in S. 528 (2) which makes it obligatory on the District Magistrate to issue notice to the opposite party. The District Magistrate has an unfettered discretion in the matter. It might be advisable in some cases that notice should issue, and quite unnecessary in other cases, such as where issue of notice would generally delay further a trial which has already been somewhat delayed by the transfer application: ('35) 22 A I R 1935 All 815 and ('26) 13 A I R 1926 Lah 156, *Rel. on*; ('29) 16 A I R 1929 Mad 511 and ('36) 23 A I R 1936 Sind 42, *Dissent*. [P 391 C 1, 2]

G. G. Chatterji — for Applicant.

Nasirulla Beg — for Opposite Party.

Order.—This is an application in revision under Ss. 435 and 439, Criminal P. C., against the order of the District Magistrate of Lucknow dated 11th November 1940, setting aside the order of the City Magistrate, Lucknow, dated 15th August 1940 whereby he had transferred a case from the Honorary Bench Magistrates to a Special Magistrate of the first class named Mr. Badshah Husain Rizvi. It appears that a complaint was made on 11th September 1939 by one Mt. Khemana, who is the applicant in the present application, against her son-in-law Dularey, who is the opposite party in this application, under S. 380, Penal Code. She alleged that she had discovered on 24th August 1939 that certain ornaments and a coin were missing from her house and that she suspected Dularey who, as her son-in-law, had access to her house. She had previously on the 31st August, made a report to the police giving the same date, namely, the 24th August, as the date on which she had discovered the loss.

A preliminary enquiry was made by the City Magistrate before whom the complaint had been made, under S. 202, Criminal P. C., and the case was then transferred by him to the Bench of Honorary Magistrates. This Bench recorded all the prosecution evidence and framed a charge on 31st May 1940. This charge was that on or about 24th August 1939, about 2 or 3 P. M. the accused Dularey had dishonestly removed certain gold ornaments and a gold coin from Mt. Khemana's house, these articles having been buried by her in a corner of the house. Thereafter defence evidence was produced and only two more defence witnesses remained to be examined. At this stage the complainant, Mt. Khemana applied to the City Magistrate for transfer of the case from the Bench of Honorary Magistrates on the ground that they had refused to amend the charge. One of the prosecution witnesses gave evidence indicating that the offence had taken place on the 20th, and not on the 24th August, and in view of this evidence Mt. Khemana had applied to the Bench Magistrates for alteration of the charge. They had rejected this application. Other prosecution witnesses, it may be noted, did not give the actual date of the offence, and Mt. Khemana herself does not appear to have had any definite knowledge on the point, though she may have thought that the offence had taken place on the 24th during her absence from the house. It is said that her evidence on the point is not consistent, but, in any case, she was not apparently in a position to know with certainty.

In the order of the 27th July passed on Mt. Khemana's application the Bench Magistrates in dismissing her application for amendment of the charge observed that the case had reached the stage of defence and two defence witnesses had already been examined. Only one witness referred to the 20th August as the date of the offence, and the complainant herself said that it was committed on the 24th. In support of this last statement they referred to the first information report in which the 24th August was given as the date of the offence. The accused had produced alibi evidence to show that he was at work elsewhere on the day and time of the alleged occurrence and it was in view of this evidence that the Bench Magistrates thought that the application had been made to amend the charge. The City Magistrate remarked that this order "shows beyond any doubt that the Court holds that the occurrence took place on 24th August 1939", and "that the grounds for entertaining this view are also not satisfactory". Consequently "the complainant rightly feels that her case has been prejudiced" and "it is desirable that the case should be tried by another Court".

The District Magistrate after examination of the record said that he was satisfied that

the City Magistrate's order was not correct. First of all he did not consider that the order of the Bench Magistrates was a prejudiced order. The complainant had herself to blame for asking for an amendment of the charge framed at such a late stage, and the Bench Magistrates were clearly justified in refusing to amend the charge because of the statement made by one witness. The case had dragged on for an unduly long time and it would be unfair to harass the accused, who is the complainant's son-in-law, by a transfer which would enable the complainant to claim a de novo trial. Only two defence witnesses remained to be heard and the accused would be prejudiced if the case was transferred to another Court at this late stage. Consequently the District Magistrate accepted the transfer application made to him and retransferred the case from the Court of Mr. Badshah Husain Rizvi to the Bench of Honorary Magistrates. With regard to this order of the District Magistrate it may be said that the transfer by the City Magistrate would not have enabled the complainant to claim a de novo trial as of right. There was, however, this objection to the transfer that if there was no de novo trial the case would have to be decided by a Magistrate who had not seen most of the witnesses.

It is contended by the learned counsel for the applicant that the District Magistrate was not justified in passing what was virtually an appellate order reversing the order of the City Magistrate, and further that he was not justified in any event in transferring the case without notice to the opposite party. In support of this contention learned counsel referred to several rulings. In A I R 1928 ALL 546[1] it was said by a single Judge that under S. 528 (2) the District Magistrate and the Sub-Divisional Magistrate have equal authority in withdrawing cases from a Subordinate Magistrate, and the District Magistrate should not exercise powers of an appellate Court as regards orders passed by the Sub-Divisional Magistrate. If he considers the Court to which the case is transferred by the Sub-Divisional Magistrate not the proper Court for the trial of the case, for reasons to be stated by him, he should transfer the case to any Court which he thinks proper after notice to the accused. It is implied, therefore, in this ruling that the District Magistrate has the power to reverse the order of the Sub-Divisional Magistrate, though he should not do this as if he were acting as an appellate Court but only under the provisions of S. 528 (2). It was said in this Allahabad case that the view was supported by a ruling of a single Judge of the Madras Court in 26 Mad 130.[2] In another case of the Allahabad High Court, 13 Cr L J 782,[3] it was also held by a single Judge that the District Magistrate cannot set aside an order of transfer passed by a Sub-Divisional Magistrate. Reference was made again to this Madras case.

For the opposite party I have been referred to a later case of the Madras High Court, A I R 1918 Mad 1122,[4] in which it was held that the fact that a Sub-Divisional Magistrate has refused to transfer a case at the request of a party does not preclude a District Magistrate from making an order of transfer on his own initiative. In this case the decision in 26 Mad 130[2] was expressly dissented from. In A I R 1936 Sind 237[5] it was said that although the District Magistrate has no appellate jurisdiction under S. 528 (2) he has a concurrent jurisdiction and that jurisdiction is not barred merely because it has been exercised by the Sub-Divisional Magistrate in the first instance. Where a Sub-Divisional Magistrate transfers a case from one Court to another, it is open to the party aggrieved to go to the District Magistrate not by an appeal against the order of the Sub-Divisional Magistrate, but by moving the District Magistrate to exercise the jurisdiction conferred upon him by sub-s. (2) and the District Magistrate after having considered the application on its merits and for good reasons can transfer the case.

It is, I think, not irrelevant in considering this question to refer to the provisions of S. 17 of the Criminal P. C., although those provisions do not appear to have been invoked in the cases referred to. Under S. 17 all Magistrates appointed under Ss. 12, 13, and 14 are made subordinate to the District Magistrate, and he may, from time to time, make rules or give special orders consistent with this Code as to the distribution of busi-

1. ('28) 15 A I R 1928 All 546 : 116 I C 751 : 30 Cr L J 654, Kishori Lal v. Emperor.

2. ('03) 26 Mad 130 : 2 Weir 689, Raghunatha Pandaram v. Emperor.

3. ('12) 13 Cr L J 782 : 17 I C 414 (All), Iltaf Husain v. Emperor.

4. ('18) 5 A I R 1918 Mad 1122 : 38 I C 447 : 18 Cr L J 335 : 40 Mad 791, Santhappa Sethuram v. Govindaswamy Kandiyar.

5. ('36) 23 AIR 1936 Sind 237 : 166 I C 83 : 38 Cr L J 133: 30 S L R 327, Sugnomal Tahilram v. Phatandas Relumal.

ness among such Magistrates and Benches. It is, therefore, clear in my opinion that a District Magistrate has the power to set aside an order of a Sub-Divisional Magistrate transferring a case and transfer that case to some other Court. In the present case, both the application to the City Magistrate and the application to the District Magistrate were made under the provisions of sub-s. (2) of S. 528, and there is nothing in the sub-section which suggests that the discretion of the District Magistrate is fettered in any way. I think, therefore, that the later ruling of the Madras High Court on the point should be followed.

As regards the failure of the District Magistrate to issue notice to the opposite party it was said in A I R 1929 Mad 511[6] by a single Judge that although S. 528 (2) does not say that notice of an application for the transfer of a case from one Court to another shall be given to the accused, still according to the practice of the Madras High Court it is desirable to give such notice. And so a transfer made without such notice must be set aside for want of notice. Similarly in A I R 1936 Sind 42[7] it was said that it is incumbent on a Magistrate transferring a case from one Court to another on the application of the Crown to hear the other party and give his reasons for passing the order of transfer.

For the opposite party I was referred on this point to two cases, A I R 1935 ALL 815[8] and A I R 1926 Lah 156.[9] In the former case it was said that though S. 528 does not provide for any notice to the opposite party yet it is desirable that notice should be given to the opposite party before an order of transfer is passed. But a mere omission to give notice will not make the order illegal and would be no ground to set aside the order. The omission to give notice is a mere irregularity. In the Lahore case it was said that the transfer under S. 528 is not illegal for want of notice to the opposite party. As there is nothing in the section itself which makes it obligatory on the District Magistrate to issue notice to the opposite party, on this point too, I think, it undesirable to fetter his discretion. It might be advisable in some cases that notice should issue, and it might be quite unnecessary in other cases. The issue of notice would generally delay further a trial which had probably already been somewhat delayed by the transfer application.

It is not necessary to go into the merits of the present case. It is possible that the complainant had little idea of the actual date and time of the occurrence, and it is also possible that she entertained different ideas on the subject at different times. It is certainly questionable whether the Bench Magistrates would have been justified in altering the charge merely because one prosecution witness had indicated that the date entered in the charge was not correct. An error in stating the particulars in the charge is not necessarily fatal to the prosecution case. If such an error is committed the Court has to consider the effect of the provisions of S. 225, Criminal P. C. On the whole I do not think that there was sufficient reason for transferring the case at the late stage which it had reached. If it was not to be tried de novo, it would have to be tried on the order of the City Magistrate by a Magistrate who had not seen any of the prosecution witnesses or some of the defence witnesses. This would not have been satisfactory. Finding that the order of the District Magistrate was not illegal, I see no reason to disturb it and I dismiss this application.

G.N./R.K. *Application dismissed.*

6. ('29) 16 AIR 1929 Mad 511 : 119 I C 385 : 30 Cr L J 1043, Kamatchi Ammal v. Emperor.
7. ('36) 23 AIR 1936 Sind 42: 161 I C 939: 37 Cr L J 545, Ahmad Chibhir v. Chellaram Tekchand.
8. ('35) 22 AIR 1935 All 815 : 156 I C 163 : 36 Cr L J 918 : 1935 A L J 1063, Chhotey Lal v. Tinke Lal.
9. ('26) 13 AIR 1926 Lah 156: 93 I C 75: 27 Cr L J 411 : 6 Lah 541 : 27 P L R 80, Bagh Ali v. Muhammad Din.

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(28) A. I. R. 1941 Oudh 391

THOMAS C. J. AND GHULAM HASAN J.

Syed Mohammad Raza and others — Plaintiffs — Appellants

v.

Syed Ahmad Abbas — Defendant — Respondent.

First Appeal No. 85 of 1937, Decided on 31st January 1941, against order of Deputy Commissioner, Unao, D/- 30th April 1937.

(a) U. P. Land Revenue Act (3 of 1901), Ss. 111 and 109—Application for perfect partition—Deputy Commissioner going into merits of objections to proprietary title and concluding that right to perfect partition was negatived by agreement between predecessors of parties and that matter having been previously determined by Deputy Commissioner and confirmed by Commissioner was res judicata — Deputy Commissioner held acted under S. 111 (1) (c)—His order held did not fall under S. 109 (1) and was appealable to civil Court.

On an application for perfect partition of the properties of the original taluqdar whose name was entered in List III of Act 1 of 1869, the Deputy Commissioner enquired into the merits of the objection raised in the case as to the question of the proprietary title and came to the conclusion that the right to perfect partition was negatived by the terms and conditions of the previous agreement between the predecessors of the parties to the partition. Having pronounced his opinion upon the merits of the matter, he expressed the opinion that the matter having been previously determined by a Deputy Commissioner and confirmed by the Commissioner was res judicata :

Held that the order of the Deputy Commissioner did not fall under S. 109 (1). The Deputy Commissioner acted under S. 111 (1) (c) and the first portion of S. 111 (1) and therefore his order was appealable to the civil Court : 7 O C 161, *Expl., and Applied;* ('39) 26 A I R 1939 Oudh 108 and ('24) 11 A I R 1924 Oudh 149, *Disting.*; 28 All 185, *Ref.* [P 393 C 2; P 394 C 1, 2]

(b) U. P. Land Revenue Act (3 of 1901), S. 106—Property partible—Owners cannot by agreement permanently impress upon it character of impartibility.

Owners of property which is in its nature partible cannot, by an agreement among themselves, impress upon it permanently the character of impartibility : 6 Cal 106; 23 All 383 (P C) and ('19) 6 A I R 1919 Oudh 321, *Foll.* [P 395 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 106 — Right to perfect partition established — Each separate mahal formed by perfect partition is responsible for its revenue — Parties cannot enter into arrangement whereby statutory liability to pay revenue is contravened — Condition that revenue of separate mahal formed by perfect partition should be paid through taluqdar cannot be imposed and does not at any rate bind successors of contracting parties.

Once the right to a perfect partition is either admitted or established the responsibility for payment of the Government revenue fastens under the provisions of the Land Revenue Act upon each separate mahal, which is formed as a result of the perfect partition and it is not open to the parties to enter into an arrangement whereby the statutory liability to pay the Government revenue imposed by the Act is contravened. A condition that the revenue of a separate mahal formed by perfect partition should be paid through the taluqdar cannot be imposed as it places a restraint upon perfect partition and does not at any rate bind the successors of the contracting parties : ('26) 13 A I R 1926 Oudh 561 and ('29) 16 A I R 1929 Oudh 193, *Disting.* [P 395 C 1, 2]

M. Wasim and Ali Hasan — for Appellants.

Akhlaque Husain — for Respondent.

Judgment. — This is a first civil appeal by the plaintiffs against the order passed by the Deputy Commissioner of Unao, dated 30th April 1937, rejecting the plaintiffs' application for a perfect partition. A short pedigree (Ex. A-6) which is not disputed by the parties, may be given to illustrate the material facts :

FARZAND ALI

- Ch. Syed Dost Ali (died childless)
- Ch. Syed Shah Ali
  - Ch. Syed Ramzan Ali
    - Ch. Syed Mohammad Mah
      - Ch. Syed Ahmad Abbas
      - Ch. Syed Abdul Qasim
      - Ch. Wasi Haider
    - Ch. Syed Talib Ali
- Daughter = wife of Ewaz Ali
  - Ch. Syed Mohammad Asghar
    - Ch. Syed Yad Ali = Mt. Bakhtawar Begam
      - Afterwards Mt. Ali Begam, under sale deed, holder of Patti Mohd. Asghar

Chaudhri Dost Ali was the original taluqdar and his name was entered in List III prepared under S. 8 of Act 1 of 1869. Chaudhri Dost Ali died childless and upon his death a dispute arose between his nephew, Chaudhri Ramzan Ali and his sister's son Chaudhri Mohammad Asghar. A partition deed by way of compromise was effected on 5th March 1877, between Chaudhri Ramzan Ali and Chaudhri Mohammad Asghar, (Ex. A-3). Under this deed it was agreed that Chaudhri Ramzan Ali shall own ten annas and Chaudhri Mohammad Asghar six annas of the properties left by Chaudhri Dost Ali. Chaudhri Ramzan Ali was to become the lambardar and was to make collection of rents. It was stipulated that in case of dispute between them the ilaqa was to be divided and each person was to remain in possession of the property according to the shares mentioned above and shall pay Government revenue of his share to the taluqdar lambardar, who shall deposit the same with the Government. As long as they were to remain joint there was to be a rendition of accounts. It appears that Chaudhri Mohammad Asghar filed an application on 14th April 1885 for a perfect partition before the Deputy Commissioner of Unao. The Deputy Commissioner thought that as the estate was in List III and as in view of the agreement dated 5th March 1877, Chaudhri Ramzan Ali was to remain the taluqdar and the head of the family and Chau-

dhri Mohammad Asghar was to pay the Government revenue through him, the application for the perfect partition could not be allowed (EX. A-1). The Commissioner on appeal upheld this decision on 30th July 1885 (EX. A-2).

Mt. Ali Begum acquired the interest of Mohammad Asghar in the six annas share held by his descendants. She applied on 15th August 1936 for a perfect partition in respect of village Unao proper before the Deputy Commissioner of Unao. She died during the pendency of the partition proceedings and was succeeded upon her death by her husband and her sons and daughters, who are the present appellants. The application was made against Chaudhri Ahmad Abbas, who is the grandson of Chaudhri Ramzan Ali. The application stated that the nature of the mahal sought to be partitioned is an imperfect pattidari but there had been in existence one patti of six annas relating to the applicant's share and the other patti of ten annas relating to the share of the opposite party on the basis of mutual partition. The object of the application was to equalise the area and valuation of the two pattis and also to get partition of a patti which was still held joint. An objection was raised by the respondent to the perfect partition on the ground that the order of the Deputy Commissioner and the Commissioner in 1885 had decided the matter between the parties and held that no partition could be effected in view of the deed of agreement dated 5th March 1877. Objection was also raised that town Unao was a taluqdari mahal and could not be partitioned without the sanction of the Local Government under S. 138, Land Revenue Act. The Assistant Collector, first class, made a report to the Deputy Commissioner in which he stated the controversy arising between the parties. He rejected the objection of the respondent that no partition could take place without the sanction of the Local Government. He, however, recorded the opinion that the history of the estate pointed out that the estate was impartible and the agreement of 1887 maintained the impartible nature of the estate. He summed up his conclusion in these words:

> I therefore hold that the Deputy Commissioner's decision of 1885 upheld by the Commissioner is at least a piece of evidence showing that the applicant cannot apply for a perfect partition of the Unao taluqa. I am therefore of opinion that this application for perfect partition should be thrown out.
>
> To Deputy Commissioner for orders.

The learned Deputy Commissioner recorded a somewhat laconic order, which is as follows:

> I have heard the parties and considered the report of the Sub-Divisional Officer of Unao, in which he has clearly set out the facts of this case. I agree with the Sub-Divisional Officer that the Commissioner's judgment of 1885, *Mt. Asghari Begam* v. *Ramzan Ali*, refusing a perfect partition of the mahal in question operates as res judicata. I, therefore, order that the proceedings be quashed under S. 109 (1), Land Revenue Act. The application for perfect partition is rejected.

The appellants have preferred a first appeal under S. 112, Land Revenue Act, against the aforesaid order of the Deputy Commissioner. Our attention has been drawn by both parties to the fact that an appeal originally filed by the appellants before the Commissioner of Lucknow was dismissed on 13th September 1937 on the ground that the appeal lay to this Court. On behalf of the respondent it has been argued that no appeal lies against the order of the Deputy Commissioner. It is urged in the first place that no question of proprietary title was raised before the Deputy Commissioner inasmuch as the objection made by the respondent merely related to the mode of partition, and in the second place even if such a question had been raised, it was necessary under sub-s. (1) of S. 111, Land Revenue Act, to show that the question had not been already determined by a Court of competent jurisdiction. It was also suggested that the Deputy Commissioner had not taken action under S. 111 (1) (c), Land Revenue Act. Reliance has been placed in support of these contentions in A I R 1939 Oudh 108[1] and 7 O C 161.[2] Lastly it was argued that the order of the Deputy Commissioner fell within the purview of S. 109, Land Revenue Act, and as such it was appealable only to revenue Courts and not to Civil Courts. Learned counsel has referred to A I R 1924 Oudh 149[3] in this connection. We are satisfied that these contentions have no substance.

It appears from a perusal of the order of the Deputy Commissioner read with the report of the Assistant Collector, which appears to have been accepted, that the order of the Deputy Commissioner is based upon the fact that the name of the original taluqdar was entered in List 3 of Act 1 of

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1. ('39) 26 A I R 1939 Oudh 108 : 179 I C 801 : 1939 O W N 173, Bhagwan Prasad Singh v. Mt. Abhairaji.
2. ('04) 7 O C 161, Mohammad Shahamat Khan v. Mt. Aziz-un-nissa.
3. ('24) 11 A I R 1924 Oudh 149 : 77 I C 358, Md. Ahsan Ali v. Masud Ali.

1869, that the agreement dated 5th March 1877, by reason of its conditions, excluded the right of perfect partition and that the previous decision of 1885 passed by the Deputy Commissioner of Unao and confirmed by the Commissioner was res judicata. We are, therefore, of opinion that the learned Deputy Commissioner acted under cl. (c) of sub-s. (1) of S. 111, Land Revenue Act, and under the first portion of sub-s. (1) of S. 111. He enquired into the merits of the objection raised in the case as to the question of the proprietary title and came to the conclusion that the right to perfect partition was negatived by the terms and conditions of the agreement dated 5th March 1877. Having pronounced his opinion upon the merits of the matter, he went on to express the opinion recorded by the Assistant Collector that the matter having been determined in 1885 was res judicata. The case in A I R 1939 Oudh 108[1] is clearly inapplicable to the facts and circumstances of the present case. There the partition officer overruled the objection to the partition without deciding the question on the merits.

In the case reported in 7 O C 161[2] the objection raised to the partition was that the property was not partible. It was held that this objection certainly involved a question of proprietary title within the meaning of S. 111, Land Revenue Act. The Assistant Collector without going into the merits of the objection decided that S. 111 did not apply as the question had already been determined by a Court of competent jurisdiction. An appeal was preferred against the order of the Assistant Collector to the Court of the Judicial Commissioner. It was held that the order of the Assistant Collector dismissing the partition was not a decree within the meaning of S. 112, Land Revenue Act, 1901, and consequently no appeal lay. It was further held that it is only when the revenue Court goes into the merits of the objection that the order dealing with the objection is appealable as a decree. The latter observation is applicable to the circumstances of this case. We are further of opinion that the order of the Deputy Commissioner does not fall under S. 109 (1), Land Revenue Act. The Deputy Commissioner decided the objection under cl. (c), sub-s. (1) of S. 111 and as a necessary corollary to his finding upon that objection quashed the proceedings under S. 109 of the Act. We are not prepared to hold that the Deputy Commissioner disavowed his intention to proceed under S. 111, Land Revenue Act, and instead proceeded under S. 109, Land Revenue Act. The case in A I R 1924 Oudh 149[3] has no application whatever to the facts of the present case. Learned counsel on behalf of the appellants has cited 28 ALL 185[4] where it was held that an agreement amongst the members of a family holding property jointly that the family property should not be partitioned, could not bind the property in the hands of the descendants of the parties to the agreement; also that the question whether such an agreement could be binding on the property in the hands of the descendants of the parties thereto was a question of proprietary right within the meaning of S. 113 of Act 19 of 1873, and an appeal would therefore lie from the finding thereon. Our decision upon the preliminary objection is that the present appeal is competent.

It has been argued on behalf of the appellants before us that the agreement dated 5th March 1877 expressly provides for partition and the fact that the revenue was to be paid by Chaudhri Mohammad Asghar through Chaudhri Ramzan Ali, the lambardar, is no bar to a perfect partition after the death of the two contracting parties. It is argued that the agreement in question may be valid and binding between the contracting parties thereto but it is of no legal effect as against their heirs or transferees. Reliance has been placed in support of this contention on 6 Cal 106,[5] 23 ALL 383[6] and 22 O C 100.[7]

In the first case it was provided by the agreement between five brothers of the joint Hindu family that none of the parties, nor their representatives, nor any person, shall be able to divide the real and personal property belonging to the family into shares. A son of one of the brothers sold his share in the family property. In a suit by the purchaser for partition it was held that the general scheme of the arrangement between the brothers could only be binding on the actual parties to it and not upon a purchaser from one of the parties. It was observed that the clause in the agreement against partition must be regarded as a mere restraint on partition and that a man cannot by gift inter vivos or by will give property absolutely to another and yet control the mode of enjoyment in respect of partition

4. ('05) 28 All 185 : 2 A L J 652 : 1905 A W N 240, Abu Muhammad Khan v. Kaniz Fizza.
5. ('81) 6 Cal 106, Rajender Dutt v. Sham Chund Mitter.
6. ('01) 23 All 383 : 28 I A 111 : 8 sar 27 (P C), Jafri Begam v. Syed Ali Raza.
7. ('19) 6 A I R 1919 Oudh 321 : 52 I C 73 : 22 O C 100, Sakhawat Ali v. Abu Said.

or otherwise. The case in 23 ALL 383[6] was a case of an award in which the arbitrator had directed that the property awarded to the heirs should not be partitioned as it was calculated to lead to ruin and destruction. It was held that the arbitrator had no power to make property, which was divisible by law, indivisible for ever and the direction in restraint of partition was inoperative against the heirs of the contracting parties. These two decisions were followed in 22 O C 100[7] where it was held that owners of property which is in its nature partible cannot, by an agreement among themselves, impress upon it permanently the character of impartibility.

The position taken up on behalf of the appellants is not seriously contested by learned counsel on behalf of the respondent. His argument however is that the condition in the deed of agreement dated 5th March 1877, to the effect that the Government revenue shall be paid through the taluqdar lambardar, does not impose any restraint upon partition and consequently neither of the cases cited above has any application to the present case. Learned counsel on behalf of the respondent concedes that he has no objection to the perfect partition being made if the condition as regards the payment of the Government revenue by the appellants through the respondent is complied with. We are of opinion that this position is not legally maintainable. Section 106, Land Revenue Act, provides that in "perfect partition" the whole mahal is divided and the several portions become separate mahals, each severally responsible for the revenue distributed thereon. Once the right of the appellants to a perfect partition is either admitted or established there can be no doubt that the responsibility for payment of the Government revenue shall fasten under the provisions of the Land Revenue Act upon each separate mahal, which is formed as a result of the perfect partition and it is not open to the parties to enter into an arrangement whereby the statutory liability to pay the Government revenue imposed by the Act is contravened. We are also of opinion that such a condition cannot be imposed and is at any rate not binding upon the successors to the contracting parties. To allow such a condition to operate is, in other words, to bar the right of a party to a perfect partition to which he is otherwise entitled. It has been suggested in course of the arguments on behalf of the respondent that although such a condition may be invalid in an ordinary deed, it must be regarded as legal and binding in the agreement dated 5th March 1877, as it was of the nature of a family settlement. We are, however, of opinion that the condition about the payment of Government revenue through the taluqdar is a condition which imposes a restraint upon partition and cannot be enforced against the plaintiffs. None of the cases in A I R 1926 Oudh 561[8] and A I R 1929 Oudh 193,[9] which were relied upon by the learned counsel for the respondent, has any bearing upon the present case.

The result is that we allow the appeal with costs set aside the order passed by the Deputy Commissioner of Unao and direct that the application for partition filed by the appellants shall be proceeded with according to law.

G.N./R.K. *Appeal allowed.*

8. ('26) 13 A I R 1926 Oudh 561 : 97 I C 897 : 2 Luck 335 : 3 O W N Sup 102, Ahmed Azim v. Safi Jan.

9. ('29) 16 A I R 1929 Oudh 193 : 120 I C 387 : 4 Luck 452 : 6 O W N 169, Hanuman Sahu v. Abbas Bandi Bibi.

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(28) A. I. R. 1941 Oudh 395

GHULAM HASAN J.

Sheoraj and another — Plaintiffs — Appellants

v.

Ganga Prasad Ram Khilawan and another, Defendants — Respondents.

Second Appeal No. 249 of 1937, Decided on 11th March 1941, against order of Civil Judge, Unao, D/- 2nd March 1937.

(a) Oudh Civil Rules, Vol. I, Paras. 53, 54 and 55 — Document admitted should not be returned before conclusion of case.

A document filed and duly admitted (which is neither inadmissible nor unproved) should not be returned to the party before the conclusion of the case. [P 397 C 1]

(b) Transfer of Property Act (1882), S. 8 — Auction sale—Entire zamindari patti constituting distinct unit sold by auction — Abadi numbers included in patti also pass to purchaser.

Where an entire zamindari patti constituting a distinct unit like the village itself in which it is situate is sold by auction without any exception or reservation the abadi numbers whose area is included in the area of the zamindari patti and which are a part and parcel of the latter also pass to the purchaser : 4 All 381; ('25) 12 A I R 1925 All 449; 30 Cal 556 (P C); ('26) 13 A I R 1926 Oudh 358 and ('27) 14 A I R 1927 Oudh 240, *Rel. on*; ('35) 22 A I R 1935 Oudh 304 and ('40) 27 A I R 1940 Oudh 118, *Distg.* [P 398 C 1, 2]

(c) Civil P. C. (1908), S. 60 (1) (c) — Plea under S. 60 (1) (c) not raised in written statement but urged only at time of argument before trial Court—Plea held could not be raised.

Where the plea under s. 60 (1) (c) is not raised in the written statement but is urged only at the time of the arguments before the trial Court the plea ought not to be allowed to be entertained.

[P 398 C 2]

(d) Civil P. C. (1908), S. 60 (1) (c) — Person relying on S. 60 (1) (c) must show himself to be "agriculturist"—Meaning of "agriculturist" explained.

A person relying on S. 60 (1) (c) must show that he is an agriculturist within the meaning of S. 60 (1) (c). The term "agriculturist" in S. 60 (1) (c) is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation : ('27) 14 AIR 1927 All 601; ('32) 19 AIR 1932 All 499; ('35) 22 AIR 1935 All 448; ('38) 25 A I R 1938 Lah 72, *Rel. on.* [P 398 C 2]

(e) Civil P. C. (1908), S. 60 (1) (c)—Agriculturist allowing house to be sold without objection under S. 60 (1) (c) — Suit by auction purchaser for possession — Agriculturist much less stranger cannot object under S. 60 (1) (c).

Where a person does not object to the sale of his house on the ground of his being an agriculturist within the meaning of S. 60 (1) (c) and allows the house to be sold, it would be no longer open to him, much less to a stranger, to raise the same objection in answer to a suit by the auction purchaser for possession of the property purchased by him : ('18) 5 A I R 1918 All 305, *Rel. on.* [P 399 C 1]

(f) Abadi — Ownership in house or materials thereof passing to auction purchaser at sale of zamindari — Subsequent acquisition of ex-proprietary rights by vendor cannot revive ownership in favour of vendor.

Where ownership of a house or the materials thereof has passed to the auction purchaser by virtue of the auction sale of the zamindari and the vendor has lost all interest therein from that date, the subsequent acquisition of ex-proprietary rights by the vendor cannot have the effect of reviving the ownership in favour of the vendor. [P 399 C 1]

Nazir Uddin for Hakim Uddin — for Appellants.

Haider Husain — for Respondents.

Judgment.—This second appeal by the plaintiffs arises out of a suit for possession which was decreed by the trial Court whose decree has been set aside by the lower appellate Court. The plaintiffs-appellants filed a suit for possession of a house No. 64/3 and a sahan and rasta No. 66/3 on the allegation that one Chandrapal Singh owned 13 biswansis and 13 kachwansis share, which corresponds to 3 bighas 13 biswas and 15 biswansis, in mahal Ganesh, village Makoor, and patti Chandrapal was constituted as a result of perfect partition of the village. On 20th April 1927, the plaintiffs purchased this patti in an auction sale and were put in possession of the same. This patti included a house and a rasta which also came into possession of the plaintiffs at the same time. The defendant is alleged to have wrongfully dispossessed the plaintiffs from the house and sahan some time in April 1936. The defence to the suit was that the entire share of Chandrapal Singh in the patti was not sold and that the plaintiffs were never put in possession of the entire share. It was pleaded that even if the entire share of Chandrapal Singh is proved to have been sold in the auction sale it did not include the house and the sahan. The defendant set up a village custom under which the house and sahan do not pass along with the zamindari upon a sale to the auction purchasers. Issues were framed on 6th October 1936, and after the evidence of the plaintiffs had been recorded on 27th October 1936, counsel for the defendant stated that he did not press the plea of custom. He also stated that his only contention in the case was that the house in the suit did not pass to the plaintiffs along with the zamindari share transferred to them under the sale certificate. He admitted that in case the Court held otherwise then the plaintiffs could get a decree for possession over the house in suit as claimed.

The trial Court held that the entire zamindari share of Chandrapal was sold and that the house and the sahan were included in that share and had passed to the auction purchasers. Upon this finding the plaintiffs' suit was decreed. It appears from the judgment of the trial Court that the defendant's counsel contended in course of the argument for the first time before it that the defendant was an agriculturist and under S. 60, Civil P. C., his house could not be attached and sold with the zamindari share nor did it pass to the plaintiffs. The trial Court repelled the contention and observed that there was nothing to show that Chandrapal Singh was an agriculturist as required by S. 60, Civil P. C. The lower appellate Court distinguished certain decisions relied upon by the trial Court in support of its findings and held that the auction purchasers did not get the house along with the zamindari share sold to them. It also found that Chandrapal Singh being a petty zamindar was entitled to the benefit of the provisions of S. 60, Civil P. C. In the result the lower appellate Court allowed the appeal and dismissed the suit. Two points have been urged before me in support of the appeal on behalf of the plaintiffs. The first contention raised is that the house in question actually passed to the plaintiffs by virtue of the auction sale. The second point is that S. 60 (1) (c), Civil P. C., does not apply to the case and the defendant respondent is not entitled to the benefit of that section. I am of opinion that both the

contentions are sound and must be accepted.

As regards the first point, it appears that the sale certificate (Ex. 1) clearly mentions the sale of 13 biswansis and 13 kachwansis share with an area of 3 bighas 13 biswas and 15 biswansis though it does not expressly mention the house in dispute. Possession over this area was duly given to the auction purchasers (*vide* Ex. 4, warrant of possession, Ex. 3, the report of the qurq amin, and Ex. 5, the final order of the Court regarding the delivery of possession). Exhibit 6 is the copy of the mutation register which duly records the entire area in dispute in favour of the plaintiffs. A reference to Ex. 7, which is a copy of the khasra paimaish of abadi of village Makoor, mahal Ganesh, will show that the house No. 64/3 and sahan and rasta No. 66/3 are situated in mahal Ganesh and patti Chandrapal, and Chandrapal is recorded as the owner in respect of both the numbers. This khasra appertains to the partition proceedings. It is regrettable that this important evidence is not referred to in the judgment of the lower appellate Court at all. Learned counsel on behalf of the appellants referred to Ex. 2, which is a copy of the chitti of abadi Chandrapal, Nos. 64/3 and 66/3. The document was filed by the plaintiffs and was admitted by the defendant. It appears from a reference to the list of documents that counsel appearing on behalf of the plaintiffs in a statement of the case on 27th October 1936, stated that he did not rely upon Ex. 2 and prayed that it be returned to him. The trial Court ordered that Ex. 2 be returned and the fact of its return is noted on the list of documents. This procedure was doubtless irregular. The document having been filed and duly admitted should not have been returned to the plaintiffs' counsel before the conclusion of the case. Paragraphs 53, 54 and 55 of the Oudh Civil Rules, Vol. I, deal with the return of the documents and it seems to me that the action of the Court in returning the document, which was neither inadmissible nor unproved, was not warranted by the aforesaid rules. Since Ex. 2 is not on the record, the plaintiffs-appellants must thank themselves for their failure to refer to it in support of their case inasmuch as the document was returned at the special request of their counsel.

An examination of the aforsaid documentary evidence establishes beyond doubt that the entire patti of Chandrapal Singh without any exception or reservation had been put to sale and was purchased by the plaintiffs-appellants in auction. It is also clear that patti Chandrapal Singh constitutes a distinct unit like the village itself and that the abadi numbers whose area was included in the area of the zamindari patti were a part and parcel of the latter. Under these circumstances it would be idle to argue that the auction sale did not transfer the interest of Chandrapal Singh in the abadi numbers, along with his zamindari share sold. Section 8, T. P. Act, lays down that unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof. Among these incidents are included, in the case where the property is land, all things attached to the earth. In 4 ALL 381,[1] the "rights and interests" of a zamindar in a certain village were sold in execution of a decree. At the time of the sale a certain building was his property qua zamindar. It was held that, in the absence of proof that such building was excluded from sale, the sale of his "rights and interests" in the village passed such building to the auction purchaser. This case was followed in 47 ALL 470[2] where it was held that in the absence of any evidence to the contrary, the houses or buildings situate within the zamindari are included in and pass with the zamindari, and a pre-emptor is entitled to get possession of such houses or buildings along with the zamindari.

In a case relating to the construction of certain deeds of conveyance by way of mortgage and sale of shares in a zamindari their Lordships of the Privy Council held that where the documents contained no words of exception or reservation, they conveyed all the interest of the vendor in the zamindari. It was also held that their interests in the houses on the land and in the profit rents derived from them passed in the absence of any words showing an intention to retain or exclude them: *vide* 30 Cal 556.[3] There are two cases decided by this Court, which are reported in 13 O L J 432[4] and 13 O L J 846.[5]

1. ('82) 4 All 381, Abu Husan v. Ramzan Ali.
2. ('25) 12 AIR 1925 All 449 : 87 I C 298 : 47 All 470 : 23 A L J 283, Abbainandan v. Pashpat.
3. ('03) 30 Cal 556 : 30 I A 71 : 7 C W N 482 : 8 Sar 439 (PC), Asghar Reza Khan v. Mahomed Mehdi Hossein Khan.
4. ('26) 13 AIR 1926 Oudh 358 : 93 I C 287 : 13 O L J 432, Balram Singh v. Ganga Singh.
5. ('27) 14 AIR 1927 Oudh 240 : 104 I C 155 : 2 Luck 48 : 13 O L J 846 : 6 O W N 1150, Krishna Kumari Devi v. Rajendra Bahadur Sinha Deo.

In the former case it was held that if a zamindar sells his zamindari share in a village, it may be presumed that he sells the property including his share in the abadi unless there are words in the sale deed showing a contrary intention. This decision also proceeded on the view taken in 4 ALL 381[1] and 30 Cal 556.[3] A similar view was taken in the latter case relying upon the same decisions and a few others. The lower appellate Court has tried to distinguish the latter cases on the ground that in both of them the entire village was transferred and not a portion therein. This distinction appears to me to be without a difference. A specific zamindari share of a patti in a village constitutes a separate entity and may well be regarded as a distinct unit like the village itself. If the sale of an entire village is presumed to convey all the interests of the owner including his interest in the abadi, there is neither reason nor principle in contending that the sale of a specific zamindari patti will not lead to the same result.

Reliance has been placed on behalf of the defendant-respondent on two cases, namely 1935 O W N 365[6] and 1940 O W N 13.[7] Neither of the cases can afford any assistance to the respondent's case. The facts of the former case are entirely distinguishable. The question in that case was whether the grove plots did or did not pass at the auction sale of the entire village consisting of 20 biswas. At p. 367 it is stated that the miscellaneous property consisting of grove land was not included in the 20 biswas share and that there was a separate patti consisting of 12 bighas 15 biswas of grove land. This statement was based upon the evidence afforded by the khewats produced in that case. Consequently, it was held that the auction sale did not convey the interest in the grove. The latter case is also inapplicable to the facts of the present case. There a part of the share and not the whole was sold. The learned Judge observed that the presumption that a house standing on a share is sold holds good in a case where a complete share has been sold, but it does not apply to a case where only a part of the share is sold. The present is not the case where only a part of the share has been sold and the balance of the share remains unsold. As I have already stated above, the zamindari share was sold in its entirety without any exception or reservation whatsoever and the decisions relied upon will therefore have no application to the present case.

As regards the plea on the basis of S. 60 (1) (c), Civil P. C., which found favour with the lower appellate Court, it is enough to state that the plea was not raised by the defendant in the written statement but was urged only at the time of the arguments before the trial Court. In my opinion such a plea ought not to have been allowed to be entertained. Under S. 60 (1) (c) houses and other buildings belonging to an agriculturist and occupied by him shall not be liable to attachment or sale in execution of a decree. Before the defendant is entitled to succeed on this plea he is bound to show that Chandrapal Singh was an agriculturist within the meaning of S. 60 (1) (c), Civil P. C. In A I R 1927 ALL 601[8] it was held that an agriculturist whose house is protected from attachment and sale by S. 60 (1) (c), Civil P. C., must be an agriculturist belonging to the class of persons who are ordinarily designated as agriculturists, that is, whose principal source of livelihood is by cultivation. Cultivation, to a certain extent, is carried on by most if not all, of the zamindars in U. P., but their houses cannot be designated as agriculturists' houses. A similar view was taken in A I R 1932 ALL 499.[9] This again was followed in a Bench decision of the Allahabad High Court in A I R 1935 ALL 448.[10] It was held in this case that the test applied in deciding whether a person is an agriculturist is whether his main source of income is derived from cultivation or not. The term "agriculturists" used in cl. (c) of S. 60 (1), Civil P. C., is used in the sense of a person who is an agriculturist by profession, that is, a person whose main source of livelihood is cultivation.

It was held in A I R 1938 Lah 72[11] that the term 'agriculturist" as used in S. 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. In the present case there is no evidence whatsoever to show that Chandrapal

6. ('35) 22 AIR 1935 Oudh 304 : 154 I C 1017 : 1935 O W N 365, Sheo Narain Singh v. Jwala Prasad.
7. ('40) 27 AIR 1940 Oudh 118 : 185 I C 373 : 15 Luck 288 : 1940 O W N 13, Bachan Lal v. Gobardhan.
8. ('27) 14 A I R 1927 All 601 : 106 I C 49, Bachan Singh v. Bhika Singh.
9. ('32) 19 A I R 1932 All 499 : 138 I C 67 : 1932 A L J 499, Sampat v. Ram Prasad.
10. ('35) 22 A I R 1935 All 448 : 157 I C 986 : 1935 A L J 507, Tirloki Prasad v. Kunj Behari Lal.
11. ('38) 25 A I R 1938 Lah 72:177 I C 60 : I L R (1938) Lah 374 : 40 P L R 984, Sant Ram v. Buta Khan.

Singh was an agriculturist by profession and that his main source of livelihood was cultivation. I hold therefore that the plea under S. 60 (1) (c), Civil P. C., has not been substantiated. I am further of opinion that since Chandrapal Singh did not object to the sale of the house in question on the ground of his being an agriculturist within the meaning of S. 60 (1) (c) and allowed the house to be sold, it would be no longer open to him, much less to a stranger like the defendant-respondent, to raise the same objection in answer to a suit by the auction-purchasers for possession of the property purchased by them: *see* 40 ALL 680.[12]

Lastly it has been urged on behalf of the defendant-respondent that Chandrapal Singh became an ex-proprietary tenant after the auction sale and as such he is entitled to retain the possession of the house as a tenant. To my mind there is no force in this contention. The ownership of the house or the materials thereof has passed to the auction-purchasers by virtue of the auction sale and the vendor has lost all interest therein from that date. The subsequent acquisition of ex-proprietary rights by the vendor cannot have the effect of reviving the ownership in favour of the vendor. For the foregoing reasons I allow the appeal with costs, set aside the judgment and decree of the lower appellate Court and restore that of the Court of first instance.

G.N./R.K. *Appeal allowed.*

12. ('18) 5 A I R 1918 All 305 : 47 I C 947:40 All 680 : 16 A L J 691, Lala Ram v. Thakur Prasad.

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(28) A. I. R. 1941 Oudh 399

YORKE AND AGARWAL JJ.

Anis Ahmad Abbasi and another — *Applicants*

v.

Hakim Qari Nasir Ahmad — *Opposite Party.*

Criminal Misc. Appln. No. 140 of 1940, Decided on 28th March 1941.

Contempt of Courts Act (1926), S. 2 — Defamation case pending—Publication with tendency to prejudice public or Court for or against any party before cause is finally heard amounts to contempt of Court—Some of publications held amounted to contempt of Court though not of serious nature — Unqualified apology held sufficient.

A publication which has a tendency to prejudice the public or the Court for or against any party before the cause is finally heard amounts to contempt of Court. [P 400 C 2]

An account of an interview between certain leaders published by newspaper *A* was contradicted as false by an article in newspaper *B* which dubbed the newspaper *A* as the king of liars. Newspaper *A* filed a case under S. 500, Penal Code, and pending the same also made a petition under S. 2, Contempt of Courts Act, against *B* for publishing certain articles. The petition was successful and ended in the conviction of the editor and printer of *B*. Thereafter *A* published certain articles in connexion with the conviction of *B*'s editor and printer for contempt of Court. With reference to these articles *B* filed a petition under S. 2, Contempt of Courts Act, while the defamation case against it was pending. In article (a) a challenge was thrown out to those who called the editor of the newspaper *A* a liar. Article (b) was a letter which showed that the publication of the account of the interview between certain leaders in *A* was true which was undoubtedly a point in the defamation case. Article (c) was to the effect that "the Haqiqat *B* which bore senseless enmity towards *A* and its Director and which had taken the biggest part in adverse propaganda against the Director of *A* published an article by a certain person in which *A* was dubbed as "King of liars" and article (d) was meant to impress on the public that those who opposed *A* were punished by God :

Held (1) that article (a) and (b) did not amount to contempt of Court: 19 I C 539 (Cal), *Rel. on.* [P 400 C 2; P 401 C 1]

(2) that article (c) was contempt of Court though not of a serious nature inasmuch as it could be understood to mean that *B* published the article on account of enmity towards *A* and not because it was true and thereby could prejudice the public. [P 401 C 2]

(3) that article (d) was contempt of Court though not of a serious nature inasmuch as its effect might be to deter witnesses from giving evidence on behalf of *B* against *A* in the defamation case. [P 401 C 2]

(4) that unqualified apology in respect of articles (c) and (d) was sufficient. [P 401 C 2]

K. P. Misra — for Applicants.

Siraj Husain — for Opposite Party.

Order.—This is an application under S. 2, Contempt of Courts Act. The applicant Anis Ahmad Abbasi is the Editor of the paper named Haqiqat, and the other applicant Maulvi Mohammad Idrees is the Printer of that paper. The opposite party Hakim Qari Nasir Ahmad is the Editor, Printer and Publisher of another paper Hamdam. An account of an interview between certain Punjab Khaksar leaders and a Sunni leader, Maulana Abdul Shakur, was published in the Hamdam of 23rd July 1940. An article over the signature of one Shaikh Mohammad Kamil was published in the Haqiqat of 25th July 1940. The heading of that article was 'Lies told by the Hamdam, King of liars', and it was alleged in it that the whole account of the interview in the Hamdam of 23rd July 1940 was a fabrication. On 30th July 1940, the Editor of the Hamdam filed a complaint in Court against the Editor and the Printer of the Haqiqat under S. 500, Penal Code. A paragraph was published in the Hamdam of 1st August 1940 the heading of which was :

Challenge to those who call Hamdam a liar. Criminal proceedings started by the Editor of the Hamdam against Haqiqat newspaper. Our opponents must come to the Court and prove that the news in the Hamdam was false, or they will go to jail. The well-known barrister of Lucknow Mr. Nasir Ullah Beg has filed a case in the Court of the City Magistrate of Lucknow.

It was stated in this paragraph that Shaikh Mohammad Kamil had contradicted in the paper Haqiqat the news published by the Hamdam and had abused it to his heart's content and accused it of publishing lies and that the Editor of the Hamdam had filed a defamation suit in the Court of the City Magistrate of Lucknow. It was also stated in it:

We challenge those who by their insinuations and malicious fabrications mislead the public against the Hamdam to come to the Court and prove that any news published in the Hamdam is false.

A letter purporting to be sent by Akram Ahmad, the leader of the deputation of Khaksars, was also published in the Hamdam of 1st August 1940. He wrote in that letter that the report of the interview between Maulvi Abdul Shakur and the Khaksar leaders published in the Hamdam of 23rd July 1940 was word by word true. The heading of this letter was 'Truth about those who make false accusations against Hamdam.' The Haqiqat published a short editorial paragraph in its issue of 3rd August 1940 with the heading '*Jhootaun ke badshah ka dawa. Haqiqat ke khilaf muqadma*,' (Complaint by the King of liars. Case against the Haqiqat). It was stated in this editorial paragraph that the case brought by Hamdam would be fought, and if it was proved that Hamdam was a liar there would be a suit for damages and costs by Haqiqat, and that the Haqiqat gladly accepted the challenge which had been thrown to it. The Editor of the Hamdam made a complaint to this Court under S. 2, Contempt of Courts Act, against the Editor and the Printer of Haqiqat on 13th September 1940 in respect of the editorial paragraph published in the Haqiqat of 3rd August 1940. Both the Editor and the Printer were found guilty of contempt of Court, and the Editor was fined Rs. 200 and the Printer Rs. 100, and they were further ordered to pay Rs. 50 as costs to the Editor of Hamdam. The judgment in that case was pronounced on 28th October 1940. On 30th October 1940, Hamdam published a paragraph with the heading:

God's lathi on the head of the opponents of Hamdam. Haqiqat called Hamdam a liar. Prosecution instituted by the Editor of the Hamdam. Prosecution aside, God took such a vengeance that by reason of the abusiveness of the Haqiqat a prosecution for contempt of Court was launched in the Chief Court and ended in a fine of Rs. 300 besides costs of the suit. The Court decided that it was a case of heinous offence of contempt of Court.

It was stated in that paragraph that the Editor and the Printer of the Haqiqat were both fined Rs. 200 and Rs. 100 respectively, and it was ordered that they should pay all the legal expenses incurred by the Hamdam and also the amount of Rs. 50 to Mr. Nasir Ullah Beg. This paragraph also contained the following:

The facts of the case are that the newspaper Haqiqat which bears senseless enmity towards Hamdam and its Director and which has taken the biggest part in adverse propaganda against the Director of Hamdam published an article by Mohammad Kamil in which the Hamdam was dubbed as 'King of liars.'

Another paragraph appeared in the Hamdam of 31st October 1940, with the heading 'God's curse on the opponents of Hamdam.' Another paragraph appeared in the Hamdam of 1st November 1940 under the heading. 'As one sows so shall he reap.' This complaint had been made in respect of the two publications in the Hamdam, dated 1st August 1940, and the three other publications in it, dated 30th October 1940, 31st October 1940 and 1st November 1940.

We have to see whether the publications had a tendency to prejudice the public or the Court for or against any party before the cause was finally heard. If they had such a tendency, the opposite party is guilty of contempt of Court. We take first the paragraph appearing in the Hamdam, dated 1st August 1940, in which a challenge was thrown out to those who called Hamdam a liar. We think that it was not contempt to throw out a challenge to the Haqiqat to prove that the news in the Hamdam was false. It is said that the Hamdam committed contempt by publishing that in case the news was not proved to be false, the opponents would go to jail, because the result of the complaint was thereby anticipated. We think that this did not amount to contempt of Court. Neither the Magistrate in whose Court the defamation complaint was pending nor the public could be prejudiced thereby about the merits of the case. Everybody knew full well that it was within the province of the Magistrate only to decide what punishment he should give. We think that there is nothing in this paragraph which can make the Editor of the Hamdam liable for contempt of Court.

Next we come to the letter of Maulvi Akram Ahmad published in the Hamdam of 1st August 1940. This letter goes to show

that the publication in the Hamdam of 23rd July 1940 was true. That was no doubt a point in the defamation suit, but we are not satisfied that the letter could tend to prejudice the Court or the public. We also think that the intention of the opposite party was not to prejudice anybody, but it was only to reply to the letter of Shaikh Mohammad Kamil in which it had been said that the account given in the Hamdam of 23rd July 1940 was untrue. This letter was published on 1st August 1940, that is only two days after the complaint was made by Hamdam and before any date had been fixed in the case. It was held under similar circumstances in 19 I C 539,[1] that the accused was not guilty of contempt of Court. The applicants themselves did not think that the letter would prejudice the trial, because they did not take any step till the present application was made on 26th November 1940, though an application was made on behalf of the opposite party on 13th September 1940, for contempt of Court in respect of a publication in the Haqiqat of 3rd August 1940. The present applicants did not say even in reply to the application of the opposite party that he had himself committed contempt of Court. That might have been a factor in determining the punishment. We are of opinion that the opposite party did not commit contempt of Court by reason of publishing this letter.

It is said that in the publication, dated 30th October 1940, the Hamdam published that the Court awarded full legal expenses incurred by the Hamdam and the amount of Rs. 50 more to the counsel, but it was wrong, and the Court had awarded Rs. 50 in all. We are not prepared to say that it was an intentional misstating of the result of the application. It could not prejudice the trial of the defamation case. It was stated in this paragraph that

> the Haqiqat which bears senseless enmity towards Hamdam and its Director and which has taken the biggest part in adverse propaganda against the Director of the Hamdam, published an article by Shaikh Mohammad Kamil in which the Hamdam was dubbed as 'King of Liars.'

One could understand this to mean that the Haqiqat published an article of Shaikh Mohammad Kamil on account of the enmity towards Hamdam and not because it was true. This could prejudice the public and the Court, and so it was a contempt of Court but not of any serious nature. The other words objected to are :

> God's lathi on the opponents of Hamdam .... God took such a vengeance that by reason of the abusiveness of the Haqiqat a prosecution for contempt of Court was launched in the Chief Court and ended in a fine of Rs. 300 besides costs of the suit.

These words imply that those who oppose Hamdam are punished by God. This might possibly deter witnesses from giving evidence on behalf of Haqiqat against Hamdam, and therefore we think that the opposite party is guilty of contempt of Court but not of serious type. Such writings are not taken very seriously by anybody. The heading of the paragraph in the Hamdam, dated 31st October 1940, is 'God's curse on the opponents of Hamdam.' It was stated in it that Mian Anis Ahmad, Editor of the Haqiqat, had grown so reckless by indulging in constant abuses against the Director of the Hamdam that he published the news of the case instituted by the Editor under the caption 'Case by the King of Liars' that the Real Avenger avenged this in this manner that in spite of the fact that the editor and the printer of the Haqiqat tendered humble apologies to the Court, the Chief Court held the offence to be so heinous that it inflicted very hard sentences against the editor and the printer of the Haqiqat. Similarly, the letter published in the Hamdam, dated 1st November 1940, is to the effect that every one who attacks Hamdam becomes victim to divine punishment. A reference to the sentence pronounced by the Chief Court on the Haqiqat is also made.

These publications of 31st October 1940, and 1st November 1940, were meant to impress on the public that those who oppose Hamdam are punished by God. They were with reference to the controversy between the Hamdam and the Haqiqat. The effect of these publications also could be to deter the witnesses from giving evidence on behalf of Haqiqat; therefore they amounted to contempt of Court though not of a serious nature. We think that the opposite party is guilty of contempt of Court in respect of the publications, dated 30th October 1940, 31st October 1940 and 1st November 1940 only, but he has withdrawn his complaint for defamation and the contempt was not at all serious. He has tendered an unqualified apology in writing to the Court, and under the circumstances of the case we think we ought to accept it. We hold that the opposite party is guilty of contempt of Court, but we accept the apology tendered by him. No order as to costs.

G.N./R.K. *Order accordingly.*

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1. ('13) 19 I C 539: 14 Cr L J 267 (Cal), Ketra Moni Dasi v. Shamal Dhone Dutt.

(28) A. I. R. 1941 Oudh 402

THOMAS C. J.

Raj Kumari Kaniz Baqar
— *Appellant*

v.

Rani Kaniz Abid and another
— *Respondents.*

Exn. of Decree Appeal Register No. 10 of 1938, Decided on 27th March 1941, against order of Civil Judge, Barabanki, D/- 4th August 1937.

Oudh Rent Act (22 of 1886), Ss. 152 and 154 — Under-proprietor mortgaging his holding — Mortgagee obtaining final decree — Rent suit by superior proprietor against under-proprietor — Mortgagee not impleaded — Rent decree passed — At sale in execution decree-holder himself purchasing property — Auction purchaser held not entitled to priority by reason of S. 152 over mortgagee who was no longer liable for any payment under S. 154.

Where an under-proprietor mortgages his holding and the mortgagee obtains a final decree on his mortgage and in the meantime the superior proprietor institutes a rent suit against the under-proprietor but does not implead the mortgagee and having obtained a decree himself purchases the property at the auction sale in execution of his rent decree, the auction purchaser cannot by reason of S. 152 claim priority over the mortgagee who is no longer liable for any payment under S. 154 after the satisfaction of the amount due under the rent decree by the execution of that decree : ('29) 16 A I R 1929 Oudh 353, *Disting.* [P 403 C 1]

Haider Husain and P. N. Bhatt — for Appellant.

Akhlaque Husain — for Respondent 1.

Judgment. — This first execution of decree appeal has been filed on behalf of Raj Kumari Kaniz Baqar, who is the superior proprietor of half of the village Achecha in the Bara Banki district against the judgment and decree of the learned Civil Judge of Bara Banki, dated 4th August 1937. The facts given in the judgment of the learned Judge are rather brief, but the following facts have been admitted by the learned counsel for the parties. It appears that one Ghazanfar Ali Khan was the under-proprietor of the plots in dispute and he on 28th June 1917 executed a mortgage deed in favour of Raja Abul Hasan Khan, the taluqdar of Belahra estate. On his death and under a will executed by him he was succeeded by Rani Kaniz Abid, one of the respondents in this case. The Court of Wards on behalf of Rani Kaniz Abid obtained a preliminary decree on 29th May 1925 on the basis of the mortgage deed of 28th June 1917 and this decree was made final on 16th May 1927. On 17th August 1933, the mortgagee decree-holder applied for sale of the mortgaged property, and as it was an ancestral property, it was sent to the Collector. In the meantime on 24th September 1928 the Court of Wards representing the superior proprietor of village Achecha obtained a decree for under-proprietary rent against Ghazanfar Ali Khan and, in execution of that decree, purchased the under-proprietary rights on 20th September 1934. It is important here to note that Rani Kaniz Abid or the Court of Wards which represented her was not made a party to the suit or to the execution proceedings.

On 19th August 1935 Rani Kaniz Abid (the mortgagee decree-holder) applied to the execution Court that the auction purchaser of the under-proprietary rights (that is the Court of Wards) be made a party in her execution case. Her prayer was granted. The auction purchaser appealed to this Court against the said order, but the appeal was dismissed by a Bench of this Court on 9th November 1936 (*vide* Execution of Decree Appeal, No. 19 of 1936). After the decision of the appeal, the second objection of the auction purchaser, which was to the effect that the under-proprietary rent was a charge on the mortgaged property and that the mortgaged property could not be sold in execution of the mortgage decree was taken up and decided by the learned Civil Judge against the auction purchaser on 4th August 1937 and it is this order which is now under appeal before me. The contention on behalf of the appellant is that the arrears of rent being a statutory liability it cannot be wiped out on the ground that Rani Kaniz Abid was not made a party and that the mortgagee is liable to pay the under-proprietary rent as it is a prior charge on the property. Reliance is placed on a Bench decision of this Court reported in 6 O W N 469.[1] I regret I am unable to accept the contention of the learned counsel. It is true that under S. 154, Oudh Rent Act, where an under-proprietor creates any incumbrance and fails to pay to the proprietor all or any part of the rent subsequently accruing in respect of the land subject to the incumbrance, the incumbrancer shall be liable to pay to the proprietor the whole or part of that rent as the case may be. This section lays down the liability of a mortgagee of any under-proprietary tenure for payment of arrears of rent due to the superior proprietor, but, in this case, as I have mentioned, the superior proprietor did not make Rani Kaniz Abid a party and sued Ghazanfar Ali Khan alone,

1. ('29) 16 A I R 1929 Oudh 353 : 117 I C 452 : 6 O W N 469, Bisheshar Dayal v. Bajrang Bahadur Singh.

obtaining a decree against him and in execution of that decree purchased the property put up for sale. The decretal amount was satisfied and the liability to pay rent by the mortgagee thus came to an end.

It was conceded by the learned counsel on behalf of the appellant that no arrears of rent were due. Under S. 154, Oudh Rent Act, the liability arises when the under-proprietor fails to pay the rent to the proprietor, in other words the charge which is sought to be declared on the mortgaged property is not due. I am of opinion that the case reported in 6 O W N 469[1] relied on by the learned counsel for the appellant is clearly distinguishable. In fact the learned counsel frankly admitted that the facts were distinguishable, but he contended that there were observations in the judgment which helped the appellant. In that case the property had been sold under a mortgage decree and then a decree for arrears of rent was obtained and the superior proprietor then wanted to make the auction purchaser a party to the execution proceedings for arrears of rent. The decree was still outstanding. In the present case, as I have said, the mortgagee was never made a party and nothing is due. It is difficult to understand how the liability can be extended to Rani Kaniz Abid when once it has been discharged.

Section 152, Oudh Rent Act, provides that where a decree is for an arrear of rent due in respect of an under-proprietary right, the interest of a judgment-debtor in that right may be sold in execution of the decree. This shows that if the under-proprietary holding has been mortgaged by the judgment-debtor, the only thing that can be sold is the interest of the judgment-debtor, which in a case like this would be his equity of redemption. The auction purchaser therefore cannot claim priority against the mortgagee who is no longer liable for any payment under the provisions of S. 154, Oudh Rent Act. I am therefore of opinion that the sum of Rs. 742-7-4 cannot be declared a charge. I therefore dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 403

BENNETT AND GHULAM HASAN JJ.

Avadh Raj Singh — Appellant

v.

Mangrey — Respondent.

Misc. Appeal No. 40 of 1938, Decided on 16th April 1941, against order of Dist. Judge, Gonda, D/- 26th February 1938.

(a) Provincial Insolvency Act (1920), S. 53 — Gift of certain property worth Rs. 200 by debtor to minor son and cousin in 1932 — Debtor indebted to extent of about Rs. 1130 — No pressure from creditor — No debt a decretal debt — No execution of decree pending at time of gift — Deed of gift given effect to and donee put in possession —Amount of debts at time of insolvency petition in 1937 almost same as in 1932 — Gift held not colourable or fictitious.

At the time of making a gift of certain property worth about Rs. 200 to his minor son and cousin in 1932 the debtor was indebted to the extent of about Rs. 1130. There was nothing to show that at the time of the gift the debtor was under any pressure from his creditors which led him to make the gift in question; or that any of the debts was a decretal debt or that there was any execution of decree pending against him. The deed of gift was given effect to and the donees were put in possession. The amount of indebtedness of the debtor at the time of his insolvency petition in 1937 was almost the same as in 1932 :

Held that the gift deed was not fictitious or colourable. [P 404 C 2]

(b) Provincial Insolvency Act (1920), Ss. 4 and 53 — Question as to fictitious character of transfer not falling under S. 53 — Court can nevertheless try it under S. 4.

It is open to an insolvency Court to try a question under S. 4 relating to the fictitious character of the transfer even though it does not fall under S. 53 : ('35) 22 A I R 1935 Bom 316; ('36) 23 AIR 1936 Rang 54; ('34) 21 AIR 1934 Nag 47; ('31) 18 AIR 1931 Oudh 124 and ('29) 16 AIR 1929 All 105 (FB), *Rel. on.* [P 405 C 1]

S. B. Bajpai — for Appellant.

Mahabir Prasad Srivastava — for Respondent.

Judgment. — This appeal arises out of an order dated 26th February 1938 passed by the District Judge of Gonda allowing the objection of the creditor-respondent that the property in dispute belongs to the insolvent. The insolvent has appealed. The material facts are that Avadh Raj Singh, the appellant, executed a registered deed of gift on 15th December 1932 in favour of his minor son Raj Bahadur Singh and his cousin Bharat Singh, under which he transferred his under-proprietary tenure measuring 6.20 acres, 35 trees without land, a house and a phulwari situate in village Saraiyan and a grove in village Bangaon. The value of the property is stated in the deed to be Rs. 200. On 23rd January 1937 Avadh Raj Singh filed a petition for insolvency. He was declared insolvent on 13th March 1937. On 18th May 1937 Mangrey, one of the creditors — now respondent — filed an application for permission to file a regular suit for cancellation of the deed of gift. This permission was granted on 13th July 1937. Instead of filing a regular suit Mangrey filed an application on 26th October 1937, purporting to be under Ss. 4/53, Pro.

vincial Insolvency Act. The receiver reported upon this application :

As the petition was presented more than four years after the transfer no action under S. 53, Provincial Insolvency Act, can be taken but the question can be decided by the insolvency Court under S. 4 of the said Act.

The learned District Judge framed three issues in the case. The first two issues related to the question whether the deed of gift was a fictitious document which was never given effect to and whether the insolvent remained in possession of the property which the deed of gift purported to transfer. Issue 3 related to the question whether the deed of gift could be annulled under S. 4, Insolvency Act. Issues 1 and 2 were taken together and the finding on these issues was that the deed of gift was a fictitious document executed by Avadh Raj Singh with the intention of saving his property from the creditors. The learned District Judge also held that the transfer could be set aside where it is found to be fictitious. The result was that he allowed the objection holding that the property in question belongs to the insolvent.

On behalf of the insolvent it has been contended that the finding upon the fictitious character of the gift is not justified by the materials on the record and that there is no finding in respect of the possession of the property covered by the deed of gift. We are of opinion that this contention must prevail. It is in evidence that the mutation of names was effected in favour of the donees in respect of the property gifted. Lalta Prasad, the patwari, states that no khewat stands in the name of Avadh Raj Singh after the date of the gift and Avadh Raj Singh no longer retains possession over the gifted property. According to the patwari, Avadh Raj Singh does not live in Saraiyan since the date of the gift but lives in another village Bangaon. He also states that Avadh Raj Singh does not stay with his minor son who really lives with Bharat Singh's mother. The evidence of the insolvent is also to the same effect. He repudiates the fact that the deed of gift is fictitious and states that he has been living in village Bangaon since the date of the gift away from his wife and son and that he has not been in possession of the gifted property since the date of the gift. Mangrey also came into the witness box and produced two witnesses in support of his objection. Mangrey admits that Bharat Singh is employed in Karachi for the last five or six years and that the minor son Raj Bahadur Singh lives with Bharat Singh's mother in village Saraiyan. Mangrey professes ignorance of the entries in the khewat and states that he has made no enquiries about it. His two witnesses Bhagwan Das and Mandhata are not reliable witnesses. Bhagwan Das admits that there has been litigation between him and the insolvent. Mandhata belongs to a different village.

We have carefully considered the evidence about possession produced by both parties and are satisfied that there is no satisfactory and reliable evidence on behalf of the creditor, which throws any doubt upon the genuineness of the khewat entries and the evidence of the patwari, who definitely states that Avadh Raj Singh has never had possession since the date of the gift over the gifted property. The existence of the khewat entries also shows that the deed of gift has been given effect to. Avadh Raj Singh stated before the Court that excepting a debt of Rs. 50 his debts at the time of the gift in 1932 were the same as given in the schedule attached to his application for insolvency. The total of these debts, minus the debt of Rs. 50, comes to about Rs. 1130. There is no evidence on the record to show what was the value of the entire property owned by the insolvent at the date of the gift. The learned Judge says that the insolvent was heavily indebted at the time, and he considers the gift of the property by a father in favour of his only minor son as most unusual. The amount of indebtedness admitted by the insolvent does not show that the insolvent was under any pressure from his creditors which led him to make the gift in question ; it has not been shown that any of the debts was a decretal debt or that there was any execution of decree pending against the insolvent. The property was transferred in equal moieties between the son and the cousin, and we do not see that there are any circumstances proved in this case to show that the deed of gift was executed merely as a cloak to save the property from the hands of the creditors. It must be borne in mind that a son is under a pious obligation to pay his father's debts unless they are tainted by illegality or immorality. A transfer of property to the son by means of a gift would not absolve the son from his liability to pay such debts.

Having regard to the circumstances of this case, we are satisfied that there is no evidence whatsoever to show that the deed of gift is a fictitious or colourable transaction which was not intended to take effect.

We therefore hold that the insolvent has got no interest in the property gifted. As regards the other question whether an insolvency Court has jurisdiction under S. 4 to go into the question involving the fictitious or genuine character of the transfer executed by the insolvent even though more than two years have elapsed before the date of the insolvency, we need only refer to AIR 1935 Bom 316,[1] A I R 1936 Rang 54[2] and A I R 1934 Nag 47.[3] A Bench of this Court in A I R 1931 Oudh 124[4] following the view taken by Sen J. in 51 ALL 550,[5] held that where the transfer was intended not to be operative from the beginning and the insolvent had remained in possession of the property, the receiver may apply for its annulment. We are of opinion therefore that it is open to an insolvency Court to try a question under S. 4, Provincial Insolvency Act, relating to the fictitious character of the transfer even though it does not fall under S. 53, Provincial Insolvency Act. The result is that we set aside the order of the learned District Judge and allow the appeal with costs.

G.N./R.K. *Appeal allowed.*

1. ('35) 22 A I R 1935 Bom 316 : 157 I C 680 : 37 Bom L R 478, Raoji Bapuji Pandarkar v. K. L. Bawachekar.
2. ('36) 23 AIR 1936 Rang 54: 161 I C 687, Maung Ba E v. Maung Kyi.
3. ('34) 21 A I R 1934 Nag 47 : 141 I C 667, Mt. Basantibai v. Ramrao Krishna Rao.
4. ('31) 18 A I R 1931 Oudh 124 : 131 I C 433 : 6 Luck 614 : 8 O W N 147, Abul Hasan Khan v. Rajbir Prasad.
5. ('29) 16 AIR 1929 All 105 : 113 I C 819 : 51 All 550: 1929 A L J 155 (FB), Anwar Khan v. Muhammad Khan.

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(28) A. I. R. 1941 Oudh 405

YORKE AND AGARWAL JJ.

Bishambharnath and others —
Plaintiffs — Appellants
v.
Kunwar Sri Prakash Singh and another
— Defendants — Respondents.

Civil Misc. Appln. No. 135 of 1941, Decided on 25th April 1941.

(a) Res judicata—Court determining value of suit at certain figure and finding it beyond its jurisdiction returning plaint for presentation to proper Court—Plaintiff not questioning Court's decision as to valuation by appeal and presenting plaint in other Court — First Court's decision held could not operate as res judicata.

The Court in which the suit was filed determined the valuation of the suit at a certain figure and finding it beyond its jurisdiction returned the plaint for presentation to proper Court. The plaintiff did not question the correctness of the valuation determined by the Court by filing an appeal against it and presented the plaint in another Court :

Held that the first Court's valuation of the suit at a certain figure could not operate as res judicata. [P 406 C 1]

(b) Suits Valuation Act (1887 as amended by U. P. Act 7 of 1939), S. 4 — Suit for declaration that certain villages are subject of public and not private trust—Suit falls under S. 4 — Value for jurisdiction held thirty times the land revenue of villages.

A suit for a declaration that certain villages are the subject of a public trust and not a private trust falls within the purview of S. 4 and hence the valuation of the suit for purposes of jurisdiction must be thirty times the land revenue payable in respect of the suit villages in accordance with the rules framed under S. 3 of the Act : 11 Mad 266, *Expl.* [P 407 C 1]

B. P. Misra — for Appellants.

Mahabir Prasad Srivastava —
for Respondents.

Order.—By our order of 21st March 1941, we held that the question raised by application on behalf of the respondents, No. 135 of 1941, should be decided as a preliminary question in view of the fact that it would affect the question whether the record should be printed or not. The question raised in this application is in regard to the valuation of the present suit for the purposes of jurisdiction. The suit was originally filed as regular suit No. 160 of 1938 in the Court of the Munsif, Biswan, Sitapur, and the prayer was that a declaration be granted that the trust created by Thakur Fateh Singh on 4th December 1899, by his will in respect of villages Ulra and Dafra with the hamlets thereof is a public trust and not a private trust. The plaintiffs in instituting this suit valued it for purposes of jurisdiction at Rs. 500. The suit was one falling within the purview of Art. 17 of Sch. 2, Court-fees Act, and for purposes of court-fee was stamped with a court-fee of Rs. 15. In the trial Court the defendant (father of the present respondents) objected to this arbitrary valuation of the suit for purposes of jurisdiction, and after considering the matter the Munsif on 14th January 1939, held that for purposes of jurisdiction the suit was incorrectly valued and was beyond his jurisdiction. He took the view that for the purposes of jurisdiction the suit was to be valued, according to the value of the subject-matter which according to Government rules would be thirty times the land revenue of the villages in suit, and would therefore amount to about Rs. 47,610, the land revenue being Rs. 1587. The plaint was returned to the plaintiffs for presentation in the Court having jurisdiction to entertain the suit and the plaintiffs

presented their plaint in the Court of the Civil Judge, Sitapur, but again failed to give it a valuation for purposes of jurisdiction other than an arbitrary valuation. This time they selected the figure of Rs. 5200. The defendants took an objection to the valuation of the suit and an issue was framed and decided by the learned Civil Judge who held that the proper valuation for purposes of jurisdiction was not Rs. 5200 but Rs. 47,610, being thirty times the land revenue of the property in suit.

The plaintiffs' suit was dismissed and the plaintiffs have come to this Court in first civil appeal and they have again valued their appeal for purposes of jurisdiction at Rs. 5200. The effect of this is that only a type-written record will be prepared and no appeal will lie from the decision of this Court as of right to their Lordships of the Privy Council. Learned counsel for the respondents has put forward two main contentions. The first is that the appellants are bound by the decision of the Munsif who returned the plaint to them, since they have never appealed against that decision. Secondly he has urged that it is not open to the plaintiffs-appellants to put an arbitrary valuation on the appeal for purposes of jurisdiction. As regards the first point we are not impressed with the contention that there is any question of res judicata about the matter. All that the Munsif could decide was that the suit was not within his jurisdiction. He was not entitled to arrive at any finding which would be binding on the Civil Judge in this matter. In the Court of the Civil Judge the decision of the Munsif on this point could not, in any circumstance, operate as res judicata nor was it so treated On the other hand, on the merits the matter appears to us to be entirely free from doubt, and learned counsel for the appellants has not put forward any argument which seems to have any force at all. He admits that for purposes of jurisdiction this suit falls within the mischief of S. 4, Suits Valuation Act (Act 7 of 1887) as modified up-to-date by U. P. Act 7 of 1939. Section 4 of the Act provides that:

> Suits mentioned in paras. IV (a), IVA, IVB, V, VA, VB, VI, VIA, VIII and X (d) of S. 7 and Arts. 17, 18 and 19 of Sch. 2, Court-fees Act, 1870, as in force for the time being in the United Provinces, shall be valued for the purposes of jurisdiction at the market value of the property involved in or affected by or the title to which is affected by the relief sought or at the amount involved in or affected by or the title to which is affected by the relief sought, and such value shall in the case of land be deemed to be the value as determinable in accordance with the rules framed under S. 3.

(It is those rules of course which lay down that the valuation shall be thirty times the land revenue.) Learned counsel has made a vain attempt to introduce into Section 4 the idea of a notional value which is to be found in the Court-fees Act in certain cases. Section 4, Suits Valuation Act, however leaves no room whatever for the idea of a notional value. In the present case the sole question for decision is whether the title as trustee of the two villages in suit vests in the public or in private persons, that is whether they are the subject of a public trust or a private trust. The position then is that the title to these villages is affected by the relief sought and therefore the valuation for the purposes of jurisdiction is the market value of the property itself. Learned counsel might possibly have put forward the argument that the valuation for the purposes of jurisdiction was to be sought for under the second head, that is with reference to the amount involved in or affected by or the title to which is affected by the relief sought, but he has done nothing of the kind. He has merely sought to show that it is impossible to give anything but an arbitrary value to the relief of a declaration that property is the subject of a public trust and not of a private trust. That argument, however, is entirely irrelevant and it was doubtless to obviate arguments of this kind that S. 4, Suits Valuation Act, was amended and worded as it now stands. Learned counsel sought to rely on 11 Mad 266.[1] In that case their Lordships of the Madras High Court, after referring to a case in which it was held that a suit to remove a karnavan is not a suit to recover tarwad property and to be valued as such, but is a suit which asks for a relief that is incapable of valuation, and that the value put on it by the parties was the one to be adopted, went on to say:

> These decisions (that is, this and the one previously referred to) proceed on the view that possession is always in the tarwad and that the subject-matter of the suit is not the land but an interest in it, namely, the right to management which is not capable of valuation. But it does not follow that a District Munsif has jurisdiction over every suit for the removal of a karnavan though the tarwad property to be managed is very considerable in value. The right of management must, from the nature of things, rise in value in proportion to the value of the property to be managed. It is not, therefore, unreasonable to take into consideration the value of the property and to see that the value put by the parties on the right of management for

1. ('88) 11 Mad 266, Krishna v. Raman.

the purpose of jurisdiction is bona fide and if bona fide to adopt it as the value of the subject-matter for purposes of jurisdiction. The Subordinate Judge was wrong in holding that because the subject-matter is incapable of precise valuation, the District Munsif had necessarily jurisdiction over the suit.

This case is, if anything, helpful to the respondents and not to the appellants. It was decided as far back as 1887 and the question which was then in doubt as to the proper jurisdictional valuation of such a suit is exactly the question which has been set at rest by the enactment of S. 4, Suits Valuation Act, in its present form. We have no doubt that the appeal has been incorrectly valued at Rs. 5200 for purposes of jurisdiction. The proper valuation is Rs. 47,610 being 30 times the land revenue. We allow the application and direct that the appellants shall within one week from this date amend their petition of appeal in accordance with this order. Should they fail to do so, the appeal will be put up for orders of dismissal.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Oudh 407

BENNETT AND GHULAM HASAN JJ.

L. Sudaman Prasad — Applicant

v.

Mohd. Abdul Alim — Opposite Party.

Privy Council Appeal No. 16 of 1939, Decided on 3rd March 1941, for leave to appeal to His Majesty in Council against decree of High Court, D/- 1st September 1939.

Civil P. C. (1908), S. 110, para. 2 — Meaning explained — S. 110, para. 2 means that suit to satisfy its conditions must involve rights and claims to property which are worth Rs. 10,000 or upwards and not that rights should affect property value of which is Rs. 10,000 or upwards.

Section 110, para. 2 is intended to extend the privilege given by para. 1 only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. The suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. It is the extent to which the decree or order operates to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever the value of the property in respect of which a claim or question is involved in the appeal no appeal lies under S. 110, unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards: 6 Bom L R 403 ; ('18) 5 A I R 1918 Mad 632 ; ('38) 25 A I R 1938 Mad 666 ; ('23) 10 A I R 1923 Lah 286 and ('34) 21 A I R 1934 Rang 292, *Rel. on* ; ('16) 3 A I R 1916 Mad 985, *Expl.*; ('37) 24 A I R 1937 All 169, *Dissent.* [P 408 C 1, 2]

The creditor obtained a simple money decree with interest for a sum of Rs. 9957-5-3. Objections to the execution of the decree against the property which was valued at Rs. 15,000 were allowed on the ground that the property being wakf was immune from attachment and sale. In the petition for leave to appeal to His Majesty in Council by the creditor :

Held that the test laid down in S. 110, para. 2 was not satisfied. [P 409 C 1]

L. S. Misra and S. N. Srivastava — for Applicant.

Mohammad Ayub — for Opposite Party.

Order. — This is a petition for leave to appeal to His Majesty in Council against the decree dated 1st September 1939, passed by a Bench of this Court in an execution of decree appeal. On 3rd April 1933, the petitioner obtained a simple money decree against one Merajuddin for a sum of Rs. 9250. On 23rd May 1935, Merajuddin died leaving a widow, Mt. Matin-un-nissa. In execution of the decree the petitioner attached mahal Amat-uz-Zahra in village Bhanpur on 21st October 1935 for recovery of the decretal amount with interest, namely Rs. 9957-5-3. The mahal in question is stated by counsel for the petitioner to have been valued at Rs. 15,000. On 5th February 1936, Mt. Matin-un-nissa filed objections under S. 47, Civil P. C., objecting that the property being wakf was not liable to attachment and sale. The Civil Judge rejected the objections, holding that the property was not wakf. This decision was reversed on appeal by a Bench of this Court and it was held that the property, which was the subject-matter of attachment, was wakf property. By the present petition the petitioner decree-holder desires permission to appeal to His Majesty in Council. Paragraphs 6 and 7 of the petition show that the petitioner prays for leave under one or other of the grounds stated in S. 110, Civil P. C.

Learned counsel on behalf of the petitioner, however, has confined his case only to para. 2 of S. 110, Civil P. C. It is argued that para. 2 of S. 110 applied to the case, namely, that the decree or final order involves, directly or indirectly, some claim or question to or respecting property of like amount or value. The contention urged on behalf of the petitioner is that although the value of the subject-matter in appeal to the Chief Court was stated as less than Rs. 10,000 the decree passed by this Court involves, directly or indirectly the question that the petitioner is entitled to sell the attached property of the value of more than Rs. 10,000

for the satisfaction of the decretal amount. We are unable to accede to this argument. It was held by Sir Lawrence Jenkins C. J. in 6 Bom L R 403[1] that to determine the value prescribed by S. 596, now corresponding to S. 110, Civil P. C., the decree is to be looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking relief is estimated at less than Rs. 10,000, the value of the matter in dispute in appeal is not of the prescribed value, the decree itself does not involve any claim or question to or respecting property of the prescribed value, and the case does not fulfil the requirements of S. 596 of the Code. That was a suit for a declaration and partition in which it was held that the property belonged to the estate of the deceased and the plaintiff's interest therein was a one-third. At page 406 it was observed :

> The argument has been that inasmuch as the whole property is valued at Rs. 12,000 there is a compliance with the terms of S. 596, though the loss to the defendant by reason of the decree is limited to one-third of that property and profits. If we were to give effect to the contentions urged before us it would follow that if the sole subject-matter in dispute were an easement of trifling value, but affecting property worth Rs. 10,000 or upwards then a right to appeal to His Majesty in Council under the Civil Procedure Code would exist.

This decision was followed in a Bench decision of the Madras High Court in 40 I C 680 = A I R 1918 Mad 632[2] where it was held that para. 2 of S. 110, Civil P. C., is intended to extend the privilege given by para. 1 only to cases where a claim regarding rights of Rs. 10,000 or upwards in value is involved indirectly, though not directly. Paragraph 2 means that the suit must, to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 and upwards, not that the rights affect properties whose value is Rs. 10,000 and upwards. This view was further confirmed in A I R 1938 Mad 666.[3] To the same effect is the decision of a Bench of the Lahore High Court in A I R 1923 Lah 286.[4] The matter was discussed at some length in A I R 1934 Rang 292[5] where it was held that under S. 110 it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal, no appeal lies under S. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards. Reliance has been placed on behalf of the petitioner in 39 Mad 843.[6] We are quite unable to see how this decision supports the contention of the petitioner. Sir John Wallice C. J. observed :

> The words "involve directly" contained in para. 2 of S. 110 of the Code, cannot be read as including cases which involve nothing but the actual subject-matter in dispute in the appeal ;

while Srinivasa Ayyangar J. observed :

> If the operation of the decision is confined only to the particular object matter, cl. (2) of S. 110 does not apply, and unless the case satisfies the conditions in cl. (1), there is no right of appeal.
>
> If the decision, beyond awarding relief in respect of the particular object matter of the suit, affects rights in other properties, cl. (2) would apply ; also if the matter in dispute is one which is incapable of valuation as in the case of easements, cl. (2) may apply.

Reference has also been made to a decision of the Allahabad High Court in I L R (1937) ALL 405.[7] There it was held that the condition laid down in para. 2 of S. 110, Civil P. C., is independent and self-sufficient, and is not in any way dependent on the fulfilment of both or either of the conditions in para. 1. Even if none of the conditions mentioned in para. 1 is fulfilled, but the sole condition mentioned in para. 2 is fulfilled, namely that the decree sought to be appealed against to the Privy Council involves directly or indirectly some claim or question to or respecting property of the amount or value of Rs. 10,000 or upwards, the requirements of S. 110 regarding valuation are complied with. In that case the plaintiff sued to enforce a charge and obtain a decree for sale, with option to sell any part or the whole of the mortgaged property. The amount claimed by the plaintiff which was decreed to him was less than Rs. 10,000. The total value of the mortgaged property which he was entitled to sell being over Rs. 10,000 it was held that the decree involved, directly

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1. ('04) 6 Bom L R 403, John Joseph De Silva v. John Joseph De Silva.
2. ('18) 5 A I R 1918 Mad 632 : 40 I C 680 : 33 M L J 481, Appala Raja v. Rangappa Naicker.
3. ('38) 25 AIR 1938 Mad 666 : 182 I C 913 : I L R (1938) Mad 923 : (1938) 1 M L J 728, Sukkira Goundan v. Palani Goundan.
4. ('23) 10 AIR 1923 Lah 286 : 75 I C 654, Dhanna Mal v. Lala Moti Sagar.
5. ('34) 21 A I R 1934 Rang 292 : 12 Rang 355, N. C. Galliara v. A. M. M. Murugappa Chetty.
6. ('16) 3 A I R 1916 Mad 985 : 31 I C 296 : 39 Mad 843 : 30 M L J 317, Subramania Ayyar v. Sellammal.
7. ('37) 24 AIR 1937 All 169 : 167 I C 670 : I L R (1937) All 405 : 1937 A L J 38, Nadir Husain v. Municipal Board, Agra.

or indirectly, some claim or question to or respecting property of the value of Rs. 10,000 or upwards, and the valuation test laid down by S. 110 was satisfied. The plaintiff had prayed in the plaint for a decree for sale of the entire mortgaged property on the ground that the sum due to him was a charge on the same and that he was entitled to put up the whole property for sale. The learned Judges held :

We find it very difficult to hold that the High Court's decree does not directly or indirectly involve some claim or question to or respecting property of the value of Rs. 10,000.

No reference was made to the decision of Sir Lawrence Jenkins C. J., or to any of the Madras decisions. We regret we are unable to follow the view taken by the Allahabad High Court and hold in the circumstances of the present case that the test laid down by para. 2 of S. 110, Civil P. C., has not been satisfied. The result, therefore, is that this application is dismissed with costs.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 409

YORKE J.

Nasimullah — Accused — Applicant

v.

Emperor through Prem Narain — Complainant — Opposite Party.

Criminal Revn. Appln. No. 147 of 1940, Decided on 18th March 1941, from order of Addl. Sess. Judge, Kheri, D/- 26th October 1940.

(a) Criminal P. C. (1898), S. 347—Prosecution by Crown—Case conducted by Prosecuting Inspector—Application for committing case to Sessions must come through Prosecuting Inspector.

Where in a prosecution by the Crown the case is conducted by the Prosecuting Inspector it is not open to the complainant to file an application for committing the case to the Sessions himself. The application must come through the Prosecuting Inspector. [P 410 C 2]

(b) Criminal P. C. (1898), Ss. 436 and 437—Words "further inquiry" in S. 436 apply to all cases of discharge except discharge mentioned in S. 437 — Under S. 436 no question of prejudice to accused arises—Distinction between Ss. 436 and 437 — Object of S. 437 stated.

Prima facie, the words "further inquiry" in para. 1 of S. 436 apply to all cases of discharge with the possible exception of a discharge mentioned in S. 437, that is to say, it covers cases of discharge under Ss. 203 and 204 or under S. 253 or under S. 209, Criminal P. C. In none of these cases can there be any question of prejudice to the accused against whom an order is made after he has had an opportunity of showing cause why such order should not be made because the direction for making of further inquiry clearly means that no final order can be passed against such a person without such further inquiry. The clear distinction between Ss. 436 and 437 is that S. 437 contemplates a case in which there has already been a completed inquiry under the provisions of Ch. 18, Criminal P. C., followed by an order of discharge in a case triable exclusively by the Court of Session. The object of S. 437 is to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. The procedure contemplated by S. 437 may be either in a proceeding under Ch. 18 or in a case in which the accused has been tried out and convicted or acquitted on other charges in a warrant case. Such discharge may be either express or by implication. [P 411 C 1,2]

(c) Criminal P. C. (1898), Ss. 437 and 347—Essential point for action under S. 437 or S. 347 is to see that accused's rights are in no way prejudiced—Interference under S. 437 in midst of trial deprecated—Order under S. 437 held not justified.

The essential point either for a Magistrate acting under S. 347 or for a Sessions Judge acting under S. 437 is to make certain that the rights of the accused are in no way prejudiced. An interference under S. 437 with a trial, while it is actually going on, must be deprecated and even if such a power exists it should only be exercised in rare cases : ('31) 18 AIR 1931 All 434 ; ('40) 27 AIR 1940 Lah 389 and ('26) 13 A I R 1926 Oudh 194, *Rel. on.* [P 411 C 2 ; P 412 C 1,2]

In a case under S. 307, Penal Code, the police prosecuted the case to the Court under S. 377 read with S. 511, Penal Code, and the Magistrate in due course took up the trial as for a warrant case. He heard arguments prior to the framing of a charge and it was urged before him that a prima facie case had been established not only under S. 377 read with S. 511 and S. 323, Penal Code, but also under Ss. 367 and 307 or 308, Penal Code. The Magistrate however framed charges under Ss. 377/511 and 323, Penal Code, only and fixed a date for further cross-examination of the prosecution witnesses. On the following day, the complainant applied to the Magistrate to commit the case to the Sessions Court on charges under Ss. 367, 327 and 307 or 308, Penal Code, in addition to the charge under S. 377/511, Penal Code. The Magistrate returned the application to the complainant with an endorsement "Returned. It must come through P. I." On the very next day, the complainant filed an application in revision under Ss. 435 and 437, Criminal P. C. The Additional Sessions Judge under S. 437 directed the accused to be committed for trial upon charges under Ss. 367 and 307, Penal Code :

Held that the order directing committal was not justified in the circumstances of the case. Nor was it justified by S. 437 in a case which was in the middle of its hearing. [P 412 C 1]

Siraj Husain — for Applicant.

Government Advocate — for the Crown.

A. N. Mulla—for Opposite Party (Prem Narain).

Order.—This is an application in revision by one Nasimullah against an order of the Additional Sessions Judge of Kheri, directing under S. 437, Criminal P. C., that the Magistrate should commit the present applicant to the Court of Session for trial

on charges under Ss. 367 and 307, I. P. C., in addition to charges under Ss. 377/511 and 323 which had already been framed against him. This case arose out of a first information report filed on 29th June 1940, and registered as a report of an offence under S. 307, I. P. C. The report was made by Jagat Narain Gupta in regard to an offence said to have been committed by the present applicant Nasimullah against his brother Prem Narain. The story told was that Nasimullah wanted to have unnatural intercourse with Prem Narain and kidnapped or abducted him for that purpose. The boy refused to allow unnatural intercourse and the applicant was said to have throttled him so that he became unconscious. The boy Prem Narain was sent for medical examination on 30th June and on 18th July the police prosecuted the case to Court under S. 377 read with S. 511, and the Magistrate in due course took up the trial as for a warrant case. On 16th September he heard arguments prior to the framing of a charge and it appears to have been urged before him that a prima facie case had been established not only under S. 377, read with S. 511 and S. 323, but also under Ss. 367 and 307 or 308, Penal Code. The Magistrate, however, on 23rd September framed charges under Ss. 377/511 and 323, Penal Code, only and fixed 4th October for further cross-examination of the prosecution witnesses. On the following day, 24th September, Mathura Prasad, guardian of Prem Narain, applied to the Magistrate to commit the case to the Sessions Court on charges under Ss. 367, 327, and 307 or 308 in addition to the charge under Ss. 377/511. This application the learned Magistrate returned to the applicant Mathura Prasad with an endorsement "Returned. It must come through P. I." Whether or not the Prosecuting Inspector would have pressed this application cannot be known as on the very next day, 25th September Mathura Prasad filed an application in revision under Ss. 435 and 437, Criminal P. C., in the Court of the Additional Sessions Judge of Kheri.

The Additional Sessions Judge has written a lengthy order and has ultimately come to the conclusion that he had the power under S. 437, Criminal P. C., to direct that Nasimullah applicant be committed for trial upon the matter of the charges under Ss. 367 and 307, Penal Code. It is against this order that the present application is filed. Learned Counsel for the applicant contends that this order of the Additional Sessions Judge is bad in every way, and to a certain extent the learned Government Advocate has to concede that there is force in this argument. It is doubtless the case that under S. 435, Criminal P. C., the Sessions Judge may call for and examine the record of any proceeding before any inferior criminal Court situate within the local limits of his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court. It is not very clear first of all as to what order the learned Sessions Judge would be justified in considering to be incorrect, illegal or improper. There was nothing at any rate very improper in the Magistrate's endorsement on the application of Mathura Prasad. The case before him was being conducted by the Prosecuting Inspector, the prosecution being by the Crown and any application of the kind should necessarily have been made to him by the Prosecuting Inspector. Secondly it is difficult, to see what irregularity there was in the proceedings of the Magistrate. The Magistrate had before him a case in which a report had been made, in consequence of which the police registered a case under S. 307, Penal Code, but the police had chosen to prosecute the case under S. 377, read with S. 511. It might be that the evidence suggested the possibility of other charges being framed against the accused, but if the Magistrate at that stage of the case thought that the only charges made out prima facie against the accused were charges under S. 377, read with Ss. 511 and 323, Penal Code, that was a view which he was perfectly competent to take. It did not tie his hands in any way. He was going on to allow further cross-examination of the prosecution witnesses according to law and further to hear such defence evidence as might be produced by the accused. It would be open to him under S. 347, Criminal P. C., if at a later stage he came to the conclusion that the case was one which ought to be tried by the Court of Session, to commit the accused under the provisions hereinbefore contained, that is the provisions stated in Chap. 18 of the Code. It seems to me prima facie that this was most definitely not the stage at which the Sessions Judge should have interfered with the discretion of the Magistrate. Non-interference could not possibly interfere with the ultimate doing of justice. Coming now to the order which the Judge did proceed to pass having once

sent for the record under the provisions of S. 435, he could, of course, send it back without further comment or with any remarks he might think advisable for the guidance of the Magistrate or he might take action under S. 436 or under S. 437, if either of those sections was properly applicable. Section 436 prescribes that :

On examining any record under S. 435, or otherwise, the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the District Magistrate may himself make, or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under S. 203 or sub-s. (3) of S. 204, or into the case of any person accused of an offence who has been discharged :

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged, unless such person has had an opportunity of showing cause why such direction should not be made.

Prima facie the words "further inquiry" in para. 1 of this section are applicable to all cases of discharge with the possible exception of that case of discharge which is mentioned is S. 437, that is to say, it will cover cases of discharge under Ss. 203 and 204 or under S. 253 or under S. 209. In none of these cases can there be any question of prejudice to the accused against whom an order is made after he has had an opportunity of showing cause why such order should not be made because the direction for making of further inquiry clearly means that no final order can be passed against such a person without such further inquiry. The position in regard to S. 437 is very different. That section provides that :

When, on examining the record of any case under S. 435 or otherwise, the Sessions Judge . . . considers that such case is triable exclusively by the Court of Session and that an accused person has been improperly discharged by the inferior Court, the Sessions Judge . . . may cause him to be arrested, and may thereupon, instead of directing a fresh inquiry, order him to be committed for trial upon the matter of which he has been, in the opinion of the Sessions Judge . . . improperly discharged.

There are two provisos which do not require consideration in the present case. It seems to me that the clear distinction between Ss. 436 and 437 is that S. 437 contemplates a case in which there has already been a completed inquiry under the provisions of Chap. 18 followed by an order of discharge in a case triable exclusively by the Court of Session. The object of S. 437 appears to be to enable the Sessions Judge in such a case to order commitment for trial without the necessity of a fresh and unnecessary inquiry. Such a procedure as is contemplated by S. 437 may be either in a proceeding under Chap. 18 or in a case in which the accused has been tried out and convicted or acquitted on other charges in warrant case. Such discharge may be either express or by implication. The essential point either for a Magistrate acting under S. 347 or for a Sessions Judge acting under S. 437 is to make certain that the rights of the accused are in no way prejudiced : *vide* for example the case in A I R 1931 ALL 434.[1] That was a case of a complaint under S. 363, Penal Code. The prosecution witnesses were examined and cross-examined. A charge was framed and all the defence witnesses were also examined and cross-examined. Then the Magistrate acting under S. 347, Criminal P. C., amended and framed the charge under S. 366, Penal Code, and committed the accused for trial. It was held that :

the procedure of the Magistrate was not illegal. The accused had no right of further examination and cross-examination to disprove the amended charge as every possible defence had been given. The amended charge must be deemed to be framed under S. 210. After the commitment the proceedings must be deemed to be in an inquiry under Chap. 18 and not in a trial. Further examination and cross-examination could be made in the Court of Session.

The crucial question in the case was whether there had been any illegality or irregularity or any prejudice to the accused, and it was held that there was no prejudice. Strong stress was laid on the same point in A I R 1940 Lah 389.[2] It was held that

there is nothing in S. 347 to suggest that where a Magistrate decides to commit under that section he should be required to commence proceedings de novo under Chap. 18. What is necessary is that as soon as a Magistrate acting under S. 347 has made up his mind to commit, he should be careful not to prejudice the accused by depriving him of the opportunities provided by Ss. 208 and 212 of offering defence evidence; and always provided that the requirements of Ss. 208, 211 and 212, as well as the formalities required by S. 213 of the Code are carefully observed, there is no reason why a Magistrate should be required to take proceedings de novo under Chap. 18, Criminal P. C.

Great stress in all these is laid on the importance of seeing that all the provisions of Chap. 18 are complied with and the interests of the accused are not prejudiced by his being deprived of any of his rights. On the other hand, the order of the learned Additional Sessions Judge in the present case obviously puts the accused at a great

1. ('31) 18 A I R 1931 All 434 : 132 I C 47 : 32 Cr L J 849 : 53 All 692 : 1931 A L J 587, Ram Ghulam v. Emperor.
2. ('40) 27 A I R 1940 Lah 389 : 190 I C 761 : 42 Cr L J 29 : I L R (1940) Lah 151 : 42 P L R 714, Fazal v. Emperor.

disadvantage. The Magistrate has been ordered to commit the case for trial at a stage when the prosecution witnesses have not been recalled for further cross-examination and the original cross-examination, was not an adequate examination because it was recognised that there would be a further right of cross-examination subsequent to the charge. In addition the accused is being deprived of his right to produce defence evidence before the Magistrate. It seems to me that apart from the question whether S. 437 could at all authorise the Sessions Judge to make an order of commitment at this stage it is obvious that this is a case in which he was not justified in so doing. If it is the duty of a Magistrate acting under S. 347 to be most careful to see that the accused has all the advantages which are given to him in an inquiry under Chap. 18, it is obviously, one might almost say a fortiori, the duty of the Sessions Judge to be most careful not to make an order which would have the effect of prejudicing the interests of the accused. In my opinion, the order was not justified in the circumstances of the case and I am personally also of opinion that S. 437 does not justify such an order in a case which is in the middle of its hearing. Such an order may possibly be justified when a Magistrate has tried out a case and has allowed the accused all the privileges which are common to a full trial in a warrant case and to a full inquiry under Chap. 18, but it is certainly not justifiable at the stage at which the order was made in the present case. In this connection I may refer to an early case of this Court, A I R 1926 Oudh 194,[3] in which it was held that

where the police chalan contains a mention of Ss. 147 and 304, Penal Code, but the Magistrate, after hearing the evidence for the prosecution, frames a charge under Ss. 147 and 325, the accused cannot be said to have been discharged within the meaning of S. 437 and the Sessions Judge is not authorised to order commitment under S. 437. Section 253 suggests that the word 'discharge' means absolute discharge. A High Court has itself power under S. 439 read with S. 423 to order commitment in a case, and it would obviously be the proper course for the High Court itself to order such commitment if the Sessions Judge's order is held to be a proper one; however, the action under S. 437 or S. 439 for ordering a commitment should rarely be taken in the midst of a trial, and certainly only when the failure of a Court to commit is shown on the face of proceedings to be improper.

I would further remark that in my opinion such interference with a trial, while it is actually going on, is to be deprecated and even if such a power exists it should only be exercised in rare cases. The Magistrate is himself seized of the case, he has heard the witnesses for the prosecution and he may have come to certain conclusions about them, but his conclusions are not yet final and they will only become final after he has heard the further cross-examination subsequent to the charge. He is at liberty at any stage up to the date on which he may either acquit or convict to take action under S. 347 in respect of the charges with reference to which an application was made to the Sessions Judge. The Sessions Judge will further himself, in case of conviction under other sections, be at liberty to set aside the conviction and order a commitment to Sessions if he thinks the case one in which such a commitment should have been made. In my opinion, therefore, the order of the Sessions Judge cannot be sustained. I allow this application and set aside the order. It will be open to the Magistrate to deal with the case according to law in whatever way he thinks fit.

G.N./R.K. *Application allowed.*

3. ('26) 13 A I R 1926 Oudh 194: 93 I C 145: 27 Cr L J 417: 3 O W N 201, Bilodar v. Emperor.

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(28) A. I. R. 1941 Oudh 412

AGARWAL J.

Rai Sahib Babu Pirthi Nath —
Defendant — Appellant

v.

Seth M. H. Nowroji, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 19 of 1938, Decided on 3rd March 1941, against decree of Civil Judge, Mohanlalganj, Lucknow, D/- 27th September 1937.

(a) Provincial Small Cause Courts Act (1887), Art. 35 (j)—Plaintiff's objections under O. 21, R. 58, Civil P. C., to attachment of his machine allowed — Plaintiff finding machine useless as many parts missing and some broken—Plaintiff suing for loss suffered on account of improper acts of decree-holder and supurdar, claiming price of machine and assessing damages on that amount — Suit held one for compensation for illegal attachment and therefore exempt from Small Cause Court's jurisdiction.

After the release of his machine from attachment on his objections under O. 21, R. 58, Civil P. C., to the same being allowed the plaintiff discovered the machine to be useless as many of its parts were missing while some of them were broken. He therefore brought an action alleging that he had suffered great loss owing to the improper acts of the decree-holder and the supurdar, claimed the price of the machine and assessed damages on that amount :

Held that the suit was for compensation for illegal attachment and therefore was exempt from the jurisdiction of the Small Cause Court : 22 Mad 457

and ('30) 17 AIR 1930 Bom 80, *Expl.*; ('26) 13 A I R 1926 Lah 150 ; 9 I C 537; 33 All 306 and ('17) 4 AIR 1917 Oudh 172, *Rel. on.* [P 414 C 1]

(b) Civil P. C. (1908), S. 100 — Finding that party's title is proved is one of fact.

A finding that party's title is proved being one of fact is binding in second appeal. [P 414 C 1]

(c) Execution—Attachment—Property attached by decree-holder damaged while in supurdar's custody—Decree-holder is liable.

Where the property of the judgment-debtor attached by the decree-holder is damaged while in the custody of the supurdar the decree-holder is liable because since he got the property attached he is bound to restore it in the condition it was at the time of the attachment : 33 All 306, *Rel. on* ; ('32) 19 AIR 1932 P C 191, *Disting.* [P 414 C 2]

Sri Ram — for Appellant.

Ramapat Ram — for Respondent 1.

Judgment. — This is a second appeal from the judgment and decree of the Civil Judge, Mohanlalganj, Lucknow. The appellant Rai Sahib Babu Pirthi Nath obtained a simple money decree against the respondents Nashim Brothers. He got a lathe attached in execution of his decree. The plaintiff-respondent, Seth M. H. Nowrojee preferred an objection under O. 21, R. 58, Civil P. C., and claimed the lathe to be his. That objection was allowed and within a year of that order, Seth Nowrojee brought a suit which has given rise to this second appeal. He stated that his machine was complete and in working condition when it was attached. That after it was ordered to be released in his favour on 8th May 1935 he learnt that some of the parts had broken, and so he applied on 27th May 1935 that the respondent Hardeo Bakhsh Singh who had been appointed supurdar be ordered to hand over the machine to him. That he was ordered by the Court to see the machine in the Golaganj Orphanage where the supurdar had taken it, and then he learnt that many parts were missing, and some were broken, and the machine had become quite useless. He stated that he suffered a great loss owing to the improper acts of the decree-holder and the supurdar, that the machine had become useless, and so he was entitled to recover its price, Rs. 450. The learned Munsif held that the parts missing were worth Rs. 105-12.0, and that the repairs of the parts broken would cost Rs. 2-8-0. He decreed the suit for Rs. 108-6-0. His decree was confirmed in appeal by the Civil Judge. Three points have been urged before me by the learned counsel for the appellant : (1) That the suit ought to have been instituted in the Small Cause Court ; (2) that the plaintiff's title to the lathe in question was not proved ; and (3) that he was not liable for the amount claimed.

I take the point of jurisdiction first. Under Art. 35, cl. (j), Provincial Small Cause Courts Act, a suit for compensation for illegal, improper or excessive distress, attachment or search or trespass committed in, or damage caused by, the illegal or improper execution of any distress, search or legal process is exempted from the cognizance of the Small Cause Courts Act. It is argued on behalf of the appellant that the suit was not for compensation for illegal, improper or excessive distress or attachment but was for the recovery of the price of the machine. It is said that the allegations in the plaint disclose a cause of action against the supurdar only, and so it cannot be called a suit for compensation for illegal attachment. It was stated in para. 7 of the plaint that the plaintiff suffered a great loss owing to the improper acts of the decree-holder and the supurdar. It is therefore clear that the suit was also for compensation for illegal attachment. The wrongful act of the decree-holder alleged by the plaintiff could be no other but that he caused his machine to be attached in execution of his decree. He stated in para. 9 of the plaint that his cause of action arose on the day when his machine was attached, on the day it was ordered to be released and on the day he learnt of the damage caused to it. The plaintiff, no doubt, claimed the price of the machine, but he had assessed the damages on that amount. I think the suit was for compensation for illegal attachment and therefore exempted from the jurisdiction of the Small Cause Court. The learned counsel for the appellant has relied on 22 Mad 457.[1] The facts of that case were that certain moveable property was distrained under S. 15 of Act 8 of 1865 (Madras). The owners thereof sued to set aside the distraint, and obtained orders directing the property to be restored, but those orders were not carried out. The owners sued for the value of the property. It was held that the suit was to recover the value of the property illegally retained. It was on the particular frame of the suit in that case that it was held not to be recognisable by the Small Cause Court. It was held in A I R 1926 Lah 150[2] that

a suit to recover the price of goods wrongfully attached and sold in execution of a decree falls

1. ('99) 22 Mad 457, Chakradharudu v. Venkataramayya.
2. ('26) 13 AIR 1926 Lah 150 : 89 I C 982, Bodh Raj v. Secy. of State.

within the purview of Art. 35 (j) and is excluded from the cognizance of the Small Cause Court.

The Madras case was referred to and was distinguished. The present case is similar to that reported in 33 ALL 306.[3] In that case certain crop was attached and was stolen by the shahna. It was held that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognisable by a Court of Small Causes. There is another case of the Allahabad High Court, 8 A L J 187.[4] In that case the crop attached was sold, and the owner brought a suit for the recovery of its price. It was held that the suit could not be entertained by a Court of Small Causes inasmuch as the Court could not give a decree without deciding whether the attachment was legal or not. The Allahabad case in 33 ALL 306[3] has been followed in this Court in 19 O C 236.[5] In that case the shahna refused to give the crop attached, and it was held that a suit brought by the owner of the crop against the decree-holder and the shahna for the price of the crop was not cognisable by the Court of Small Causes. It is argued that it was stated in that case that the decree-holder and the shahna had colluded, but that would not make any difference in my opinion so far as the point of jurisdiction is concerned. The learned counsel for the appellant has also relied on A I R 1930 Bom 80.[6] That was a case in which the plaintiff had sued to recover the excess amount of rent recovered from him by his landlord together with certain sums for penalty and damages by way of interest. It was held that the interest was claimed by way of damages for detention of money and not as compensation under clause (j) of Art. 35, Provincial Small Cause Courts Act. After considering these authorities I am of opinion that the suit was excluded from the cognisance of the Small Cause Court.

The second point argued is that the plaintiff failed to prove his title to the machine in question. Both the Courts have, on a consideration of the oral and documentary evidence on the record, come to the conclusion that the plaintiff's title is proved. This finding of fact is binding on me. It is argued that the sale deed in favour of the plaintiff does not mention the machine in question. This argument is based on the fact that the list of attached property shows that the machine attached was 6 feet long but lathes of only 6 inches were sold under the sale deed. The learned Civil Judge has explained the discrepancy. He thinks that a lathe 6 feet long can be one technically called 6 inches lathe. There was further evidence besides the sale deed to prove the plaintiff's title. There was a letter to show that the judgment-debtor, from whose possession it was attached, had taken it on hire from the plaintiff. I see no reason to disturb the finding of the two Courts. The third point is about the liability of the defendant. The case in 33 ALL 306,[3] above referred to, is an authority against the plaintiff. In that case the shahna had stolen the property attached but the decree-holder was held liable. In this case the parts of the machine were also removed and broken while the machine was in the custody of the supurdar. I find no distinguishing features between the two cases, and think that the decree-holder has been rightly held liable. It has been argued that the supurdar was an officer of the Court, and the judgment-debtor ought to have been liable for his actions and not the decree-holder. Reliance is placed for this proposition on 9 O W N 571.[7] In that case a receiver was appointed by the Court and certain payments were made by the judgment-debtor to him. The receiver embezzled the money and disappeared. A question arose whether the judgment-debtor was absolved of his liability by reason of the payment. Their Lordships of the Privy Council held that it was not shown to them that the judgment-debtor was authorised by any order of the Court to pay the money to the receiver and the receiver was not an agent of the judgment-creditor. That case is quite distinguishable. Here there is no question of any payment being made to the supurdar. The decree-holder's liability arises because he got the plaintiff's property attached, and he was bound to restore it in the condition it was at the time of the attachment. I hold that the decree-holder has been rightly held liable. All the points are decided against the appellant. The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

3. ('11) 33 All 306 : 9 I C 317 : 8 A L J 92, Bishamber Nath v. Gaddar.
4. ('11) 8 A L J 187 : 9 I C 537, Rup Kishan v. Sobhi.
5. ('17) 4 AIR 1917 Oudh 172 : 37 I C 169 : 19 O C 236, Ramphal v. Mathura.
6. ('30) 17 AIR 1930 Bom 80 : 124 I C 112 : 31 Bom L R 1307, Jodha Bijal v. Maganlal Chhaganlal.
7. ('32) 19 AIR 1932 P C 191 : 137 I C 900 : 59 I A 311 : 7 Luck 382 : 9 O W N 571 (P C), Mt. Brij Indar Kuar v. Jai Indar Bahadur Singh.

(28) A. I. R. 1941 Oudh 415

AGARWAL J.

Jwala Prasad and another —
Defendants—Appellants
v.
Lachhmi Narain—Plaintiff—
Respondent.

Second Appeal No. 304 of 1938, Decided on 7th March 1941, against order of Addl. Civil Judge, Gonda, D/- 25th July 1938.

(a) Limitation Act (1908), Arts. 142 and 144 — Suit for possession — Plaintiff alleging that defendant was in possession without right, that he was in possession of share in suit and was dispossessed when his father's name was struck off mutation register and that he based his claim on title and not on possession and dispossession—Suit held governed by Art. 142.

The plaintiff brought a suit for possession stating that the defendant was in possession without any right, that he was in possession of the share in dispute and lost possession when his father's name was struck off the mutation register, and that he based his claim on title and not on possession and dispossession :

Held that the case was one in which the plaintiff alleged his dispossession and was governed by by Art. 142 : ('37) 24 A I R 1937 Oudh 328, *Held not good law;* ('34) 21 A I R 1934 All 993 (FB) and ('40) 27 A I R 1940 Oudh 134, *Rel. on.* [P 416 C 1]

(b) Cosharers — Adverse possession—Denial of *X* cosharer's title by other cosharer *Y* by institution of mutation proceedings — *Y's* possession becomes adverse from date on which *X* comes to know of denial of his title and not from date of decision in mutation proceeding.

Where the title of a cosharer *X* is denied by the other cosharer *Y* by the institution of mutation proceedings, the possession of *Y* becomes adverse from date on which *X* comes to know of the denial of his title and not from the date of the decision in the mutation proceedings : ('34) 21 A I R 1934 All 993 (FB), *Rel. on;* ('17) 4 A I R 1917 Oudh 168 and ('33) 20 A I R 1933 Oudh 560, *Disting.;* 33 All 125 (PC), *Expl.* [P 417 C 1]

Bishun Singh and R. B. Lal — for Appellants and Appellant 1, respectively.

Hargovind Dayal Srivastava — for Respondent.

Judgment. — This second appeal arises out of a suit brought by the respondent Lachhmi Narain for possession of 2 annas 7 pies 4 kirants share in village Gaura Buzurg. Ram Charan, Rasiawan and Bindhychal made a gift of 2 annas share in Gaura Buzurg to Ram Saran by means of a deed, dated 20th October 1880. Ram Saran brought a suit for possession against Ram Charan and others in 1885 for that 2 annas share. That suit was dismissed by the first Court, but on appeal Manik Ram, the nephew and heir of Ram Charan, admitted Ram Saran's claim, and the suit was decreed. Mutation was effected in favour of Ram Saran. Ram Saran died in 1900 or 1901, but his name continued in the papers over the share gifted to him. Lachhmi Narain put in an application on 29th April 1924 before the revenue Court that his father died on 1st March 1924 and his name be mutated in his place. The original 2 annas share had been changed to 2 annas 7 pies 4 kirants by reason of the partition in the village. Manik Ram preferred an objection on 19th May 1924 that the applicant was not in possession and had no title. The revenue Court decided on 30th March 1925 that Manik Ram was in possession, and the application of Lachhmi Narain was dismissed. Manik Ram subsequently died leaving Jwala Prasad and Hira Lal, his sons, who are the appellants before me. Lachhmi Narain brought a suit which has given rise to this appeal on 30th March 1937 for the possession of the 2 annas 7 pies 4 kirants share on the allegation that the defendants were in unlawful possession of it. The learned Munsif framed several issues on the pleas of the appellants and two of them were :

(1) Was the plaintiff in possession within twelve years? (2) Have the defendants acquired title by adverse possession?

He held that the plaintiff's suit being based both on title and possession and dispossession, the burden of proving adverse possession was on the defendants. He however held that the defendants have established their adverse possession and dismissed the suit. The learned Civil Judge in appeal held that the adverse possession of the defendants was not proved and decreed the suit. It is contended before me in appeal that the plaintiff ought to have proved his possession within 12 years, and that the appellants have succeeded in proving their adverse possession for more than 12 years. The first point which is for consideration before me is whether the plaintiff ought to have proved his possession within 12 years and if so whether he has succeeded in proving it. The first thing is to see the nature of the suit. It was stated in the plaint that the defendants were in possession without any right. It was stated by the plaintiff before the learned Munsif that he was in possession of the share in dispute and lost possession when his father's name was struck off the mutation register, and that he based his claim on title and not on possession and dispossession. It is, therefore, clear that it is a case in which the plaintiff alleges his dispossession, and the learned Munsif relied on 1937 O W N 585[1] for the proposi-

1. ('37) 24 AIR 1937 Oudh 328: 168 I C 309: 1937 O W N 585 : 13 Luck 266, Sheo Moorat v. Chhangoo.

tion that when the plaintiff's suit is based on title and possession and dispossession, the burden of proving adverse possession is on the defendants. This is no longer the view of law. It was held by the Allahabad High Court in a case reported in A I R 1934 ALL 993[2] that :

> Article 142 is not restricted to suits based on possessory title only, and where a plaintiff who was a cosharer with some of the defendants who transferred a part of the property to third parties admits in the plaint that he was dispossessed by the transferees some time prior to the institution of the suit, Art. 142 and not Art. 144, Limitation Act, applies.

This Court also held in 1939 O W N 1005[3] that :

> Article 142 is very general in its scope and application. There is no reason to confine the word "plaintiff" in this article to plaintiff's bringing their suits on possessory title only, and that it will apply to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietary or his possessory title.

It is, therefore, clear that this is a case to which Art. 142 is applicable. The next point to consider is whether the plaintiff has succeeded in proving his possession within twelve years of the suit which was instituted on 30th March 1937. The learned Civil Judge appears to be of the view that the parties and their predecessors were cosharers, and so no question of adverse possession could arise, till there was a denial by the defendants of the plaintiff's title. He was further of opinion that the limitation began to run not from the date of the denial by the defendants' predecessor in the mutation case, but from the date the mutation case was decided against the plaintiff. It may be assumed that the parties' predecessors were cosharers, though this case was not specifically taken in the pleadings. It was observed by Sulaiman C. J. in the Allahabad case above noted that :

> If, therefore, the plaintiff, a co-owner, admits that he has been dispossessed and that, at any rate, for a short period prior to the suit, the possession of his co-owner was adverse to him, then he cannot fall back on mere presumption of joint possession in his favour and succeed without showing any other circumstances whatsoever. But if the co-owner, who has been dispossessed were to satisfy the Court that he was actually dispossessed on some date within twelve years, he discharges his burden; or even if he proves that prior to that period the parties were on good terms with each other without any denial of title and without any quarrel, the Court may record a finding that the possession of the plaintiff prior to the period of actual possession was constructive.

It cannot be denied in this case that the possession of the defendants-appellants after mutation in favour of the father has been adverse. The mutation case was decided on 30th March 1925, and the suit was brought on 30th March 1937. It is to be seen whether the plaintiff had proved his possession, actual or constructive, within twelve years of the institution of the suit. The plaintiff stated that Ram Saran, his father, died 36 years ago, and after his death his elder brother Jainath looked after the property, that Jainath died 21 or 22 years ago, and after him his widow Mt. Brijraji was in possession for a year or two, that after the death of Jainath Manik Ram, father of the appellants, was in possession, and used to pay profits to his guardian, Mt. Brijraji, and that he himself began to collect rent in 1924. He stated that he realised rent in April and October 1924. The mutation application was presented on 29th April 1924. Even if the plaintiff be believed, the last act of his possession was in October 1924, and the suit was instituted 12 years after it. It is said that he must be considered to be in constructive possession before it. Manik Ram clearly denied the title of the plaintiff on 19th May 1924. The plaintiff admits that he learnt of the denial of his title after 15 days, that is, in the end of May 1924. The suit was instituted even 12 years after that date. The learned Civil Judge has held that the title of the appellants became adverse not from the date the plaintiff came to know of the denial of his title by Manik Ram, but from 30th March 1925, when the mutation order was made. I think that it cannot be said that the defendants' father was in possession on behalf of the plaintiff, after he had denied his title. The learned Civil Judge has relied on 38 I A 23.[4] In that case the plaintiff had applied in 1867 for regular settlement of certain villages, and then adverse title was distinctly set up. Her application was dismissed in 1868, and the suit was instituted in 1905. The point, whether the adverse possession began to run from the date her title was denied or from the date of the dismissal of her application, did not arise in the case, because the suit was instituted some 37 years after the dismissal of the application. The other case relied by

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2. ('34) 21 AIR 1934 All 993 : 152 I C 1 : 57 All 278 : 1934 A L J 973 (FB), Bindhyachal Chand v. Ram Gharib Chand.
3. ('40) 27 A I R 1940 Oudh 134 : 185 I C 736 : 15 Luck 157 : 1939 O W N 1005, Jaimangal Tewari v. Bindeshuri Singh.
4. ('11) 33 All 125 : 9 I C 391 : 38 I A 23 : 14 O C 95 : 8 A L J 132 (P C), Muhammad Bakar v. Muhammad Bakar Ali Khan.

the learned Civil Judge is 10 O W N 1326.[5] That was a suit for profits by one co-sharer against another. The defendant claimed some property as exclusively his. In a previous partition case he had claimed the property as his, but his application was disallowed. It was held that as his claim was unsuccessful, so the limitation did not run in his favour. This case is quite distinguishable from the present one. In this case it was found by the mutation Court that Manik Ram had been in possession. I see no reason to hold why the possession of Manik Ram did not become adverse to the plaintiff from the date the plaintiff came to know of the denial of his title.

The learned counsel for the respondent has relied on 20 O C 126.[6] That was a suit for a declaration that the defendants had no proprietary or under-proprietary rights in the land. Before the institution of the suit, the Assistant Collector had cancelled a notice of ejectment on the ground that the defendants had made out a prima facie claim to under-proprietary rights. It was held that the limitation began to run from the date the order became final. That was a suit to which Art. 120, Limitation Act, was applicable and not Art. 142 or Art. 144, and it was virtually a suit for the setting aside of the order, and so the cause of action did not arise till the order became final. So, in my opinion, the possession of the defendants' predecessor ceased to be on behalf of the plaintiff when he denied the latter's title within his knowledge. As the suit was instituted beyond 12 years from that date, it was barred by time. I, therefore, allow the appeal, set aside the order of the lower appellate Court and restore that of the first Court. The appellants will have their costs throughout.

G.N./R.K. *Appeal allowed.*

5. ('33) 20 A I R 1933 Oudh 560 : 149 I C 1172 : 10 O W N 1326, Brahma Singh v. Raghuraj Singh.

6. ('17) 4 A I R 1917 Oudh 168 : 39 I C 428 : 20 O C 126, Bansgopal v. Basdeo Singh.

(28) A. I. R. 1941 Oudh 417

BENNETT J.

Ram Padarath Misir and others — *Defendants — Applicants*

v.

Data Din Misir and others — *Plaintiffs — Opposite Party.*

Application No. 22 of 1941, Decided on 19th February 1941, for revision of order of Civil Judge, Fyzabad, D/- 8th October 1937.

1941 O/53 & 54

Civil P. C. (1908), O. 23, R. 1 — Failure to put alternative case or omission to implead other parties or failure to produce documents at proper time are material and not formal defects — Court granting application under R. 1 on aforesaid grounds acts with material irregularity—High Court will interfere in revision.

The plaintiff's failure to put forward an alternative case or to produce documents at the proper time or his omission to implead other parties are material and not formal defects. Consequently, a Court granting permission under O. 23, R. 1 on any of the aforesaid grounds acts with material irregularity so as to attract the provisions of Section 115, Civil P. C. : *Case law referred.*

[P 420 C 1, 2]

Akhlaque Husain — for Applicants.

Salik Ram — for Opposite Party.

Judgment. — This is a second civil appeal against the judgment and decree passed by the learned Civil Judge of Fyzabad on 8th October 1937, setting aside a decree passed by the Munsif, Havali, Fyzabad, on 11th May 1937. The Munsif dismissed the suit. In first appeal the Civil Judge allowed the application of the plaintiffs under R. 1 of O. 23, Civil P. C., for permission to withdraw the suit with liberty to sue afresh. The defendants, that is the present appellants, were given their costs. The reason for allowing the application is given in the following sentence of the Civil Judge's order :

In the interest of justice I allow the application as there seem formal defects in the plaint as alleged in the application.

The first question which arises is whether an appeal lies against this order. The learned counsel for the appellants concedes that no appeal would ordinarily lie, but he points out that a decree was passed by the Civil Judge setting aside the decree passed by the Munsif and he explains that it was on this account that an appeal was preferred. It is asked in the memorandum of appeal that if a second appeal does not lie the appeal may be treated as an application for revision under S. 115, Civil P. C.

Learned counsel for the respondents contends that an application in revision does not lie and he bases this contention mainly on two cases of the Allahabad High Court. In 40 ALL 612[1] it was held in somewhat similar circumstances (though permission to withdraw was given by the trial Court after the evidence had concluded in this case) that the Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the Court may have

1. ('18) 5 A I R 1918 All 418 : 46 I C 71 : 40 All 612 : 16 A L J 495, Jhukku Lal v. Bisheshar Das.

exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application was not sufficient to bring the case within the purview of S. 115. In 50 ALL 835[2] it was held that where a Court allowed a plaintiff to withdraw his suit with liberty to bring a fresh one upon the ground that he had not given formal proof of a document which was essential to his success, the Court was within its jurisdiction, and that the High Court should not interfere.

On the other hand the learned counsel for the appellants has cited rulings both of the Allahabad and of other High Courts which show that in certain circumstances an application in revision lies. In 20 A L J 90[3] it was held by the Allahabad High Court in revision that where after remand of a suit by the appellate Court, the plaintiff applied for permission to withdraw the suit "for some reasons and defects," with liberty to bring a fresh suit, but no reasons were assigned or defects specified, and the only order passed by the Court was "allowed," the Court had not exercised its jurisdiction as required by law, and the order was set aside. Again in A I R 1935 ALL 740[4] it was said that while the High Court is very reluctant to interfere in revision with orders passed under O. 23, R. 1, the reluctance has been in every case to interfere with the discretion of the Court. Where the Court has not observed the rule and has not had before it the considerations by which it ought to be guided it is certainly proper to exercise the revisional powers of the High Court. In 37 Bom 682[5] after the case for both the plaintiff and the defendant had been closed and all their witnesses had been examined, the Court gave time to the plaintiff to adduce documents to counteract the effect of the documents already produced by the defendant. On the plaintiff's inability to adduce the documents on the appointed day, he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court passed an order granting leave. It was held that the Court had acted with material irregularity in the exercise of its jurisdiction. The hearing had finished and it was improper to allow the plaintiff to try and produce documents to counteract the defendant's documents. The plaintiff's failure to produce the documents was not a sufficient ground to put the defendant to the trouble and annoyance of a fresh suit. In A I R 1934 Cal 59[6] an order of the Subordinate Judge was set aside where the provisions of O. 23 R. 1 had not been satisfied. In this case the defects alleged were that certain necessary parties were not impleaded and certain properties were not included in the claim. It was held that these were not formal defects and that there was no reason, therefore, why the suit should fail by reason of any formal defects, nor was there any other sufficient reason for a fresh suit.

In an earlier case of the Calcutta High Court in A I R 1931 Cal 107[7] it was said that the power given to the Court to give permission to withdraw a suit has to be governed by certain considerations, and if it appears that those considerations were not present, it must be held that the order was passed without jurisdiction in the sense that it had exercised its power in the wrong exercise of jurisdiction or at any rate it was a material irregularity. It was also said that permission should not ordinarily be given so as to cause much harassment to the opposite party. It should only be given when the Court is satisfied that the defect is not for any fault of the plaintiff but for discovery of certain facts which renders the suit in its present shape defective. After having lost a party cannot ordinarily be permitted to withdraw with liberty to bring a fresh suit unless the Court is absolutely satisfied that the failure of the plaintiff was due to certain defects which were not known to him at the time of the institution or the trial of the suit. Although an order granting permission in circumstances which did not justify such permission is not an order totally without jurisdiction, it is not one which can be supported as it is vitiated by material irregularity. Lastly it was held by this Court in A I R 1935 Oudh 495[8] that the failure of the plaintiff to produce documents at the proper time or any other

2. ('29) 16 AIR 1929 All 133 : 115 I C 124 : 50 All 835 : 26 A L J 774, Chandrika Lal v. Sami Nath.
3. ('22) 9 AIR 1922 All 185 : 64 I C 948 : 20 A L J 90, Rahmat-Ullah v. Dharam Singh.
4. ('35) 22 A I R 1935 All 740 : 157 I C 673 : 58 All 245 : 1935 A L J 983, Raghubir Das v. Sital Prasad.
5. ('13) 37 Bom 682 : 21 I C 23 : 15 Bom L R 823, Bai Kashibai v. Shidapa Annapa.
6. ('34) 21 A I R 1934 Cal 59: 148 I C 111: 57 C L J 498, Haridas Sadhu Khan v. Giridhari Sadhu Khan.
7. ('31) 18 A I R 1931 Cal 107: 130 I C 142: 34 C W N 912, Motl Lal v. Kali Das.
8. ('35) 22 A I R 1935 Oudh 495: 158 I C 280: 1935 O W N 1066, Bidya Dhar v. Kapurthala Estate, Bahraich.

default on his part in properly prosecuting the suit cannot be regarded as a sufficient ground within the meaning of O. 23, R. 1, and that where in the absence of sufficient grounds the Court allows a suit to be withdrawn with liberty to bring a fresh suit, it acts with material irregularity in the exercise of its jurisdiction and its order is open to revision. It will appear, therefore, that in certain circumstances an application in revision lies against an order passed by a Court under O. 23, R. 1 and that it is necessary to see whether the Court has been guilty of material irregularity in passing the order.

I come now to the facts of the present case. The suit was brought for possession of 7 biswas of land situated in village Sindhaura mohal Pirthi Singh and for Rs. 5 by way of damages. It was alleged that the plaintiffs held a patta istimrar dated 11th June 1936, in respect of this land from Keshoraj Singh and Jagannath Singh, zamindar of the land, and that the defendants had cut and appropriated a babool tree therefrom and thereby dispossessed them. The defendants contested the suit alleging that Keshoraj and Jagannath were not the owners of the land and had no right to lease it to the plaintiffs. They also contended that neither the lessor nor the lessee had ever been in possession of the land in suit and that the suit was time barred. It was further contended that the former zamindar had given the land in suit along with other land under a shankalap patta to the ancestors of the defendants and that consequently the tree in question belonged to them. The following issues were framed:

(1) Were Keshoraj and Jagannath superior proprietors of the land in suit in 1936 and as such entitled to grant a patta istimrar to the plaintiffs? (2) Are Exs. 1 and 2 (patta and kabuliat) genuine and valid? (3) Have the plaintiffs been in possession of the land in suit within limitation? (4) Were plaintiffs owners of the tree in suit? (5) To what relief, if any, are the plaintiffs entitled?

The judgment of the Munsif shows that on issue 1 the plaintiffs filed eleven documents,of which eight were filed to prove the title of Keshoraj and Jagannath in the land in suit. The khetauni of a partition which took place in 1890 showed that Pirthi Singh was the owner of Plot No. 1220 of the old settlement which contained the land in suit. On his death the property was mutated in the names of his sons Baij Nath Singh and Surajpal Singh by an order of 7th September 1892, and on the death of Surajpal Singh his half share was mutated in the name of Baijnath Singh by an order dated 7th September 1900. It was further proved that on the death of Baijnath Singh the property was inherited by Mt. Brij Dei, widow of Surajpal Singh. The Munsif observed that Mt. Brij Dei was not the heir of Baij Nath Singh and had no right to inherit his property. Mutation was effected in her name on 24th April 1926. There was no plea or proof that she had completed title by adverse possession. It further appeared that Mt. Brij Dei had gifted one-third of the property to her grandson Jagannath Singh (son of her daughter) and that mutation had been effected thereon on 21st July 1932. The deed of gift was not, however, produced, nor was the gift in favour of Jagannath Singh proved. The remaining two-thirds of the property in the possession of Mt. Brij Dei was mutated in the name of another grandson Keshoraj (son of another daughter) by an order dated 24th September 1935 on the basis of some iqrarnama which was not produced. The Munsif observed that this was the only evidence to prove the title of Jagannath and Keshoraj in the property in suit. He remarked that it was evident that Mt. Brij Dei had no title in the property of Pirthi Singh and hence had no right to transfer it to Jagannath and Keshoraj. In any event the transfers alleged to have taken place in their favour had not been proved. Consequently, in the Munsif's opinion, the plaintiffs transferors had no title in the land in suit and no right to grant a patta to the plaintiffs. On issue 2 the Munsif found that it was not proved what property was transferred by Exs. 1 and 2. On issue 3 the Munsif found that the plaintiffs had not been in possession of the land, and on issue 4 that they were not owners of the tree. Consequently he decided that they were not entitled to any relief.

In their appeal to the Civil Judge, which was preferred on 7th July 1937, the plaintiffs challenged all these findings and also contended that the trial Court should have held that Keshoraj and Jagannath had possessory title and could transfer their possession to the appellants. On 3rd September 1937, the plaintiffs applied to the Civil Judge for admission of certain additional documentary evidence in appeal. No order was passed on this application. It was not supported by an affidavit. The appeal came up for hearing on 8th October 1937 and on this date the plaintiffs presented another application which must be taken to be an application under O. 23, R. 1, Civil P. C.,

although this rule is not referred to in it. The previous application of 3rd September was not pressed. In the application of 8th October it was said that certain defects had crept into the suit as a result of which the plaintiffs might be prejudiced as their claim had become defective and it was apprehended that it might be dismissed. Consequently they asked for permission to withdraw the suit with liberty to institute a fresh suit. The following defects were alleged: (1) The objection about "possessory title" had not been taken. (2) Keshoraj and Jagannath Singh had not been made parties. (3) Certain necessary papers of which a list was given were not filed in the original Court. The papers referred to in (3) were those to which the application of 3rd September 1937 related, and it was because they were included in the application of 8th October 1937 that the previous application was not pressed. Reference to the omission about possessory title in (1) was presumably made in view of the fact that one of the grounds of appeal was that the Court below should have held that Keshoraj and Jagannath had possessory title.

The question now for consideration is whether the lower appellate Court was justified in granting permission under R. 1 of O. 23 on account of these alleged defects. It is contended that it acted with material irregularity in the exercise of its jurisdiction by granting this permission, and that it failed to apply its mind properly to the provisions of O. 23, R. 1. It is clear that the defects alleged cannot properly be described as formal defects. If they are defects at all they are material defects. It has been argued that the lower appellate Court might have been justified in granting permission on other grounds. But the order of the Civil Judge does not show that he took any other grounds into consideration. The application of 8th October 1937 indicates that the application was made in view of certain defects, and the Civil Judge apparently had these in mind when he spoke of "formal defects." He did not, however, say that he was satisfied that the suit must fail on this account. It is clear from the first alleged defect that the plaintiffs wished to put forward an alternative case and clearly this defect was not of a formal nature. Nor was the omission to implead other parties. And it has been held both by the Bombay High Court and by this Court that the failure to produce documents at the proper time is not a sufficient ground within the meaning of R. 1 of O. 23. For such defects the plaintiffs themselves were wholly responsible. It is not suggested that subsequent to the institution of the suit there was a discovery of any facts which rendered the suit defective. It appears to me, therefore, that the Civil Judge must be held to have acted with material irregularity in permitting the plaintiffs to withdraw the suit with liberty to sue afresh. I treat the appeal as an application in revision and allow it with costs, set aside the order of the lower appellate Court and direct that the first appeal be disposed of by the Civil Judge according to law. The plaintiffs will be at liberty to press their application for admission of additional documentary evidence, on which no order has yet been passed, but I do not express any opinion on the question whether it should be allowed or not.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Oudh 420

GHULAM HASAN J.

Brij Lal — Defendant — Applicant

v.

Surajman — Plaintiff —

Opposite Party.

Civil Revn. Appln. No. 77 of 1940, Decided on 2nd May 1941, for revision of order of Civil Judge, Bara Banki, D/- 25th April 1940.

(a) U. P. Agriculturists' Relief Act (27 of 1934), S. 39 — Court has power under S. 39 to determine whether receipt is written document evidencing loan within S. 39 — Its decision on this question is not open to revision.

It is open to a Court to determine the question whether a receipt is a written document evidencing a loan within the meaning of S. 39 and its decision upon that question is not open to revision inasmuch as it cannot be said to have acted illegally or with material irregularity. [P 421 C 2]

(b) U. P. Agriculturists' Relief Act (27 of 1934), S. 39—Object—No particular form of writing is necessary to evidence transaction of loan — Receipt held evidenced transaction of loan.

The intention of S. 39 is that loans taken by agriculturists should be evidenced by a writing and should not be made dependent upon parole testimony. The words "written document" used in S. 39 are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor, and no particular form of writing is necessary to evidence the transaction of loan. [P 421 C 2]

A receipt drawn up on a printed form showed that the defendant had received Rs. 150 from the plaintiff in consideration of a promissory note which he had executed in his favour:

Held that upon a reasonable interpretation of the language used in the receipt it was clear that the document furnished evidence of the loan taken by the defendant from the plaintiff. [P 421 C 2]

(c) U. P. Agriculturists' Relief Act (27 of 1934), S. 39 (3)—Plea under S. 39 (3) cannot be raised in revision for first time.

The plea that the provisions of S. 39 (3) were not complied with cannot be raised for the first time in revision. [P 422 C 1]

Bhawani Shanker — for Applicant.

B. K. Dhaon — for Opposite Party.

Order. — This revision petition by the defendant arises out of an appellate judgment and decree passed by the Civil Judge of Bara Banki decreeing the plaintiff's suit. The plaintiff brought a suit for recovery of Rs. 150 on the basis of a promissory note dated 22nd June 1936, executed by the defendant in favour of the plaintiff. On the same date a receipt was also executed by the defendant in favour of the plaintiff. Both the promissory note and receipt bear postage stamps. The plaintiff alleged in the plaint that Rs. 150 were due to him on the principal amount of the promissory note and Rs. 60 on account of interest upto the date of the suit. He gave credit to the defendant for a sum of Rs. 20 alleged to have been paid to him, relinquished his claim in respect of Rs. 40 and sued for the balance of Rs. 150. The defence to the suit was a denial of the loan. It was also pleaded that the promissory note and the receipt were not admissible in evidence as they were not properly stamped. There was a further plea that the plaintiff had obtained the defendant's thumb-impression upon the promissory note and receipt by fraud. Lastly it was pleaded that the defendant is an agriculturist and the suit could not be decreed under S. 39, U. P. Agriculturists' Relief Act, against him. The trial Court held that the promissory note was inadmissible in evidence for want of proper stamp but admitted the receipt in evidence upon payment of the necessary penalty. The trial Court further held that Ex. 2, the receipt, evidenced the loan in question within the meaning of S. 39, U. P. Agriculturists' Relief Act. It therefore decreed the suit against the defendant. The learned Civil Judge dismissed the appeal. It is against this decision that the present revision petition has been preferred.

Learned counsel on behalf of the defendant-applicant argued that the Courts below were wrong in holding that the loan was evidenced by a written document within the meaning of S. 39, U. P. Agriculturists' Relief Act. It was also argued that the provisions of S. 39 (1) and (2) have not been complied with and consequently the plaintiff was not entitled to charge any interest on the alleged loan. The contention was that no copy of the written document evidencing the loan had been given to the defendant and there was no entry made upon the written document specifying the date by which repayment must be made. No copy of the written document having been furnished to the debtor, it was argued that the plaintiff was not entitled to charge any interest within the meaning of cl. (3) of S. 39, U. P. Agriculturists' Relief Act. Lastly it was urged that the Courts below had omitted to give credit for the payment of Rs. 20 which the defendant had made to the plaintiff. I am of opinion that no question of the exercise of a jurisdiction not vested in the Courts below by law, or failure to exercise jurisdiction so vested, or the exercise of jurisdiction illegally or with material irregularity, arose in the present case. It was open to the Courts below to have determined the question whether the receipt (Ex. 2) was a written document evidencing the loan within the meaning of S. 39, U. P. Agriculturists' Relief Act. In coming to a decision upon that question it cannot be contended that the Courts below acted illegally or with material irregularity. In this view of the matter, the revision application is incompetent and cannot be entertained.

I have, however, examined the merits of the case and I quite agree with the finding arrived at by the Courts below that Ex. 2 is such a written document evidencing the loan as is contemplated by S. 39, U. P. Agriculturists' Relief Act. Exihibit 2, the receipt, is drawn up on a printed form and shows that the defendant had received Rs. 150 from the plaintiff in consideration of a promissory note which he had executed in his favour. Upon a reasonable interpretation of the language used in the receipt, it seems to me clear that the document furnishes evidence of the loan taken by the defendant from the plaintiff. Section 39 does not prescribe any particular form of a written document to evidence the loan. The words "written document" used in the section in my opinion are wide enough to cover any writing which would unmistakably show that a loan was taken by the debtor, and no particular form of writing is necessary to evidence the transaction of the loan. The intention of the section appears to be that loans taken by agriculturists shall be evidenced by a writing and should not be made dependent upon parole testimony. It is only to guard against an oral or parole transaction of loan that the section insists that the transaction shall

be evidenced by a document. I uphold the decision of the Courts below that Ex. 2 evidences the loan by a written document as required by S. 39, U. P. Agriculturists' Relief Act.

As regards the other question raised, it appears that no plea was raised in the written statement, that no copy had been furnished to the defendant and no issue was framed on that point. The point has not been raised in the ground of revision to this Court. I am unable to entertain this plea in revision at this late stage. If the plea had been raised at the proper stage in the trial Court, the plaintiff would have been in a position to produce evidence. It cannot be allowed to be raised at this stage now. As regards the last point that Rs. 20 were not credited towards the account of the defendant, the plea has no substance. It is quite clear from the account given in the plaint that a credit was given to the defendant for Rs. 20 and the plaintiff relinquished Rs. 40 out of the total amount of Rs. 60 as interest. This plea also has no force. The result is that the application fails and is dismissed with costs.

G.N./R.K. *Application dismissed.*

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* (28) A. I. R. 1941 Oudh 422

GHULAM HASAN AND AGARWAL JJ.

Raja Bahadur Bishwanath Saran Singh and another — Defendants — Appellants

v.

Ch. Mujtaba Husain and others — Plaintiffs — Respondents.

Second Appeal No. 375 of 1940, Decided on 27th March 1941, against order of Dist. Judge, Lucknow, D/- 12th October 1940.

(a) Society — Registered Association — R. 53 of Association prohibiting matter not mentioned in agenda of business to be brought before general meeting or meeting of Executive Committee without Chairman's permission—Chairman's power not circumscribed by any limitation — Chairman's discretion to permit matter not mentioned in agenda held could not be challenged by members.

Rule 53 of the Rules framed by the Association provided that no matter other than those mentioned in the agenda of business shall be brought before a general meeting or a meeting of the Executive Committee without the Chairman's permission. The power conferred on the President by R. 53 was not circumscribed by any limitation whatsoever:

Held, that the question of granting or withholding permission rested entirely with the Chairman to decide and his discretion in permitting the matter to be moved although the members had had no notice of it and the same had not been included in the agenda was not liable to be challenged by the members. [P 426 C 1]

*(b) Society — Registered Association — Rules of — R. 58 prescribing minimum quorum of 60 members for general meeting of Association to modify, amend or repeal any of rules—No rule to be modified, amended or repealed without approval of three-fifth majority—Minimum quorum of 60 held should be present at time of amendment, modification or repeal of rules — 67 members present at meeting—Some walking out in protest—Remaining 47 members amending rules — Amendment held ultra vires for want of requisite quorum.

Rule 58 of the Rules framed by the Association prescribed a minimum quorum of 60 members for a general meeting of the Association to modify, amend or repeal any of the rules. It further laid down that no rule could be repealed except with the approval of a three-fifth majority :

Held, that the spirit of R. 58 required that the minimum quorum of 60 should be present at the time when any of the rules was either modified, amended or repealed. Consequently, where at the commencement of the meeting 67 members were present and some of them walked out in protest the amendment of any of the rules by the remaining 47 members must be held to be ultra vires for want of requisite quorum. [P 426 C 2]

(c) Specific Relief Act (1877), S. 42 — Relief under S. 42 should not be granted if Court's decree is likely to prove futile and ineffective—Association — Rules of, fixing term of office of elected members of Executive Committee to be three years—Members of Executive Committee duly elected — Association amending rules and providing for fresh election of members of Executive Committee — Suit by elected members of Executive Committee for declaration that amendment of rules was ultra vires and that they were entitled to hold office for three years and for restraining Association from holding fresh elections—General Committee of Association having full powers to amend, modify or repeal any of rules—Court held could not grant reliefs sought as they could be nullified by passing of other rules by Association (Per *Ghulam Hasan J.*; *Agarwal J., Dissenting.*).

(Per Ghulam Hasan J.) — A Court should not exercise its discretion in favour of the plaintiff under S. 42 if the decree which it might be prepared to grant is likely to prove futile and useless. [P 427 C 1]

Under the rules framed by the Association the elected members of the Executive Committee were to hold office for three years. The members of the Executive Committee were duly elected but subsequently the Association in a general meeting amended its rules and decided to hold fresh elections of the members of the Executive Committee in pursuance thereof. The duly elected members of the Executive Committee brought a suit for declaration that the amendment of the rules was ultra vires and that they were entitled to hold office for three years and for injunction restraining the Association from holding fresh elections. The association under the rules framed by it had full powers to amend, modify or repeal any of the rules :

Held (Per Ghulam Hasan J.) — that the reliefs sought for could not be granted inasmuch as the rules of the Association were variable at its sweet

will and pleasure in a meeting strictly conforming to the requirements of the rules. Any decree passed by the Court, either of a declaratory character or in the form of an injunction, would be rendered ineffective and devoid of force by the Association choosing to amend its rules. The Association was governed by its own rules which were liable to modification, amendment or repeal at any time and any decree passed in such a case would therefore be *brutum fulmen*: ('15) 2 AIR 1915 All 197, *Rel. on*; ('39) 26 AIR 1939 Bom 35, *Disting.* [P 427 C 1, 2]

(Per Agarwal J.) — The plaintiffs as members of the Executive Committee had certain rights in the Association and therefore they could seek the declaration sought for and also a relief that the amendment be not enforced. If the amendment of the rules was ultra vires the plaintiffs were entitled to the reliefs sought for. The decree in the case could not be *brutum fulmen*, because the amendment being ultra vires, there would be no fresh election, and no apprehension of the plaintiffs being unseated. It could not be said that the Association would be able to amend the rules in a proper meeting. If a proper meeting with sufficient quorum was held, the rule might or might not be amended. It could not be said at the time of passing the decree that the amendment would surely be made : ('34) 21 AIR 1934 Bom 431 and ('39) 26 AIR 1939 Bom 35, *Rel. on*; ('15) 2 A I R 1915 All 197, *Disting*. [P 428 C 2 ; P 429 C 1]

(d) Society — Registered Association—Rules of — R. 21 providing for general meeting to be convened when necessary or when 12 members of Association sent requisition for same — Subject-matter wholly outside competence of Association to decide — President can refuse to convene meeting — Under rules, President to hold office for three years—No provision for removal of President—Requisition under R. 21 to hold general meeting for moving no-confidence motion against President—President held justified in refusing to convene general meeting.

The relevant portion of R. 21 of the Rules of Association ran as follows : "An extra-ordinary general meeting shall be convened when necessary or when 12 members of the Association send a requisition to the President for convening such meeting."

Held, that R. 21 did not render it obligatory upon the President to convene a meeting at the instance of certain members irrespective of the fact whether the matter to be discussed at such a meeting fell within the purview of the powers of the Association or not. The President would be perfectly justified in declining to call a meeting if he was of opinion that the Association was not competent to pronounce a decision upon the subject-matter of the requisition. Consequently, where under the rules of the Association, the President was entitled to hold office for 3 years and no provision was made for his removal, the President would be justified in refusing to convene a general meeting on the requisition of members for the purpose of moving a no-confidence motion against the President on the ground that the subject-matter of the requisition was wholly outside the scope of the authority of the Association. [P 428 C 1]

(e) Practice—Subsequent events — Court can take notice of and mould decree according to circumstances at time of decree — Suit against Association by some of its members—Association subsequently holding general meeting—Court can take notice of proceedings of meeting.

It is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. Consequently in a suit against the Association by some of its members, the Court can take notice of the proceedings of a general meeting held by the Association after the institution of the suit : ('17) 4 A I R 1917 Cal 716, *Rel. on.* [P 429 C 2]

M. Wasim, I. A. Abbasi and Dr. Jai Karan Nath Misra — for Appellants.

Ali Zaheer — for Respondents.

Ghulam Hasan J.—This second appeal arises out of a suit for declaration and injunction brought by the plaintiffs-respondents against the defendants-appellants. The suit was substantially decreed by the trial Court whose decision on appeal has been confirmed by the District Judge. The plaintiffs brought the present suit on 8th December 1939 for the following reliefs : (a) it may be declared that the amendments made to the rules in the meeting of 16th April 1939 are illegal and ultra vires and cannot be enforced; (b) it may be declared that, in any case, the members of the executive committee are entitled to hold office for three years from the date of their elections, and that the fresh election of thirty-five members attempted to be held on 19th December 1939 is illegal, and the President and the British Indian Association of Oudh through the President and the Vice-President be restrained by an injunction from holding the meeting on 19th December 1939, or any other date ; (c) it may be declared that the defendant President has by reason of acting contrary to the constitution of the Association, rendered himself unfit to act as President of the Association and should therefore be removed from the presidentship ; (d) in any case, a mandatory injunction be issued to the defendants ordering them to call a general meeting of the Association at a very early date, in order to consider and decide the resolution about non-confidence and the removal of the President, submitted by the plaintiffs and other members by a requisition according to the rules of the Association.

The plaintiffs-respondents, four in number, are ordinary members of the British Indian Association of Oudh which is stated to have 400 members. This Association is a body consisting of the taluqdars of Oudh and other landholders of high status and position. The Association was duly registered under the Societies Registration Act

(21 of 1860) on 16th April 1933, with the Registrar of Joint Stock Companies. It is guided by rules which were framed by that body for the management of its affairs. These rules have been filed and are Ex. 8 in the case. Defendant 1 is the elected President of the British Indian Association while the latter is impleaded as defendant 2 in the case. Throughout this judgment defendant 2 will be referred to for brevity's sake as the Association. The management of the affairs of this Association is entrusted to the executive committee under R. 12 of the rules. The plaintiffs were duly elected members of the executive committee on 18th April 1938, at a general meeting of the Association in which 126 taluqdars were present and their tenure of office under R. 16 is three years. The members of this Association according to rules are either ordinary members or honorary or extraordinary members or additional members. Ordinary members are those whose estates are governed by Act 1 of 1869 as amended and whose names are borne on the list of members published in the Regulations of the Association and who pay the subscription to the British Indian Association and the Canning College. The plaintiffs are admittedly the ordinary members. I am not concerned in this case with the honorary and extraordinary members or the additional members. On 16th April 1939, a general meeting of the Association was held under the presidentship of defendant 1 at which sixty-seven members were present. The agenda of this meeting had been duly circulated to the members according to the rules. This agenda included a consideration of the budget and one or two other non-controversial matters. It appears from Ex. 2, the proceedings of the meeting, that Babu Vidya Dutta Ram, a member, sought the permission of the President to move a resolution for appointing a small committee of the members to approach Mr. Gandhi in connexion with the tenancy laws in these provinces. Raja Maheshwar Dayal Seth, another member, objected to the resolution on the ground that it could not be moved as it was not a written statement within the meaning of R. 51 of the rules. Rule 51, as it then stood, stated that a member wishing to place a written statement of his views or some other paper before a meeting of the Association shall forward the same to the office of the Association 24 hours before such meeting is held. Rai Bahadur Lal Mathura Prasad Mehrotra intervened and said that the President had the power to give permission under R. 53 which runs thus:

> No matter other than those mentioned in the agenda of business shall be brought before a general meeting or a meeting of the Executive Committee without the Chairman's permission.

The proceedings show that the President after considering both the rules gave the ruling that Babu Vidya Datt Ram could move the resolution which he intended to move. This resolution was then moved and seconded by Raja Jagannath Bakhsh Singh. This resolution is no longer the subject-matter of controversy as the Tenancy Bill which was then pending in the Assembly became law before Mr. Gandhi's intervention could be sought. While Raja Jagannath Bakhsh Singh was seconding the resolution, Raja Maheshwar Dayal Seth requested the President to disallow it. The President declined to do so as he had already given a ruling whereupon Raja Maheshwar Dayal Seth protested on the ground that an important resolution had been allowed to be moved without the same having been included in the agenda. He left the meeting along with certain members. The resolution was then passed unanimously. Babu Shanta Datt Ram, another member, with the permission of the President and the wishes of the members present moved an amendment of the rules, which was seconded by Babu Kamakhya Datt Ram. The amendments which were unanimously passed are as follows :

Rule 13.—Under the unamended rule the executive committee was to consist of thirty-six members of whom as far as possible at least one shall belong to each district of Oudh and one may be the representative of the additional members of the Association. By the amendment the words "as far as possible" were deleted and the amended rule made it obligatory to have at least one member from each district of Oudh.

Rule 19. — It deals with the matters to be brought before the general meeting and these matters are enumerated as (a) to (e). By the amendment the words "election of the representatives of the British Indian Association, Oudh, to various bodies" were added as clause (e) and the original clause (e) was renumbered as (f).

Rule 51.—It required a member wishing to place a written statement of his views or some other paper before a meeting of the Association to forward the same to the office of the Association 24 hours before such meeting is held. The amendment added the words

"to move a resolution" in addition to the words "to place a written statement."

Rule 57. — It deals with the powers of the executive committee to make regulations regarding the business of the Association. The amendment added the words "subject to the confirmation of the general body of the British Indian Association."

In addition to these proposals, Raja Jagannath Bakhsh Singh moved that the amendments which had been passed should take effect from 1st June 1939, and the executive committee should be re-elected in accordance with those amendments. This proposal was also moved with the permission of the President and was passed unanimously. On 19th April 1939, 14 members including the present plaintiffs, sent a requisition to the President asking him to convene an extraordinary general meeting of the Association under R. 21 of the rules to discuss the resolutions, the amendments, the budget and the situation arising out of the proceedings in the general meeting held on 16th April 1939. In this requisition, the signatories pointed out that the amended rules were ultra vires as the required quorum under R. 58 of the Association was not present. 29th May 1939, was fixed by the President for the meeting in accordance with this requisition and a notice was issued to the members accordingly. This meeting was, however, postponed and was never called. On 24th October 1939, a notice was issued for the holding of the general meeting on 3rd December 1939 to consider—(1) confirmation of the proceedings of the ordinary meeting dated 25th September 1939; (2) election of 35 members of the executive committee in accordance with the amended rules and resolutions dated 16th April 1939 which were confirmed on 25th September 1939; (3) any other important matter which may be brought up with the permission of the President. This meeting was postponed by the President and fixed for 19th December 1939. Before this meeting could be held, the plaintiffs filed the present suit on 8th December 1939, and got an injunction issued from the Court against the holding of such a meeting. It may also be mentioned that on 18th October 1939 a requisition was sent by certain members of the Association to the President requesting him to convene a general meeting to consider the following resolution :

Since the members of the British Indian Association of Oudh have no confidence in the President of the British Indian Association of Oudh, Raja Bahadur Bishwanath Saran Singh of Tiloi, it is resolved that he be removed from the office of the President which post he shall cease to occupy from this day. (Ex. 6.)

A reference to the reliefs sought in the plaint will show that the plaintiffs challenged the validity of the rules passed in the meeting of 16th April 1939. They asked for a declaration that they are entitled to hold office for three years and a fresh election attempted to be held on 19th December 1939 should not be held and the defendants be restrained by an injunction from holding the same. The plaintiffs further asked for the removal of the President on account of his alleged contravention of the constitution of the Association. They also asked for a mandatory injunction against the defendants calling upon them to convene a general meeting to consider the question of the non-confidence motion and the removal of the President. The defence to the suit is that the rules and the amendments passed in the meeting of 16th April 1939 are perfectly legal and valid, that the President had full power to permit any member to move any matter which was not included in the agenda. It is stated that the rules were passed in a meeting in which the requisite quorum as required by R. 58 was present. Further the proceedings of the general meeting of 16th April 1939 had been reiterated and confirmed in the meeting of 25th September 1939, and again in the general meeting of 19th December 1939. As regards the non-confidence motion, it was stated that the President had called a meeting on 29th May 1939, but he had to postpone it at the request of some of the requisitionists themselves, including two of the plaintiffs, who wanted a date to be fixed in July or August, and that the matters mentioned in the said requisition were considered at the general meeting of 25th September 1939, and the resolutions in question were duly confirmed in the said meeting. Lastly it was urged that the suit of the plaintiffs was totally misconceived and did not lie in the civil Court for the reliefs claimed by them.

The trial Court found that the suit was maintainable as the civil right of the plaintiffs as duly elected members of the executive committee had been infringed. It also found that the rules passed in the meeting of 16th April 1939, whereby fresh elections of 35 members of the executive committee were to be held are ultra vires and illegal on the ground that they were not shown in the agenda of the meeting and the members had no notice of them and

also on the ground that there was no quorum when these resolutions were passed. The trial Court held that the President had acted against the constitution of the Association in permitting members to move a resolution without previous notice to the members and in ignoring the requisition of the plaintiffs to call an extraordinary general meeting, but it did not think that by these acts the President had rendered himself unfit to continue as President of the Association and the Court had no power to remove the President of the Association under the rules. The trial Court further held that the President could be compelled by an injunction to call a meeting in accordance with the requisition dated 18th October 1939 (Ex. 6) which he received on 26th October 1939, for consideration of the resolution mentioned therein within a reasonable time. The result was that reliefs (a), (b) and (d) were granted while relief (c) was refused.

The learned District Judge in appeal confirmed the decision of the trial Court in its entirety. The main question which occupied the attention of the Courts below is whether the rules passed in the meeting of 16th April 1939 were intra vires of the Association and valid. Their validity is challenged on two grounds which found favour with the Courts below: firstly that the question of the amendment of Rr. 13, 19, 51 and 57 was not included in the agenda issued to the members and the proposal was sprung upon them as a surprise in the meeting, and secondly that the requisite quorum for amending the said rules was not present at that time. There is no doubt whatever from the language of R. 53 that the Chairman of the executive committee can permit any matter to be brought up before it which does not find place in the agenda of business circulated to the members. This power vests in the President by virtue of the rules framed by the Association and is not circumscribed by any limitations whatsoever. The question of granting or withholding permission rests entirely with the Chairman to decide and his discretion in permitting the matter to be moved, although the same has not been included in the agenda, is not liable to be challenged by the members. It must, therefore, be held that the Chairman was perfectly within his rights in allowing the matter to be moved at the meeting despite the fact that the members had had no previous notice of it and the same had not been included in the agenda circulated to them.

As regards the second point, R. 58 prescribes a minimum quorum of 60 members for a general meeting of the Association to modify, amend or repeal any of the rules. It further lays down that no rule is to be repealed except with the approval of a three-fifth majority. Rule 58 is not happily worded. The latter part of the rule, which requires a three-fifth majority as *sine qua non*, uses the word "repealed," while the former part uses the words "modify, amend or repeal." There is no doubt however that the intention of the framers of the rule is that the modification, amendment or repeal of the rules can take place only with the approval of a three-fifth majority of the members. It is true in the present case that 67 members were present at the commencement of the meeting. It is, however, in evidence that 14 persons walked away in protest and six other members also left some time after, so that at the time when the amendments to the rules were passed the number of the members present was only 47, which is undoubtedly less than the minimum quorum of 60 required under the rules. Though the language of R. 58 on the question of quorum is not as explicit as it might have been, I am of opinion that the spirit of the rule requires that the minimum quorum of 60 should be present at the time when any of the rules is either modified, amended or repealed. It must, therefore, be held that the requisite quorum at the time of passing the amended rules in question was not present. It is urged, however, on behalf of the appellants that these rules were brought up again and confirmed in the meeting of 25th September 1939, and later in the meeting of 19th December 1939. I consider it wholly unnecessary to pursue the matter further as in my opinion a discussion of this point is purely of academical interest.

Assuming for the sake of argument that the amendments of the rules passed in the meeting of 16th April 1939 are invalid and ultra vires and consequently no fresh election should be held under those rules, the fact remains that reliefs (a) and (b), if granted to the plaintiffs, can be easily nullified by the passing of another rule by the Association in strict accordance with the requirements of R. 58, whereby fresh elections may be held with the resultant loss of seats to the plaintiffs. As long as the general meeting of the Association is vested with the power to modify, amend or repeal any of the rules framed by it with the approval of a

three-fifth majority of at least 60 members, the right of the members of the committee to continue as members for a period of three years under R. 16 can be taken away by a single meeting of the Association called to modify or amend that rule. In these circumstances any declaratory decree passed by a Court of law would be rendered nugatory by the action of the Association which may choose to amend R. 16 by a requisite majority. Even if I were prepared to hold that the rights for which the plaintiffs were fighting in Court were rights of a civil nature within the meaning of S. 9, Civil P. C., I do not think I would be justified in passing a declaratory decree for the reliefs sought for by the plaintiffs as the decree can be set at naught at any time by an alteration of R. 16 of the rules.

I follow the principle enunciated by the Allahabad High Court in 37 ALL 313[1] where it was held that although the fact that an office is of a purely honorary nature may not by itself be sufficient to render a suit respecting such office unmaintainable in a civil Court, yet, where a plaintiff complained of his eviction from the office of secretary to a society which was an honorary office and his continuance wherein depended upon rules which the society had power to alter at any moment, a civil Court ought not to entertain a suit for a declaration that the plaintiff had been illegally deprived of such office, inasmuch as such Court could not give any decree in his favour which might not be immediately rendered nugatory by the action of the society. There is a plethora of authority in support of the view that a Court should not exercise its discretion in favour of the plaintiff under S. 42, Specific Relief Act, if the decree which it might be prepared to grant is likely to prove futile and useless. I do not think it necessary to encumber this judgment with numerous cases upon the point which will be found collected in any commentary on S. 42, Specific Relief Act. Having regard to the fact that the rules of the Association are variable at its sweet will and pleasure in a meeting strictly conforming to the requirements of R. 58, any decree passed by the Court, either of a declaratory character or in the form of an injunction, would be rendered ineffective and devoid of force by the Association choosing to amend its rules. The Association is governed by its own rules which are liable to modification, amendment or repeal at any time, and any decree passed in such a case would therefore be *brutum fulmen*. Courts of law shall be exposing themselves to public ridicule if they grant declarations which prove to be infructuous.

The single Judge decision in A I R 1939 Bom 35[2] relied upon on behalf of the plaintiffs-respondents, has no real bearing upon the question before me. There it was held that a club is an autonomous institution and a Court of law will not lightly interfere with its action in expelling a member unless it has violated the recognised rules of procedure in that connection or those of natural justice. I am therefore of opinion that the lower Courts were not justified in granting reliefs (a) and (b) to the plaintiffs. As regards the relief (d), I am satisfied that the plaintiffs are not entitled to this relief. Exhibit 6 is the letter dated 18th October 1939, whereby certain members sent a requisition to the President requesting him to convene a general meeting of the Association under R. 21 of the rules to consider the following resolution:

> Since the members of the British Indian Association of Oudh have no confidence in the President of the British Indian Association of Oudh, Raja Bahadur Bishwanath Saran Singh of Tiloi, it is resolved that he be removed from the office of the President which post he shall cease to occupy from this day.

Rule 21 lays down:

> An extraordinary general meeting shall be convened when necessary or when 12 members of the Association send a requisition to the President for convening such meeting. Notice of such meetings shall be issued from the Association's office to all the members two weeks before the dates fixed for them. Provided that the date for such meeting should be fixed within 30 days from the date of receipt of requisition.

I do not think that the subject-matter of the proposed resolution falls within any of the matters which can be brought up before a general meeting of the Association. Rule 17 lays down that the general meeting of the Association may be ordinary general meeting or extraordinary general meeting. Rule 19 specifies the matters which can be brought before a general meeting which may be an ordinary general meeting or extraordinary general meeting. The two definite matters to be discussed by the requisitionists were (1) a no-confidence motion in the President and (2) a resolution that he should be removed from the office of the President. Neither of these matters falls within the

1. ('15) 2 A I R 1915 All 197 : 29 I C 53 : 37 All 313 : 13 A L J 455, Mahraj Narain Sheopuri v. Shashi Shekhareshwar Roy.

2. ('39) 26 A I R 1939 Bom 35 : 180 I C 685 : 40 Bom L R 1213, Ambalal Sarabhai v. Phiroz H. Antia.

scope of the authority of the Association and I am not prepared to hold that R. 21 renders it obligatory upon the President to convene a meeting at the instance of certain members irrespective of the fact whether the matter to be discussed at such a meeting falls within the purview of the powers of the Association or not. I am quite clear in my mind that a President would be perfectly justified in declining to call a meeting if he is of opinion that the Association is not competent to pronounce a decision upon the subject-matter of the requisition. The trial Court has clearly pointed out that the rules of the Association do not provide for the removal or expulsion of the President on any ground and if a no-confidence resolution were passed against the President the latter is not compelled to tender his resignation under the rules nor does he automatically cease to be the President by reason of the no-confidence motion having been passed against him. According to R. 10 the President is to hold office for three years. The subject-matter of the requisition being wholly outside the scope of the authority of the Association, it follows that the President was perfectly within his rights in declining to convene a meeting for that purpose. In this view of the matter the mandatory injunction granted against the defendants enjoining upon them to convene a general meeting on the basis of requisition (Ex. 6) cannot be allowed to stand and must be set aside. The result is that I allow the appeal, set aside the judgments and decrees of the lower Courts and dismiss the suit with costs throughout.

Agarwal J. — I had the advantage of reading the judgment of my learned brother Ghulam Hasan J. The facts are fully narrated in it. I agree with the conclusion of my learned brother in dismissing the suit with costs, but I regret I differ from him that the Courts below ought not to have granted reliefs (a) and (b), even if the amendment of Rr. 13, 19, 51 and 57 of the British Indian Association, Oudh, was invalid and ultra vires. My learned brother is of opinion that the Association could amend its rules at any time, after strictly conforming to its rules; even if the amendment done in the meeting of 16th April 1939 was invalid and ultra vires, and so it would be quite useless to grant a declaratory decree and ought not to be granted. He has relied on the principle laid down by the Allahabad High Court in 37 All 313.[1] That case is distinguishable in my opinion. There the plaintiff had sued for a declaration that the resolution of the defendant, a registered Association, removing him from the honorary office of the Chief Secretary of the Board of Trustees of the Association, was null and void. It was held that the point was whether the plaintiff did or did not possess the confidence and support of a majority of the Board of Trustees, and in the former case no such machinations, as were alleged in the plaint, could prevent the said Board from continuing to use his services as their Honorary Secretary, and in the latter case no decree which any civil Court would pass in a suit could prevent the Board of Trustees from dispensing with the plaintiff's services. It appears the plaintiff was outside the Association and held only an honorary office. He held the office at the will of the Association and so he could be removed by it, and if the removal complained of was not in accordance with the rules they could be amended at any time.

In this case the plaintiffs are members of the executive committee of the Association and entitled to hold the office for three years. The amendment of R. 13 would result in a fresh election in which they might be unseated. The plaintiffs are entitled to see that the amendment of the rules is done in accordance with the rules of the Association. In 37 All 313[1] it does not appear whether the plaintiff was also a member of the Association. The decree in this case will not be *brutum fulmen*, because if the amendment is held to be ultra vires, there will be no fresh election and no apprehension of the plaintiffs being unseated. It cannot be said that the Association would be able to amend the rule in a proper meeting. If a proper meeting with sufficient quorum is held, the rule may or may not be amended. It cannot be said at the present stage that the amendment would surely be made. In A I R 1934 Bom 431[3] the plaintiff claimed a declaration that the resolution expelling him from caste was invalid and of no effect and an injunction to restrain the defendant from giving effect to the resolution. The suit was decreed by Mirza J., and his judgment was upheld in appeal by Beaumont C. J. and Rangnekar J. Beaumont C. J., repelled the argument that it was not necessary for the caste to make a rule and because the caste can alter the rule when it has made it, therefore, the caste can ignore

3. ('34) 21 A I R 1934 Bom 431 : 153 I C 283 : 36 Bom L R 901, Ratansey Virji v. Megbji Hirji.

the rule while it exists and held that the expulsion of the plaintiff having been carried out in complete disregard of the rules of the caste the plaintiff was entitled to the declaration and injunction. This ruling was followed in A I R 1939 Bom 35.[2] That was a case of a member of a club being expelled, and the suit was decreed.

The principle relating to clubs and caste can very well be applied to this Association. The members of the executive committee have certain rights in the Association and, therefore, they can seek the declaration sought for and also a relief that the amendment be not enforced. The relief was not in respect of a contingent right nor such which would be useless. I, however, agree with my learned brother that the plaintiff cannot get reliefs claimed in this suit. I agree with him that the plaintiff was not entitled to relief (d). As regards reliefs (a) and (b), I think that the defect in the amendment of the rules done in the meeting of 16th April 1939, was removed in the meeting of 19th December 1939. The rule about amendment of rules is 58. It is that "a general meeting of the Association may modify, amend or repeal any of the rules." The quorum for such a meeting, shall not be less than 60 and no rule shall be repealed except with the approval of a three-fifth majority. There is another R. 53 that

no matters other than those mentioned in the agenda of business shall be brought before a general meeting or a meeting of the Executive Committee without the Chairman's permission.

A general meeting was held on 19th December 1939. At that meeting, a resolution was moved by Raja Jagannath Bakhsh Singh with the permission of the Chairman. It was seconded and unanimously passed. It was :

The amendments in the rules passed in the meeting of 16th April 1939, have been confirmed in the meeting of 25th September 1939. They are reiterated and the amendments are again accepted and they be enforced as soon as possible.

It was announced when the resolution was passed that 67 members were present. I think that the effect of the resolution was to amend the rules, even if they had not been done previously. These amendments were made unanimously in a general meeting. The required quorum was also present. The matter was not in the agenda, but any resolution can be moved with the Chairman's permission. It may be argued that this meeting of 19th December 1939 was held after the institution of the suit, but as held in 44 Cal 47,[4] it is incumbent upon a Court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. In the end, I agree with the order proposed to be passed by my learned brother.

By the Court. — We allow the appeal, set aside the judgments and decrees of the lower Courts and dismiss the suit with costs throughout.

G.N./R.K. *Appeal allowed.*

4. ('17) 4 A I R 1917 Cal 716 : 34 I C 869 : 44 Cal 47 : 24 C L J 140 : 20 C W N 1099, Nuri Mian v. Ambica Singh.

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(28) A. I. R. 1941 Oudh 429

YORKE AND GHULAM HASAN JJ.

Mt. Munia — Appellant

v.

Manohar Lal and others — Respondents.

Second Appeal No. 333 of 1937, Decided on 18th March 1941, against order of Dist. Judge, Lucknow, D/- 1st May 1937.

(a) Civil P. C. (1908), S. 100—Finding of fact on question of title cannot be challenged in second appeal.

A finding of fact of the lower appellate Court on the question of title cannot be challenged in second appeal. [P 431 C 1]

(b) Civil P. C. (1908), O. 41, R. 27 (1) (c) and (b) as amended by Oudh Chief Court — Under O. 41, R. 27 (1) (c) appellate Court can admit additional evidence only when it finds it needful—Appellant cannot be allowed to fill up lacuna in evidence produced in lower Court and patch up weak points—Whether non-production is due to negligence of appellant or his counsel is immaterial.

Under O. 41, R. 27 (1) (c) it is only when the appellate Court requires, in other words, finds it needful, that additional evidence can be admitted. The words "for any other substantial cause" must be read as ejusdem generis with the previous portion of cl. (c), namely "the appellate Court requires." Whether the non-production of the documents is due to the negligence of the appellant or his counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced in the Court below and to patch up the weak points of the case : ('31) 18 A I R 1931 P C 143, *Foll.* [P 431 C 2]

(c) Estoppel — Admission wrong in point of fact and made in ignorance of legal rights cannot operate as estoppel.

An admission which is wrong in point of fact and is evidently made in ignorance of legal rights has no binding effect on the person making it. [P 431 C 2]

(d) Evidence Act (1872), S. 116—Operation of doctrine of estoppel under S. 116 is confined only during continuance of tenancy.

Section 116 confines the operation of the doctrine of estoppel against a tenant only during the continuance of the tenancy. Consequently after the expiry of the period of tenancy S. 116 can have no application : ('37) 24 A I R 1937 P C 251, *Disting.* [P 432 C 1]

(e) Civil P. C. (1908), S. 11 —Ejectment suits — Former suit tried by Munsif — Subsequent suit tried by Additional Civil Judge — Subsequent suit held not barred by res judicata as former Court was not competent to try it.

Where a previous decision for ejectment is one by a Munsif while the subsequent suit is decided by the Additional Civil Judge the subsequent suit cannot be held to be barred by the principles of res judicata inasmuch as the former Court was not competent to try it. [P 432 C 2]

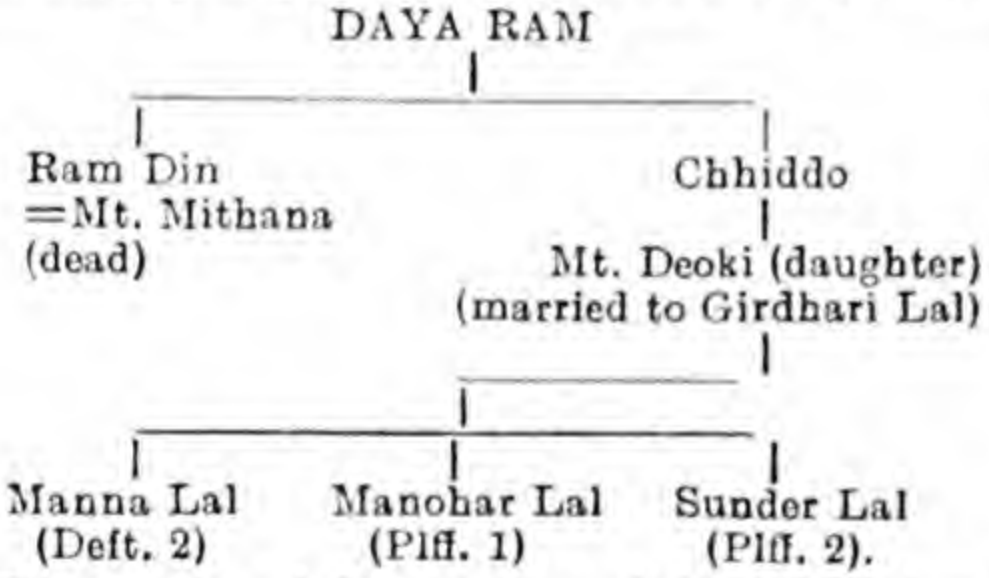
(f) Hindu law— Stridhan property—Sons inheriting from mother take as tenants-in-common and not as joint tenants.

The sons inheriting the stridhan property of their mother take it in distinct shares, that is, as tenants-in-common and not as joint tenants: ('37) 24 A I R 1937 P C 233, *Rel. on*; 25 Mad 678 (P C), *Expl.* [P 432 C 2]

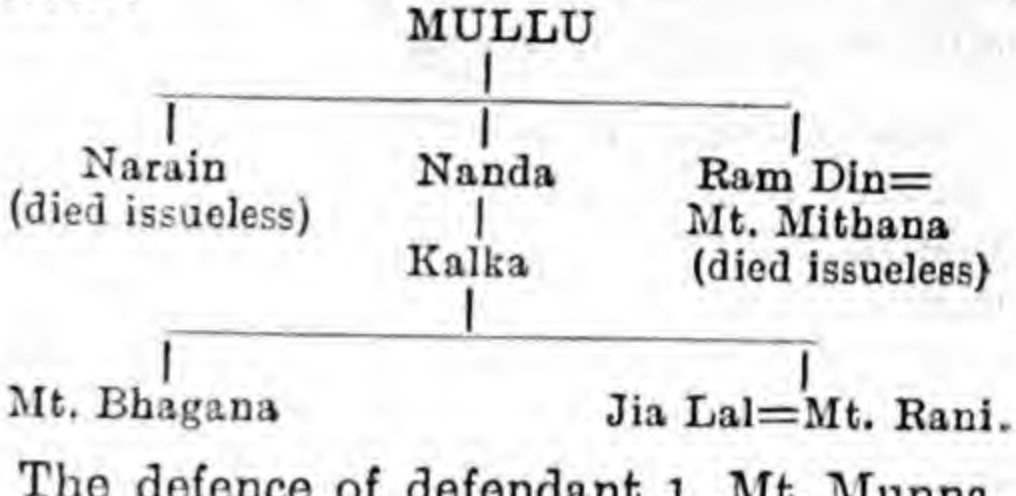
R. B. Lal and Suraj Sahai — for Appellant.

Haider Husain and B. K. Mathur and Mohammad Naziruddin — for Respondents 1 and 2, and 3, respectively.

Judgment.—This is a second civil appeal by the defendant arising out of a suit for a declaration, which has been decreed by both the Courts below. The plaintiffs set up the following pedigree in support of their claim:



The name of Daya Ram did not find a place in the pedigree given in the plaint but the fact that Daya Ram was the father of Ram Din was proved by the evidence and is no longer disputed. The plaintiffs' case as set out in the plaint was that Mt. Mithana was the absolute owner of a house situate in muhalla Bazar Kaliji, Lucknow. Mt. Mithana died sometime in 1919 leaving the plaintiffs and defendant 2 as her heirs, the latter being the daughter's son of the brother of her husband. Defendant 1 having filed a suit for ejectment and arrears of rent against defendant 2 on 4th April 1935, on the ground that the house in suit belongs to her, there was a cloud on the plaintiffs' title which rendered it necessary for them to bring the present suit for a declaration to the effect that they, along with defendant 2, are the absolute owners in possession of the property in suit and that defendant 1 had no right whatsoever in the same. Manna Lal, the brother of the plaintiffs, was impleaded as defendant 2 in the suit. Defendant 1 set up a counter pedigree which may be set out below :



The defence of defendant 1, Mt. Munna, was that the house was owned by her sister Mt. Rani and upon her death she and Mt. Bhagana became the owners of the assets left by Mt. Rani and as a result of certain arrangement the house in suit came into the possession of defendant 1, while another house owned by Mt. Rani fell to the share of Mt. Bhagana. The plaintiffs' title to the house was denied. It was pleaded that even if Mt. Mithana was held to be the owner in the house in suit and the plaintiffs be held to be Mithana's heirs, Mt. Rani had become the owner by adverse possession. It was also pleaded in the written statement that defendant 2 as the elder brother and karta and manager of the Hindu joint family consisting of himself and the two plaintiffs was the first tenant of the house in suit on behalf of Mt. Rani in whose favour he had executed a sarkhat and that after her death he was the tenant of defendant 1 and a suit for ejectment and arrears of rent filed by defendant 1 against defendant 2 had been decreed.

In oral pleadings before the Court the defendant's counsel denied that Chhiddo was the brother of Ram Din. On 20th August 1936, counsel for the defendant stated that if the plaintiffs proved that Ram Din and Chhiddo were brothers the plaintiffs will be the nearest heirs of Mt. Mithana. Defendant 2 admitted the claim. The trial Court held that the house in suit had been purchased by Mt. Mithana and that she was the absolute owner thereof. It further found upon a consideration of the entire evidence that the plaintiffs had proved that Ram Din and Chhiddo were brothers and in this view of the matter they were the heirs of Mt. Mithana. The adverse possession pleaded by defendant 1 was negatived and the plea of estoppel was also overruled. As a result of the findings arrived at by the trial Court

the suit was decreed. The lower appellate Court in appeal confirmed the decision of the trial Court. Hence the second appeal.

Learned counsel on behalf of the appellant has frankly conceded that upon the materials on the record it is not open to his client to assail the finding of fact of the lower appellate Court on the question of title. He has, however, filed an application before us (Civil Misc. Application No. 377 of 1939) under O. 41, R. 27, Civil P. C., praying for admission of five documents mentioned in the application on the ground that the documents Nos. 2 to 5 which relate to a certain litigation of 1885 were not after the exercise of due diligence within the knowledge of the applicant at the time when the decree was passed by the trial Court. These documents were sought to be filed before the lower appellate Court on a similar application made to that Court more than a month after the admission of the appeal. Another application was filed on the same day for the amendment of the written statement by removing the name of Mullu from the pedigree and substituting the name of Daya Ram for the apparent object of bringing it into conformity with the fresh evidence. The lower appellate Court rejected both the prayers on the ground that the appellant was represented by two senior counsel in the trial Court: the case went on for more than a year and as many as 54 documents were filed in the case on behalf of the appellant. Two of the documents, Exs. A-49 and A-50 were the old documents and related to the year 1885. The lower appellate Court was not satisfied that with the exercise of due diligence the evidence which the appellant wished to produce could not have been discovered during the trial and consequently rejected the application. One of the grounds of appeal relates to the rejection of the appellant's prayer for the admission of the aforesaid documents. As regards the document No. 1, which is a copy of an abadi khasra, the trial Court, it is stated, declined permission to file the same presumably on the ground of delay.

We have heard learned counsel in support of the prayer for the admission of the additional evidence and see no reason to dissent from the conclusion arrived at by the lower appellate Court. Reference has been made on both sides to a decision of their Lordships of the Privy Council in 58 I A 254[1] where it was held that under R. 27 (1) (c) of O. 41, Civil P. C., it is only when the appellate Court requires, in other words finds it needful, that additional evidence can be admitted. The words "for any other substantial cause" must be read as ejusdem generis with the previous portion of cl. (c), namely "the appellate Court requires". It seems to us quite clear that the finding of fact arrived at by the lower appellate Court is supported by sufficient evidence of a satisfactory character and it is not necessary for this Court to require the production of any document within the meaning of R. 27 (1) (c) of O. 41, Civil P. C. We are further of opinion that the appellant has not complied with the conditions prescribed by sub-cl. (b) of R. 27 (1) added by this Court. This clause runs thus:

> (b) The evidence sought to be adduced by a party to the appeal, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made.

The lower appellate Court has given adequate reasons for holding that the appellant had not satisfied the Court that the documents sought to be produced in appeal were not within the knowledge of the appellant or after the exercise of due diligence could not be produced by her in the trial Court. Whether the non-production of these documents is due to the negligence of the appellant or her counsel, it is neither desirable nor proper to allow the appellant to fill up the lacuna in the evidence produced in the Court below and to patch up the weak points of the case. We accordingly reject the application. The next point which was argued on behalf of the appellant relates to the question of estoppel. This plea is founded on the basis of two leases, Exs. A-36 and A-37, executed by defendant 2 in favour of Mt. Rani and a statement (Ex. A-32) made by defendant 2 in the ejectment case. The Courts below have considered these pieces of evidence in conjunction with the other evidence in the case and have come to the conclusion that the admissions contained in these documents were not true and were mistaken. In view of the positive evidence, which has been accepted by both the Courts below on the question of the plaintiffs' pedigree, it is clear that the aforesaid admissions were wrong in point of fact and were evidently made in ignorance of legal rights. These admissions were rightly rejected by the Courts below as having no binding effect on the plaintiffs' interests. It has, however, been contended on the strength of Exs. A-36

1. ('31) 18 A I R 1931 P C 143 : 132 I C 721 : 10 Pat 654 : 58 I A 254 (P C), Parsotim Thakur v. Lal Mohar Thakur.

and A-37 that under S. 116, Evidence Act, the execution of these leases by defendant 2 as manager and karta of the joint family consisting of himself and his brothers, the plaintiffs, estopped all of them from denying landlord's title. Strong reliance has been placed upon a decision of their Lordships of the Privy Council in A I R 1937 P C 251,[2] where it has been held that the words "at the beginning of tenancy" in S. 116, Evidence Act, do not give a ground for a contention that when a person already in possession of land becomes tenant to another, there is no estoppel against his denying his lessor's title. "Tenant who has occupied but not entered" is a difficult notion to thrust in S. 116 of the Act. It is urged that the fact that defendant 2 and his brothers, the plaintiffs, were already in possession of the house before the execution of these leases, did not take the case out of the purview of S. 116, Evidence Act, as interpreted by their Lordships in the above-mentioned case.

We are, however, of opinion that the present case does not fall within the mischief of the rule enacted under S. 116, Evidence Act. Exhibit A-36 is a sarkhat executed on 5th March 1932, by defendant 2 in favour of Mt. Rani for a period of six months. The lease, therefore, must be deemed to have expired on 5th September 1932. Exhibit A-37 is a sarkhat executed by defendant 2 on 5th February 1933, in favour of Mt. Rani for a period of one year. This period must also be deemed to have expired on 5th February 1934. The present suit was filed on 3rd September 1935, long after the expiry of the terms of these leases. Section 116, Evidence Act, confines the operation of the doctrine of estoppel against a tenant during the continuance of the tenancy. As the term fixed by Exs. A-36 and A-37 expired before the filing of the present suit, and as there is no evidence on the record as regards the continuance of the tenancy, we must hold that S. 116, Evidence Act, has no application to the present case.

As regards the question of adverse possession, we hold in agreement with the view taken by the Courts below, that no such adverse possession is established. According to the plaintiffs, Mt. Mithana died about 17 years ago while according to defendant 1, she died about 21 or 22 years ago: *vide* oral pleadings. It is not disputed that the plaintiffs have all along been in possession during the said period and, beyond the fact that two sarkhats (Exs. A-36 and A-37) were executed by defendant 1 in favour of Mt. Rani in the years 1932 and 1933, there is no evidence on the record that Mt. Rani ever came into possession of the property. As a matter of fact the plaintiffs are still in possession of the same property and they have filed the suit for a bare declaration which, according to the plaint allegations, was necessitated by reason of the ejectment suit against defendant 2. We, therefore, overrule the plea of adverse possession. The plea of res judicata has been faintly pressed on behalf of the appellant. This plea is based upon the suit for ejectment filed by defendant 1 against defendant 2 on 4th April 1935. The suit was decreed. This plea was not raised in the trial Court. We are, however, of opinion that there is no substance in this plea. The previous decision for ejectment was one by a Munsif while the present suit was decided by the Additional Civil Judge. It is clear therefore that the former Court was not competent to try the subsequent suit and consequently the present suit cannot be held to be barred by the principle of res judicata.

Lastly it has been argued that the plaintiffs, being the stridhan heirs of Mt. Mithana, must be held to have succeeded as tenants-in-common and the Courts below should not have decreed the suit for more than two-third share in the house in dispute. This plea was not raised in the trial Court and the lower appellate Court refused to entertain this plea on the ground that it was one involving a question of fact and could not be allowed to be raised in appeal. It is admitted that the plaintiffs were claiming as the stridhan heirs of Mt. Mithana, who was alleged in the plaint to be the absolute owner of the property in dispute. This claim was denied by defendant 1. In these circumstances we are of opinion that the property descended upon the plaintiffs and defendant 2 in distinct shares; in other words they succeeded as tenants-in-common and not as joint tenants. Reliance was placed on behalf of the plaintiffs-respondents on 29 I A 156.[3] In that case two brothers living as members of a joint family inherited some property from their maternal grandfather. On the death of one of them leaving a widow a dispute arose as to whe-

2. ('37) 24 AIR 1937 P C 251 : 169 I C 556 : I L R (1938) 1 Cal 1 : 64 I A 311 : 31 S L R 625 (P C), Krishna Prasad v. Baraboni Coal Concern Ltd.

3. ('02) 25 Mad 678 : 29 I A 156 : 2 M L J 299 : 8 Sar 286 (P C), Raja Chelikani Venkataramanayyamma v. Raja Chelikani Venkayyamma Garu.

ther his share in the property passed to his widow by succession or to his brother by survivorship. It was held that the property inherited by the two brothers was joint property in their hands and the undivided interest of the deceased passed on his death by survivorship to his brother and not by succession to his widow.

In a later case in A I R 1937 P C 233,[4] their Lordships of the Judicial Committee held that the word "ancestor" in its ordinary meaning includes an ascendant in the maternal, as well as the paternal, line; but the 'ancestral' estate, in which, under the Hindu law, a son acquires jointly with his father an interest by birth, must be confined, as shown by the original text of the Mitakshara, to the property descending to the father from his male ancestor in the male line. Hence the estate, which is inherited by father from his maternal grandfather, cannot be held to be ancestral property in which his son has an interest jointly with him. It was argued before their Lordships on the authority of the decision in 29 I A 156[3] that the property inherited by a daughter's son from his maternal grandfather is ancestral property. Their Lordships repelled the contention observing that the question formulated in the previous case was whether the property of the maternal grandfather descended, on the death of his daughter, to her two sons jointly with benefit of survivorship, or in common without benefit of survivorship, and their Lordships decided that the estate was governed by the rule of survivorship, and the claim of the widow was, therefore, negatived. Their Lordships proceeded to explain that the question whether the property which a daughter's son inherits from his maternal grandfather is ancestral property in the technical sense that his son acquires therein by birth an interest jointly with him, was neither raised by the parties nor determined by the Board, and the phrase "ancestral property" was used in its ordinary meaning, namely property which devolves upon a person from his ancestor, and not in the restricted sense of the Hindu law which imports the idea of the acquisition of interest on birth by a son jointly with his father. That being the view enunciated by their Lordships of the Privy Council, it seems to us to follow clearly from the facts of the present case that the plaintiffs succeeded to the stridhan property left by Mt. Mithana along with defendant 2 as tenants in common and not as joint tenants. In this view of the matter, the plaintiffs are not entitled to a decree for more than two-third share in the house in dispute.

There is an additional reason why the plaintiffs are not entitled to a larger decree. Defendant 1 has already obtained a decree for ejectment and arrears of rent against defendant 2, which has become final and binding between the parties thereto. That being so, our decision will lead to absurd legal results if we maintain the decree in respect of the entire property in favour of the plaintiffs. The result, therefore, is that we allow the appeal in part, and in lieu of the decree passed by the lower Courts decree the suit for two-third share in the property in dispute, with proportionate costs in all the Courts.

G.N./R.K. *Appeal partly allowed.*

4. ('37) 24 A I R 1937 P C 233 : 169 I C 1 : 31 S L R 590 : 64 I A 250 : I L R (1937) All 655 (P C), Muhammad Husain Khan v. Kishva Nandan Sahai.

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(28) A. I. R. 1941 Oudh 433

GHULAM HASAN J.

Amjad Husain and another —

Applicants

v.

Mt. Raisunnisa and another —

Opposite Party.

Civil Revn. Appln. No. 37 of 1938, Decided on 18th March 1941, from order of Dist. Judge, Barabanki, D/- 23rd November 1937.

(a) U. P. Agriculturists' Relief Act (27 of 1934), Ss. 23 and 12 — Case arising out of redemption proceedings under S. 12—High Court can interfere in revision provided case fulfils requirements of S. 115, Civil P. C.—S. 23 is no bar.

In a case arising out of proceedings for redemption under S. 12, S. 23 does not divest the High Court of the power of interference in revision if the case fulfils the requirements of S. 115, Civil P. C.: ('40) 27 A I R 1940 Oudh 33 (F B) and 29 Cal 167 (P C), *Disting.* [P 435 C 1]

(b) Evidence Act (1872), Ss. 90 and 65—Document in respect of which statutory presumption is to be made must be produced under S. 90 before Court — Certified copy of sale deed produced — Court cannot under S. 90 presume genuineness of original sale deed.

Section 90 clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. The admissibility under S. 65 of a certified copy of a sale deed as secondary evidence of the original means only that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissible to invoke the assistance of S. 90 to prove the genuineness of the original by the production of the certi-

fied copy : ('35) 22 A I R 1935 P C 132, *Rel. on* ; ('29) 16 A I R 1929 P C 115, *Expl.* ; 34 Cal 1059 (P C), *Disting.* ; ('29) 16 A I R 1929 Oudh 483, *held not good law.* [P 435 C 2]

Mohammad Husain — for Applicants.

Sri Ram and Lekh Ram Varma — for Opposite Party.

Order. — This revision application is directed against the appellate order passed by the District Judge of Barabanki allowing the appeal and setting aside the order of the Assistant Collector, first class in a suit for redemption of a mortgage under S. 12, U. P. Agriculturists' Relief Act. The facts giving rise to the present litigation are as follows : One Ramzan Ali mortgaged the property in suit with possession to defendant 2, Fazal Ahmad, under a mortgage deed dated 7th July 1902. Defendant 2 sold his mortgagee rights to Amjad Husain, defendant 1. On 21st July 1904, Ramzan Ali is alleged to have sold his equity of redemption to one Abdul Hakim, defendant 3, who in turn made a gift of the property in favour of his wife, the plaintiff. The plaintiff thereupon filed an application for redemption of the said mortgage of 7th July 1902, under S. 12, U. P. Agriculturists' Relief Act, in the Court of the Assistant Collector, first class. Defendant 3 admitted the plaintiff's claim while defendants 1 and 2, who are the present applicants, filed a joint written statement contesting the application on the ground that Ramzan Ali never sold his equity of redemption and consequently the plaintiff was not a representative of the original mortgagor entitled as such to sue for redemption. In para. 12 of the written statement the sale deed of 21st July 1904 was denied and was alleged to be a forgery. The said defendants also denied that the plaintiff was an agriculturist as defined in the U. P. Agriculturists' Relief Act and hence the plaintiff was not entitled to sue under S. 12, Agriculturists' Relief Act.

The learned Assistant Collector found that the plaintiff had not proved that she is the legal representative of the original mortgagor Ramzan Ali. The original sale deed of 21st July 1904, was not produced but a certified copy was produced. In this connexion the learned Assistant Collector found that the evidence regarding the loss of the original document was not satisfactory and refused to admit the copy as secondary evidence. On the second question whether the plaintiff was an agriculturist or not, the learned Assistant Collector recorded a finding against the plaintiff holding that she was not an agriculturist within the meaning of the Act.

The learned District Judge in appeal set aside the finding that the loss of the original document was not satisfactorily proved and presumed from the certified copy the genuineness of the original under S. 90, Evidence Act. In regard to the second point the learned District Judge held that as the property was admittedly in the possession of the mortgagee the plaintiff was liable to pay revenue for the property if she had possession of it. Upon this reasoning he held that the plaintiff was an agriculturist. He set aside the judgment of the trial Court and remanded the case to him for disposal according to law. Defendants 1 and 2 have come up in revision to this Court challenging the decision of the learned District Judge on both the points decided against them.

A preliminary objection has been raised on behalf of the plaintiff opposite party that this revision application is incompetent. Reference has been made in this connexion to the provisions of S. 23 (2), Agriculturists' Relief Act, which lays down that no appeal shall lie from an appellate order under this section and to 29 I A 51,[1] A I R 1937 Oudh 124[2] and 1939 O A 760.[3] To my mind the preliminary objection has no substance. The last mentioned case is a decision of a Full Bench of this Court in which it was held with special reference to the provisions of S. 5 (2), Agriculturists' Relief Act, that no revision is entertainable against an appellate order refusing instalments under S. 5 of the Act. The case in A I R 1937 Oudh 124[2] was followed in this Full Bench case. The decision of the Full Bench proceeded on the ground that the words "decision of the appellate Court shall be final" in S. 5 (2), Agriculturists' Relief Act, debarred not only a further appeal against it but prevented interference with it in revision. A reference was made to the provisions of Ss. 23 and 30 (3), Agriculturists' Relief Act, in which the words used were that "no appeal shall lie from an appellate order passed under this section." The learned Judges constituting the Full Bench held that if the intention of the Legislature had

1. ('02) 29 Cal 167: 29 I A 51: 8 Sar 154: 6 C W N 226 (P C), Ghulam Jilani v. Muhammad Hassan.
2. ('37) 24 A I R 1937 Oudh 124 : 165 I C 469 : 1936 O W N 1158, Nihal Singh v. Ganesh Dass-Ram Gopal.
3. ('40) 27 A I R 1940 Oudh 33 : 184 I C 768 : 15 Luck 163: 1939 O W N 970: 1939 O A 760 (F B), Mahipal Singh v. Kamta Prasad.

been to bar only a second appeal they would have used in sub-s. (2) of S. 5 of the Act the same language which they used in Ss. 23 and 30 (3), Agriculturists' Relief Act. The decision of the Full Bench must, therefore, be confined to cases falling under S. 5 (2), Agriculturists' Relief Act and must not be deemed to extend to cases under S. 23. It may be noted that Ss. 12 and 23 are both included in Ch. 3, Agriculturists' Relief Act, whereas S. 5 appears in Ch. 2 of the same Act.

As regards the decision in 29 I A 51[1] learned counsel for the opposite party has relied on the provisions of para. 16 (2) of Sch. 2, Civil P. C., which lays down in the case of awards that no appeal lies except in so far as the decree may be in excess of, or not in accordance with, the award. In that case their Lordships of Privy Council approved the view of Clarke J. that in the case of an award revision would be more objectionable than an appeal. Their Lordships emphasized that if an application in revision were admissible in a case like the present, the finality of any award would be open to question. That case, however, has no application to a case arising out of proceedings for redemption under S. 12, Agriculturists' Relief Act. The language of S. 23, Agriculturists' Relief Act, in my opinion does not divest this Court of the power of interference in revision if the case fulfils the requirements of S. 115, Civil P. C. As I shall show presently, the case before me is one in which the learned District Judge has acted illegally, or at least with material irregularity in his finding upon the principal question in the case as regards the right of the plaintiff to institute the suit for redemption.

The learned Judge has fallen into two errors, one of which is an error of fact and the other is an error of law. In his judgment he states that there were only two attesting witnesses of the sale deed and both were dead. As a matter of fact, there are three attesting witnesses, Mukarram Husain, Aulad Ali and Jawwad Ali, and this was so stated by Abdul Hakim, the husband of the plaintiff. Mukarram Husain and Aulad Ali are admittedly dead. According to the unrebutted testimony of Abdul Ghani, a witness produced on behalf of the defendants, Jawwad Ali, who was closely related to him, was still alive. This point is however not of very great importance. The question that really arises for determination is whether the learned District Judge was right in presuming the genuineness of the original sale deed under S. 90, Evidence Act, by the mere production of a certified copy of the sale deed. This point is now set at rest by a decision of their Lordships of the Judicial Committee in 1935 O W N 759[4] where it was held that S. 90, Evidence Act, clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under S. 65 of the Act as secondary evidence and it is produced from proper custody and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine, but the Court is not entitled to presume the genuineness of the original. According to the aforesaid decision the certified copy of the sale deed produced in the case is admissible under S. 65, Evidence Act, as secondary evidence of the original which means only this that it is a correct copy of the original document, but whether the original document was a genuine document is a question which is capable of proof and it is not permissible to invoke the assistance of S. 90, Evidence Act, to prove the genuineness of the original by the production of the certified copy. As regards the case in 56 I A 146[5] relied upon on behalf of the opposite party, their Lordships referred to that case in 1935 O W N 759,[4] and explained that in that case the dispute was as to the terms of a grant, which had admittedly been made. The case in 34 Cal 1059[6] cited by the opposite party has no bearing on the present case. There was no question of any presumption under S. 90, Evidence Act, which was not even referred to in the judgment. One of the two documents in that case was admitted in the trial Court without any objection while the other document was accepted as genuine upon the evidence produced in that case.

The case in A I R 1929 Oudh 483[7] decided by a single Judge of this Court is no longer good law in view of the latest pronouncement of their Lordships of the Privy Council. In this view of the matter there is no legal basis whatever for the finding arrived at by the lower appellate Court upon the genuineness of the original sale deed on the

4. ('35) 22 AIR 1935 P C 132 : 156 I C 864 : 57 All 494 : 62 I A 180 : 1935 O W N 759 (PC), Basant Singh v. Brij Raj Saran Singh.
5. ('29) 16 AIR 1929 P C 115 : 117 I C 507 : 52 Mad 453 : 56 I A 146 (PC), Seethayya v. Subramany Somayajulu.
6. ('07) 34 Cal 1059 : 34 I A 194 : 6 C L J 678 (PC), Shahzadi Begam v. Secretary of State.
7. ('29) 16 AIR 1929 Oudh 483 : 121 I C 273 : 5 Luck 424 : 6 O W N 880, Brij Kishore v. Beni Pershad.

basis of which the plaintiff sought redemption. The decision of the learned District Judge upon this point cannot therefore be sustained and must be set aside. In view of the decision at which I have arrived upon the principal question in the case the plaintiff is at once non-suited and has no right to maintain the suit for redemption. This finding renders it wholly unnecessary to pursue the second point raised on behalf of the defendants-applicants. The result therefore is that this application succeeds, the judgment and decree of the lower appellate Court is set aside and the suit is dismissed with costs throughout.

G.N./R.K. *Application allowed.*

(28) A. I. R. 1941 Oudh 436

YORKE AND GHULAM HASAN JJ.

Syed Iqbal Ali—Defendant—Appellant

v.

S. Humayun Qadar and others — Plaintiffs—Respondents.

Appeal No. 19 of 1937, Decided on 21st February 1941, against order of Smith J., D/- 8th May 1937.

(a) Civil P. C. (1908), S. 100—Adverse possession is mixed question of fact and law—Facts found by first appellate Court are binding in second appeal—Question whether facts establish adverse possession being one of law can be challenged.

The question of adverse possession is a mixed question of fact and law. Though the facts found by the Court of first appeal must be accepted as final in second appeal, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal : 19 Cal 253 (PC); ('19) 6 A I R 1919 P C 60 and ('35) 22 A I R 1935 Oudh 387, *Rel. on.* [P 439 C 2]

(b) Adverse possession—Onus is on plaintiff to establish affirmatively his acquisition of statutory title by reason of adverse possession —No case of permissive possession set up by defendant—Permissive character of possession never arising as independent issue for decision —Question of adverse possession cannot be approached by determining whether defendant has proved permissive possession or not.

It is the duty of the plaintiff claiming title by adverse possession to establish affirmatively that they had acquired statutory title to the property by reason of adverse possession for the requisite period. Where no case of permissive possession has been set up by defendant in the pleadings, and the permissive character of possession has never arisen as an independent issue calling for a decision in the case, it is wholly wrong to approach the question of adverse possession by determining whether the defendant has proved a case of permissive possession or not and hold adverse possession upon the weakness of that case : 27 Cal 943 (PC) and ('16) 3 A I R 1916 P C 21, *Rel. on.* [P 439 C 2; P 440 C 1]

(c) Adverse possession — Proof of — House fallen into ruins and presenting mere appearance of ahata with dalan bounded on all sides by neighbour's houses—Such acts of possession as tethering of cattle, using land as playground, cooking food on ceremonial occasions and even planting trees by real owner's family members cannot be taken to arouse notice of real owner and cannot constitute adverse possession against him.

The title of the owner must be deemed to carry with it the legal possession and must be deemed to subsist, unless and until there is an open and hostile assertion of title accompanied by exclusive possession of an effective nature to the knowledge of the actual owner. To constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity and in extent, and is displaced by evidence of partial possession by the defendant, and the onus of establishing these essential elements is upon the adverse possessor. In determining the question whether possession is hostile and notorious so as to charge the real owner with notice of the adverse claim the nature, the situation and the user of the property must be considered: 27 Cal 943 (PC) and (1895) 1 Ch 641, *Rel. on.* [P 440 C 1,2]

Where after the falling of a house into ruins for a long time the land presents the appearance of a mere ahata with a dalan bounded on all sides by the houses of neighbours such acts of possession by the adverse possessors, (members of the real owner's family), as tethering of cattle, using the land as a playground, cooking food on ceremonial occasions and even planting trees cannot possibly arouse the notice of the real owner even if he be living in the same town, much less would they constitute adverse possession against him if he has been living away from the land since a long time : 16 Bom 338, *Rel. on; Case law discussed.* [P 440 C 2]

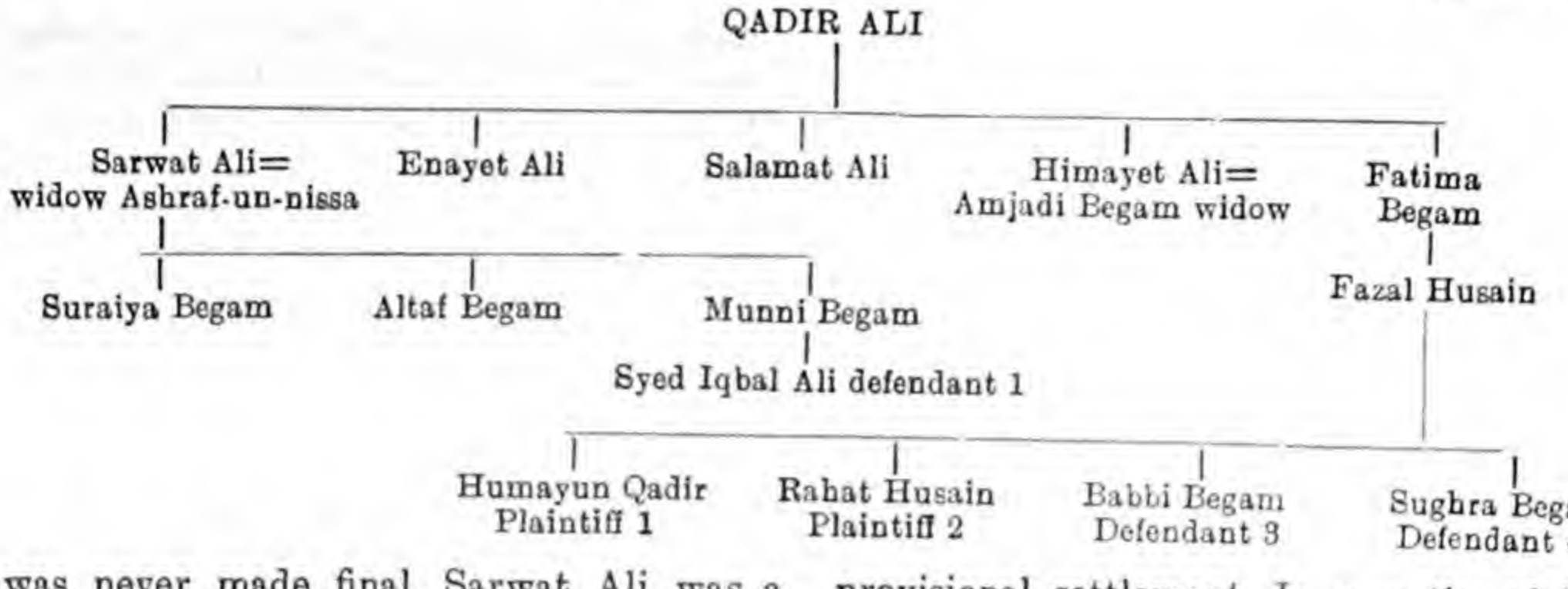
Mohammad Ayub and S. Mohammad Husain— for Appellant.

Ali Zaheer and K. N. Tandon — for Respondents 1 and 2 and Respondents, respectively.

Judgment.—This is an appeal by defendant 1 under S. 12 (2), Oudh Courts Act, against the decision of the late Smith J. A short pedigree table, in so far as it is material to explain the situation of the parties, is set out below. The pedigree is undisputed.

(For pedigree see p. 437.)

The facts giving rise to this litigation are fully set forth in the judgments of the two lower Courts and in the judgment of our learned brother, Smith J. Briefly they are as follows : On 22nd July 1891, Sarwat Ali executed a mortgage (Ex. 5) in favour of one Hasan Jafar, the father of defendant 2, as benamidar for Fazal Husain, the father of the plaintiffs, in respect of three houses in Golaganj, Lucknow, which are now admitted to have been situate on plots Nos. 232, 236 and 237. On 8th March 1893, Sarwat Ali purchased house No. 261 from Amjadi Begam, the widow of Himayet Ali. The mortgagee under Ex. 5 obtained a preliminary decree for sale on 16th August 1898. This decree



was never made final. Sarwat Ali was a practising lawyer and had shifted to Hyderabad, Deccan. He died there some time in 1905. On 21st January 1927, Sarwat Ali's heirs applied for redemption under the old S. 89, T. P. Act, now corresponding to O. 34, Rr. 5 and 8, Civil P. C., against the heirs of Saiyid Hasan Jafar, benamidar, and the heirs of Saiyid Fazal Husain, who was the real mortgagee. The application was allowed by the lower Court but the decision was reversed on appeal by this Court on 24th March 1930 : *vide* 7 O W N 538.[1] The heirs of Fazal Husain had set up an oral sale of the mortgaged property in their favour after the preliminary decree for sale and had also pleaded adverse possession over the mortgaged property. The plea of oral sale was rejected, but the plea of adverse possession was upheld by this Court. The heirs of Sarwat Ali had obtained possession of the mortgaged property after the decision of the lower Court in their favour but this possession was restored to the plaintiffs after the decision of this Court. In the course of the restitution proceedings, a dispute a rose as regards the possession over plot No. 261 which the plaintiffs contended was covered by the mortgage deed, but they were resisted by defendant 1, and this led to a criminal litigation between the parties. Ultimately, however, the parties came to a provisional settlement under which plot No. 261 was, pending the adjudication of title by civil Court, put in the possession of defendant 1, barring a small portion which went to the other party who in return gave defendant 1 a portion of plot No. 236. The plaintiffs instituted the present suit on 23rd May 1933 for possession. The number of the plot was not given in the plaint, but it is no longer disputed between the parties that the suit related to plot No. 261 and that part of plot No. 236 which was given to defendant 1 under the provisional settlement. In case the plaintiffs succeeded in establishing their claim to plot No. 261, they would be entitled to get back that portion of plot No. 236 which they had surrendered to defendant 1 in return for a portion of plot No. 261.

Defendant 2 is the son of Hasan Jafar, who was admittedly the benamidar for Fazal Husain in the mortgage executed in 1891. Defendants 3 and 4 are the sisters of the plaintiffs and have been impleaded as pro forma defendants. The only contesting party in the case therefore is defendant 1. The plaintiffs asserted themselves in the plaint as owners of land along with the building, of which the boundaries were given at the foot of the plaint but which must now be deemed to refer to plot No. 261, since 14th September 1898. The plaint refers to the fact of Sarwat Ali's heirs having taken possession of the said plot in 1928 after their application for redemption was granted by the lower Court, and that the plaintiffs regained possession of the same on 31st May 1930. On 7th July 1930, defendant 1 is alleged to have taken unlawful possession of the said plot, and this, according to the plaint allegations, gave rise to the suit for possession against him along with damages to the extent of Rs. 50 for allowing a dalan in the land in suit to fall into disrepair during the period of his possession. Defendant 1 pleaded that plot No. 261 was not the subject-matter of dispute in the redemption case which he lost in the Chief Court, that he was the owner in possession of the said plot and that the plaintiffs had no title whatsoever to the same. In the oral pleadings before the Court counsel for the plaintiffs stated on 26th August 1933 as follows :

> I claim title to the property by virtue of the decrees in foreclosure and redemption suit and also on the ground of adverse possession which has been established against defendant 1 by the judgment of the Hon'ble Judges of the Chief Court.

1. ('31) 18 A I R 1931 Oudh 69: 127 I C 252: 7 O W N 538, Humayun Qadar v. Suraiya Begam.

Defendant 1's possession over the property was always permissive.

Counsel for defendant 1 replied that the property in suit was not included either in the foreclosure decree of 1898 or in the redemption suit lost by defendant 1 against the plaintiffs in the Chief Court. The property in suit appertains to ahata No. 261, which originally belonged to Himayat Ali, whose heirs sold it to Sarwat Ali, and after the death of Sarwat Ali his heirs who succeeded to the property transferred the same to defendant 1. On 25th November 1933, the plaintiffs filed a replication in which they stated that they had become owners of the land in suit by adverse possession for a long time. On 27th November 1933, counsel for the plaintiffs stated that the whole of the land was previously in the possession of the plaintiffs and his predecessors-in-interest since the year 1898 and that with the exception of a dalan shown in the Commissioner's map there was no other building in the land in suit since 1898. The trial Court appointed a Commissioner, who prepared a plan of the land in suit. In an elaborate judgment the trial Court held that plots Nos. 232, 236 and 237 were the only plots in suit in the redemption case, and that plot No. 261 was not included in it. It held that the land in suit so far as it was enclosed by the letters "a1 b1 C1 G1 d1 e1 f1" in the map of the Commissioner was included in the redemption case, and the rest of the land in suit was not included. This finding was accepted by the learned Subordinate Judge and was not challenged in the appeal to this Court. Issue 2 related to adverse possession and ran as follows :

Has the land in suit been in adverse possession of the plaintiffs and their predecessors-in-interest since the year 1898, and have they perfected their title to it ?

The trial Court split up the question of adverse possession into two parts, one relating to deorhi shown in the Commissioner's map and the other relating to the ahata, which included the dalan towards the south. It held that the deorhi formed part of the house of Mir Himayat Ali which was sold to Sarwat Ali, but that it had been in the possession of the plaintiffs for a long time who had connected it with their own house and had settled a tenant therein. As regards the ahata which was coloured red in the Commissioner's map its view was that it had been a vacant land from the year 1909 or 1910. No building existed on the land, and there was a dalan which was in a dilapidated condition. The trial Court enumerated the following acts of possession which were alleged to have been exercised by the plaintiffs over the land in suit, namely, that the plaintiffs used to keep their cattle and hens, that singing parties used to be arranged in the dalan and the ahata occasionally and that plaintiff 2 used to fly kites in the ahata and that on occasions of ceremonies food used to be cooked in the ahata. Its view was that the aforesaid acts did not prove ouster of the owner, much less any adverse possession over the land in suit. It disbelieved the evidence of the plaintiffs who had stated that in the year 1915 the widow of Sarwat Ali wanted to take possession of the ahata but was prevented from doing so. Certain post-cards were relied upon on behalf of defendant 1, Exs. A-11 to A-14, which were written by plaintiff 2 and his brother-in-law Afzal Husain to Suraiya Begam in 1906-08. The trial Court came to the conclusion that these letters show that the plaintiffs were on cordial terms with Suraiya Begam, and consequently there could be no question of any adverse possession till that date. The trial Court further disbelieved the story set up by the plaintiffs that they had been in possession of the entire ahata under an oral sale. This latter finding was confirmed in appeal and has not been challenged. The trial Court made an inspection of the spot with a view to better understand and appreciate the evidence recorded by him in the case. This the Court was entitled to do under O. 18, R. 18, Civil P. C. The trial Court further found that since the year 1908 no relation of Sarwat Ali or his brothers resided in the ahata in suit, and the walls of the house situate therein had fallen down and disappeared, and the only structure left was a dalan in a dilapidated condition. The ahata was now surrounded by the houses of neighbours, and the condition of the ahata was attributed to the course of nature. There was no defined boundary, and the boundary walls of the ahata on three sides belonged to different persons, who are the plaintiff's neighbours. Three passages led to his ahata, one from the deorhi, the other from the east of the ahata connected with a lane and the third from a window of the plaintiffs' house. Neither of these passages was opened by the plaintiffs or their predecessors, but the position as it stood showed that they were controlled by the plaintiffs. Upon this finding the trial Court decreed the suit for possession of that portion of the land in suit which ap-

pertains to plot No. 236 and is enclosed by letters "a1 b1 C1 G1 d1 e1 f1" in the map prepared by the Commissioner and dismissed the rest of the claim. The learned Subordinate Judge on appeal observed :

When the possession of the appellants over the deorhi is adverse and the Hon'ble Chief Court has recognised their title by adverse possession in respect of plot No. 236, when they have purchased the land of the ahata towards the north (not in suit) from Mt. Bibi Jan in 1905 and 1906 as Exs. 8 and 9 show and when appellants have full control of the three passages leading to the land in suit which is in the shape of one ahata and is a vacant land enclosed by walls and it is also admitted that they have been in possession for a long time, I think there can be no other conclusion except that their possession over the land in question is also adverse.

The result was that the learned Subordinate Judge decreed the plaintiffs' suit for possession of the land coloured red in the map prepared by the Commissioner. He did not however decree the claim for damages. This decision was affirmed in second appeal by our learned brother Smith J. The learned Judge observed in his judgment :

The sole question at issue between the parties has been whether the plaintiffs and their predecessor have been in adverse possession of this plot and of the buildings standing on it for over twelve years, or whether their possession was simply permissive.

At another place he says that

the whole question is, however, whether the nature of the possession of the plaintiffs and their predecessor was such as to constitute it adverse possession.

After referring to the evidence of the two plaintiffs and quoting passages from their evidence he came to the conclusion that the evidence given by Saiyid Humayun Qadar was neither consistent nor clear, and he was not prepared to hold on that evidence that Fazal Husain's possession of the plot No. 261 and the house standing thereon was in the first place permissive. The learned Judge summed up his conclusions in the following passage :

Taking into consideration the weakness of the appellant's case on this point, and also the fact that this case of permissive possession on the part of Fazal Husain was not the case originally set up by him, (the learned Subordinate Judge said in his judgment that even before him S. Iqbal Ali did not set this up as a definite case), I think that the case of the appellant based upon permissive possession must be held to have failed, and on the facts as a whole alleged on the side of the plaintiffs-respondents I am of opinion that the learned Subordinate Judge was justified in finding the plaintiffs entitled to succeed on the basis of title by adverse possession.

After having heard arguments at considerable length in this case we regret we are unable to uphold the decision of our learned brother. At the outset it may be pointed out that the question of adverse possession is a mixed question of fact and law. Though the facts found by the Court of first appeal must be accepted as final in second appeal, the question whether the proved facts substantiate the plea of adverse possession is a matter of law which can be challenged in second appeal : *vide* 19 Cal 253,[2] 42 ALL 152[3] and 11 Luck 82.[4] In the well-known case in 27 I A 136[5] their Lordships of the Judicial Committee in a case resting firstly on title and secondly on adverse possession observed that it is necessary to remember that the onus is on the appellant (plaintiff), and that what she has to make out is possession adverse to the competitor. This principle was further confirmed in 43 I A 192[6] where it was held :

Nothing is better settled than that the onus of establishing property by reason of possession for a certain requisite period lies upon the person asserting possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct, it would be open to the possessor for a year or a day to say "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions." Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great spaces of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

Having regard to the principle enunciated above regarding the onus in such cases, we are of opinion that the issue framed by the trial Court was perfectly correct, and it was the duty of the plaintiffs to establish affirmatively that they had acquired statutory title to the property by reason of adverse possession for the requisite period. No case of permissive possession was admittedly set up by defendant 1 in the pleadings, and it seems to us that the permissive character of possession never arose as an independent

2. ('92) 19 Cal 253 : 19 I A 48 : 6 Sar 133 (PC), Lachmeswar Singh v. Manowar Hossein.
3. ('19) 6 AIR 1919 P C 60 : 55 I C 486 : 42 All 152 : 46 I A 197 (PC), Satgur Prasad v. Raj Kishore Lal.
4. ('35) 22 AIR 1935 Oudh 387 : 155 I C 23 : 1935 O W N 423 : 11 Luck 82, Mt. Rajana v. Musaheb Ali.
5. (1900) 27 Cal 943 : 27 I A 136 : 4 C W N 597 : 7 Sar 714 (PC), Radhamoni Debi v. Collector of Khulna.
6. ('16) 3 AIR 1916 P C 21 : 35 I C 902 : 39 Mad 617 : 43 I A 192 (PC), Secy. of State v. Chelikani Rama Rao.

issue calling for a decision in the case. In these circumstances it was wholly wrong to approach the question of adverse possession by determining whether defendant 1 had proved a case of permissive possession or not and hold adverse possession upon the weakness of that case. Defendant 1 never set up the case that the plaintiffs had been in possession of the land in dispute by leave or license of his predecessor-in-title. The question seems to have agitated the minds of the Courts upon the statement in cross-examination made by plaintiff 1, Saiyid Humayun Qadar, which was as follows :

> While going back to Hyderabad in 1898, Sarwat Ali sent for my father. My father was busy, so he sent his clerk Sardar Husain to Sarwat Ali. Sarwat Ali told Sardar Husain that he was going to Hyderabad, Fazal Husain should come and take possession of the house. When Sardar Husain intimated this to Fazal Husain, the latter replied that the houses of Sarwat Ali were of little value and they may be looked after.

This statement was relied upon by the defendant as indicating permissive possession, but the learned Subordinate Judge did not uphold this contention. We are of opinion that this statement may well have been relied upon as destructive of the case of adverse possession set up by the plaintiffs, but it by no means follows that defendant 1 was setting up a definite and substantive case of permissive possession which was legally not permissible through the evidence of a plaintiff in the witness box. We do not think it necessary to rest our decision upon the meaning to be attached to the above statement of the plaintiff in order to hold that the possession of the plaintiff was of a permissive character. Having regard to the acts of possession found by the two lower Courts on the land in suit, we are of opinion that these occasional acts in the circumstances of the present case are acts of a temporary and flimsy character which do not destroy the title of the defendant or his predecessor-in-interest. The title of the defendant or his predecessor-in-interest must be deemed to carry with it the legal possession and must be deemed to subsist, unless and until there is an open and hostile assertion of title accompanied by exclusive possession of an effective nature to the knowledge of the actual owner. According to the classical definition of "adverse possession" by Lord Robertson in 27 I A 136,[5] to constitute a plaintiff's title by adverse possession, the possession required to be proved must be adequate in continuity, in publicity, and in extent, and is displaced by evidence of partial possession by the defendant, and the onus of establishing these essential elements is upon the adverse possessor. We are of opinion that the plaintiffs have failed to satisfy the test essential to the proof of adverse possession. In determining the question whether possession is hostile and notorious, so as to charge the real owner with notice of the adverse claim, the nature, the situation and the user of the property must be considered. "It is impossible," says Lord Halsbury in (1895) 1 Ch 641[7] at p. 645, to speak with exact precision about the degree of possession or dispossession that will do unless you have regard as Cotton L. J. said in (1879) 5 Ex D 264[8] to the nature of the property.

Sarwat Ali never visited Lucknow since 1898, and Suraiya Begam, one of his daughters, stayed with him in Hyderabad. Neither Munni Begam, the mother of defendant 1, nor Altaf Begam, who is married in Hardoi district, ever lived in Lucknow. Defendant 1 himself did not come to Lucknow till the year 1927. The house which Sarwat Ali acquired in 1893 evidently fell in ruins before 1898 and no permanent structure worth the name has been in existence on the spot at any rate since the year 1898, and the land in suit has presented the appearance of a mere ahata with a dalan bounded on all sides by the houses of neighbours. Such acts of possession as tethering of cattle, using the land as a playground, cooking food on the occasions of ceremonies and even planting trees could not possibly have aroused the notice of the real owners—who are no other than members of the plaintiff's own family — even if they had been living in Lucknow, much less would they constitute adverse possession against Sarwat Ali and his family, who have been away from the land in dispute since 1898. Exhibits A-11 to A-14 are postcards written in the year 1906 to 1908. Exhibit A-11 was written by Afzal Husain, brother-in-law of the plaintiffs, to Suraiya Begam, while Exs. A-12 to A-14 were written by plaintiff 2 to Suraiya Begam. We agree with our learned brother that these postcards do not show that the plaintiffs acknowledged the claims of Sarwat Ali's heirs to the property in dispute, but at the same time we are of opinion that they do show that cordial relations existed between the heirs of Sarwat Ali and the plaintiffs. Plaintiff 1 admits in his evidence

7. (1895) 1 Ch 641 : 64 L J Ch 416 : 12 R 310 : 72 L T 670, Marshall v. Taylor.
8. (1879) 5 Ex D 264 : 49 L J Ex 220 : 42 L T 463 : 28 W R 452 : 44 J P 488, Leigh v. Jack.

that he was on good terms with Mt. Suraiya Begam when Exs. A-11 to A-14 were written by him to her. There is no evidence on the record to show that at any time before the application for redemption was filed in 1927 the relations of the parties became hostile. We do not think it will serve any useful purpose to refer to decided cases upon the point, as in our opinion the principles governing the acquisition of prescriptive title have been laid down by their Lordships of the Privy Council, and the only question that arises for consideration before us is whether in view of these principles the plaintiffs have succeeded in discharging the heavy onus which lay upon them to prove the essential elements of adverse possession. We may, however, refer to two cases, 16 Bom 338[9] and 21 Mad 53,[10] which have frequently been referred to in subsequent decisions of the various High Courts in India.

16 Bom 338[9]: In this case a small piece of land being of no present use to its owner and being convenient in many ways to his neighbour, the latter made use of it, in various ways, without objection for more than 12 years. A privy and sheds for cows, goats, fowls, etc. and a hut for a ghariwallah —all, however, structures of a flimsy and purely temporary character—were said to have been constructed and maintained for many years on the said piece of land. Such user, it was contended, amounted to adverse possession. It was held that such user as this was insufficient to give a title to the land by adverse possession. User of this sort, under similar circumstances, is common in this country and excites no particular attention. It is neither intended to denote, or understood as denoting—on the one side or the other—a claim to the ownership of the land, and, where this, and no more, is the case it would be wrong to hold that a claim by adverse possession has been made out.

21 Mad 53[10]: In this case the defendant had used as a backyard a small piece of land situated between his house and that of the plaintiff, who was his brother, for a period of more than 12 years. In 1894 the defendant began to build on it, whereupon the plaintiff protested and sued for possession. It was held that the use of the land for the purpose of a backyard would not be sufficient to constitute adverse possession.

Learned counsel on behalf of the plaintiffs-respondents has cited A I R 1931 Mad 282,[11] A I R 1929 Rang 153,[12] 34 Mad 353,[13] A I R 1927 Lah 753[14] and 58 I A 29.[15] None of these cases has any application to the facts and circumstances of the present case.

A I R 1931 Mad 282[11]: The plaintiff not only relied upon the presumption of possession arising from title over waste land in his favour but actually put forward a case of effective possession and adduced evidence in support of it. It was held that he had not succeeded in proving possession within limitation and he was not entitled to fall back upon the presumption of possession in face of the case that he had put forward.

A I R 1929 Rang 153[12]: In this case the plaintiff definitely put forward a case that he himself had given possession to the defendant over the land in suit. This case failed; on the other hand it was proved that the defendant had been in possession for the last 15 or 20 years. It was held that it was the duty of the plaintiff to prove his possession within limitation and therefore the suit fell within Art. 142, Limitation Act.

34 Mad 353[13]: In this case it was held that acts done on parts of a tract of land will only be evidence of possession of the whole where the said tract of land possesses a defined boundary. As we have already held that is not the case here.

A I R 1927 Lah 753[14]: It was held that though ordinarily speaking the doctrine of constructive possession cannot be used in favour of the trespasser, nevertheless, in a case where the plot in dispute forms part of a larger plot with defined boundaries over which larger plot there have been physical acts of ownership in portions and where there has been an assertion of title over the whole plot throughout, such circumstances are relevant evidence as to the possession of the waste land. In this case the plot had lain waste, and the predecessors of the plaintiffs purported to mortgage the whole of the plots and purported to sell portions of the whole plot, and therefore it could fairly be held that they had an *animus possidendi* even over the plots now in dispute and consequently

9. ('92) 16 Bom 338, Framji Cursetji v. Goculdas Madhowji.
10. ('98) 21 Mad 53, Chokkalinga Naicken v. Muthusami Naicken.
11. ('31) 18 A I R 1931 Mad 282 : 130 I C 845 : 60 M L J 430, Sevugan Chetty v. Kannappa Chetty.
12. ('29) 16 A I R 1929 Rang 153 : 117 I C 591 : 7 Rang 85, U Maung Gyi v. Maung On Bwin.
13. ('11) 34 Mad 353 : 9 I C 9 : 21 M L J 132 : (1911) 1 M W N 55, Subramania Pillai v. Secretary of State.
14. ('27) 14 A I R 1927 Lah 753 : 99 I C 698, Nizam Din v. Ali Mohammad.
15. ('31) 18 A I R 1931 P C 186 : 130 I C 315 : 10 Pat 407 : 58 I A 29 (P C), Nageshwar Bux Roy v. Bengal Coal Co., Ltd.

they had acquired title by adverse possession over the plots now in dispute.

58 I A 29[15]: In this case a coal company, who held a mukarrari lease of a village and believed that they were entitled to the subjacent minerals, openly carried on for twelve years mining operations in various parts of the village by working pits and making trial bore-holes; it was not clear whether any one pit had been worked continually for twelve years. The zamindar sued the coal company claiming the minerals under the village. It was held that the company had been in adverse possession of the minerals under the whole village for more than 12 years and the right of the zamindar was, therefore, barred. It was further observed that as a general rule where title is founded on adverse possession the title will be limited to that area of which actual possession has been enjoyed. But the extent of possession enjoyed may be an inference of fact, and in applying the rule to the case of a mineral field regard is to be had to the nature of the subject and the possession to which it is susceptible.

Having given our best consideration to the facts and circumstances of the present case, we are satisfied that the plaintiffs have failed to establish the plea of adverse possession set up by them over the plot No. 261 except with regard to the deorhi over which the trial Court upheld the adverse possession of the plaintiffs. We, therefore, allow the appeal, set aside the decree passed by our learned brother upholding the decree of the lower appellate Court, and restore the decree of the trial Court. As regards costs, we maintain the order passed by the trial Court but we allow costs to the defendant-appellant in all the other Courts on the ground that he has substantially succeeded.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Oudh 442

GHULAM HASAN J.

Ganesh Prasad and others —
Defendants — Appellants
v.
Basdeo — Plaintiff — Respondent.

Second Appeal No. 91 of 1939, Decided on 25th February 1941, against order of Addl. Civil Judge, Unao, D/- 4th January 1939.

Specific Relief Act (1877), S. 54 — Defendant opening door in wall of his house towards plaintiff's land—Plaintiff apprehending acquisition of easement to light and air if doors allowed to stand—Aforesaid apprehension held no reason to prevent defendant from enjoying his property without interfering with plaintiff's right to enjoy his property.

A person is entitled to open doors in a wall of his own house in the exercise of his right of possession and enjoyment of his own property unless he is prevented from doing so by any rule of law or by any right acquired by another authorizing him to have the said doors closed or on the ground that the doors interfere with the right of enjoyment by another of his own property. [P 443 C 2; P 444 C 1]

A mere apprehension of the defendants' acquiring a right of easement to light and air after the lapse of 20 years if the doors opened by them in the wall of their house towards the plaintiff's land are allowed to stand, cannot afford any justification for preventing the defendants from enjoying their property without interfering with the rights of the enjoyment of the plaintiff of his own property. It is perfectly open to the plaintiff to prevent the acquisition of the right of easement to light and air by the defendants by putting up structure on his own land if he so desires : ('37) 24 AIR 1937 Mad 21; 2 N W P H C R 182 and ('34) 21 AIR 1934 Cal 752, *Rel. on*; ('32) 19 AIR 1932 Cal 249; 24 Cal 260 and 31 Cal 944, *Disting.* [P 444 C 1, 2]

Ali Zaheer and S. P. Awasthi— for Appellants.
R. B. Lal and R. N. Shukla — for Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for possession by demolition of certain constructions and for perpetual injunction. The plaintiff-respondent is admittedly the owner of plots Nos. 111 and 113/1 in the abadi of patti Basudeo mauza Tajpur, tahsil and district Unao. According to the plaint allegations the defendants-appellants are alleged to have dispossessed the plaintiff-respondent from the above plots in the end of 1937 by erecting two walls on plot No. 111 and three walls on plot No. 113/1 as shown in the sketch plan annexed with the plaint, thus encroaching upon the plaintiff's land. The defendants further built a chabutra on plot No. 113/1 and fixed three doors in their walls towards the north of their house on plot No. 110. These doors open on the plaintiff's land. The defendants further stored bricks, bullock-carts, tied cattle, prepared cow-dung cakes etc., etc., on plot No. 113/1 and exercised similar acts on a portion of plot No. 111 as marked in the sketch plan. There was a partition of the village four or five years ago. As a result of the partition abadi plots Nos. 113/1 and 111 fell to the share of the plaintiff while plots Nos. 110 and 109 were allotted to another cosharer, whose rights now vest in the defendants. The defendants constructed a hall and side rooms on No. 110 just abutting upon No. 113/1 after the partition. The plaintiff sued the defendants for closing the three doors opening towards the plaintiff's land, restraining them from using Nos. 111 and 113/1 as their sahan and for demolition of

the chabutra which they had constructed upon plot No. 113/1. Before the trial Court the defendants disclaimed any interest in plot No. 111 with the result that the controversy was thus narrowed down to plot No. 113/1 only.

In defence the defendants pleaded that they had been using plot No. 113/1 as their sahan for a long time and admitted exercising acts upon that plot as alleged by the plaintiff. They denied the plaintiff's possession within limitation and asserted that the defendants had acquired rights of easement over plot No. 113/1. The encroachments alleged by the plaintiff to have been made on plots Nos. 111 and 113/1 by the defendants were denied. The trial Court appointed a Commissioner to prepare a plan of the land in dispute showing the constructions as well as the alleged encroachments. This plan is no longer in dispute and forms part of the decree. The trial Court held that plot No. 113/1 had not been used by the defendants as their sahan and that they had acquired no right of easement over that plot. It further held that the plaintiff had been in possession within limitation. According to the Commissioner's plan the constructions complained of were found to exist on plot No. 110 alone which belonged to the defendants and not on any portion of the abadi plots belonging to the plaintiff. In the result the plaintiff's claim for possession over plots Nos. 111 and 113/1 was decreed. His claim in respect of demolition of the walls and enclosure as alleged by him was dismissed. The chabutra shown as A G H I J in the Commissioner's plan on plot No. 113/1 was ordered to be demolished and the materials thereof to be removed by the defendants at their costs within one month. The defendants were further ordered to remove their cart, cattle, cow-dung cakes etc., from the plot in suit and not to use the said plots as their sahan in future nor to exercise any acts of enjoyment or of possession on the said plots. The relief as regards the closing of the three doors in the wall A B as shown in the Commissioner's plan was, however, refused and it was ordered that they shall remain fixed.

Both parties were aggrieved by the decision of the trial Court. The defendants filed an appeal challenging the decree of the trial Court on the points which had been decided against them while the plaintiff filed a cross-objection in respect of the claim for closing the three doors. The defendants' appeal was dismissed while the plaintiff's cross-objection was allowed and the three doors towards the north of the defendants' house were ordered to be closed. The defendants have preferred a second appeal to this Court.

The only question that has been urged before me in support of the appeal relates to the relief for the closing of the three doors, which was granted to the plaintiff-respondent against the defendants-appellants. It has been contended that the decision of the lower appellate Court ordering the closing of the doors is not legally sustainable. I am of opinion that this contention must prevail. The lower appellate Court remarks that in view of the finding that the defendants had not succeeded in establishing that they used plot No. 113/1 towards the north as their sahan, they had no right to fix their doors towards the north unless they proved that these doors originally were opened on this side. The lower appellate Court held that the defendants were not entitled to open new doorways towards the plaintiff's land and acquire a fresh right of light and air from the plaintiff's land. It was remarked in this connection that if these doors are allowed to stand for over 20 years, the defendants will acquire a right of light and air from his land.

The trial Court found, and this finding has not been dissented from by the lower appellate Court, that plot No. 113/1 is a parti land and that part of it at any rate has been under cultivation. This fact is also borne out by the evidence of the plaintiff's own witnesses: (*vide* P. Ws. 2, 3 and 5). The reasoning of the lower appellate Court to the effect that as the plea about the use of plot No. 113/1 as a sahan by the defendants has not been established they have no right to open the doors, does not commend itself to me. The defendants have opened doors admittedly upon their own land and this they are entitled to do in the exercise of their right of possession and enjoyment of their own property unless they are prevented from doing so by any rule of law or by any right acquired by the plaintiff authorising him to have the said doors closed. Having regard to the finding arrived at by both the lower Courts it is not now open to the defendants to use any portion of plot No. 113/1 for the purpose of a sahan or for any other purpose. They cannot claim the right of egress and ingress upon plot No. 113/1 and, it is not pretended on their behalf that they have any such right. There is no legal justification, however, for pre-

venting the defendants from enjoying their property by opening doors in a wall of their house as they have done in the present case unless the plaintiff is able to prove that the existence of these doors interferes with the right of enjoyment by the plaintiff of his own property. In A I R 1937 Mad 21[1] it was laid down that an owner cannot be restrained from enjoying his own property when it is not impossible for him and others to enjoy their rights. A person is entitled to enjoy his own property in any way he pleases provided that he does not create a nuisance or interfere with the rights of others. In this case the plaintiffs sought to restrain the defendants from interfering with the worship and in particular from opening doors on the southern side of the plot recently purchased by them. The first injunction was granted by the trial Court and the second injunction was granted by the Subordinate Judge in appeal. Reference was made to 2 N W P H C R 182[2] where it was observed :

> Parties are at liberty to build what structure they please upon their own land ; but if they interfere with the free enjoyment of their neighbour's property, they may become liable in damages for the injury that they do.

It was held by the Madras High Court that the opening of the doors on the southern side can in no way interfere with the rights of the plaintiffs. In A I R 1934 Cal 752[3] it was observed that an act which is not unlawful in itself does not become unlawful merely because it interferes with other people's business or merely because the motive of the act is bad. The holding of a rival mela by defendant on his own land is not unlawful merely because it interferes with the plaintiff's mela or merely because the defendant in holding his mela had a bad motive for his act. But such an act is an actionable wrong if he exercises his right of using his land by the employment of illegal means. The grant of an absolute injunction restraining defendant from enjoying his own land is therefore wholly illegal.

Learned counsel on behalf of the plaintiff-respondent has failed to satisfy me in what way the existence of these three doors amounts to a violation of the plaintiff's rights. He takes his stand upon the reasoning employed by the lower appellate Court that there is an apprehension of the defendants' acquiring a right of easement to light and air after the lapse of 20 years if the doors are allowed to stand. It appears to me that this apprehension cannot afford any justification for preventing the defendants from enjoying their property without interfering with the rights of the enjoyment by the plaintiff of his own property. It is perfectly open to the plaintiff to prevent the acquisition of the right of easement to light and air by the defendants by putting up structure on his own land if he so desires. According to S. 54, Specific Relief Act, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the plaintiff, whether expressly or by implication. In the present case there is no obligation in favour of the plaintiff so as to restrain the defendants from opening the doors and enjoying their property. The existence of these doors, in my opinion, involves no invasion of the plaintiff's right; on the contrary the order of demolition is tantamount to an encroachment upon the defendants' legitimate rights to enjoy their property.

Learned counsel for the plaintiff-respondent has referred to certain cases but neither of these cases has any application to the facts and circumstances of the present case. The case in 59 Cal 260[4] has no bearing whatever upon the present case. The case in 24 Cal 260[5] is distinguishable upon the facts. There, the defendants wantonly and with the intention of causing injury to the plaintiff dug a trench on the verge of the boundary of her tenure resulting in the subsidence of the plaintiff's land. The plaintiff sought perpetual injunction prohibiting them from digging earth within a certain distance of the plaintiff's tenement, the filling up of the excavation, or in default a certain sum of money as the costs of filling it up. The Munsif dismissed the suit holding that no cause of action accrued until actual damage occurred. During the prosecution of the suit the plaintiff's land subsided in consequence of the excavation and this fact was brought to the notice of the Court. The plaint was ordered to be amended in appeal by the lower appellate Court and the Munsif was ordered to try the suit afresh. The Calcutta High Court held in

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1. ('37) 24 A I R 1937 Mad 21 : 166 I C 777 : 71 M L J 611, Pitchai Rowther v. Devaji Rao.
2. ('70) 2 N W P H C R 182, Kasim Ali Khan v. Birj Kishore.
3. ('34) 21 A I R 1934 Cal 752 : 152 I C 66 : 61 Cal 543 : 59 C L J 383, Mohammad Zahadur Rahim v. Satyendra Narayan.
4. ('32) 19 A I R 1932 Cal 249 : 138 I C 193 : 59 Cal 260: 35 CWN 963, Jottendramohan Mitra v. Prabodhkumar Datta.
5. ('97) 24 Cal 260, Bindu Basini Chowdhrani v. Jannabi Chowdhrani.

appeal that the Munsif was wrong in his view of the law. They observed that the suit for injunction will lie when the threatened act is of such a character that it must result in injury. There can be no question whatever in the present case that any injury to the plaintiff's right of enjoyment of his own land is inevitable from the action of the defendants in opening these doors on their own land. The case in 31 Cal 944[6] is clearly inapplicable. There it was held that as every owner of land is under an obligation not to allow the branches of his tree to grow so as to overhang, or the roots of his tree to extend so as to penetrate, his neighbour's land to the detriment of the latter, in case of breach of such an obligation it is open to the Court to grant a mandatory injunction for the removal of the nuisance under S. 55, Specific Relief Act.

Reference has been made on behalf of both parties to certain cases bearing on the question of the right of privacy existing in the United Provinces. It is not necessary to refer to any of these cases, as in my opinion they have got no bearing upon the present case. It cannot be pretended with any show of reason that any right of privacy exists in respect of the open piece of land and that any such right has been invaded by the setting up of the three doors by the defendants on their own land. The result is that I allow the appeal, set aside the judgment and decree of the lower appellate Court in so far as it decrees the plaintiff's suit for the closing of the three northern doors on the defendants' land. In other respects the decree of the lower appellate Court will stand. Parties shall bear their own costs in all the Courts.

G.N./R.K. *Appeal allowed.*

6. ('04) 31 Cal 944: 8 CWN 710, Lakshmi Narain Banerjee v. Tara Prosanna Banerjee.

(28) A. I. R. 1941 Oudh 445

YORKE AND BENNETT JJ.

Chaturbhuj — Applicant

v.

Commissioner of Income-tax, U. P. and C. P. — Opposite Party.

Application No. 1 of 1940, Decided on 16th April 1941, against order of Commissioner of the Income-tax, U. P. and C. P., at Lucknow, D/- 12th December 1939.

(a) Income-tax Act (1922), S. 66 (2) — Question whether particular sum is profits or capital is one of fact.

The question whether a particular sum is profits or capital is one of fact to be determined by the income-tax authorities upon the materials before them and is not a question of law : ('33) 20 A I R 1933 Rang 217, *Rel. on.* [P 446 C 2]

(b) Income-tax Act (1922), Ss. 66 (2) and 27 — Question whether there was any material for holding that assessee had not sufficient cause within S. 27 is one of law.

The question whether there were any materials upon which it could be found that there was no sufficient cause within S. 27 for not complying with the requirements of the law is one of law: ('41) 28 A I R 1941 Oudh 279, *Expl., and Rel. on.* [P 447 C 1]

(c) Income-tax Act (1922), S. 66 (3) — High Court has discretion under S. 66 (3).

Sub-section (3) of S. 66 gives the High Court a discretion in the matter of directing the Commissioner to state a case. [P 447 C 1]

Radhey Shiam, S. P. Avasthi and B. K. Dhaon — for Applicant.

S. C. Dass — for Opposite Party.

Order. — This is an application under sub-s. (3) of S. 66, Income-tax Act, arising out of an application to the Income-tax Commissioner, United and Central Provinces, under sub-s. (2) of this section to state a case and his refusal to do so. The assessee is a joint Hindu family. It is represented by the applicant Chaturbhuj. The assessee declared an income of Rs. 812 and produced certain books of accounts in response to a notice served on him under S. 22 (4). An examination of these account books showed that three sums aggregating Rs. 3160 had been credited in the personal account of the assessee, and the Income-tax Officer called upon the assessee to prove the deposits. The explanation given was that these sums represented capital brought from "home." A further notice under S. 22 (4) was thereupon served on the assessee requiring the production of accounts of the cash kept at home from which these sums had been produced. The assessee did not produce the accounts and alleged that no such accounts were maintained. The Income-tax Officer disbelieved this, and holding that notice under S. 22 (4) had not been complied with made the assessment under S. 23 (4) of the Act. In this assessment he included the sum of Rs. 3160 as profit derived from concealed sources. The assessee filed an appeal to the Assistant Commissioner claiming that the assessment should have been made under S. 23 (3) and not under S. 23 (4). The Assistant Commissioner held that the assessment had been rightly made under S. 23 (4).

The assessee also filed an application to the Income-tax Officer under S. 27 praying that the assessment might be cancelled and a fresh assessment made on the ground that he was prevented by sufficient cause from making

the return required by S. 22. This application was rejected by the Income-tax Officer, and an appeal to the Assistant Cmmissioner against the order of rejection was unsuccessful. Application was then made to the Commissioner under Ss. 33 and 66 (2). In his order of 12-12-1939, rejecting this application the Commissioner observed that the assessee could claim a reference to the High Court only in respect of some question of law arising out of the second appellate order dated 29th April 1939, passed by the Assistant Commissioner, whereby he confirmed the Income-tax Officer's rejection of the assessee's application under S. 27. He further observed that in the case of an assessment under S. 23 (4) the only question of law that could arise is whether there were any materials upon which the Income-tax Officer or the Assistant Commissioner could find that there was no sufficient cause excusing the assessee from complying with the requirements of the law as prescribed by S. 27. The assessee's failure to comply with the requirements of the law consisted in the non-production of the accounts of the cash "kept at home." The Commissioner was of opinion that the assessee must have kept some accounts. He said that it is not usual for business people of the assessee's class to keep large sums of money idle in the house, and that where large deposits are found credited to his personal account in the business it is not enough for him to say that the money was "brought from home." The burden is on the assessee to prove by evidence the real source and character of these deposits. He had not discharged this burden, and, in the circumstances, a clear presumption arises that the deposits represented the proceeds of some other business carried on by the assessee the existence of which he has found it convenient not to disclose. If such business was carried on, it is reasonable to suppose that accounts were being maintained in respect of it. Consequently, there were in the Commissioner's opinion ample materials for holding that the assessee had other accounts than those produced and was not prevented by sufficient cause from producing them. He, therefore, refused to interfere. Four questions have been set out in the application now under consideration as questions of law on which the Income-tax Commissioner should be directed to state a case, but only the first two have been pressed. They are :

(a) Whether there is any evidence on record to justify the finding of the Income-tax Officer, Cawnpore, and the Assistant Commissioner of Income-tax, Lucknow, that the assessee maintains any other account books of the capital which the assessee did not produce before the Income-tax Officer and thereby committed a default under S. 23 (4) ?

(b) Whether cash deposits on various dates amounting to Rs. 3160 in the khata of Sohan Lal Chaturbhuj is income or profits assessable under the Income-tax Act or in other words this amount is not the capital of the assessee ?

It is contended for the Income-tax department, and we think the contention is valid, that the question in (b) is not a question of law, but a question of fact, and therefore it cannot be considered in this application. It was said by the Rangoon High Court in 11 Rang 397[1] that in every case the question whether a particular sum is profits or capital is one of fact to be determined by the Income-tax authorities upon the materials before them. It was also said by the Allahabad High Court in A I R 1940 ALL 530[2] that the question whether an assessee had or had not sufficient cause within the meaning of S. 27 is ordinarily a question of fact. In that case there had been a finding by the Assistant Commissioner that the assessee had only produced partial accounts and that there must exist a supplementary set of accounts which had not been produced, and it was said that upon these findings it was impossible to say that the issue whether the assessee had sufficient cause within the meaning of S. 27 involved any question of law. In A I R 1932 Oudh 164[3] a similar view was taken by a Bench of this Court. The headnote to this case reads :

Where the accounts or documents or evidence produced by the assessee do not furnish sufficient material for an assessment and in particular if they so far from revealing the income intentionally falsify the income it is open to the Income-tax Officer to make an assessment under S. 23 (4), for the assessee has failed to comply with all the terms of the notice.

The question whether there has been a compliance with the terms of the notice is not a question of law but a question of fact. Further, whether the evidence before the Income-tax Officer is sufficient to justify him in rejecting the accounts of the assessee is also a question of fact.

We recently held in 1941 O W N 68[4] that while sufficiency of evidence is a question

1. ('33) 20 A I R 1933 Rang 217 : 148 I C 330 : 11 Rang 397, V. P. R. P. L. Firm v. Commissioner of Income-tax, Burma.
2. ('40) 27 A I R 1940 All 530 : 192 I C 614 : ILR (1941) All 1 : 1941 A L J 12, Sheoduttrai Pannalal v. Commissioner of Income-tax, U. P.
3. ('32) 19 A I R 1932 Oudh 164 : 137 I C 732, Muzaffar Ali Khan v. Commissioner of Income-tax, U. P.
4. ('41) 28 A I R 1941 Oudh 279 : 192 I C 609 : 1941 O W N 68, Commissioner of Income-tax, C. P. & U. P. v. Kanhaiya Lal Umrao Singh.

of fact, the question whether there is evidence at all from which an inference could be drawn is a question of law. In that case there had been a reference by the Commissioner under S. 66 (2), the point of law referred being whether there were any materials upon which the Assistant Commissioner could find that a head office set of accounts was in existence.

In the present case the Commissioner observed that the only question of law that could arise is whether there were any materials upon which it could be found that there was no sufficient cause for not complying with the requirements of the law and he proceeded to say that there was ample material for holding that the assessee had other accounts than those produced and was not prevented by sufficient cause from producing them. The question considered by us in 1941 O W N 68[4] was very similar to that now under consideration. In the former case the Commissioner referred the question of law stated, while in the present case he refused to do so, answering it himself as we answered it in 1941 O W N 68.[4] No doubt the question might have been referred by the Commissioner—perhaps should have been referred by him—as he himself rightly stated that the question whether there were any materials to justify the finding of the Assistant Commissioner was a question of law but we do not consider in the circumstances that we should require him to state a case now. Sub-section (3) of S. 66 gives us a discretion in the matter, and after hearing arguments on the question whether there were any materials to support the decision of the Income-tax Officer and Assistant Commissioner we have come to the conclusion that the question must be answered in the affirmative. No purpose would be served therefore in directing the Commissioner to state a case.

Learned counsel for the applicant attempted to distinguish between the present case and that in 1941 O W N 68.[4] There are certainly some differences between the two cases, but there are also similarities, and we think that the principles laid down in 1941 O W N 68[4] are applicable to the present case. In particular we would refer to our observations in 1941 O W N 68[4] that in cases of this kind the giving of positive evidence by the department about facts which are within the special knowledge of the opposite party is almost out of the question, and that materials which come within the description of circumstantial evidence or general probabilities which would justify a presumption under S. 114, Evidence Act, are materials upon which the Court can come to a finding just as properly as it could upon positive evidence.

In the present case the sums of money in question are shown as having been advanced by Sohan Lal, father of Chaturbhuj, and they are said to have been advanced out of capital kept by him. Sohan Lal has no bank account ; admittedly he has no sources of income other than the joint family business. He gave evidence himself, stating that he advanced money for the joint family business whenever it was required. The accounts produced showed that he made advances and that he also withdrew money, but there is nothing to show how and when he acquired the funds from which the advances were made, how much capital he has, or how it is otherwise invested. He made no attempt in his evidence to give any explanation on these points. We consider that these facts warrant the presumption that there are other account books which the assessee had reasons for not producing, and justify the view taken by the income-tax authorities. We accordingly dismiss this application. We fix the fee of the learned counsel for the Income-tax Department at Rs. 75 with Rs. 3-12-0 for his clerk.

K.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 447

YORKE AND BENNETT JJ.

Surjan Singh — Applicant

v.

Mashal Singh — Opposite Party.

Civil Ref. No. 18 of 1940, Decided on 24th April 1941, made by Chief Inspector of Stamps and Government Offices, U. P. at Allahabad.

(a) Court-fees Act (1870), Sch. 1, Art. 2B — Application for redemption under U. P. Agriculturists' Relief Act — Decree conditional on payment of amounts due under mortgage and under deeds of further charge—Appeal contesting liability under deeds of further charge—Ad valorem court-fee should be paid on difference between amounts decreed and amount which is admitted.

Where on an application for redemption under U. P. Agriculturists' Relief Act, a decree for redemption is passed on payment of the amount due under the mortgage and the amounts due under certain deeds of further charge and the plaintiff appeals from the decree contesting his liability under the deeds of further charge, the difference between the amount decreed and the amount over which the plaintiff admits liability is the amount or value of the subject-matter in dispute and he is

bound to pay ad valorem court-fee on that amount. [P 449 C 2]

(b) Costs — Special costs — Petty matter regarding court-fees unnecessarily contested — Special costs may be awarded.

Where a point regarding court-fees has been quite unnecessarily and gratuitously contested and a considerable amount of the time of the Court and of counsel for the Crown wasted, special costs may be awarded under S. 35, Civil P. C. [P 449 C 2]

K. N. Tandon — for Applicant.

H. K. Ghose, Assistant Government Advocate — for the Crown.

Order.—This is a reference by the Chief Inspector of Stamps, U. P., under the provisions of S. 6B (1), Court-fees Act, as modified up to date by the U. P. Court-fees (Amendment) Act, 1938. The reference has arisen in the following circumstances: One Surjan Singh filed an application under the provisions of S. 12, Agriculturists' Relief Act, for redemption of a mortgage on payment of Rs. 10 or whatever amount might be fixed by a Court. Among the defences taken was that there were two deeds of further charge executed by the mortgagors still subsisting which must be paid off before the applicant should obtain a decree for redemption. The Assistant Collector who decided the case held that these deeds had been executed and constituted deeds of further charge. He gave a decree for redemption on payment within one month of a sum of Rs. 2121-5-6 made up of Rs. 271 due under the first usufructuary mortgage and Rs. 901-8-0 and Rs. 948-13-6 due under the two deeds of further charge dated 5th June 1879 and 13th June 1882.

Against this decree the applicant filed an appeal which was worded in the most peculiar fashion. He said that he was appealing against the two alleged deeds of further charge and was therefore paying a court-fee of Rs. 12-12-0 on the principal amount of these two deeds, namely Rs. 100 and Rupees 64-5-0, total Rs. 164-5-0. His chief contention in the grounds of appeal was that the trial Court had erred in holding that these deeds were deeds of further charge and that the appellant was not entitled to redeem the property without paying the entire amount under these two deeds. He prayed that the appeal be allowed with costs and justice done. The learned Judge should undoubtedly have called upon the appellant to amend his prayer, and had he done so, it would at once have become clear that what the appellant was asking for was that the decree of the trial Court should be varied in this way, that the claim for redemption should be decreed on payment of a sum of Rs. 271 only instead of the sum of Rupees 2121-5-6 found by the trial Court. The learned District Judge had to consider on 29th March 1940 the report of the Inspector of Stamps and he decided that the appellant was liable to pay court-fee on Rs. 485-5-0 in appeal. It is not apparent how the learned District Judge arrived at this figure but the point is not important. The Court proceeded subsequently on 14th August to decide the appeal, the difference between the court-fee due on Rs. 164-5-0 and that due on Rupees 485-5-0 having been made good by the appellant. Thereafter the reference made by the Chief Inspector of Stamps was received in this Court and has now come up for decision.

On behalf of the Chief Inspector and in support of the reference the learned Assistant Government Advocate has pointed to the decision of a Bench of the Allahabad High Court in 1937 A L J 1173.[1] In that case a mortgagor made an application under S. 12, Agriculturists' Relief Act, for the redemption of his mortgage on payment of a sum of Rs. 375. The Assistant Collector, on an inquiry made under the provisions of the Act, decided that the amount payable was Rs. 1101 and directed the deposit of the balance within fifteen days. It was pleaded on an appeal to the District Judge that the mortgagor was entitled to redeem on payment of Rs. 375 only. A court-fee of annas 12 was paid on the memorandum of appeal, regarding it presumably as an appeal from an order. It was held by the Bench that the memorandum of appeal does not come within the meaning of Article 11 of Sch. 2, Court-fees Act, and therefore it must come within the provisions of Art. 1, Sch. 1 and consequently the court-fee had to be calculated ad valorem. It was held further that the value of the subject-matter of the appeal is the difference between Rs. 1101 and Rupees 375.

The learned Assistant Government Advocate also referred to several other cases but in the main he very rightly bases his case on the Court-fees Act itself. Article 2-B of Sch. 1, Court-fees Act, provides that on a memorandum of appeal filed under S. 23, U. P. Agriculturists' Relief Act, 1934, the proper fee is the same fee as would be leviable on a memorandum of appeal under Art. 1. Article 1 provides that on a memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court

1. ('38) 25 A I R 1938 All 14 : 173 I C 50 : I L R (1937) All 949 : 1937 A L J 1173, Anant Gir v. Ram Nazer.

an ad valorem court-fee is to be paid on the amount or value of the subject-matter in dispute and a graded scale is provided according to the amount or value of the subject-matter. There cannot be the least doubt that in the present case the subject-matter in dispute is the difference between the sum of Rs. 2121-5-6 and the sum of Rs. 271. Learned counsel for the appellant Surjan Singh has sought to argue that he is not in this appeal raising any question as to the amount which has been decreed on the basis of these two deeds of further charge, but he is contesting, he says, his liability under these two deeds and he contends therefore that the proper court-fee is that which would be paid in a suit for redemption falling under the provisions of S. 7 (ix), Court-fees Act. He has relied in support of this contention on a case of the Judicial Commissioner's Court, 12 O C 130.[2] That was a case in which A had executed a usufructuary mortgage of his property. After A's death, his widow B executed several deeds of further charge. On the death of B, the reversionary heirs brought the present suit to redeem the original mortgage. The Court of first instance held the plaintiff liable for payment of the sum due on two of the deeds of further charge also. The plaintiff appealed on the ground that he was not liable to redeem the two deeds of further charge. He valued his appeal at the amount due on the original mortgage and paid court-fee thereon. It was held by Chamier J. C. and Tudball, A. J. C., that the court-fee paid being the same as that paid on the plaint which entitled him to an adjudication on his claim and there being no dispute as to the amount due on the subsequent deeds the court-fee paid was sufficient.

Learned counsel however seems to have forgotten that Mr. Chamier himself sitting with Mr. Evans to decide the case in 13 O C 62[3] remarked about the *case of Ram Phal*[2] (the names of which were given incorrectly as Jawahir Singh v. Rajendra Bahadur though the reference was otherwise correct).

My notes of that case do not show that any authorities were cited by counsel and it seems that we dealt with the case as if the question was not covered by authority. After hearing further arguments and considering the authorities to which our attention has been directed I am of opinion that that case should not be followed. It is contrary to the current of authority both in this Court and in the Allahabad High Court and is likely to cause confusion.

We find no force in the argument put forward by learned counsel for the appellant Surjan Singh that he was seeking only to get the finding about these two deeds of further charge set aside. What he was seeking was a reduction of the amount on payment of which he could redeem the property from Rs. 2121-5-6 to Rs. 271. As the Chief Inspector has very rightly said he was challenging the amount of Rs. 1850-5-6 and that was the amount or value of the subject-matter in dispute, and he was bound to pay ad valorem court-fee under the provisions of Art. 1 of Sch. 1 on that amount. We accordingly accept the reference and make a declaration under the provisions of S. 6 B (2), Court-fees Act, that the proper court-fee has not been paid on the memorandum of appeal, in Civil Appeal No. 53 of 1939 of the Court of the District Judge, Hardoi, In re Surjan v. Mashal Singh and others, and that the amount of deficiency is Rs. 130-14-0 being the difference between a court-fee of Rupees 170 payable on Rs. 1850-5-6 and Rs. 39-2-0 actually paid. We think that the Government is entitled to the costs of this reference. The amount of costs ordinarily taxable for the fee of counsel is only Rs. 4-14-0 at most, but as the point has been quite unnecessarily and gratuitously contested and a considerable amount of the time of the Court and of counsel for the Crown wasted on a very petty matter, we allow special costs of Rs. 50, under S. 35, Civil P. C.

K.S./R.K. *Reference accepted.*

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(28) A. I. R. 1941 Oudh 449

YORKE AND GHULAM HASAN JJ.

Khagga and others — Plaintiffs — Appellants

v.

Humma and others — Defendants — Respondents.

Appeal No. 13 of 1937, Decided on 7th May 1941, against order of Chief Judge, Chief Court of Oudh at Lucknow, D/- 16th March 1937, *Reported in ('37) 24 A I R 1937 Oudh 330.*

(a) U. P. Land Revenue Act (3 of 1901), S. 118 — S. 118 protects rights of cosharer in buildings possessed by him as cosharer — Cosharer acquiring house of riyaya—S. 118 does not apply—His rights are no better than those of riyaya and are governed by general law governing tenant's rights in house situate in abadi.

Section 118 protects the rights of a cosharer in the dwelling house or other buildings which he possesses as a cosharer. The protection does not extend to the houses of riyayas which a cosharer may have acquired and in which his interests are

2. ('09) 12 O C 130 : 2 I C 600, Ram Phal v. Deputy Commissioner, Bahraich.
3. ('10) 13 O C 62 : 5 I C 941, Basudeo Ben v. Sri Krishn Gir.

no better than those of the riyayas themselves, and as such his rights in the house will be governed not by S. 118 but by the general law governing the rights of a tenant in a house situate in abadi. [P 452 C 1, 2]

(b) Landlord and tenant — House in village abadi appurtenant to tenancy — Tenant is entitled to retain possession until he is ejected from holding or abandons village — House in abadi not appurtenant to tenant's holding — Person building house has only right of residence until house falls or tenant abandons it.

A riyaya in a village abadi is entitled to retain the possession of his house appurtenant to his tenancy, and his right to retain such possession continues until he is either ejected from his holding or he abandons the village. If the house in the abadi is not appurtenant to the agricultural holding of the tenant, then the person, who has built the house, has only a right of residence in it so long as the house does not fall down or the tenant does not abandon it. [P 452 C 1]

(c) U. P. Land Revenue Act (3 of 1901), Chap. 7 — Scope — Chap. 7 deals with rights of cosharers — It is not concerned with rights of riyaya which are governed by tenancy law.

Chapter 7, which deals with partition and union of mohals, deals with the rights of cosharers, and has nothing whatever to do with the rights of a riyaya, which are governed by the tenancy law. [P 452 C 2]

(d) U. P. Land Revenue Act (3 of 1901), S. 118—Cosharer's right under S. 118 to retain possession of site of his building depends on performance of conditions of that section—It is incumbent on cosharer to safe-guard that right at time of partition — Partition proceedings — Cosharer failing to establish his right to house as cosharer and failing to obtain partition officer's order under S. 118 in his favour — Cosharer is debarred from re-opening aforesaid question subsequently before civil Court.

The right of a cosharer to be allowed to retain the site without which he cannot enjoy the possession of the building depends upon the performance of the conditions imposed by the section without which his right remains wholly inchoate. Consequently, it is incumbent upon a cosharer to safeguard his right at the time of partition by representing to the Court his wishes to retain the site occupied by his building, and to take proper steps to get the rent fixed by the Collector at that time. The section does not impose an obligation upon a cosharer to retain the site along with the building if he does not desire to do so. [P 453 C 2]

Therefore, where a cosharer fails to establish his right to a house as a cosharer and fails to obtain an order from the partition officer in his favour as required by S. 118 at the time of the partition, it is no longer open to him to re-open that question in a civil Court after the rights of the parties had been lawfully adjusted by a partition Court: 5 I C 664 (All), *Rel. on*; ('15) 2 A I R 1915 All 73 and ('15) 2 A I R 1915 All 286, *Approved*; ('17) 4 A I R 1917 All 412 (F B), *Dissent.*; 1906 A W N 194, *Not approved.* [P 454 C 1]

Ram Bharose Lal — for Appellants.

H. N. Misra — for Respondents 2 to 9.

Judgment. — This is an appeal by the plaintiffs under S. 12 (2), Oudh Courts Act, which has been permitted by a learned Judge of this Court on the ground that it involves a substantial question of law upon which there is absence of any authority of a Bench of this Court. The circumstances leading to the present litigation may be stated shortly. In 1898 a perfect partition of village Atwa resulted in its division into several mohals, one of them being mohal Bhikhari with which we are concerned in the present case. There was an imperfect partition of mohal Bhikhari in 1922 when several pattis were formed, one of which, patti Mulla, admittedly fell to the share of the plaintiffs while patti Bhikhari fell to the share of the defendants and other cosharers. It is no longer disputed by the parties that the abadi plot in suit, No. 7, measuring two biswas was allotted at the above partition to patti Mulla. It appears that the building No. 4 with a neem tree and a compound wall stood on the plot in suit at the time of the imperfect partition, and was in the possession of the defendants. The plaintiffs instituted the present suit in March 1934 for possession of abadi plot No. 7 measuring two biswas along with the building or house, the compound wall and the neem tree. They also sought a perpetual injunction against the defendants restraining them from interfering with the plot in suit. The cause of action as alleged in the plaint was the opening of a new door in the compound wall of the building and plastering the wall in January 1934. The plaintiffs alleged their title to the plot in suit along with the building and the neem tree standing thereon. Defendants denied the claim and asserted that they had been in possession of the building standing on plot No. 7 for a long time, and that even if the plot had been assigned to the share of the plaintiffs at the time of the partition the defendants were not liable to eviction from the building. The trial Court found that it was not satisfactorily established that the building in suit and its site was owned by the plaintiffs, that it was really allotted to them at the partition of 1922 and that they had ever been in possession of it. The plaintiffs' suit was dismissed upon these findings.

The learned District Judge in appeal held that it was satisfactorily proved that the constructions in suit stood on abadi plot No. 7 which was allotted to the plaintiffs at the partition of 1922 and that the plaintiffs, therefore, had full proprietary title to the abadi plot No. 7 with the constructions standing thereon. The learned Judge fur-

ther found that the building in question was originally in the possession of one Pancham, and later came into the possession of one Sanwal Singh and that neither of these persons was a cosharer in mohal Bhikhari. Pancham's rights were those of a riyaya and Sanwal Singh, who is alleged to have purchased the building from him, did not get any higher rights than those of a riyaya. Similarly the defendants, who acquired the building in question from Sanwal Singh by virtue of a compromise arrived at in a suit, did not possess greater rights than those of a riyaya. Another finding recorded by the learned District Judge was that the defendants did not claim the building in suit as cosharers at the time of the partition of 1922 and allowed it to be treated as the building of a riyaya. There being no order of the partition officer under S. 118, Land Revenue Act, permitting the defendants to retain possession of the building in suit on payment of rent, the defendants were not entitled to continue in possession and were liable to ejectment. In this view he decreed the plaintiffs' suit for possession over the abadi plot No. 7 with the building and tree on it.

The learned Chief Judge (the late Sir Bisheshwar Nath Srivastava) partly allowed the second appeal by the defendants and modified the decree of the lower appellate Court to this extent that the plaintiffs' suit was dismissed for possession of the land occupied by the building. The learned Chief Judge found that at the time of the partition of 1922 the house was in the possession of the defendants, who were cosharers in mohal Bikhari, though they had acquired possession from a person who was not the owner of the house but at best possessed only the rights of a riyaya in it. The learned Chief Judge also held that the conditions requisite for the application of section 118, Land Revenue Act, were satisfied in the case and that it was immaterial whether the defendants acquired possession by constructing the building themselves or by acquiring it from the riyaya who had been in previous occupation of it. Following the view taken in a Full Bench case of the Allahabad High Court in 39 ALL 707[1] the learned Judge raised the presumption that the abadi plot having been allotted to the share of the plaintiffs, the defendants, in the absence of anything to the contrary in the record of the partition case, would under S. 118, Land Revenue Act, be entitled to retain it with the building thereon. He upheld the decree for possession of such portion of the land which was not occupied by the building and the tree standing on the plot, but dismissed the suit for possession with respect to that portion of the land which was occupied by the building.

It may be stated at the outset that Durga, defendant-respondent 1, died on 16th March 1940, leaving a son Mittho. No application was admittedly made by the plaintiff-appellants for substitution of his legal representative on the record within the time allowed by law, but the appellants made an application on 23rd December 1940, that the right to sue survived against the remaining respondents and that the name of Durga, respondent 1, may be removed from the record. Accordingly the name of Durga, respondent 1, was removed from the array of the respondents by an order, dated 12th February 1941. The rights of Durga's legal representative will not be affected by the order passed in this appeal. The sole question that falls to be determined is whether the facts found in the present case attract the application of S. 118, Land Revenue Act, in other words, whether the view taken by the learned Chief Judge of this Court, that S. 118 will apply even to the case of a house in the possession of a cosharer held as a riyaya and not as a cosharer, is correct, and whether in the absence of any claim by the defendants at the time of the partition of 1922 to retain such house and in the absence of any order by the partition officer reserving the house in favour of the defendants, the defendants are not liable to be evicted from the same.

A reference to the partition proceeding (Ex. A-2), which is called Tarz-i-taqsim, will show that it was drawn up in accordance with the provisions of S. 114, Land Revenue Act. Rule 13 of the Circular No. 23-II of the Board of Revenue lays down that a partition proceeding should be drawn up in a prescribed form. Rule 14 requires the drawing up of a draft partition proceeding which must be explained to such of the cosharers as are present. Every cosharer is at liberty to obtain a copy of the draft partition proceeding upon payment. Under R. 15, objections are invited and a date is fixed for the hearing of the objections, and a final partition proceeding is drawn up by the Court after disposing of such objections and claims as may be preferred vide R. 16. All questions of title, which may be raised

1. ('17) 4 AIR 1917 All 412 : 42 I C 589 : 39 All 707 : 15 A L J 757 (FB), Sarup Lal v. Lala.

by the cosharers to a partition proceeding, are decided by the partition officer and incorporated in the Tarz-i-taqsim. There is no suggestion whatever to show that the requirements of the law were not complied with. Paragraph 16 of the Tarz-i-taqsim deals with the site of the house of the cosharers. As against this paragraph the order of the partition officer is that the possession of the cosharers over their houses and the courtyards of their houses shall remain as before, and that compensation shall be made from such parti inside the abadi as is fit for building houses. Paragraph 17 refers to the sites of the houses of other persons, and as against it the order is that these shall be divided according to caste and occupation. Paragraph 18 relates to abadi plots which had been appurtenant to the houses, and these are to be divided proportionately. Section 118, Land Revenue Act, runs thus:

If, in making a partition, it is necessary to include in the portion allotted to one cosharer the land occupied by a dwelling-house or other building in the possession of another cosharer, the latter shall be allowed to retain it with the buildings thereon, on condition of his paying for it a reasonable ground rent to the cosharer in whose portion it may be included. The limits of such land and the rent to be paid for it shall be fixed by the Collector.

It is clear firstly that there is no specific mention in the Tarz-i-taqsim about the right of the defendants to retain possession of the building in dispute under the orders of the partition officer, and secondly, no ground rent was fixed by the Collector for that portion of the land occupied by the building as required by the section. The words 'the land occupied by a dwelling-house or other building in the possession of another cosharer' clearly show that the intention of the section was to protect the rights of a cosharer in the dwelling-house or other buildings which he possessed as a cosharer. They were not intended to extend the protection to the houses of riyayas which a cosharer may have acquired and in which his interests would be no better than those of the riyayas themselves. A riyaya in a village abadi is entitled to retain the possession of his house appurtenant to his tenancy, and his right to retain such possession continues until he is either ejected from his holding or he abandons the village. If the house in the abadi is not appurtenant to the agricultural holding of the tenant, then the person, who has built the house, has only a right of residence in it so long as the house does not fall down or the tenant does not abandon it. We do not think that the defendants acquired any better rights than those of a riyaya in the building in question. It would, therefore, be reasonable to hold that the defendants made no claim before the partition officer to retain the building in suit on condition of paying a reasonable rent on the ground that they were fully conscious of the fact that their rights in the building were merely those of a riyaya and not those of an owner or a cosharer. It must be remembered that Chap. 7, which deals with partition and union of mohals, deals with the rights of cosharers, and has nothing whatever to do with the rights of riyayas, which are governed by the tenancy law. It must follow from a plain construction of the language used in S. 118, Land Revenue Act, that the present case is not covered by the terms of that section, and consequently it is not open to the defendants to call in aid its provisions in defence of their rights. This finding does not involve the consequence that the defendants should be dispossessed from the house in the present suit. The possession of the defendants qua the house in dispute is merely that of a riyaya, and as such their rights in the house will be governed not by S. 118, Land Revenue Act, but by the general law governing the rights of a tenant in a house situate in an abadi. In this view of the matter the plaintiffs are not entitled to a relief for possession against the defendants, and the other question as regards the application of S. 118, Land Revenve Act, becomes purely academical inasmuch as, even if our decision were against the defendants upon that point, the plaintiffs will still be disentitled to a relief for possession against the defendants on the grounds stated above.

Assuming, however, for a moment that the provisions of S. 118, Land Revenue Act, apply to the case of a cosharer, who is in possession of a house as a mere riyaya, the next question is whether the defendants not having invited the attention of the partition officer to the fact that they wished to retain the building at the time of the partition, subject to the payment of a reasonable ground rent, and not having obtained a proper order from the partition officer, are now debarred from re-agitating the same question before a civil Court. The learned Chief Judge upon the authority of the Full Bench decision in 39 ALL 707[1] has raised the presumptions that the mere fact that the site of the defendants' house was allotted to the share of the plaintiffs was enough to show that the former were

entitled to retain the possession of the house and that the fact that no ground rent had been assessed could not deprive them of their right to the house. With the utmost possible respect we find it difficult to agree with this view. There is no doubt that there has been divergence of opinion in the Allahabad High Court upon this question. The earliest decision to which our attention was drawn was by Banerji J. in the year 1906 and is to be found in (1906) A W N 194.[2] There the plaintiffs brought a suit against the defendants for the recovery of possession of a plot and for demolition of that portion of the defendants' building which stood thereon. The learned Judge held that the effect of the partition was not to allot to the plaintiffs any portion of the building, and there being no direction by the partition officer for the removal of the house, the defendants were entitled under S. 124, Land Revenue Act, 1873, (now S. 118, Land Revenue Act, 3 of 1901) to retain the building, and that ground rent could be assessed even after a partition. Subsequently, in 1910 a Bench of the Allahabad High Court consisting of Sir John Stanley C. J., and the same learned Judge, who decided the previous case in 1906 in a letters patent appeal, in 5 I C 664[3] took a contrary view. The learned Judges observed :

In this case no application was made to the Collector by the defendants for liberty to retain the building in question and no offer was made by him to pay a reasonable rent therefor. The site of the house was, as we have said, allotted to the plaintiff and no reservation was made of any right of residence by the defendant. In view of this it is idle to contend that the defendants have any right whatever to remain in possession of the site of the house.

The learned Judges also expressed the view that,

when a partition has been effected by the Revenue Court, the parties are bound by the provisions contained in the order of partition and they cannot, in a subsequent civil suit, go behind the partition.

Two learned Judges of the same Court sitting singly, namely, Piggott J. and Rafique J. in 1915 followed the view of the Divisional Bench, vide 26 I C 933[4] and 28 I C 358[5] respectively. The judgment of the Full Bench (in 39 ALL 707[1]) consisting of Sir George Edward Knox, Ag. C. J., Sir Pramada Charan Banerji and Tudball JJ. however, held that

where a partition has been effected under the provisions of the United Provinces Land Revenue Act, 1901, and the site of the house of one cosharer has been allotted to the share of another cosharer, the presumption is that the owner of the house was to retain possession of the house. The mere fact that ground rent has not been assessed cannot deprive the owner of the house of his right to it.

Banerji J. who wrote the leading judgment, which was agreed to by his learned colleagues, expressed himself entirely differently from what the Divisional Bench had observed in 5 I C 664.[3] While the Bench emphasised in that case that as no reservation was made of any right of residence by the defendant he was consequently not entitled to remain in possession of the site of the house, the learned Judge in the Full Bench case observed :

There is nothing to show that the house was not reserved to the plaintiffs respondents. In the absence of any evidence to the contrary the presumption will be that the law was complied with.

With great respect due to the learned Judge we are unable to see any legal basis for the presumption raised by him. Section 118, Land Revenue Act, lays down in unambiguous language that the right of a cosharer to retain the land occupied by his building subject to the payment of a reasonable ground rent arises only in making a partition, and must be settled at the time of such partition. The right of a cosharer to be allowed to retain the site without which he cannot enjoy the possession of the building depends upon the performance of the conditions imposed by the section, namely the payment of the ground rent, and the fixing of this ground rent and the fixing of the limits of the land occupied by the building must be done by the Collector at the time of the partition, without which his right remains wholly inchoate. It cannot be said that in every case a cosharer will desire to retain the site on which the building stands, for there may be cases in which the building may be in an entirely dilapidated state, or may otherwise be of no value to him. Consequently, it is incumbent upon a cosharer to safeguard his right at the time of the partition by representing to the Court his wishes to retain the site occupied by his building, and to take proper steps to get the rent fixed by the Collector at that time. The section does not impose an obligation upon a cosharer to retain the site along with the building if he does not desire to do so. The learned Judge in the Full Bench case sought to distinguish the decision in 5 I C 664[3] to which he was a party

2. ('06) 1906 A W N 194, Iswar Parshad v. Jagarnath Singh.
3. ('10) 5 I C 664 (All), Nandan Pat Tewari v. Radha Keshun Kalwar.
4. ('15) 2 A I R 1915 All 73 : 26 I C 933, Bhure Lal v. Jagan Nath.
5. ('15) 2 A I R 1915 All 236 : 28 I C 358, Ramjas Mal v. Zabarya Singh.

on the ground that there was a clear non-reservation of the ownership of the house in that case and that furthermore the building had been demolished at the time when the appeal was decided. With all due deference, neither of these reasons appears to us to affect the soundness of the principle laid down by the Divisional Bench. His reasoning as regards the non-reservation of the ownership of the house in the Divisional Bench case applies equally to the case before the Full Bench. As regards the second reason the Divisional Bench was not at all influenced in its decision by the fact that the house had been demolished since the passing of the decree as will appear from the following observation:

> We are informed that the house has been demolished since the decree was passed by the Court of first instance. Be this as it may, we think that the plaintiff is clearly entitled in view of the partition award to a decree for possession of the site.

Having given our best consideration to the case we are of opinion that the view taken by the Divisional Bench in 5 I C 664[3] lays down a correct statement of the law, and that the decision of the Full Bench in 39 ALL 707[1] cannot be regarded as laying down a sound principle. We are of opinion that the defendants having failed to establish their right to the house in question as cosharers and having failed to obtain an order of the partition officer in their favour as required by S. 118, Land Revenue Act, at the time of the partition, it is no longer open to them to reopen that question now after the rights of the parties had been lawfully adjusted by a partition Court. As observed by their Lordships of the Privy Council in A I R 1928 P C 210[6] the word 'partition' in the Land Revenue Act is not used in the narrow sense of mere arrangement into units of area. It imports and includes that rights in these units are distributed among the sharers. We are unable to uphold the view of law taken by the learned Chief Judge on the basis of the Full Bench case. We hold for the reasons indicated above that the plaintiffs are not entitled to the relief for possession of the site occupied by the building. The defendants' rights in the building will be those of a riyaya and not those of a cosharer. We dismiss the appeal though on different grounds. Parties will bear their own costs throughout.

G.N./R.K. *Appeal dismissed.*

6. ('38) 25 A I R 1938 P C 210: 175 I C 775: 13 Luck 508: 65 I A 314: 32 S L R 845 (PC), Bajrang Bahadur Singh v. Beni Madho Bakhsh Singh.

(28) A. I. R. 1941 Oudh 454

AGARWAL J.

Ram Charan Singh — *Defendant* — *Appellant*

v.

L. Chunni Lal and others — *Plaintiffs* — *Respondents.*

Second Appeal No. 85 of 1938, Decided on 7th May 1941, against order of Civil Judge, Fyzabad, D/- 23rd December 1937.

(a) Adverse possession — Plea of, in alternative — Suit for declaration of title — Defendant failing in plea of derivation of title from another — He is not estopped from pleading adverse possession.

Where in a suit for declaration of title, the defendant pleads that he has got title by purchase from a person other than the plaintiff but fails, he is not estopped from pleading adverse possession in the alternative : ('25) 12 AIR 1925 Oudh 601, *Disting.* [P 455 C 1,2]

(b) Adverse possession — Title by — Suit for rent — Defendant not found to be tenant and suit dismissed — Defendant's possession becomes adverse.

In a suit for rent, the defendant's plea that he was not a tenant was upheld and the suit was dismissed in 1918. Subsequently in 1936, the successors in interest of the plaintiff in the previous suit sued for a declaration of their title to the property :

Held that the defendant's possession was adverse and that he had acquired title by such possession : ('23) 10 AIR 1923 P C 118 and ('25) 12 AIR 1925 Oudh 601, *Disting.* [P 457 C 1]

P. N. Chaudhri — for Appellant.

Ali Hasan — for Respondents.

Judgment. — This second appeal arises out of a suit brought by the plaintiffs-respondents against the defendant-appellant for a declaration that they are proprietors of the three plots in dispute and the defendant has not got proprietary or under-proprietary rights in them and his rights are only those of a tenant. The respondents had sued the appellant for arrears of rent in the Court of the Assistant Collector. The suit was dismissed by him and there was an appeal by the plaintiffs to the Deputy Commissioner of Fyzabad who held that the defendant had been holding over twelve years after having stated that he was proprietor and so he was not a tenant of the plaintiffs. He dismissed the appeal and the plaintiffs then brought the suit which gave rise to this appeal. The defendant pleaded that his father Ram Adhin Singh, his two uncles Sheo Ratan Singh and Ram Ratan Singh and an uncle's widow had purchased the plots in dispute from Mt. Kulsam Begam and her two sisters by means of a sale deed dated 23rd October 1883 and so he was the proprietor of the

plots. In any case he pleaded that he had acquired title by adverse possession. He also pleaded that the plaintiffs' suit was barred by time. He took some other pleas but we are not concerned with them in this appeal. The learned Munsif held that Mt. Kulsam Begam and her sisters had no title to the plots in suit and the name of their father Mirza Jan was entered as tenant only of one of the plots No. 353, in the papers of the first settlement. He held that the defendant was recorded as a tenant in the papers. He also held that he had not acquired the rights of a proprietor by adverse possession and overruled the plea of limitation. The learned civil Judge upheld the judgment of the trial Court.

The first point argued before me is that the defendant has acquired proprietary title by adverse possession for more than twelve years. The learned Munsif observed in his judgment that the defendant had definitely pleaded the sale deed of Kulsam Begam and others to be the original source of his title and he could not be allowed to turn over when his title failed and to claim adverse possession. For this view he relied on 1 O W N 768.[1] The question in that case was whether the defendants had acquired the title of under-proprietors by adverse possession. The learned Judicial Commissioner of Oudh made the following observation :

> I find considerable difficulty in understanding the possession by adversity of title by a person who comes forward with a claim on the basis of a grant and fails to prove it. A definite origin and source of title are relied upon and then when they have failed the defendants turn round and say that they have been holding adversely from the date on which they founded their title under a grant. I do not think that such a position can be permitted. The plaintiff zemindar who is the admitted owner of the land avers that he never passed under-proprietary title to the defendants. The defendants reply that they hold a title deed. The title deed is either not forthcoming or is not valid. The result must be that the defence of under-proprietary title is false and the defendants in occupation could only be tenants. It cannot be permitted to the defendants under such circumstances to start the theory of adversity of title which can only commence if they did not lay claim to any title whatsoever for the commencement of their possession.

The defendants in that case claimed under a grant from the zamindar and therefore his case of adverse possession was inconsistent with his plea of grant. In the present case the defendant did not claim to derive his title from the plaintiffs but from Mt. Kulsam Begam and others. I think a defendant who claims title from a person other than the plaintiff is not estopped from pleading adverse possession in the alternative. The next point to be considered is whether the defendant has succeeded in proving adverse possession. I may mention that the plaintiffs purchased the zemindari from the son and son's wife of Sheo Ratan Singh by means of a sale deed dated 25th April 1926. Sheo Ratan Singh had joined with the defendant's father Ram Adhin Singh in purchasing the plots in dispute under the sale deed of 23rd October 1883. Sheo Ratan Singh who is the predecessor-in-title of the plaintiffs had therefore the knowledge in 1883 that Ram Adhin Singh father of the defendant, had purchased those plots and thus was claiming adversely to him. In the year 1884, some plots including plot No. 353 which is in dispute were attached in execution of a decree and then Sheo Ratan Singh preferred an objection claiming the plots under the sale deed of 1883. The objection was allowed. This document shows that Sheo Ratan Singh himself claimed one of those plots not by virtue of his title as zemindar but on the basis of the sale deed. One Mahabir Shukul sued Sheo Ratan Singh for arrears of rent in respect of plot No. 356/6. Sheo Ratan Singh contested the suit and pleaded that he had purchased plot No. 353 (the one in suit) and two others close to plot No. 356/6. The sale deed of 1883 was filed by the defendant. It thus appears that Sheo Ratan Singh, predecessor-in-title of the plaintiffs, had himself been relying on the sale deed of 1883 in proof of his title. Ram Adhin Singh, father of the defendant, was a co-purchaser with him under the same sale-deed. In the year 1918 Sheo Ratan Singh sued the present defendant for arrears of rent in respect of the plots in question. The defendant pleaded that he was not a tenant but a cosharer with the plaintiff Sheo Ratan. It was held that the defendant was not a tenant of the plaintiff. This judgment was passed on 21st August 1918.

There is also a mortgage deed dated 9th July 1886, which shows that Ramadhin had executed a usufructuary mortgage in respect of one of the plots. Of course there is nothing to show whether possession was delivered under the mortgage deed. The Court of Wards sued Ram Charan who is the defendant-appellant for arrears of rent in respect of the plots adjoining the plots in question. Ram Charan pleaded that he had purchased those plots by means of a sale deed dated 23rd October 1883, and had been

1. ('25) 12 AIR 1925 Oudh 601 : 85 I C 850 : 1 O W N 768, Sultan Khan v. Hardwari.

in possession of the plot in question by adverse possession. His plea of adverse possession was held proved. This judgment was pronounced on 30th September 1929. It thus appears that Sheo Ratan Singh, predecessor-in-interest of the plaintiff and Ram Charan Singh, the defendant, have been both claiming proprietary title in the plots in question under the sale deed of 1883. It was held in the case brought by Sheo Ratan Singh against Ram Charan Singh for arrears of rent that the defendant had never paid rent to the plaintiff. In 11 O W N 1165[2] it was held that if possession is acquired by a person under an invalid title and he continues to remain in possession for more than twelve years, the title becomes an unassailable one. It was held in A I R 1928 Oudh 18[3] that where it is found that a person is in continuous possession of some property for more than twelve years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and circumstances attending his possession clearly showed that he had intended to hold possession as of right, he must be declared as having acquired title by adverse possession.

I think that the circumstances of this case show that the defendant has been holding the land claiming to be a proprietor from before the year 1918. Reliance is placed by the plaintiffs on the Privy Council case in 26 O C 231.[4] In that case the zemindar had issued a notice of ejectment against some persons who contested the notice on the ground that they could not be ejected as they were not ordinary tenants but were under-proprietors. The notices were cancelled by the Board of Revenue on the ground that the persons to whom notices were given were not ordinary tenants. In 1910 the zemindar brought a suit against them for arrears of rent, and it was decided that the defendants in that suit were ordinary tenants. Those defendants then brought a suit for a declaration that they were under-proprietors. It was held that the simple assertion of a proprietary right in a judicial proceeding connected with the land in suit which ex hypothesi was unfounded at the date when it was made cannot, by mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. In that case it was found by the Revenue Court that the plaintiffs who had sued for a declaration that they were under-proprietors were ordinary tenants. In this case the revenue Court found that the defendant was not a tenant of the plaintiffs. It cannot be said that the claim of proprietorship made by the defendant in 1918 was unfounded. The following remark in the judgment of the Privy Council is very important :

> The case might have been different if in addition to the judicial assertion by the plaintiff there had been any change in the money payment which he thereafter made to his landlord. There is however no suggestion that the same money payment which had been made before the notice of ejectment was not continued thereafter. The possession by the plaintiff therefore remained on precisely the same footing as at the time when he was held by the Court to have merely an occupancy title the precise nature of which it is not necessary to consider in this case.

In this case the plaintiffs claim arrears of rent against the defendant. The revenue Court held that the plaintiffs were not entitled to claim any rent. The plaintiffs' possession was therefore materially affected if they were deprived of the usufruct of the land. In my opinion, when the defendant set up adverse title and it was decided that he was not a tenant of the plaintiffs and the plaintiffs' suit was dismissed, the defendant's title became adverse to the plaintiff. The plaintiffs cannot say in this case "I get my rent all right and it matters little whether the defendant is a tenant or an under-proprietor." The other case relied on is 1 O W N 768[1] quoted above. That case is based on the Privy Council case cited above. In this case also, it was found that the defendants were holding the land on payment of rent. I think this case is also distinguishable from the present one. Cases have been cited to show that mere non-payment of rent does not amount to adverse possession. This is so, but that principle applies only when the person claiming adverse possession is a tenant. Here it was found by the Assistant Collector in 1918 in the suit brought by Sheo Ratan Singh that rent was never paid and the entry of the defendant's name as a tenant was wrong. It has not been shown that the defendant entered upon the land as a tenant. Sheo Ratan Singh, the predecessor of the plaintiff, and the defendant's father both purchased the plots in question by means of one sale deed and they entered into possession. It seems highly improbable

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2. ('34) 21 A I R 1934 Oudh 449 : 152 I C 180 : 11 O W N 1165, Ram Dutt Singh v. Mohammad Nazir Khan.
3. ('28) 15 A I R 1928 Oudh 18 : 104 I C 760, Sukhdeo Pande v. Pragdat Pande.
4. ('23) 10 A I R 1923 P C 118: 74 I C 476: 45 All 419: 50 I A 202 : 26 O C 231 (P C), Mohammad Mumtaz Ali Khan v. Mohan Singh.

that one may have been the tenant of the other. The defendant has been in possession of the land openly claiming title thereto as a proprietor from the year 1883 and he successfully raised that plea in the rent suit brought against him by Sheo Ratan Singh in 1918 and so I think that the defendant had acquired title by adverse possession in 1936 when the present suit was brought. The learned Civil Judge has relied on A I R 1929 Oudh 370.[5] In that case the entry in the village papers was that the defendant was a tenant and it was held that it was inconsistent with his claim for adverse possession. The entries may be presumed to be correct but in this case they have been proved to be wrong. The fact that the defendant claimed to be co-owner with Sheo Ratan Singh does not show that he was not claiming by adverse possession. He was claiming to be proprietor of the land along with Sheo Ratan Singh. So far as the proprietary claim is concerned, he has acquired a title by adverse possession though along with the plaintiffs' predecessor.

It is said that the plaintiffs did not assert their right in the partition proceedings of 1894 and 1337 F, but as they were not recorded as cosharers so could not assert their title. Moreover the defendant has been in possession for more than 12 years after 1894 also. The learned Munsif has relied on the statement of the defendant that he learnt about his title after the rent suit of 1918. He had clearly set up his title by adverse possession in that suit and so this statement before the Munsif cannot go against him. The decree granted by the Munsif which has been confirmed by the lower Court is that the defendant is not a proprietor or under-proprietor of the land in suit. I hold that the defendant has acquired proprietary title by adverse possession and so the plaintiffs cannot get this relief. The result is that the appeal is allowed and the plaintiffs' suit is dismissed. The defendant will get his costs throughout.

K.S./R.K. *Appeal allowed.*

5. ('29) 16 A I R 1929 Oudh 370 : 115 I C 302, Lalta Pershad v. Harnam Singh.

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(28) A. I. R. 1941 Oudh 457

THOMAS C. J. AND GHULAM HASAN J.

Haji Faqir Bux and others — Defendants — Appellants

v.

Pandit Thakur Prasad, Plaintiff and others — Defendants — Respondents.

First Appeals Nos. 102 and 103 of 1937, Decided on 18th April 1941, against order of Sessions and Civil Judge, Lucknow, D/- 22nd May 1937.

(a) Mahomedan law — Dower—Gift by husband to wife in lieu of dower debt — Deed reciting certain amount to be due as dower—Wife's evidence of having demanded dower debt — Dower must be deemed to be prompt.

A recital in a deed of gift executed by a Mahomedan in favour of his wife that a certain amount was due as a dower debt from the husband to the wife by itself indicates that the whole dower was prompt inasmuch as it could not have been stated in the deed to be due, as deferred dower is not due until dissolution of marriage either by death or by divorce. The evidence of the wife that she had been demanding the entire dower debt also points to the same effect because a demand cannot be made until the whole dower is prompt. [P 460 C 2]

(b) Mahomedan law—Dower — Gift by husband to wife in lieu of dower debt — Plaintiff challenging deed as fictitious on ground that dower was paid long before execution of deed—Burden to prove payment is on plaintiff—Mere statement by plaintiff disclosing certain living persons as source of his knowledge of payment cannot shift burden.

Where the plaintiff challenges a deed of gift by a Mahomedan in favour of his wife as being fictitious on the ground that the dower had been paid long before the execution of the gift deed, the burden of proving the payment of dower clearly lies upon the plaintiff and this burden cannot be held to have shifted on to the defendant by the mere statement of the plaintiff disclosing certain living persons as the source of his knowledge of the alleged payment. [P 461 C 2]

(c) Mahomedan law — Dower — Payment of —Presumption — Lapse of time since marriage or husband's having been in position to pay dower debt raises no presumption in favour of payment.

Lapse of time since marriage raises no presumption in favour of payment of dower under the Mahomedan law. Nor can the fact that the husband had been in a position to pay the dower debt of his wife necessarily lead to the inference that he actually paid it. [P 461 C 2]

(d) Mahomedan law — Dower — Compromise decree for certain amount passed against husband—Gift by husband to wife in lieu of dower debt few days before expiry of time fixed in decree cannot throw any doubt on such payment of dower.

The fact that the husband paid his wife's dower debt by means of the execution of a deed of gift only a few days before the time allowed under the compromise decree passed against him for a certain amount expired cannot throw any doubt upon such

payment. At best his conduct may amount to an attempt to save the property from the hands of the creditors and to prefer paying the dower debt of his wife against the debts of his other creditors. [P 461 C 2 ; P 462 C 1]

(e) Transfer of Property Act (1882), S. 53 — Transfer which defeats or delays creditors explained—Mahomedan gifting property to wife in lieu of dower debt — Transaction genuine — Husband's other creditors cannot avoid transaction merely on ground that it gave preference to one creditor over others even if wife had knowledge of this fact provided property transferred is not materially worth more than her debts.

The transfer which defeats or delays creditors under S. 53 is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid. Consequently, where a Mahomedan transfers by way of gift certain property to his wife in satisfaction of the dower debt due to her and the transaction is a genuine one, it is not open to the other creditors of the husband to avoid the transaction merely on the ground that the effect of it was to give preference to one creditor over the others, even though it be shown that this was a fact known to the wife, provided the property transferred is not worth materially more than her debts: ('31) 18 AIR 1931 Oudh 344 ; ('37) 24 AIR 1937 Oudh 349 and ('38) 25 AIR 1938 Oudh 230, *Disting.* ; *Case law referred.* [P 462 C 2 ; P 463 C 2]

(f) Transfer of Property Act (1882), S. 53 — Question of adequacy of consideration is immaterial where issue is whether transaction is fictitious or genuine.

No doubt in a suit under S. 53, the question of adequacy of consideration is relevant but that question becomes immaterial in a case where the issue framed is whether the transaction is fictitious or genuine. [P 463 C 1]

(g) Civil P. C. (1908), O. 6 — Practice of introducing obscure pleading with view to take adversary by surprise deprecated—It is duty of Court to clarify pleadings.

The practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. The law imposes a duty upon the Court as well to clarify pleadings. [P 464 C 1]

(h) Civil P. C. (1908), O. 6, R. 4—Plea under S. 53, T. P. Act, not specifically pleaded in written statement but raised in course of argument—Plea held could not be allowed as it took plaintiff unawares.

Where a plea under S. 53 is not specifically pleaded in the written statement but is raised only in the course of arguments, it should be disallowed as it would take the plaintiff unawares. [P 464 C 1]

(i) Transfer of Property Act (1882), S. 53 — Suit under S. 53 must be on behalf of all creditors — Any one of creditors cannot institute such suit — Whether suit falls under S. 53 — Test—In suit under S. 53 plaintiff has to accept deed as genuine—Plaintiff suing for declaration that transaction in respect of suit property was fictitious and not genuine and that he was owner thereof—Suit does not fall under S. 53.

A suit to set aside a transfer on the ground that it was made with the intent to defeat or delay the creditors should be brought on behalf of all the creditors. It is not competent to any of the creditors to institute such a suit. The proper test to apply in determining whether a suit comes within the purview of S. 53 is to see whether if the plaintiff succeeds in the action, the property claimed in the action would be available to the general body of creditors : ('21) 8 AIR 1921 Pat 53 and ('15) 2 AIR 1915 Bom 89, *Rel. on.* [P 465 C 1]

In a suit under S. 53 the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor : ('16) 3 AIR 1916 P C 238, *Rel. on.* [P 464 C 2]

No fraud against the creditors was pleaded anywhere in the plaint. Throughout the plaint the plaintiff tried to emphasize that documents in suit were fictitious and paper transactions and were not genuine ; in other words no title passed under those deeds. There were no specific allegations in the plaint that the transfers impugned had been made with a view to defeat or delay the creditors. There was no indication in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors. On the other hand, there was every indication in the averments of the plaint that the plaintiff wanted to vindicate his personal and individual rights, and not the rights of other creditors :

Held that the suit did not fall within the purview of S. 53, and that even if it was one under S. 53, it was not possible to grant any relief to the plaintiff under that section as it was wholly inconsistent and irreconcilable with the relief claimed by him in the suit. [P 465 C 2]

(j) Specific Relief Act (1877), S. 42 — Suit by auction purchaser for declaration under S. 42 that transfer of property purchased by him in favour of defendants was fictitious and not genuine — Property in suit in possession of mortgagee—No evidence that plaintiff obtained actual possession—Suit under S. 42 for declaration held did not lie unless plaintiff asked for further relief for possession or redemption.

The auction purchaser instituted a suit for a declaration under S. 42 that the transfer in favour of the defendants by the judgment-debtor of the suit property was fictitious and not genuine. The property was in the possession of the mortgagee and though the plaintiff had obtained formal delivery of possession after the auction purchase there was no evidence that he obtained actual possession:

Held that the plaintiff was not entitled to the declaration under S. 42 inasmuch as under the circumstances it was open to him to ask for a further relief either for possession or redemption. The suit for a mere declaration, therefore, was not maintainable: ('36) 23 AIR 1936 Oudh 67, *Disting.* [P 466 C 1]

Niamatullah and Rameshwar Dayal — for Appellants.

K. N. Tandon and R. S. Kapoor and Suraj Sahai — for Respondents 1 and 4 respectively.

Judgment. — These are the defendants' first appeals arising out of a claim for declaration of right which has been decreed by the civil Judge of Lucknow by a judgment and decree dated 22nd May 1937. The plaintiff-respondent brought a suit claiming a declaratory decree to the effect that the deed of gift dated 20th October 1930, and subsequent sale deeds dated 22nd October 1932, 16th December 1932 and 23rd January 1935, are void and ineffective against him and that he is the absolute and sole owner of the auctioned property. The material facts upon which this claim was based were as follows : The plaintiff obtained a simple money decree on the basis of a compromise from the Court of the Munsif of Sitapur on 25th July 1930, against Karim Bakhsh, defendant 1, for Rupees 750 besides costs and interest.

Under the compromise defendant 1 was required to pay the decretal amount with costs and interest to the plaintiff within three months, that is to say by 25th October 1930, failing which the plaintiff was given a right to take out execution. The money was not paid and the decree was transferred for execution to Lucknow. The plaintiff applied for execution by attachment and sale of five annas and three pies share of Karim Bakhsh in muhalla Rahimganj, near Fatehganj, Lucknow, and himself purchased the property in a public auction on 27th June 1932. He also obtained possession through Court on 2nd November 1932. It is stated in para. 5 of the plaint that Karim Bakhsh, defendant 1, in order to deprive the plaintiff of his money, in bad faith and fraudulently, executed a deed of gift in respect of 3 annas and 11 pies share situate in Rahimganj in favour of his wife, Mt. Maryam Begam, defendant 2, on 20th October 1930 (Ex. 25) which is alleged to be fictitious, concocted and showy. The plaintiff alleged that the deed of gift was void against him and he was not bound by it. Defendant 2 in turn executed a sale deed of the same property in favour of defendant 3, Sultan Mohammad, her son-in-law, on 21st October 1932, and this deed is likewise fictitious, showy, concocted and is void and ineffective against the plaintiff. It is further alleged that the 5 annas 3 pies share in Rahimganj was mortgaged with possession to Faqir Bakhsh, defendant 4, by a deed dated 15th December 1923, (Ex. 36) in lieu of Rs. 2500 and he (Faqir Bakhsh) took possession of the said property under a decree dated 22nd October 1926, passed by the Subordinate Judge of Mohanlalganj, Lucknow. The plaintiff approached Faqir Bakhsh for redemption of the mortgaged property on 2nd April 1936, but he refused to redeem the property. It was then that the plaintiff came to know for the first time that two sale deeds were collusively executed by defendant 3, Sultan Mohammad, in favour of defendant 5, Abdul Ghafur, on 16th December 1932, (Ex. 40) in respect of two annas share out of the Rahimganj property and in favour of defendant 6, Abdullah, on 23rd January 1935 (Ex. 39) in respect of one anna share out of the same property. Defendants 5 and 6 are admittedly the sons of defendant 4, Faqir Bakhsh. These latter deeds are alleged to have been executed by defendant 3 Sultan Mohammad, in collusion with defendant 4, Faqir Bakhsh, in favour of the latter's sons and were fictitious, benami and without consideration. In two redemption suits filed by Faqir Bakhsh and Abdullah against Karim Bakhsh and others in 1932 the plaintiff, who was made a party to the suits, was described as a mortgagee of the Rahimganj property, in reply whereof he filed a written statement dated 23rd February 1934, clearly mentioning that he was owner by virtue of the auction purchase and not a mortgagee. Despite this knowledge defendant 4, Faqir Bakhsh, got a fictitious deed executed on 23rd January 1935, without consideration in favour of Abdullah. In para. 14 of the plaint, all the deeds, namely the deed of gift in favour of Mr. Maryam, defendant 2, the sale deeds in favour of Sultan Muhammad, defendant 3, Abdul Ghafur, defendant 5, and Abdullah, defendant 6, are alleged to be absolutely void and ineffective against the plaintiff and the necessity for filing the suit arose against the defendants because they totally denied the ownership of the plaintiff. Paragraph 17 of the plaint may be considered to divide the relief for declaration into two parts, firstly a declaration that the gift and the three aforementioned deeds are void and ineffective against the plaintiff, and secondly that the plaintiff is the absolute owner of the property in dispute.

Defendants 1 and 2 made no defence. The defence of the other defendants was that the deed of gift was executed in lieu of dower debt and was a perfectly genuine transaction. It was also alleged that the defendants had no knowledge of the execution proceedings by the plaintiff and that the plaintiff never got possession of the property purchased by him. It was pleaded

that the plaintiff not being in possession of the property in suit, the suit for a mere declaration was not maintainable. Defendants 2 to 6 were alleged to be bona fide purchasers for valuable consideration and the sale deeds in their favour were binding upon the plaintiff. The pleas of limitation and insufficiency of court-fee were also raised. In para. 25 of the written statement filed by defendants 4 and 6 it was vaguely asserted that the plaintiff's suit as it stands is not maintainable and is fit to be dismissed with costs. The learned Civil Judge framed issues in the case of which only the material ones may be set out below :

(1) Did defendant 1 execute the deed of gift dated 20th October 1930, in favour of defendant 2 fraudulently and in bad faith? Is the deed not binding on the plaintiff as alleged in paras. 5 and 6 of the plaint?

(2) Did defendant 2 execute the sale deed in favour of defendant 3 after receiving information of the proceedings for the delivery of possession and is it fictitious and not binding on the plaintiff?

(3) Is the plaintiff in possession of the property in suit and is the suit for mere declaration maintainable?

(5) Are defendants 2 to 6 bona fide purchasers for value?

(7) Is the plaintiff not entitled to maintain the suit as alleged by defendants 4 to 6?

On issue 1 the learned Civil Judge held that the deed of gift was a fraudulent and fictitious deed executed in order to defeat and delay the creditors of Karim Bakhsh and was not binding upon the plaintiff. On issue 2 he held that defendant 3 got the sale deed effected in his name in spite of the knowledge of the execution proceedings by the plaintiff and the circumstances attending it were such as to lead him to infer that it was a fictitious document and, therefore, not binding upon the plaintiff. On issue 3 he held that the plaintiff being in constructive possession, the suit for a mere declaration was maintainable and no extra relief for possession was necessary. On issue 5, he held that none of defendants 2 to 6 was a bona fide purchaser for value. On issue 7 he held that the suit was maintainable in spite of the fact that it was brought by the plaintiff in his individual capacity and not on behalf of all the creditors. The pleas of court-fee and limitation were not pressed. The result was that the suit for the declaration was decreed and the deed of gift and the three sale deeds were declared to be fictitious and fraudulent documents and not binding upon the plaintiff. Two appeals were brought against the aforesaid judgment and decree. Appeal No. 102 of 1937 is by Faqir Bakhsh, defendant 4, and his two sons, defendants 5 and 6, while appeal 103 of 1937 is by Sultan Muhammad, defendant 3. Both these appeals will be disposed of by one judgment.

The following questions have been argued before us on behalf of the defendants-appellants: (1) That the deed of gift was executed in lieu of the dower debt of Mt. Maryam Begam, which was due and subsisting at the time of the execution of the gift, namely 20th October 1930, that the deed was genuine and was not fictitious or fraudulent, and further that the three sale deeds were genuine deeds and were not fictitious or fraudulent. (2) That the suit as framed is neither in form nor in substance a suit under S. 53, T. P. Act, and, that even if it were assumed to be one under that section, no relief under that section could be granted to the plaintiff. (3) That the plaintiff not being in actual or constructive possession of the property was not entitled to maintain the suit for a mere declaration under S. 42, Specific Relief Act. (4) That the defendants were in any event bona fide purchasers for value.

The first question that arises for determination before us is whether the deed of gift executed by Karim Bakhsh in favour of his wife Mt. Maryam Begam, was fictitious or genuine. It is clear that the gift was made in lieu of dower debt of Rs. 1000. The plaintiff denied the amount of the dower but the learned Civil Judge found that the dower of Mt. Maryam was Rs. 1000. The deed recites that the parties were married thirty years ago and the dower debt was due from the husband. It was ingeniously argued on behalf of the plaintiff-respondent that there was no proof that the whole of the dower debt was prompt and that in the absence of any evidence that the whole dower was prompt it must be held that the dower was partly prompt and partly deferred. The learned Civil Judge rejected this contention and we agree with him. As we have already stated, the deed of gift itself recites the amount of Rs. 1000 as dower debt due from Karim Bakhsh to Mt. Maryam Begam. This by itself indicates that unless the whole dower was prompt it could not have been stated in the deed to be due as deferred dower is not due until dissolution of marriage either by death or by divorce. There is also the evidence of Mt. Maryam Begam, which shows clearly that she had been demanding the entire dower debt of Rs. 1000. This demand could not have been made until the whole dower was prompt.

The learned Civil Judge found that the dower had really been paid off by Karim Bakhsh to his wife long before the deed had been executed. He, however, conceded that if the dower debt had not been paid then the husband would not have been guilty of any fraud in transferring the property by means of the gift in lieu of dower debt. He says that

> there can be no doubt that if the dower had really remained due nobody could have stopped defendant 1 from paying it off by making a gift of the property, and in that case his wife would have been a creditor, and no doubt preference shown by him to one creditor would not have been tantamount to fraud. That would have been merely a piece of family policy.

In support of this finding that the dower debt must really have been paid off before the execution of the deed of gift the learned Civil Judge relied upon the evidence of the plaintiff (as P. W. 10) who stated that he had heard from one Nathuni, the husband of the sister of Karim Bakhsh, and one Hafiz Ahmad Husain, the son-in-law of Mt. Maryam, that her dower debt had been paid, and some circumstantial evidence to which reference will be made hereafter. Nathuni, according to P. W. 10, told him about the payment of the dower during the pendency of the suit. P. W. 10 states that he saw him in Court. Hafiz Ahmad Husain told the witness some time in 1934 or 1935. Hafiz Ahmad Husain is also admittedly alive. We are of opinion that the evidence of P. W. 10 based upon the alleged statements of Nathuni and Hafiz Ahmad Husain is manifestly hearsay and is inadmissible in evidence. The plaintiff raised no plea in the case that the deed of gift was not genuine because the dower due to Mt. Maryam had been paid long before the execution of the gift. If the plaintiff really wanted to produce evidence in support of the payment of the dower, it was his bounden duty to have produced Nathuni and Hafiz Ahmad Husain, who are alleged to have conveyed to him the information on the point. We must, therefore, eliminate from consideration the hearsay evidence referred to by the plaintiff in his evidence as P. W. 10. It also appears that Mt. Maryam who was examined in the case stated that her dower debt had not been paid till her husband transferred the property by means of the gift in lieu of her dower. She was not cross-examined on this point and we cannot therefore but hold that the evidence about payment of dower before the execution of the deed of gift is completely lacking. We are not prepared to agree with the learned Civil Judge that as soon as the plaintiff in the witness-box stated that two living witnesses gave him information about the payment of the dower long before the execution of the gift, it became the bounden duty of the defendants to produce those witnesses in rebuttal. The burden of proving the payment of dower clearly lay upon the plaintiff and this burden cannot be held to have shifted on to the defendants by the mere statement of the plaintiff disclosing two living persons as the source of his knowledge.

The circumstantial evidence relied upon by the learned Civil Judge is to the effect that as the parties were married 40 years ago and the dower was demanded on a number of occasions, there is no reason why it should not have been paid long before the execution of the deed of gift. Another circumstance which has been greatly pressed upon our notice is that on different occasions Karim Bakhsh came by large sums of money which he borrowed, and he should have discharged the dower debt of his wife out of those moneys. The third circumstance alleged in this connexion is the execution of the deed just a few days before the period of time allowed under the compromise decree expired. We have given due weight to these considerations but we do not think that either of these circumstances constitute a valid and adequate ground for raising a presumption that the dower debt must have been paid long before the execution of the deed of gift. The deed of gift, which was executed in 1930, mentions that the parties had been married thirty years ago. The learned Judge is wrong in stating that they were married 40 years ago. Although prompt dower, according to Mahomedan law, is payable immediately on demand, yet our experience about Mahomedan families shows that in a large majority of cases it is rarely demanded and is rarely paid; in practice a Mahomedan husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for payment upon the husband's embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of payment of dower. That Karim Bakhsh may have been in a position to pay the dower debt of his wife does not necessarily lead to the inference that he actually paid it; nor can the mere circumstance, that

Karim Bakhsh paid the dower by means of the execution of the deed of gift only a few days before the time allowed under the compromise decree expired, throw any doubt upon such payment. At best his conduct may amount to an attempt to save the property from the hands of the creditors and to prefer paying the dower debt of his wife against the debts of his other creditors.

Having given our best consideration to the case, we have no hesitation in arriving at the conclusion that the dower debt of Mt. Maryam was due and subsisting at the time of the execution of the deed of gift in 1930 and it was paid only by means of the deed of gift in her favour. The finding of the learned Civil Judge on this point cannot therefore be upheld. If the deed be upheld as a genuine gift, it follows that the sale deed executed by Mt. Maryam in favour of her son-in-law, Sultan Muhammad, was perfectly valid, and similarly sale deeds by Sultan Muhammad in favour of defendants 5 and 6, Abdul Ghafur and Abdullah, are equally valid. In this view of the matter, the auction purchase made by the plaintiff on 27th June 1932 conferred no title upon him. The next question that arises for consideration in this connextion however is, that the transfer under the deed of gift contravenes the provisions of S. 53, T. P. Act. Here again, we must express our dissent from the finding arrived at by the learned Civil Judge. The following observations of Lord Wrenbury in 43 I A 104[1] provide in our opinion a sufficient answer to the argument raised with reference to S. 53, T. P. Act :

As matter of law, their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy or insolvency applies there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid although the result may be the rest of his assets will be insufficient to provide for the payment of the rest of his debts. The law is, in their Lordships' opinion, rightly stated by Palles C. B. in (1888) 21 L R Ir 27,[2] at p. 62, where he says : "The right of the creditors, taken as a whole, is that all the property of the debtor should be applied in payment of demands of them or some of them, without any portion of it being parted with without consideration or reserved or retained by the debtor to their prejudice. Now it follows from this, that security given by a debtor to one creditor upon a portion of or upon all his property, although the effect of it, or even the interest of the debtor in making it, may be to defeat an expected execution of another creditor, is not a fraud within the statute, because notwithstanding such an act, the entire property remains available for the creditors or some or one of them and as the statute gives no right to rateable distribution, the right of the creditors by such act is not invaded or affected."

The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid : (1876) 2 Ch D 104[3] at p. 108. So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor, it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy.

This statement of law was approved by their Lordships of the Judicial Committee in 56 I A 379.[4] Their Lordships added :

A debtor is entitled to prefer a creditor, unless the transaction can be challenged in bankruptcy, and such a preference cannot in itself be impeached as falling within S. 53.

In 1937 O W N 1176[5] a debtor executed a deed of gift in favour of his wife in lieu of her dower debt and it was found that the dower debt had not been paid and remained due at the time of the execution of the deed of gift and also that the amount fixed for dower was Rs. 40,000 but the property forming subject of the gift was worth Rs. 8000. It was held that the transfer in question was genuine and that it was not possible to say that the debtor had retained any benefit for himself or that the object of the transfer had been to remove the property from the creditors for the benefit of the debtor, but that it was a case merely of one creditor being preferred to another and consequently the transfer in question did not offend against the provisions of S. 53, T. P. Act. A similar view was taken in 1939 O A 375,[6] which was a case of a sale deed executed by a husband in favour of his wife in lieu of her dower debt. The transferee was also held to be a bona fide transferee for consideration. In 1936 ALL L J 1328[7] it was held that where a Mahomedan husband transfers certain property to his wife in satisfaction of the prompt dower debt due to her

1. ('15)2 AIR 1915 PC 115: 32 IC 343: 43 Cal 521: 43 I A 104 (P C), Musahar Sahu v. Hakim Lal.
2. (1888) 21 L R Ir 27, In re Moroney.
3. (1876) 2 Ch D 104 : 45 L J Ch 293, Middleton v. Pollock.
4. ('29) 16 A I R 1929 P C 279 : 120 I C 645 : 7 Rang 624 : 56 I A 379 (P C), Ma Pwa May v. Chettyar Firm.
5. ('38) 25 A I R 1938 Oudh 44 : 171 I C 887 : 13 Luck 655 : 1937 O W N 1176, Bansidhar v. Mt. Nawab Jahan Begam.
6. ('39) 26 A I R 1939 Oudh 230 : 181 I C 181 : 1939 O W N 398 : 14 Luck 621 : 1939 O A 375, Ram Ratan Lal v. Mt. Akhtari Begam.
7. ('37) 24 A I R 1937 All 89 : 166 I C 619 : I L R (1937) All 153 : 1936 A L J 1328, Razina Khatun v. Abida Khatun.

and the transaction of sale is a genuine one, it is not open to the other creditors of the husband to avoid the transaction merely on the ground that the effect of it was to give preference to one creditor over the others, even though it be shown that this was a fact known to the wife (transferee). In a case of such fraudulent preference the proper remedy of the other creditors, if there is not sufficient property left to meet their claims, is to approach the insolvency Court within two years of the transfer and get the debtor adjudicated an insolvent, in which case they would be placed on the same footing as the preferred creditor and the transfer would be avoided by the insolvency Court. Another ground urged on behalf of the plaintiff.respondent is that the gift is fraudulent because it was executed in lieu of a grossly inadequate consideration the value of the property being much greater than the amount of the dower debt. Under the old unamended S. 53, T. P. Act, it was laid down :

> Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously, or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

This paragraph does not however find a place in the new S. 53 introduced by the Amendment Act (20 of 1929). As a matter of fact the question of adequacy of consideration is not material in view of the nature of the issue which was framed in the case, namely whether the transaction was fictitious or genuine. Although the old section does not in terms apply to the case, yet the question of the adequacy of the consideration will be relevant in a suit under S. 53, T. P. Act. Upon the merits, however, we are satisfied that this is not a case in which the property covered by the deed of gift was transferred for a grossly inadequate consideration so as to justify an inference of fraud. In order to determine this matter we shall have to refer in some detail to the history of this property. (Their Lordships went through the history of the property and proceeded.) It will thus appear that although the deed of gift was executed in lieu of the dower debt of Rs. 1000 only, the encumbrances existing upon the property, which the donee was bound to discharge, came up to very nearly the value of the property computed according to the sale deed executed by Sultan Mohammad in favour of Abdullah. We, therefore, hold that the consideration for the deed of gift, far from being grossly inadequate, represented the full value of the property. This circumstance, therefore, affords no justification for the inference that the transfer by way of gift was fraudulent within the meaning of S. 53, T. P. Act. Even if the value of the property on any other computation had been greater than the consideration of the deed of gift, we do not find any satisfactory evidence on behalf of the plaintiff-respondent to show that the inadequacy of the consideration in the present case was to any material degree. In A I R 1929 Lah 409[8] it was held that the transfer which defeats or delays creditors is not an instrument which prefers one to the other but an instrument which removes property from the creditors for the benefit of the debtor. This is true even though the debtor intended to defeat the claims of the other creditor and the transferee had knowledge of this, if his only purpose was to secure payment of his own debt, and the property is not worth materially more than his debts. The cases relied upon by learned counsel on behalf of the plaintiff, 8 O W N 794,[9] 1937 O W N 391[10] and 1938 O W N 922,[11] are clearly distinguishable upon the facts.

Our finding, therefore, is that the deed of gift in favour of Mt. Maryam Begam was a genuine deed and not a fictitious deed. We also find that the transfer under that deed was not fraudulent and did not offend against the provisions of S. 53, T. P. Act. Our conclusion is the same in respect of the three subsequent sale deeds referred to above. As regards the second point, it may be pointed out that the defendants have nowhere specifically raised the question that the suit was not properly framed under S. 53, T. P. Act, and that it was not filed by the plaintiff in a representative capacity on behalf of and for the benefit of other creditors. Paragraph 25 of the written statement of defendants 4 and 6, which we have quoted above, is too vague and too general to indicate what was meant by the defendants and strangely enough no attempt was made on behalf of the plaintiff to seek a clarification of the plea contained in paragraph 25 of the

8. ('29) 16 A I R 1929 Lah 409 : 116 I C 317 : 30 P L R 306, Labhu Ram v. Charnu Fauju.
9. ('31) 18 AIR 1931 Oudh 344 : 134 I C 415 : 8 O W N 794, Mt. Amna Begam v. Sheo Prasad.
10. ('37) 24 AIR 1937 Oudh 349 : 168 IC 53 : 1937 O W N 391, Mt. Hashmat Begum v. Lala Mohan Lal.
11. ('38) 25 AIR 1938 Oudh 230 : 177 I C 611 : 1938 O W N 922, Mohammad Haider Kamzi v. Prince Safdar Jah Zahid Ali Mirza.

written statement nor did the Court care to ascertain from the defendants as to the exact scope of the aforesaid plea. Issue 7 does not specify what is the allegation of defendants 4 and 6 upon which the plaintiff is not entitled to maintain the suit.

There were no oral pleadings before the Court on the date of the issues, and as a matter of fact, no facts had been alleged by the defendants in para. 25 of the written statement upon which the plea of non-maintainability of the suit was based. If the parties neglected to perform their duty, it was clearly the duty of the Court to have called upon the defendants to furnish definite particulars of the plea contained in para. 25 of the written statement. It is to be regretted that the rules of pleadings contained in O. 6, Civil P. C., have not been complied with in this case and we cannot help observing that the practice of introducing obscure pleadings with a view to taking the adversary by surprise is open to grave objection and is not unoften likely to lead to grave miscarriage of justice. From the finding recorded by the learned Civil Judge on issue 7 it appears that the plea under S. 53, T. P. Act, was raised in course of the argument. The learned Civil Judge rightly points out that it was not specifically pleaded in the written statement and he was not prepared to allow it at the time of the arguments as it took the plaintiff unawares. The learned Judge does not realize that his failure of duty to clarify pleadings imposed upon him by law itself contributed to the unfortunate result. Apart from the fact that the defendants did not definitely raise the question that the suit was not properly framed as contemplated by S. 53, T. P. Act, the plaintiff cannot succeed in avoiding the transfers on the ground that they had been made with intent to defeat or delay the creditors of the transferor unless he succeeds in showing that the transfers, although genuine, were fraudulent within the meaning of the section. Here again we regret to note that we do not find any specific allegations in the plaint that the transfers impugned had been made with a view to defeat or delay the creditors.

Reference has been made on behalf of the plaintiff-respondent to paras. 5, 8, 13, 14 and 17 of the plaint. We do not find a single assertion in any of these paragraphs to the effect that the transfers were made with a view to defeat or delay the creditors of Karim Bakhsh. The words "fraudulently" and "in bad faith" have no doubt been used in para. 5 of the plaint but the particulars of the fraud are nowhere mentioned. No fraud against the creditors is pleaded anywhere in the plaint. Throughout the plaint the plaintiff has tried to emphasize that these documents were fictitious and paper transactions and were not genuine; in other words no title passed under these deeds. If the deed of gift is proved to be collusive and fictitious, it is clear that it never took effect and the subsequent sale deeds are of no legal effect. Karim Bakhsh retained the ownership of the property, and in that view of the matter the plaintiff's title to the property by virtue of the auction purchase must be held to be unassailable. If, however, the deed of gift is proved to be genuine and not fictitious, the validity of the subsequent deeds will not be affected and the plaintiff will be at once out of Court. It must also be clearly understood that the case set up by the plaintiff in the plaint as regards the fictitious character of the deed of gift and the other deeds is entirely different from the scope of a suit under S. 53, T. P. Act, where the plaintiff has to accept the genuineness of the deed as an initial fact and has to prove that the transfer, though genuine, was made with a view to defeat or delay the creditors of the transferor. This distinction was clearly emphasized by their Lordships of the Judicial Committee in 44 I A 72[12] where it was observed :

> First then, as to the alienation in favour of the plaintiff being, as it is termed in the respondent's case, collusive and fictitious. It is there alleged that "judgment-debtor, Chhatrapat Singh, was, and always remained, the real owner of the properties in dispute." Strictly this means that the transaction was benami and not that it was a fraudulent transfer within the meaning of S. 53, T. P. Act. The difference is distinct, though it is often slurred. To the suggestion that the transaction was benami a complete answer is furnished by the admission that the judgment-debtor owed the plaintiff the amount stated to be the consideration for the sale-deeds and more. And even if the case for the decree-holder be treated as raising the further plea of a fraudulent transfer, this same admission operates strongly in the plaintiff's favour.

The plaintiff in para. 17 of the plaint does not allege that the transfers are voidable at the instance of the creditors and they should, therefore, be set aside, and the property should be sold for satisfaction of his decretal debt. On the other hand, he asserts that these transfers are void, and consequently he should be declared to be the owner of the property. We have no doubt in our

12. ('16) 3 A I R 1916 P C 238 : 40 I C 242 : 44 Cal 662 : 44 I A 72 (P C), Mina Kumari Bibi v. Bijoy Singh Dudhoria.

mind that the plaintiff's suit as framed is not one under S. 53, T. P. Act. There is no indication in the plaint or elsewhere that the suit was filed on behalf of or for the benefit of other creditors. On the other hand, there is every indication in the averments of the plaint, to which we have already referred, that the plaintiff wanted to vindicate his personal and individual rights, and not the rights of other creditors. The plaintiff claimed title to the property on the ground of the auction purchase. If the plaintiff succeeds in his action and obtains a declaration of title in his favour, that declaration will not advance the cause of the creditors, as there will be no property available to them for the satisfaction of their claims. Form No. 13, Appendix D, of Sch. I, Civil P. C., is the form of the decree to be prepared in a case under S. 53, T. P. Act, to set aside a transfer in fraud of creditors. The form is as follows :

No. 13.

Decree to set aside a transfer in fraud of creditors.

(Title.)

It is hereby declared that the dated the day of 19 , and made between and is void as against the plaintiff and all the other creditors, if any, of the defendant.

Having regard to the reliefs claimed in the suit, it cannot be contended with any show of reason that the suit is one under S. 53, T. P. Act, and no decree has been sought by the plaintiff to the effect that the transfer is void as against him and all the other creditors, if any, of the defendant. It has been held that the primary object of an action under S. 53, T. P. Act, is to make the assets of the transferor available to the general body of creditors. If it would, then the action would in substance be an action under S. 53, T. P. Act, and would have to be instituted by, or on behalf of, all the creditors. If it would not, then the action cannot be regarded as an action under S. 53, T. P. Act. The proper test to apply when a question of this nature is raised is to see whether if the plaintiffs succeed in the action, the property claimed in the action would be available to the general body of creditors: *vide* A I R 1921 Pat 53[13] and 39 Bom 507.[14]

Applying this test to the present case, we are quite clear in our mind that the present suit is not one under S. 53, T. P. Act. Before the passing of the Transfer of Property (Amendment) Act (20 of 1929) there was a conflict of opinion between the Calcutta and the Bombay High Courts on the one hand and the Madras High Court on the other hand on the question whether a suit to set aside the transfer on the ground that it was made with the intent to defeat or delay the creditors should be brought on behalf of all the creditors or whether it is competent to any one of the creditors to institute such a suit. The Calcutta and the Bombay High Courts were of opinion that the suit should be a representative suit to be brought on behalf of all the creditors while the Madras High Court was of opinion that the suit could be instituted by a single creditor. The practice of the Calcutta and the Bombay High Courts was also in accordance with Form No. 13 of Appendix D of Sch. 1, Civil P. C. The Legislature gave statutory recognition to the view of the Calcutta and Bombay High Courts by enacting para. 4 of S. 53 (1), T. P. Act, which is as follows :

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

We have already held that the plaintiff's suit was not a representative suit intended for the general body of the creditors, but we do not desire to press into service this point against the plaintiff as the defendants themselves are to blame for not putting forward their objection to the maintainability of the suit on this ground definitely in their pleadings. Assuming the suit to be one under that section we are of opinion that it is not possible for us to grant any relief to the plaintiff under that section as it is wholly inconsistent and irreconcilable with the relief claimed by him in the suit.

Coming to the third point we find that defendants 4 and 6 asserted in para. 9 of their written statement that defendant 4 did not get actual possession for a portion of the mortgaged property in spite of getting a decree for recovery of mortgagee's possession. We also find from the evidence of Maryam Begam that she got possession over two shops after the gift in her favour. She says that defendant 4 was a mortgagee in possession before the date of the gift and that she obtained possession of a certain shop and a house occupied by the tenants

13. ('21) 8 A I R 1921 Pat 53 : 63 I C 788 : 6 Pat L J 48 : 2 P L T 217, Sri Thakurji v. Narsingh Narain Singh.

14. ('15) 2 A I R 1915 Bom 89 : 29 I C 497 : 39 Bom 507 : 17 Bom L R 522, Vasudeo Raghunath v. Janardhan Sadashiv.

who paid rent to her. We accept this evidence as true. Sultan Mohammad, as D. W. 1, has also stated that after the deed of gift Mt. Maryam Begam got possession over the shop occupied by Mohan, tenant, and that she was already in possession of the house. He further says that Mt. Maryam Begam could not obtain possession of the entire property gifted, as it had been mortgaged with possession to Faqir Bakhsh. The plaintiff obtained formal delivery of possession on 4th November 1932, after the auction purchase. There is no evidence that he obtained actual possession of the property. In these circumstances it was open to the plaintiff to ask for a further relief either of possession or redemption before he was entitled to a declaration under S. 42, Specific Relief Act. The proviso to that section clearly lays down.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

The learned Civil Judge admits that Faqir Bakhsh being the mortgagee of the property was in physical possession, but he holds that the plaintiff was in constructive possession and could therefore maintain the suit for declaration. There is absolutely no evidence on the record to show that the plaintiff was in possession through his agents or tenants paying rents to him. It is difficult to see in what way the plaintiff was in constructive possession. We do not agree with the finding of the learned Civil Judge on this point and hold that the plaintiff was not entitled to maintain the suit for a mere declaration. The decision in 1935 O W N 1071[15] referred to on behalf of the plaintiff-respondent has no application to the present case. There it was held that as it was impossible for the plaintiff to sue for possession without having the Privy Council decree set aside, and it was not open to the Court to set aside such a decree, no further relief need have been claimed.

The last point which has been urged before us on behalf of the defendants-appellants, is covered by issue 5 in the case, namely whether defendants 2 to 6 are bona fide purchasers for value. It has been contended that the transferees had no reason to consider the gift in favour of Mt. Maryam Begam otherwise than as genuine, that they paid value for the transfers as will appear from the recital of the considerations set out in the respective deeds in their names and that the fact that the plaintiff was taking proceedings in execution in pursuance of his decree did not affect the matter. Having regard to the findings at which we have arrived upon the principal points in the case, we do not consider it necessary to express any opinion on this point. For the foregoing reasons we allow the appeals, set aside the judgment and decree of the trial Court and dismiss the suit with costs throughout.

G.N./R.K. *Appeals allowed.*

15. ('36) 23 A I R 1936 Oudh 67: 158 I C 338 : 11 Luck 486 : 1935 O W N 1071, M. Fariduddin Ahmad v. Murtaza Ali Khan.

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(28) A. I. R. 1941 Oudh 466

AGARWAL J.

Mt. Kaniz Zahra Begam —
Claimant — Appellant
v.
Tej Narain and others —
Claimants — Respondents.

Misc. Appeal No. 130 of 1938, Decided on 1st May 1940, against order of Special Judge, 1st Grade, Hardoi, D/- 11th October 1938.

U. P. Encumbered Estates Act (25 of 1934), S. 14 (1) before amendment—Proceedings under —Provision of O. 1, R. 10 (2), Civil P. C. apply — Other claimants can be added as parties — Mere absence of express finding by Court that presence of such claimants is necessary for suit is no ground for interference in appeal.

The proceedings under the Encumbered Estates Act must be considered to be a suit and the Court has to make a list of all the creditors. In order to see that no bogus creditors come on the list it is necessary to make the other creditors parties. Hence even though under S. 14 (1), as it stood before its amendment, the Court had to give notice only to the claimant and the person who made the application, still it had power to add the other claimants as parties to a claim. [P 467 C 1, 2]

The provisions of O. 1, R. 10 (2), Civil P. C., are not inconsistent with the wording of S. 14 (1), U. P. Encumbered Estates Act, and hence apply to these proceedings, and the mere fact that the Court's order impleading the other claimants does not expressly say that their presence is necessary to enable it to effectually and completely adjudicate the claim, is not by itself a ground for interference in appeal : ('40) 27 A I R 1940 Oudh 435, *Rel. on*; 1939 O W N 1068, *Expl.* [P 467 C 2]

Akhlaq Husain and Abrar Husain —
for Appellant.

B. K. Dhaon — for Respondents 1, 2, 5, 6, 10, 13/1 and 13/2.

Judgment. — This is an appeal under S. 45, U. P. Encumbered Estates Act, against an order dated 11th October 1938, passed by the Special Judge. Saiyid Mohammad Baqar and others applied under S. 4, Encumbered Estates Act. Notices were issued under S. 9 of the Act, and the present appellant, wife of one of the applicants, put in her claim for dower.

The other creditors also put in their claims and the Special Judge ordered that the other claimants be added as opposite parties in the claim of the appellant. The appellant complains of this order. It is argued that the Special Judge had no jurisdiction to make the other claimants parties to the appellant's claim. Section 14, U. P. Encumbered Estates Act, as it was when the order complained of was passed, ran thus :

The Special Judge shall, by an order in writing, fix a date for inquiring into each claim made in pursuance of the notice published in accordance with S. 9 and give notice of such date to the claimant and the person who made the application under S. 4.

Sub-section (2) ran thus :

The Special Judge shall examine each claim and after hearing such parties as desire to be heard and considering the evidence if any produced by them shall determine the amount if any due from the landlord to the claimant on the date of the application under S. 4.

It is argued that under this section the Court was to give notice only to the claimant and the applicant and it did not provide that a notice of a claim be given to other claimants also. The section has since the order complained of been amended and now sub-s. (1) runs thus :

The Special Judge shall by an order in writing fix a date for inquiring into the claims made in pursuance of the notice published in accordance with S. 9 and give notice of such date to all the claimants and the person who made the application under S. 4.

It is argued that the amended section makes it obligatory on the Court to give notice to all the claimants and it follows that previous to the amendment the notice of each claim was to be given only to the person who made it and not to all the claimants. The Legislature may have thought it proper to enact that a notice of a claim should be given to all the claimants but it does not follow from it that a Court had no power to add the other claimants as parties to a claim. Now it has been made compulsory that notice be given to all the claimants of a particular claim but before that if the other claimants wanted to be made parties they had to apply for it.

The next point which I have to determine is whether the Special Judge had power to add the other claimants as parties to the claim of the present appellant. Some rules have been made under the U. P. Encumbered Estates Act and R. 6 makes the provisions of the Civil Procedure Code applicable to proceedings under the Encumbered Estates Act if they are not inconsistent with its provisions. The provisions of the Civil Procedure Code therefore apply unless they are inconsistent with any provision of the Encumbered Estates Act. Order 1, R. 10 (2), Civil P. C., provides that a Court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear by the Court to be just, order that the name of any party improperly joined whether as plaintiff or as defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or as defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon or settle all the questions involved in the suit be added. I think the provisions of this rule are not inconsistent with the wording of S. 14 (1), Encumbered Estates Act. It is true that the order of the lower Court is very brief and it does not say that it thought the presence of the other claimants necessary to enable it effectually and completely to adjudicate the claim of the appellant, but that by itself will not be a ground for interference in appeal.

Then it is argued that it was not necessary to decide the claim of the appellant to make the other claimants parties. Under sub-r. (2) of R. 10, the Court can make such persons parties whom it thinks necessary in order to enable it to settle all the questions involved in the suit. The proceedings under the Encumbered Estates Act must be considered to be a suit and the Court had to make a list of all the creditors. In order to see that no bogus creditors came on the list it was necessary to make the other creditors parties. In 1939 O W N 1068[1] it was held by this Court that any creditor under the Encumbered Estates Act could under the Act intervene to prevent collusion between one alleged creditor and the applicant but that this did not mean that a creditor and the applicant could not come to an agreement without first obtaining the consent of the other creditors. In that case the question was between the applicant and one of the creditors and it was held that the particular agreement alleged to have been made by the creditor with the applicant was binding on her. It was observed that the other creditors were not necessary parties to that agreement. Whether that agreement was binding on the other creditors or not was not decided. I think this ruling helps the respondent more than the appellant. In

1. ('39) 1939 O W N 1068, Girdhari Lal v. Mt. Ahmadunnissa.

1940 O A 691[2] certain persons had applied to be made co-applicants. That application was refused but it was held by this Court that those persons could be made parties to the proceedings. It follows from this ruling that a Special Judge can add parties to a proceeding. I think the Special Judge acted properly in this case in making the other claimants parties to the claim of the appellant and he had power to do it. The appeal is therefore dismissed with costs.

K.S./R.K. *Appeal dismissed.*

2. ('40) 27 A I R 1940 Oudh 435 : 190 I C 76 : 16 Luck 110 : 1940 O W N 716 : 1940 O A 691, Dwarka Nath Singh v. Mt. Rajrani.

(28) A. I. R. 1941 Oudh 468

BENNETT J.

Harun Rashid—Defendant—Appellant

v.

Mt. Kaniz Fatima, Plaintiff and others, Defendants — Respondents.

Second Appeal No. 53 of 1938, Decided on 17th March 1941, against order of Civil Judge, Gonda, D/- 10th December 1937.

(a) Second appeal—Question as to existence of custom — Finding based on rejection of evidence which should not have been rejected, can be questioned.

If the decision of the lower Court that a certain custom does not exist is based on the rejection of evidence which should not have been rejected, the decision can be questioned in second appeal: *Case law referred.* [P 472 C 1]

(b) Custom—Wajib-ul-arz — Similar entries regarding certain custom but conflicting statements in regard to other customs — Wajib-ul-arz should not be rejected on question of former custom.

The Courts are not justified in rejecting the evidence of the wajib-ul-arz on the question of a certain custom, e. g., inheritance, merely because there are some apparently conflicting statements in regard to other customs like adoption : ('41) 28 A I R 1941 Oudh 198, *Rel. on.* [P 469 C 2; P 472 C 1]

H. Husain and H. H. Zaidi—for Appellant.

Siraj Husain for Mohammad Ayub —

for Respondent 1.

Judgment. — This second appeal arises out of a suit brought by one Mt. Kaniz Fatima to obtain a share in the property of her father, Suleman Khan, according to Mahomedan law. The suit was brought against her cousin Harun Rashid Khan, and the plaintiff's mother and two sisters were also made defendants. The defence was that daughters were excluded from inheritance by a family custom. This defence was not accepted either by the learned Munsif who tried the suit or by the learned civil Judge of Gonda who dismissed the first appeal preferred by Harun Rashid Khan. The latter is the sole appellant also in this second appeal. The relationship between the parties is shown in the following short pedigree :

ABDUR RAZAK KHAN

- Saltanat Bahadur Khan
  - Harun Rashid Khan (deft. 1)
- Sulaiman Khan = Mt. Zainab Bibi (deft. 2)
  - Mt. Saira (deft. 4)
  - Mt. Kudratunnisa (deft. 3)
  - Mt. Kaniz Fatima (Plaintiff).

The principal questions for consideration were whether the custom set up by Harun Rashid Khan excluding daughters from inheritance was proved and whether the suit was within limitation. Suleman Khan died in 1921 and in January 1922 mutation in respect of his property was effected by a compromise between his widow Mt. Zainab Bibi and her brother-in-law, Saltanant Bahadur Khan. The deed of compromise, Ex. A-6, has been proved. It shows that Mt. Zainab Bibi was allowed to remain in possession of her husband's share in three out of four villages during her lifetime on the basis of custom, Saltanat Bahadur obtaining possession of the fourth village, Khaprail. It was argued that Saltanat Bahadur Khan should become absolute owner of the share in the other three villages also on the death of the widow. It was further stated that no heir of Mr. Zainab Bibi nor any member of her family should have any interest in the property. The defence of the defendant Harun Rashid Khan was based on the wajib-ul-arz of three out of the four villages. They are Paihar (Ex. A-1), of Jafarabad (Ex. 8) and Khaprail (Ex. 3). The wajib-ul-arz of the fourth village, Mohammad Nagargrant alias Bhalwar, has not been produced but the wajib-ul-arz (Ex. 11) of another village, Budhia Bakri, has been produced, apparently because it was dictated by the same ancestors of the parties. Presumably though this is not clearly shown, this other village was at one time in the family.

Both the Courts below held that the evidence of these wajib-ul-araiz was not sufficient to establish the custom. They both held on the point of limitation that the suit was not barred, because under Mahomedan law, which in their view applied, Mt. Kaniz Fatima was a cosharer with the defendants, and there was therefore no question of the possession of the latter being adverse to her.

The learned Civil Judge conceded that the wajib-ul-arz of Pihar (Ex. A-1) recorded the exclusion of daughters from inheritance, and he also conceded that the wajib-ul-arz of two of the other three villages, Jafarabad and Budhia Bakri (Exs. 8 and 11), excluded daughters by implication without expressly referring to them. But he agreed with the Munsif that these wajib-ul-araiz could not be relied upon as a correct record of custom. He might also have said that the wajib-ul-arz of Khaprail (Ex. 3) also indirectly supports the exclusion of daughters, since it only makes provision for inheritance by male issue. The Civil Judge considered that there were glaring contradictions in the wajib-ul-araiz. There was first of all discrepancy in the wajib-ul-arz of Pihar (Ex. A-1) in regard to the share owned by a man named Bhaggan Singh (with whom the case is in no way concerned), and the entries in the wajib-ul-arz relating to Bhaggan Singh are not in accord with a khewat (Ex. A-3). These discrepancies have not been explained by counsel, and there is no material on the record by which they might be explained : but the question whether they could be reconciled was never gone into because it was of no direct relevance in the case. I think that had the question been examined it is quite possible that these discrepancies might have been cleared up. The Civil Judge then referred to two other matters dealt within the wajib-ul-araiz, which, he thought, indicated that the latter were not to be relied upon. He remarked as follows :

> I. Position of issueless widow. Exhibit A-1 says that if she is one of two widows she would hold half of the estate for life. But Exs. 3 and 11 say that she would hold the entire estate. And Ex. 8 allowed her maintenance only.
>
> II. Adoption. Exhibit A-1 allows it : and Exs. 8 and 11 disallow it : and Ex. 3 is silent.

A close examination of these wajib-ul-araiz discloses that the contradictions in respect of the issueless widow are not very serious. Exhibit A-1, the wajib-ul-arz of Pihar, shows that on the death of a cosharer who has different issues by two wives or more his share shall be divided according the number of wives : if one wife has got issue while the other is issueless, then the latter shall enjoy half the share without power of transfer during her lifetime : if there is only one wife and she is issueless she shall enjoy the entire share for her lifetime and after her death the nearest relations of her husband shall obtain the property. Daughters and daughters' sons are excluded from inheritance. The wajib-ul-arz of Khaprail (Ex. 3) shows that on the death of a cosharer his male issue inherits the property : if the cosharer left two wives, one of whom has only one son and the other has more than one, the property shall be divided according to stribhag system, that is per stirpes. If one of the wives has got issue and the other is issueless then the issueless wife shall remain in possession of her husband's share without power of transfer during her lifetime, and on her death that share shall devolve on the wife who has issue.

Exhibit 11, the wajib-ul-arz of Budhia Bakri, also shows that only males can inherit and that on the death of a cosharer who leaves more than one wife the property is divided according to their number, the male issue of each wife inheriting per stirpes. If some of the widows have issue and others are issueless the issueless wife shall continue to hold possession of her share during her lifetime and after her death her share shall be divided among the remaining issues of other widows per stirpes. Exhibit 8, the wajib-ul-arz of Jafarabad, makes similar provisions, except that it refers to the portion of the issueless wife as a guzara (according to her status) and not as a share. But she is to get such guzara only where there is an another wife who has issue. If a cosharer dies issueless it is provided that his widow shall continue to hold possession of her husband's share during her lifetime without power of transfer.

As regards adoption Ex. A-1 says that a widow cannot make any adoption, but any cosharer who has no issue and who wants to adopt a son can adopt from among the minor collaterals up to the age of 12 years. Exhibit 8 says that the custom of adopting a son is not prevalent among the birtdars, and Ex. 11 says that there is no custom of adoption in the family. Exhibit 3 does not refer to adoption. It is true, therefore, that there is some conflict between the various wajib-ul-araiz on the point of adoption. But whatever the explanation may be, I doubt whether it justifies the conclusion of the Courts below that these records of custom are unreliable as a whole, and that therefore they cannot be regarded as establishing the custom which was set up by the defendants, although with regard to that custom they are in accord. I have been referred to various authorities on both sides on the point whether a wajib-ul-arz should be rejected as unreliable as a whole because it is found to be unreliable in some respect or

respects, and also on the question whether a Court in second appeal would be justified in reversing the concurrent finding of the Courts below on the question of the existence of a custom, in which connexion it has to be considered whether that finding is a pure finding of fact or a finding of mixed fact and law. On the first point I was referred by the learned counsel for the appellant firstly to certain notes and comments in 3 O W N 77 (at page 84) where it is said:

> It is to be seen in the first place that one of the stock arguments based on certain discrepancies in the various wajib-ul-araiz on matters irrelevant to the enquiry which used to be advanced by the older class of lawyers does not appear to remain open now in view of the recent pronouncement of their Lordships of the Privy Council in 50 I A 179 =26 O C 228[1] by which their Lordships reversed the decision of the late Court of the Judicial Commissioner reported in 6 O L J 637.

The reference should have been to 6 O L J 337. The case is that of *Balmakund* (dead and on his death *Jugal Kishore*) v. *Bishwa Nath Singh*.[2] The case related to adoption and it was held by the learned Judicial Commissioners that where a wajib-ul-arz simply states that a Hindu widow has power to adopt and states nothing about any authority of her husband, it must be construed to mean that it gives the widow the ordinary power of adoption. They said (at page 345):

> The learned Subordinate Judge has also stated that the divergence in these wajib-ul-araiz on many other questions of family custom will not affect their validity as records of the peculiar custom of adoption set up. We are unable to agree with this finding. If the wajib-ul-arzes are not consistent they cannot be relied on as correctly stating the custom of the family.

And they went on to show that the variation in that particular case was very great. In appeal by Bishwa Nath Singh their Lordships of the Privy Council held that where in some wajib-ul-araiz it was stated that widows could adopt without any authority from their husband and in other wajib-ul-araiz it was simply stated that widows could adopt, the statements meant the same thing, that is, that they could adopt, although they had no authority from their husbands. Their Lordships did not expressly refer to the view of the learned Judicial Commissioners that the wajib-ul-araiz were unreliable because there was much divergence in them on other points of family custom, but it is clear that it did not appeal to them. It may be said that they impliedly rejected it since notwithstanding the variations on other points they accepted what they held to be an unambiguous statement on the point of adoption. It is also clear that their Lordships of the Privy Council considered a single unambiguous statement in one wajib-ul-arz sufficient to prove a custom. In another case of the late Judicial Commissioner's Court, 50 I A 196,[3] the question under consideration was the same as in the present case, whether a daughter and her issue were excluded from inheritance. There was an entry in a single wajib-ul-arz: "*Dukhtar ko waristan hissa nahin milta*" The learned Judicial Commissioners said:

> The question is whether on the strength of this single entry in the wajib-ul-arz it can be held that the alleged custom is proved . . . Though there is nothing illegal in holding a family custom to be proved by a mere entry in the wajib-ul-arz yet we think that before accepting such an entry as sufficient proof of the alleged custom the Court should be satisfied that the entry is free from ambiguity and that it is in reality a record of a custom and not merely of the wishes of the proprietors at the time when the wajib-ul-arz was prepared. In the present case we are of opinion that the entry is in itself not altogether free from ambiguity. Coming as it does immediately after the statement that on the death of a proprietor his sons become owners of his property in equal shares, the entry with regard to daughters might be construed as meaning that in the presence of sons daughters do not get any share in the inheritance.

And the learned Judicial Commissioners went on to show from other sentences in the wajib-ul-arz that this might in their opinion be the meaning. There was an appeal to the Privy Council and their Lordships allowing the appeal observed as follows:

> The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the wajib-ul-arz of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion that para 4 of the wajib-ul-arz of Binduli was ambiguous and owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a wajib-ul-arz.
>
> In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is in their Lordships' opinion that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not.

The question whether wajib-ul-araiz should be rejected as unreliable on one point of custom because they are discrepant on

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1. ('23) 10 AIR 1923 P C 90 : 73 I C 244 : 26 O C 228 : 50 I A 179 (PC), Biswanath Singh v. Jugal Kishore.
2. ('19) 6 AIR 1919 Oudh 386 : 52 I C 851 : 6 O L J 337.
3. ('23) 10 AIR 1923 P C 70 : 74 I C 449 : 26 O C 217 : 45 All 413 : 50 I A 196 (P C), Balgobind v. Badri Prasad.

other points of custom was recently considered by this Court in 192 I C 420.[4] The case was not, however, referred to by counsel in the present appeal. The following passages from the judgment of Yorke J. are relevant.

> The two wajib-ul-araiz on the record . . . are certainly curious documents . . . it is certainly remarkable that in one village the family should record a custom that a widow will get nothing more than maintenance, while in another village the same family records a custom that the widow will have a life estate over half of her husband's property. Similarly, it is remarkable that in one village the cosharer is given a non-Mahomedan right of adoption, while in the other nothing is said about the existence of such a right.
>
> On the other hand it seems to me to be quite unsound to suggest as an explanation of such differences that the differences have arisen because the wajib-ul-araiz represent only the wishes of the cosharers. The cosharers were in both cases the members of the same family and one should expect that they would dictate the wajib-ul-arz of each village in the same terms, even if they were only seeking to make a statement of their wishes in the matter of inheritance. It seems to me therefore that it is not sound reasoning to say that these discrepancies lead to the conclusion that these documents represent rather the wishes of the parties who had them recorded than a declaration of an old established and binding custom. It appears to me rather that the differences are the result of the different mentalities of the officers who were making enquiries, or more probably of the clerks of those officers who were, under the direction of the Settlement Officers, recording the result of the enquiries. It seems to me to follow that where as in both these documents we find it recorded in clear terms in the one case that a daughter who has got a real brother will be excluded from inheritance, and in the other case that in case there is no male issue the daughter will be entitled to a share, we have a clear record of custom that daughters are excluded by sons.

In the present case the wajib-ul-araiz, considered together, furnish clear and definite evidence in my opinion of the intention to exclude daughters from inheritance altogether and I see no reason to reject this evidence. I entirely agree, if I may say so, with the view of Yorke J. that the differences in the record of these customs must be attributed to the idiosyncracies of the recording officials. It was contended for the respondents that this Court would not be justified in interfering in second appeal with a concurrent finding of fact in the two Courts below. In 1940 O W N 1136[5] it was no doubt said by the Allahabad High Court that the question whether the custom exists or not is one of fact and in support of this statement reference was made to the following Privy Council cases: 53 Mad 597[6] and 32 ALL 363[7] and *Muhammad Kamil* v. *Mt. Imtiaz Fatima*, 31 ALL 457. The last case is to be found in 31 ALL 557.[8] The case at 31 ALL 457 is that of *Parbati Kunwar* v. *Chandarpal Kunwar*.[9] It was said in 31 ALL 557[8] that the existence of a custom excluding female heirs was a question of fact. As the Courts in India had concurred on this question their Lordships saw no reason why they should not follow their usual practice of accepting concurrent findings of fact. In 26 O C 386[10] it was held by the Judicial Commissioner of Oudh that a question of custom is one of mixed fact and law. The point whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law, and in second appeal an enquiry must be made whether all the attributes of a local custom have been established or not by evidence which is accepted by the lower Courts. In 44 I A 147[11] at p. 158 it was said by their Lordships of the Judicial Committee:

> Questions of the existence of an ancient custom are generally questions of mixed law and fact, the Judge first finding what were the things actually done in alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of the law. This latter is a question of law—not fact.

In 2 O W N 838[12] it was held by the Court of the Judicial Commissioner that the question whether in any given instance the evidence led to prove the existence of the attributes essential for a valid custom is adequate or inadequate proof of what the law requires is a question of law which can be discussed in second appeal. In 1939 O W N 372[13] reference was made to 44 I A 147[11] and it was added:

> What has to be seen is not merely whether the decision arrived at by a Court is one of fact but

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4. ('41) 28 AIR 1941 Oudh 198: 192 I C 420: 1940 O W N 1352, Mohammad Jafar v. Lal Bahadur.
5. ('40) 27 AIR 1940 All 535 : 192 I C 570 : I L R (1940) All 726 : 1940 O W N 1136 : 1940 A L J 650, Narain Singh v. Net Ram.
6. ('30) 17 AIR 1930 P C 234 : 126 I C 84 : 57 I A 264 : 53 Mad 597 (P C), Raja of Ramnad v. Mangalam.
7. ('10) 32 All 363 : 6 I C 787 : 37 I A 191 : 13 O C 163 : 7 A L J 704 (P C), Anant Singh v. Durga Singh.
8. ('09) 31 All 557 : 4 I C 457 : 36 I A 211 : 13 O C 183 (P C), Muhammad Kamil v. Mt. Imtiaz Fatima.
9. ('09) 31 All 457 : 4 I C 25 : 12 O C 304 : 6 A L J 767 (P C).
10. ('24) 11 AIR 1924 Oudh 157 : 76 I C 774 : 26 O C 386, Manna Lal v. Jai Indar Bahadur Singh.
11. ('17) 4 AIR 1917 P C 33 : 39 I C 722 : 40 Mad 709 : 44 I A 147 (PC), Palaniappa Chetty v. Deivasikamony Pandara Sannadhi.
12. ('26) 13 AIR 1926 Oudh 53 : 90 I C 525 : 2 O W N 838, Raza Husain Khan v. Subhani.
13. ('39) 26 AIR 1939 Oudh 210 : 181 I C 70 : 14 Luck 515 : 1939 O W N 372, Ram Din v. Balbhaddar Singh.

whether in arriving at that decision the Court has committed an error in law or not : for instance if the decision of a Court that a certain custom existed was based on the acceptance of evidence which was inadmissible there can be no doubt that that decision could be questioned in second appeal.

Conversely it may be said that if the decision of the lower Court that a certain custom did not exist was based on the rejection of evidence which should not have been rejected, the decision can be questioned in second appeal. That is the position in the present case, for, in my opinion, the Courts below were not justified in rejecting the evidence of the wajib-ul-araiz on the question of inheritance merely because there are some apparently conflicting statements in regard to other customs. The question of the value to be attached to the record of a custom in a wajib-ul-arz is no longer in dispute. As mentioned above their Lordships of the Privy Council accepted as sufficient proof the unambiguous statement in a wajib-ul-arz as to the custom of inheritance in 50 I A 196.[3] In 2 O W N 357[14] it was held by the Court of the Judicial Commissioner of Oudh that where the language of an entry of a custom in a wajib-ul-arz is perfectly unambiguous and definite and there is no suggestion that in making the entry the settlement officer was guilty of any dereliction in the discharge of his official duties, the entry proves the custom.

I am of opinion therefore that the evidence of these wajib-ul-araiz clearly indicates that a daughter is excluded from inheritance and that this is a question which can be gone into in second appeal where the Courts below have drawn an inference from the wajib-ul-araiz which cannot be upheld. It is unnecessary on this view to discuss the question of limitation. While on the case brought by the plaintiff, Mt. Kaniz Fatima, that she was a cosharer in the property, the suit was not time-barred, it may be said that on the finding that she was not a cosharer it was time-barred. It can also be said that if the compromise was valid in so far as it conferred on her mother a life interest in three villages the suit was premature so far as those villages were concerned, though not premature as regards the fourth village. I accordingly allow this appeal, set aside the decrees awarded by the lower Courts and dismiss the plaintiff's suit. I allow the appellant his costs in all Courts.

K.S./R.K. *Appeal allowed.*

14. ('25) 12 AIR 1925 Oudh 377 : 89 I C 51 : 2 O W N 357, Abdul Wahab v. Tahira Bano.

(28) A. I. R. 1941 Oudh 472

GHULAM HASAN J.

Emperor through Municipal Board, Khairabad — Complainant — Applicant.

v.

Abdul Razzaq — Opposite Party.

Criminal Ref. No. 8 of 1941, Decided on 21st April 1941, made by Dist. Magistrate, Sitapur.

U. P. Municipalities Act (2 of 1916), S. 314— Words "some person authorized by the Board" in S. 314 do not necessarily mean that person authorized should be mentioned by name — They are comprehensive enough to include power to delegate authority on officer of Municipal Board by virtue of his office and not merely by name—Municipal Board by resolution conferring power of prosecution on Secretary sahib—Successor of Secretary held on true construction of resolution competent to act under that resolution.

The words "some person authorized by the Board" in S. 314 do not necessarily mean that the person authorized must be mentioned by name. Those words are comprehensive enough to include the power to delegate authority to an officer of the Municipal Board by virtue of his office as well and not necessarily by name only : ('29) 16 A I R 1929 All 901, *Rel. on* ; ('16) 3 A I R 1916 Lah 358, *Disting.* [P 473 C 1]

In 1917 the Municipal Board passed a resolution which conferred the power of prosecution on the secretary. The resolution in two places mentioned that the power of prosecution was conferred on the Secretary sahib. Upon the strength of these words it was argued that the person who was authorized to initiate prosecutions was Mr. Daulat Singh, who was the Secretary in 1917 and consequently the aforesaid resolution did not empower his successor to act on the strength of that resolution :

Held that on a true construction of the resolution the successor of the secretary was fully empowered to act upon the strength of the resolution of 1917. [P 473 C 2]

Akhtar Husain — for Applicant.

J. N. Tandon — for Opposite Party.

Order.—This is a criminal reference by the District Magistrate of Sitapur arising out of the following circumstances : One Abdul Razzaq was prosecuted under S. 178/185, U. P. Municipalities Act, upon the complaint of the Secretary of the Municipal Board of Khairabad. The case came up for hearing before the Bench Magistrates of Khairabad, who by a majority dismissed the complaint on the ground that the secretary was not authorized to institute the complaint against the accused. The Municipal Board of Khairabad went up in revision before the District Magistrate of Sitapur who has referred this case to this Court with the recommendation that the order passed by the Bench Magistrates dismissing the complaint and acquitting the accused

be set aside, and the case be tried on the merits. The learned counsel on behalf of the accused who opposes the reference, argues that in the first instance the Municipal Board of Khairabad had no power to delegate the authority to prosecute any person except by name. In the second place it has been argued that in any case the resolution passed by the Municipal Board of Khairabad in 1917 authorized the then secretary, Mr. Daulat Singh, to institute prosecutions, and it was not open to his successor without being expressly empowered by name in that behalf to institute the present prosecution against the accused. In my opinion these contentions have no substance. Section 314, U. P. Municipalities Act, runs thus :

> Unless otherwise expressly provided, no Court shall take cognizance of any of the offences punishable under this Act (whereof a list is given in Sch. 8 for the purpose merely of easier reference) or under any rule or bye-law, except on the complaint of, or upon information received from, the Board or some person authorized by the Board by general or special order in this behalf.

The words 'some person authorized by the Board' do not necessarily mean that the person authorized must be mentioned by name. It seems to me that these words are comprehensive enough to include within its purview the power to delegate authority to an officer of the Municipal Board by virtue of his office as well and not necessarily by name only. In a case of the Allahabad High Court reported in 120 I C 207[1] where the Municipal Board had passed a resolution empowering the police to prosecute for certain offences under the Municipalities Act, and the complaint was instituted by a Sub-Inspector of Police under the orders of the Superintendent of Police, it was held that the delegation of power as contemplated under S. 314, U. P. Municipalities Act, was perfectly valid and the complaint was properly instituted. Reliance has been placed on behalf of the accused on a case reported in 34 I C 311,[2] where it was held upon an interpretation of S. 228, Punjab Municipal Act, that the complaint was not made by a person duly authorized in accordance with the terms of S. 228, Municipal Act. Though S. 228, Punjab Municipal Act, is substantially the same as S. 314, U. P. Municipalities Act, yet there is an important distinction between the two sections inasmuch as the explanation to S. 228, Punjab Municipal Act, does not find a place in S. 314, U. P. Municipalities Act. That explanation clearly lays down that the committee may authorize persons to make complaints or give information, and that the person authorized may be authorized by office, if he is president, vice-president or secretary of the committee, and in any other case the authority must be by name. Under a resolution passed by the Municipal Board it appears that the authority to institute complaints was conferred upon the Darogha safai, whereas according to the explanation it should really have been conferred upon the particular individual who held the office at that time. In these circumstances it was held that the terms of S. 228 being imperative, the complaint was not made by a person duly authorized in accordance with the terms of that section. That case has, therefore, no application to the present case.

As regards the resolution itself it appears that in the column relating to the synopsis of contents the following sentence appears: "In the matter of conferring powers of the executive officer on the secretary." The resolution however in two places mentions that the power of prosecution was conferred on the secretary sahib. Upon the strength of these words, it is argued that the person who was authorized to initiate prosecutions was Mr. Daulat Singh, who was the secretary in 1917, and consequently the aforesaid resolution does not empower his successor, the present secretary, to act on the strength of that resolution. It seems to me that the construction put upon the resolution is unduly restricted and is not justified either by the language of the resolution read in conjunction with the synopsis of contents referred to above, or by the intention of the framers of the resolution. I am satisfied that the present secretary was fully empowered to act upon the strength of the resolution referred to above, and the Bench Magistrates were clearly wrong in not taking cognizance of the complaint.

The reference is accepted. The order of acquittal passed by the Bench Magistrates is, therefore, set aside and the case is returned to the learned District Magistrate with the direction that he shall transfer it for disposal to a stipendiary Magistrate.

G.N./R.K. *Reference accepted.*

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1. ('29) 16 A I R 1929 All 901 : 120 I C 207 : 31 Cr L J 13 : 1930 A L J 202, Mohammad Yusuf v. Emperor.
2. ('16) 3 AIR 1916 Lah 358 : 34 I C 311 : 8 P R 1916 : 17 Cr L J 199, Emperor v. Dharma Shah.

(28) A. I. R. 1941 Oudh 474

BENNETT AND GHULAM HASAN JJ.

Mt. Hajira Khatoon — Defendant — Appellant

v.

Saiyad Mustafa Husain — Applicant — Respondent.

Misc. Appeal No. 20 of 1939, Decided on 28th April 1941, against order of the District Judge, Hardoi, D/- 17th January 1939.

Succession Act (1925), S. 278 — No estate in need of administration — Question raised by parties involving question of title to estate — Proper course is regular suit and not application for letters of administration.

Where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate have to be collected, and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. The proper course is to obtain an adjudication of the rights in a regular suit properly framed for the purpose: 17 I C 155 (Cal) and 64 I C 61 (Cal), *Rel. on*; ('20) 7 A I R 1920 Pat 197, *Disting.* [P 475 C 2; P 476 C 1]

Akhlaque Husain — for Appellant.
R. I. Wahid — for Respondent.

Judgment. — This is a miscellaneous appeal arising out of an order passed by the District Judge of Hardoi, dated 17th January 1939, granting letters of administration to the respondent. The facts which give rise to this appeal lie within a narrow compass. A short pedigree no longer in dispute between the parties may be set out below :

SAADAT ALI

Munnawar Ali	Karamat Ali
Arif Ali	Hashmat Ali
Muhammad Ali (deceased)	Mt. Hajira Khatoon (minor)
Mehdi Hasan	Mustafa Husain (petitioner)
M. Baqar.	Mt. Maqbulan
	Murtaza Ali

Arif Ali died some time in 1930 and was succeeded upon his death by his son Muhammad Ali and his daughter Mt. Hajra Khatoon. Both Muhammad Ali and Mt. Hajra Khatoon were minors. Syed Ishtiaq Ali, a pleader of Hardoi, was appointed as guardian of the two minors by the District Judge of Hardoi. It is not disputed that Muhammad Ali inherited two-thirds and Mt. Hajra Khatoon inherited one-third in the property of their father, Arif Ali. Muhammad Ali died on 24th May 1936. The respondent applied on 8th January 1938, under S. 278, Succession Act, for the grant of letters of administration with respect to the property left by Muhammad Ali. Mt. Hajra Khatoon, who was made a party to this application, filed a caveat through her guardian, Syed Ishtiaq Ali, pleader, and contested the petitioner's rights to the letters of administration. She alleged that she was the sole heir of Muhammad Ali, deceased, and the petitioner had no right to his property. She further alleged that the petitioner had lost all his rights due to his conversion to Christianity. She claimed exclusive right to the property of Muhammad Ali on the ground that both Muhammad Ali and Arif Ali were Shias, while the petitioner contended that they were Sunnis. There was some reference in the oral pleadings that according to the custom of the village and wajib-ul-arz the entire property of Arif Ali had devolved upon Muhammad Ali. The particulars of the custom were not given. The learned District Judge of Hardoi framed six issues in the case. Two of these related to the question whether Arif Ali was a Sunni or a Shia and whether Muhammad Ali was a Sunni or a Shia. The third related to the question whether the petitioner was an heir of Muhammad Ali under the Mahomedan law applicable to the parties and issue 4 related to the question whether the petitioner's conversion to Christianity deprived him of his right under the Mahomedan law. There was also another issue to the effect whether the letters of administration should be granted to the petitioner assuming that he was an heir and there was no particular property to administer. There was also another issue, namely, whether in view of the intricate questions of personal law involved in the case, the Court should not refer the parties to a civil Court. The two latter issues were treated as preliminary issues and were decided in favour of the petitioner.

The learned District Judge held that both Arif Ali and Muhammad Ali were Sunnis, and that consequently the petitioner was an heir of Muhammad Ali, deceased. He also held that the petitioner's conversion to Christianity did not deprive him of the rights under the Mahomedan law. In the result he ordered letters of administration to be issued to the petitioner with respect to the estate of Muhammad Ali, deceased. Mt. Hajra Khatoon has preferred this appeal against the order of the learned District

Judge. It has been contended on behalf of the appellant that the order of the learned District Judge is wrong inasmuch as there is no estate in the present case which needs to be administered. It appears that the respondent left his residence in Sandila many years ago and returned shortly before the present controversy arose. He failed in his attempt to obtain orders for the appointment of guardianship in his favour by the removal of the present guardian, Syed Ishtiaq Ali. He carried the matter up to the Chief Court but was unsuccessful. Then he made another attempt to get orders of mutation from the revenue Court, but that attempt also failed. It is urged that the respondent made the present application for letters of administration nearly nineteen months after the death of Muhammad Ali.

A reference to the list of the properties left by Muhammad Ali filed by the guardian shows that Muhammad Ali owned a two-thirds share out of 11 pies share in village Ghoghera, pargana and tahsil Sandila and a two-thirds share in the mortgagee interest of 12 biswansis 10 kachwansis in patti Bakhtawar Singh, village Damgarah, pargana and tahsil Sandila. He also held a fractional share in a grove in Shahabad. He had also a two-thirds share in a residential house at Sandila and houses at Shahabad and Ghoghera. As regards the debts due to Muhammad Ali he had a two-thirds share in a final decree for sale for about Rs. 2100, dated 9th November 1933, a two-thirds share in another sale decree for about Rupees 300 dated 9th December 1933, a two-thirds share in another sale decree, dated 21st January 1933 against Bakhtawar Singh and a two-thirds share in a simple money decree for Rupees 111 against one Darshan Singh, and lastly a debt for Rs. 25 was due to him from one Mujtaba Ali. He also had some cash in a Bank and some Post Office Cash Certificates and some money in the Savings Bank Accounts in banks and in Post Offices. There is no evidence that Muhammad Ali owed any debt to any creditor.

It has been pressed upon us that after the death of Muhammad Ali the debts could not be realized and the property cannot be administered without the letters of administration as the guardian cannot execute the decree in respect of the property of Muhammad Ali, whose guardianship terminated with his death. This matter was considered by a learned single Judge of this Court in an application under O. 41, R. 5, Civil P. C., by the appellant praying for the stay of execution of the order granting letters of administration, and a similar argument was advanced on behalf of the respondent. The learned Judge observed that the decrees stood in the names of both the brother and the sister and that under O. 21, R. 15, Civil P. C., Mt. Hajra Khatoon was entitled to apply for the execution of any decree to its entire extent for the benefit of herself as well as the legal representative of the deceased joint decree-holder unless the decree imposed any condition to the contrary. He also observed that the respondent was placed in a similar position and was entitled to execute the whole decree only under the provisions of O. 21, Rule 15, Civil P. C., by virtue of letters of administration. We are in entire agreement with this view. We do not think that there is any difficulty in the execution of those decrees without the grant of letters of administration. The only debt which is to be realised is a debt of Rs. 25 and it appears to be a parole debt. We do not think there is any justification for the administration of the estate. On the other hand, having regard to the circumstances of the case, we are of opinion that this is eminently a fit case in which the parties should be directed to go to a civil Court for the adjudication of their respective titles. The question raised by the parties involves the trial of a serious question which can be more satisfactorily thrashed out by means of a regular suit. Having regard to the conduct of the respondent in taking no action in the matter since after the death of Muhammad Ali and delaying the filing of the application for letters of administration for nearly 19 months, and the further fact that prior to the filing of this application the respondent had been fighting unsuccessfully to obtain an order of guardianship in his favour and an order for mutation from the revenue Court, we are by no means certain that the respondent is not really trying to obtain a summary decision on the question of title and avoiding recourse to a civil Court.

We agree with the view taken by the Calcutta High Court in 17 I C 155[1] and 64 I C 61[2] to the effect that where there is no estate which stands in need of administration, no suggestion that any creditors have to be paid or any debts due to the estate

1. ('12) 17 I C 155 : 17 C L J 66, Prosonno Kumari Devi v. Ram Chandra Singha.
2. ('21) 64 I C 61 (Cal), Lakshmi Sundari v. Nityananda Dhupi.

have to be collected, and an application for letters of administration is a transparent device to secure from the Probate Court a decision upon a contested question of title to the estate, there is no occasion for the grant of letters of administration. We hold that the remedy sought by the respondent was misconceived, and that the proper course was to obtain an adjudication of his rights in a regular suit properly framed for the purpose.

Reliance has been placed by the learned counsel on behalf of the respondent on a decision of the Patna High Court in 57 I C 583.[3] That case, however, has no bearing upon the present case. All that was held in that case was that letters of administration cannot be granted to a minor and that they may be granted to his legal guardian, provided that the minor is the sole residuary legatee, or a person who would be entitled to the estate of the intestate. In considering the question whether the District Judge was right in granting letters of administration to the manager of the Court of Wards, it was observed in that case that although the manager had large powers of management over the estate of the proprietor, there was nothing in the Act that entitled him as such manager and by virtue of his office to apply for letters of administration to the estate of the deceased in which the disqualified proprietor might have a large interest. In the present case no such question arises, as the guardian has not filed a counter petition for letters of administration being granted to him. We allow the appeal with costs and set aside the order of the learned District Judge granting letters of administration to the respondent. The appellant will get her costs in this Court and in the Court below.

K.S./R.K. *Appeal allowed.*

3. ('20) 7 A I R 1920 Pat 197: 57 I C 583 : 5 Pat L J 347: 1 P L T 304, Bhagwati Kuer v. Baburia Ramsakhi Kuer.

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(28) A. I. R. 1941 Oudh 476

GHULAM HASAN J.

Bishambhar Nath and another
Applicants
v.
Emperor.

Criminal Revns. Nos. 40, 41 and 42 of 1941, Decided on 23rd April 1941, for revision of order of Addl. Sess. Judge, Hardoi, D/- 5th March 1941.

(a) Penal Code (1860), Ss. 390 and 394—Words "for that end" in S. 390 — Meaning explained— Assault or hurt need not be caused in same transaction or in same circumstances—Accused first belabouring complainant and subsequently committing theft of his cash — Injury caused to complainant only when assault was made with the primary object of enabling accused to commit theft — Assault having no relation to commission of theft though theft committed at same time or immediately afterwards—Accused held not guilty under S. 394.

The words "for that end" in S. 390 clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances : ('18) 5 A I R 1918 Mad 821 and ('33) 20 A I R 1933 Lah 407, *Rel. on.* [P 478 C 1]

The accused persons first belaboured the complainant and his servant and subsequently committed the theft of his cash. Whatever injury was caused to the complainant and his servant it was caused when the assault was made upon them with the primary object of enabling the accused to the committing of the theft. The assault or the beating had no relation whatever to the commission of the theft, although the theft was committed at the same time or immediately afterwards :

Held that the accused were not guilty under Section 394. [P 478 C 2]

(b) Criminal P. C. (1898), S. 439 — Evidence of certain witnesses accepted by lower Courts— Applicant in revision cannot urge that evidence of other witnesses should be given greater weight.

Where the evidence of certain witnesses has been accepted by the lower Courts it is not open to the applicant in revision before the High Court to urge that the evidence of other witnesses should be given greater weight. [P 478 C 2]

Dr. J. N. Misra — for Applicants.

Assistant Government Advocate — for the Crown.

Order.—These are three connected criminal revisions by Bishambhar, Hitta Singh, Bechey Lal and Roop Narain alias Filas, who were convicted by a Magistrate under S. 394, Penal Code and sentenced to rigorous imprisonment for one year and a fine of Rs. 50 each, and whose convictions and sentences were upheld in appeal by the learned Additional Sessions Judge of Hardoi.

The prosecution case against the applicants briefly was that on 11th November 1940, the applicants went to a carnival show held at Hardoi, where they tried their luck at what is known as dart shooting stall. This stall had a table placed in the middle which had different colours painted on it. There was a board which had similar colours just behind the table. Those who wanted to bet were given three darts with which to shoot at the board at the colour selected by them. The customers paid one

anna at least for each set of darts. Filas, applicant, along with his companions, started the betting at about 8 P. M. and this went on for about three hours. At about 11 P. M. Filas bet Rs. 2 on a white colour and threw all his three darts. These did not hit a white colour at the board, but they hit a black colour. Filas demanded his money back claiming that he had bet on a black colour and had consequently won. The manager in charge of the stall refused to accept his claim and asserted that he had really bet on a white colour. This led to an altercation between Filas on the one side and the manager on the other. There was an exchange of hot words between the two persons with the result that all the four accused including Filas tore down the cloth surrounding the booth, entered the enclosure and began to belabour the manager, Maqbul Husain P. W. 1, and his assistant Agha Khan, P. W. 2, with fists, kicks and lathis. The accused overpowered the two persons, and removed the cash box and the money lying on the table. The cash box which contained Rs. 114 was turned down by Filas accused and its money was taken away by all the accused. There were a number of spectators at the spot, and it is somewhat remarkable that the carnival staff which had arrived at the spot on hearing the alarm was not able to arrest the accused with the help of the spectators, due, it is stated, to the fact that the accused were armed with lathis. The accused disappeared with the booty. The two police constables who were on duty at the carnival premises, arrived at the spot after the accused had run away. Maqbul Husain, the manager, received six injuries while his companion, Agha Khan, received three. These injuries were simple. Maqbul Husain was advised to lodge a report at the police station by the constables, who remained at the spot to guard the scene of occurrence. They detained some persons who were eye-witnesses of the occurrence. Maqbul Husain made the first information report at the police station at 12-30 A. M. In this report the facts stated above are substantially repeated, but the important fact which needs special mention is that the report says that upon an altercation ensuing between the manager and Filas accused on the question whether he had bet on a white colour or a black colour, Filas and his companions looted all the cash in the cash box and the other money which was lying on the table, and that when they were restrained from doing so then Filas and his companions began to beat Maqbul Husain and Agha Khan with their lathis.

The Sub-Inspector arrived at the scene of the occurrence soon after the report and examined the witnesses to the occurrence. He arrested all the accused except Filas who had absconded. The accused denied the charge and put up a counter story which need not now be discussed as it has been rejected by the learned Magistrate and the learned Additional Sessions Judge. The learned Magistrate upon a consideration of the entire prosecution evidence came to the conclusion that all the accused were present at the shooting stall as stated by the prosecution witnesses, and that they took part in the assault upon the manager and his servant and that they further robbed them of the money. He held that all the accused were guilty of an offence under S. 394, Penal Code, and sentenced each of them to undergo one year's rigorous imprisonment and pay a fine of Rs. 50. The learned Additional Sessions Judge dismissed the appeals of all the accused. The learned Counsel on behalf of the applicants has argued that even accepting the evidence of the prosecution witnesses the necessary ingredients of an offence under S. 394, Penal Code have not been established and a conviction under that section is not legally sustainable. Reference has been made in this connection to the definition of the word, 'robbery' in S. 390, Penal Code. The relevant portion of S. 390, Penal Code, lays down that:

> Theft is 'robbery' if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

It is argued before me that although the first information report did actually set out the case that when the manager of the stall and his servant attempted to stop the accused from removing the cash, the latter pounced upon them and started belabouring them. This story is, however, contradicted by the prosecution evidence, which is to the effect that when an altercation ensued the accused started beating the manager and his servant, and when they succeeded in overpowering them the accused removed the cash and ran away. In other words while, according to the first information report, the beating followed the theft of cash, according to the evidence of the prosecution

the beating preceded the theft. I have looked into the evidence of Maqbul Husain, P. W. 1, Agha Khan, P. W. 2, Rahim Khan P. W. 3 and Matroo P. W. 4, and it seems to me that there is force in the contention that Maqbul Husain and Agha Khan were first belaboured as a result of the quarrel and the money from the cash box on the table was removed subsequently, while accepting the prosecution evidence in agreement with the opinion of the Courts below I hold that it has been satisfactorily established that the accused persons first belaboured the manager and his servant and subsequently committed the theft of the cash. The question for determination upon this finding, therefore, is whether the offence falls within the purview of S. 394, Penal Code. Can it be said in the present case that in order to the committing of the theft of cash or in committing the theft of cash, or in carrying away or attempting to carry away property obtained by the theft, the accused, for that end, voluntarily caused or attempted to cause hurt? The words 'for that end' used in S. 390, Penal Code, in my opinion, clearly mean that the hurt caused by the offender must be with the express object of facilitating the committing of the theft, or must be caused while the offender is committing the theft or is carrying away or is attempting to carry away the property obtained by the theft. It does not mean that the assault or the hurt must be caused in the same transaction or in the same circumstances. A Bench of the Madras High Court in 18 Cr L J 346[1] has held that "the words 'for that end' in S. 390, Penal Code, cannot be read as meaning in those circumstances". It was held by the Lahore High Court in 35 Cr L J 297[2] that

before a person can be convicted of robbery the prosecution must prove that hurt was caused in order to the committing of the theft or in committing the theft or in carrying away or attempting to carry away the property obtained by the theft. The hurt contemplated must be a conscious and voluntary act on the part of the thief for the purpose of overpowering resistance on the part of the victim, quite separate and distinct from the act of theft itself.

In the present case it cannot be contended with any show of reason that whatever injury was caused it was caused when the assault was made upon the stall manager and his servant with the primary object of enabling the accused to the committing of the theft. I am satisfied, therefore, that the assault or the beating had no relation whatever to the commission of the theft, although there is no doubt that the theft was committed at the same time or immediately afterwards. I am of opinion that the accused are not guilty of an offence under S. 394, Penal Code. I therefore set aside their convictions on the charge of robbery. The result of this finding is that all the accused will, however, be liable under S. 323, Penal Code. I therefore alter the conviction of the applicants under S. 394, Penal Code, to one under S. 323, Penal Code, and reduce their sentence to three months rigorous imprisonment under the latter section.

As regards the question whether the applicants are guilty of an offence under S. 379, Penal Code, the learned counsel on behalf of the applicants has argued that the only person liable under this section is Filas, who according to the evidence of Kartar Singh, P. W. 6, in the main case and of Matroo, P. W. 4, in the cognate case, alone removed the cash. This argument ignores the other prosecution evidence on the record which is unanimous upon the point that all the four accused removed the cash. This evidence was accepted by both the Courts below, and it is not open to the applicants to urge in revision that in preference to that evidence the evidence of these two witnesses, namely Matroo, P. W. 4 and Kartar Singh, P. W. 6, should be given greater weight. I therefore hold that all the applicants committed the theft of the cash and are consequently liable under S. 379, Penal Code. In my opinion the ends of justice will be sufficiently met if Bishambhar, Hitta Singh and Beche Lal, accused, are sentenced to rigorous imprisonment for six months each and a fine of Rs. 50 each under S. 379, Penal Code. Roop Narain alias Filas, who appears to have taken the leading part, deserves no reduction in sentence. He is accordingly sentenced to one year's rigorous imprisonment and a fine of Rs. 50 under S. 379, Penal Code. In default of payment of fine, each accused will undergo another six weeks rigorous imprisonment. The result is that I allow the revision applications in part, set aside the convictions and sentences of the applicants under S. 394, Penal Code, convict them under Ss. 323, Penal Code and 379, Penal Code, and sentence them as stated above. The sentences of rigorous imprisonment under Ss. 323, Penal Code and 379, Penal Code, shall run concurrently.

G.N./R.K. *Revisions partly allowed.*

1. ('18) 5 A I R 1918 Mad 821 : 38 I C 730 : 18 Cr L J 346, Karuppa Gounden v. Emperor.
2. ('33) 20 A I R 1933 Lah 407 : 147 I C 99 : 35 Cr L J 297: 35 P L R 186, Karmun v. Emperor.

(28) A. I. R. 1941 Oudh 479

YORKE AND BENNETT JJ.

Syed Mehdi Hussain — Plaintiff — Appellant

v.

Syed Mohammad Jawad and others — Defendants — Respondents.

Second Appeal No. 91 of 1937, Decided on 15th April 1941, against decree of the Civil Judge, Rae Bareli, D/- 4th November 1936.

(a) Pleadings—Plaintiff not suing as mutwalli but alleging himself to be mutwalli — Mere omission in relief clause that decree should be given to him as mutwalli cannot disentitle Court from decreeing plaintiff's claim as mutwalli if he were otherwise entitled thereto.

Where the plaintiff does not sue technically as "mutwalli" but alleges that he was "mutwalli" of the suit property the mere omission in the relief clause that the decree in suit should be given to him as " mutwalli " would not disentitle a Court from decreeing the plaintiff's claim as "mutwalli" if he were otherwise entitled to such a decree. [P 480 C 1]

(b) Deed—Construction—Sale or mortgage—Intention of parties at time of transaction must be looked to— Intention must be gathered from deed itself and surrounding circumstances — Test whether document creates relationship of debtor and creditor is not satisfactory—Transaction held mortgage by conditional sale and not out and out sale.

In deciding whether a given transaction is an out and out sale with a condition for repurchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded. That intention must be gathered from the terms of the deed itself and the surrounding circumstances. The test whether the document or documents create the relationship of creditor and debtor, that is whether they create a debt is not a very satisfactory one, inasmuch as it cannot be said that a mortgage by conditional sale creates a 'debt', since such a mortgage creates in the mortgagee no right to realize the consideration of the mortgage either as a personal liability or as a liability under the mortgage : *Case law discussed.* [P 481 C 1, 2]

The document in favour of the alleged vendee was framed as an absolute sale deed, by which property subject to a previous mortgage was transferred to the vendee the consideration for the sale being the amount supposed to be due to the prior mortgagee under the mortgage. The same day a deed of argeement was executed by the vendee undertaking that if within 15 years time in any fallow season of " Jeth " the vendor or his successors by paying Rs. 41,000, the consideration money, wanted to have the property transferred to them (there were also provisions for piecemeal repurchase), the declarant, his successors and representatives who might succeed to him in any way will return back the said property without any objection. The parties to the transaction were Mahomedans. The period for repurchase in the sale deed was the same as for redemption in the case of the mortgage to which the property was subject. The document fixed the consideration for the sale as Rs. 41,000, Rs. 20,500 for each of the two sets of properties mortgaged, the whole of which was left with the vendee for redemption of the previous mortgage with the stipulation that whatever amount remained as surplus should be received by the vendor from the vendee by executing a receipt therefor. The vendor assumed liability in case the vendee had to pay anything in excess of Rs. 40,500 (Rs. 41,000 less Rs. 500 expenses of the sale deed). The vendee was to bring a suit for redemption claiming set off respecting trees improperly cut by the mortgagee etc., and all those proceedings were to be taken in consultation with the vendor. There was a considerable stress laid upon the document being an out and out transfer of the property and the rights and interests in the zamindari property transferred by the deed were described in great details, and great emphasis was laid on the transferee being a representative of the vendor and competent to take all proceedings and seek all remedies thereafter in his own right as the owner of the property. The document showed no signs of any bargaining between the vendor and the vendee, and no consideration whatever passed between the parties except the sum of Rs. 500 said to be paid by the vendee for purchase of stamp and registration expenses and prima facie the vendor got practically nothing out of it, whereas prior to its execution he was in a position to institute a suit for redemption against the previous mortgagee on payment of a sum considerably less than the original consideration of the mortgage deed, Rs. 37,000. He made the transfer to the vendee for a purely problematic future sum, the surplus which remained after the mortgagee had been paid off. The price stated in the sale deed was grossly inadequate. There was also indication that the vendee had been persuaded to purchase the property. The sale deed also provided that the cess and revenue in respect of the property transferred to the vendee should be paid by the vendee and the profits remaining thereafter should be appropriated by him exclusively :

Held that in view of all the circumstances of the case the sale deed and the agreement to repurchase evidenced a transaction of mortgage by conditional sale. [P 485 C 1]

(c) Civil P. C. (1908), S. 100—Sale—Finding that price alleged in deed is grossly inadequate is one of fact.

A finding that the alleged price of the property in the sale deed was grossly inadequate is a finding of fact which is binding in second appeal. [P 484 C 2]

Hyder Husain and H. H. Zaidi — for Appellant.

Hakimuddin Siddiqi for Naziruddin — for Respondent 1.

Judgment.—This is a second appeal by the plaintiff in a pre-emption suit referred to a Division Bench under the provisions of S. 14 (2), Oudh Courts Act, on the ground that it involves an important question of law. The plaintiff Syed Mehdi Husain, a minor under the guardianship of his grandfather Wajid Ali, as "mutwalli" of a wakf property in village Unchahar, district Rae Bareli sued for pre-emption in respect of the sale of certain land, measuring 7 bighas odd in mahal and village Unchahar. The

vendee defendants contended that the plaintiff as a "mutwalli" was not a cosharer in the mahal. They further contended that in any case the property, in respect of which the plaintiff claimed to be "mutwalli" of a wakf property, was property in respect of which the executant of the wakf was a mortgagee and not a proprietor. The executant of the wakf was the same Wajid Ali who was the guardian ad litem of the plaintiff. He had on 29th September 1921 executed a deed of wakf-alal-aulad, Ex. 2, by which he reserved the right to sell part of the wakf property and purchase other wakf property with the proceeds. Subsequently, in 1927 he sold some portion of the wakf property for Rs. 64,000 and purchased other property. On 12th May 1928, he got this property in village Unchahar under the sale deed, Ex. 3, executed by Saiyid Yusuf Hasan, along with which he himself executed an agreement to resell the property to Saiyid Yusuf Hasan in certain circumstances. This document was Ex. A-1. Subsequently, on 4th October 1932, by a deed Ex. 4, Wajid Ali appointed his son Ikbal Husain and another man Mohammad Wasi as "mutwallis." Ikbal Husain, however, subsequently died and was succeeded by the minor plaintiff Syed Mehdi Husain. It is said that Syed Mehdi Husain's name is entered in the revenue record as "mutwalli" and as beneficiary of the wakf to the extent of his share in the family property. Other points were raised in the suit which no longer arise.

The learned Munsif held that the plaintiff not having sued as "mutwalli" but only as a beneficiary under the wakf was not a cosharer in the "mauza" and not entitled to maintain the suit. On this point the learned Civil Judge held in appeal that it was not seriously challenged before the Munsif that the plaintiff was "mutwalli." It might be technically speaking true that the plaintiff did not sue as "mutwalli," but as he alleged that he was "mutwalli" of the property the mere omission in the relief clause that the decree for pre-emption should be given to him as "mutwalli" would not disentitle a Court from decreeing the plaintiff's claim as "mutwalli" if he were otherwise entitled to such a decree. In second appeal this point was not of course raised by the appellant but might have been raised on behalf of the respondents. Learned counsel for the respondents has, however, conceded that he has not got an arguable case on this point. The only point therefore which is for consideration in this appeal is the second point, namely whether the pre-emptor is "mutwalli" of property which is in his ownership under an out and out purchase made by the creator of the wakf, Wajid Ali, or that transaction was only a transaction of mortgage so that the pre-emptor is not as "mutwalli" owner of the property and therefore a cosharer in "mauza" Unchahar and entitled to maintain a suit for pre-emption.

The facts in regard to the acquisition of this property by Wajid Ali are set forth in the document purporting to be a sale deed, Ex. 3, executed by Saiyid Yusuf Hasan, vendor, on 12th May 1928, and the document Ex. A-1 executed on the same day by Wajid Ali, vendee in favour of Saiyid Yusuf Hasan. Put shortly Ex. 3 is framed as an absolute sale deed by which property previously mortgaged to one Thakur Jadu Nath Singh is transferred to the vendee Wajid Ali the consideration for the sale being the amount supposed to be due to the prior mortgagee under the mortgage. Exhibit A-1 executed the same day and presented for registration simultaneously with Ex. 3, is a deed of agreement executed by the vendee Wajid Ali undertaking that if within 15 years' time in any fallow season of "Jeth" the vendor, his heirs and representatives or his successors by paying Rs. 41,000, the consideration money, want to have the property transferred to them (there are also provisions for piecemeal repurchase), the declarant, his successors and representatives who may succeed to him in any way as "mutwalli" will return back the said property without any objection. The costs of the new sale deed will be borne by the vendor, that is the vendor under the deed of sale Ex. 3 referred to in this undertaking.

The question is whether in the circumstances the sale deed and "ikrarnama" record an out and out sale with a contract or condition for repurchase or they record a transaction of mortgage. The question is in the first instance one of construction of the deed, but in view of the rulings on the subject the Court is entitled to take into consideration a certain number of surrounding circumstances, as for example the circumstances in which the document was executed, the price at which the sale was concluded, the existence or non-existence of bargaining and the like. Learned counsel for the parties have put before us the leading cases on the question of interpretation of such a combination of documents as we have in the present case. The test which has usually been stated

in these circumstances as the crucial test is the intention of the parties. Learned counsel for the appellant in the present case has also sought to suggest that the proper test is whether the document or documents create the relationship of creditor and debtor, that is do they create a debt? We are inclined to think that this latter test is not a very satisfactory one. Even in the case of an usufructuary mortgage, it is open to argument whether there is really a debt created, particularly in those cases in which the amount of mesne profits of the property is to be taken in lieu of interest. It has frequently been said that the term "debt" connotes the existence of a right in the creditor to realize the amount of the debt. In a recent Full Bench case of the Lahore High Court, 22 Lah 71,[1] it has been held that

the essence of 'debt' is the liability of the obligor which the obligee is entitled to enforce by action. Where a transaction neither imports the personal liability of the obligor to pay, nor confers on the obligee the right to recover the amount by the coercive machinery of the law, it cannot be called a debt.

Held also, that the principal characteristics of a usufructuary mortgage are that there is no personal liability of the mortgagor to pay nor has the mortgagee a right to have the mortgaged property brought to sale. The money secured by a usufructuary mortgage cannot therefore be called a 'debt' either according to the ordinary meaning of the word or the enlarged significance of the term as used in S. 7 (1), Punjab Relief of Indebtedness Act.

The position in the case of a mortgage by conditional sale is very similar; vide the provisions of S. 58 (c), T. P. Act, defining mortgage by conditional sale as follows:

Where the mortgagor ostensibly sells the mortgaged property,
on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or
on condition that on such payment being made the sale shall become void, or
on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

It is obvious that it would be difficult to say that a mortgage by conditional sale creates a "debt" since such a mortgage creates in the mortgagee no right to realize the consideration of the mortgage either as a personal liability or as a liability under the mortgage. This test therefore seems to fall, and indeed it is not one of the tests which emerge from the decisions which have been put before us. We do not propose to go at length into these cases as most of the points in the earlier cases are summarised in two cases, one of the Allahabad High Court and one of this Court. The decision in 12 ALL 387[2] is rather of negative nature. It was held by their Lordships that :

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to repurchase the property sold, on repayment of the purchase money within a certain time, is not on that account to be construed as if it were a mortgage.

In this particular case the right to repurchase was to be exercised within ten years. Their Lordships considered the terms of the document and considered the case to be one of sale with a right to repurchase within the period stipulated. In 38 ALL 570,[3] the view stated in 12 ALL 387[2] was affirmed. Their Lordships were of opinion that the intention of the parties which was the test in such a case must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances. They concluded that the transaction was an out and out sale and not a mortgage by conditional sale. This was a case in which there was a right to repurchase within nine or ten years stated in an agreement executed a week later than the sale deed in the year 1852, and the vendors instituted a suit for redemption no less than 55 years later. Their Lordships referred to a remark in the English case in *Alderson* v. *White*,[4] where it is said by Lord Cranworth:

I think a Court after a lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be.

The case is, of course, easily distinguishable from the present case where the plea that this was a transaction of mortgage is put forward within the period fixed for repurchase and within a comparatively short period of the original deed of sale. In 45 ALL 581,[5] a Bench of the Allahabad High Court re-stated the proposition that

in deciding whether a given transaction is an out and out sale with a condition for repurchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded. That intention must be gathered from the terms of the deed itself and the surrounding circumstances.

1. ('40) 27 A I R 1940 Lah 401 : 191 I C 583 : 42 P L R 560 : I L R (1941) 22 Lah 71 (FB), Lachhman Singh v. Natha Singh.
2. ('90) 12 All 387 : 17 I A 98 : 5 Sar 551 (P C), Bhagwan Sahai v. Bhagwan Din.
3. ('16) 3 A I R 1916 P C 49 : 36 I C 38 : 38 All 570 : 43 I A 284 (P C), Jhanda Singh v. Wahid-ud-din.
4. (1889) 2 De G & J 97 : 4 Jur (NS) 125 : 6 W R 242 : 119 R R 38.
5. ('23) 10 A I R 1923 All 586 : 77 I C 572 : 45 All 581 : 21 A L J 502, Bishambar Nath v. Muhammad Ubaidullah Khan.

The details of the transaction in this case are not in any way parallel to those of the present case, but in the course of the judgment a reference was made to two points which are of some interest in the present case. One of these was the fact that one of the parties was a Mahomedan, about which it was remarked :

One of the parties being a Mahomedan may, in a doubtful case, lend some additional probability in favour of a document being construed as a mortgage but it does not in any way do away with the rule laid down by the Privy Council that a document is to be construed in accordance with the intention of the parties as evidenced by its terms.

Elsewhere it was said :

It has not been suggested that the price paid under the deed was in any way inadequate to the value of the property at the time when the sale was effected.

In A I R 1929 ALL 174,[6] certain tests for the determination as to whether a transaction was one of sale or of mortgage were laid down and it was said :

It can be contended that a transaction was not intended to be a mortgage, when it is found that there was nothing to show that the relation of debtor and creditor continued to exist, there was nothing about interest or its equivalent, that the price was a very fair one for a sale, and that a very long period (five times as great as the period contemplated in the deed) had been allowed to elapse before the party took action.

Some other points have been mentioned in A I R 1931 ALL 113.[7] It is pointed out that:

Whether or not two transactions are integral parts of the same transaction, connected and interdependent or whether they are disconnected and dissociated is in each case a question of fact which has to be ascertained from the evidence produced in the case and no question of legal presumption arises.

Elsewhere it was said that :

Where there is a controversy as to whether the transaction is a sale or a mortgage by conditional sale, the matter has primarily to be determined upon a construction of the document or documents concerned. An absolute sale deed does not cease to be so merely because the vendor stipulates that he shall have a right to repurchase.

The case law on this subject has been discussed at some length in the judgment of Sen J., in this particular case. In the body of the judgment in this case also it is remarked :

It may also be an important factor as to whether the sale consideration represents the actual value of the property.

Reference has also been made to A I R 1933 ALL 443[8]. In this case there was, simultaneously with the sale deed, an agreement executed by the vendee under which the vendor was given a right of repurchase of the property for the sale price at any time after 25 years from the date of the sale. It was said that

the time was not the essence of the contract and that the transaction was one of mortgage by conditional sale, the vendor being entitled to redeem within the maximum period of 60 years but after the expiry of the 25 years period fixed in the agreement.

There are no means of comparing a case of that kind with the present case in which a maximum period for repurchase is fixed instead of a minimum period and the maximum period has not yet expired. Greater reliance was placed by learned counsel on a Calcutta case, 2 I C 930[9]. In this case the agreement was that if the purchase money was repaid within four years, the purchaser would be bound to give up the property, and it was held that this was a case of sale with a contract for repurchase and not a case of mortgage. Reliance was also placed for the appellant on 42 Mad 407.[10] The head-note runs as follows :

Where in one and the same transaction land is sold absolutely but with a right of repurchase to be exercised before a certain date, the transaction does not necessarily become by virtue of S. 58, T. P. Act, a mortgage by conditional sale, whatever the intention of the parties might have been.

Learned counsel referred to a passage on page 421 in the judgment of Seshagiri Ayyar J., where he says:

A party who wishes the document to be understood as being different from what the words suggest should show that the form in which the language is clothed does not express the real intention of the parties and that in substance the parties intended that there should be a transaction different from what the language imports. In other words there must be evidence to show that the parties intended a mortgage although they used expressions which prima facie connote a sale.

On behalf of the respondents reliance has been placed first on the case referred to by the learned Civil Judge, A I R 1925 Cal 1151,[11] in which stress was laid on the habit of Mahomedans of disguising mortgages as sales and it was held that

in construing a document between Mahomedans in order to find whether the transaction is a mortgage by conditional sale or an out and out sale, it should be remembered that documents are executed by Mahomedans in which they conceal, or at least try to conceal, the real nature of the transaction and attempt to make out that the transaction is an out and out sale, although as a matter of fact the intention of the parties is to create a mortgage.

6. ('29) 16 A I R 1929 All 174 : 116 I C 807, Mt. Mumtaz Begam v. Mt. Lachhmi.
7. ('31) 18 A I R 1931 All 113 : 129 I C 719 : 1931 A L J 571, Ram Das Rae v. Brindaban Ram.
8. ('33) 20 A I R 1933 All 443 : 145 I C 147 : 1933 A L J 907, Mt. Gomti v. Meghraj Singh.
9. ('09) 2 I C 930 (Cal), Mohammad Yusuffe v. Jashodha Kumar Das.
10. ('19) 6 A I R 1919 Mad 1 : 50 I C 205 : 42 Mad 407 : 36 M L J 385 (FB), Muthuvelu Mudaliar v. Vythilinga Mudaliar.
11. ('25) 12 A I R 1925 Cal 1151 : 90 I C 100 : 42 C L J 74, Mohammad Usman v. Abdul Rahaman.

This is, of course, due to the desire of Mahomedans to avoid any appearance of lending money at interest. Another point referred to in this case was the existence of contrast between the real value of the property and the consideration that passed in money. A reference was also made by learned counsel to 51 I A 305.[13] It will be sufficient to refer to the head-note which runs as follows:

> Two deeds of the same date were so phrased as to be ostensibly a sale of certain villages with an agreement for a resale and repurchase at the same price at a certain date. (Two dates five and six years respectively after the date of sale were stipulated.) It appeared however that the price named, which was an amount immediately required to prevent a sale under a decree, had been settled without bargaining; it was absurdly low, less even than the property would have realised upon a public sale. A clause in one of the deeds indicated that time was not to be of the essence of the contract for repurchase, and there were other provisions which supported the view that a mortgage was intended: *Held*, that the transaction was a mortgage by conditional sale, and that the purchasers upon a sale in execution of a decree against the mortgagor had a right to redeem.

These same points are mentioned and a reference made to this decision in a recent case of this Court, 1937 O W N 1236,[13] a case in which reference has been made to many of the cases discussed in this judgment. It is in the light of the above decisions that we proceed to consider the construction of the two deeds in suit. We take first the circumstances in which the sale deed Ex. 3 was executed. They appear from the document itself. The opening portion of the sale deed shows that this property had been mortgaged with possession about 14 years earlier on 25th July 1914, for Rs. 37,000 to Thakur Jadu Nath Singh. The mortgage contained three important conditions: (1) that the mortgagor had no power to redeem the property until after the expiry of ten years, (2) that he must redeem it within five years after the expiry of that period, that is, within 15 years of the execution of the mortgage, and (3) that in case the mortgagor failed to redeem the property (within the prescribed period), it should be entirely foreclosed. The document was in fact an anomalous mortgage. It is to be observed that at the date of execution of Ex. 3, the mortgagor had only about 15 months left in which he must redeem the property. The document goes on to mention that the mortgagee Jadu Nath Singh had been guilty of various acts of highhandedness and the mortgage was redeemable after deduction of certain amounts. The object of the execution of Ex. 3 is said to be to save the mortgagor from the atrocities (highhandedness) of the mortgagee Jadu Nath Singh, and it is said that in order to achieve this result the vendor has made the aforesaid Wajid Ali Sahib ready to purchase the entire property as the trustee of the wakf-alal-aulad. The document goes on to fix the consideration as Rs. 41,000, Rs. 20,500 for each of the two sets of properties mortgaged, the whole of which is left with the vendee for redemption of Jadu Nath Singh's mortgage with the stipulation that whatever amount shall remain as surplus shall be received by the vendor from the vendee by executing a receipt therefor. The vendor assumes liability in case the vendee has to pay anything in excess of Rs. 40,500 (Rs. 41,000 less Rs. 500 expenses of the sale deed.) Condition 2 of this sale deed provides that the vendee shall bring a suit for redemption claiming set off respecting trees improperly cut by the mortgagee etc., "and all these proceedings shall be taken in consultation with the vendor." It is possible to interpret this consistently with the document being a sale deed inasmuch as the vendor is to get the surplus remaining over after redemption but it is otherwise more consistent with the document being a mortgage. Condition 4 lays down that

> after the execution and completion of this deed the entire property noted in Appendices Nos. 1 and 2 with all the external and internal rights and the customary and ordinary dues and all the zemindari and proprietary profits and all the appurtenances and other things connected with the property, the sewai dues and the rent, the cultivated and uncultivated land, waste and banjar land, jungle, tanks, wells, abadi houses of ryots, as well as escheated houses, the personal as well as the escheated groves and trees, rights of easement as well as irrigation rights, without the exception of anything or right, have now been transferred in favour of the vendee who has now become the absolute owner in possession of the property in place of me the vendor and he shall be competent to take all proceedings and seek all remedies as a representative of me the vendor.

In this paragraph as in others there is considerable stress laid upon the document being an out and out transfer of the property. It appears to us that in fact the case is over-stated and this very paragraph contains indications that the over-statement justifies suspicion. In a case of transfer of zemindari property by the owner as vendor

12. ('24) 11 A I R 1924 P C 226 : 82 I C 993 : 47 Mad 729 : 51 I A 305 (PC), Narasingherji Gyanagerji v. Parthasaradhi Rayanim Garu.
13. ('38) 25 A I R 1938 Oudh 57 : 172 I C 536 : 13 Luck 680 : 1937 O W N 1236, Fazal Ahmad v. Afaqul Rahman.

to a vendee, there is no necessity for all this reference to details, and in fact it is not usual to include so many details. The last sentence of this paragraph is particularly suggestive where the transferor says that

the transferee is to be competent to take all proceedings and seek all remedies as a representative of me the vendor *(ba qaim mukami baiya)*.

Really a person who has purchased property by a sale deed is competent to take all proceedings and seek all remedies thereafter in his own right as the owner of the property, and the emphasis on the transferee being a representative of the vendor seems to suggest that the transferee was regarded as being or being expected to be only a temporary transferee. The document shows no signs of any bargaining between the vendor and the vendee, and it has to be borne in mind that no consideration whatever passed between the parties except the sum of Rs. 500 said to be paid by the vendee for purchase of stamp and registration expenses. Prima facie, if this is a sale deed, the vendor seems to get practically nothing out of it, whereas prior to its execution he was, judging by the facts stated in the deed itself, in a position to institute a suit for redemption against Jadu Nath Singh on payment of a sum considerably less than the original consideration of the mortgage deed, Rupees 37,000. He makes the transfer to Wajid Ali for a purely problematic future sum, the surplus, which will remain after the mortgagee has been paid off. Bearing in mind this fact and the fact that in Ex. A-1, executed simultaneously and held by the Courts below to be interconnected with Ex. 3, a period of 15 years exactly similar to the period of Jadunath Singh's mortgage is fixed for repurchase of the property, it seems much more likely that the vendor was seeking by this transaction to exhange one contract for another, the second contract being clearly on easier terms than the first, since it gave the vendor or mortgagor a right to repurchase or redeem the property in two portions, that is in effect of instalments. Turning to the question of price it has been stated in argument, and this argument has not really been met, that if this was a case of an out and out sale, the price was very inadequate. The price comes to about 16 or 17 times the annual rental. The learned Munsif who tried the case held that a reasonable price would have been 25 or 30 times the annual rental and the purchaser Wajid Ali had in fact himself sold property at 40 times the annual gross rental. The learned Civil Judge has also held that the alleged price of the property was grossly inadequate and this is a finding of fact which is binding upon us in second appeal.

Another point which has to be considered in the present case is that the parties are Mahomedans. There is therefore some amount of presumption in favour of this being a transaction of mortgage concealed under the cloak of a sale deed with a contemporaneous contract for resale. The learned Civil Judge has also pointed to the fact that the parties were on friendly terms and we have noted the remark in the sale deed that Wajid Ali had been persuaded to purchase the property. The underlying suggestion is that Wajid Ali had been persuaded to help the vendor and it would have been, we think, of little help to the vendor for Wajid Ali to take an out and out transfer of this property. The learned Civil Judge has further relied on the circumstance that the alleged vendor has a long period up to 15 years within which to pay back the sale price and recover the property. He seems to think that the vendor could also have a claim to repurchase the property after the expiry of the period of 15 years fixed in the deed. We doubt the soundness of this view but we agree that where a period as long as 15 years is given for repurchase at the exact sale price, the probabilities are in favour of mortgage rather than sale. A period of 15 years is a long period within which there may be considerable rise or fall in the value of the property. The general tendency of landed property until the last few years was for it to rise in value, and it would not be very natural for an out and out purchaser of property to be willing to give it up as much as 15 years later at the price which he had paid for it. A case of this kind is to be distinguished from cases in which the period allowed for repurchase is only three or four years. Moreover such a condition for repurchase must greatly hamper the vendee in his handling of the property which in theory he has purchased out and out, and one would not expect the purchaser to be content to be under such a handicap for so long a period as 15 years. We are not greatly impressed with some of the points relied upon by the learned Civil Judge, as for example his statement that the vendor is entitled as of right to have the property reconveyed to him. The provision for resale of the property in "khali fasl Jeth" is also consistent both with a transaction of mortgage and a transaction of sale with a condi-

tion of repurchase, since that is the most convenient time of the year for effecting such a transfer of ownership. Lastly the learned Civil Judge has referred to the terms of the deed, with some of which we have dealt already, but we may conveniently refer here to condition 5 which provides that

> the liability to pay the present revenue and cesses relating to the property sold shall be on the vendee. After the payment of the revenue and the cesses whatever profit shall remain all that shall be appropriated by the vendee and I the declarant shall have no concern with any portion of the property sold or the income thereof.

Such a provision was entirely unnecessary if this document was a sale deed and the very fact of its insertion goes quite a considerable way to support the view that the document does not evidence a transaction of sale. Taking all these points into consideration we have no hesitation in agreeing with the learned Civil Judge that the documents Exs. 3 and A-1 evidence a transaction of mortgage by conditional sale. It is the only point which has been argued before us, and as the appellant has failed on this point, the appeal necessarily fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Oudh 485

YORKE J.

L. Gaya Prasad — Plaintiff — Applicant

v.

Ahmad Husain and another — Defendants — Opposite Party.

Civil Revn. Appln. No. 60 of 1940, Decided on 9th May 1941, for revision of order of Munsif (as Judge of Sm. C. C.), Kheri, D/- 10th April 1940.

(a) Limitation Act (1908), Art. 75 — Waiver — Intention to waive certain instalment clear — Suit should not be dismissed merely because plaintiff makes mistake in not including such instalment also.

An instalment bond provided that the principal was repayable by monthly instalments and that on default of payment of six instalments, the creditor would have the option to realize the entire amount of the debt. The first instalment was made payable on 1st September 1935 and subsequent instalments on the 1st of each calendar month. No instalments were ever paid towards the debt. Plaintiff filed a suit on 24th February 1940 claiming his cause of action to have arisen on 1st March 1937 and he claimed to waive 12 instalments thereby stating his waiver incorrectly as a waiver of 12 instalments instead of 13 :

Held that his suit should not be allowed to fail on the ground that he made a mistake of one month in calculation, his intention having clearly been to waive his claim to any instalments going beyond the period which he could claim reckoning from the date of institution of the suit.

[P 486 C 1]

*** (b) Limitation Act (1908), Art. 75—Creditor entitled to realize entire amount on default of six monthly instalments—He can claim not only instalments within three years of suit but also the six instalments which constitute his cause of action.**

A plaintiff cannot be worse off in regard to a claim based on a subsequent cause of action than he would have been had he filed his suit when he could proceed on the first cause of action and the same principle is applicable to cases where the right accrues after six monthly instalments as is applicable where it accrues on the failure to pay one six monthly instalment. And under the provisions of Art. 75 he can institute that suit within three years of the sixth default, and in that suit he can claim not only the instalments still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit, but also the six instalments which constituted his cause of action. In effect the plaintiff is entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining in the future at the date of the suit.

[P 486 C 2; P 487 C 1]

(c) Provincial Small Cause Courts Act (1887), S. 25 — Duty of Court is to see that substantial justice is done to parties.

It is the duty of the High Court acting under S. 25 to see that substantial justice is done as between the parties. [P 487 C 1]

(d) Costs — Plaintiff's suit failing in lower Court on account of his mistake and inability to explain case—In revision plaintiff successful — Still he may be refused costs.

Where the plaintiff's suit failed in the lower Court as to a considerable extent on account of the mistakes of the plaintiff and his inability to explain his case he may be refused costs even if he succeeds in revision. [P 487 C 1]

Akhlaq Husain — for Applicant.

Siraj Husain—for Opposite Parties Nos. 1 and 2.

Order. — This is an application under Section 25, Provincial Small Cause Courts Act, by Lala Gaya Prasad, plaintiff, whose suit to recover Rs. 146 principal due on a bond for Rs. 170 dated 27th August 1935, has been dismissed with costs by the learned Munsif of Kheri, sitting as a Judge of Small Cause Court. The present suit was based on an instalment bond for Rs. 170 executed by the defendants in favour of the plaintiff Gaya Prasad on 27th August 1935. It was provided in the bond that the principal was repayable by monthly instalments of Rs. 2, and that on default of payment of six instalments, the creditor would have the option to realize the entire amount of the debt. The first instalment was made payable on 1st September 1935 and subsequent

instalments on the 1st of each calendar month. Admittedly no instalments were ever paid towards the debt. The present suit was instituted on 24th February 1940, the cause of action being stated as having arisen on 27th February 1937 and 1st March 1937. The plaintiff claimed Rs. 146, that is to say he gave up 12 monthly instalments, those which fell due on 1st September 1935, up to 1st August 1936. He claimed by implication to have waived the option which arose on every instalment after the first six up to and including the 12th. He sued to recover the instalments beginning from 1st September 1936 up to 1st February 1937, as if his cause of action had arisen on 1st February 1937. It seems actually that the plaintiff made a simple mistake of calculation. Claiming his cause of action to have arisen on 1st March 1937, that is within three years of the date of suit he could only claim to recover, as part of his cause of action, the six instalments ending on 1st March 1937, and it follows that he stated his waiver incorrectly as a waiver of 12 instalments instead of 13. In my opinion, the plaintiff's suit should not be allowed to fail on the ground that he made a mistake of one month in calculation, his intention having clearly been to waive his claim to any instalments going beyond the period which he could claim reckoning from the date of institution of the suit. I treat the suit therefore as having been one of a claim for Rs. 144 only.

This mistake having been corrected, the question now is whether the plaintiff could maintain a suit for the amount of Rs. 144 or his suit was time barred. By his suit the plaintiff claimed to exercise the option given to him under the default clause as provided by Art. 75, Limitation Act. Article 75 provides for a suit on a bond payable by instalments which provides that if default be made in payment of one or more instalments, the whole shall be due, a period of limitation of three years which begins from the date when the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver. There is no doubt that in the ordinary way when a debt is payable by instalments, and there is no default provision, a new cause of action arises upon each default, and the plaintiff can recover in respect of instalments falling due within three years before suit : *vide* Art. 74. But if there is a default provision, Art. 74 cannot be relied upon, and under Art. 75 if the plaintiff sues more than three years from the first default and there is no waiver, the suit is totally time barred, that is he cannot recover even those instalments which fell due within three years of suit. On the other hand after a consideration of a number of cases of this Court on the point, I myself held in 1940 O W N 1081[1] that :

> The general current of decisions in the Chief Court of Oudh is in favour of interpreting any facts which can possibly be so interpreted as favouring the view that the creditor has waived the exercise of the option on the first instalment when he bases his suit on subsequent defaults which are within limitation and does not seek to found his cause of action on the earlier defaults.

In the present case the plaintiff does not found his cause of action on the first twelve defaults, and it is clear that when he founded it on the 13th default it was by a mistake of description only. The question, however, is whether founding it on the 14th where date be seen correctly and the subsequent five defaults the plaintiff was entitled to maintain the suit, bearing in mind that the instalments in respect of which the 14th to 19th defaults took place, fell due more than three years prior to the date of suit. Learned counsel for the opposite party has contended strongly that the present suit must fail in any case because the plaintiff has claimed six instalments which were time barred. On a fair consideration, however, it seems to me that this is a mistaken view. The plaintiff was entitled on the 6th default to institute a suit to recover the whole amount due under the bond. Under the provisions of Art. 75, he could institute that suit within three years of the 6th default, and in that suit he could claim not only the instalments still outstanding at the date of the suit and the instalments which had fallen due within three years of the suit, but also the six instalments which constituted his cause of action. It appears to me that the principle which holds good in regard to the first exercise of the option under the default clause holds equally good in respect of a claim founded on subsequent defaults and accompanied by a waiver of the option which had accrued to the plaintiff on the earlier defaults. In effect the plaintiff was in any case entitled to claim the instalments of three and a half years, that is 42 past instalments in addition to the instalments still remaining in the future at the date of the suit.

1. ('41) 28 A I R 1941 Oudh 74 : 191 I C 220 : 1940 O W N 1081, Sheo Narain v. Bageshur.

Learned counsel for the opposite party on the other hand has sought to argue that the plaintiff's suit was no less than seven months overdue. He contends that as the plaintiff claimed Rs. 146, his cause of action for that amount arose in August 1936, that is to say at the close of the first year of the instalments and that the plaintiff was not entitled to reckon time from the 18th instalment (or as it should have been the 19th instalment). I have dealt with that point sufficiently already. The plaintiff could not be worse off in regard to a claim based on a subsequent cause of action than he would have been had he filed his suit when he could proceed on the first cause of action, and the same principle is applicable to cases where the right accrues after six monthly instalments as is applicable where it accrues on the failure to pay one six-monthly instalment. The main ground of argument put forward on behalf of the opposite party is that in all the cases which have been quoted (they were nearly all quoted in my decision in 1940 O W N 1081[1]) the claim made by the plaintiff did not include any time-barred amount. Founding on the contention that the six months which furnished the cause of action are time barred, learned counsel argues that the claim includes time-barred amounts and must therefore fail. It seems to me to be clear that save in so far as there was an error in calculation by which the plaintiff by mistake claimed Rs. 2 more than he was entitled to, there was no claim for any amount which was time barred, and therefore applying the principle applied in other Oudh cases, it is reasonable to hold that the plaintiff had waived the option whenever it accrued to him earlier. In my opinion therefore the plaintiff's suit was wrongly dismissed as barred by limitation. It should have been decreed for the amount which was properly due to him, namely Rs. 144. It is the duty of this Court acting under S. 25, Small Cause Courts Act, to see that substantial justice is done as between the parties. I allow this application to this extent that the plaintiff's suit is decreed for Rs. 144, but as to a considerable extent the suit failed on account of the mistakes of the plaintiff and his inability to explain his case, I allow no costs of this application or of the suit.

K.S./R.K. *Application allowed.*

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(28) A. I. R. 1941 Oudh 487

THOMAS C. J. AND GHULAM HASAN J.

Emperor

v.

Gaya Prasad and others — Accused — Respondents.

Criminal Appeal No. 723 of 1940, Decided on 7th May 1941, against order of First Asst. Sess. Judge, Gonda, D/- 8th July 1940.

(a) Criminal trial—Evidence—Portion of evidence disbelieved on material points against some accused—Remaining evidence should not be accepted as against other accused.

Where a portion of certain evidence is disbelieved on material points so far as some of the accused are concerned, the remaining portion should not be accepted as against the other accused. [P 490 C 1]

(b) Criminal trial — Distribution of rewards to police should be delayed till decision of case.

The distribution of rewards to police and other witnesses before Courts of law had finally pronounced judicial findings is not proper. Such an action is calculated to prejudicially affect the fair trial of the case against the accused. [P 490 C 1]

(c) Criminal trial — Evidence — Evidence of prosecution witnesses who have been rewarded before decision of case is suspicious and tainted.

The evidence of prosecution witnesses who have received rewards before the decision of the case should not be accepted as it is suspicious and tainted. [P 490 C 1]

(d) Penal Code (1860), Ss. 436, 149—Some of accused setting fire to houses—Common intention not to do so — All cannot be convicted under S. 436.

Where the common intention of all the accused was not to burn the houses and there is definite evidence that at the instigation of one man two others set fire to the houses, all the accused cannot be convicted under S. 436/149, Penal Code. [P 491 C 1]

(e) Criminal trial — Benefit of doubt.

Where the case against the accused is not free from reasonable doubt, he should be given the benefit of the doubt. [P 492 C 1]

(f) Criminal trial — Evidence — Prosecution evidence should be examined on its intrinsic worth and not in light of defence evidence.

The Court should examine the prosecution evidence witness by witness on its own merits and reject it, if upon a careful analysis and scrutiny of the evidence it finds that it is not true or reliable to support the prosecution case. It should not test its trustworthiness in the light of the defence evidence. [P 492 C 2]

S. C. Das, Assistant Government Advocate and Sarju Prasad Srivastava, Government Pleader, Gonda — for the Crown.

H. G. Walford and J. W. Peters — for Accused 1, 3 and 4 ; and 1 respectively.

Judgment. — Forty-three persons were tried under Ss. 147, 323/149, 325/149, 332/149 and 436/149, Penal Code, by the learned 1st

Assistant Sessions Judge of Gonda and acquitted on 8th July 1940. The Provincial Government has preferred this appeal against the order of acquittal of (1) Gaya Prasad Azad, (2) Hira Singh, (3) Ram Milan, and (4) Har Prasad Singh. Hira Singh accused has not been arrested as it is said that he is on active service somewhere in Africa. The charge against the accused was that on 29th January 1940, in mohalla Chain Tola, Nawabganj, they were members of an unlawful assembly, the common object of which was to forcibly rescue four cows belonging to Mohammad Ishaq alias Gojai, (P. W. 1), as it was apprehended that they were going to be slaughtered; that in the prosecution of the said object they committed the offence of rioting punishable under S. 147, I. P. C. that they caused simple hurt to Gojai and others, and grievous hurt to Mt. Shubratan, P. W. 5; that they set fire to the houses of Mohammad Ishaq, Mohammad Yasin and others, and further voluntarily caused hurt to Abid Husain, head constable P. W. 2, and some other constables in the discharge of their duties. Nawabganj is about 23 miles from Gonda and the majority of the population in the town consists of Hindus. Mohammad Ishaq alias Gojai is a beef-seller in mohalla Chain Tola, of Nawabganj, which is a short distance from the police station of Nawabganj.

The case for the prosecution is that Mohammad Ishaq on 29th January 1940, purchased four cows for Rs. 16 from Ali Raza, P. W. 3. Mohammad Ishaq did not pay the price of the cows but asked Ali Raza to accompany him (Mohammad Ishaq) and that he would pay the money and take a receipt at his house. Abdul Rahim, Mohammad Ishaq's cousin, Ali Raza and his five years old son Roshan went with the cows to Mohammad Ishaq's house. When they were near a school in Chain Tola they met two Hindus, Ram Milan accused, and another man. It was 11 A. M. They asked them where they had got the cows from. Mohammad Ishaq replied that he had purchased them from Ali Raza. Ram Milan and his companion are alleged to have said that they would kill him and set his house on fire if he slaughtered the cows. Mohammad Ishaq kept quiet. The two Hindus then went towards the bazar, and Mohammad Ishaq and his party proceeded to Chain Tola. Mohammad Ishaq tied the cows in his ghari and went to his shop with Ali Raza where they waited for Allah Bakhsh who had been sent for to write a receipt. Abdul Rahim who was sent to call Allah Bakhsh informed Mohammad Ishaq that Allah Bakhsh was not at his house. He was then sent a second time, but Allah Bakhsh could not be found. This was about 2 P. M.

A mob consisting of 100 or 150 persons headed by Ram Milan accused and armed with lathis, bamboos, kulhari and brickbats arrived at Mohammad Ishaq's house. Ram Milan and Hira Singh accused forcibly untied the four cows from the ghari. Mohammad Ishaq and his party protested against this highhandedness and tried to snatch the cows. On this some of the rioters beat Mohammad Ishaq and his party. On their shouts for help some Muslim residents of the mohalla arrived. Gobardhan accused ordered his companions to set fire to Mohammad Ishaq's house. Lachhman and Ram Khelawan accused lighted a match and set the house on fire. The rioters are alleged to have next threatened to beat the Muslims who came to help Mohammad Ishaq and to burn their houses. The Muslim party which had come to help Mohammad Ishaq was chased by some of the rioters and beaten, and their houses set on fire. A police party consisting of Abid Husain, head constable, and three constables, Mohammad Yaqub, Sharafat Husain and Durga Din with Bashir Jumman and Phurti Din chaukidars, armed with guns arrived on the scene. It appears that Bashir chaukidar, P. W. 14, received information that a riot was going on. He saw some houses burning and rushed to the thana which was four furlongs from his house and informed the head constable who was in charge at that time. His statement was reduced to writing in the general diary at 2.10 P. M. The head constable ordered the rioters to disperse, and when they refused to do so, he ordered the constables to arrest them. Thereupon Har Prasad accused struck the head constable with a lathi on the head which felled him. He was removed by the chaukidars to the kachcha road at a place shown as No. 12 in the sketch plan at a distance of 35 paces. The head constable's gun was picked up by Durga Din constable. The rioters are alleged to have caused injuries to some of the chaukidars, and when they advanced towards the police party shouting "seize their guns and beat them", the police fired from a distance of 4 or 5 paces in self-defence. One Jagmohan among the rioters was fatally wounded and nine other persons received gunshot wounds. The crowd then dispersed. The head constable was taken to the police station where

his injuries were attended to by the medical officer of Nawabganj dispensary.

The station officer who was away at village Newada returned by train, and was informed on the way that a riot had taken place. He went to the scene at about 4 P. M. when it is said that Mohammad Ishaq dictated the first information report, Ex. 3. He sent the injured persons for medical examination. Jagmohan died at the hospital the following day and his dead body was sent for post-mortem examination by the second officer, M. Mohammad Mirza, P.W. 30. The Superintendent of Police reached the scene of occurrence about 6-30 P. M. Mr. Harpal Singh, Magistrate, first class, reached about 7 P. M in response to a telegram which was sent by the accused Gaya Prasad Azad, and the Deputy Commissioner reached about 8 P. M. Gaya Prasad accused was arrested on 29th January 1940, that is on the day of the riot. Hira Singh was arrested on 1st February 1940, Ram Milan on 16th February 1940, and Har Prasad Singh presented himself in Court on 23rd February 1940. [His Lordship then referred to the injuries received by the several prosecution witnesses and proceeded.] The accused denied the charge, pleaded enmity with the police, and stated that they were not on the scene of occurrence. The Hindus who received gunshot wounds stated that they were innocent passers-by, but as we are not concerned with their cases, no further comment is necessary. Ram Milan accused works in the Sugar Mills at Nawabganj. He stated that he was not present at the scene of occurrence and did not join the rioters and that he did not go to Gojai's house and untie the cows. He further stated that he was run in by the police in a dacoity case, but was acquitted on 15th December 1939. (Exhibit N M is the judgment of the Sessions Judge). In his defence he examined Ram Lal, D. W. 4, who produced the attendance register to show that the accused was on duty from 8 P. M. to 6 P. M. on 29th January 1940. Har Prasad Singh pleaded enmity with the police, and stated that the police prosecuted him under S. 411, Penal Code, and in a riot case, but he was acquitted in both. He further stated that he was employed in the Sugar Mills, and was on duty from 10 A. M. to 6 P. M. on 29th January 1940. He denied beating the head constable.

It may be mentioned that he and Ram Milan are history-sheeters. Gaya Prasad Azad filed a long written statement in which he stated that cow slaughter was not permitted in Nawabganj, that Mohammad Ishaq with the help and connivance of the police wanted to establish this as an old custom, that on 29th January 1940, it was known in the town that cows were going to be slaughtered, that he with Ram Swarup and five or six others went to Mohammad Ishaq's house to ask him not to slaughter the cows, that he saw a gathering of Muslims there who told him that they would not stop cow slaughter, that he left his companions at Mohammad Ishaq's house and went to the police station for help, that the head constable refused to record his report, that he went back to Mohammad Ishaq's house and saw a fight going on between the Hindus and Musalmans where Ram Swarup was seriously injured. Some badmash had set fire to Mohammad Ishaq's house and the fire spread to other houses, that soon the police party arrived and fired indiscriminately injuring several innocent persons. He further stated that he was the President of the Congress Committee of Nawabganj and had been doing his best to stop corruption in the police department which was very bad in Nawabganj. He filed a pamphlet Ex. AA which evidently was printed in November 1930. There are strong allegations against the police for corruption. Hira Singh was an employee of the Sugar Mills. He stated that he was an Aryasamajist and the Darogha who was a Mahomedan did not like him or his work. He further stated that on the day of the riot he was at the mills from 10 A. M. to 6 P. M. In his defence he examined D. Ws. 3, 6 and 7 to prove that he was working at the mills, between 10 A. M. and 6 P. M. The case for the prosecution may be divided into three parts, namely the first incident which took place near Mohammad Ishaq's house at 11 A. M.; the second incident which took place at 2 P. M. when the police party arrived to disperse the rioters and the third incident when the station officer reached the scene of occurrence about 4.30 P. M. and started the investigation. In this appeal we are faced with three difficulties:

(1) There is evidence to show that a large number of accused committed overt acts, but the Government has not appealed against their acquittal. We take it that the appeal has been filed against these four persons perhaps because they were the leaders and assailants of the police party. There is overwhelming evidence to show that at the instigation of Gobardhan Lachhman and

Ram Khelawan accused set fire to Mohammad Ishaq's house, and some of the witnesses who testify to this incident are witnesses against the present four persons. If we accept their evidence against these persons it means that though their evidence was disbelieved on material points as far as the other accused persons were concerned yet we accept the remaining portion of their evidence as far as these accused are concerned which, to say the least, is unfair.

(2) It has come out in evidence that before the trial of this case was concluded in the Court of Session the D. I. G. rewarded all the police witnesses and two outsiders, namely, Mohammad Rafiq, P. W. 16 and Sultan Ali, P. W. 25. The date when the reward was distributed is not apparent from the record, but it certainly was before the trial was concluded. P. W. 37, M. Ghulam Ahmad, station officer of Nawabganj, has made the following statement:

> From the Reward Grant Fund, D. I. G. sanctioned the reward of Rs. 100 to the head-constable, Rs. 50 to each constable and Rs. 10 to each of the chaukidars, Sultan Ali and Rafiq.

The word "sanctioned" used by the learned Judge is not accurate. The Urdu record shows that the D. I. G. distributed the amounts himself. Durga Din constable, P. W. 26, admits that he received a reward of Rs. 50 in this case. This action of the authorities has given a chance to the defence to urge that the evidence of the witnesses who received rewards should not be accepted as it is tainted. It is regrettable that the distribution of the rewards was not delayed till the decision of the case. Such an action is calculated to prejudicially affect the fair trial of the case against the accused and we cannot help expressing our disapproval of the distribution of rewards to police and other witnesses before Courts of law had finally pronounced judicial findings. We confess we have not in our experience come across such action before, and we desire to lay down for future guidance that similar action repeated in future may lead to a large body of otherwise good evidence being eliminated altogether from consideration. Having regard to the circumstances of this case we are compelled to treat the evidence of such witnesses as suspicious and tainted.

In this case the action of the police in firing on the mob is challenged. The defence urged that Durga Din constable was not in Nawabganj on 29th January 1940. He had gone out and returned on 30th January as the entry in the general diary shows. Sultan Ali and Mohammad Rafiq, who were two independent witnesses, have not shown any act of bravery, and it is difficult to understand why they were rewarded. Sultan Ali, who is a postman, sent a petition, Ex. Z, to his superior officer in which he stated that about 2 p.m. when he started for the post office and came out of his house he saw a mob and rushed back to his house and locked himself in. According to this he cannot be said to be an eye-witness and yet we find that he has given a long statement in Court, and identified a large number of accused persons as rioters. It is unfortunate that Ex. Z was not put to the witness in cross-examination as the defence did not know about it until he had been examined, and it is doubtful whether it is admissible in evidence, though an attempt has been made to prove it by the evidence of Kunj Behari Lal, D. W. 8, only. We do not propose to make use of Ex. Z for the purposes of this case and have referred to it only incidentally. If the evidence of the seven police witnesses and Mohammad Rafiq, P. W. 16, and Sultan Ali, P. W. 25, is rejected as tainted, as we hold it to be, the case of the prosecution becomes very weak, and certainly the serious charge of assaulting the police while in discharge of their duty cannot be maintained.

(3) Some of the important witnesses have not identified the accused on the spot. On the other hand there are some witnesses who have identified the accused among the rioters. The prosecution have examined no less than 35 witnesses in this case. We shall first take up the charge under S. 332/149, I. P. C., which arose out of the second incident as great stress has been laid upon it by the learned Assistant Government Advocate. His contention is that there is overwhelming evidence against each of the accused, and the learned Judge has wrongly and without sufficient reasons rejected this evidence. [His Lordship then examined the evidence and held that the charge against the accused under S. 332/149, I. P. C., was not proved. The judgment then proceeded.] There can be no doubt that there was a riot, (though the number of the rioters has been greatly exaggerated by the witnesses), that the houses were burnt, that the common object of the rioters was to forcibly take away the cows, and in the prosecution of their common object they caused simple and grievous hurt. It was strongly urged by the learned counsel for the defence that

the police fired indiscriminately and injured a large number of persons who were either sightseers or passers-by, and in order to justify their action they have falsely stated that when the mob was at a distance of 4 or 5 paces they fired in self-defence. We are not holding an inquiry into the conduct of the police, but the evidence and the circumstances of the case make it very improbable that the firing was resorted to by the police when the mob was at a distance of 4 or 5 paces. [His Lordship referred to such evidence and circumstances and proceeded]. The evidence as to the number of rioters is conflicting. Some witnesses put it down to 100 or 150. Durga Din, P. W. 26, puts it down to 200 or 250. According to Mohammad Rafiq, P. W. 16, he saw 100 Hindus going towards Gojai's house. P. W. 17, Ibrahim, stated that he saw 30 or 32 men with 2 Nagas coming from the side of the Sugar Mills but according to him the crowd swelled later in the bazar to 100 or 150 men. The learned Judge has found that the original party of the rioters consisted of members not more than 50 and less than 20 and that of them 12 or 16 were armed.

After considering all the evidence we are inclined to take the view that the number of rioters did not exceed 50 or thereabout. The charge under S. 436/149, I. P. C., may be disposed of in a few lines. We are of opinion that the common intention of all the accused was not to burn the houses. There is definite evidence that at the instigation of one man (Gobardhan), Lachhman and Ram Khelawan set fire to one of the chhappars. In our opinion no common intention is proved, and all the accused cannot be convicted under S. 436/149, I. P. C. This charge against the present accused must fail. As regards the first incident which furnishes the basis for the charges under Ss. 147, 323/149 and 325/149, I. P. C., the prosecution relied upon the evidence of Mahammad Ishaq alias Gojai, P. W. 1, Ali Raza, P. W. 3, and Noorullah, P. W. 10. According to their evidence, Ram Milan accompanied by another Hindu, whom the witnesses were not able to identify, met Gojai, his cousin Abdul Rahim, Ali Raza and his son Roshan in the bazar at 11 A.M., on 29th January 1940, while they were proceeding to Gojai's house with the four cows purchased by Gojai from Ali Raza. Ram Milan is alleged to have told Gojai and his party that he should not slaughter cows else he would be beaten and his house will be burnt. Abdul Rahim and Roshan have not been produced and the only witnesses to this particular incident are therefore Gojai and Ali Raza. [After referring to the evidence of these witnesses his Lordship held that the charges under Ss. 147, 323/149 and 325/149, Penal Code, were not brought home to the accused. The judgment then proceeded.] There is no doubt that 13 persons were injured on the complainant's side, including the police party, out of whom one, namely Mt. Shubratan, P. W. 5, received grievous hurt. There is however no satisfactory evidence on the record to show as to who were the assailants of the injured persons.

We have already dealt at some length with the difficulties which confronted us in accepting the evidence of a number of prosecution witnesses. The evidence of these witnesses was disbelieved by the learned Assistant Sessions Judge on material points against the other accused persons against whom no appeal has been filed by the Provincial Government. We find it hard to believe that important prosecution witnesses such as Mohammad Taqi, P. W. 8, Noorullah, P. W. 10, Allah Bakhsh, P. W. 12 and Hasan Ali, P. W. 13 could possibly have missed identifying the present four accused who were undoubtedly the ringleaders among the rioters according to the prosecution case. Mohammad Taqi identified Ram Milan and Gaya Prasad besides four others, but he did not identify Hira Singh and Har Prasad Singh. In this statement Exs. A and B recorded by the Sub-Inspector on 15th April 1940, he did not mention Gaya Prasad Singh but Ram Milan only. Noorullah, P. W. 10, who, according to the prosecution evidence, witnessed the advent of Ram Milan and Hira Singh and the removal of the cows by them, was unable to identify them. Allah Bakhsh, P. W. 12, mentioned only the name of Ram Milan but admitted that he was unarmed. He appears to bear some ill-feeling towards Ram Milan on account of the fact that the latter did not pass his cart of sugarcane about one or one and a half months before the occurrence and this led to a fight between the two. Hasan Ali, P. W. 13, admits that all the 43 accused have been known to him from before the occurrence but he did not notice them among the rioters with the exception of six persons other than the present four accused. Although these prosecution witnesses are alleged to have identified some out of the rioters in the crowd, it is at least remarkable that they failed to notice all the four accused who admittedly took a prominent part in the

riot. The prosecution evidence as a whole does not in our opinion establish beyond reasonable doubt the participation of any of the four accused. We do not therefore find it possible to hold that the present accused are guilty either of a charge under S. 147, Penal Code or the charge under S. 323/149, Penal Code.

As regards the charge under S. 325/149, Penal Code, Mt. Shubratan, P. W. 5, no doubt received grievous injuries. She deposes to have seen Ali Raza, Roshan, Abdul Rahim, Gojai and Noorullah injured and bleeding at the door of their houses. She also deposes to have seen Khelawan and one other man set fire to Gojai's house. She herself was beaten by Ram Shankar accused with lathis at her house and Kedar Nath accused set fire to her house. She identified eight persons out of whom one was Gaya Prasad. Her son Mohammad Yasin, P. W. 6, did not identify Gaya Prasad but identified Hira Singh. No appeal has been filed against Ram Shankar or Kedar Nath. No part is alleged by these witnesses to have been assigned to Gaya Prasad and Hira Singh. In the absence of satisfactory or reliable evidence to connect any of the accused with complicity in the crime of committing riot and causing simple and grievous injuries we are driven to the conclusion that the case against the accused is not free from reasonable doubt and the learned Assistant Sessions Judge was justified in giving the benefit of the doubt to the accused and acquitting them. We therefore hold that the charge under S. 325/149, Penal Code also is not substantiated. Nothing turns upon the third incident which merely relates to the investigation of the case by the station officer. As the prosecution evidence in the case in our opinion does not satisfactorily establish the charges against any of the accused, it is not necessary to deal with the defence evidence.

Before taking leave of this case we should like, however, to observe that the learned Assistant Sessions Judge's approach to the consideration of the prosecution evidence does not commend itself to us. While dealing with the evidence of each prosecution witness the learned Judge has unnecessarily introduced the defence evidence and has rejected the prosecution evidence largely because in his opinion the defence evidence established the innocence of the accused. The learned Judge should, in our opinion, have examined the prosecution evidence witness by witness on its own merits and rejected it, if upon a careful analysis and scrutiny of the evidence he found that it was not true or reliable to support the prosecution case. Instead of examining the prosecution evidence on its intrinsic worth the learned Judge tested its trustworthiness in the light of the defence evidence, and here we think the procedure adopted by him was not justified. The result is that we dismiss the appeal against all the accused including Hira Singh, although the latter has not been apprehended and has not been represented before us. We direct that they be set at liberty forthwith unless wanted in connexion with some other matter.

K.S./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Oudh 492

BENNETT AND GHULAM HASAN JJ.

Mt. Akhtar Banu Begam —
Defendant—Appellant

v.

M. Kanhaiya Lal and another —
Plaintiffs — Respondents.

Second Appeal No. 123 of 1938, Decided on 28th April 1941, against decree of Addl. Civil Judge, Hardoi, D/- 27th January 1938.

*** Mussalman Wakf Validating Act (1913), S. 3—S. 3 is not exhaustive — Wakf providing for maintenance of servants is perfectly valid.**

The purposes specified in S. 3 are by no means exhaustive. The words "among other purposes" in S. 3 themselves unmistakably suggest that a wakf can be made for purposes other than those described in S. 3. A wakf providing for maintenance in favour of servants is perfectly valid under the Mahomedan law. There is nothing in Act 6 of 1913 which invalidates any such wakf : ('32) 19 A I R 1932 All 248 ; ('29) 16 A I R 1929 Oudh 225 (FB); ('29) 16 A I R 1929 Oudh 25 and 22 Cal 619 (PC), *Rel. on* ; ('32) 19 A I R 1932 P C 81 and ('32) 19 A I R 1932 Oudh 71, *Expl.*

[P 493 C 2]

P. N. Chaudhri — for Appellant.

R. N. Shukla — for Respondents.

Judgment. — This is a second appeal which has been referred to a Bench by the Honourable the Chief Judge under S. 14 (2), Oudh Courts Act, for decision. This defendant's appeal arises out of the judgment and decree, dated 27th January 1938, passed by the Additional Civil Judge of Hardoi, upholding the judgment and decree passed by the Munsif West of the same place decreeing the plaintiffs' suit. In order to understand and appreciate the question involved in the appeal the material facts, which are few and simple, may be shortly stated.

One Syed Ali Hasan, taluqdar of Bilgram, the appellant's father, executed a deed of

wakf on 9th January 1921, in respect of his property whereby he granted maintenance allowances to his children and also made provisions for the payment of Rs. 16 p.m. to plaintiff 1 and Rs. 4 p.m. to plaintiff 2. Plaintiff 1, M. Kanhaiya Lal, was a ziledar of Syed Ali Hasan, while Misri Lal, the husband of plaintiff 2, was also employed under him. Under the deed of wakf Syed Ali Hasan constituted himself as the first mutwalli and after him his daughter, the defendant-appellant. The plaintiffs brought a suit claiming arrears of maintenance allowances from 1st April 1936 to the end of March 1937. The defendant admitted the execution of the deed of wakf and further admitted that she had not paid maintenance for the period sued for. She however denied the liability for the payment of maintenance allowance to either of the two plaintiffs. She further alleged that plaintiff 1 had by exercise of undue influence over her father, who was an old man, got the provision for maintenance fixed in favour of plaintiff 2. It was also pleaded that the maintenance allowance was liable to reduction on the ground of diminution of profits owing to remissions. In reply the plaintiffs pleaded that the defendant was barred by res judicata from raising the plea that plaintiff 2 was not entitled to maintenance, as she had already agreed to pay maintenance to her in a previous suit. The trial Court held that the provision for the payment of the maintenance allowance to plaintiff 2 was not invalid and unenforceable. He also held that the previous decree passed against the defendant in favour of plaintiff 2 operated as res judicata. The trial Court further found that the maintenance for the plaintiffs was not liable to reduction and decreed the suit. The learned Additional Civil Judge in appeal differed from the view of the trial Court on the question of res judicata, but agreed with him upon the other points, and dismissed the appeal. In second appeal to this Court all the pleas raised by the defendant have been repeated in the grounds of appeal to this Court.

The learned counsel on behalf of the defendant-appellant has, however, confined his arguments only to one point, namely that the provision for the payment of maintenance allowances to the plaintiffs in the deed of wakf contravened the provisions of S. 3, Mussalman Wakf Validating Act, (Act 6 of 1913) and was, therefore, invalid and unenforceable. We are of opinion that this contention is unfounded and must be rejected. It is argued on behalf of the appellant that under S. 3, Mussalman Wakf Validating Act, a wakf could be made for the maintenance and support of the settlor and not strangers or persons who are not members of his family. The preamble of Act 6 of 1913 shows clearly that the object of the enactment was to remove the doubts which had arisen regarding the validity of wakfs, created by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes. Section 3 of the Act opens with the words:

> It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law, for the following among other purposes.

Among the purposes specified are those relating to the maintenance and support wholly or partially of his family, children or descendants, and in the case of a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts. The language of S. 3 of the Act leaves no room for doubt whatever that the specified purposes are by no means exhaustive. As a matter of fact the words "among other purposes" themselves unmistakably suggest that a wakf could be made for purposes other than those described in S. 3 of the Act. These purposes, according to the definition of the word 'wakf' in S. 2 are purposes recognized by the Mussalman law as religious, pious or charitable.

There are ample authorities in support of the proposition that a provision for the maintenance of servants is a valid object of a wakf. A Bench of the Allahabad High Court in 54 ALL 455[1] held that "a provision for the salary and pension of servants is a valid object of wakf." Reliance in support of this proposition was placed by the learned Judges on Ameer Ali's Mahomedan Law, Vol. 1, p. 276, Edn. 4, and Tyabji's notes under S. 457 of his book on Mahomedan Law, Edn. 2, where even strangers are mentioned as objects of bounty, and dependants and servants are specifically mentioned as persons for whose maintenance provision can be made in a wakf. Reference may also be made to Wilson's Anglo-Mahomedan Law, Edn. 6, para. 322 at p. 353, where it is laid

1. ('32) 19 A I R 1932 All 248 : 136 I C 619 : 54 All 455 : 1932 A L J 171, Abdul Wahab v. Mt. Sughra Begum.

down that all works of religion, charity, or public utility, not condemned by the Mahomedan religion, are proper objects of wakf. Reference may also be usefully made to a Full Bench decision of this Court reported in 4 Luck 429,[2] where it was observed that the signification of 'charity' is very wide in the Mahomedan law generally, and provision for the maintenance of one's kindred, dependants, servants and persons occupying similar positions in relation to the wakif is 'charity' in the eye of Mahomedan law, and a wakf made in favour of any such person or class of persons is a valid wakf.

There is no doubt therefore that a wakf providing for maintenance in favour of servants is a perfectly valid wakf under the Mahomedan law. There is nothing in Act 6 of 1913, which was passed in special circumstances to be stated hereafter, which invalidates any such wakf. It is not necessary to refer to the history of the passing of the Act (Act 6 of 1913), and we shall be content to refer to a case decided by a Bench of this Court in 4 Luck 101[3] at p. 105 where the learned Judges remarked that their Lordships of the Privy Council in 22 I A 76[4] had laid down that "under Mahomedan law a perpetual family settlement expressly made as wakf is not legal merely because there is an ultimate but illusory gift to the poor," and refused to a great extent to recognize dispositions which were colourable wakfs on the ground that they transgressed the law relating to perpetuities. It was observed by the Bench that Act 6 of 1913 was passed to protect from attack certain wakfs based on grounds of contravention of the law relating to perpetuities, and that it was intended to expand the law relating to the creation of a wakf and not to restrict it, and a wakf which would have been considered a good wakf before the Act was passed could not possibly be considered a bad wakf owing to anything contained in the Act. Learned counsel on behalf of the defendant-appellant has referred to two cases, AIR 1932 PC 81[5] and AIR 1932 Oudh 71[6] in support of his contention. He relies on a passage in the former case at p. 86 to the effect that :

> It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act 6 of 1913, and it is, therefore, unnecessary to consider the effect of Act 32 of 1931, which purports to give retrospective effect to the Act of 1913.

This observation lends no assistance to the appellant's case. That was a case of a will and not of a wakf, and the question whether a provision in favour of servants was valid or not in view of the terms of S. 3 of Act 6 of 1913 did not arise for decision. The learned counsel for the appellant also relies on a passage in AIR 1932 Oudh 71[6] at p. 75 where it was observed that

> that part of the wakf which provides for enjoyment of a portion of the profits of the estate by Muhammad Mustafa after the death of Rahmani Bibi is invalid for the reason that Muhammad Mustafa cannot be treated to be a member of the settlor's family.

It appears from the facts of that case that the wakf was made with a view to maintain the children and enforce certain religious objects and charitable purposes laid down by the settlor. Mt. Rahmani Bibi, the widow of the settlor, was to remain in possession of one-third share of the profits as a mutwalli, and after her death one-half of that one-third shall be possessed by Muhammad Mustafa, the son of Rahmani Bibi by a previous husband. The observation quoted above, therefore, related to the interest of Muhammad Mustafa, which the learned Judges observed could not be given effect to. They, however, qualified their observation by the statement that

> the question will arise after the death of Rahmani Bibi as to whether the benefits allotted to Muhammad Mustafa should go to the heir of the settlor or be captured by the objects, immediate and ultimate.

In any view of the matter the passage relied upon is no authority for the proposition that it is not open to a settlor under the Mahomedan law to make provisions in favour of his servants, on account of any prohibition, express or implied, contained in S. 3 of Act 6 of 1913. We are satisfied, therefore, that the decision of the lower appellate Court upon this point is correct and must be maintained. Learned counsel on behalf of the plaintiffs-respondents, besides supporting the judgment of the lower appellate Court on points, which had been decided in plaintiffs' favour, also urged that the defendant was barred by the principle of res judicata from reopening the question. In the view we have taken upon the main point arising in the case we do not consider

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2. ('29) 16 A I R 1929 Oudh 225 : 117 I C 739 : 4 Luck 429 : 6 O W N 316 (F B), Shabbir Hussain v. Ashiq Husain.
3. ('29) 16 A I R 1929 Oudh 25 : 113 I C 494 : 4 Luck 101 : 5 O W N 980, Imdad Ali v. Ashiq Ali.
4. ('95) 22 Cal 619 : 22 I A 76 : 6 Sar 572 (P C), Abul Fata Mahomed Ishak v. Rasamaya Dhur.
5. ('32) 19 AIR 1932 P C 81 : 136 I C 454 : 54 All 93 : 59 I A 74 (P C), Ghulam Mohammad v. Ghulam Husain.
6. ('32) 19 A I R 1932 Oudh 71 : 135 I C 372 : 7 Luck 300 : 8 O W N 1302, Sheikh Ramzan v. Mt. Rahmani.

it necessary to pursue this point. The appeal, therefore, fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 495

YORKE J.

Atiullah Khan — Applicant
In re
Aman Ullah Khan and others —
Defendants — Appellants
v.
Abdul Hakim Khan and others —
Plaintiffs — Respondents.

Misc. Application No. 97 of 1941, Decided on 9th May 1941, from order of High Court, D/- 22nd January 1941.

Civil P. C. (1908), O. 22, Rr. 10 and 4—O. 22, R. 10 contemplates application by successor-in-interest —Appellant allowing opportunity to apply under O. 22, R. 4 to go by owing to negligence — Appeal against deceased respondent abating — Application to substitute transferees of deceased is not maintainable under O. 22, Rule 10.

Order 22, Rule 10 contemplates an application by the successor-in-interest and not an application by the opposite parties to the suit or appeal that is the party who is not the assignee or the person in whose favour an interest has been created. An appellant who allows his opportunity to apply under O. 22, R. 4 to go by owing to negligence cannot maintain an application under O. 22, R. 10 for the substitution of the transferees of the deceased respondent : ('34) 21 A I R 1934 Lah 190; ('34) 21 A I R 1934 All 442 and ('36) 23 AIR 1936 Oudh 224, *Rel. on*; ('36) 23 A I R 1936 Pat 420, *Expl. and Approved*; ('35) 22 A I R 1935 Lah 316 and ('38) 25 AIR 1938 Mad 757, *Ref.*

[P 496 C 1, 2]

Siraj Husain — for Applicant.

Mohamed Ayub — for Opposite Party No. 1 and Maqbul Ahmad Khan, Siraj Ahmad Khan and Maqbool Ahmad Khan.

Order. — This is an application on behalf of the appellants purporting to be under O. 22, R. 10 for the removal from the array of parties, of respondent, Dost Mohammad Khan admittedly dead more than three months prior to the application and the impleading in his place of Maqbool Ahmad Khan and Siraj Ahmad Khan in favour of whom it was said that a transfer had been made by way of an oral gift in the year 1935, and mutation effected on the basis of the oral gift in or about the year 1935. The ground on which the application was made at this particular stage on 29th January 1941 in second appeal was stated in para. 6 of the application, in which it was stated that the applicant came to know last week that the names of Maqbool Ahmad Khan and Siraj Ahmad Khan were not on the record and hence this application for substitution was made. The occasion and ground of making the application is itself most illuminating, because it is not really the fact that the oral transfer and the mutation were unknown to the applicant-appellant but that he only came to know recently that the names of the transferees were not on the record. If he was not aware of that fact, it could be only because of his own negligence.

Now the position is this. This is a second appeal in a suit which began in the year 1932. The case went up in appeal and came before this Court in second appeal in the year 1936 when the suit was remanded to the trial Court for rehearing. It is not quite clear in what Court the suit was when the oral transfer was made, but at any rate it was made at a stage long prior to the institution of the present second appeal on 26th April 1938. The question is whether the present application under O. 22, R. 10 is at all maintainable. It is contended on behalf of the opposite parties that the application now made in this Court in respect of a transfer which took place long ago at a stage when the case was, so far as appears from the record, not before this Court is not maintainable and reliance has been placed on a Lahore case in A I R 1934 Lah 190[1] in which it was held that

an appellant should not, after the appeal has abated for not bringing the legal representatives on record, be allowed to bring the transferee of the defendant on the record when he was not impleaded as a defendant though the plaintiff came to know of the transfer during the pendency of the suit, and was not given an opportunity of defending the suit.

Reliance was also placed on a similar decision in A I R 1334 ALL 442,[2] in which it was held that

where the assignment in favour of the applicant has been made during the pendency of the suit in the Court below and not during the pendency of the appeal, the appellate Court has no jurisdiction under R. 10 to implead the applicant as a party to the appeal. It is immaterial that the suit is a mortgage suit.

It was also held in the same case that

it is not permissible to invoke the inherent jurisdiction of the Court as defined by S. 151 in cases where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it.

The same view has been taken in this Court in A I R 1936 Oudh 224[3] in which the

1. ('34) 21 A I R 1934 Lah 190 : 149 I C 1103, Ghulam Rasul v. Ramun Mal.
2. ('34) 21 AIR 1934 All 442 : 149 I C 970 : 1934 A L J 832, Phul Chand v. Tahir Husain.
3. ('36) 23 A I R 1936 Oudh 224 : 160 I C 801 : 1936 O W N 183, In re Rana Umanath Bux.

decision in the Allahabad case was followed. Learned counsel for the applicant has urged that this matter was really decided on another ground and the reference to the view taken in A I R 1934 ALL 442[2] and its soundness was more or less obiter, nonetheless it appears to me that I am bound by it. The position as it appears to me to be in the present case really is that the appellant has allowed his appeal against Dost Mohammad Khan to abate. It may be the fact that he could at any time within three months of Dost Mohammad Khan's death which took place on 17th July last have applied under O. 22, R. 4 and got substitution made of the legal representatives of Dost Mohammad Khan, but this he did not do, and he is in the position that his appeal, so far as it affects the case of Dost Mohammad Khan, has abated, and it has therefore also abated so far as it may affect the case of any transferees of the same Dost Mohammad Khan. It does not appear to me that it is competent for the appellant, having allowed his opportunity to apply under O. 22, R. 4 to go by owing to negligence, to fall back on O. 22, R. 10. There may certainly be cases in which it is legitimate for one party to apply under R. 10 for substitution in the ranks of the opposite parties, but that is not speaking generally the purpose of R. 10. Rule 10 provides that

in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

In ordinary cases of devolution by death O. 22, R. 4 applies. In cases of assignment, creation of an interest or devolution of an interest other than by death, it would normally be the party in whose favour the assignment has been made or the interest created or had devolved, who would apply under R. 10. There is no need for any such application on the part of the opposite party, that is the plaintiff, if the assignment affects the interests of the defendants or the defendants if it affects the interest of the plaintiff. In the case of a transfer during the pendency of a suit the transferee whether he be the plaintiff or the defendant is ordinarily bound by the result of the suit and R. 10 has been framed in the interests of the party in whose favour an assignment has been made to enable him either to prosecute or to defend the suit in view of the possibility, not to say the probability, that the assignor will not after the assignment be so interested in prosecuting or defending the suit. In his notes under R. 10 of O. 22, Mr. Aiyar remarks that

Rule 10 empowers the Court to give leave to a person who has taken an assignment from a party (ex-hypothesi a party already on the record) to continue the suit.

In my opinion speaking generally it is difficult to imagine a case in which it would be open to the opposite party, that is the party who is not the assignee or the person in whose favour an interest has been created to apply for substitution under R. 10. Learned counsel for the respondents relied upon A I R 1935 Lah 316[4] in which it was held that "where a mortgagor has been adjudicated an insolvent, the receiver is a necessary party to enforce the mortgage." This is rather of the nature of the exception which goes to prove the rule, and in any case the decision was relied upon mainly for the view that for an application under R. 10 of O. 22 there is no limitation. Reference was also made to A I R 1938 Mad 757,[5] in which it was held that

the term 'suit' in O. 22, R. 10 includes an appeal and second appeal following on decree and the clause 'the suit may, by leave of the Court, be continued' in O. 22, R. 10 means also that the appeal and the second appeal arising under the decree in the suit may be continued by or against the person who has acquired the interest.

I am not clear how learned counsel was seeking to interpret this decision which, so far as I am able to see, does not affect the present case. He was inclined to argue that R. 10 implies that in cases of an assignment during the pendency of a suit the appeal may by leave of the Court be continued, but that is contrary to the accepted view of this Court. Learned counsel also relied on A I R 1936 Pat 420,[6] in which it was held that

no doubt O. 22, R. 10 gives the Court a discretion in allowing or refusing an application by the successors-in-interest to continue the litigation, but leave should not be unreasonably refused.

But this very decision supports the view which I have already expressed that R. 10 of O. 22 contemplates an application by the successor-in-interest and not an application by the opposite parties to the suit or appeal. In my opinion therefore the present application was made under R. 10 of O. 22 merely with the object of enabling the appellant to get out of the awkward position in which he stood owing to his having failed within three months to make an

4. ('35) 22 A I R 1935 Lah 316 : 36 P L R 483, Karim Bakhsh v. Khesa.
5. ('38) 25 A I R 1938 Mad 757 : 178 I C 205 : (1938) 1 M L J 882, Alagar Raja v. Narayana Raja.
6. ('36) 23 A I R 1936 Pat 420 : 163 I C 908 : 15 Pat 607 : 17 P L T 564, Joti Lal Sah v. Sheodhayan Prasad.

application for substitution of Dost Mohammad Khan deceased. I hold that this application cannot be maintained under R. 10 of O. 22 and I dismiss it accordingly.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 497

AGARWAL J.

Jagannath Singh and others — *Applicants*

v.

Sita Ram and others—*Opposite Party.*

Civil Revn. Appln. No. 41 of 1940, Decided on 30th April 1941, from order of Assist. Collector, 1st Class and S. D. O., Tarabganj, Gonda, D/- 16th March 1940.

U. P. Tenancy Act (17 of 1939), S. 276—Suit under S. 108 (15), Oudh Rent Act, instituted before U. P. Tenancy Act came into force — After Act came into force Court dismissing suit under O. 17, R. 3, Civil P. C., but restoring it subsequently without notice to defendant—S. 276 held applied — Order restoring suit not being appealable to District Judge held not open to revision—S. 115, Civil P. C., does not apply.

The plaintiff instituted a suit under S. 108 (15), Oudh Rent Act, before the U. P. Tenancy Act came into force. After the U. P. Tenancy Act came into force the Court dismissed the suit under O. 17, R. 3, Civil P. C., but restored it subsequently without notice to the defendant:

Held that S. 276, U. P. Tenancy Act, applied and the order restoring the suit not being appealable to the District Judge no revision was maintainable against it. Section 115, Civil P. C., had also no application: ('33) 20 A I R 1933 All 118, *Rel. on*; ('32) 19 A I R 1932 All 273 (FB), *Expl.*

[P 497 C 2]

K. N. Tandon — for Applicants.

S. N. Srivastava — for Opposite Party 1 (a), (c) and (d).

Order. — This is an application in revision under S. 115, Civil P. C., against an order dated 16th March 1940, passed by an Assistant Collector, first class. The suit was brought by the opposite parties under S. 108, cl. (15), Oudh Rent Act, against the present applicants. The Assistant Collector passed the following order on 5th March 1940:

The plaintiff has failed to summon the relevant records to enable the patwari to prepare profit statement although it was definitely ordered that all evidence should be summoned for today and no further adjournment would be allowed. I therefore dismiss the plaintiff's suit for default.

This order as already stated was passed on 5th March 1940, and the order sheet of that date shows that the Court had taken action under O. 17, R. 3, Civil P. C. On 16th March 1940, the Assistant Collector made the following order: "The ex parte order dated 5th March 1940, is set aside and the suit is restored to the file." This order was passed without any notice to the defendants who are the present applicants and they have come up to this Court in revision against this order. A preliminary objection has been taken that no revision lies. The suit was instituted on 18th September 1939, when the Oudh Rent Act was in force, but the U. P. Tenancy Act, was in force on 5th March 1940 and 16th March 1940. I think this application should be governed by the U. P. Tenancy Act. The suit was no doubt instituted before the Tenancy Act came into force but the revisional remedy is not the right of any party and so it cannot be said that the U. P. Tenancy Act, could not affect the rights acquired by a party before it came into force. I think we have to see whether the revision is maintainable under the provisions of the U. P. Tenancy Act. It is clearly provided in S. 243 and list 1, Sch. 2, U. P. Tenancy Act, that S. 115, Civil P. C., is not applicable to suits or other proceedings under the Act. Section 115 under which the application has come to this Court is therefore not applicable. The applicants were expressly asked by the office whether they would like to have the application treated as one under S. 115 or one under S. 276, Tenancy Act, and they stated that they would like to have it treated as an application under S. 115. Section 276, Tenancy Act, is applicable only when an appeal from an order complained of lies to the District Judge. The order complained of in this case is dated 16th March 1940 and was not appealable to the District Judge. A revision is therefore not maintainable. This view was taken in A I R 1933 ALL 118[1] on an interpretation of S. 253, Agra Tenancy Act, which corresponded to S. 276, U. P. Tenancy Act. The learned counsel for the applicant has relied on 1932 R D 293.[2] In that case it was held that a revision lies from an order of an Assistant Collector whether an appeal has been filed before the District Judge or not but it nowhere lays down that a revision would lie even if the order complained of is not appealable to the District Judge. I think this revision is not maintainable under S. 276, U. P. Tenancy Act, and S. 115 does not apply. The application is therefore dismissed with costs.

G.N./R.K. *Application dismissed.*

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1. ('33) 20 A I R 1933 All 118: 143 I C 307: 1932 A L J 1100, Panna Lal v. Basdeo.
2. ('32) 19 A I R 1932 All 273: 138 I C 583: 54 All 573 : 1932 A L J 855 : (1932) 16 R D 293 (FB), Gobardhan Das v. Dau Dayal.

(28) A. I. R. 1941 Oudh 498

YORKE AND AGARWAL JJ.

Raja Sir Mohd. Ejaz Rasul Khan Bahadur — Claimant — Appellant

v.

Hakim Saiyid Ali Mohammad and others — Debtors — Respondents.

First Appeals Nos. 104, 105 and 106 of 1937, Decided on 16th April 1941, against order of Special Judge, 1st Grade, Barabanki, D/- 31st July 1937.

(a) Transfer of Property Act (1882), S. 72— Mortgage deed providing for interest at 6 per cent. per annum compoundable every six months —In default of payment of two instalments of interest mortgagee after waiting for two months more entitled to take possession of mortgaged property — Mortgagor defaulting and failing to deliver possession—Suit by mortgagee for possession — Mortgagee held entitled to costs of suit — Costs of suit held could be recovered in proceedings under U. P. Encumbered Estates Act.

The rate of interest mentioned in the mortgage deed was 6 per cent. per annum compoundable every six months, and it was provided that in case two instalments of interest were not paid, the mortgagee after waiting for two months more would be entitled to take possession of the mortgaged property. The mortgagors not only defaulted in the payment of the instalments of interest but did not deliver possession to the mortgagee which they were bound to do under the mortgage deed. The mortgagee had therefore to bring suit for possession to take possession as mortgagee :

Held that the mortgagee was entitled to the amounts spent by him as costs of the suit for possession inasmuch as they were spent by him to make good his title against the mortgagor: ('24) 11 AIR 1924 Bom 264 and ('15) 2 AIR 1915 Mad 402, *Rel. on.* [P 501 C 1]

Held further that the mortgagee was entitled to recover the costs of the suit for possession in proceedings under the U. P. Encumbered Estates Act. [P 502 C 1]

(b) Transfer of Property Act (1882), S. 76 (h)— Mortgagee in possession suing to recover rent from tenants — Mortgagee is entitled to costs of rent suits.

A mortgagee in possession filing suits to recover arrears of rent from the tenants is entitled to the costs of the rent suits: ('14) 1 AIR 1914 Oudh 330, *Rel. on.* [P 502 C 2]

(c) Pleadings — Amendment—Court properly allowing defendant to add to his pleading without objection by plaintiff — It is too late in appeal to object to same.

Where the Court properly allows the defendant to add to his pleading without any objection by the plaintiff, it is too late for the plaintiff to object to the same in appeal. [P 502 C 2]

(d) Mortgage — Mortgagee in possession — Profits—Collection of—Mortgagee is entitled to 10 per cent. of profits as costs of collection.

A mortgagee in possession in the absence of evidence is entitled to 10 per cent. of the profits of the mortgaged property as costs of collection : ('35) 22 A I R 1935 P C 49 ; 8 Cal 332 (PC) and 27 Cal 951 (PC), *Rel. on.* [P 503 C 1]

(e) U. P. Encumbered Estates Act (25 of 1934 as amended by Act of 1939), Ss. 14 (7) Proviso and 20A—S. 14(7) Proviso is retrospective.

Section 20A makes it clear that S. 14 (7) Proviso is retrospective in its effect. [P 503 C 1, 2]

(f) Mortgage — Interest — Mortgagee making himself personally liable—Mortgagee nevertheless can treat interest due as charge on property in absence of contract to contrary.

In the absence of any contract to the contrary a mortgagee is entitled to treat interest due under the mortgage as a charge on the property, and the fact that the mortgagor has made himself personally liable makes no difference. Consequently in spite of a personal liability undertaken by the mortgagor to pay the deficiency in profits the mortgagee in possession is entitled to recover it from the mortgaged property : ('24) 11 A I R 1924 P C 183; ('33) 20 A I R 1933 P C 136; ('28) 15 AIR 1928 Pat 398 and ('26) 13 AIR 1926 Lah 624, *Rel. on* ; ('24) 11 AIR 1924 P C 102 and ('32) 19 AIR 1932 Oudh 255, *Disting.*; ('19) 6 AIR 1919 Oudh 50, *Dissent.* [P 504 C 1, 2]

M. Wasim, Ali Hasan and Nawab Ali — for Appellant.

Hyder Husain and H. H. Zaidi — for Respondents Nos. 1 to 6 and 8 to 10.

Judgment. — These are three connected appeals, Nos. 104, 105 and 106 of 1937. We propose to decide them by one judgment. Syed Mohammad Askari, Mir Syed Hasan and Syed Agha Ali, three brothers, divided their zamindari property by an agreement, dated 16th June 1902, and Syed Mohammad Askari got 5/9ths share and the remaining two brothers 2/9ths each. On 16th January 1905, all the three brothers executed a mortgage deed for Rs. 44,000 in favour of Raja Tasadduq Rasul Khan, Taluqdar of Jehangirabad, who is now represented by the appellant Raja Sir Mohammad Ejaz Rasul Khan Bahadur, Kt., C. S. I. Two villages Daulatpur and Balchhat were mortgaged in this deed. The rate of interest mentioned in the deed was 6 per cent. per annum compoundable every six months, and it was provided that in case two instalments of interest were not paid, the mortgagee after waiting for two months more would be entitled to take possession of the mortgaged property. On 3rd February 1906 Syed Mohammad Askari executed another mortgage deed in favour of the same mortgagee in respect of a share in the village Guthia. The amount borrowed was Rs. 20,000, and there was the same condition of the mortgagee taking possession over the mortgaged property in case two instalments of interest were not paid. The rate of interest was $6\frac{3}{4}$ per cent. Syed Mohammad Askari executed another deed on 12th September 1911, in which a further charge of the amount borrowed under the deed of 1906 was created over his share in villages Daulatpur and Balchhat. There was

default in payment of two instalments, and the mortgagee brought two suits for possession, one in respect of mauzas Daulatpur and Balchhat and the other in respect of village Guthia. Suit No. 16 in respect of Daulatpur and Balchhat was decreed on 7th April 1924, and the other suit in respect of Guthia on 28th February 1924. The mortgagee obtained possession in execution of these decrees on 15th May 1924 over Daulatpur and Balchhat and on 23rd July 1924 over Guthia. A sum of Rs. 1276 was awarded as costs to the decree-holder in the suit relating to Daulatpur and Balchhat and Rs. 646-2-0 in the other suit. The mortgagee was in possession subsequent to 15th May 1924 till ejected in course of these proceedings.

Three applications under S. 4, Encumbered Estates Act, were made, one by Syed Agha Ali who died during the pendency of the proceedings and was liable for 2/9ths share of the money due on the mortgage deed, dated 16th January 1905. Another application was made by Hakim Syed Ali Mohammad, one of the heirs of Syed Hasan, and he is liable for 2/9ths of the money due on the mortgage deed dated 16th January 1905. The third was made by Mt. Sartaj Fatima who is liable to pay 1/12th of the money due on the mortgage deed dated 16th January 1905 and 1/10th of that due on the deed, dated 3rd February 1906. Raja Sir Mohammad Ejaz Rasul Khan, the heir of the mortgagee, put forward his claim in all the three cases. He claimed 2/9ths of Rs. 44,000 principal, Rs. 5161-11-6 interest and compound interest due on the date he obtained possession, Rs. 1276 costs of the suit for possession and interest on the two latter amounts from the date he obtained possession till the date of the application amounting to Rs. 4355-10-6 total Rs. 54,793-6-0 from Agha Ali. He claimed 2/99ths of this amount from Hakim Syed Ali Mohammad. In the case of Sartaj Fatima he claimed 1/12th of this very amount. He also claimed 1/10th of Rs. 20,000 principal of the bond, dated 3rd February 1906, Rs. 2935 interest and compound interest due on the date he obtained possession of Guthia, Rupees 646-2-0 costs of the suit for possession and Rs. 2679-0-9 interest on the two latter amounts from the date of his obtaining possession over Guthia to the date of the application—total Rs. 26,240-2-9. A reply to the mortgagee's claim was filed on behalf of Hakim Syed Ali Mohammad in which it was stated that the annual income of Daulatpur and Balchhat was more than the annual interest due on the bond of 1905, and so the mortgagee must account for it. It was also stated that the mortgagee had realized a large sum of money by sale of wood, fish, mango produce and the receipt of nazranas. Various other allegations were made which we do not think it necessary to state here. Similar replies were given by the other applicants. The parties in all the cases agreed that the three cases should be tried together, and the Special Judge accepted their request. On 18th September 1936, the following issues were framed:

(1) Is the claimant under the terms of the deeds of mortgage Ex. A-1 (mortgage of 1905) and Ex. A-4 (mortgage deed of 1906) not liable to render accounts of the profits received by him from the property mortgaged during the period of his possession?

Issues 2 and 3 need not be mentioned.

(4) Did the mortgagee fail to let out to fresh tenants lands in the mortgaged villages that were given up by old tenants? If so, is he liable to be debited in respect of the profits of those lands in taking accounts?

(5) Is the mortgagee entitled to charge interest on sums other than the principal amounts advanced by him which were due and payable by the mortgagors when the mortgagee took over possession?

(6) What sums were due to the claimant from the applicants in respect of his share of the debts under Exs. A-1 and A-4 at the date of the present application?

(6a) Is the mortgagee's claim in respect of the costs decreed to him in suits for mortgagee possession brought by him barred by the law of limitation?

and it was ordered on 23rd April 1937 that a commissioner be appointed to prepare a statement of accounts showing the profits of various kinds, collected and recovered by the mortgagee from the properties mortgaged during the period of his possession and the charges incurred by him. The parties were ordered to produce a sketch form of statement showing the various heads of income and expenditure which the commissioner should consider. The commissioner submitted his report on 15th January 1937. The parties filed objections to that report. The Special Judge then proceeded to determine the issues framed by him, and in determining issue No. 6 he also considered the commissioner's report and the objections preferred to it by the parties. He held that the claimant, that is the mortgagee, was liable to render accounts of the receipts from the mortgaged property that came into his hands during the period of his possession. He also held that it was not proved that any land remained uncultivated owing to the negligence of the mortgagee, that the mortgagee was entitled to interest which was due under the bonds when the mortgagee took possession, and that the mortgagee was not entitled to the costs incurred by him in

bringing suits for possession nor to interest on them. He further held that it was not proved that the mortgagee had cut any trees, and that the mortgagee was entitled to 10 per cent. on the collections as collection charges and had realized Rs. 75 as nazar daura, Rs. 66 as nazar shagun, Rs. 144 as nazar salana, Rs. 325-8-0 as nazar tasfia arazi and for the houses in the abadi and Rs. 117-7-0 as bisah dues, (customary dues levied from tenants to the extent of one quarter of a seer of wheat for every rupee of the rent). He was of opinion that the mortgagee had realized nothing on account of payal, bhusan and jhankar, etc. He ordered the Commissioner to submit a fresh report in the light of his findings and each claim be decreed for the amount due with interest at Rs. 4-4-0 per cent. per annum from the date the mortgagee gives up possession. The Commissioner submitted his report on 25th May 1937. The Special Judge passed a decree on the basis of this report but set it aside subsequently on the findings that the parties had not been allowed any opportunity to file objections to the second report, and they had been given that right under the order dated 23rd April 1937. The Commissioner in his second report had prepared an account of village Guthia and in doing it he had added every year to the principal amount the shortage of interest that is, the difference between the amount of interest and the amount of profits. The learned Special Judge held that the mortgagee was not entitled to anything more than the profits, even if they were less than the amount of interest. He ordered that the account be amended, and a decree for the amount due be passed.

Appeal No. 104 has been filed by the mortgagee Raja Sir Mohammad Ejaz Rasul Khan Bahadur and is valued at Rs. 41-9-9. Three points have been taken by him. The first point is that he had incurred Rs. 201-8-3 as costs in the rent suit brought by him against the tenants and is entitled to Rs. 4-1-3 from Hakim Syed Ali Mohammad. The other point taken by him is that he is entitled to recover the proprotionate liability of the applicant out of Rs. 1276 incurred by him in the costs of the suit for possession. The third point taken by him is that he has been wrongly made liable for nazrana. The respondents have filed cross-objections and they are:

(1) That the Court below was wrong in holding that the appellant was entitled to 10 p. c. as costs on collections, although the actual costs were much less; (2) that the Court was wrong in holding that the objectors were not entitled to credit of the arrears of rent which the appellant allowed to be time-barred; (3) that the mortgagee ought to have been made further liable for Rs. 22-3-9 on account of different kinds of nazaranas, Rs. 172-14-6 on account of the trees cut by the appellant and Rs. 44-2-3 on account of the nazarana of tasfia arazi; (4) that the Court below erred in holding that they were not entitled to the credit of Rupees 377-12-6 on account of the land which the appellant allowed to remain fallow; and (5) that the Court below should have allowed future interest to the appellant from the date of the application of the objectors and not from the date of the dispossession of the appellant.

The same points are involved in the appeal and the cross-objections in appeal No. 105. In appeal No. 106 the appellant has raised a further point that the lower Court was wrong in not allowing him the amount of interest due on the bond of 1906 which was not realized by the profits of the property, and has also contended that he is entitled to the costs of the suit for possession brought in respect of Guthia. The respondents have raised the same cross-objections, in all the cases. The only difference is about the amounts. The respondents did not press the objections that the lower Court erred in not crediting them with the arrears of rent which the appellant allowed to become time-barred and in not allowing them credit for the land which the appellant allowed to remain fallow. The claim about nazarana was also not pressed. The points which we have now to determine are: (1) whether the mortgagee is entitled to recover the amounts spent by him as costs of the suits for possession brought by him, (2) is the mortgagee entitled to Rs. 201-8-3 as costs of the rent suits brought by him, (3) whether the mortgagee received any nazranas, (4) whether the mortgagee is entitled to 10 per cent. costs of collections, (5) whether any trees were cut by the mortgagee, (6) whether the mortgagee was entitled to interest from the date of the application or from the date of the dispossession of the applicants, and (7) whether the mortgagee is entitled to the portion of the interest of the bond of 1906 not paid by the profits of the property. The last point arises in Appeal No. 106 only.

Point No. 1: The condition in the mortgage deeds about the mortgagee taking possession is,

that if in any year any two instalments of profits (interest) are not consecutively paid by us, the mortgagors, to the mortgagee, and we fail to pay the amount in a lump sum by the end of the year, then the mortgagee after waiting for two months more shall have power to take possession of the property mortgaged through Court and we, the de-

clarants, shall get mutation of names effected in the name of the mortgagee. In case of default the mortgagee may himself get mutation of names effected in his favour, and the amount of interest falling in arrears having been included in the principal, interest at the said rate shall be paid thereon also.

There was admittedly default in the payment of interest, and the mortgagee brought two suits for possession and stated that the mortgagors had not paid interest towards the instalments of December 1922 and June 1923 and did not deliver possession in spite of repeated requests. It appears that the mortgagors not only did not pay the instalments but did not deliver possession to the mortgagee which they were bound to do under the mortgage deeds. The mortgagee had therefore to bring suits for possession to take possession as mortgagee. Under S. 72, T. P. Act, a mortgagee can spend such money as is necessary for making his own title to the mortgaged property good against the mortgagor. We think that the amount spent by the mortgagee in getting decrees for possession was spent to make good his title against the mortgagor. It appears that he is entitled to these costs under the law in England. Paragraph 618 of Halsbury's Laws of England, Vol. 23, page 413 runs thus. The costs of litigation which are allowed include the following: (1) .... (2) costs incurred in obtaining possession of the mortgaged property. Thus the mortgagee is allowed expenses of taking possession and the costs of an action to recover possession of the mortgaged property, and these may be included in his accounts as 'just allowances' without special mention in the order. No direct Indian ruling has been brought to our notice, but the principle is laid down in some cases. It was observed in A I R 1924 Bom 264,[1] that there is no reason to think that the law in India is different from the law in England, and

a mortgagee is allowed proper costs, charges and expenses incurred by him in relation to the mortgage debt or mortgage security including the costs of litigation properly undertaken by him.

The suit for possession was undertaken by the mortgagee quite properly, because the mortgagor failed to deliver possession. The mortgagor was himself to be blamed, and he should not complain now. In another case, 26 I C 184,[2] the mortgagee was entitled to add to the mortgage money the costs incurred by him in defending an unsuccessful suit by the mortgagor. We see no reason on principle to differentiate that case from the present one. Dr. Ghosh in his Law of Mortgage, Vol. 1, 5th Edition, p. 573, makes the following observation:

The mortgagee is also entitled to spend money for supporting the mortgagor's title to the property, as well as for establishing his own security against the mortgagor.

The suit for possession was surely for establishing the mortgagee's security against the mortgagor. We are clearly of opinion that the mortgagee was entitled to spend money in bringing the suits for possession.

The next point that arises is whether he is entitled to recover those costs in these proceedings under the Encumbered Estates Act. The Encumbered Estates Act altered the ordinary procedure for recovery of the mortgage money. Under S. 14 of the Act all the debtors, secured or unsecured, are bound to put in their claims, and the Special Judge shall exercise all the powers of the Court in which a suit for the recovery of the money would lie and shall decide the questions in issue on the same principles as those on which such Court would decide them. The Special Judge shall determine the claims and pass a simple money decree for the amount found due. Section 18 of the Act provides that the effect of a decree of the Special Judge shall be to extinguish the previously existing rights, if any, of the claimant, together with all the rights, if any, of mortgage or lien by which the same are secured. The mortgagor also becomes entitled to the possession of the property under S. 35 of the Act. The effect of the Encumbered Estates Act is that the mortgaged property is redeemed by proceedings under it. We think that we should apply the same principles which would have been applicable, had a suit for sale or redemption been brought. The amendment of the Civil Procedure Code in O. 34, R. 2 and O. 34, R. 7 by Act 21 of 1921 has made it quite clear that before redemption a mortgagee is entitled to costs other than those incurred in the suit itself, costs, charges and expenses properly incurred by him up to the date fixed for redemption together with the interest thereon. It was also held in the Bombay case[2] above referred to

that a mortgagee is entitled at the time of redemption to all the costs incurred by him in making good his title to the property.

We are therefore of opinion that the mortgagee is entitled to recover these costs

1. ('24) 11 A I R 1924 Bom 264 : 87 I C 129 : 25 Bom L R 839, Nadershaw Seriarji v. Shirinbai Bapuji.
2. ('15) 2 A I R 1915 Mad 402 : 26 I C 184, Varadarajulu Chetty v. Dhanalakshmi Ammal.

in these proceedings. The costs incurred in the suits relating to Balchhat and Daulatpur were Rs. 1276. The applicants in Appeal No. 104 are liable to pay 2/99ths of Rs. 1276, that is Rs. 25-12-6. The applicants in Appeal No. 105 are liable to pay 2/9ths of Rs. 1276, that is Rs. 283-9-0. The applicants in Appeal No. 106 are liable to pay 1/12 of Rs. 1276 that is Rs. 106-5-4, and 1/10th of Rs. 646-2-0, that is Rs. 64-9-10.

Point No. 2.: There is a list on the file showing that the mortgagee spent Rs. 201-8-3 as costs in suits for arrears of rent brought by him against tenants. These suits were decreed from March 1927 to 10th July 1935. The Commissioner states in his report that the mortgagee at a very late stage in the proceedings when the chart was almost complete and the arguments practically heard wanted to file certain papers showing the amounts spent in litigation, and he could not accept them at that stage and returned them. An objection was taken that the Commissioner had erred in refusing to bring on record the papers filed by the mortgagee, although he got the accounts of legal expenses filed, but he did not award anything on that account. An issue was framed "Were the documents sought to be produced refused by the Commissioner without good grounds." It appears that the learned Special Judge has overlooked this issue, and there is no finding about it. It appears that the Commissioner in determining the income of the property had taken into account the amount of Rs. 97-5-0, costs of litigation which were realised. It was, therefore, very unfair on his part not to credit the mortgagee with the amount spent by him. The result is that the mortgagor gets credit for the amount which the mortgagee had spent from his own pocket. Section 72, T. P. Act, before it was amended by Act 20 of 1929, provided that when during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he may spend such money as is necessary for the due management of the property and the collection of the rents and profits thereof. By reason of the amendment this clause has been deleted but we find a corresponding provision in cl. (h) of S. 76, T. P. Act. It provides that when during the continuance of the mortgage the mortgagee takes possession of the mortgaged property, the receipts from the mortgaged property after deducting the expenses properly incurred for the management of the property and the collection of rents and profits should be debited against him. It was held in 17 O C 47[3] that in the absence of any foundation for a suggestion of bad faith, the filing of suits to recover arrears of rent by a mortgagee in possession is an act of management and any expenses incurred in connexion therewith are recoverable by the mortgagee under S. 72, T. P. Act.

In this case certain items had been realized by the mortgagee, and it was held that he was entitled to all the money spent by him. We are of opinion that the mortgagee is entitled to this amount from each applicant in proportion to his liability. He is entitled to Rs. 4-1-3 from the applicants-respondents in Appeal No. 104, Rs. 44-12-6 from the applicants-respondents in Appeal No. 105 and Rs. 16-12-9 from the applicant-respondent in Appeal No. 106.

Point No. 3.: The learned Special Judge was satisfied by the oral evidence recorded by the Commissioner that the mortgagee received certain nazranas amounting to Rs. 727-15-0 in all the villages. We see no reason to differ from him. It is argued that certain sorts of nazranas were not claimed by the mortgagors in their replications to the claims of the mortgagee. The learned Judge has considered this point. He held that after the appointment of the Commissioner the applicants added a number of other heads to those mentioned by them previously under which they alleged the mortgagee had received various sums of money from the tenants, and evidence was given on those points without any objection. It was within the power of the Court to allow the applicants to add to their pleadings, and this appears to have been done without any objection by the other side. We think it is too late for the mortgagee now to argue in appeal that evidence about the nazranas not mentioned in the replications should not have been given. It is said that the learned Judge has found that the mortgagee kept proper accounts, but no nazrana is mentioned in them. The mortgagee owns considerable other property, and it was found that the amount of nazrana is not mentioned in respect of other property, even though it was admittedly realized by him. It appears that as the realization of these nazranas is not legal, they are not mentioned in the account books. We refuse to disturb the finding of the Special Judge on this point.

Point No. 4.:—It is not denied and cannot be denied in the face of the observations made by their Lordships of the Privy Council

3. ('14) 1 AIR 1914 Oudh 330: 23 I C 456: 17 O C 47, Basant Singh v. Mata Bakhsh Singh.

in 1935 O W N 261,[4] 9 I A 1[5] and 27 I A 110[6] that profits mean amount realised minus the costs of collections, and in the absence of any evidence the costs of collections should be considered to be 10 per cent. It is however argued that there is evidence in this case that the costs of collections are much less, and reliance is placed on the statement of the mortgagee's witness Mohammad Kazim. He did not state anything about these costs in examination-in-chief, but he stated in cross-examination that he was paid Rs. 15 a month, and there were two peons under him who were paid Rs. 3 each. It does not follow that the entire costs of collections were the salaries of these three servants. We think that the lower Court was right in allowing 10 per cent. as collection charges.

Point No. 5:—The Commissioner and the Court both agreed that there was no reliable evidence to prove that any trees were cut in Purai Ahiran, a hamlet of villages, Balchhat. The Commissioner was of opinion that certain trees were cut in villages Balchhat, Daulatpur and Guthia. The Commissioner relied on his own observation that there were some traces of the trees being cut. It was however proved that the mortgagor had himself cut some trees before the mortgagee entered into possession. The mortgagee has kept proper accounts, and there is no reason for the price of the trees not being entered in them, had any been really cut. We see no reason to differ from the finding of the Special Judge on this point.

Point No. 6:—A provision has been added by the Amending Act of 1939 to S. 14, Encumbered Estates Act. It is that no pendente lite interest shall be allowed in the case of any debt where the creditor was in possession of any portion of the debtor's property in lieu of interest payable on such debt. It is argued on behalf of the respondents that this provision was added in 1939, and so the lower Court in the absence of it was not entitled in 1937 to award interest from the date of dispossession of the mortgagee. The learned Counsel for the respondents has relied on certain rulings that the amendment should not have a retrospective effect but that very Act which amended S. 14 added S. 20A, cl. (v). Clause (v) of S. 20A provides that any order passed otherwise than in accordance with the proviso to sub-s. (7) of S. 14 shall be cancelled. It is thus clear that the Legislature meant to give this amendment a retrospective effect, and we see no reason to make any alteration in this order. If we were to allow pending interest the order is liable to be cancelled under the amending Act of 1939.

Point No. 7:—The Commissioner in his report dated 25th May 1937, found that Rs. 26,904-8-0 were due to the mortgagee on the bond of 1906. The amount found due on 24th July 1924, when the mortgagee took possession was Rs. 22,935. In the year 1924-1925 the income was Rs. 3186-7-6 and the interest and expenses amounted to Rupees 3182-2-2, and so the mortgagee got Rs. 4-5-4 more than the interest. This amount was deducted from the principal and the amount remaining due on 24th July 1925, was Rupees 22,930-10-8. In most of the subsequent years the income was less than the amount of interest and other expenses. The Commissioner found the amount due to the mortgagee at the end of each year and added it to the principal beginning from the second year. The learned Judge held that the mortgagee was not entitled to get any amount more than that received by him even if the amount of interest and other expenses were more. He has relied on two points : (1) that the mortgagee never claimed the deficiency in profits in his claim, and (2) that he was not legally entitled to it. We think that the learned Judge is wrong on both the points. The mortgagee's claim was that there should be no accounting and he was entitled to the possession of the property in lieu of his interest. The applicants themselves pressed for account and the Court accepted their contention in its order dated 23rd April 1937. The Commissioner was then appointed to prepare accounts and he did it as claimed on behalf of the mortgagee. The applicants then objected to it and their objection was allowed by the Court. The mortgagee had never any opportunity to state before the applicants objected that they were entitled to the portion of the interest which was not paid by the profits. The accounting denotes the idea that the mortgagee would be entitled to his interest and would give account of the money received by him after deducting the legal expenses. We are of opinion that the learned Judge was not justified in not awarding the shortage of interest to the mortgagee on the ground that it was not

4. ('35) 22 AIR 1935 P C 49 : 154 I C 1 : 62 Cal 499 : 62 I A 53 : 1935 O W N 261 (PC), Secretary of State v. Saroj Kumar.
5. ('83) 8 Cal 332 : 9 I A 1 : 4 Sar 304 (PC), Hurro Doorga Chowdhrani v. Surut Soondari Debi.
6. (1900) 27 Cal 951 : 27 I A 110 : 4 C W N 631 (PC), Girish Chunder Lahiri v. Shoshi Shikhareswar Roy.

claimed by him in his claim. The second point taken by the learned Judge is that there is a covenant in the deed that the mortgagor would make up this deficiency out of his other property. The reference is to para. 7 of the mortgage deed of 1906 which runs thus :

That if at the time of taking possession over the property by the said mortgagee or at any time in future there occurs a deficiency in the profits of the property noted in the deed, I, the declarant shall make up the deficiency out of my other property, and I, the declarant, shall have nothing to do with the enhanced amount of rent.

It is clear that the mortgagor was liable if the entire amount of interest was not realized from the profits of the property. The question is whether by reason of his taking a personal liability to pay the deficiency in profits the mortgagee is not entitled to recover it from the mortgaged property. It was held by the Privy Council in 5 Lah 425,[7] that :

A mortgagee is entitled to treat interest due under a mortgage as a charge upon the mortgaged property in the absence of any contract to the contrary.

There is no provision in the deed that the interest be not a charge on the property. In 10 O W N 299[8] there was a covenant in the deed that if any portion of the mortgaged property was acquired for Government purposes and any decrease in the profits payable to the mortgagee occurs for that reason or if the mortgagee has to pay any other kind of new Government cess with regard to the mortgaged property and the same cannot be realized from the tenants, then the mortgagor will pay the deficit in the annual profits out of his own pocket. It was held that notwithstanding this covenant the mortgagee was not prevented from claiming the deficiency in the profits at the time of redemption. The case in 5 Lah 425,[7] has been followed in several cases by the Courts in India. It was held in A I R 1928 Pat 398,[9] that :

A mortgagee in the absence of any contract to the contrary is entitled to treat the interest due under the mortgage as a charge on the property, and the mere fact that there is an express reference to interest in the personal covenant and no express reference to interest in the hypothecation clause is not evidence to the contrary.

The Lahore High Court in 96 I C 477,[10] held that :

In the absence of any contract to the contrary a mortgagee is entitled to treat interest due under the mortgage as a charge on the property, and the fact that the mortgagor has made himself personally liable makes no difference.

Several cases are cited in Mitra's Transfer of Property Act, Edn. 9, para. 331 in support of this view. The learned counsel for the respondents has relied on 22 O C 270.[11] In that case there was a stipulation that if the mortgagee had to pay enhanced revenue, he was entitled to realize it from the mortgagor by bringing a suit against him, and it was held that this stipulation was incompatible with the mortgagee having a right to add the excess to the mortgage money. We cannot follow this case in the face of the subsequent rulings cited above. The other case relied upon by the respondents is 27 O C 72.[12] In that case the case was of the liability of the mortgagor to pay enhanced revenue, and it was held that he was not liable at all, so there was no question whether the property was liable or not. The third case relied upon by the respondents is 1932 O W N 253.[13] In that case money was left with a mortgagee to pay off a prior mortgagee, and there was a stipulation that if the mortgagee had to pay more than the money left, the mortgagee would be personally liable. That case is quite distinguishable from the present one. We are of opinion that the mortgagee is entitled to recover the deficiency in the profits at the time of redemption.

We have shown above that the mortgagee is entitled to get a decree for all the amounts which he could claim at the time of redemption. It is argued on behalf of the appellant that the mortgagee is also entitled to interest on the deficiency, that is compound interest. Reliance is placed on para. 2 of the mortgage deed, dated 3rd February 1906. It provides that the period of mortgage is 20 years, but the mortgagor shall have power after the expiry of five years from the date of the deed to pay off in a lump sum the entire mortgage money with interest which may be due up to the date

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7. ('24) 11 A I R 1924 P C 183 : 80 I C 820 : 5 Lah 425 : 51 I A 377 (P C), Ganga Ram v. Natha Singh.
8. ('33) 20 A I R 1933 P C 136 : 144 I C 1025 : 10 O W N 299 (PC), Bachchulal v. Syed Mohammad Mah.
9. ('28) 15 A I R 1928 Pat 398 : 110 I C 594 : 9 P L T 785, Rang Raj Singh v. Sheonarain Lal.
10. ('26) 13 A I R 1926 Lah 624 : 96 I C 477 : 7 Lah 559 : 27 P L R 643, Manghi v. Dial Chand.
11. ('19) 6 A I R 1919 Oudh 50 : 54 I C 264 : 22 O C 270, Farzand Ali v. Sadiq Husain Khan.
12. ('24) 11 A I R 1924 P C 102 : 80 I C 1019 : 51 I A 157 : 46 All 269 : 27 O C 72 (P C), Mirza Abid Husain v. Kaniz Fatima.
13. ('32) 19 A I R 1932 Oudh 255 : 139 I C 64 : 8 Luck 40 : (1932) 9 O W N 253, Said Ahmad v. Pratab Narain Singh.

with one six-monthly instalment of interest more than may be due in future, then the property noted in the deed shall be redeemed. Reliance is also placed on para. 4 which provides that in case any two instalments of interest be not paid the mortgagee will be entitled to possession and the amount of interest falling in arrears having been included in the principal interest at the said rate shall be paid thereon also and on the last portion of para. 7 quoted above. We do not think that the mortgage deed entitles the mortgagee to claim compound interest after taking possession of the property. We are of opinion that he is entitled to claim deficiency in the profits but not interest thereon. According to the report of the commissioner dated 25th May 1937, the amount due on 24th July 1925, was Rupees 22,930-10-8, and there was a deficiency of Rs. 20-12-11. We do not add this deficiency to the mortgage money then due and thus the amount due on 24th July 1926 was Rs. 22,930-10-8. One year's interest on that amount comes to Rs. 1547-13-1. The profits were Rs. 31-13-8 more and that amount has to be excluded from Rs. 22,930-10-8. The balance is Rs. 22,898-13-0. This was the mortgage money due on 24th July 1927. The account ought to be as follows :

Date.	Principal amount.	Interest for one year.	Profits for one year.	Deficiency in profits.	Excess in profits.
	Rs.	Rs.	Rs.	Rs.	Rs.
24-7-24.	22,935 -0-0	1548- 1-2	1552- 6-6	...	4- 5-4
24-7-25.	22,930-10-8	1547-13-1	1527- 0-6	20-12-7	...
24-7-26.	22,930-10-8	1547-13-1	1579-10-9	...	31-13-8
24-7-27.	22,898-13-0	1545- 8-9	1510-14-0	34-10- 9	...
24-7-28.	22,898-13-0	1545- 8-9	1441- 0-6	104- 8- 3	...
24-7-29.	22,898-13-0	1545- 8-9	1338- 8-1	207- 0- 8	...
24-7-30.	22,898-13-0	1545- 8-9	1800-13-9	745-11- 0	...
24-7-31.	22,898-13-0	1545- 8-9	...	489-13-10	...
24-7-32.	22,898-13-0	1545- 8-9	...	549- 9- 7	...
24-7-33.	22,898-13-0	1545- 8-9	...	503- 4- 9	...
24-7-34.	22,898-13-0	1545- 8-9	...	506- 7- 5	...

The mortgagee is entitled to get Rupees 22,898-13-0 plus Rs. 3261-14-10, total deficiency in profits, plus Rs. 122-8-0, interest from 24th July 1935 to 24th August 1935, total Rupees 26,283-3-10. Out of this amount Rs. 147-7-0 will be deducted on account of nazranas. The balance is Rs. 26,135-12-10. Sartaj Fatima is liable to pay 1/10th of it, i. e., Rs. 2611-9-3. The result is that Appeal No. 104 is allowed to the extent of Rs. 4-1-3, costs of rent suits and Rs. 25-12-6, costs of the suit for the recovery of possession—total Rs. 29-13-9. The rest of the appeal and the cross-objections are disallowed. Appeal No. 105 is allowed to the extent of Rs. 44-12-6, costs of rent suits and Rs. 283-9-0, costs of the suit for recovery of possession—total Rs. 328-5-6. The rest of the appeal and the cross-objections are disallowed. Appeal No. 106 is allowed to the extent of Rs. 336-7-0, (difference between Rs. 2611-9-3 found by us and Rs. 2275-2-3 allowed by the lower Court), deficiency in profits allowed by us on account of the bond, dated 3rd February 1906, Rs. 16-12-9 costs of the suits for arrears of rent, Rupees 106-5-4, costs of the suit for recovery of possession of the mortgaged property on the basis of mortgage deed, dated 16th January 1905, and Rs. 64-9-0, costs of the suit for recovery of possession of the mortgaged property on the basis of deed dated 3rd February 1906—total Rs. 524-2-0. The rest of the appeal and the cross-objections are disallowed. The parties will get and pay costs of the appeals in proportion to success and failure. The respondents will pay to appellant costs in respect of the cross-objections. The appellant will also get proportionate costs in the lower Court on the amounts decreed in each appeal.

G.N./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Oudh 505

AGARWAL J.

Suraj Bali — Judgment-debtor — Appellant

v.

Ganga Pershad — Decree-holder — Respondent.

Execution of decree Appeal No. 38 of 1940, Decided on 28th April 1941, against order of Civil Judge, Malihabad, Lucknow, D/- 11th May 1940.

* Provincial Insolvency Act (1920), Ss. 28 and 51 — Execution sale — Judgment-debtor subsequently adjudicated insolvent and granted discharge—Failure of decree-holder purchaser

to prove his debt in insolvency is no bar to confirming sale even if debt is wiped off by insolvent's discharge — Judgment-debtor has no right to object to confirmation of sale in absence of claim by receiver to property sold — Section 28 bars creditor's remedy pending insolvency proceedings and does not bar confirmation of sale after they are over.

Where after the execution sale the judgment-debtor is adjudged insolvent and obtains his discharge the decree-holder purchaser's failure to prove his debt in the insolvency proceedings is no reason for setting aside the sale even if the debt is wiped off by the insolvent's discharge. Under S. 51 the decree-holder is not entitled to the benefit of his execution against the receiver only, and, therefore, where the receiver laid no claim to the property sold and purchased by the decree-holder, the judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed. Section 28 bars the remedy of the creditor only during the pendency of the insolvency proceedings but does not bar the confirmation of the sale after they were over : ('38) 25 A I R 1938 Oudh 221, *Disting.* [P 506 C 2 ; P 507 C 1]

R. K. Bose — for Appellant.

P. N. Asthana — for Respondent.

Judgment. — This is a second appeal in an execution matter. The facts of this case are as follows: The respondent Ganga Prasad obtained a simple money decree against the appellant Suraj Bali on 13th May 1937, and the decree-holder applied for the execution of the decree on 16th August 1937, by attaching a house of the judgment-debtor. That house was sold on 7th March 1938, and 8th April 1938 was fixed for confirmation of the sale. On 21st March 1938, Suraj Bali, the present appellant, applied for insolvency, and he was adjudicated an insolvent on 9th May 1938. He obtained a discharge on 16th December 1938. The sale was not confirmed till then owing to a suit brought by one Nannhun claiming that he was the owner of the house and not the judgment-debtor. The present appellant put in an application on 23rd January 1939, that as the decree-holder did not prove his debt in the insolvency proceedings, it was wiped off, and so the sale should not be confirmed. That application was refused and the sale was confirmed on 26th July 1939. The learned Civil Judge on appeal has upheld the order of the lower Court.

It is argued before me that as the appellant obtained the order of his discharge before the confirmation of the sale, and the decree-holder did not prove his debt in the insolvency proceedings, his debt was wiped off, and no decree was left in which the sale could take place. It is also argued that the property vested in the receiver under S. 28 and was no more the property of the judgment-debtor or the decree-holder. In my opinion it is not material whether the debt was wiped off or not owing to the appellant's obtaining an order of discharge. I assume that the debt was wiped off, as is contended on behalf of the applicant, but what would be the effect? At the time the sale took place, there was a valid decree. If the debt was wiped off at all, it was long after the sale. The case is distinguishable from those in which it is found that the decree had been satisfied before the sale or the decree is set aside in appeal. In those cases there is no valid decree at the date of the sale. Such is not the case here. I think the fact that the debt was wiped off on account of the discharge is no reason for setting aside the sale. If the subsequent satisfaction of the decree can be a ground for setting aside a sale, the provisions of O. 21, R. 89, C. P. C., would be quite nugatory because a judgment-debtor can claim to have the sale set aside on paying the decretal amount and not 5 per cent. of the purchase money. Under O. 21, R. 89, Civil P. C., when the decree-holder is a purchaser, he is also entitled to 5 per cent. of the purchase money. I, therefore, hold that the effect of the decree-holder not proving his debt in the insolvency proceedings was not to set aside the sale. Reliance is placed on 1938 O W N 911.[1] In that case the provisions of S. 7, U. P. Encumbered Estates Act, were construed, and it was held that if before the confirmation of the sale an order under S. 7, U. P. Encumbered Estates Act, is made, the decree-holder will not be entitled to have the sale confirmed or take delivery of the property purchased by him. This case is distinguishable. It is argued that the provisions of S. 7, Encumbered Estates Act, are similar to those of S. 28, Insolvency Act. Section 28 provides that :

On making of an order of adjudication the whole of the property of the insolvent shall vest in the Court or in a receiver, and except as provided by this Act, no creditor, to whom the insolvent is indebted in respect of any debt provable under this Act, shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court on such terms as the Court may impose.

There is another S. 51 which provides that :

Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the receiver except in respect of assets realized in the

1. ('38) 25 A I R 1938 Oudh 221 : 177 I C 543 : 1938 O W N 911, Sheo Nath v. Madan Mohan Lal.

course of the execution by sale or otherwise before the date of the admission of the petition.

It follows from the latter section that the decree-holder will not be entitled to the benefit of his execution against the receiver only, but the receiver in this case laid no claim to the house sold and purchased by the decree-holder. The judgment-debtor has no right to say that the sale held in favour of the decree-holder should not be confirmed. Section 28 bars the remedy of the creditor only during the pendency of the insolvency proceedings but the sale in this case was confirmed after they were over. I am, therefore, of the opinion that the judgment-debtor had no right to ask the Court not to confirm the sale, and his application was rightly disallowed. The appeal is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 507

AGARWAL J.

Bisheshwar Singh and others — *Defendants — Appellants*

v.

Pt. Achhaibar Din and another, Plaintiffs and others, Defendants — *Respondents.*

Second Appeal No. 330 of 1937, Decided on 6th May 1941, against order of Civil Judge, Sultanpur, D/-17th May 1937.

(a) Transfer of Property Act (1882), S. 8 — Transferor possessing proprietary and under proprietary rights—Transfer of rights includes under-proprietary rights in absence of reservation.

A transfer of his rights by a person having proprietary and under-proprietary rights in land without reservation, includes the under-proprietary rights also: 9 C W N 710 and 17 I C 494 (Cal), *Rel. on.* [P 508 C 1]

(b) Deed—Construction— Deed not ambiguous and capable of legal construction — Contemporaneous circumstances and subsequent conduct of parties are inadmissible.

The contemporaneous circumstances and subsequent conduct of the parties are not admissible when there is no ambiguity in the deed and a legal construction can be put on it. [P 508 C 1]

(c) U. P. Land Revenue Act (3 of 1901), S. 233 (k) — Partition proceedings in revenue Court—No question of under-proprietary rights involved—Suit in civil Court by one of parties for partition of under-proprietary rights is not barred by S. 233 (k).

Where in the partition proceedings before the revenue Court between the parties no question of under-proprietary rights was involved, it is open to any of the parties to sue in a civil Court for a partition of his under proprietary rights. Section 233 (k) does not bar such suit: ('38) 25 A I R 1938 P C 210 and ('40) 27 A I R 1940 Oudh 63, *Disting.*; ('40) 27 A I R 1940 Oudh 354 (FB), *Ref.* [P 508 C 2; P 509 C 1]

Haider Husain and H. H. Zaidi — for Appellants.

M. Wasim — for Respondents 1 and 2.

Judgment. — This second appeal arises out of a suit by the respondents Achhaibar Din and Bhagauti Din for partition of 8 bighas 7 biswas of which they claimed to be under-proprietors to the extent of three-fourths. One Jagannath was the owner of a two-thirds share in village Pipargaon. He granted under-proprietary rights to one Lautawan Singh in respect of 8 bighas 7 biswas land on 28th December 1880. Jagannath Singh sold his entire proprietary share to Lautawan Singh by means of a deed dated 6th March 1888. Lautawan Singh thus became owner of the two-thirds proprietary share and to under-proprietary rights in 8 bighas 7 biswas. On 24th June 1891 Lautawan Singh sold one-half of his share to Jwala Prasad and Bisheshwar Prasad predecessors-in-interest of the plaintiffs. It is in controversy between the parties whether only the proprietary share of Lautawan Singh was sold or the under-proprietary rights also. Lautawan Singh died in 1899 leaving his son Data Din. Data Din made defendants 1 and 2 cosharers with him in his proprietary and under-proprietary rights. On 7th July 1908, Data Din Singh sold his one-half of proprietary rights to Bisheshwar Misir, predecessor-in-interest of the plaintiff.

The plaintiffs' case is that they acquired one-half of the under-proprietary rights of Lautawan Singh under the sale deed dated 24th June 1891 and they got one-fourth under the sale deed dated 7th July 1908 executed by Data Din and thus they became owners of three-fourths of the under-proprietary rights. It was pleaded by defendant 1 that no under-proprietary rights were transferred under the sale deed of 1891 and so the plaintiffs owned only one-half of those rights under the sale deed of 7th July 1908. It was also pleaded that the suit was barred under S. 233 (k), Land Revenue Act. The learned Munsif decided both the points against the plaintiffs and held that they were entitled only to one-half of the under-proprietary rights. The learned civil Judge on appeal has taken a contrary view and decided both the points in favour of the plaintiffs. Defendant 1 had appealed and made defendant 2 a pro forma respondent. Defendant 1 died during the pendency of the appeal and his representatives have been brought on the record.

There was a partition in 1902 and half of the plots were in the chitthi of the plaintiffs, one-fourth in the chitthi of Data Din and one-fourth in the chitthi of defendants 1 and 2. The learned Civil Judge held that the plaintiffs were entitled to the plots in their chitthi and those in the chitthi of Data Din. The two points before me are : (1) whether the plaintiffs acquired a title to the under-proprietary rights under the sale deed of 1891, and (2) whether the plaintiffs' suit is barred by S. 233 (k), Land Revenue Act. Lautawan Singh stated in his sale deed that he owned a one anna share by means of purchase and he was also a permanent lessee on the basis of a lease executed by Jagannath Singh and he was transferring half his zamindari rights and was putting the predecessors of the plaintiffs in proprietary possession. The argument is that under-proprietary rights were not transferred under the deed while the plaintiffs contend that all his rights were transferred. Section 8, T. P. Act, provides that unless a different intention is expressed or necessarily implied, a transfer of property passed forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof. This section was interpreted in 9 C W N 710.[1] The mortgagor in that case possessed superior zamindari rights and sarbarakari interest. It was held that though the mortgage deed did not in terms purport to pass the sarbarakari rights they should be considered to be mortgaged as there was no reservation. The same view was taken by the Calcutta High Court in 17 I C 494[2] and it was held that the maxim of law is that every man's grant shall be taken by that construction of law which is most forcible against himself. There is no reservation in this sale-deed of 1891 that the under-proprietary rights were not transferred.

The learned counsel for the appellants has relied upon some contemporaneous circumstances and subsequent conduct of the parties but they are not admissible when there is no ambiguity in the deed and a legal construction can be put on it. I agree with the learned Civil Judge that the under-proprietary rights were also transferred to the plaintiffs' predecessors. The plaintiff is thus owner of one-half under the sale deed of 1891 and of one-fourth under the sale deed of 1908. The other point is whether the plaintiffs' claim is barred under S. 233 (k), Land Revenue Act. As already stated in the partition of 1902, three chitthis were prepared, one of Data Din, another of Jwala Misir, predecessors of the plaintiffs, and the third of the defendants. Some plots, the area of which is half of the entire area, was allotted in Jwala Misir's chitthi, one-fourth of the area was allotted in the chitthi of Data Din and one-fourth in that of the defendants. The lower Court has granted decree in respect of the plots allotted in the share of Data Din as well as in the share of Jwala Misir. All those plots were shown to be of Lautawan Singh in those chitthis. I fail to understand what objection the plaintiffs could take in the partition proceedings. It does not appear that there was any question of under-proprietary rights in the partition. The name of Lautawan Singh who was the predecessor of the parties was entered over the plots. The plaintiffs could take as much advantage of those entries as the defendants because Lautawan Singh was the predecessor of both. The learned counsel for the appellants has relied on the Privy Council case in 1938 O W N 606.[3] In that case the plaintiffs were recorded as having an under-proprietary interest in the land in which they claimed proprietorship and it was held that their claim was barred as the land was included in another mohal. The plaintiffs here do not claim proprietary interest in the land allotted in the patti of Data Din.

The other case relied on by him is 1939 O W N 997;[4] it was held that if a question affecting partition of a mohal which might have been raised in the partition proceedings is not raised, S. 233 (k) debars the parties to the partition from raising the question subsequently in a civil Court. Here the question whether the plaintiffs were the under-proprietors of one-half or three-fourths could not be raised in the partition proceedings. The most recent case is in 15 Luck 557[5] which was decided by a Full Bench of this Court. It was held that a suit by a plaintiff is

1. ('05) 9 C W N 710, Raja Gour Chandra Gajapati Narayan Deb v. Raja Makunda Deb.
2. ('12) 17 I C 494 : 18 C L J 48, Bhojohari Das v. Bhagabati Dasi.
3. ('38) 25 AIR 1938 P C 210 : 175 I C 775 : 13 Luck 508 : 65 I A 314 : 32 S L R 845 : 1938 O W N 606 (PC), Bajrang Bahadur Singh v. Beni Madho Bakhsh Singh.
4. ('40) 27 AIR 1940 Oudh 63 : 185 I C 137 : 15 Luck 112 : 1939 O W N 997, Patipal Singh v. Rampal Singh.
5. ('40) 27 AIR 1940 Oudh 354 : 189 I C 357 : 15 Luck 557 : 1940 O W N 570 (FB), Rameshar Singh v. Hanwat Singh.

maintainable in a civil Court for a declaration of his right and interest in the chitthi or khata made exclusively in the name of the defendant at a revenue Court partition where the plaintiff and the defendant were both arrayed on the same side as co-applicants or as co-non-applicants and there was no dispute inter se between them. It does not appear in this case whether the parties were arrayed on one side or on opposite sides. I am of opinion that S. 233 (k), Land Revenue Act, does not bar the suit. I agree with the lower Court on both the points and dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 509

GHULAM HASAN J.

Chhutai (Chitai) — *Applicant*

v.

Emperor.

Criminal Revn. Appln. No. 63 of 1941, Decided on 19th May 1941, for revision of order of Addl. Sess. Judge, Bahraich, D/- 15th April 1941.

Criminal P. C. (1898), S. 109 (a) and (b) — Applicability of S. 109 (a) — Police discovering accused concealing himself at night with his companions in hedges near village — Accused arrested and on being questioned giving wrong name and address — Accused unable to explain his presence in hedges at night with house breaking implement and refusing to disclose identity of his companions who had escaped into jungle — S. 109 (a) held was applicable though S. 109 (b) was not.

Section 109 (a) applies to a person who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence and is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the fact of his presence within the local limits of the jurisdiction of a certain Magistrate.

[P 510 C 1]

The police constables on night patrol duty suspecting that certain bad characters were hiding in the hedges near a village went towards the hedges and found three men concealing themselves in the hedges. Seeing the police party, the accused along with his companions ran away but the accused was arrested though his companions got away into the jungle. The accused on being questioned gave a wrong name and address though one of the constables recognized him. The accused was found in possession of a housebreaking instrument called sabar and was unable to explain his presence in the hedges at night and did not disclose the identity of his companions:

Held that S. 109 (a) was applicable to the facts of the case though S. 109 (b) did not apply: ('29) 16 A I R 1929 All 33 (F B), *Foll.* [P 510 C 1, 2]

K. P. Misra — for Applicant.

Government Advocate — for the Crown.

Order.—The applicant Chuttai Chamar files this revision application against the order passed by a Magistrate of the first class directing him to execute a personal bond of Rs. 200 and two sureties in the like amounts to be of good behaviour for a period of one year under S. 109 (a) and (b), Criminal P. C. He went in appeal to the Additional Sessions Judge of Bahraich, who, however, upheld the Magistrate's order. The applicant, according to the prosecution case, was seen hiding himself between the night of 18th/19th February 1941, along with two other men in the hedges of the forest at a little distance from the motor road in village Billi, police station Bhinga, in the district of Bahraich, in order to commit an offence. The case against him was that he was taking precautions to conceal his presence with a view to commit an offence and further that he could not give a satisfactory account of himself. The case was started against him upon police report. It appears that Ram Binayak Singh, constable, was on patrol duty along with Waris Ali, constable, and a chaukidar on the night in question. When the party got on to the motor road, Ram Binayak Singh suspected that certain bad characters were hiding in the hedges near village Billi at a short distance. The party went towards the hedges and found three men concealing themselves in the hedges. Seeing the police party, the applicant along with his companions ran away but the police gave chase and certain other persons from the neighbouring fields came up on the spot. The applicant was arrested but his companions got away into the jungle. The applicant on being questioned gave a wrong name and address. Waris Ali, constable, however, recognized him. The applicant was found in possession of a housebreaking instrument called sabar. The applicant was unable to explain his presence in the hedges at night and did not disclose the identity of his companions. These facts have been fully proved by the prosecution evidence.

The defence of the accused was that he was arrested at Piprehwa, where he had gone with Bhagwan Bania of his village to ask for the gauna of Lala Bania's daughter, who was married to the grandson of Bhagwan. The applicant states that Bhagwan had hired his cart to go to Piprehwa. He attributed his arrest to enmity with Waris Ali, against whom he stated that he had filed an application (EX. A) to the District Magistrate. The accused produced evidence in his defence. The learned Magistrate disbelieved the defence and took the precaution of examining Lala Bania of Piprehwa

under S. 540, Criminal P. C. He denied the fact of Bhagwan Bania's visit to him in order to settle the date of his daughter's gauna. The learned Magistrate also found that the recovery of the housebreaking instrument from the possession of the accused could lead to no inference other than that he was concealing his presence at that unreasonable hour 10 or 12 miles away from his home with a view to commit an offence. Accordingly he made the order against the applicant under S. 109 (a) and (b), Criminal P. C. The learned Additional Sessions Judge in appeal upheld the order of the Magistrate.

Learned counsel for the accused has contended that the story about the applicant's arrest is concocted as village Billi, where the applicant is alleged to have been arrested, was not within the beat of the police constables. This argument was raised for the first time in appeal but the learned Additional Sessions Judge rejected it as being belated as well as being devoid of substance. He found no flaw in the arrest and held that the applicant was actually arrested at the spot alleged by the prosecution. I agree with the view taken by the learned Additional Sessions Judge on the point. It has been argued that S. 109 (a) and (b) has no application to the case. There is no doubt that cl. (b) of S. 109 is inapplicable and this point is conceded by the learned Government Advocate. I am, however, satisfied that the case is fully covered by cl. (a) of S. 109, Criminal P. C. Learned counsel for the accused has referred to a number of cases of the different High Courts, but in my opinion it is not necessary to deal with any of them, as some of them are clearly inapplicable to the facts and circumstances of the present case and others have already been considered and discussed in a Full Bench decision of the Allahabad High Court in 50 ALL 909.[1] It was held by the Full Bench that:

Section 109 (a), Criminal P. C., is applicable to a person who, being or coming within the local limits of the jurisdiction of a certain Magistrate, takes precautions to conceal his presence with a view to committing an offence. It is not limited to the more restricted case of a person who, with a similar object, takes precautions to conceal the facts of his presence within the local limits of the jurisdiction of a certain Magistrate.

The case was practically similar in facts to the present case. There also the police had received information that a number of persons were concealing themselves on a dark night at about midnight in a mango grove outside the abadi of a village with a view to commit some offence. When the police went to the grove, they found four persons sitting there, who, on being challenged, tried to run away. They were chased, and two of them were captured. They had housebreaking instruments with them. When caught, they first gave wrong names and addresses, but later on disclosed their real names and identities. It was held that S. 109 (a) was applicable to the above facts. It was observed at p. 917 of the report that

if a man is taking precautions anywhere in order to conceal his presence, and that concealing is to be effected within the jurisdiction of a Magistrate who receives information, such Magistrate has power to demand security, even though the residence of the person informed against within the jurisdiction is well known.

Accepting the view taken by the Full Bench, I am of opinion that the order passed against the applicant under S. 109 (a), Criminal P. C., calling upon him to execute the bond and sureties is perfectly justified. Cl. (b) of S. 109 being inapplicable, the order under that clause is vacated. This will, however, not affect the order relating to the bond and the furnishing of sureties. Subject to the variation indicated above, the application fails and is dismissed.

G.N./R.K. *Order accordingly.*

1. ('29) 16 A I R 1929 All 33 : 113 I C 417 : 30 Cr L J 145 : 50 All 909 : 26 A L J 1257 (F B), Emperor v. Phuchai.

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(28) A. I. R. 1941 Oudh 510

GHULAM HASAN J.

Ram Charan and others — Accused

v.

Emperor.

Cri. Ref. No. 15 of 1941, Decided on 28th May 1941; reference made by Sess. Judge, Rae Bareli.

(a) Criminal P. C. (1898), S. 345 (6) — Complaint under Ss. 452 and 392, Penal Code, dismissed as complainant did not wish to proceed with case — Fresh application by complainant stating that withdrawal of complaint was based on misconception of facts—Magistrate reviving original complaint and on evidence finding accused guilty under S. 323, Penal Code, and not Ss. 452 or 392, Penal Code—Revival of complaint held justified — Conviction under S. 323, Penal Code, held legal.

The Magistrate on the application of the complainant that he did not wish to proceed with his complaint under Ss. 452 and 392, Penal Code, dismissed the complaint. Subsequently the complainant made an application stating that his previous application withdrawing the complaint was based on a misconception of facts whereupon the Magistrate revived the original complaint and upon a consideration of the evidence found that no offence under S. 452 or S. 392, Penal Code, was committed but the accused were guilty under S. 323, Penal Code, and therefore convicted them:

Held that the offences under Ss. 452 and 392, Penal Code, being non-compoundable, on the facts the Magistrate was entitled to revive the original complaint : 21 Cal 103; ('27) 14 A I R 1927 Bom 410 ; (29) 16 A I R 1929 Bom 375 and 11 P R 1907 Cr, *Rel. on.* [P 511 C 2]

Held further that the conviction of accused under S. 323, Penal Code, was perfectly legal inasmuch as there was no reference to that section in the original complaint. [P 512 C 1]

(b) Criminal P. C. (1898), Ss. 342 and 537 — Magistrate examining accused after prosecution case was closed and one defence witness heard —Procedure is not in violation of S. 342 unless accused is prejudiced thereby — Even if it be irregularity it is curable under S. 537.

The procedure of a Magistrate in examining the accused after the close of the prosecution case and hearing one defence witness cannot be said to be in violation of S. 342 unless the accused is shown to be prejudiced thereby. Even if it is an irregularity it can be cured under S. 537. [P 512 C 1, 2]

Siraj Hussain — for Accused.

S. M. Yusuf — for the Crown.

Order.—This is a reference made by the learned Sessions Judge of Rae Bareli recommending to this Court that the conviction and sentence passed upon Mt. Rajjau and certain others under S. 323, Penal Code, be set aside. The reference arises out of the following circumstances. Mt. Chhuttan filed a complaint under Ss. 452, and 392, Penal Code, against Mt. Rajjau and five others. On the following day, namely 12th July 1940, Mt. Rajjau filed a cross complaint under Ss. 323 and 504, Penal Code. Both the complaints were tried together by the same Magistrate. The complainants in the two cases are alleged to have made statements before the Magistrate requesting that they did not wish to proceed with the complaints and that their cases might be consigned to the record. The Magistrate accordingly consigned the cases to the record. Two days later, namely 15th August 1940, Mt. Chhuttan made an application to the District Magistrate in which after referring to the two complaints she stated that the case was taken up on 13th August 1940, in the absence of her counsel, that she got confused and without understanding the matter she stated that she did not wish to prosecute her complaint with the result that the complaint was dismissed. She further stated therein that legally the complaint under Ss. 452 and 392, Penal Code, could not be withdrawn nor compromised. She, therefore, prayed that the complaints be revived and the accused be dealt with according to law. It also appears that on 23rd August 1940 Mt. Rajjau filed a fresh complaint under Ss. 323, 504 and 506, Penal Code, apparently as a counterblast against the complaint filed by Mt. Chhuttan. On 12th September 1940, the same Magistrate recorded the order in respect of the complaint of Mt. Chhuttan that the order of discharge passed on her previous complaint was not passed on merits or consideration of evidence. He made no enquiry into the truth of the allegations made in Mt. Chhuttan's complaint but referred to it as alleging that her earlier statement had been made under the misrepresentation made by the opposite party and the misconception of facts. This statement in the order is contrary to the actual allegations made by Mt. Chhuttan in her complaint. She did not attribute any misrepresentation to the opposite party. The fact that the Magistrate entertained the complaint shows that he accepted the allegation of Mt. Chhuttan that her statement was based upon a misconception of facts. That a Magistrate is entitled to revive the complaint in a non-compoundable case on such facts is supported by the authority of the decisions in 21 Cal 103,[1] A I R 1927 Bom 410,[2] A I R 1929 Bom 375[3] and 6 Cr L J 336.[4]

The Magistrate thereupon proceeded with the complaint and ultimately on 7th December 1940, convicted four persons under S. 323, Penal Code, including Mt. Rajjau, and sentenced them to pay a fine of Rs. 15. He acquitted the two other accused. On the same day he dismissed the complaint of Mt. Rajjau. Those convicted thereupon filed a revision application before the learned Sessions Judge of Rae Bareli, who considering that the case involved an important and novel point of law referred the matter to this Court.

It has been contended on behalf of the accused persons, who were convicted, that the dismissal of the complaint against them on 13th August 1940, amounted to an acquittal within the meaning of S. 345 (6), Criminal P. C., and that the Magistrate had no jurisdiction to convict them under S. 323, Penal Code, again upon the same facts after they had once been acquitted. As far as the complaint under Ss. 452 and 392, Penal Code, was concerned, they were non-compound-

1. ('94) 21 Cal 103, Murray v. Queen-Empress.
2. ('27) 14 A I R 1927 Bom 410 : 102 I C 549 : 28 Cr L J 581 : 51 Bom 512 : 29 Bom L R 718, Dajiba Ramji Patil v. Emperor.
3. ('29) 16 A I R 1929 Bom 375 : 122 I C 118 : 31 Cr L J 353 : 31 Bom L R 789, Hanmant Shrinivas v. Emperor.
4. ('07) 11 P R 1907 Cr : 6 Cr L J 336 : 47 P L R 1908 : 34 P W R 1907 Cr, King-Emperor v. Hira Singh.

able offences, and the accused must be held to have been discharged on 13th August 1940. They were, however, liable to be proceeded against under the same sections and convicted if the offences could be established against them. The learned Magistrate found upon a consideration of the evidence that no offence had been established under sections 452 and 392, Penal Code, but the accused were guilty under S. 323, Penal Code, with the result that he convicted them, as has been stated above. There is no doubt whatever in my mind that the order of the Magistrate convicting the accused under S. 323 on the complaint of Mt. Chhuttan cannot, upon the same facts after they had once been acquitted, be allowed to stand in view of the provisions of S. 345 (6), Criminal P. C. This, however, will depend upon the fact whether the original complaint of Mt. Chhuttan included the offence under S. 323, Penal Code, in addition to the offences under Ss. 452 and 392, Penal Code. The learned Sessions Judge in his order states that the complaint against the accused was filed under Ss. 452, 392 and 323, Penal Code, while the explanation submitted by the Magistrate does not mention S. 323, Penal Code. I have, therefore, thought fit to send for the original record to satisfy myself as to the accuracy of the facts. I shall pass final orders after the receipt of the original record.

The original record has been received. It shows that Mt. Chhuttan's first complaint was under Ss. 452 and 392, Penal Code, and made no reference whatsoever to S. 323, Penal Code. It appears therefore that the order of the Magistrate convicting the accused under S. 323, Penal Code, for the first time upon facts being established upon that charge is not open to question. The only other point that was urged by learned counsel on behalf of the accused is that the prosecution evidence closed on 21st November 1940, and the only defence witness was examined on 25th November 1940. The grievance is that the provisions of S. 342, Criminal P. C., have been ignored inasmuch as the accused were examined actually after one witness for the defence had been heard. The record however shows that the accused were fully examined before the charge was framed and again examined on 7th December 1940. Under para. 1 of S. 342, Criminal P. C., it is open to the Court to examine the accused at any stage of the enquiry or trial without previously warning him if it considers it necessary. I agree with the learned Sessions Judge that there has been no violation of S. 342; in any case it has not been shown that the accused have been prejudiced by this action of the Court. I am not at all satisfied that miscarriage of justice has resulted from the course adopted by the Magistrate. Section 537, Criminal P. C., is sufficient to cure the defect of the irregularity, if any, in this respect.

Another grievance of the accused is that they were not allowed to produce a second defence witness, who had been summoned for 25th November 1940, but was absent. It is stated that an application was put in before the judgment was written but it was returned by the Magistrate. There is nothing on the record to substantiate these allegations and I am unable to hold that any prejudice has resulted to the accused by the non-production of the witness. The order of the Magistrate convicting the accused is perfectly justified. The recommendation of the learned Sessions Judge to the effect that the finding of the Magistrate be reversed on the ground that the case under S. 323, Penal Code, had been compromised between the parties and the accused must be deemed to have been acquitted within the provision of S. 345 (6), Criminal P. C., proceeds upon an error of fact and cannot be accepted. I therefore reject the reference. Let the papers be returned.

G.N./R.K. *Reference rejected.*

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(28) A. I. R. 1941 Oudh 512

YORKE AND GHULAM HASAN JJ.

Lala Ajodhia Nath Seth — Applicant.

In re

Pt. Chandra Bhushan — Appellant

v.

Mt. Putta Devi — Respondent.

Misc. Applications Nos. 282, 283 and 284 of 1940, Decided on 10th February 1941.

Civil P. C. (1908), O. 21, R. 16 and S. 37 (b) — O. 21, R. 16 does not contemplate order of substitution—It gives transferee of decree right to apply for execution directly without obtaining order for substitution — Application can be entertained only by trial Court or on its ceasing to exist, under S. 37 (b).

Order 21, R. 16 does not contemplate an order of substitution being made in favour of an assignee on the basis of a deed of assignment in place of the assignor. It gives the transferee a right to apply for execution of the decree directly without the necessity of obtaining any order for substitution in his favour : ('28) 15 A I R 1928 Oudh 30; ('27) 14 AIR 1927 All 165 (F B) and I L R (1939) 2 Cal 325, *Rel. on*; ('21) 8 A I R 1921 Mad 599 (F B) and ('32) 19 A I R 1932 Mad 73 (F B), *Expl.*

[P 513 C 2]

The application under O. 21, R. 16 can be entertained only by the Court which passed the decree and not by the Court to which the decree is sent for execution or to the appellate Court before which an execution appeal is pending. Where the Court which passed the decree has ceased to exist the application should be made in accordance with S. 37 (b): ('37) 24 A I R 1937 Oudh 111 and ('32) 19 A I R 1932 Pat 168, *Rel. on.* [P 514 C 2]

P. N. Asthana — for Applicant.

Ali Hasan — for Appellant.

P. N. Chowdhry — for Respondent.

Order. — These are three applications under O. 21, R. 16, Civil P. C., filed by one Lala Ayodhya Nath Seth in the three connected execution appeals pending in this Court. The material facts are few and simple. Mt. Putta Devi is the widow of Pandit Chandika Prasad. She obtained a decree for maintenance for Rs. 50 per mensem, i. e., Rs. 12-8-0 per mensem against each of her four step-sons out of whom three, namely, Chandra Bhushan, Satya Narain and Ram Shankar, are the appellants in the three execution of decree appeals. Mt. Putta Devi applied for execution of her decree by appointment of a receiver against the three aforesaid sons separately. The sons filed objections to the execution on the ground that the applications for execution are not maintainable as they had applied under S. 4, Encumbered Estates Act. The learned Civil Judge rejected the objections holding that the maintenance dues cannot be called debt within the meaning of the definition of the word "debt" given in the Encumbered Estates Act and consequently the execution is maintainable. This order was passed on 11th February 1939.

On 24th February 1939, the three objectors preferred three separate appeals, which are now pending in this Court. On 6th March 1940, Lala Ayodhya Nath Seth filed three applications (Nos. 282, 283 and 284 of 1940) under O. 21, R. 16, Civil P. C., stating that Mt. Putta Devi, the decree-holder, had transferred three-fourths of her interest in the decree to him by a registered sale deed dated 18th August 1939, and claimed a right to be substituted as a respondent in all the appeals along with Mt. Putta Devi. He also prayed that he should be treated as entitled to three-fourths share of the decretal amount and that further proceedings in execution should be regarded both on behalf of Putta Devi and himself.

The three judgment-debtors appellants have filed objections to the applications of Lala Ayodhya Nath Seth. Mt. Putta Devi has also filed separate objections. The sale deed in favour of Lala Ayodhya Nath Seth is challenged on various grounds both by the decree-holder as well as the judgment-debtors as being void on the ground of fraud, undue influence, misrepresentation, want of intelligent execution and absence of consideration. The sale deed is further alleged to have been executed in order to stifle criminal prosecution and is alleged to be void under S. 23, Contract Act. It is further objected that the applications are not maintainable under O. 21, R. 16, Civil P. C., in this Court. Having heard learned counsel on both sides at some length we have come to the conclusion that these applications are misconceived. The object of the applications appears to be to obtain an order of substitution of names in regard to three-fourths share of the decretal amount in place of the decree-holder. We have no doubt whatever that R. 16 of O. 21 does not contemplate an order of substitution being made in favour of an assignee on the basis of a deed of assignment in place of the assignor. Rule 16 of O. 21 lays down that where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder.

It is clear from the wordings of the section, that the transferee has been given a right to apply for execution of the decree directly without the necessity of obtaining any order for substitution in his favour. We are fortified in this view by a decision of a Bench of this Court in 3 Luck 126,[1] where it was held, following a Full Bench decision of the Allahabad High Court in 49 ALL 509,[2] that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. A similar view has been taken in I L R (1939) 2 Cal 325,[3] where

1. ('28) 15 A I R 1928 Oudh 30 : 105 I C 611 : 3 Luck 126 : 4 O W N 1025, Muhammad Sadiq Ali Khan v. Sajjad Mirza.
2. ('27) 14 A I R 1927 All 165 : 104 I C 116 : 49 All 509 : 25 A L J 249 (F B), Baij Nath v. Ram Bharos.
3. ('39) I L R (1939) 2 Cal 325, Radha Nath Das v. Produmna Kumar Sarkar.

it was held that there is no provision in the Code of Civil Procedure enabling the assignee of a decree to apply only for recording the assignment. In that case the assignee had made an application that the assignment of the decree in favour of the applicant should be recorded, that he should be allowed leave to execute the decree and that the name of the applicant should be substituted as an assignee of the said decree. There was no application by the assignee for execution of the decree. It was remarked that there could be no justification for splitting the matter into two parts and thereby necessitating one application for recording the assignment of the decree and the other for execution of the decree.

Reference has been made on behalf of the applicant to 44 Mad 919[4] and 55 Mad 352.[5] Neither of these cases is of any assistance to the applicant. In the former case two of the learned Judges expressed the opinion that O. 22, R. 10, Civil P. C. applies to proceedings in execution, while the third learned Judge expressed a contrary opinion. The decision of the case, however, was not founded upon that ground. This was fully explained in a later case of the same Court in A I R 1927 Mad 824.[6] The case in 44 Mad 919[4] further laid down that S. 146, Civil P. C. recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee, and O. 21, R. 16 is no bar to the application of the section.

In 55 Mad 352[5] it was held by the Full Bench that the legal representative of a deceased decree-holder who died during the pendency of an execution petition filed by him could be substituted in his place in the execution petition and be allowed to continue it. Their Lordships overruled an earlier decision of the Madras High Court in 50 Mad 1[7] in which it had been held that the widow of a transferee decree-holder, who died pending his application for the execution of the decree, could not be brought on the record as his representative and be permitted to continue the execution petition filed by him and that the only course left to her was to file a separate and fresh application. The decision in 50 Mad 1[7] proceeded upon an interpretation of Rule 3 read with R. 12 of O. 22, Civil P. C. There it was held that Rr. 3 and 4 of O. 22 were inapplicable to execution proceedings and consequently the legal representative could not be brought on the record. After referring to a number of decisions of the various Courts the Full Bench held that the penalty of abatement of a suit for failure to bring a legal representative on the record on the death of a plaintiff imposed by R. 3 of O. 22 does not attach to execution proceedings in the case of the death of a decree-holder by virtue of R. 12; and R. 12 does not lay down that the legal representative cannot be brought on the record in the course of the execution proceedings. This case, therefore, is inapplicable to the facts of the present case.

It has been contended on behalf of the decree-holder and the judgment-debtors that the proper remedy of the applicant is to apply for the execution of the decree to the lower Court under O. 21, R. 16, Civil P. C., and not to this Court. This contention receives support from a Bench decision of this Court in 12 Luck 755,[8] where it was laid down that an application under O. 21, R. 16, Civil P. C., for substitution of name of the assignee of a decree in place of the decree holder can be entertained only by the Court which passed the decree and not by the Court to which the decree is sent for execution. A similar view was taken by a Bench of the Patna High Court in 11 Pat 94.[9]

It has been represented to us that the Court which passed the decree in this case has ceased to exist. According to S. 37 (b), Civil P. C., the expression "Court which passed a decree" shall be deemed to include, where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. We do not see any difficulty in the way of the applicant to seek his remedy in the lower Court as required by R. 16 of O. 21, Civil P. C. It has been urged on behalf of the applicant that if his interest is not protected by allowing the substitution of his name along with the

4. ('21) 8 A I R 1921 Mad 599 : 69 I C 337 : 41 M L J 316 : 44 Mad 919 (F B), Muthiah Chettiar v. Govinddoss Krishnadoss.
5. ('32) 19 A I R 1932 Mad 73 : 135 I C 561 : 55 Mad 352 : 62 M L J 1 (F B), Venkatachalam Chetti v. Ramaswamy Servai.
6. ('27) 14 A I R 1927 Mad 824 : 104 I C 420 : 53 M L J 512, Mayankutti v. Biyyathumma.
7. ('27) 14 A I R 1927 Mad 184 : 99 I C 627 : 50 Mad 1 : 51 M L J 745, Palaniappa Chettiar v. Valliammai Achi.
8. ('37) 24 A I R 1937 Oudh 111 : 165 I C 891 : 12 Luck 755 : 1936 O W N 1236, Jogendra Singh v. Oudh Commercial Bank, Ltd.
9. ('32) 19 AIR 1932 Pat 168 : 137 I C 472 : 11 Pat 94 : 13 P L T 402, Prithvi Chand Lal v. Satya Kinkar Das.

decree-holder to contest the appeals of the judgment-debtors, the decree-holder might collude with the judgment-debtors and cause loss to him by entering satisfaction of the decree. We think that this suggestion is entirely irrelevant to the question of the maintainability or otherwise of the present applications in this Court. We hold that these applications are not maintainable in this Court and dismiss them with costs.

G.N./R.K. *Applications dismissed.*

(28) A. I. R. 1941 Oudh 516

GHULAM HASAN J.

Mahmood Beg and another —
Complainants — Applicants
v.
Ehsan Beg — Opposite Party.

Criminal Revn. Appln. No. 44 of 1941, Decided on 19th May 1941, for revision of order of Sess. Judge, Lucknow, D/- 2nd January 1941.

(a) Criminal P. C. (1898), Ss. 145(2) and 146 —Land in S. 145(2) does not include moveable property such as stock of medicines in shop.

The definition of land in S. 145 (2) does not include moveable property, such as the stock of medicines in a shop and therefore cannot be attached under S. 146. [P 516 C 1]

(b) Criminal P. C. (1898), S. 145 — S. 145 contemplates not only actual possession but exclusive possession of subject in dispute.

The possession contemplated under S. 145 is not only actual possession but the exclusive possession of the subject in dispute. There is no room whatever for the application of the doctrine of joint possession under that section. The questions of joint possession or constructive possession are both foreign to the scope of S. 145 : 23 C W N 1051 and ('32) 19 A I R 1932 All 683, *Disting.* [P 516 C 2; P 517 C 1]

(c) Criminal P. C. (1898), S. 145(4) — Magistrate's only concern under S. 145(4) is to see who is in de facto possession of subject in dispute — It is not for him to determine title of parties or whether possession is founded on title or not.

A Magistrate acting under S. 145 (4) has to decide the possession of the subject of dispute without reference to the merits of the claims of any party. It is not within the province of the Magistrate to determine the title of the parties or the question whether the possession was founded upon title or not. His only concern is to see who is in de facto possession of the subject of dispute : 11 Cal 365, *Rel. on.* [P 516 C 2]

(d) Criminal P. C. (1898), S. 145(4) proviso and S. 145(1) — Two months in S. 145 (4) proviso mean two months from date of preliminary order under S. 145 (1).

Two months mentioned in the proviso to S. 145 (4) mean two months from the date of the preliminary order under S. 145 (1) and not two months from the date of the complaint : ('35) 22 A I R 1935 All 35; ('29) 16 A I R 1929 Oudh 526; ('31) 18 A I R 1931 Nag 38 and ('40) 27 A I R 1940 Sind 33, *Rel. on*; ('29) 16 A I R 1929 Mad 198, *Dissent.* [P 517 C 1]

Siraj Husain — for Applicants.
Hakim Uddin — for Opposite Party.

Order. — This is an application in revision arising out of proceedings under S. 145, Criminal P. C., between the parties. These proceedings were initiated upon an application filed by one Mahmood Beg on 20th May 1940, in the Court of the City Magistrate of Lucknow. The facts are as follows : Ashraf Beg, a resident of Lucknow, died on 15th May 1940, leaving a brother Ehsan Beg, the opposite party, and the widow Mt. Phundan, one of the applicants, and her brother Mahmood Beg, the other applicant, four minor daughters and a son. Mahmood Beg stated in the application that Ashraf Beg left a shop known as "Undatul Advia" in Nazirabad, Lucknow, that his shop was in the possession of the deceased in his lifetime and after his death in the possession of his widow and children as his heirs, who had put their lock in the shop. The shop in which the goods are stocked was held on rent by Ashraf Beg. The application stated that the opposite party took wrongful possession at 6 A. M. on 20th May 1940, the date of the application. The applicant prayed that the entire property may be attached after a police report, and possession after the enquiry be delivered to the family of the deceased.

The police reported on 28th May 1940, that there was an apprehension of a breach of the peace and that the dispute related to four houses and a piece of land. The learned Magistrate, however, passed no order under S. 145 (1), Criminal P. C., on the receipt of this report. It appears, however, that there were certain other proceedings pending between the parties and in the course of those proceedings the goods of the shop had been given in the custody of Ehsan Beg as a custodian upon his executing an agreement and furnishing a bond for Rs. 1100 on 29th May 1940. This appears to be clear from the order sheet dated 12th June 1940, of the Magistrate's Court. On the same day Mahmood Beg was directed to file a list of the household articles in his possession and a similar agreement. The list was, however, not filed till 3rd July 1940, on which date the Magistrate recorded the order that the plaintiff (meaning the applicant) should seek his redress in the civil Court. He postponed the case to 11th August 1940, adding that the application will be dismissed if the

suit was not filed by that date. Nothing however, appears to have been done till 23rd August 1940, when the Magistrate, for the first time recorded an order in terms of S. 145 (1), Criminal P. C., calling upon the parties to tender evidence of their possession. The order states that there is an apprehension of a breach of the peace regarding the possession of the medicines stocked in the shop known as "Umdatul Advia," Nazirabad, Lucknow, and also in respect of four houses and a piece of open land. It is to be noted that Mahmood Beg's application was confined to the stock of medicines in the shop while the police report covered the entire property left by Ashraf Beg. Written statements were filed by the parties on different dates. No oral evidence was tendered but documentary evidence was produced. Ultimately the learned Magistrate passed the order on 18th December 1940, holding that the provisions of S. 145, Criminal P. C., did not apply to the stock of medicines in the shop and the case was, therefore, liable to fail on that ground. He also held that Ehsan Beg had established his actual and exclusive possession over the contents of the shop since 20th May 1940. The Sessions Judge declined to interfere in revision.

Mahmood Beg and his sister, Mt. Phundan, have filed the present application in revision against that order. It has been contended by learned counsel on their behalf that the learned Magistrate has virtually attached the stock of medicines in the shop by ordering the preparation of the list and entrusting them to the care of Ehsan Beg, and under these circumstances the case fell within the meaning of S. 146, Criminal P. C., and the learned Magistrate should have continued the attachment till the parties had got their rights determined by a competent Court. This contention has no force. In the first place, the preparation of the inventory of the goods was not made under the orders of the learned Magistrate but it was made in the course of other proceedings pending between the parties in a different Court. In the second place, no order for attachment of these goods could have been passed by the learned Magistrate as the definition of land in cl. (2) of S. 145 cannot include the moveable property, such as the stock of medicines in the shop, nor was any order actually passed by him. As a matter of fact, the applicants made several applications to obtain an order for attachment of the shop but the Court did not pass the order of attachment. The learned Magistrate is wrong in observing that the formal possession of Ehsan Beg under the orders of the Court in another case was tantamount to attachment. I am satisfied, therefore, that there was no room for the application of S. 146, Criminal P. C., under the circumstances stated above.

Another argument that has been advanced on behalf of the applicants is that Ashraf Beg was the exclusive owner of the contents of the shop and that his clients came into exclusive possession as heirs after his death. It is further argued that Ehsan Beg admits the joint title of the applicants and therefore his possession over the property must be considered to be the possession on behalf of the applicants as well and as such the case does not fall within the purview of S. 145, Criminal P. C., but under S. 146, Criminal P. C., and the learned Magistrate should have taken action under that section. In this connexion it is also stated that the applicants were in possession for five days, namely from 15th May to 19th May 1940, and were dispossessed only on 20th May 1940 when Ehsan Beg took forcible possession.

It appears from EX. D-1 that the shop was closed from 15th to 19th May 1940. Consequently the question of the applicants' possession is entirely ruled out. The possession of Ehsan Beg being admitted since 20th May 1940, the only question which remains for determination is whether that possession can be considered to satisfy the requirements of S. 145, Criminal P. C. It cannot be seriously disputed that possession contemplated under S. 145, Criminal P. C., is not only actual possession but the exclusive possession of the subject in dispute. There is no room whatever for the application of the doctrine of joint possession under that section. The questions of joint possession or constructive possession are both foreign to the scope of S. 145, Criminal P. C. Further it cannot be questioned that a Magistrate acting under S. 145 (4), Criminal P. C., has to decide the possession of the subject of dispute without reference to the merits of the claims of any party. It is not within the province of the Magistrate to determine the title of the parties or the question whether the possession was founded upon title or not. His only concern is to see who is in de facto possession of the subject of dispute : *vide* 11 Cal 365.[1] It is true that Ehsan Beg set up a joint title with Ashraf Beg and

1. ('85) 11 Cal 365, Ambler v. Pushong.

after his death with his heirs but he nowhere admits that the heirs of Ashraf Beg are in joint possession with him over the property in dispute. Parties may be joint owners and yet any one of them may be in actual possession of the property to the exclusion of other co-owners. No doubt the possession of one co-owner will be considered to be the possession of all, and a co-owner not in actual possession of one would be deemed to be in constructive possession of the property. This doctrine of constructive possession, however, has no place in criminal law and a Magistrate acting under S. 145, Criminal P. C., is entitled to take notice only of exclusive actual physical possession and has nothing whatever to do with constructive possession or joint possession. The contention advanced on behalf of the applicants on this score must, therefore, be rejected.

Learned counsel on behalf of the applicants has referred to two decisions, 23 C W N 1051[2] and A I R 1932 ALL 683,[3] in support of his contention. Neither of these cases is helpful to his clients. In the former case it was held as a fact that the person in possession was in possession on behalf of his nephews and himself, while in the latter case it was found as a fact that the land was admittedly in the joint possession of both parties, and not in the exclusive possession of any of them. In view of that finding on facts it was held that the Magistrate was entitled to pass an order under S. 146, Criminal Procedure Code, neither of the parties being in exclusive possession of the property.

The only other point that requires decision is whether, even if the possession of Ehsan Beg was wrongful, the applicants' possession had been disturbed within the two months next before the date of the preliminary order under S. 145 (1), Criminal P. C. Ehsan Beg took possession on 20th May 1940, while the preliminary order was made on 23rd August 1940, namely three months and three days later. There is ample authority in support of the view that two months mentioned in the proviso to cl. (4) of S. 145 mean two months from the date of the preliminary order and not two months from the date of the complaint: *see* 6 O W N 957,[4] 57 ALL 488,[5] A I R 1931 Nag 38[6] and A I R 1940 Sind 33.[7] The only case in which a different view was taken is a single Judge decision of the Madras High Court reported in 52 Mad 66,[8] where it was held that the period of two months should be taken from the application made to the Magistrate. This case was, however, dissented from in all the aforesaid cases. In my opinion, the remedy sought by the applicants under S. 145, Criminal P. C., was, for the reasons aforesaid, wholly misconceived. Their proper remedy lies in a civil suit in the regular Courts. The application fails and is dismissed.

G.N./R.K. *Application dismissed.*

2. ('19) 23 C W N 1051, Kinu Mondal v. Haji Baul Mondal.

3. ('32) 19 A I R 1932 All 683 : 143 I C 54 : 34 Cr L J 480 : 1932 A L J 819, Chiranji Lal v. Mahadeo Prasad.

4. ('29) 16 A I R 1929 Oudh 526 : 124 I C 363 : 5 Luck 440 : 6 O W N 957 : 31 Cr L J 678, Emperor v. Baijnath.

5. ('35) 22 A I R 1935 All 35 : 152 I C 496 : 36 Cr L J 102 : 57 All 488 : 1934 A L J 1157, Meharban Singh v. Bhola Singh.

6. ('31) 18 A I R 1931 Nag 38 : 130 I C 153 : 32 Cr L J 476 : 26 N L R 377, Emperor v. Parashram.

7. ('40) 27 A I R 1940 Sind 33 : 187 I C 636 : 41 Cr L J 486 : I L R (1940) Kar 162, Muhammad Ali v. Shamsul Haq.

8. ('29) 16 A I R 1929 Mad 198 : 113 I C 336 : 30 Cr L J 144 : 52 Mad 66 : 56 M L J 33, Srinivasa Reddy v. Dasaratha Rama Reddy.

(28) A. I. R. 1941 Oudh 517

BENNETT AND GHULAM HASAN JJ.

Parmeshar Din—Accused—Appellant

v.

Emperor.

Capital Sentence No. 25 and Criminal Appeals Nos. 177, 194, 201 and 235 of 1941, Decided on 29th July 1941, against order of Sess. Judge, Unao, D/- 15th May 1941.

(a) Penal Code (1860), Ss. 149, 147 and 302 — Accused charged with having organized and directed offences under Ss. 325, 149 and 147 resulting in death — Accused convicted under S. 302 read with S. 149—It is important to ascertain age of accused so far as possible.

In cases where the accused is charged with having organized and directed the offences under Sections 325, 149 and 147 resulting in death and particularly where the accused has been sentenced to death it is important to ascertain his age correctly so far as that may be possible, and the Sessions Judge should clearly indicate his own opinion if there is any doubt on the point. [P 518 C 2; P 519 C 1]

(b) Criminal trial—Evidence — Accused disappearing after occurrence — Accused's failure to put forward any explanation is point in favour of prosecution.

The failure of the accused to put forward any explanation for his disappearance after the occurrence must be regarded as a point in favour of the prosecution. [P 519 C 2]

(c) Criminal P. C. (1898), S. 342 — Though S. 342 gives Court discretion, it is generally expedient that accused should have his attention drawn to circumstances strengthening prosecution case against him and be expressly given opportunity of explaining them.

Though S. 342 gives the Court a discretion in the matter of putting questions to the accused, it is generally expedient that an accused person should have his attention drawn to circumstances which appear to strengthen the prosecution case against him, so that he may be expressly given an opportunity of explaining them. [P 520 C 1]

(d) Criminal P. C. (1898), S. 164 — Fact of police having witness's statement recorded under S. 164 suggests that they do not consider witness to be altogether reliable and apprehend his being tampered with — But aforesaid procedure can be followed in appropriate cases.

No doubt the fact that the police have considered it necessary for the statement of a witness to be recorded under S. 164 suggests that they do not consider him altogether a reliable witness: that is to say they apprehend that he may be tampered with. But there can be no objection to the procedure being followed in appropriate cases, such as where the persons accused in the first information report disappear immediately after the occurrence and therefore there is a probability of some attempt being made by one or more of them to tamper with the witnesses while the accused were still at large. The recording of statement under S. 164 does no doubt help to deter witnesses from changing their stories subsequently and to this extent its effect is salutary: ('38) 25 A I R 1938 Pat 290; *Not approved*; ('41) 28 A I R 1941 Oudh 487, *Disting.* [P 522 C 2; P 523 C 1]

(e) Penal Code (1860), Ss. 34 and 149 — Distinction between object and intention explained.

There is a difference between object and intention, for though their object is common, the intention of the several members of an unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of S. 34, is replaced in S. 149 by membership of the assembly at the time of the committing of the offence : ('25) 12 A I R 1925 P C 1, *Rel. on.* [P 524 C 1]

(f) Penal Code (1860), S. 149 — Unlawful assembly — Principle governing constructive liability of members, explained — Assailants armed with lathis — Common object to attack two persons—One person killed—All are guilty under S. 302 read with S. 149.

Once an assembly becomes unlawful then all things done in the prosecution of the common unlawful object of that assembly are chargeable against every member thereof. The liability of every member extends not only to the acts intended by all to be done, but also to those offences which are likely to be committed in achieving the common object. Consequently, where the common object of the assailants armed with lathis constituting an unlawful assembly is to attack two persons and in the course of the prosecution of the common object some of the assailants cause death of the persons attacked all the assailants must be held to be guilty under S. 302, read with S. 149 : ('39) 26 A I R 1939 Lah 245 and ('41) 28 A I R 1941 Lah 117, *Rel. on* ; ('36) 23 A I R 1936 Pat 481; ('35) 22 A I R 1935 Oudh 52 and ('35) 22 AIR 1935 Oudh 381, *Ref.* [P 524 C 2]

H. G. Walford and H. D. Sinha — for Appellant.

Government Advocate — for the Crown.

Judgment. — The eleven appellants in this case have been convicted under S. 147 and Ss. 302 and 325 read with S. 149, Penal Code. They have all been sentenced to two years rigorous imprisonment under S. 147 and to seven years rigorous imprisonment under S. 325 read with S. 149. Under S. 302 read with S. 149 Parmeshar Din has been sentenced to death, while the other ten appellants have each been sentenced to transportation for life. The reference in confirmation of the death sentence is also before us. With the appellants were tried three other men named Nattha and his son Badlu, who are Barhais by caste, and a Brahman named Hira Lal. These three men were acquitted by the Sessions Judge. Another man named Sheo Nath, son of Hira Lal, died during the trial. Of the eleven appellants four are Brahmins, six are Pasis, and the eleventh Angu is a Teli. The four Brahmans are Parmeshar Din, Madho, Badri and Bachan. Madho and Bachan are brothers and Badri is their cousin. The Pasis are Shiva Adhar and Paragi, who are brothers, their uncle Nokhey, and Mahabir, Raghubar and Puttu, who belonged to the same family as Nokhey. Parmeshar Din, who has been sentenced to death as having organized and directed the offences of which the appellants were found guilty, is a young man. His age is given in the Magistrate's record as 25 years, but in the record of the Sessions Judge as only 19 years. No explanation of this appreciable difference is to be found on the record. Usually in such cases the reduction in age is made by the accused himself in the Sessions Court, but it would have been more satisfactory if the Sessions Judge had indicated whether the age shown by him was what this appellant himself gave out, or was the Sessions Judge's own estimate from Parmeshar Din's appearance. As the record stands, however, it must, we think, be presumed that Parmeshar Din stated in the Sessions Court that he was 19 years, having previously stated in the Magistrate's Court that he was 25. In cases of this kind, particularly where the person concerned has been sentenced to death, it is important to ascertain his age correctly, so far as that may be possible, and the Sessions Judge should clearly indicate his own opinion if

there is any doubt on the point. In the present case the question of age is of particular importance because it has been contended on this appellant's behalf that a young man of only 19 is not likely to have organized and directed the offences of which he and the other appellants have been found guilty.

The fifteen accused persons named above were all implicated by a man named Vishnu (or Bishun) in an oral report made by him at the Hasanganj police station in the Unao District at 6-10 P. M. on 22nd October 1940. Vishnu is a first cousin of Gajodhar Prasad, father of the appellant Parmeshar Din. Vishnu commenced his report by saying that there had been a partition case between himself, Sadasheo (who is his uncle) and Gajodhar Prasad and Arjun Prasad. Arjun Prasad is Gajodhar Prasad's brother, and therefore another first cousin of Vishnu. Vishnu proceeded to say that as a result of this partition the land of Sadasheo had fallen under the cultivation of Gajodhar Prasad and Arjun, that is to say as his tenants. Gajodhar and Arjun did not pay their rent and consequently Sadasheo was compelled to sue them. Sadasheo obtained a decree and in execution of that decree on the previous day the qurk amin had attached the ukh (sugarcane) of Gajodhar and Arjun. Other causes for enmity between Sadasheo on the one hand and Gajodhar on the other were also mentioned by Vishnu in his report. He said that there had been litigation between the two as a result of encroachment by Gajodhar upon some land of Sadasheo, and some time ago Gajodhar and his brother Arjun had beaten Sadasheo which had led to proceedings in Court. On the morning on which the report was made that is to say at about 8 or 9 A. M. on 22nd October, Vishnu had been working in the fields with Sadasheo, his son Ram Sarup, and their servants, Lachman, Dwarka and Gulab, when the 15 accused persons, to whom he referred as the "lathbands" of the village came up. They all, Vishnu said, belonged to the party of Gajodhar. Parmeshar Din, Gajodhar's son, had called upon them to kill Ram Sarup and Sadasheo. Upon this Parmeshar Din himself and four other accused, Puttu, Raghubar, Sheonath and Madho, began to beat Ram Sarup with lathis, while the rest attacked Sadasheo with lathis. Vishnu, Ram Sarup and Sadasheo raised an alarm and four persons, namely, Himman Teli, Arjun Prasad, Bhola Pasi and Sewan Pasi arrived on the spot, together with many other persons. Of these four witnesses named by Vishnu, Arjun Prasad is, as already mentioned, the brother of Gajodhar Prasad. They all, with the exception of Bhola Pasi, gave evidence in support of the prosecution case. Vishnu concluded his report by saying that Ram Sarup had died on the spot, while Sadasheo had received serious injuries. He had left the corpse of Ram Sarup in the village. Finally he said that it was Gajodhar Prasad who had caused his men to kill Ram Sarup.

With reference to this last statement it may be noted that Gajodhar Prasad himself was not alleged to have been present at the occurrence, and there is some evidence that he was away from the village at the time. The report was made in the presence of the second officer at the Hasanganj police station. He left at once for the village Mirzapur Bhanbhau where the occurrence was alleged to have taken place. It is eight miles from the police station. The Sub-Inspector held an inquest on the corpse of Ram Sarup and sent it for post-mortem examination to Unao. He also sent Sadasheo to the Hasanganj dispensary for medical examination and treatment. He examined all the alleged eye-witnesses on the night of 22nd October with the exception of Himman, Sewan and Sadasheo. These he examined the next day. This Sub-Inspector also searched for all the 15 accused on the night of 22nd October, but was unable to find any. The judgment shows how and when each accused was arrested or gave himself up. It will be seen that while Nattha, Nokhey, Paragi, Hira Lal and Mahabir were arrested either on 23rd or 24th October, the remaining accused were not to be found until November or December. Proceedings were taken against some of them as absconders. No explanation was given by any of the accused for their disappearance after the occurrence, except in the case of Mahabir who stated in the Sessions Court that he was in another village ten miles from the scene of the occurrence at the time when it took place. But he produced no evidence to prove this.

All the accused were represented by counsel, and it must be presumed that their counsel were aware that their disappearance after the occurrence was a circumstance which, in the absence of any plausible explanation might be taken into consideration against them. The failure of the accused to put forward any explanation must therefore be regarded as a point in favour of the prosecution. At the same time we consider

that it would have been more satisfactory if the Magistrate or the Sessions Judge had questioned the accused particularly with regard to their disappearance. Section 342, Criminal P. C., provides that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, put such questions to him as the Court considers necessary; and though this gives the Court a discretion, it is generally expedient that an accused person should have his attention drawn to circumstances which appear to strengthen the prosecution case against him, so that he may be expressly given an opportunity of explaining them. In the present case not only did the Sessions Judge not question the accused about their disappearance after the occurrence but he does not appear to have taken their disappearance into consideration at all.

The post-mortem examination and the evidence of the Civil Surgeon of Unao show that no less than 21 injuries were found on Ram Sarup's person. These included a rupture of the spleen and three rib fractures. Ram Sarup's death was due to multiple injuries, haemorrhage and shock. Ram Sarup was a young man of about 24 years of age. The injuries were spread all over the head, body, arms and legs. The injury report of Sadasheo shows only 12 injuries, of which all but one were simple. The grievous injury consisted of a simple fracture of both bones of the left forearm. But although it would at first sight appear that Sadasheo's injuries were less numerous than those of his son, we find that as many as 12 contusions are collected under one item. These 12 contusions were all over the back from the shoulders to the hips. Consequently in reality Sadasheo's injuries were more numerous than those of Ram Sarup, and it would seem that he might have been more seriously injured had he been lying in a different position.

The prosecution story as told by Vishnu in his first information report was repeated at the trial by the eight eye-witnesses referred to, namely, Vishnu himself, Sadasheo, Dwarka, Arjun Prasad, Lachman, Himman, Sewan and Gulab, and there is little difference to be found in their stories. One apparent discrepancy on which the defence have relied for the purpose of arguing that many of these witnesses were not present on the scene of the occurrence at all is that Arjun Prasad deposed that he did not see Vishnu. But Arjun Prasad did not say that he did not see Vishnu at the scene of the occurrence at all. He said that he did not see him there at one particular stage. He himself was at some distance from the places where Ram Sarup and Sadasheo were being attacked, and he said that when he himself was threatened by the assailants he went home, leaving the accused assaulting their victims. At that time he saw some of the other witnesses but he did not see Vishnu there "at that time". Vishnu deposed that he saw the first part of the attack upon Ram Sarup and his father and that he left for home when Ram Sarup became speechless and Sadasheo was crying that he had been murdered. He went to the village for help but experienced some difficulty in getting it as other men of the village were not willing to return with him. Eventually he obtained a cart and came back with it to the scene of occurrence in company with his brother Ram Autar, and these two brought back Sadasheo and Ram Sarup's body to their house. We do not think, therefore, that the evidence of Arjun Prasad proves the absence of Vishnu from the scene of the occurrence.

It also appears from the evidence of the eye-witnesses that most, if not all of them, left the scene of the occurrence before the accused, and it has been argued that this of itself is unnatural. The witnesses would, however, have been unable to do anything to help Ram Sarup and Sadasheo if they were being attacked by such a large number of assailants and they may very well have thought it advisable to run away to the village or to distant fields. It is true that Sadasheo himself stated that the witnesses remained on the spot till the accused had gone away, but he added that they did not come to him even after the departure of the accused. It would certainly have been curious if the witnesses had not come up to him then, had they been still on the spot. But we do not think that Sadasheo's evidence on this point can be relied upon for he had received a very severe beating, including an injury to the head, and he could hardly have been in a position therefore to appreciate his surroundings and the presence or absence of the witnesses at that time. On the whole, therefore, on a consideration merely of the stories told by the eye-witnesses, we cannot find any good reason for doubting the truth of the prosecution case generally.

We have, however, to consider the question whether all the accused or rather all

the appellants took part in the occurrence. The Sessions Judge acquitted three of the accused namely, Nattha, Hira Lal and Badlu, because some of the eye-witnesses denied their presence, and because they had little motive for participating in the riot. The Sessions Judge also rejected the evidence of the eye-witness Dwarka because of certain contradictions in his statements before the Committing Magistrate, in the Sessions Court and his attempts to prevaricate. The Sessions Judge also rightly took into consideration the delay which undoubtedly occurred in making the report. The report was made after about eight hours although the police station was only as many miles from the village. Vishnu was questioned about the delay and he admitted that instead of going straight to the police station he went to the adjoining village of Sirauli which is about one mile away. He took a man named Pohkar Gamel from there with him to the police station and some delay was caused because Pohkar Gamel could not be found at first. It is not quite clear why he wanted to take this man with him, but Vishnu does not appear to have been expressly questioned about this. Vishnu was asked if he had not gone to Sirauli to consult three zamindars named Sheo Adhar, Sheo Balak and Sheo Narain, and he denied this, but the Sessions Judge thought that he might have done so.

One of the chief arguments put forward on behalf of the appellants is that they or some of them were implicated at the instance of these zamindars. But it is to be noted that there is no suggestion that any of these zamindars came to the village of Mirzapur Bhanbhau after the occurrence or that after consulting them Vishnu himself returned to the village. It would seem to follow, therefore, that if the case was in any way concocted by Vishnu he must have tutored the eye-witnesses before he went from his village to Sirauli, and in this case there would have been little point in consulting the zamindars. It is also to be noted that most of the eye-witnesses were examined by the second officer of the Hasanganj police station the same evening, and it would not have been possible for Vishnu to have returned to his village after making the report and to have tutored the witnesses then before the arrival of the Sub-Inspector. On the whole, therefore, we do not think that, although there was undoubtedly some delay in Vishnu's departure for the police station, this delay is very suspicious, nor do we think that the report embodies what Vishnu was told by the zamindars to say rather than what actually occurred. Most of the accused said that they had been implicated on account of enmity; as we shall presently show there is good reason for thinking that some at least of the appellants had been on bad terms for a long time with some of the prosecution witnesses; but it has also to be considered whether it was not on account of the enmity between these appellants on the one hand and Sadasheo and his supporters or servants on the other that Sadasheo and his son were attacked.

The Brahman and Pasi accused were represented by different counsel, while the Teli Angnu was represented by a third counsel. In cross-examination, a motive was suggested by the learned counsel for the Brahman accused which, if true, might indicate that only the Pasis were concerned in the assault. The suggestion was that the deceased Ram Sarup had been discovered on the morning in question in illicit intercourse with the wife of the appellant Mahabir and that he and his father were attacked in consequence by the Pasis. This suggestion was put to two of the prosecution witnesses, Vishnu and Sadasheo, and was categorically denied by them. The suggestion was not made at all by any of the appellants in their statements either in the Magistrate's Court or in the Sessions Court. It has been argued that the suggestion finds some support in the evidence of the second officer, Pt. Ram Swarup, who commenced the investigation, and also in the evidence of the station officer, Pt. Suraj Narain Tewari, who relieved the second officer on the evening of 24th October. Pt. Ram Swarup stated that he called Mahabir's wife on 24th October 1940, after Mahabir's arrest. He denied that Mahabir and his wife had been with him since the night of 22nd October. It appears that on 24th October he sent a report asking that Mahabir's confession might be recorded and the Magistrate's note on the back of this report (Ex. H) shows that Mahabir at first expressed a wish to confess, but after being given two days for reflection changed his mind.

The station officer was asked whether he had also examined Mahabir's wife and he answered this question in the affirmative. He further stated that the information given by Mahabir's wife was borne in mind during the investigation of the case. Mahabir's wife was not a witness in the case, and there is nothing to show what information was given

by her. We are quite unable on the basis of this evidence to find that there is any substance in the suggestion that the riot occurred as the result of the misconduct of Ram Sarup with this woman. Had there been any foundation for the suggestion we have little doubt that it would have been made by one or other of the appellants in their statements in Court, and we have also little doubt that Mahabir's wife would have been produced as a witness. It has been argued that the theory finds some support in the absence of any other motive for the assault so far as the Pasis are concerned. But we shall show later in a review of the documentary evidence produced by the appellants that some of the Pasi accused or their relatives had on previous occasions sided with the Brahman appellants and the absence of any specific motive in the case of the Pasis is not therefore, we think, material.

So far as the motive alleged in the first information report is concerned we have very clear evidence, not only in the depositions of Vishnu and Sadasheo, but also in the statement of the qurk amin, Izahar Mohammad, who attached the sugarcane crop on 21st October 1940. He stated that this sugarcane crop was attached in two execution cases in which Sadasheo was the decree-holder and Gajodhar Prasad and Arjun Prasad judgment-debtors. The qurk amin further stated that he had not met either of the judgment-debtors that day in the village. The field had been pointed out to him by Sadasheo and put in charge of a man named Bachan, who is one of the appellants in the case. This supurdar, the qurk amin stated, had been supplied by Parmeshar Din, Gajodhar Prasad's son. It appears from the evidence of this qurk amin that Gajodhar Prasad himself had gone to Unao. It is no doubt a possibility that different motives may have influenced different accused. There is this clear motive in the case of Parmeshar Din, with whom the other Brahman appellants probably sympathised. Even if the Pasis had another motive it does not follow that they alone took part in the assault; persons who had different reasons for enmity with Ram Sarup and his father may have made common cause against them.

No defence witnesses were called by the appellants but a substantial volume of documentary evidence was produced by the defence showing what the relations between the parties or their witnesses had been for many years past. Only a portion of this documentary evidence was referred to in arguments, and there is little reference to it in the judgment of the Sessions Judge. We have however examined it with some care in order to ascertain whether there is any likelihood of any of the appellants having been implicated falsely. (Their Lordships went into the documentary evidence produced by the defence, and proceeded.) Our general conclusion from this documentary evidence is that it does not cast any real doubt on the prosecution story. It is clear that members of Parmeshar Din's family have been on bad terms for many years. It is also clear that each have their partisans in the Pasi community. We can find no reason on a review of this evidence to think that the prosecution story against both Brahman and Pasi accused or, we may add, against Angnu Teli, is false.

Some legal points were raised by the learned counsel for the appellants. They are points of some importance and deserve consideration, particularly in view of certain rulings to which we were referred. It appears that all the eye-witnesses were sent by the police to have their statements recorded under S. 164, Criminal P. C., and it was argued by the learned defence counsel that this of itself, besides being unfair, was sufficient to throw doubt upon their evidence. We were referred on this point to the case in A I R 1938 Pat 290.[1] In this case the Patna High Court expressed the view that a statement of a witness obtained under S. 164 always raises a suspicion that it has not been voluntarily made. It was added that the section was not intended to enable the police to obtain a statement from some person and as it were to put a seal on that statement by sending in that person to a Magistrate practically under custody, to be examined before the judicial enquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken. We are not ourselves prepared unreservedly to endorse this view. No doubt the fact that the police have considered it necessary for the statement of a witness to be recorded under S. 164 suggests that they do not consider him altogether a reliable witness: that is to say they apprehend that he may be tampered with. But we can see no objection to the procedure being followed in appropriate cases, and we do not know with what other object this provision was made in S. 164. Village witnesses are pecu-

1. ('38) 25 A I R 1938 Pat 290 : 175 I C 716 : 39 Cr L J 635, Emperor v. Manu Chik.

liarly susceptible to local influences. In the present case we find that all of the persons accused in the first information report disappeared from the village immediately after the occurrence, and it was therefore by no means improbable that some attempt would be made by one or more of them to tamper with the witnesses while the accused were still at large. We can see no objection in these circumstances to the police sending the witnesses to have their statements recorded by the Magistrate under S. 164. The precaution is a very natural one. It is the only legal method by which the statements made by the witnesses at an early stage in the investigation can afterwards be proved at the trial by the prosecution, and then only for the purpose of corroboration. But it does no doubt help to deter witnesses from changing their stories subsequently and to this extent its effect is in our opinion salutary.

We were next referred to a recent case of this Court 1941 O W N 852[2] where it was observed by a Bench of this Court, of which one of us was a member, that where certain witnesses had been disbelieved on material points as regards some accused, it would be, to say the least, unfair to accept the remaining portion of their evidence as regards other accused. We do not think that this principle is applicable in the present case. In 1941 O W N 852[2] there was overwhelming evidence given by certain witnesses against a number of accused, of having organized the attack and having committed riot and incendiarism and other overt acts. The Assistant Sessions Judge disbelieved the evidence and acquitted the accused. The Government selected four persons only out of 43 accused against whose acquittal the appeal was filed as they were the alleged assailants of the police party. In these circumstances the Bench remarked that it would be unfair to accept the evidence of those witnesses against the four persons while their evidence was rejected by the Assistant Sessions Judge and his decision was acquiesced in by the Government by not filing an appeal.

It was also argued that an offence under S. 302 read with S. 149 had not been established against any of the appellants because it was not proved that they intended to cause Ram Sarup's death or knew that his death was likely to be caused. In A I R 1936 Pat 481[3] the Patna High Court held that in construing S. 149 a question arises whether a member of the assembly is guilty necessarily of the same offence as the principal offender or whether it is to be determined, with reference to the facts of the case, what offence the members must have known to be likely to be committed and whether, if such offence is a minor offence, they should be convicted accordingly. The latter construction, it was said, appears to be more in accordance with the intention of the Legislature on a reading of the words of the section. A similar view was taken by a Bench of this Court in 11 O W N 1456.[4] According to the headnote in this case :

> Where the common object of an unlawful assembly is only to beat the members of the opposite party and, during the prosecution of this object, one of them, on the spur of the moment and without premeditation, thrusts a spear into the abdomen of a member of the opposite party and kills him, the other members of the unlawful assembly cannot be held guilty of murder under S. 302 read with S. 149, Penal Code, inasmuch as even considering the fact that some of them were armed with spears, the murder cannot be said to have been committed in prosecution of the common object of the assembly and the other members of the assembly cannot be imputed with a knowledge that murder was likely to be committed in the prosecution of their common object.

Reference was also made to another case of this Court, 1935 O W N 343.[5] In this case seven accused made a deliberate attack upon one man and ultimately caused his death by fracturing his ribs and rupturing his spleen and inflicting three injuries on his head which left him unconscious and which might have also resulted in his death. Altogether 24 injuries were inflicted on the deceased, about 20 of them being inflicted after the deceased had fallen down and was unconscious. This was a case of a Government appeal against the acquittal of the accused under S. 302 read with S. 149, and their conviction under S. 325 read with section 149. A Bench of this Court allowed the Government appeal to the extent of finding the accused guilty under S. 304, though at the same time they did not expressly hold that they were not guilty under S. 302. They said that :

> Even if it be assumed that the accused had no intention of committing wilful murder of the deceased, still the fact that they inflicted 24 injuries

2. ('41) 28 A I R 1941 Oudh 487 : 194 I C 557 : 42 Cr L J 595 : 1941 O W N 852, Emperor v. Gaya Prasad.

3. ('36) 23 A I R 1936 Pat 481 : 162 I C 563 : 37 Cr L J 630: 17 P L T 350, Bhagwat v. Emperor.

4. ('35) 22 A I R 1935 Oudh 52 : 153 I C 96 : 36 Cr L J 268 : 10 Luck 320 : 11 O W N 1456, Raghunandan v. Emperor.

5. ('35) 22 A I R 1935 Oudh 381 : 154 I C 808 : 36 Cr L J 573 : 1935 O W N 343 : 11 Luck 51, Emperor v. Sat Narain.

on the deceased, about 20 of them being inflicted after the deceased had fallen down and was unconscious, showed that they beat him with the intention of causing such bodily injuries as were likely to cause his death, or with the knowledge that they were likely by such acts to cause his death, and that all the accused were, therefore, guilty of an offence under S. 394, if not of the offence of wilful murder punishable under S. 302, Penal Code.

Reference was made to certain other cases of this Court on the point of constructive liability, but these were cases where S. 34 and not S. 149 was applicable. A clear distinction between these sections was laid down by their Lordships of the Privy Council in 52 I A 40[6] at p. 52. Their Lordships observed that there is a difference between object and intention, for though their object is common, the intention of the several members of an unlawful assembly may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of S. 34, is replaced in S. 149 by membership of the assembly at the time of the committing of the offence. The correct view of the law relating to constructive liability under S. 149 is in our opinion laid down by the Lahore High Court in I L R 20 Lah 77[7] and in I L R 21 Lah 554.[8] The first part of the headnote of the first case reads :

Held, that once an assembly has become unlawful then all things done in the prosecution of the common unlawful object of that assembly are chargeable against every member thereof. The liability of every member extends not only to the acts intended by all to be done, but also to those offences which are likely to be committed in achieving the common object.

It was also contended in the present case that on the evidence, while some of the appellants might be found guilty under S. 302 in respect of the death of Ram Sarup, others could only be held guilty under S. 325 in respect of the injuries inflicted on Sadasheo. The witnesses generally say that of the 15 accused persons five attacked Ram Sarup, while the remaining ten attacked Sadasheo. Some witnesses, however, say that seven attacked Ram Sarup and the others Sadasheo. Dwarka reconciles this by saying that Ram Sarup was first attacked by seven accused, but afterwards two of these joined the seven other accused who were attacking Sadasheo. The witnesses are, however, agreed that all the accused came in a body and that Ram Sarup was first attacked by Parmeshar Din. We have no doubt, therefore, that the common object of the assailants was to attack both men, and this was the common object alleged in the charge. We are not able, therefore, to accept the contention that only some of the accused should be found guilty under S. 302 read with S. 149.

There remains the question whether the capital sentence imposed on Parmeshar Din should be upheld, or whether the same sentence should not be imposed under S. 302 in his case as in the case of the other appellants. The Sessions Judge found, as we have stated that Parmeshar Din alone was primarily responsible for the death of Ram Sarup, as he had organized and directed the assault and the rest of the accused were tools in his hands. There is certainly some support for this view, and we are not prepared to say that the Sessions Judge had no justification for taking it. But there are some other considerations. There is first of all the question of his age which has not been cleared up and if he was only 19 years of age there is certainly some doubt whether he took a leading part in the affair. It is true that some of the prosecution witnesses attributed such a part to him, and indeed say that Parmeshar Din cried out that Ram Sarup and Sadasheo should be murdered because "they always picked quarrels and created mischief." But we do not think that we should place much reliance on statements of this kind. Most of the other appellants are considerably older men, that is if Parmeshar Din is only 19, and it is not improbable that they are as much to blame as he was. For these reasons, while upholding his conviction, we reduce the sentence of death to transportation for life.

It was urged on behalf of the appellant Bachan that his arm was broken and that he could not, therefore, have taken part in the riot. It is true that he put forward this plea in the Sessions Court, but the Sessions Judge was apparently not impressed by it as he has not referred to it. It is not shown when the bone was broken, and probably all that happened was that the bone after being broken did not set properly with the result that the arm is somewhat deformed. This would not necessarily prevent Bachan from taking part in the riot. Had there

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6. ('25) 12 A I R 1925 P C 1 : 85 I C 47 : 26 Cr L J 431 : 52 Cal 197 : 52 I A 40 (P C), Barendra Kumar v. Emperor.

7. ('39) 26 A I R 1939 Lah 245 : 182 I C 900 : 40 Cr L J 712 : I L R (1939) 20 Lah 77 : 41 P L R 443, Rahman v. Emperor.

8. ('41) 28 A I R 1941 Lah 117 : 193 I C 666 : I L R (1940) 21 Lah 554, Emperor v. Ramji Lal.

been any substance in his plea we should have expected medical evidence to have been produced to support it. We see no reason, therefore, to interfere with the convictions of any of these appellants or with the sentences, except as already stated in the case of Parmeshar Din, and accordingly with this modification we dismiss these appeals.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Oudh 525

BENNETT J.

Emperor

v.

Ram Baran Singh — Complainant Respondent.

Criminal Ref. No. 21 of 1941, Decided on 15th July 1941; reference made by Sess. Judge, Rae Bareli, D/- 15th May 1941.

U. P. Land Revenue Act (3 of 1901), Ss. 46 and 234, Rules under, Land Records Manual, R. 116—R. 116 extends liability imposed by S. 46 to all persons receiving rent whether zamindar himself or person authorized by him to collect rent and is not inconsistent with S. 46 —Words "who receives the rent" in R. 116—Meaning— Person actually receiving rent and refusing to furnish particulars of payment to patwari under R. 116 is guilty under S. 176, Penal Code.

Rule 116, U. P. Land Records Manual, prepared under S. 234, U. P. Land Revenue Act, is an extension of the provisions of S. 46. It extends the liability imposed by S. 46 to all persons who receive the rent, whether they are the zamindars themselves or persons authorized by them to collect the rent. But on this account R. 116 cannot be said to be inconsistent with the provisions of S. 46. The extension of the principle is perfectly natural. It is clearly desirable where the landlord is a pardanashin lady, that a liability should be imposed on the agent who collects the rent similar to that imposed on the zamindar under S. 46, and it was in view of this desirability that the rule was made. Rule 116 therefore is valid. The words "who receives the rent" in R. 116 do not mean the person who is personally entitled to receive it and who is therefore the ultimate recipient. Rule 116 imposes a liability upon the person who actually receives the rent from the tenants, whether the zamindar himself or his agent to furnish the patwari with particulars of the payment, and if the aforesaid person refuses to furnish the particulars he is guilty of an offence under S. 176, Penal Code : 10 O C 238, *Expl.* [P 526 C 2]

Assistant Government Advocate—for the Crown.

Shiva Shankar Tripathi— for Respondent.

Order.—This is a reference by the learned Sessions Judge of Rae Bareli recommending that the conviction of one Ram Baran Singh under S. 176, I. P. C., be set aside together with the sentence of fine imposed thereunder. Ram Baran Singh is a ziladar in the taluqdari estate of Gaura and in this capacity collected rent from the tenants of a village in this estate. He was called upon to dictate these collections to the patwari and was found to have deliberately omitted so to do. The only question for consideration is whether he was legally bound to furnish this information. The Sessions Judge in his order of reference observed that the only provision in the Land Revenue Act which makes it obligatory to furnish information necessary for the preparation of records (in this case the siyaha) is contained in S. 46, which reads as follows :

Any person whose rights, interests, or liabilities are required by any enactment for the time being in force or by any rule made under any such enactment, to be entered in any official register by a Kanungo or patwari, shall be bound to furnish, on the requisition of the Kanungo or patwari or of any revenue officer engaged in compiling the register all information necessary for the correct compilation thereof.

The Sessions Judge remarks that this section has no reference to ziladars but is designed to apply only to landholders, or other persons having a definite interest in land. It would not in his opinion apply also to their agents. He refers to R. 159 of the Land Records Manual and says that this does not impose a statutory obligation on the part of the ziladar to make such disclosure; it is at most a guide to the patwari. Finally he refers to a ruling of the Court of the Judicial Commissioner of Oudh which, he says, confirms this view. The case referred to is that in 10 O C 238.[1] In this case a zamindar Suraj Bakhsh Singh and his agent Hubdar Singh had been convicted under S. 176 for failure to furnish the patwari with information required to enable him to write up his siyaha. The case was referred to the Court of the Judicial Commissioner because the Sessions Judge was of opinion that the siyaha was not an official register and therefore there was no legal obligation to furnish the information. This view was not accepted by the learned Judicial Commissioner who was of opinion that the zamindar had been rightly convicted. But he set aside the conviction of the agent, Hubdar Singh, observing :

But I do not understand how the agent Hubdar Singh can be brought within S. 46, Land Revenue Act. A requisition under this section made to an agent might perhaps be treated as equivalent to a requisition made to his principal, but it is a novel idea that an agent may be held responsible for an offence committed by his principal. Hubdar Singh

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1. ('07) 10 O C 238 : 6 Cr L J 301, King-Emperor v. Suraj Bakhsh Singh.

has not been charged with abetment of the offence committed by his master.

It is to be noted in the first place that in this case it was the zamindar and not the agent who was called upon to furnish particulars of his collections. It does not appear what part in the matter was taken by the agent; there is merely a remark that "it may be that he did his best to induce his master not to comply with the patwari's requisition." The facts are therefore by no means similar to those of the case under consideration. Secondly, the question whether liability was imposed on the agent under any rule was not considered. On the facts stated it would seem that this question did not arise. The zamindar himself being found to have committed the offence, the agent could only be found guilty of abetment, as observed by the Judicial Commissioner. But in the present case the zamindar is not concerned at all. The rent was collected by the ziladar, the requisition was made to him, and he failed to comply with it. At the same time it may be conceded that if the case rested on S. 46 alone it would be difficult to justify his conviction as his own "rights, interests or liabilities" were not concerned. In his explanation the Magistrate who tried the case has invoked the provisions of para. (or rule) 116 of the Land Records Manual. He says that the attention of the Sessions Judge was not invited to this rule, but R. 116 of the present Manual corresponds with R. 159 of the 1927 Manual, and is identical with it except for the addition of a sentence which has no bearing on the present question. Rule 116 reads thus:

The patwari shall obtain the information necessary for making entries in Part I from the person who receives the rent or other payment, who shall give a description of the holding on account of which the rent has been paid only when more than one holding is held by one and the same tenant, and shall specify in each case the year and instalment for which payment has been credited; but no payment can be credited in the siyaha against the demand for any instalment after three years from the date on which the rent for that instalment became due. The entries shall be made as soon as possible after the payment, and the patwari shall obtain the signature of the landlord or of his agent to the payments entered each day. If at any time difficulty is found in obtaining the necessary information, the patwari shall report without delay to the supervisor Kanungo.

Now there can be no doubt that it is implied in this rule that the person receiving the rent must furnish the information specified. I do not agree that the rule is merely a guide to the patwari. It is, however, argued in support of the reference first of all that the agent cannot be made liable under the rule when he is not liable under S. 46 of the Act, and secondly that by the person who receives the rent is meant the person who ultimately receives it, that is the zamindar who is entitled to receive it.

It is not disputed that the rule was made under the provisions of S. 234, Land Revenue Act. It is therefore a statutory rule and is valid if it is consistent with the Act. Section 234 expressly provides that rules made thereunder must be consistent with the Act. The rule is no doubt an extension of the provisions of S. 46; it extends the liability imposed by S. 46 to all persons who receive the rent, whether they are the zamindars themselves or persons authorized by them to collect the rent, but I do not consider on this account that the provisions of the rule are inconsistent with the provisions of the section. The extension of the principle is a perfectly natural extension; it is clearly desirable in cases like the present, where according to the Magistrate the landlord is a pardanashin lady, that a liability should be imposed on the agent who collects the rent similar to that imposed on the zamindar under S. 46, and it was presumably in view of this desirability that the rule was made. I hold therefore that the rule is valid.

The other contention that by the words "who receives the rent" is meant the person who is personally entitled to receive it and who is therefore the ultimate recipient hardly merits consideration. I see no reason whatever to put such a construction upon them.

I conclude that a liability is imposed by a statutory rule upon the person who actually receives the rent from the tenants, whether the zamindar himself or his agent, to furnish the patwari with particulars of the payment, and that if this person refuses to furnish this information he is guilty of an offence under S. 176. Ram Baran Singh was therefore rightly convicted. The reference is accordingly rejected.

G.N./R.K. *Reference rejected.*

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(28) A. I. R. 1941 Oudh 526

GHULAM HASAN AND MADELEY JJ.

Mir Mohommad Husain—Appellant

v.

Mohammad Habib Khan—Respondent.

Appeals Nos. 11 and 12 of 1939, Decided on 31st July 1941, against order of Ziaul Hasan J., D/- 16th November 1938.

(a) Oudh Rent Act (22 of 1886), Ss. 5 and 127—Transfer of occupancy rights created under S. 5 and those created by agreement—Distinction—Transfer by agreement—Condition against alienation is for benefit of superior proprietor who alone can question it—Transferor cannot raise question of invalidity of transfer and sue transferee as trespasser under S. 127.

There is a clear-cut distinction between a transfer of occupancy rights created under S. 5 and those created by a decree of a Court. Under S. 5 a transfer of occupancy rights is declared to be void ab initio by the statute In the case of a transfer of occupancy rights created either by an agreement or by a decree of a Court a condition against alienation must be taken to be for the benefit of the superior proprietor, who alone has the right to question it, but, as between the transferor and the transferee, it is not open to the transferor to raise the question of the invalidity of the transfer. The decision of the revenue Court declaring the transfer to be invalid against the interest of the superior proprietor cannot have the effect of making the transfer void altogether and it is not competent to the transferor to set up a plea of the invalidity of the transfer as against the transferee from whom he has received valuable consideration. It is no doubt open to the landlord to refuse to recognise the transfer and treat the transferee as a trespasser and eject him, but the transferor is bound by the transfer and is consequently estopped from maintaining a suit against the transferee treating him as a trespasser liable to ejectment under S. 127: 15 O C 67 and ('31) 18 A I R 1931 Oudh 352, *Rel. on.* [P 528 C 2]

(b) Oudh Courts Act (4 of 1925), S. 12 (2) — Third appeal — Point not raised before Judge whose decree is appealed against cannot be raised in third appeal.

In an appeal under S. 12 (2) an appellant is not entitled to be heard on points which were not raised before the Judge against whose decree he is appealing. ('37) 24 A I R 1937 Oudh 113 and ('37) 24 A I R 1937 Oudh 431, *Foll.* [P 529 C 1]

Zahur Ahmad—for Appellant.

Nazir Uddin and Mohd. Ayub—for Respondent.

Judgment. — These are two connected appeals against the decision of our learned brother, Ziaul Hasan J., in two second rent appeals, (Nos. 11 and 12 of 1939) under S. 12 (2), Oudh Courts Act. The relevant facts are few and simple. The plaintiff-appellant filed two suits against the defendant, one under S. 108 (5), Oudh Rent Act, and the other under S. 108 (2) read with S. 127, Oudh Rent Act The plaintiff alleged that he holds certain qabzedari lands in villages Goraura and Aurangabad Jagir in tahsil Lucknow and that he had appointed defendant 1 as his mukhtar-i-am to make collections of rent and to look after the lands by a mukhtarnama dated 30th April 1932, and that the defendant had collected some rents on behalf of the plaintiff but had not paid the same nor rendered any account. Consequently, the plaintiff prayed for the recovery of the amount realized by the defendant. The defence was that on 15th November 1929, the plaintiff had sold to the defendant five plots in village Goraura, which had been held by him under the settlement decree as an occupancy tenant, and that the plaintiff executed the general power of attorney on 30th April 1932, in order to enable him to realize rents and enjoy the property transferred. Consequently the defendant was not liable for any accounting as the collections had been made in his own personal right and not on behalf of the plaintiff. The learned Assistant Collector held that the defendant made realizations in the capacity of a general agent and decreed the suit for Rs. 112-1-6. The learned District Judge on appeal held that the mukhtarnama was executed by the plaintiff in order to enable the defendants to realize the rents and, therefore, the defendant was not liable to accounting as he had made the collections in his own right. The plaintiff filed a second appeal in this Court against the decision of the learned District Judge. The suit under S. 108 (2) read with S. 127, Oudh Rent Act, was filed by the plaintiff for recovery of the arrears of rent for the years 1341 and 1342 Fasli and for ejectment on the ground that the plaintiff is a qabzadar of the land in village Goraura and the defendant had taken actual cultivatory possession without the plaintiff's consent.

The defendant denied the plaintiff's claim on the ground that he is not holding the land in suit as a trespasser without the plaintiff's consent and asserted that he held it in his own right and was therefore neither liable to pay any rent nor was liable to ejectment. The learned Assistant Collector held that the defendant is not entitled to hold the land in suit under the spurious sale deed set up by him. He also held that the aforesaid sale deed was void and did not confer any rights on the defendant nor did it take away the occupancy rights from the plaintiff. Treating the defendant as a trespasser under S. 127, Oudh Rent Act, the learned Assistant Collector decreed the suit. One of the issues arising before the learned Assistant Collector was to the effect whether the plaintiff was estopped from bringing the suit. On this issue the learned Assistant Collector held that no question of estoppel arose as the sale deed had been shown to be invalid and not binding on the plaintiff. It may be mentioned that the defendant had paid Rs. 400 out of Rs. 525, the consideration of the sale deed, and he

had passed a promissory note for Rs. 125 in favour of the plaintiff. The learned Assistant Collector held the view that sitting as a revenue Court he could not grant any relief to the defendant in the matter of price. The learned District Judge reversed the decision of the learned Assistant Collector holding that the plaintiff was estopped from asserting that he was an occupancy tenant and that the defendant to whom he had sold the land was a trespasser. The plaintiff preferred a second rent appeal against the aforesaid decision. Both these appeals, (Second Rent Appeals Nos. 67 and 68 of 1936) came up for hearing before our learned brother, Ziaul Hasan J. He held that the plaintiff's suits were barred by estoppel and dismissed the appeals. The learned Judge, however, granted leave to the appellant to appeal in both the cases to a Bench of this Court.

We have heard learned counsel on behalf of the appellant and see no reason to dissent from the view of law taken by the learned Single Judge of this Court. It appears that the superior proprietor questioned the validity of the sale deed executed in favour of the defendant in the course of the mutation proceedings taken by the defendant on the strength of the sale deed. The Assistant Collector gave effect to the plea raised by the superior proprietor and ordered that the entry about the occupancy rights in the land be discontinued and the land be recorded as superior proprietor's khalsa land. This order was upheld by the Deputy Commissioner in appeal. In a second appeal to the Commissioner it was held that although the sale was invalid, the plaintiff's occupancy rights had not been extinguished and the land could not be recorded as superior proprietor's khalsa land. Consequently, the order relating to the land being recorded as superior proprietor's khalsa land was set aside. The plaintiff thereupon sued for ejectment of the subtenants but these suits were dismissed on the ground that the plaintiff had sold away his rights in the land. The suits were, however, decreed in appeal. It was argued on behalf of the appellant that the sale having been declared to be invalid by the revenue Court on the objection of the superior proprietor it became null and void for all purposes and consequently the appellant was not estopped from maintaining the suit for ejectment and arrears of rent against the defendant-respondent. This contention was raised before the learned Single Judge, who however repelled it on the ground that the transfer made by the plaintiff-appellant in favour of the defendant-respondent was neither void ab initio nor became void after the decision of the revenue Court on the objection of the superior proprietor.

We agree with the learned Judge that there is a clear-cut distinction between a transfer of occupancy rights created under S. 5, Oudh Rent Act, and those created by a decree of a Court. Under S. 5, Oudh Rent Act, a transfer of occupancy rights has been declared to be void ab initio by the statute. In the case of a transfer created either by an agreement or by a decree of a Court a condition against alienation has always been held to be one which is inserted for the benefit of the superior proprietor, who alone has the right to question it, but, as between the transferor and the transferee, it is not open to the transferor to raise the question of the invalidity of the transfer. This view is fully supported by 15 O C 67[1] and 8 O W N 785.[2] We hold, therefore, that the decision of the revenue Court declaring the transfer to be invalid against the interest of the superior proprietor cannot have the effect of making the transfer void altogether and it is not competent to the transferor to set up a plea of the invalidity of the transfer as against the transferee from whom he has received valuable consideration. It is no doubt open to the landlord to refuse to recognise the transfer and treat the transferee as a trespasser and eject him, but the transferor is bound by the transfer and is consequently estopped from maintaining the suit against the transferee treating him as a trespasser liable to ejectment under S. 127, Oudh Rent Act. Reference may be made in this connexion to p. 143 of Mr. Mata Prasad Saksena's commentary on the Oudh Rent Act, which lays down :

> Where a tenant alienates the occupancy holding once for all and divests himself of all his right in the land by an out and out transfer such as by sale or deed of gift, the transferee gets no title and the landlord is entitled to recover possession, by an ejectment suit against both the transferor and the transferee.

Learned counsel on behalf of the appellant also questioned the finding of the learned District Judge to the effect that the defendant in making realizations had acted in his own right as a vendee and not as a general agent of the plaintiff. This

1. ('12) 15 O C 67 : 13 I C 613, Wazir Mohammad v. Har Pershad.
2. ('31) 18 A I R 1931 Oudh 352 : 134 I C 472 : 7 Luck 111 : 8 O W N 785, Gaya Prasad v. Beni Madho.

finding was not challenged before our learned brother at the time of hearing of the appeals, and having regard to the view taken in 1937 O W N 49[3] and 1937 O W N 237[4] we are of opinion that it cannot be allowed to be entertained for the first time in third appeals. The result, therefore, is that the appeals fail and are dismissed with costs.

G.N./R.K. *Appeals dismissed.*

3. ('37) 24 A I R 1937 Oudh 113 : 166 I C 295 : 1937 O W N 49: 13 Luck 76, Ramzani v. Bansidhar.
4. ('37) 24 A I R 1937 Oudh 431 : 167 I C 79 : 1937 O W N 237 : 13 Luck 178, Mt. Rajjana v. Musaheb Ali.

* (28) A. I. R. 1941 Oudh 529

YORKE J.

Rani Huzur Ara Begam and others — Plaintiffs

v.

Deputy Commissioner, Gonda, in charge of Court of Wards, Utraula Estate and others — Defendants.

Original Suit No. 1 of 1937, Decided on 3rd April 1941.

(a) U. P. Court of Wards Act (4 of 1912), S. 7—One of members has no authority to act as agent of Court of Wards unless a resolution is passed to that effect.

The Court of Wards is a statutory body and its decisions are embodied in resolutions. Therefore one of the members of the Court of Wards has no authority to act as agent of Court of Wards unless a resolution has been passed to that effect. [P 537 C 2]

(b) Contract—Offer and acceptance—Informal discussions by interested persons and Court of Wards passing resolution that if possible compromise to be effected on those terms—Resolution held did not amount to offer or acceptance of offer.

During the pendency of a suit regarding property in possession of the Court of Wards an informal discussion outside the Court between certain interested persons to find out what sort of terms would be acceptable to both parties and would be accepted by one party if offered by the other was going on. These terms were discovered by one of the members of the Court of Wards who put it before the Court of Wards and the Court of Wards passed a resolution that if otherwise possible the suit should be compromised on those particular terms :

Held that the stage of making the offer and getting the acceptance was a stage which would follow the passing of this resolution and the resolution itself did not amount either to an offer or the acceptance of an offer. [P 539 C 2]

(c) U. P. Court of Wards Act (4 of 1912), S. 6 (1) (3)—Scope of cl. (3).

Clause 3 of S. 6 cannot operate to extend the powers given by cl. (1). [P 540 C 1]

(d) U. P. Court of Wards Act (4 of 1912 as amended in 1933), S. 5—Effect of amendment in 1933 explained.

Prior to the amendment the authority was vested in the Board of Revenue as Court of Wards subject to the control of the Local Government in all matters. After the amendment the authority vested in the Court of Wards as now re-constructed is to be subject to the control of the Local Government in the important matters specified in S. 5. [P 540 C 2; P 541 C 1]

(e) U. P. Court of Wards Act (4 of 1912), S. 44—In cases falling under S. 8 (1) (b), (d), previous sanction of local Government is necessary even for resolution for release of property.

An order of Court of Wards for the release of any estate from superintendence is always subject to the control of the Local Government, that is the Local Government has the last word always in the matter, but in cases to which cl. (b) or cl. (d) of sub-s. (1) of S. 8 applies the Court of Wards may not even pass a resolution for the release of a property without the sanction of the Local Government previously obtained. [P 541 C 1]

(f) Contract Act (1872), S. 4—Passing resolution in confidential proceedings is not communication.

Passing of a resolution regarding compromise in a confidential proceeding does not amount to communication of it : (1877) 2 A C 666 and ('27) 14 A I R 1927 All 407, *Disting.*; ('19) 6 A I R 1919 All 7, *Expl., and Disting.* [P 542 C 2]

(g) Contract Act (1872), S. 7—One of conditions left to discretion of third person—Acceptance is not unqualified.

Where one of the conditions essential to the implementing of the acceptance is left to the discretion of a third person, the acceptance cannot be said to be unqualified : ('27) 14 A I R 1927 All 407, *Rel. on.* [P 543 C 1]

(h) U. P. Court of Wards Act (4 of 1912), S. 6—Court of Wards has power to compromise suit if such compromise is linked with questions under (a) to (k) of sub-section (1).

In cases where the compromise of a suit is linked with any question which falls under items (a) to (k) of sub-s. (1) that compromise will be part of the business which is to be disposed of by the Court of Wards as distinct from the President. [P 544 C 1]

(i) Deed—Execution— Proof—Statements by Government officers regarding execution of document by certain person are not proof of execution by such person.

Statements made by Government officers regarding execution of a document by a certain person do not amount to an admission of execution by such person. They amount only to an admission of the fact that certain information had been received by the officers concerned which might be true or false. Such statements of this kind cannot take the place of proof of execution. At the most they amount to an admission of the fact that a certain document had come into existence. [P 546 C 1]

* (j) Registration Act (1908), Ss. 58, 60—Registration endorsement is not proof of execution of document but only proof of admission by executant and this by itself is not sufficient to prove execution—S. 70, Evidence Act, has no application.

The effect of the registration endorsement is not to prove execution as is required by S. 67, Evidence Act, but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances, and the Sub-Registrar's certificate is admissible not to prove execution of the deed but merely to prove the admission of execution. The effect of the admission is in every case a separate question. And this evidence of admission is not by itself sufficient to establish execution of the deed: *Case law referred.* [P 548 C 1]

And S. 70, Evidence Act, has no application to such admission. [P 548 C 1]

(k) Deed — Execution — Presumption is that executant was of sound disposing mind at time of execution.

The presumption in the first instance is undoubtedly that the executant of a document was of a sound disposing mind at the time of execution and the burden of proof that he was not so is necessarily upon the person who alleges it. [P 548 C 2]

(l) Trusts — Trustee has full legal estate in property — No real transfer of ownership to trustee — Executant himself having effective control over estate—Deed held not deed of trust.

In Indian law as in English law the trustees have the full legal estate in the trust property. And the true test as to whether a deed of trust has been created or not is whether there has been a real transfer of ownership. [P 550 C 2; P 554 C 1]

Where in a deed called a deed of trust, the executant had effective control over the affairs of his estate and there was no real transfer of ownership to the trustee who was under the deed put in charge of the property:

Held that the executant really intended not to appoint trustees but to appoint managers and that the deed was not a deed of trust: *Case law referred.* [P 551 C 2]

(m) Trusts—Invalid deed of trust—Supplementary deed purporting not to be fresh deed of trust but adding to former—Defect in former cannot be cured by later deed.

By a supplementary deed the executant did not purport to execute a fresh deed of trust having revoked the former one, but merely to add to the former deed, supposed to be a valid deed of trust, supplementary provisions. The first deed was found to be ineffective as a deed of trust:

Held that the defects in the first deed could not be held to be cured by the second deed. [P 552 C 1]

(n) Words and Phrases—"Malik kamil"—"Malik" does not imply full proprietary ownership—It has to be interpreted according to circumstances—Addition of word 'kamil' has no sensible effect.

The word "malik" is not a term of art implying full proprietary ownership free from any limitation. On the contrary it is a term which has to be interpreted according to the surrounding circumstances of each case. The addition of the word "kamil" does not have any sensible effect, although it is doubtless a slightly stronger form of expression to say that some one is malik kamil or absolute owner than he is only malik which in proper cases would also mean absolute owner. [P 553 C 1,2]

Where in a document the words "malik kamil" were used and it contained the words "subject to the conditions embodied in this deed as well as in the deed of wakf":

Held that the words "malik kamil" meant no more than the equitable owner. [P 553 C 1]

(o) Deed — Trust deed — Trustees not given any powers and their tenure of office at control of executant — Deed held void as being sham and fictitious.

The question whether a document is a fictitious, sham and colourable document and therefore void has to be decided on a consideration of the effect of the document if enforced as it stands. [P 554 C 2; P 555 C 1]

Where under a deed of trust the trustees are not given under the document any real power beyond the powers of managers, and their tenure of office is entirely at the pleasure of the executant who preserves his possession of the property and his full rights of control over the property, the deed is only a fictitious and sham document not intended to have any effect except to appoint the so-called trustees as managers of the estate and is void. [P 555 C 1]

(p) Contract Act (1872), S. 23 — Preventing estate by legal means from being taken over by Court of Wards is not unlawful purpose.

The Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law. But there is nothing illegal about trying to avoid or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. In effect the purpose of preventing the estate (ex-hypothesi by legal means) from being taken over by the Court of Wards is not an unlawful purpose. [P 555 C 1]

(q) U. P. Court of Wards Act (4 of 1912), S. 3 — Definition covers beneficiaries under Trusts Act if Court of Wards Act applies to estate.

The definition of proprietor in S. 3, Court of Wards Act is wide enough to cover the cases of beneficiaries under the Trusts Act, provided only that the estate concerned is such that the Court of Wards Act is otherwise applicable. [P 556 C 2]

(r) U. P. Court of Wards Act (4 of 1912), S. 3 — Execution of deed of trust revocable at notice of executant-proprietor—Proprietor does not cease to be proprietor and Court of Wards can enforce Act.

By the execution of a deed of trust even one which is revocable at the notice of the executant the proprietor who executes it does not cease to be any longer within the definition of proprietor contained in S. 3, Court of Wards Act. He continues to be a person entitled as proprietor to a beneficial interest in a mahal and consequently the other provisions of the Act are still applicable to him and the Court of Wards can enforce the Act and assume superintendence of the property and call upon the trustees to surrender that possession. [P 556 C 2]

(s) U. P. Court of Wards Act (4 of 1912), Ss. 53, 11 and 13 — Superintendence assumed on supposition that property is of disqualified proprietor — Suit by third parties to assert their title to such property is not barred.

Sections 53, 11 and 13 do not prevent the institution of suits by third persons of whose property

superintendence has been assumed on the supposition that it was the property of a disqualified proprietor. On the assumption that trustees are third persons who are the transferees of the original proprietor a suit by them to assert their title to the property is not barred by the provisions of these three sections : ('35) 22 A I R 1935 Oudh 234 and ('40) 27 A I R 1940 P C 82, *Disting.* [P 557 C 1]

(t) Will — Creation of — Deed held did not amount to will.

Where all that a document appeared to do was to indicate that the estate was to go to the children of the executant according to law, but that *R* was to be the guardian of those children and that the heir would not himself have control until he reached the age of 21 :

Held that this was not really of the nature of a will, because it did not, and in fact could not in the presence of the sons, operate to create any sort of title or estate in *R* during the minority of the sons. [P 557 C 1]

(u) Mahomedan law — Guardianship — Person who is neither father or father's father nor executor appointed by will of either of them is not guardian of property.

The following persons are entitled in the order mentioned below to be guardians of the property of the minors : (1) the father, (2) the executor appointed by the father's will, (3) the father's father and (4) the executor appointed by the will of the father's father. Therefore a person who has not been appointed an executrix by the will either of the father or of the father's father is not a legal guardian of the property of the minor. [P 557 C 2; P 558 C 1]

(v) Mahomedan law—Order of District Judge as quazi appointing person to perform duties of mutwalli does not bar suit for possession by person claiming to be trustee.

An order of the District Judge appointing a person to perform the duties of the "mutwalli" of certain properties during the minority of a ward would not operate as a bar to a suit for possession by a person claiming to be trustee. [P 558 C 1]

(w) U. P. Court of Wards Act (4 of 1912), S. 12 (2) (a), (3) — For applicability of S. 12 (3) minor and disqualified proprietor should not be one and same person.

The wording of S. 12 (3) necessitates that the minor and the disqualified proprietor should not be one and the same person. If they are one and the same person then it will not be S. 12 (3) which will apply but S. 12 (2) (a) with the inevitable result that if superintendence of the property has been wrongly assumed so also must be superintendence of the person. [P 558 C 2]

(x) Limitation Act (1908), Art. 13 — Decision of District Judge appointing person to perform duties of mutwalli — Suit for possession by person claiming to be trustee—Art. 13 does not apply.

Where the District Judge has appointed a person to perform the duties of a mutwalli and a suit is filed against such person for possession of the properties by another claiming to be the trustee, no question of limitation arises as this is not in any sense a suit to alter or set aside the decision of the District Judge within the meaning of Art. 13. [P 558 C 2]

(y) Civil P. C. (1908), S. 80 — Person appointed mutwalli by District Judge — Suit in respect of acts done by such person — Merely because such person happens to be public officer, acts done by him cannot be said to be done in official capacity — No notice is necessary.

Where the District Judge has appointed a public officer to perform the duties of a mutwalli, a suit filed in respect of acts done by such person, is not a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity. It is in relation to an act done by him in his capacity as the person appointed by the District Judge to perform certain duties. The District Judge could have appointed any suitable person to perform those duties and the mere fact that the person actually appointed is a public officer does not render the acts done by him acts done in his official capacity. They are in fact acts done in his private capacity as the person appointed by the District Judge, and as such no notice under S. 80 is necessary. [P 559 C 1]

J. Jackson, Ali Zaheer, Niamatullah, Ram Bharosey Lal and Mahabir Prasad Srivastava — for Plaintiffs.

M. Wasim and H. S. Gupta — for Defendants.

Judgment. — This is a suit by Rani Huzur Ara Begam, widow of Raja Mohammad Mumtaz Ali Khan, taluqdar of Utraula, district Gonda, and three other persons, Sayid Asghar Hasan, Nawab Mansur Ali Khan and Nawab Mohammad Shikoh claiming to be trustees under a deed of trust executed by the said Raja on 19th December 1933, and the supplementary deed of trust executed by him on 1st February 1934, for recovery of possession of certain properties, of which it is alleged that the defendant the Court of Wards represented by the Deputy Commissioner, Gonda, in charge of the Court of Wards, Utraula, district Gonda, has illegally taken possession.

Some preliminary facts which are more or less admitted as between the parties are necessary before I come to the pleadings. It is said that on 9th October 1933, the late Raja Mohammad Mumtaz Ali Khan, taluqdar of taluqa Bilaspur, also known as taluqa Utraula in the Gonda district, executed a deed of wakf-alal-aulad for the benefit of his younger son Kunwar Mohammad Iqbal Ali Khan, and his only daughter Raj Kumari Fatima Begam. By this deed he appointed himself to be the first mutwalli of the wakf properties, and thereafter appointed the same son as mutwalli in respect of certain properties and the daughter as mutwalli in respect of others. During the minority of these two mutwallis their guardian, according to Mahomedan law, was to act as mutwalli.

On 11th December 1933, a notice was issued under the Court of Wards Act to the

Raja to show cause why his property should not be taken under the superintendence of the Court of Wards on the grounds stated in that notice, the last date for giving a reply being 20th December. One day before the notice expired on 19th December 1933, the Raja is said to have executed a deed of trust, Ex. 2, appointing three gentlemen, Mohammad Yusuf, defendant 2, Nawab Mansur Ali Khan, plaintiff 3, and Mohammad Yamin, defendant 3, as trustees of his property. It is in question in this suit whether by this deed a real trust was created, or on the other hand the Raja merely appointed these gentlemen as managers giving them merely the title of trustees. There are some features of this document which support the latter construction. On 1st February 1934, the Raja is said to have executed a supplementary deed, by which he appointed as trustees plaintiffs 1, 2 and 4, and made certain further provisions in regard to the administration of the trust. It was in these circumstances that on 15th February 1934, the Local Government issued a notification taking the property under the superintendence of the Court of Wards with the result that on 16th February 1934, the Deputy Commissioner of Gonda took possession of the property.

A fortnight later, on 4th March 1934, the Raja died. In consequence it became necessary to reconsider the position. On 29th March 1934, the Court of Wards assumed superintendence of the persons and property of the two minor sons of the late Raja under S. 12 (2), Court of Wards Act, and published a notification to that effect under S. 15 of the Act. A contest followed for the possession of the persons of the minors and an application for "habeas corpus" was made by the Deputy Commissioner as Manager of the Court of Wards in charge of the persons and property of Raja Mustafa Ali Khan and Kunwar Mohammad Iqbal Ali Khan minors. This was decided on 11th May 1934, by a single Judge of this Court who allowed the application and directed that the opposite party Mohammad Shikoh and another should release the minors from their custody and that the minors should be handed over to the custody of their lawful guardian, the Deputy Commissioner, applicant. Subsequently in the same year the Deputy Commissioner of Gonda applied to the District Judge of Gonda as exercising the functions of a Qazi under the Mahomedan law to appoint him as mutwalli of the wakf during the minority of Kunwar Mohammad Iqbal Ali Khan in order to administer the wakf properties covered by that portion of the wakfnama which related to Kunwar Mohammad Iqbal Ali Khan. The District Judge in due course on 7th August 1934, made an order appointing the Deputy Commissioner as the person to perform the duties of mutwalli of the three properties in question during the minority of Kunwar Mohammad Iqbal Ali Khan. Thereafter the Court of Wards continued to retain superintendence of the property.

On 5th April 1937, the present suit was instituted. The plaint is a lengthy document reciting most of the facts set out above. It alleges that the late Raja had executed a valid deed of trust and had delivered possession of the trust properties to the plaintiffs as trustees. It was alleged that the original notifications under the Court of Wards Act were ultra vires and illegal, and that the act of the taking of possession of the trust properties by the Court of Wards was similarly ultra vires and illegal. It was further said that when on the death of the Raja the Court of Wards, purporting to act under S. 12 (2), Court of Wards Act, retained possession of the trust properties and proceeded further to have notifications issued, their act and those notifications were ultra vires and not authorized by the Court of Wards Act. In these circumstances the plaintiffs claimed to recover possession of the properties of the late Raja as trustees. Alternatively the widow of the late Raja, plaintiff 1 Rani Huzur Ara Begam, claimed that she was entitled to recover possession of the properties in suit under certain provisions of the deed dated 1st February 1934, which were said to be clearly testamentary in their character in respect of the right of the two minor sons to obtain actual possession of the properties in suit. It was said by way of explanation that under these testamentary directions the possession of the minor legatees was postponed to their attainment of the age of 21 years, and in the intervening period plaintiff 1 was entitled to possession.

Plaintiff 1 further claimed custody of her minor sons as an executrix of the alleged will said to be contained in the supplementary deed of trust of 1st February 1934. It was further said that defendant 1 was in wrongful possession of the wakf property, of which Kunwar Mohammad Iqbal Ali Khan was the mutwalli. The plaintiffs sought a declaration that the possession of the Court of Wards of the properties in suit

detailed in Schs. A, B and C, Items 1 to 3 was ultra vires and illegal. They also sought a decree for possession in favour of the plaintiffs and defendants 2 and 3 (who not having joined in the suit, had been impleaded as pro forma defendants) as trustees of the said properties, and alternatively in favour of plaintiff 1 alone as against the Deputy Commissioner, Gonda, in charge of the Court of Wards, Utraula, and as a person in possession of the properties mentioned. A declaration was further claimed that custody of the two minor sons of the late Raja by the Court of Wards becomes unlawful in the event of a decree for possession being passed.

The written statement on behalf of the Court of Wards was filed on 1st September 1938. In this written statement the illegality of the acts of the Court of Wards was denied. It was denied that the alleged trustees had ever been in possession of the properties of the late Raja. The circumstances in which the notice of 11th December 1933, was issued were set forth, and it was pleaded that the deed of trust of 19th December 1933, was really not executed by the Raja who was unable even to sign his name. It was said that the second document was procured on 1st February 1934, when the physical and mental condition of the Raja had become still worse, and that both deeds were fictitious and mere devices to prevent the estate being taken over by the Court of Wards, and null and void. It was further pleaded that even if execution of these deeds were proved they were not deeds of trust as contemplated by law, and therefore had no legal binding force, and the Court of Wards was entitled to take over superintendence of the estate of the Raja, and subsequent to his death, of his sons. A number of other pleas were taken which, (after a replication had been filed on behalf of the plaintiffs on 26th September 1938), gave rise to the following issues framed on 12th January 1939.

Issues.—(1) Did Raja Mohammad Mumtaz Ali Khan execute the deeds dated 19th December 1933 and 1st February 1934? (2) Was he at the time of execution of a sound disposing mind or was he not? (3) If on its decision on issues 1 and 2 the Court finds the deeds to have been validly executed, are they nevertheless invalid in law as being (i) fictitious, and (ii) mere devices to prevent the estate from being taken over by the Court of Wards, i. e., being for an unlawful purpose? (4) Do the deeds, dated 19th December 1933 and 1st February 1934, amount to deeds of trust and if not what legal force have they? (5) If the deeds, dated 19th December 1933 and 1st February 1934, be held to constitute valid deeds of trust, was the Court of Wards nevertheless empowered under the Court of Wards Act to assume the superintendence of the properties in dispute either in the lifetime of Raja Mohammad Mumtaz Ali Khan or subsequently? (6) Is the suit barred by the provisions of Ss. 11, 13 and 53, U. P. Court of Wards Act, 1912? (7) If the deeds are held to be valid in law, was the act of the Local Government in taking possession of the properties in suit unlawful and ultra vires? (8) If the document dated 1st February 1934 does not constitute a deed of trust, does it nevertheless operate as a will conferring possession of the property on plaintiff 1 until the minor sons have reached the age of 21 and then to them? (9) Is plaintiff 1 entitled to possession of the property detailed in Sch. C under the terms of the deed, dated 9th October 1933? *or* Is she not entitled by reason of the order of the District Judge dated 7th August 1934? (10) Are the plaintiffs entitled to relief (c) also in the event of their being found entitled to relief (b), or does the order of the Chief Court dated 11th May 1934 operate as a bar to the granting of the relief (c)?

On the occasion of the framing of these issues on 12th January 1939, it was pointed out by learned counsel for defendant 1 that the suit was bad for non-joinder in that by the order of the District Judge dated 7th August 1934, the Deputy Commissioner of Gonda as such was appointed mutwalli and the Deputy Commissioner of Gonda appears as defendant in his capacity as Manager, Court of Wards, and not as Deputy Commissioner, Gonda. In consequence it was ordered that notice should go to the Deputy Commissioner, Gonda, as Deputy Commissioner also in addition to his status as manager in charge of Court of Wards. In that capacity the Deputy Commissioner filed a further written statement on 27th April 1939, and two further issues Nos. 11 and 12 were framed on 2nd May 1939. (11) Is this suit barred by Art. 13, Limitation Act, as being a suit to alter or set aside a decision or order of a civil Court in any proceeding other than a suit, namely the order of the District Judge, dated 7th August 1934, appointing the Deputy Commissioner, Gonda, as mutwalli of the wakf properties in suit? (12) Is the suit maintainable against the Deputy Commissioner, Gonda, as mutwalli on the ground that no notice was sent to him as such under S. 80, Civil P. C.? The

case was fixed for hearing in the month of February 1940, and as appears from the orders of Hamilton J., in the proceedings the parties had for a long time been aware that the case would be proceeded with in the month of February, and that for some weeks he had proposed to take up the case on 22nd February : *vide* for example the order of 26th February 1940. It was in these circumstances that on 22nd February Application No. 163 of 1940 was filed by the plaintiffs, alleging that the suit had been adjusted by a lawful compromise, of which no date was given. It was said in this application that the compromise, a copy of which was enclosed, was accepted and approved by the Court of Wards and thereupon the following resolution was passed :

> The Court resolves that the case pending in the civil Court between the Court of Wards and the trustees of Utraula estate be compromised on the terms approved by the Advocate-General and that the estate be recommended for release.

This resolution, it has since emerged, was dated 28th January 1939. In the application it was further said that there thus came into existence a lawful compromise by which the entire suit was wholly adjusted and all that remained to be done was to file a joint application embodying the said compromise before the Court. It was said that the plaintiffs had always accepted, and were even now willing to file, the compromise as finally accepted by the Court of Wards but in spite of the said resolution the compromise had not so far been filed. Hence it was prayed that counsel for the Court of Wards be ordered to file the original compromise and the proceedings of the Court of Wards for the perusal of the Court and an order be passed that the compromise be recorded and a decree in terms of the compromise be passed under the terms of O. 23, R. 3, Civil P. C. What happened thereafter is recorded in the Court's proceedings of 22nd February 1940, printed as No. 8 of the record of proceedings. On behalf of the defendants, it was said that they were not ready to compromise the suit on the terms embodied in the so-called terms of compromise attached to the application, and it was said that whatever had taken place did not in fact amount to a valid compromise. Paragraph 2 at p. 37 of the printed record states that

> the learned counsel for the defendants do not admit that the so-called terms of the compromise attached to this application correspond with any document prepared by the Advocate-General at the instance of the Court of Wards nor that there was any resolution in the terms stated in para. 3 of this application.

It is not now disputed that in fact a document was prepared by the Advocate-General which contains these terms and that a resolution was so passed, but it is stated that the whole matter was sprung upon counsel on 22nd February and that the only course open to them was to make no admission, unless and until they had an opportunity to obtain instructions. The learned presiding Judge proceeded to frame a new issue, No. 13: "Has the suit been adjusted wholly or in part by a lawful compromise as alleged by the applicants?" On behalf of plaintiffs it was now sought that this issue No. 13 should be treated as a preliminary issue and the hearing of evidence which had been fixed to start on 26th February on the case generally should be postponed until this preliminary issue had been disposed of. My learned brother refused to grant any postponement of the evidence on the merits of the case and to treat this issue No. 13 as a preliminary issue remarking that this prayer was not granted, because as already stated there was no reason why this application should not have been made at an earlier stage. In fact, as he remarked, there was no reason why this application should not have been put in months earlier, and there was no reason why any postponement should be granted for production of evidence.

On 23rd February an application No. 166 of 1940 was presented in which it was stated that the resolution of the Court of Wards compromising the suit was passed after the terms had been discussed by the parties for several months somewhere in the end of January 1939, and that subsequently when the Court of Wards did not bring the compromise into Court the plaintiffs came to know that the proceedings of the Court of Wards had been sent to the Hon'ble the Revenue Minister. In para. 3, it was stated that on learning this the plaintiffs through their counsel and friends had many interviews with the Hon'ble Minister on different dates right up to the first week in November and sought to have the matter of the filing of the compromise expedited, but failed to get the compromise brought into Court up to the resignation of the ministry in November 1939; that thereafter they made efforts to get in touch with the present Government in order to get the compromise produced by the Court of Wards, and this effort continued till the last week of January 1940, and even early in February. These statements which were supported by

the affidavit of one Mohammad Qazim Ali Khan must be characterized as false in part at least, since there is on the record, with genuineness admitted by the plaintiffs' counsel, a letter from the Secretary to Government, U. P., to the Secretary Court of Wards, U. P., EX. A 37, dated 4th October 1939, in which it is stated that

> the Governor, agreeing with the view of the President, Court of Wards, has decided that in the interests of the estate as well as of the minor wards, it is essential that the Court of Wards should retain management of the estate and superintendence of the persons of the wards, and that no compromise should be entered into between the Court of Wards and the alleged trustees.

It is admitted by learned counsel for the plaintiffs that this letter communicates the decision of the Government to the Court of Wards. If therefore the plaintiffs through their counsel and friends were having interviews with the Hon'ble Minister right up to the first week of November, they could not have failed to learn that the Government had decided by the first week in October not to release the estate nor to compromise the suit. I mention these facts only in view of their bearing on the order made by my learned brother. On this application he passed a considered order calling upon the plaintiffs' counsel to open his case on Monday, 26th February, and thereafter to produce such evidence as he had in connexion with the issues framed in the case. On 26th February learned counsel, when asked to open his case, said that he had no evidence to lead, and therefore there was really nothing for him to explain while opening his case, but he wished to put in an application for postponement for the purpose of producing witnesses. It was ordered that the application be put in after the interval.

On the same day my learned brother passed an order covering applications No. 167 for the summoning of certain documents from the possession of the Court of Wards, No. 168 for the delivery of interrogatories to Dr. Rai Rajeshwar Bali as a member of a statutory body namely the Court of Wards, No. 186 a narrative of facts, and No. 187 an application that issue 13 be treated as a preliminary issue, and that the plaintiffs should be given an opportunity to produce evidence in support of their case if the Hon'ble Court were pleased to hold that the compromise was not proved. In this last application the incorrect statement about efforts to get the Local Government to implement the compromise arrived at between the plaintiffs and the Court of Wards continuing up to the end of January 1940 was repeated. In my learned brother's order it was remarked that issue 13 might have been decided there and then against the plaintiffs, because there was no evidence on the record but as a matter of grace the Court rejected the application in so far as it asked for a postponement to produce evidence on issues other than issue 13, but allowed the application for time to prove the facts in connexion with the last issue. The Court then called upon the defendants to put in a reply as to what, if anything, they were prepared to admit, on 11th March 1940, whereafter orders on the remaining applications and on the further course of the case would be passed. On 15th March the application to deliver interrogatories to Dr. Rai Rajeshwar Bali was rejected. On 18th April 1940, it appeared that Dr. Rai Rajeshwar Bali could not be examined even on commission owing to the state of his health, and an order was passed fixing 23rd April for arguments on the point,

> whether the agreement of the Court of Wards and of the plaintiffs, presuming that it existed as alleged by the plaintiffs up to and including the resolution of 28th January 1939, would constitute an agreement or compromise to which O. 23, R. 3 would apply in view of the controlling power of the Local Government under S. 5, Court of Wards Act.

It was added that "the parties should be prepared to argue other issues as soon as I have decided this particular point." On 23rd April my learned brother came to the conclusion that the course proposed was not satisfactory and postponed the case for the recording of evidence on issue 13. He further remarked :

> Although in view of what I have said before it may be unnecessary to say so, I wish to confirm now what I have already stated previously that the oral evidence which will be admitted in this case will be confined to issue 13, and that no oral evidence on the other issues shall be admitted.

Thereafter my learned brother ceased to be a member of this Court and the case came before me for disposal. The attendance of Dr. Rai Rajeshwar Bali was obtained only with considerable difficulty and his evidence was recorded on 12th November 1940. The plaintiffs then closed their case on this point and arguments on issue 13 were heard on 12th and 13th December 1940.

Findings.—The case for the plaintiffs in connexion with this alleged compromise is set out in application No. 186 of 1940 filed on 26th February 1940. In that application it is stated that :

> After the filing of this suit the terms of the compromise were discussed by plaintiff 4 (Mohammad

Shikoh) on behalf of the plaintiffs and Dr. Rai Rajeshwar Bali on behalf of the Court of Wards from July 1938 to August 1938 when the general lines on which the compromise could be made were chalked out and certain terms were agreed upon and reduced to writing on or about the end of August or early September 1938; that this draft (apparently Ex. 46) was then left with Dr. Rai Rajeshwar Bali as he was representing the Court of Wards Committee in these negotiations.

It is further said that :

Probably in September 1938 the compromise was considered by the Court of Wards when it was decided to refer the compromise to the Legal Remembrancer and Advocate-General for legal opinion. That the Legal Remembrancer and Advocate-General made certain additions and alterations, and ultimately in December 1938 they prepared a final compromise (apparently Ex. A-40). That this final compromise was approved on behalf of the plaintiffs and was finally accepted by the Court of Wards in its meeting held on 28th January 1939, when the resolution (to which I have referred earlier) was passed. That the proceedings of the meeting held on 28th January 1940, were confirmed in the meeting held in the last week of March 1939.

The case for the defendants is set out in the reply to Civil Misc. Applications Nos. 163, 166, 186 and 187 filed by learned counsel for the defendants on 11th March 1940. In this reply it is denied that there were negotiations for a settlement of the dispute between the Court of Wards and the plaintiffs. An account is given of the acts of Dr. Rai Rajeshwar Bali in connexion with this matter. It is admitted that a resolution was passed on 13th September 1938 that

the draft of the compromise given by Rai Rajeshwar Bali Saheb should be referred to the Legal Remembrancer and the Advocate-General for legal opinion.

It is admitted that the final resolution referred to was passed, but it is added that this resolution was sent by the President of the Court of Wards to the Secretary to Government, for the orders of the Government, under S. 5, Court of Wards Act, and that the Provincial Government decided to retain management of the estate and the superintendence of the persons of the wards and that no compromise should be entered into between the Court of Wards and the alleged trustees, and it is contended that there was thus no lawful compromise by which the suit was adjusted as alleged in the application No. 163. As regards the position of Dr. Rai Rajeshwar Bali it is contended in para. 7 that he was only one of the members of the Court of Wards Committee and had no power or right to discuss any terms of compromise on behalf of the Court of Wards and was not authorized by the Court of Wards to discuss them on their behalf. It is stated that Dr. Rai Rajeshwar Bali never represented the Court of Wards and it appears that he was acting in the interests of the plaintiffs. It is further pointed out in para. 9 that the defendant gave no information to the plaintiffs of the aforesaid resolution or that the papers had been sent to the minister, that the Court Wards never made to, or received from the plaintiffs, any communication about the alleged compromise. It is said that the proceedings and resolutions passed by the Court of Wards and communications between them and the Government Officials are unpublished official records and of a confidential nature and that the plaintiffs have obtained copies surreptitiously and improperly. It is further stated in para. 11 that the resolution of 28th January 1939 has no legal and binding effect without the sanction of the Provincial Government, because the release of the estate was an integral part of the proposed compromise. In para. 12 it is stated that :

It is only the President of the Court of Wards who can compromise a suit, but even he is incompetent to do so if the compromise involves the release of person or property of a ward from the superintendence of the Court of Wards without the sanction of the Provincial Government as provided by Ss. 5 and 6, Court of Wards Act.

It is contended therefore in para. 13 that "the resolution in question merely recommends to the Provincial Government the release of the estate" and further in para. 14 that the resolution in question not having been communicated to the plaintiffs has no legal and binding effect and it cannot in law constitute a compromise.

It may be noted, with reference to the remarks about communication, that the plaintiffs at a later stage, in the interrogatories which they served on defendant 1 and the President of the Court of Wards, were apparently inclined to the position that Dr. Rai Rajeshwar Bali was acting to some extent as agent of the plaintiffs in these negotiations. The interrogatory runs as follows :

Is it not a fact that all the members of the Court of Wards, including the president, were fully aware that Dr. Rai Rajeshwar Bali was in constant communication with the plaintiffs in the matter of the compromise and it was understood that the passing of the resolution on 28th January 1939 in the presence of Dr. Rai Rajeshwar Bali was communication of the same to the plaintiffs, and that it was assumed that Dr. Rai Rajeshwar Bali would inform the plaintiffs of the said resolution?

It is in the light of these pleadings that I come to the evidence of Dr. Rai Rajeshwar Bali, the one and only witness produced on behalf of the plaintiffs to give evidence in regard to the negotiations leading up to the alleged compromise. I regret that I am not able to accept at its full face value

every thing that has been said by Dr. Rajeshwar Bali, despite the fact that he is a talukdar and a member of the Court of Wards Committee, and was at one time a minister of the U. P. Government. He has sought to give an air of great impartiality to his conduct but the admissions made by him show that he was approached by plaintiff 4 Mr. Mohammad Shikoh immediately after the suit was filed. The suit was filed on 5th April 1937, and Dr. Rai Rajeshwar Bali says that he was shown legal opinions which had been obtained by Mohammad Shikoh and as a result of seeing these legal opinions he wrote as early as 22nd June 1937, a letter to Mr. Lane, the then President of the Court of Wards. Mr. Lane replied to this letter in EX. A-31 dated 22nd June 1937, and Dr. Rai Bajeshwar Bali replied in EX. A-32 dated 24th June, stating that the points on which he wanted a full note were :

(1) The legal opinion as to whether the trust is valid or not, and (2) whether it is advisable for the Court of Wards to attempt to compromise the case rather than to proceed to litigation.

As a result of this correspondence a resolution EX. A-32, was passed by the Court of Wards Committee on 25th August 1937, which was as follows :

The opinion of Sir Wazir Hasan and Sir Sultan Ahmad may be sent to the Legal Remembrancer and the latter's opinion may be taken again. Rai Rajeshwar Bali has undertaken to procure copies of these two opinions and send them to President, who has undertaken to forward them to the Legal Remembrancer when he receives them.

It appears that Rai Rajeshwar Bali did at some later date produce these opinions and presumably they were sent to the Legal Remembrancer. According to Rai Rajeshwar Bali his interest in the matter began with a proposal by a member of the Court of Wards that this estate should be released, and it was Rai Rajeshwar Bali himself who thought that certain safeguards were necessary. Rai Rajeshwar Bali, however, speaks as if what happened took place at the first meeting, of which we have not got any record, and he says that apart from this safeguarding of the management of the estate and the proper education and upbringing of the wards, there was a difficulty that the release would mean a recognition of the trust which was said to have been created and which the Court of Wards had not recognized. He says that he himself suggested that as the case was before the Court, they might be able to get the safeguarding of the management of the estate and the upbringing of the wards effected through a compromise of the suit. He goes on to say :

The question then arose who should negotiate the compromise. Somebody suggested that I should do it. I was reluctant to do it because of the obvious difficulties. Other members joined in pressing me to do it and so I agreed to negotiate a compromise. I said I would make an attempt.

There is no support whatever for this statement of Dr. Rai Rajeshwar Bali in the records of the resolutions of the Court of Wards. The Court of Wards is a statutory body and its decisions are embodied in resolutions. If at any time the Court of Wards intended to appoint Dr. Rai Rajeshwar Bali to negotiate a compromise of the suit between itself and Mohammad Shikoh, there must be necessarily have been a resolution passed to that effect. Rai Rajeshwar Bali admits that he does not know if there was any resolution to that effect but he cannot say for certain that there was. He goes on to say in cross-examination :

I did not ask that a resolution should be passed authorizing me to negotiate. I did not have the fact that I was authorized recorded in the proceedings. I do not know what was put on record. The proceedings of the meetings are circulated with the agenda of the next meeting at which those formal proceedings have to be confirmed. Item 1 of the agenda at the next meeting was to confirm the proceedings of the last meeting. I never challenged the proceedings of the meeting at which I was asked to negotiate. I cannot say that I ever noticed that there was any record in the proceedings of the meetings of my being asked to negotiate. I never considered the matter. I am not aware of any formal resolution of the Court of Wards by which I was authorized to negotiate a compromise. I did not find at a later date that the only record that was made was that the matter, (that is the matter of the release of the estate) was postponed.

It is perfectly obvious therefore that Rai Rajeshwar Bali was never in any sense authorized to negotiate a compromise. Whatever he did he did entirely without authority. Even if two or three of the members at the meeting suggested to him that he should get in touch with Mohammad Shikoh and find out the terms on which the suit could be settled out of Court, that would not clothe him with any form of authority as an agent of the Court of Wards. The only manner in which he could be clothed with authority would be by the passing of a resolution. The whole history of the matter and the whole statement of Dr. Rajeshwar Bali, taking his answers in examination-in-chief and in cross-examination together, shows that at the instance of Mohammad Shikoh he was taking a personal interest in the matter of this suit, but it is clear that he had no official status in the matter, and the least that can be said is that there was a considerable degree of impropriety in his conduct in, as it were, pushing the interests

of Mohammad Shikoh and the trustees. With this I may come to the points in his statement which really matter. He says that the first step he took for negotiating the compromise was to discuss the matter with Nawab Mohammad Shikoh, and that Nawab Mohammad Shikoh subsequently told him that he was authorized by the trustees to settle the terms of the compromise. He goes on to say that at a subsequent meeting of the Court of Wards he presented the terms settled between himself and Mohammad Shikoh. This appears to have been at a meeting which took place on 12th September 1938: *vide* the answer of the President of the Court of Wards to the interrogatories. In para. 4 it is stated :

> It is correct that Rai Rajeshwar Bali produced a document containing the terms of compromise on which the plaintiffs wanted to compromise the suit, and the following resolution was passed at the meeting on 12th September 1938 :
>
> The draft of the compromise given by Rai Rajeshwar Bali should be referred to the Legal Remembrancer and the Advocate-General for legal opinion.

This draft compromise was EX. 46 as Rai Rajeshwar Bali himself says, and if it could be taken to be an offer made by Mohammad Shikoh, it is at any rate perfectly clear that it was an offer which was not accepted and it therefore requires no further consideration.

This document was sent to the Legal Remembrancer and the Advocate-General, vide Rai Rajeshwar Bali's own letter EX. A-35, dated 6th January, without year, but evidently written on 6th January 1939 in which he says, writing to Mr. Himmat Singh who had by this time succeeded Mr. Lane as President of the Court of Wards that the Court of Wards had referred the Utraula case to the Legal Remembrancer and the Advocate-General three months earlier, and that he wished to know if their opinion had been received yet, and asked the president to remind them so as to expedite disposal. It seems that between 6th January and 28th January the Legal Remembrancer and the Advocate-General sent back to the President of the Court of Wards an alternative draft, EX. A-40, and Dr. Rai Rajeshwar Bali states about this :

> The opinions of the Legal Remembrancer and the Advocate-General were duly obtained. They suggested some modifications. I had a talk with Mohammad Shikoh about these modifications and he agreed to them. The matter was laid before the Court of Wards again. I told the meeting that the modifications had been agreed to. The decision of the Court of Wards was that the agreement as modified be approved and be sent to the Government for whatever further action was necessary.

The resolution actually passed is EX. A-36 which was that the case pending in the civil Court between the Court of Wards and the trustees of the Utraula estate be compromised on the terms approved by the Advocate-General and that the estate be "recommended" for release. What followed on this is clear from the application and reply and the letter EX. A-37 from the Secretary to Government to the Secretary, Court of Wards. The resolution with the draft compromise EX. A-40 was sent to the Local Government with a recommendation that the estate be released. It was recognized, that is, by the Court of Wards, that the compromise of the suit and the release of the estate from the superintendence of the Court of Wards were indissolubly linked together, that the release of the estate was a matter within the competence of the Local Government, and therefore the Local Government had the last word to say about both questions, that is compromising the suit and the release of the estate.

The first contention put forward on behalf of the plaintiffs is that by showing EX. A-40 to Mohammad Shikoh, Dr. Rai Rajeshwar Bali made an offer on behalf of the Court of Wards to compromise the suit on those terms and this offer was accepted by Mohammad Shikoh acting for the plaintiffs and communicated to the Court of Wards. It is argued that even if Dr. Rai Rajeshwar Bali had not got proper authority to negotiate the compromise, none the less the Court of Wards by passing the resolution ratified his acts and thus there was an offer by the Court of Wards and acceptance by Mohammad Shikoh, all conveyed through the channel of Dr. Rai Rajeshwar Bali. Alternatively it is contended that Dr. Rai Rajeshwar Bali having shown the draft EX. A-40 to Mohammad Shikoh and obtained his approval, the act of Dr. Rai Rajeshwar Bali in communicating this agreement to the Court of Wards at the meeting amounted to an offer by Mohammad Shikoh which was accepted by the Court of Wards by the passing of the resolution. It is no longer said that this acceptance is to be presumed to have been communicated because the resolution was passed in the presence of Dr. Rai Rajeshwar Bali, but it is said that there is nothing confidential about the passing of such a resolution and therefore it must be taken that communication of the acceptance is complete. On the other

hand for the defendant it is said that there was no communication and that even if there was communication, it would not make any difference, because the Court of Wards was not competent to effect a compromise of the suit, because the compromise of the suit and the release of the estate are one and the same thing, and the latter is within the competence of the Local Government alone as recognized by the Court of Wards which resolved only that the estate be recommended for release.

Now as to the actual position of Dr. Rai Rajeshwar Bali, I entertain no sort of doubt that he was not technically or actually an agent either of the Court of Wards or of Mohammad Shikoh. He was doing what he could in the interest of the latter certainly, but that could not make him his agent. Taking the first position suggested on behalf of the plaintiffs, namely that Dr. Rai Rajeshwar Bali's act in communicating EX. A-40 to Mohammad Shikoh amounted to an offer by the Court of Wards, the acceptance of which was communicated to the Court of Wards by Dr. Rai Rajeshwar Bali at the meeting when it is suggested that the act of making the offer was ratified by the resolution; it might be almost enough to say that we have nothing whatever from the side of Mohammad Shikoh, who could at any time back out. He has never said a word or written a word, and it is only through the mouth of Dr. Rai Rajeshwar Bali that we are expected to believe that an offer was made to him and accepted by him. Mohammad Shikoh was expected to be put up as a witness and at one stage learned counsel was on the point of putting him in the witness-box but decided to wait for the appearance of Dr. Rai Rajeshwar Bali. Ultimately he was never put in the witness box at all, possibly because of the danger of what might be elicited from him in cross-examination, but, in any case, the ultimate decision on the effect of such an offer, acceptance and ratification depends on whether the Court of Wards by passing this resolution was competent to compromise a suit and direct release of an estate. If it was not competent to direct release of the estate, it was not competent by resolution or otherwise to compromise the suit.

The second line of argument is that Rai Rajeshwar Bali by producing EX. A-40 as approved by Mohammad Shikoh before the meeting made an offer to the Court of Wards which was accepted by means of the resolution. The same criticisms apply but the ultimate ratio is the same. Before examining this question of offer and acceptance on the assumption that there was a real offer, I would remark that I have the gravest doubts as to whether proceedings such as took place in connexion with this compromise amounted to offer and acceptance at all. What seems to have been going on was rather an informal discussion outside the Court between certain interested persons to find out what sort of terms would be acceptable to both parties and would be accepted by one party if offered by the other. It seems to me that when these terms were discovered by means of Dr. Rai Rajeshwar Bali, his act in putting EX. A-40 before the Court of Wards committee did not amount to an offer by Mohammad Shikoh which was accepted by the Court of Wards, but that the Court of Wards by passing this resolution merely came to a decision that if otherwise possible the suit should be compromised on those particular terms, which appeared to the members of the committee to be proper terms. The stage of making the offer and getting the acceptance was a stage which would follow the passing of this resolution, and the resolution itself did not amount either to an offer or the acceptance of an offer.

If, however, it be assumed that the passing of the resolution amounted to something more than the mere making of a decision, then the question is, what was the extent of the authority of the Court of Wards? The powers of the Local Government and of the Committee of the Court of Wards are laid down in the U. P. Court of Wards Act (Act 4 of 1912) as amended by the U. P. Court of Wards (Amendment) Act 5 of 1933. Under the old Act prior to the amendment, S. 5 ran as follows :

> The authority vested in the Court of Wards shall be subject to the control of the Local Government.

Under the Act as amended the section runs as follows :

> The authority vested in the Court of Wards shall be subject to the control of the Local Government in the following matters: (a) the assumption of superintendence of person or property ; (b) the release of person or property from such superintendence . . . . .

Section 6 provides as follows :

> (1) Subject to the provisions of S. 5 the following business shall be disposed of by the Court of Wards :
>
> . . . .
>
> (b) All questions relating to the assumption or non-assumption of the superintendence of the person or property of a proprietor or minor under

S. 12 (2) or S. 12 (3) and to the release or non-release of person or property from superintendence under Sections 44, 45 or S. 46.

* * * *

(l) Any other business which the President may think proper.

(2) All other business shall be disposed of by the president.

(3) Any member may bring up before the Court of Wards any matter which he desires to initiate and may ask the president for information on any matter.

Prima facie I should suppose that cl. (3) could not operate to extend the powers given by cl. (1). Chapter 3 deals with assumption of superintendence of persons and property, and in this chapter S. 8 defines disqualified proprietors. These are of four kinds, "(a) minors ; (b) females declared by the Local Government to be incapable of managing their own property ; (c) persons adjudged by a competent civil Court to be of unsound mind and incapable of managing their own property ; (d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property" on grounds specified under four heads, the first of which is physical or mental defect or infirmity unfitting them for the management of their own property.

Under S. 12 (1) the Act provides that:

The Court of Wards shall assume the superintendence of the property of any proprietor disqualified under cl. (b) or cl. (d) of sub-s. (1) of S. 8 or in regard to whom a declaration has been made under section 10.

(the section which deals with applications by a proprietor himself for having his property placed under the superintendence of the Court of Wards). Sub-section (2) provides that :

The Court of Wards may in its discretion assume or refrain from assuming the superintendence of (a) the property, or person and property, of any proprietor disqualified under cl. (a) or cl. (c) of sub-s. (1) of S. 8 ; (b) the person of any proprietor disqualified under cl. (b) or cl. (d) of sub-s. (1) of section 8.

We turn next to S. 44. This section provides that "the Court of Wards may at any time release any person or property from its superintendence." There are four provisos to this section but the only one requiring consideration in the present case is the first which runs as follows :

Provided, first, that the Court of Wards shall not, without the previous sanction of the Local Government, so release any property, the proprietor of which has been disqualified under cl. (b) or cl. (d) of sub s. (1) of S. 8.

It is contended on behalf of the plaintiffs that by the modifications of the Act enacted in 1933 the Court of Wards has been given full authority to release an estate of which superintendence has been assumed under cls. (a) and (c) of sub-s. (1) of S. 8 read with S. 12 (2) of the Act. The suggestion is that as the Act stood prior to the enactment of Act 5 of 1933 this was not the case. I may note first that S. 44 is not one of the sections which was amended in 1933. Section 5 was amended in the manner to which I have already drawn attention. Sections 4 and 6 are entirely new sections necessary for the purpose of substituting the present statutory committee in place of the Board of Revenue which by the former S. 4 was the Court of Wards for the United Provinces. Section 6 formerly merely provided for the distribution of business between the two members of the Board of Revenue, whereas now it provides for the distribution of work as between the committee and the president. It is therefore not with any imaginative idea in regard to the intention of the Government in dealing with the new body that we have to examine Ss. 5 and 44. Under the old S. 5 the whole authority of the Court of Wards was subject to the control of the Local Government. Under the amended Act S. 5 the control of the Local Government has been retained in all matters of superior importance, that is (a) the assumption of superintendence, (b) the release from superintendence, and (c) appointments to superior posts, budgets of estates of which the income is above Rs. 50,000 per annum, and proposals for sale or purchase on behalf of an estate under superintendence for more than Rs. 10,000 which the President refers to the Local Government for their decision. In this last connection it has to be noticed that such reference may be made by the President at his own discretion and shall be made if a majority of the other members of the Court of Wards so request, and it is further provided that if the Local Government should provisionally not agree with the proposal of the members, the Government is to state its view to the Court of Wards and before coming to a final decision consider any comment which the Court of Wards may make. As I have remarked we have to discard from our minds all idealistic theories of experiments in self-government and the like and merely to consider the actual effect of the amendments. Prior to the amendment the authority was vested in the Board of Revenue as Court of Wards subject to the control of the Local Government in all matters. After the amendment the authority vested in the Court of Wards as now re-constructed is to be subject to the

control of the Local Government in the important matters specified in S. 5. Those particular matters always have been subject to the control of the Local Government and they continue to be subject to the control of the Local Government. However the provisions in regard to discretionary reference to the Local Government in regard to matters falling under head (c) seem clearly to imply that there is no discretion in the matters falling under heads (a) and (b).

Turning to S. 44, as I remarked earlier, that is not a new section and we have therefore to interpret Ss. 5 and 44 just as if the Court of Wards as at present constructed were the same old Court of Wards which formerly existed under the statute, namely the Board of Revenue. As it appears to me on an examination of Ss. 5 and 44, so far from the modification of the Act leading to the conclusion that the present Court of Wards has complete and unfettered authority in the matter of the release of an estate from superintendence, exactly the opposite is the result of the modification of the Act. What S. 44 provides is that although the Court of Wards may release at any time any person or property from its superintendence, subject to the control of the Local Government under S. 5, it shall not so release any property, the proprietor of which has been disqualified under cl. (b) or cl. (d) of sub-s. (1) of S. 8 without the previous sanction of the Local Government. What it comes to is this that an order of the Court of Wards for the release of any estate from superintendence is always subject to the control of the Local Government, that is the Local Government has the last word always in the matter, but that in cases to which cl. (b) or cl. (d) of sub-sec. (1) of S. 8 applies the Court of Wards may not even pass a resolution for the release of a property without the sanction of the Local Government previously obtained. Even if it be assumed that it is not absolutely clear what is the connotation of the phrase "subject to the control of the Local Government", it certainly implies that in all matters in which the Court of Wards by its resolution makes a reference to the Local Government, it is leaving the final decision of the matter in question to the Local Government. I should suppose it to be the case that in the matter of the release of the property of minors and lunatics (cls. (a) and (c) of sub-s. (1) of S. 8) the Court of Wards always had authority, unless a reference to the Local Government was thought necessary or the Local Government had already taken some interest in the matter, to make an order of assumption of superintendence or of release from superintendence, but that does not lead to the result that the Court of Wards has an absolute discretion, and that the resolution passed in the present case can be regarded as a final decision to release the estate and to compromise the suit. The Court of Wards in this resolution clearly recognized that the two things were linked together, and it further, while deciding to compromise the suit, declined to exercise the discretion, if it had such a discretion, to order release of the estate, and it left that matter to the Local Government, thereby leaving to the Local Government the final decision on the whole matter. How closely these matters were linked is to be inferred from para. 1 of the terms of the compromise which provides that the Court of Wards will put the property mentioned in the schedules annexed to the plaint into the possession of the plaintiffs and defendants 2 and 3 as trustees under the deeds dated 19th December 1933 and 1st February 1934.

Learned counsel for the plaintiffs have referred me to a number of cases in regard to the powers of the Court of Wards in the matter of compromise of suits. I do not think that these are very helpful but I will summarise them *en passant*. In 3 O W N Sup 185[1] at p. 215, it was held that there could be no doubt that the Court of Wards had authority to compromise suits on behalf of or against wards even when two such wards were contesting parties in the suit. Similarly in 23 ALL 394[2] at p. 404 it was remarked by their Lordships of the Privy Council that

> the Court of Wards has of course all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by statute.

Reference was also made to 48 Cal 469[3] a case under the Bengal Court of Wards Act (Act 9 of 1879) in which it was held that

> a guardian appointed under the Court of Wards Act, 1879, on behalf of minors has power to compromise proceedings in a civil Court, to which these minors are defendants; upon the guardian

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1. ('26) 13 A I R 1926 Oudh 530: 97 I C 520: 3 O W N Sup 185, Court of Wards v. Chandra Bhan Dat.
2. ('04) 23 All 394: 28 I A 190: 8 Sar 85 (P C), Mohammad Mumtaz Ali Khan v. Farhat Ali Khan.
3. ('21) 8 A I R 1921 P C 22: 59 I C 911: 48 Cal 469: 48 I A 27 (P C), Nakim Dewani v. Mt. Pimba Dichen.

assenting to an agreement of compromise, it is necessarily recorded by the civil Court under S. 375, Civil P. C., 1882, and its validity does not depend upon its terms having been examined and approved by the civil Court,

(as would be the case in connexion with a compromise effected on behalf of minors by a guardian ad litem). Similarly in 65 I A 57[4] at p. 65 their Lordships remarked :

The validity of the compromise depends entirely upon whether the Court of Wards consented on his behalf. If they did, the absence of a formal order making their manager guardian ad litem as distinct from an additional defendant does not invalidate the decree.

As I remarked earlier I do not think any of these cases is helpful to the decision of the present case. It may be that subject to the control of the Local Government which it might or might not choose to exercise the Court of Wards had power to direct the release of the estate of the minors which release was necessary to the effecting of a compromise with the plaintiffs, but it is quite clear that the Court of Wards did not purport to exercise that power. It therefore follows that the resolution passed by them was not a decision compromising the suit, but a decision that the suit should be compromised, and that the matter of the release essential to the compromising of the suit should be left to the Local Government, and therefore the last word in regard to the compromising of the suit remained with the Local Government.

Turning back now to the possible effect of the negotiations and the resolution, even if that resolution was assumed to be a complete decision on the part of the Court of Wards to compromise the suit, the question is whether the passing of that resolution could bring about a completed contract of compromise. A compromise is, when all is said and done, nothing more nor less than a contract, and for the purpose of bringing about a completed contract certain points are essential. The position of the plaintiffs on the question of offer and acceptance is just as uncertain as it is in regard to the position of Dr. Rai Rajeshwar Bali, whom at one time they called the agent of the Court of Wards and at another time implied to be their own agent. One case for the plaintiffs is that Dr. Rai Rajeshwar Bali by bringing to the Court of Wards meeting this draft compromise, Ex. A-40, which had been approved by Mohammad Shikoh, was communicating an offer of Mohammad Shikoh to the Court of Wards. As I have remarked already this depends entirely on the statement of Dr. Rai Rajeshwar Bali that he had shown this draft Ex. A-40 to Nawab Mohammad Shikoh and he had approved of the terms. It is said that the passing of the resolution amounted to an acceptance of the offer and that thereupon the contract became complete.

It is argued on behalf of the defendants that the mere passing of the resolution, even if it amounted to acceptance of the proposal, still required communication to the proposer under the provisions of S. 4, Contract Act. It is contended that such a resolution amounts to nothing more than a mental assent, and that communication to Mohammad Shikoh could only be made in the manner appropriate to the communication of the decision of a statutory body, that is by a letter written by or on behalf of the President of the Court of Wards. For the plaintiffs it is argued that there was nothing confidential about the proceedings of the Court of Wards and that the mere passing of the resolution amounted to communication. It appears to me that there is no force whatever in this contention, which is contradicted in terms by Dr. Rai Rajeshwar Bali himself; he says that the proceedings are confidential and that he never communicated the proceedings or the resolution to Mohammad Shikoh. Learned counsel for the plaintiffs sought to rely on the case in (1877) 2 A C 666,[5] but the facts of that case are completely dissimilar. That was a case of a contract not very formally signed but the original paper was left with the promisee and the contract was acted upon over a considerable period. It was in fact followed by a course of action and was not a mere single act, and was in no sense a case of mere mental assent. The limits of an unexpressed assent can be seen from the case quoted at the bar in 49 ALL 674[6] in which it was held that

the mere sending of a notice by a bank to one of its customers that the interest charged on overdrafts against security held by the bank had been raised is not of itself sufficient to render the customer liable to pay the enhanced rate. But where, after receiving notice that the rate of interest had been raised, the customer borrows more money from the bank, the bank is justified in charging him interest at the enhanced rate.

A further point arises and is suggested

4. ('38) 25 A I R 1938 P C 49: 172 I C 643: 17 Pat 1: 65 I A 57: 32 S L R 290 (P C), Braja Sunder Deb v. Rajendra Narayan Bhanj Deo.

5. (1877) 2 A C 666, Alexander Brogden v. Directors, &c., of the Metropolitan Railway Co.

6. ('27) 14 A I R 1927 All 407 : 100 I C 1023 : 49 All 674: 25 A L J 372, Gaddar Mal v. Tata Industrial Bank, Ltd., Bombay.

by the same case, where it is remarked at page 677 that

> the law on the subject of acceptance of an offer is indicated in Ss. 7, 8 and 9, Indian Contract Act, and these sections must be read without reference to the English law on the subject. According to S. 7, before a proposal becomes a promise rendering the promisee liable to the conditions contained in the promise, there must be an absolute and unqualified acceptance. This acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted.

For the defendants it is, I think, rightly contended that even if the passing of this resolution could possibly be construed as an acceptance, it is in no sense an unqualified acceptance. On the contrary, it fails as an acceptance because it leaves one of the conditions essential to the implementing of the acceptance to the discretion of a third person, namely the local Government. Reverting to the question of communication learned counsel for the plaintiffs referred to 42 ALL 187[7] in support of his contention that acceptance can be made without express communication. This was a case in which the promisor, having made an offer to supply certain goods, received and kept money sent to him with an order and credited it to his account. This was obviously not an act of mere silence giving consent but of an act on the part of the promisor vis a vis the promisee. It is suggested that the act of the Court of Wards in the present case in passing the resolution is analogous to the act of the promisor in that case. Perhaps all I need say is that the facts are so utterly dissimilar that I find it impossible to derive from that case any assistance in the decision of the present case. I do not see how it can be said that the act of the Court of Wards in passing a resolution is in any way comparable to the act of someone who receives and credits to his own account money sent along with an offer.

To sum up on this question of offer and acceptance; in this first place, as I remarked earlier, I do not consider that the various manoeuvres which preceded the passing of the resolution were formal negotiations at all, and that they could possibly come within the scope of offer and acceptance. I think that they amounted to little more than hole and corner intrigues and that the decision of the Court of Wards embodied in the resolution of 28th January 1939, was no more than a decision to make an offer to the plaintiffs to compromise the suit on the terms stated in EX. A-40 provided that the Local Government was willing to direct the release of the estate. As regards the suggested position that Dr. Rai Rajeshwar Bali by showing EX. A-40 to Mohammad Shikoh between 6th and 28th January 1939, made an unauthorised offer, the making of which was ratified by the resolution of 28th January which offer was accepted by Mohammad Shikoh and thereby the contract of compromise completed, I do not think that the evidence is sufficient to prove anything of the kind. The highest position I could give to those proceedings is the alternative one suggested, namely that an offer was made to the Court of Wards by Mohammad Shikoh through Dr. Rai Rajeshwar Bali, which offer was however not met with an unqualified acceptance which would convert EX. A-40 into a completed contract. In any case, as I have already indicated, I am entirely satisfied that the Court of Wards had not any complete authority to compromise the suit and to take the steps necessary for that purpose, that is to direct the release of the estate, and that the absence of that complete authority was recognized by the resolution itself.

I might remark incidentally that whatever may now be said on behalf of the plaintiffs in support of the contention that there was a completed contract and the suit was adjusted by compromise, it is perfectly clear that this is an afterthought of the most obvious kind. Judging by the previous conduct of Dr. Rai Rajeshwar Bali, it is impossible to doubt, and it is indeed the plaintiffs' own case, that the resolution of the Court of Wards came to the knowledge of the plaintiffs as soon as it came into existence. The negotiations which are said to have had the object of persuading the Government to implement the resolution must have concluded in October 1939, since, as the plaintiffs or their friends were in close touch with the Ministers or the Minister concerned, as is implied by their own applications, they cannot but have come to know that the Local Government had decided not to implement the resolution in October 1939. Yet the plaintiffs never made any attempt to move this Court to deal with the matter under the provisions of Order 23, R. 3 until 22nd February 1940. They show now a confidence in the effect of this resolution which their previous conduct shows that they have up till now been far from feeling, and this goes a long way to throw doubt on the state-

7. ('19) 6 A I R 1919 All 7: 54 I C 487: 42 All 187: 18 A L J 73, Bishan Pado Haldar v. Chandi Prasad & Co.

ments of Dr. Rai Rajeshwar Bali in regard to what he says passed between him and Nawab Mohammad Shikoh. Before I proceed to state my finding on this issue I must refer to an argument put forward on behalf of the Court of Wards in para. 12 of the reply to Civil Miscellaneous Applications Nos. 163, 166, 186 and 187 of 1940, where it is said that

> the Court of Wards has no power to compromise a suit. It is only the President of the Court of Wards who can compromise a suit, but even he is incompetent to do so if the compromise involves the release of person or property of a ward from the superintendence of the Court of Wards, without the sanction of the Provincial Government as provided by Ss. 5 and 6, Court of Wards Act.

It is pointed out on behalf of the defendant that the matter of entering into a compromise in a suit is not one of the items of business to be disposed of by the Court of Wards under sub-s. (1) of S. 6, and it is argued that it follows that it falls within the scope of sub-s. (2) of this section which provides that "all other business shall be disposed of by the President." It appears to me that in cases where the compromise of a suit is linked with any question which falls under items (a) to (k) of sub-s. (1) that compromise will be part of the business which is to be disposed of by the Court of Wards as distinct from the President. Under head (b) are included all questions relating to the assumption or non-assumption and to the release or non-release of person or property from superintendence under Ss. 44, 45 or 46. In any case it has been pointed out that this matter of the compromise of the suit was an item of business which was permitted by the President to be put before the Court of Wards and it must therefore be construed as falling under cl. (1) of sub-s. (1), that is "any other business which the president may think proper." I think there is force in this argument and that had it been possible to hold the compromise valid on other grounds, it could not have been invalidated on this particular ground.

Another argument which has been urged is that this compromise could not in any case affect the properties of which the Deputy Commissioner of Gonda is manager as a mutwalli appointed under the order of the District Judge of Gonda acting in the capacity of a Qazi under the Mahommedan law. The only person who can release that estate and therefore effect a compromise is not the Court of Wards but the Deputy Commissioner, and he could only do so under the orders of the District Judge. On behalf of the defendants it is contended that as the compromise must therefore necessarily fail in respect of the wakf properties, it must fail as a whole. For the plaintiffs it is admitted that so far as the wakf properties are concerned the compromise would necessarily fail, but it is said in reply that R. 3 of O. 23 permits a settlement in part, and therefore the adjustment of the suit by the compromise, if valid, will be effective for the rest of the subject-matter of the suit. I think that this contention is sound. For the reasons however which I have given earlier I have not the smallest hesitation in finding that the suit has not been adjusted wholly or in part by a lawful compromise as alleged by the plaintiffs.

At this stage the parties were informed of the substance of the finding on issue 13 and were called upon to argue the case on the main issues framed in the suit. An application No. 125 of 1941 was then made to me on 12th February 1941, to allow the plaintiffs first to exercise their right of appeal against the order refusing to record the compromise and to this end to pronounce an order under O. 23, R. 3 before further proceedings were taken. In view of the orders made by Hamilton J. to which I have referred earlier and with which I am in entire agreement, I ordered this application merely to be put upon the record and proceeded to hear the arguments of learned counsel on those issues. In my opinion, in view of the manner in which the attempt was made to put forward this compromise and the complete disregard of and failure to comply with the order of the Court, there could be no justification for leaving the remaining issues undecided or postponing arguments on those issues until such time as an appeal could be heard and decided against the finding on issue 13. In case, as no doubt will happen, there should be an appeal by them against the finding on that issue and or against the findings on other issues, the plaintiffs will be no worse off for this procedure being adopted in view of the orders of my learned brother, and the procedure has the advantage that many of the facts of the case have already been put before me, and it might easily happen that if the arguments were not heard now they might even have to be heard by a third Judge. The remaining issues in the case have not been argued in the order in which they stand, but I think it is desirable,

as far as convenient, to keep them in their original order.

Issue 1.—This issue runs as follows : "Did Raja Mohammad Mumtaz Ali Khan execute the deeds dated 19th December 1933, and 1st February 1934?" The position in regard to this and all other issues, in so far as they are issues of fact, is rather peculiar. The plaintiffs came into the Court alleging the execution by the late Raja of two deeds described as deeds of trust on which they relied as the foundation of their whole claim. They however never made the slightest attempt to lead any oral evidence to establish execution of these two deeds. Learned counsel for the plaintiffs has relied first on certain things which he describes as admissions by the defendants, those being statements contained in official letters filed on behalf of the defendants; secondly he relies on certain statements made by the Raja himself in other documents which he describes as admissions binding on the defendants, and thirdly he relies on the registration endorsements proving admissions of execution of both these documents made by the late Raja in the presence of the Sub-Registrar, and therefore admissible in evidence under S. 60 (2), Registration Act, for the purpose of proving that the documents have been duly registered in the manner provided by the Act and that the facts mentioned in the endorsement referred to in S. 60 have occurred as therein mentioned. These facts are mentioned in S. 58, which prescribes that the Registrar is to endorse on every document admitted to registration (a) the signature and addition (description, etc.) of every person admitting the execution of the document, (b) the signature and addition of every person examined in reference to such document under any of the provisions of the Act, (c) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution. We are only concerned with the admission of the execution of the document. In this connexion we have to consider a number of documents, some admitted and some denied by the plaintiffs' counsel, all of them filed by the defendants.

Exhibit A-14 dated 11th December 1933, is the notice issued under S. 8 (2), Court of Wards Act, 1912, to the Raja containing a detailed statement of the grounds on which it is proposed to disqualify him from the management of his property and allowing him seven days from the receipt of the notice to transmit his reply to the Local Government. In reply to the notice a letter Ex. A-15 dated 19th December 1933, was sent to the Deputy Commissioner enclosing the explanation offered by the Raja. It may be noted that this explanation contains a reference to a registered deed of trust and the date of the deed of trust. The first deed of trust is also of 19th December, the very date on which the explanation with the covering letter was sent to the Deputy Commissioner. Exhibit A-15 is not in the handwriting of the Raja, but in that of M. Mohammad Yusuf, one of the trustees, and the words "signed Mohammad Mumtaz Ali Khan" are also in his handwriting. The explanation itself bears only a thumb impression described thereon as the left hand thumb-impression of the Raja. This covering letter along with the explanation and a medical certificate were forwarded by the Deputy Commissioner to the Commissioner under a letter dated 20th December 1933, Ex. A-12.

Reliance is placed first on the statement contained in para. 3 of this letter of the Deputy Commissioner where he says: "I understand that the trust was executed only yesterday." Reliance is further placed on Ex. A-13, a letter written by the Commissioner, Fyzabad Division, on 22nd December 1933, forwarding the Raja's explanation to the Secretary to the Board of Revenue, United Provinces. This latter letter does not question the execution of the trust deed and contains the remark :

> I do not know whether the execution of the trust deed creates any legal difficulty in the way of his (the Raja's) disqualification.

Reliance is also placed on the wording of the notice Ex. 41 issued by the Deputy Commissioner, Gonda, to Rani Hazur Ara Begam and other trustees on 16th February 1934, which begins in the following terms :

> Whereas it has been made known to me that Raja Mohammad Mumtaz Ali Khan, taluqdar of Bilaspur (Utraula) estate had executed a certain deed of trust dated 19th December, 1933, which had been further amended by a supplementary deed of trust dated 1st February 1934.

The notice goes on to inform the trustees : that the so-called trust is functus officio from the time of the assumption of the charge of the estate by the Court of Wards, whatever may have been its validity before.

The argument is that these statements all amount to admissions by the Government Officers concerned who wrote these letters and issued this notice that the deed, Ex. 2 dated 19th December 1933, and the

deed Ex. 3 dated 1st February 1934 were actually executed by the Raja. It does not appear to me that the statements in these letters amount to an admission of execution by the Raja. They amount only to an admission of the fact that certain information had been received by the officers concerned which might be true or false. Learned counsel for the plaintiffs has fallen back on the contention that at any rate these letters show that the execution was not surrounded by an atmosphere of suspicion. It would be difficult to attach much weight to this in view of the remark of the Commissioner in Ex. A-13 where, discussing the matter of handwriting, he says :

> It seems a fair inference that written communications from the Raja really emanate from the trio who have now been made trustees.

Statements of this kind cannot, in my opinion, take the place of proof of execution. At the most they amount to an admission of the fact that a certain document had come into existence, a point on which there is not, of course, any room for dispute. As regards the covering letter and the explanation there is no evidence on the record to establish that the explanation is really the work of the Raja and embodies a statement by the Raja, but even if it could be taken that that is the effect of the explanation, it takes the matter no further than does the admission of execution made before the Sub-Registrar on the very day on which Ex. A-16 purports to have been written. Coming now to the endorsement of the Sub-Registrar on Exs. 2 and 3, Ex. 2 contains the endorsement :

> Execution and completion of the deed admitted by Raja Mohammad Mumtaz Ali Khan, the above named, who is personally known to me.

The endorsement on Ex. 3 is in similar terms :

> The execution and completion of this deed admitted by Raja Mohammad Mumtaz Ali Khan, the above named. The executant is personally known to me.

About the absence of signature of the Raja and the presence of the thumb impression in Ex. 2 it is noted that one of these thumb impressions is "the left hand thumb impression of Raja Mohammad Mumtaz Ali Khan owing to the fingers of the right hand being bent downward." In Ex. 3 the note against thumb impression is merely, "thumb impression of Raja Mohammad Mumtaz Ali Khan, executant, owing to defect and inability of the right hand." On behalf of the plaintiffs it is contended that the Sub-Registrar's endorsement proving admission of the execution of these documents made by the Raja himself to the Sub-Registrar is sufficient proof of the execution of the documents, particularly in the circumstances of the present case when it is suggested that this execution was not surrounded by circumstances giving rise to suspicion, and particularly when much of the argument on other issues has been based on the assumption that there was an intelligent execution of this document by the Raja. As regards this last point I can attach no weight to it, because arguments on these other issues had to be based on the assumption of a finding of execution and involves no admission that the finding on issue 1 would be or must be in favour of the plaintiffs. Reference has been made to 33 I A 60[8] at p. 65 where their Lordships of the Privy Council said :

> The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction : and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order.

In an Oudh case of 1914, 20 O C 18,[9] it was held by a Bench of the Judicial Commissioner's Court that :

> Section 69, Evidence Act, no doubt requires proof that the signature of the executant is in his handwriting, but this fact may be proved indirectly by a contemporaneous admission of execution made by the executant or by other relevant facts, such as his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature. Such an admission recorded by the Sub-Registrar in his registration endorsement can be accepted in evidence as proof of execution.

It may be noted in connexion with this case that the executant of the deed, the attesting witnesses and the Sub-Registrar before whom it was registered were all dead. The learned Judicial Commissioners remarked that

> had the Sub-Registrar been alive his statement could have been taken but he being admittedly dead, the endorsement made by him under S. 58, Registration Act, could be read under S. 32 (2), Evidence Act, as his statement consisted of an entry made by him in the discharge of his professional duty.

The learned Judicial Commissioners do not seem to have been prepared to treat the mere certificate standing by itself as evidence sufficient to prove execution. They referred to a previous case decided by a

8. ('06) 33 Cal 537 : 33 I A 60 : 3 C L J 349 : 10 C W N 522 (P C), Gangamoyi Debi v. Troiluckhya Nath.
9. ('17) 4 A I R 1917 Oudh 248 : 38 I C 605 : 20 O C 18, Ajudhia Prasad v. Jagannath Bakhsh Singh.

single Judge, Mr. Lindsay, 19 O C 23[10] in which it was held that :

Whether a document is one which the law requires to be attested or not, it is necessary in all cases to prove that the document has been executed, that is to say, signed by the party making the transfer.

Section 70, Evidence Act, refers only to admissions made in the course of the trial and any admission which can be availed of under S. 70 is only evidence against the party himself.

Held further that the endorsement of the Registrar cannot be relied upon under S. 60, Registration Act, in proof of the execution of the document.

The same learned Judicial Commissioner had to deal with the same question in 5 O L J 191[11] after the decision in 20 O C 18,[9] and he remarked :

In this case it seems to me that even if I allow the endorsement to be taken into consideration (doubtless as being admissible under S. 60 (2), Registration Act) as evidence in this matter the execution of the deed is not satisfactorily established. It cannot be pretended that the Court is bound to treat the registration endorsement as conclusive proof of the fact of execution.

The headnote runs as follows :

Although under S. 67, Evidence Act, no particular kind of proof is required for the purpose of establishing the fact of execution, it must nevertheless be shown to the satisfaction of the Court that the mark or signature denoting execution was actually fixed to the document by the person who professed to execute it. And the Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution. If there are suspicious circumstances attending the execution of the document, such endorsement cannot be resorted to for the purpose of holding that the execution has been proved.

In the present case we have to bear in mind that the first deed of trust was executed, evidently in a hurry, on the last possible date before the reply of the Raja to the notice issued by the Deputy Commissioner was to be sent in. The circumstances are therefore by no means free from suspicion. Another case on which reliance has been placed for the plaintiffs is 13 Luck 723=A I R 1938 Oudh 69[12] in which it was held that,

where the certified copy of a will, more than 30 yearsiold, is produced from the registration records (the original not being forthcoming) and the Sub-Registrar's certificate endorsed on the will is to the effect that the executant having heard the contents word for word verified it and two of the attesting witnesses identified the executant and witnessed the deed and the executant himself as well as these attesting witnesses were personally known to the registering officer and apart from this there is a mention of the will in a subsequent will and codicil of the executant and it was produced at the mutation proceedings, the will of which the certified copy was produced was, excluding S. 90, Evidence Act, validly executed.

This decision evidently does not rest solely on S. 60 (2), Registration Act. Another case relied upon for the plaintiffs is 55 Bom 103[13] in which it was held,

that a registered document was duly executed by the executant might be proved by the endorsements of the Sub-Registrar appearing on the document under Ss. 58, 59 and 60, Registration Act.

Lastly learned counsel relied upon a single Judge case of the Nagpur High Court, A I R 1940 Nag 382,[14] in which it was held that

an endorsement by a Sub-Registrar showing that the executant presented the document for registration and acknowledged execution is a relevant fact under S. 35, Evidence Act;

and further held that

though the Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution yet it is certainly open to the Court to treat it as sufficient proof.

For the defendants in addition to the cases in 19 O C 23[10] and 5 O L J 191[11] to which reference has been made already reliance has been placed on 11 Luck 393.[15] In this case it was held :

Under S. 60, Registration Act, the certificate signed by the registering officer is evidence of the fact that the payment of money referred to in the endorsement was made as therein mentioned. The mention in the endorsement of the executant as mortgagor does not prove the execution of the mortgage but it is certainly evidence of the payment of the sum mentioned as a loan.

That was, of course, a case in which it was necessary to prove something more than mere admission of execution. In A I R 1936 ALL 422[16] it was held that execution of a certain will could not be proved by the registration endorsement, but the point was not discussed, presumably because of the further question as to how far an admission of execution would be binding on third persons. Reliance was also placed on a Calcutta case in 17 Cal 903[17] in which it was held that mere registration of a document is not

10. ('16) 3 A I R 1916 Oudh 146 : 34 I C 281 : 19 O C 23, Hori Lal v. Bhagwan Bakhsh.
11. ('18) 5 A I R 1918 Oudh 120 : 46 I C 279 : 5 O L J 191, Jagannath v. Mt. Dhiraja.
12. ('38) 25 A I R 1938 Oudh 69 : 172 I C 882 : 13 Luck 723 : 1938 O W N 67, Sri Ram v. Mohammad Abdul Rahim Khan.
13. ('31) 18 A I R 1931 Bom 105 : 128 I C 901 ; 55 Bom 103 : 32 Bom L R 1385, Vishwanath Ramji v. Rahibai.
14. ('40) 27 A I R 1940 Nag 382 : 193 I C 41, Ganpatrao Yadorao v. Nagorao Vinayakrao.
15. ('35) 22 A I R 1935 Oudh 500 : 157 I C 567 : 11 Luck 393 : 1935 O W N 892, Pármanand Misir v. Gur Prasad.
16. ('36) 23 A I R 1936 All 422, Gopal Das v. Sri Thakurji.
17. ('90) 17 Cal 903, Salimatul-Fatima v. Koylashpoti Narain Singh.

in itself sufficient proof of its execution. The fact of the matter is that if the broad proposition put forward on behalf of the plaintiffs were to be accepted, in a large majority of cases proof of execution such as is contemplated by S. 67, Evidence Act, would become unnecessary. The effect of the registration endorsement is not to prove execution as is required by S. 67 but only to prove an admission made by the executant to the Registrar or Sub-Registrar in solemn circumstances, and the Sub-Registrar's certificate is admissible not to prove execution of the deed but merely to prove the admission of execution. The effect of the admission is in every case a separate question. Section 70, Evidence Act, has no application as it refers only to cases where the admission is by a party to the suit made in the suit itself: *vide* numerous cases quoted at the bar.

The question arises whether this admission by the Raja is binding on the defendants or not. The suggestion is that it is binding on the defendants because for the purposes of this case they are the representatives of the Raja. In point of fact, in the present case, it is somewhat difficult for the plaintiffs to put forward the proposition that the defendants are the representatives in interest of the Raja because the plaintiffs themselves claim to be his representatives under the deed of trust executed by him. There is some force in the contention put forward on behalf of the defendants that the plaintiffs are really seeking to use their own admission in their own favour. There is perhaps more force however in the argument put forward that the whole case for the plaintiffs is that the defendants are not entitled to the position which they claim of being the representatives of the Raja and of the Raja's sons by reason of the effect of the Court of Wards Act. To sum up the whole position, as it appears to me, the plaintiffs were in a position to lead evidence of execution without, so far as appears from the record, any difficulty. They have chosen to withhold evidence of execution although it could hardly be said that the surrounding circumstances were free from suspicion. They have elected to rely on the admission of the Raja proved only by the registration endorsement. In my opinion; after consideration of all the circumstances of the case, this evidence of admission is not by itself sufficient to establish execution of the two deeds in suit. The second deed, of course, stands on no better footing than the first having been executed merely to supplement the first and make good the obvious defects in the first. I hold accordingly on issue 1 that the plaintiffs have failed to prove execution of the two deeds of trust.

Issue 2. — "Was the Raja at the time of execution of a sound disposing mind or was he not?" The presumption in the first instance is undoubtedly that the Raja was of a sound disposing mind and the burden of proof that he was not so is necessarily upon the defendants. Learned counsel for the defendants concedes that in the absence of any evidence, it is not possible for him to contend that the Raja was not of a sound disposing mind at the time of execution of Ex. 2 and Ex. 3. I find accordingly in favour of the plaintiffs on this issue. It may be noted in this connexion that the execution by the Raja of the deed of "wakf-alal-aulad" dated 9th October 1933, has never been disputed by the defendants, and in fact the Deputy Commissioner acting in another capacity has himself moved the District Judge of Gonda for his appointment to perform the duties of "mutwalli" during the minority of Kunwar Iqbal Ali Khan.

Issue 4. — "Do the deeds dated 19th December 1933, (Ex. 2) and 1st February 1934, (Ex. 3) amount to deeds of trust, and if not, what legal force have they?" For the purpose of deciding this issue it has to be assumed that the decision of issue 1 is in favour of the plaintiffs. In view of the possibility that an appellate Court may take a different view on that issue from the view taken by me, I proceed on that assumption. It is necessary also to relate the deeds, Exs. 2 and 3 to the historical circumstances so far as they are more or less admitted as between the parties. Raja Mohammad Mumtaz Ali Khan was born in the year 1865, and some time between 1918 and 1920, when over the age of 50, he married a lady from Lucknow, the plaintiff Rani Hazur Ara Begam, by whom he has had children, the present Raja, and his younger brother Kunwar Iqbal Ali Khan, and a daughter.

It is alleged, but there is not on the record any evidence to show, that some of the relations of the wife accompanied her to Utraula, and that they, as the Raja's health deteriorated, caused loss to the estate. Be this as it may, it is certain that by November 1933 the authorities had received information which rendered them anxious in regard to the management of this important

estate. On the evidence, so far as it is admissible on the record it is impossible to come to any conclusion. Certain undisputed facts, however, can be mentioned. On 6th August 1933, the Raja endorsed a bank fixed deposit receipt for Rs. 9323 in favour of Rani Hazur Ara Begam. On 19th August a letter was written by the Raja to the Deputy Commissioner, Gonda, in the handwriting of the same Mohammad Yusuf, but apparently accepted as genuine by the Deputy Commissioner, in which he recorded his inability to come to Gonda on 3rd September. In this year 1933 the Raja had been trying to obtain the services of one Khan Sahib Mir Amanat Ali, Tahsildar, as shown by letters, the defendants' documents, Ex. A-5 and Ex. A-6. Exhibit A-8 is another letter written by the Deputy Commissioner to the Commissioner on 29th August 1933, which does not suggest any doubt about the mental condition of the Raja. On 9th October 1933, the Raja executed a deed of "wakf-alal-aulad," Ex. 1, dedicating certain property for the maintenance of his younger son Kunwar Mohammad Iqbal Ali Khan and his daughter Raj Kumari Fatima Begam, and appointing himself as trustee or "mutwalli" of the property during his lifetime. This document has never been disputed by the defendants, or indeed by anyone, and the Deputy Commissioner has, as mentioned earlier, obtained an order appointing him to act on behalf of Kunwar Mohammad Iqbal Ali Khan as long as he is disqualified by minority or acting as "mutwalli." These documents etc., go to show that at the time of the alleged execution of Exs. 2 and 3, the two trust deeds, the Raja was an intelligent man perfectly capable of understanding what he was doing. We have to interpret these documents in the light of these preceding circumstances, coupled with the immediately preceding circumstance that the Raja had received a notice under the Court of Wards Act, and the last date for replying to that notice was fixed as 20th December 1933. It was thus on what was really the last day for preparing a reply or taking any other action to prevent his property being taken under the superintendence of the Court of Wards that the Raja executed the document Ex. 2, and got written the explanation Ex. A-16 which was sent to the Deputy Commissioner under the covering letter, Ex. A-15. It cannot be doubted that there can have been only one object in the execution of Ex. 2, namely to prevent the Court of Wards from taking over the superintendence by executing a document which should either be a real deed of trust or should have so much the appearance of a deed of trust that the Court of Wards should accept it as such and not continue their proceedings for the assuming of superintendence.

It is in the light (1) of these circumstances and (2) of the wording and effect of the deed that we have to consider whether this deed and the subsequent deed Ex. 3 amount to deeds of trust, and if not what, if any, legal force they have. It may be noted at once that in Ex. 2 there is a good deal of what might be called flourishing of the word "trust." Incidentally the translator has used the word "trustee" in two places in this document where he should have used the word "mutwalli," *vide* line 11 at p. 7, part 3 of the plaintiffs' paper book. In the second document Ex. 3, the same mistake has been committed in the translation of paras. 12, 13 and 14 at lines 34, 38 and 44 of page 13, part 3 of the plaintiffs' paper book, and lines 4, 14, 18 (twice) and 20 of page 14 of the same paper book. At all these places the word used is "mutwalli" or a related word whereas with reference to the trust in suit the word used is consistently "trustee." The document Ex. 2 runs as follows :

Whereas I, the executant (he has given his description already), am the proprietor of taluqa Bilaspur (Utraula), district Gonda as well as other moveable and immovable property and I have every sort of right and power relating to the same; and whereas the villages Achalpur Rup, Khimria and a portion of the land, situate in village Adhinpur, along with kothi and grove as well as a share in village Kok Nagar Grant are 'wakf-alal-aulad' and I myself am the trustee (mutwalli) thereof; so, at present, I the executant while in the enjoyment of sound health and unimpaired intellect enjoying my full senses without reluctance and coercion and without any undue influence, create a trust in respect of the said taluqa Bilaspur, as well as all other property, of which I am the proprietor or trustee (mutwalli), without the exception of anything or right existing at present or which may accrue in future, (Literally this passage should run, 'I put under trust the said taluqa Bilaspur as well as . . . without the exception of anything or right existing at present or which may accrue in future,' that is to say, 'I put under trust the whole taluqa without exception of any kind') and put the same under the management of Moulvi Mohammad Yusuf, Vakil, resident of Utraula, Nawab Mansur Ali Khan, son of Nawab Muzaffar Ali Khan, deceased, resident of Mohalla Nazirabad and Moulvi Mohammad Yamin, Vakil of Gonda, the trustees. This trust shall exist uptil my lifetime, and after my death till the majority of Rajkumar Mohammad Mustafa Ali Khan, Rajkumar Mohammd Iqbal Ali Khan and Rajkumari Fatima Begam.

I the executant do possess and shall possess the right of maintaining and cancelling this trust, as well as the right of appointing, dismissing and reinstating the trustees. The approximate value of

the property under trust for purposes of registration has been fixed at Rs. 2,00,000. (*N. B.* This figure of 2 lakhs is a very heavy under-valuation) I the executant have created this trust out of my own free will and consent and having fully understood the same.

Wherefore I have reduced to writing these few presents by way of a deed of trust to serve as authority and be of use when required.

As I have remarked earlier, the document makes a considerable parade of the creation of a trust and learned counsel for the plaintiffs has in effect made that fact the chief foundation of his argument. He does not quite go so far as to argue that if a document repeats the word "trust" in one form or another half a dozen times, that document must necessarily be regarded as a deed of trust, but he goes a good long way in that direction. The main contention for the defence is that there being no transfer of ownership either by this deed or by the subsequent deed, Ex. 3 and no vesting of the property in the so-called trustees, this document, under which the executant reserves the full right of immediate cancellation of the trust and the right of appointing, dismissing and reinstating the trustees, is nothing more than a deed of appointment of managers cloaked under the name of a deed of trust. Learned counsel for the plaintiffs has attempted to meet this line of attack by an examination of the terms of the Trusts Act (Act 2 of 1882) with the object of showing that the ownership which is vested in trustees under the Trusts Act is only a notional ownership and that the deeds in suit do vest the ownership to the extent required by the Trusts Act. There can be no doubt that the Trusts Act lays considerable stress on the necessity of a transfer of ownership for the effective creation of a trust. Under S. 3 of this Act a "trust" is an obligation annexed to the "ownership of property", and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner. By the definition in the same section "beneficial interest" or "interest of the beneficiary" is his right against the trustee as owner of the trust property. Under section 5:

No trust in relation to immovable property is valid unless declared by a non-testamentary instrument in writing signed by the author of the trust or the trustee and registered, or by the will of the author of the trust or of the trustee

and by section 6:

Subject to the provisions of S. 5, a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property and (unless the trust is declared by will, or the author of the trust is himself to be trustee) transfers all the trust property to the trustee.

Prima facie, taking the wording of Ex. 2 as it stands there may be a compliance with (a). As regards (b) the purpose of the trust is not stated at all, (c) there is no mention of any beneficiary and (d) there are no words suggesting any transfer unless such a transfer is to be inferred from the words "I put the property under a trust and I put it under the management of so and so, the trustees." Learned counsel for the plaintiffs has gone on to refer to Ss. 15, 36, 37 and 51, etc., as showing what a severely limited kind of ownership it is that a trustee is permitted by the Act to exercise, and he contends that a trustee possesses no real ownership save in the sense that he excludes any other owner. In this connexion learned counsel has referred to the definition of a trust in Halsbury's Laws of England, 2nd Edition, Vol. 33, p. 87 para. 140 which runs as follows:

A trust, in the modern and defined sense of the word, is a confidence reposed in a person with respect to property of which he has possession or over which he can exercise a power to the intent that he may have the property or exercise the power for the benefit of some other person or object.

While conceding that in India there is no such thing as an equitable owner, learned counsel contends that the person who has the beneficial interest in the property as cestui que trust has the equitable estate under a different name, and he contends that despite its apparent defects this document must be interpreted as effective to create a valid trust of the properties included in it, apart from those properties which were already the subject of a trust under the "wakf-alal-aulad". So far as Exhibit 2 is concerned I find it difficult to accept this contention of learned counsel for the plaintiffs. Whatever the limitations of that estate may be, there is no doubt that in Indian law as in English law the trustees have the full legal estate in the trust property. Learned counsel for the defendants has referred to the English case in (1927) A C 844[18] at p. 850 where it is said that "the trustee has the full legal property in the whole of the trust fund and the beneficiary has not." Further on it is remarked:

All that the beneficiary can do is to claim the assistance of a Court of equity to enforce the trust and to compel the trustee to discharge it. This

18. (1927) 1927 A C 844 : 96 L J K B 803 : 137 L T 762 : 71 S J 727 : 43 T L R 758: 11 Tax Cas 749, Baker v. Archer-Shee.

right is quite as good and often is better than any legal right, but it is not in any case one, which for all purposes makes the trust fund 'belong' to the beneficiary or makes the income of it accrue to him *eo instanti* and directly as it leaves the hand of the party who pays it.

This view has been expressed in India by their Lordships of the Privy Council in 58 I A 279[19] at p. 297, where it was said that the Indian law does not recognize legal and equitable estates. By that law therefore there can be but one 'owner' and where the property is vested in a trustee the 'owner' must, their Lordships think, be the trustee. This is the view embodied in the Trusts Act of 1882: *see* Ss. 3, 55, 56, etc. . . . . The trustee is, in their Lordships' opinion, the 'owner' of the trust property, the right of the beneficiary being in a proper case to call upon the trustee to convey to him.

A single Judge of the Bombay High Court has made the matter clear in A I R 1937 Bom 374[20] at page 377, where he says:

In India there is no distinction between legal and equitable estates in the sense in which it is understood in England, as was pointed out by the Privy Council in 58 I A 279[19] at p. 297. But it is necessary that the trust property should effectually vest in the trustee, properly so called, for he holds the legal ownership; and under S. 12, Trusts Act, it is incumbent upon him to obtain, where necessary, a transfer of the trust property to himself.

Section 12 of the Act in fact makes it one of the duties of a trustee to see that S. 6 (d), Trusts Act, is complied with. The same principle is laid down in other cases as for example 17 C L J 233[21] at p. 235, in which it was said that a deed by which no interest in property is vested in the trustee is not a trust-deed, though so described: *vide also* 18 M L J 158[22] at p. 177. It appears to me that so far from there being a transfer by Ex. 2 in favour of the trustees there is every indication that the author of the trust had no intention of parting with the ownership of the property. The same is borne out by the applications which were subsequently made for mutation, Exs. 18, 19, 20 and 21. In the first of these applications no transferor was mentioned at all. In the remainder the transferor was described as the Raja, the transferee was described as the Raja under the superintendence (basarbarakhari) of Moulvi Mohammad Yusuf, Nawab Mansur Ali Khan and Moulvi Mohammad Yamin trustees. These applications themselves indicate that the trustees did not regard themselves as transferees of the property in respect of which they sought mutation. Learned counsel for the plaintiffs has laid some stress on the contention that no particular words of transfer are required, and no doubt that is perfectly true, but it must be the case that the document aims at effecting a transfer, and it does not appear to me that so far as Ex. 2 is concerned any such idea was in the mind of the Raja Another document which has to be considered in this connexion is the explanation Ex. A-16 admitted by the plaintiffs' counsel and purporting to be written on the same day as Ex. 2. In this document the Raja makes some remark about this deed of trust on the very first page, vide p. 19 of part 3 of the defendants' paper book. He says:

I am therefore not incapable of managing my property and do not come within the purview of S. 8 (d) (i), U. P. Court of Wards Act. . . . Now I am well and hearty and am in a position to exercise an effective control over and manage the affairs of the estate myself. I have executed a registered deed of trust and have put all the properties under the management of three trustees, two of them being pleaders and have long been associated with the affairs of the estate and are competent persons, while the third is a near relation of mine and has been residing here for the last 8 years. The trustees will manage the estate and will look to all other matters and I trust that the management will be most satisfactory and acceptable to all.

Later on at page 31 of the printed paper-book, part 3, he says:

I am, God be thanked, well able to understand everything and to exercise an effective control over all its affairs (the affairs of the estate) and it is quite unjustifiable to intervene specially when a trust of competent persons has been created and the property put in their charge.

The Raja thus in the same breath speaks of exercising himself an effective control over the affairs of his estate and of putting his property in the charge of a trust of competent persons. It seems clear that as was implied in the earlier passage he really intended not to appoint trustees but to appoint managers. When we come to consider Ex. 3, the second deed of trust dated 1st February 1934, we have to consider that document not as a document standing by itself because it does not purport to stand by itself. On the contrary the document is stated in terms to be a supplementary deed to the deed of trust executed on 19th December 1933. What I mean is that by this document the Raja does not purport to execute a fresh deed of trust having revoked the former one but merely to add to the former deed, supposed to be a valid deed of

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19. ('31) 18 A I R 1931 P C 196 : 133 I C 705 : 10 Pat 851 : 58 I A 279 (P C), Chhatra Kumari Devi v. Mohan Bikram Shah.
20. ('37) 24 AIR 1937 Bom 374 : 171 I C 49 : ILR (1937) Bom 843 : 39 Bom L R 633, In re Sabnis, Goregaonkar and Senjit.
21. ('13) 17 C L J 233 : 18 I C 969, Sidhu Sahu v. Gopi Charan Das.
22. ('08) 31 Mad 187 : 18 M L J 153, Manuel Louis Kunha v. Jnana Coelho.

trust, supplementary provisions. Learned counsel for the plaintiffs has gone into a very minute and detailed examination of Ex. 3 as if this was a document creating a trust or which this Court should examine as standing by itself to see whether by it a trust is created. In my opinion this procedure was not open to him. I am inclined to think that if it cannot be shown that the first deed is an effective deed of trust, the defects in that deed cannot be held to be cured by the second deed, Ex. 3. Ex. 3 is a lengthy document. In the Preamble the Raja says that having become old and unable to look after and do the affairs of the estate with such labour and care as he had done previously, he had deemed it fit to create a trust through which, in future, the 'management' of the estate, the education and maintenance of his three children, etc. should be done according to the opinion and advice of certain persons of sound opinion and the said 'management' be enforced and acted upon in his lifetime so that even after his death that arrangement might exist and continue. He goes on :

In order to achieve this object I having executed a deed of trust on 19th December. 1933 got the same registered, but the details of the objects of trust, in accordance with clause (b) of S. 6, Trusts Act, 2 of 1882, as well as rules and regulations for the managing committee have not been entered in the said deed of trust, so I, the executant, execute this deed by way of a supplementary deed to the deed dated 19th December 1933 per following conditions :

Learned counsel for the plaintiffs suggests that this statement itself indicates that the first deed was intended as a deed of trust but this does not at all necessarily follow. This second deed could not have the effect of validating the first deed if that deed was in fact invalid. The explanation of these clauses in the second deed, Ex. 3, no doubt is that the legal defects of the first deed had been observed and an attempt was being made to remedy them. Very naturally everything possible has been said in this deed to create an impression that there were no real defects in the first deed except due to omission of that which was really intended. But even if it could be taken that this second deed, Ex. 3, was an independent deed eligible to be interpreted as a deed of trust if it complies with the law in that respect and if its intention, as it appears from its clauses, was that it should be a deed of trust, the question is whether on a careful examination of the wording of this deed and a consideration of it, both in its details and as a whole, one is led to the conclusion that it really expresses the intention to create a trust and is a valid deed of trust.

In what is described as para. 1 of this deed, the settlor after describing the property affected under three heads list 1, 2 and 3 repeats the remark in Ex. 2 that the valuation of this entire property as mentioned in Ex. 2 is two lacs. He goes on to speak of the property of list 2, of which he is in possession as guardian under the deed of "wakf-alal-aulad" and the property of list 3 of which he is in possession as guardian of his son Kunwar Iqbal Ali Khan and he says that his possession in these two capacities will continue as long as he lives and this trust shall remain in force while he holds possession in the same capacity (capacities) and that after his death his widow will remain in possession as guardian and the management will be carried on according to the trust deed referring to the deed of wakf. In para. 2 he provides : "That I appoint a managing committee of six persons which shall be called ('go by the name of') the trust committee" and he nominates six persons of this committee. In para. 3 the objects of the trust are stated as follows :

That the object of the execution of this deed of trust and the appointment of the committee is better management (and maintenance the Urdu word is 'qayyam') enhancement of profits and the increase and benefit of the estate, and it shall be the duty of the trustees to act upon the same.

In para. 4 he provides : "That the trustees, like myself, shall look to all the affairs relating to the management of the estate." In para. 5 it is provided :

That in all Court proceedings the trustees shall be deemed just like myself, the executant. In cases which may be filed in future on my behalf or against me, the said trustees shall in those cases remain (including myself, the executant, if necessary) the plaintiffs, defendants, decree-holders, judgment-debtors, applicants and opposite parties.

Much stress has been laid upon this paragraph on behalf of the plaintiffs, it being said that these provisions would not be applicable to managers. In para. 6 it is provided :

That during the lifetime of the executant, the trustees shall have no power whatsoever to alienate any property, take any debt over any property, and sell the jungle, orally or by means of any deed in writing, or under a court-compromise, with the exception of the jungle in Pipra Grant, which can be sold by the trustees, and for each such sale by writing (written permission) according to law and procedure shall be necessary.

On behalf of the plaintiffs it is contended that this paragraph lays down nothing more than what is provided by the Trusts Act. In para. 7 it is provided:

That the trustees shall prepare a budget in the month of September every year for the expenses of the coming year, for which sanction shall be taken from me the executant, and after obtaining such sanction the said budget shall be enforced from the month of October.

The preparation of a budget to be sanctioned by the presumed beneficiary does not seem to be easily reconcilable with the supposed position of the managing committee as a trust committee. In para. 8 it is provided:

That I, the executant, as long as I live, shall have the power to dismiss the existing trustees or any one out of them and appoint other trustee or trustees.

This again is a more natural provision for an owner dealing with manager than for settlor dealing with trustees. Paragraphs 9, 10 and 11 relate to procedure of the trustees. Paragraph 12 is more important and has been greatly relied upon by learned counsel for the plaintiffs. It runs as follows:

That as long as I, the executant, live I shall remain the absolute owner (malik kamil) of the property mentioned in list No. 1 and the trustee (mutwalli) of the property detailed in list No. 2 and the guardian of the minor proprietor of the property mentioned in list No. 3, abiding by (subject to would be a better translation) the conditions embodied in this deed as well as in the deed of wakf dated 9th October 1933. "(The Urdu language here is "ba paband-i-sharai)." If at the time of my death the owners of the property mentioned in lists Nos. 1 and 3 or the trustee (mutwalli) of the property mentioned in list No. 2 be minors, then my wife Rani Hazur Ara Begam shall resign the office of the trustee (to which she had been appointed in para. 2) and the trust committee, including the said Rani Sahiba shall appoint a trustee in place of Rani Sahiba and after that time Rani Sahiba shall as the guardian of the minor or minors exercise like myself all sorts of proprietary rights or rights of a trustee (mutwaliana) or of a guardian as the case may be, including all those rights which I, the executant, have particularly preserved for myself in this deed.

I have listened to a considerable amount of argument on the provisions of para. 12. For the plaintiffs it is contended that "malik kamil" means no more than the equitable owner and that this interpretation is irresistible in view of the words "subject to the conditions embodied in this deed as well as in the deed of wakf". It may be noted that there is no reference to the deed of 19th December, Ex. 2, and the same point is to be noted about the provision in the last sentence of this paragraph. It is certainly indisputable in the light of numerous cases which have been quoted at the bar that the word "malik" is not a term of art implying full proprietary ownership free from any limitation. On the contrary it is a term which has to be interpreted according to the surrounding circumstances of each case. The addition of the word "kamil" does not have any sensible effect, although it is doubtless a slightly stronger form of expression to say that someone is malik kamil or absolute owner than that he is only malik which in proper cases would also mean absolute owner. The second sentence of this paragraph is intended to have the effect of substituting Rani Hazur Ara Begam for the Raja in every possible way, although there might be some doubt about her having the power to cancel the trust deed which power was reserved to the Raja in Ex. 2. It does not really seem to me that the provisions of para. 12 take the matter any further. Even were one to assume this document Ex. 2 to be a deed of trust (although that is not what it claims to be) the subjection to the provisions of this deed itself does not in any way hamper the settlor, much less does it hamper him so long as he continues to have the power given by Ex. 2 to cancel the trust at any moment. The second sentence itself implies that the Raja contiunes to exercise all sorts of proprietary rights and this provision is not made subject to the conditions of the deed. It would seem therefore that when in the first sentence the settlor says that he will remain the absolute owner of the property so long as he may live, he means that so long as he may live he will exercise all sorts of proprietary rights including those particularly preserved to him in this deed.

My conclusion is that no sound inference in favour of this document being held to be a trust deed can be drawn from para. 12. As regards para. 13, this is a provision in case not only the Raja but also the Rani should both have died before the majority of the proprietor (that is the heir to the estate) or the trustee (mutwalli) of the estate, that is the second son Mohammad Iqbal Ali Khan. In that case it is provided that the powers of the guardian of a minor or minors shall be delegated to the trust committee and the trustees are to obtain the permission of the District Judge for the sanction of the budget, transfer of the estate, borrowing money and so on. There is however nothing more in this paragraph really than a provision that the members of the managing committee called the trust committee shall be the guardians of the minors and shall look after the property in accordance with the provisions of the Guardians and Wards Act. Paragraph 14 relates to the

determination of the trust on the proprietor or the trustee, that is the heir or the "mutwalli," becoming major. The most significant feature of the whole document is that although it does make some suggestion in regard to the purpose of the trust and as to who the beneficiaries are, although they are not so described, it differs in no way from Ex. 2, in containing no sort of provision suggesting a transfer of the property to the trustees.

Paragraph 1 describes the property governed by the trust. Paragraph 2 speaks of a managing committee. Paragraph 3 puts as the first of the objects of the deed the better management and maintenance of the estate, and second the making of arrangements for the education and upbringing of the Raja's children. Paragraph 4 speaks entirely of management and designates Mohammad Yusuf as the managing trustee. Paragraph 7 is definitely inconsistent with the notion of a transfer of ownership as also is para. 8. Paragraphs 9, 10 and 11 are negative. Paragraph 12 is on the whole definitely opposed to the idea of any transfer of the property and the last two paragraphs do not take the matter any further. If the true test as to whether a deed of trust has been created or not is whether there has been a real transfer of ownership, then as it appears to me, there is not in Ex. 3, any more than in Ex. 2, any sign of such a transfer. Learned counsel for the plaintiffs argued that if "malik kamil" is to be interpreted as absolute proprietor and as inconsistent with the idea of a trust, then that term should be construed as a condition repugnant to the absolute estate already created, and several cases were referred to on this point. I do not think it necessary to quote these cases because it does not seem to me that this is in any sense a case of the use of words having the effect of a derogation from a grant already completed.

Some argument was devoted to Ex. 42, extracts from or copies of estate registers of the month of January 1934. These have been relied upon by both sides in support of their contention and I do not think that the entries lead to any sound inference. They show moneys collected from two portions of the estate described as Utraula and Atwa portions. Income of the Atwa portion is used for the estate management, payment of revenue, etc. Income of the Utraula portion goes to the private purse of the Raja through Mansur Ali Khan. On the one side it is argued that it shows the trustee receiving the money which under the trust would go to the Raja and handing it on. On the other side it is argued that no effective application of the trust is indicated by these entries. It would certainly have been a most peculiar proceeding for the Raja to attempt to appoint other persons as trustees of property in respect of which he was himself already the trustee. On the other hand there was no difficulty whatever in making them managers of all the properties of which he was the person in charge, or as one might say the effective owner. In my opinion on a sound construction of Exs. 2 and 3, bearing in mind the language used and the glaring omissions, the conclusion is irresistible that they do not amount to deeds of trust and I hold accordingly on this issue against the plaintiffs. It has not been suggested that these documents could have any legal force if they are not deeds of trust and I hold accordingly that they have none. It may be noted here that on the findings on issues 1 and 4 the plaintiffs' suit necessarily fails since their whole claim to oust the defendants rests on the foundation that the Raja on 19th December 1933 and 1st February 1934, validly executed documents which amount to deeds of trust. The remaining issues fall to be decided only in view of the possibility of a different decision by an appellate Court on issues 1 and 4.

Issue 3 runs as follows :

If on its decision on issues 1 and 2 the Court finds the deeds to have been validly executed are they nevertheless invalid in law as being (i) fictitious, and (ii) mere devices to prevent the estate from being taken over by the Court of Wards, i. e., being for an unlawful purpose ?

As regards the first part of this issue, the question which it raises is not quite the same question which arises in issue 4. Issue 4 raises the question of the validity in law of each or both documents as deeds of trust and the question whether it is possible to construe them as such. The questions raised in issue 3 go rather to the intention of the executant in executing those two documents. The circumstances of the case would go to suggest that the object of execution of the first document whether it was a trust deed or a mere deed appointing managers was to avoid the property being brought under the superintendence of the Court of Wards. This first document was so obviously executed in a hurry and so incomplete in itself as to make it clear that that was the immediate object. The question whether this document is a fictitious, sham and colourа-

ble document and therefore void has to be decided on a consideration of the effect of the document if enforced as it stands. As I have pionted out already, neither it nor the second document effects any transfer of the property. They are both, and particularly the first, exactly the kind of documents which the Raja's advisers might have suggested to him to execute while at the same time insisting that it could have no real effect upon his control of his property. The trustees are given under neither document any real power beyond the powers of managers. Their tenure of office is entirely at the pleasure of the Raja who preserves his possession of the property and his full rights of control over the property. It appears to me on a consideration of both deeds that they were really fictitious documents not intended to have any effect except to appoint the so-called trustees as managers of the estate, giving them the name of the trustees merely in the hope of making the Court of Wards or the Government think that a trust deed had been created. The question raised in the second part of this issue is somewhat more difficult. Learned counsel for the defendants has relied on S. 23, Contract Act, which provides that

> the consideration or object of an agreement is lawful, unless it is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or .... the Court regards it as immoral, or opposed to public policy .... every agreement of which the object or considera.tion is unlawful is void.

Admittedly it is an established principle that the Court will not lend its aid to enforce a contract entered into with a view to carry into effect anything which is prohibited by law, and the cases quoted at the bar are really cases of that kind, being for the most part cases of attempts to get round the provisions of the Rent law in regard to the creation of ex-proprietary rights. Prima facie it seems to me that there is nothing illegal about trying to avoid or successfully avoiding having one's property taken under the superintendence of the Court of Wards so long as the device adopted is not illegal in itself. I can find nothing making the adoption of such a device invalid in law. In effect it does not appear to me that the purpose suggested of preventing the estate (ex-hypothesi by legal means) from being taken over by the Court of Wards is an unlawful purpose. I find accordingly on the first half of issue 3 in favour of the defendants and on the second half against them.

Issue 5 runs as follows :

> If the deeds dated 19th December 1933, and 1st February 1934, be held to constitute valid deeds of trust, was the Court of Wards nevertheless empowered under the Court of Wards Act, to assume the superintendence of the properties in dispute either in the lifetime of Raja Mohammad Mumtaz Ali Khan or subsequently ?

The question raised in this issue is not one which has come up for decision before. In the judgment of Srivastava J. on the application for "habaes corpus," made by the Deputy Commissioner in order to obtain actual custody of the two minor sons of the late Raja, the following remark occurs at p. 48 of the defendants' paper book, part 3, at line 39:

> I would only observe that the rights of the opposite-party (the trustees) as regards the guardianship of the person of the minors do not stand on the same footing as their rights as trustees of the property. If the legal ownership in the estate has vested in the trustees, the Court of Wards cannot assume charge of the estate treating it as the property of the minors.

The correctness of this statement of law is disputed on behalf of the defendants in the present issue. The basis of this contention is that the wording of the Court of Wards Act is sufficiently wide to enable the Court of Wards to assume superintendence of the property of disqualified owners and to oust the trustees from superintendence and control (even in cases where a perfectly valid deed of trust has been executed). Under the Land Revenue Act of 1876, enacted six years before the Trusts Act, it is provided that :

> Deputy Commissioners shall, subject to the control of the Commissioner of the Division and the Chief Commissioner, have the power of a Court of Wards within their respective districts for the superintendence of the persons and property of all persons who may become entitled as proprietors or under-proprietors ..... who are either disqualified for the management of their own estates or are committed by a civil Court to the care of the Deputy Commissioner.

By section 102 :

> persons shall be held to be disqualified to manage their own estates when they are (b) minors, (c) idiots, (d) lunatics, (e) persons who may in the opinion of the Chief Commissioner be otherwise rendered incapable by physical defects or infirmities from managing their estates.

Under the present Court of Wards Act section 8 (1) :

> Proprietors shall be deemed to be disqualified to manage their own property when they are (a) minors, (b) ...., (c) ....., (d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property, (i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property.

By section 12 (1) :

The Court of Wards shall assume the superintendence of the property of any proprietor disqualified under cl. (b) or (d) of sub-s. (1) of S. S . . . , (2) The Court of Wards may in its discretion assume or refrain from assuming the superintendence of (a) the property or person and property of any proprietor disqualified under clause (a) or (c) of sub-s. (1) of section 8.

By S. 3 (2) of the same Act "proprietor" means "a person entitled as proprietor or under-proprietor to any beneficial interest in a mahal." Learned counsel for the defendants seemed at first to suggest that the definition in the subsequent Land Revenue Act and the Court of Wards Act was derived from the definition in S. 3, Trusts Act, but this is chronologically incorrect. That section defines the "beneficial interest" or "interest of the beneficiary" as "his right against the trustee as owner of the trust property," that is to say against the trustee in his (trustee's) capacity as owner of the trust property. It cannot be doubted that the effect of the definition in the Trusts Act is to stress (as has been mentioned earlier in this judgment) the position or status of the trustee as owner (even if only a limited owner) of the trust property. Learned counsel for the defendants however contends that the proprietorship contemplated by the definition in S. 3, Court of Wards Act, is wide enough to include the position of a proprietor of an estate in respect of which a valid trust has been created. The proprietor may have a postponed interest but, it is argued, he has certainly a beneficial interest, and that beneficial interest is as proprietor, although the actual ownership may be postponed. Moreover, even if the ownership is postponed, the beneficiary, more particularly if he is the sole beneficiary, has certainly rights under the Trusts Act itself, as for instance under S. 56 (if he is competent to contract) to require the trustee to transfer the trust property to him.

On behalf of the plaintiffs stress is laid on the provision that the proprietor must have a beneficial interest "as proprietor," whereas it is argued that the beneficiary under a trust is not the proprietor or owner. It does not seem to me that this contention is conclusive. The effect of the arguments for the plaintiffs would seem to be that however bad the management of the trustees of a disqualified proprietor might be, the Court of Wards Act could afford no protection and the only means of protecting the Ward would be to proceed under the ordinary law against persons who might have squandered the property and be men of straw from whom no recovery could be made and all that the wards would get would be the barren remedy of a criminal prosecution. It may be so, but it seems to me that the definition of proprietor in S. 3, Court of Wards Act, is wide enough to cover the cases of beneficiaries under the Trusts Act, provided only that the estate concerned is such that the Court of Wards Act is otherwise applicable. The real question underlying this issue is whether by the execution of a deed of trust even one which is revocable at the notice of the executant the proprietor who executes it ceases to be any longer within the definition of proprietor contained in S. 3, Court of Wards Act. It seems to me that he does not so cease but continues to be a person entitled as proprietor to a beneficial interest in a mahal and consequently the other provisions of the Act are still applicable to him and the Court of Wards can enforce the Act and assume superintendence of the property and call upon the trustees to surrender that possession. It seems to me that this was the scheme and intention of the Act and that the provisions of the Act do not militate against it. I would accordingly if it were necessary to decide this issue hold on issue 5 in favour of the defendants.

Issue 7. If the deeds are held to be valid in law, was the act of the Local Government in taking possession of the properties in suit unlawful and ultra vires ?

It is clear and conceded by both parties that the finding on this issue must follow the finding on issue 5. If it was lawful for the Court of Wards to assume superintendence, it was lawful and not ultra vires for the Local Government, that is for the Court of Wards, to take possession of the properties. I would find therefore on this issue in favour of the defendants.

Issue 6. — Is the suit barred by the provisions of Sections 11, 13 and 53, United Provinces Court of Wards Act, 1912 ?

Section 53, Court of Wards Act, provides that :

The exercise of any discretion conferred on the Local Government or the Court of Wards by this Act shall not be questioned in any civil Court.

This will have a bearing on cases falling under S. 12 (2) for example. By S. 11:

No declaration made by the Local Government under S. 8 or by the Court of Wards under S. 10 shall be questioned in any civil Court,

and by Section 13 :

If the right of the Court of Wards to assume or retain the superintendence of the person or property of any disqualified proprietor is disputed by such proprietor or, if he be a minor or of unsound

mind, by some person on his behalf, the case shall be reported to the Local Government, whose orders thereon shall be final and shall not be questioned in any civil Court.

It is scarcely disputed that these sections do not prevent the institution of suits by third persons of whose property superintendence has been assumed on the supposition that it was the property of a disqualified proprietor. On the assumption that trustees are third persons who are the transferees of the original proprietor, it does not appear to me that a suit by them to assert their title to the property can be barred by the provision of these three sections. I hold accordingly on this issue in favour of the plaintiffs. Two cases have been quoted to me in this connexion, 1935 O W N 132[23] and 1940 O W N 431,[24] but it does not seem to me that either of these cases is helpful as it is conceded by learned counsel for the defendants that these sections cannot be of any help to the defendants if the property has actually vested in trustees and it is on that assumption only that the question really arises.

Issue 8.—If the document dated 1st February 1934 does not constitute a deed of trust does it nevertheless operate as a will conferring possession of the property on plaintiff 1 until the minor sons have reached the age of 21 and then to (on) them ?

The contention on behalf of the plaintiffs is that in case Ex. 3 fails as a transfer inter vivos, nevertheless paras. 12 and 15 are of the nature of a testamentary disposition creating something in the nature of an estate limited in time in favour of the Rani on the death of the Raja. It is quite clear however that this document Ex. 3 in no sense purports to be a will. All that the document appears to do is to indicate that the estate goes to the children of the Raja according to law, but that the Rani is to be the guardian of those children and that the heir will not himself have control until he reaches the age of 21. This paragraph is therefore not really of the nature of a will, because it does not, and in fact could not in the presence of the sons, operate to create any sort of title or estate in the Rani during the minority of her sons. Paragraph 12 says specifically that she is to exercise proprietary rights like those of the Raja "as the guardian of the minor or minors." In short this paragraph, which is really the only one relied upon for the purpose, does not make any bequest to the Rani or to the Raja's sons and it cannot possibly be construed as a will. I hold accordingly on issue 8 against the plaintiffs.

Issue 9.—Is plaintiff 1 entitled to possession of the property detailed in Sch. C under the terms of the deed, dated 9th October 1933? or Is she not entitled by reason of the order of the District Judge dated 7th August 1934 ?

The first part of this issue is founded on para. 4 of the wakf named Ex. 1 which provides

that in case the trustee is minor, his (or her) legal guardian (wali sherai) shall be the manager and supervisor of the entire wakf property till the trustee (mutwalli) attains majority and he shall have to file regular accounts according to the existing law, at the appointed time in Court and at the time of the trustee's attaining majority he will have to render accounts relating to the period of minority.

For the plaintiffs reliance is placed on para. 12 of Ex. 3. by which the Raja appointed the Rani as guardian of the minor or minors to exercise all sorts of proprietary right or rights of a "mutwalli" or guardian. It appears to be the contention of the plaintiffs that the Raja being himself the author of the wakf had a right to appoint his widow as "mutwalli" after him. On the other hand at this stage the Raja himself was no more than a "mutwalli" and could not any longer act in the capacity of author of the wakf. He had already laid down a provision in regard to the guardianship during the minority of the next "mutwalli" after him, and that provision was that the legal guardian or "wali sherai" should be the manager of the wakf property in the minority of the "mutwalli" Iqbal Ali Khan or the other "mutwalli" in case of the property of Fatima Begam. We are not concerned with the property of which Fatima Begam was the "mutwalli," because in fact the Rani has been appointed by the District Judge to manage that property. In the case of the other property, that of Iqbal Ali Khan, the simple position is that under the Mahomedan law the Rani is not the legal guardian. Mulla's Mahomedan Law, S. 262 deals with legal guardians of property and states :

The following persons are entitled in the order mentioned below to be guardians of the property of the minors : (1) the father; (2) the executor appointed by the father's will, (3) the father's father; (4) the executor appointed by the will of the father's father.

The Rani has not been appointed an executrix by the will either of the Raja or of

23. ('35) 22 A I R 1935 Oudh 234: 154 I C 142: 1935 O W N 132: 10 Luck 670, The Deputy Commissioner, Kheri v. Daya Chand.
24. ('40) 27 A I R 1940 P C 82: 187 I C 646: I L R (1940) Kar P C 160: I L R (1940) All 432: 67 I A 197: 1940 O W N 431 (P C), Bhagwan Bakhsh Singh v. Secretary of State.

the Raja's father, and she is clearly, therefore, not a legal guardian of the property of Kunwar Iqbal Ali Khan. It follows that she is not entitled to possession of all the property detailed in Sch. c under the terms of the deed dated 9th October 1933. It has been further pointed out that even if she had been appointed as a guardian by a testamentary act, S. 41, Guardians and Wards Act, would have the effect that immediately on the assumption of superintendence by the Court of Wards her powers as a guardian would come to an end. As regards the second part of this issue the question is whether the order of the District Judge dated 7th August 1934, appointing the Deputy Commissioner as the person to perform the duties of the "mutwalli" of the three properties in question during the minority of Kunwar Iqbal Ali Khan would operate as a bar to plaintiff 1's getting possession, if she was otherwise successful in the suit. In my opinion, there is no force in the argument that the order of the District Judge cannot be challenged by means of the present suit. It is a final order against which no appeal has been filed. It seems to me that although there may be a stage at which the order of this Court, were it to be in favour of the Rani, might be temporarily inconsistent with the order of the District Judge, it would be open to the Rani then to point to the fact that she had obtained a decree in respect of the estate and to move the District Judge to make a fresh order. There can be no necessity, so far as I am able to see, for any attempt to be made to get any change in the District Judge's order unless and until such a position arises. I hold, therefore, on the second part of this issue against the defendants and in favour of the plaintiffs that the order of the District Judge is no bar.

Issue 10. Are the plaintiffs entitled to relief (c) also in the event of their being found entitled to relief (b), or does the order of the chief Court dated 11th May 1934, operate as a bar to the granting of relief (c) ?

Relief (b) is

that a decree for possession of the properties in suit detailed in Schs. (a), (b) and (c) items (1) to (3) attached herewith be passed in favour of the plaintiffs and defendants 2 and 3 as trustees of the aforesaid properties in suit or in the alternative in favour of plaintiff 1 alone against the Deputy Commissioner, Gonda, as in charge Court of Wards, Utraula, and as person in possession of wakf properties 1, 2 and 3 detailed in Sch. (c).

Relief (c) is

that it may also be declared that the custody of Raja Mohammad Mustafa Ali Khan and Kunwar Mohammad Iqbal Ali Khan, minor sons of the deceased Raja Mohammad Mumtaz Ali Khan, by the Court of Wards becomes unlawful in the event of a decree for possession being passed in favour of plaintiffs and defendants 2 and 3 or plaintiff 1 alone.

The argument on behalf of the plaintiffs is that if the assumption of superintendence of the property by the Court of Wards was unlawful, as that assumption was under the provisions of S. 12 (2) (a), the assumption of superintendence of the person of the disqualified proprietor or proprietors was also unlawful. Learned counsel for the defendants has suggested that the action of the Court of Wards in assuming superintendence of the person of the minors could be justified by sub-s. (3) of S. 12. This provides that :

The Court of Wards may assume the superintendence of the person of any minor who has an immediate or reversionary interest in the property (a) of any proprietor disqualified under S. 8.

This would undoubtedly have justified the Court of Wards assuming the superintendence of the minors during the lifetime of the Raja, but it is obvious that the wording of the section necessitates that the minor and the disqualified proprietor should not be one and the same person. If they are one and the same person, then it will not be S. 12 (3) which will apply but S. 12 (2) (a) with the inevitable result that if superintendence of the property has been wrongly assumed, so also must superintendence of the person. It appears to me therefore that in the event of the plaintiffs being found entitled to relief (b), they would be entitled to relief (c) also. No attempt has been made to argue that the order of the Chief Court dated 11th May 1934, could operate as a bar to the granting of relief (c). I hold accordingly on this issue in favour of the plaintiffs.

Issue 11. Is the suit barred by Art. 13, Limitation Act, as being a suit to alter or set aside a decision or order of a civil Court in any proceeding other than a suit, namely the order of the District Judge, dated 7th August 1934, appointing the Deputy Commissioner, Gonda, as 'mutwalli' of the wakf properties in suit ?

It may be noted that the decision of the District Judge did not appoint the Deputy Commissioner as "mutwalli" but only as the person to perform the duties of "mutwalli". In my opinion no question of limitation arises as this is not in any sense a suit to alter or set aside the decision of the District Judge, Gonda. It would have been open to plaintiff 1 to make an application to the District Judge had she been successful in the present suit and the order made by the District Judge in 1934 would

not operate in any way as a bar to his making a fresh order in view of the changed circumstances. Article 13 which prescribes a period of limitation of one year to alter or set aside a decision or order of a civil Court in any proceeding other than a suit would only operate if this was a suit to set aside the decision of the District Judge, which decision does not require to be set aside.

Issue 12. Is the suit maintainable against the Deputy Commissioner, Gonda, as 'mutwalli' on the ground that no notice was sent to him as such under S. 80, Civil P. C. ?

In this issue the word "not" has been omitted after the word "suit." Section 80, Civil P. C., is a mandatory section prescribing that :

no suit shall be instituted against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

In so far as this is a suit against the Deputy Commissioner, Gonda, as the person appointed by the District Judge of Gonda to perform the duties of "mutwalli" under the wakf-alal-aulad of 9th October 1933, it does not appear to me that this is a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity. It is in relation to an act done by him in his capacity as the person appointed by the District Judge to perform certain duties. The District Judge could have appointed any suitable person to perform those duties and the mere fact that the person actually appointed is the Deputy Commissioner of the District does not render the acts done by him acts done in his official capacity. They are in fact acts done in his private capacity as the person appointed by the District Judge, and as such no notice under S. 80, Civil P. C., was necessary. I hold accordingly on this issue in favour of the plaintiffs.

Order.—On the above findings and particularly the findings on issues 1, 3, 4 and 13, the plaintiffs' suit fails and is therefore dismissed with costs. Only one set of costs will be taxed.

K.S./R.K. *Suit dismissed.*

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(28) A. I. R. 1941 Oudh 559

GHULAM HASAN AND AGARWAL JJ.

Brijraj Singh

v.

Ganga Charan.

F. A. No. 68 of 1938, Decided on 25-7-1941.

U. P. Encumbered Estates Act (25 of 1934), S. 4, Rules under, R. 1 and Ss. 8 and 11—Entry in khewat does not confer title — Applicant under S. 8 stating certain property to be his — Objector under S. 11 claiming property to be his — Property not standing in khewat in name of applicant — Applicant is not precluded from establishing his title to property—Special Judge must decide question of title on merits.

An entry in khewat does not confer any title but is made merely for fiscal purposes. Where an objector under S. 11 claims certain property mentioned by the applicant under S. 8 to be his, the fact that the property does not stand in the khewat in the name of the applicant does not preclude him from establishing his title to the property. The Special Judge in such cases must adjudicate the question of title on the merits, by examining the rights of both parties and by receiving such oral and documentary evidence in support of their title as they may wish to produce. [P 560 C 2]

M. K. Seth — for Appellants.

R. N. Shukla — for Respondent.

Judgment. — This is an appeal by the applicants against the order of the Special Judge, first grade, of Hardoi dated the 11th April 1938, allowing the claim of the respondent under S. 11, U. P. Encumbered Estates Act. The applicants filed an application under S. 4, U. P. Encumbered Estates Act, and alleged therein that they owned 1 biswa and 15 biswansis situated in village Sursa, pargana Bangar, district Hardoi. Notice was published in the Gazette as required by S. 11 of the Act. The claimant filed an objection under S. 11, U. P. Encumbered Estates Act, claiming the property by virtue of a sale deed executed in his favour by Ranbir Singh, the father of applicant 1 and uncle of applicant 2, and urged that the same is not liable to attachment or sale on account of the debts of the applicants. In reply the applicants alleged that originally the family owned 3 biswas and 15 biswansis out of 20 biswas in village Sursa and the original owner was their ancestor Darshan Singh. Darshan Singh had two sons, Balwant Singh and Jit Singh. Jit Singh died issueless. Balwant Singh had two sons, Fateh Bahadur Singh and Ranbir Singh. Applicant 1 is the son of Ranbir Singh while applicant 2 is the son of Fateh Bahadur Singh. Mt. Phoophi is the widow of Balwant Singh and Mt. Kanchan Kuar is the wife of Ranbir Singh. It was stated that after the death of Balwant Singh a partition of the family property was effected between Ranbir Singh and Fateh Bahadur Singh and

later on a partition through Court was effected between Ranbir Singh, applicant 1, Mt. Phoophi and Mt. Kanchan Kuar. As a result of these partitions Ranbir Singh was owner of 8 biswansis 15 kachwansis share and had nothing to do with the remaining share of 2 biswas 6 biswansis and 5 kachwansis share. The sale deed executed by Ranbir Singh was challenged and it was stated that the objector acquired ownership in respect of 8 biswansis 15 kachwansis only and Ranbir Singh had no right whatever to transfer 1 biswa 15 biswansis share of applicant 1. Documentary evidence was filed in support of the partition.

The objector denied the partition and challenged it as being fictitious and fraudulent. The learned Special Judge without deciding the matter on the merits held that as the share in question was not entered in the khewat in the name of applicant 1 but, on the other hand, it was entered in the name of the objector, it could not be taken into account in the proceedings under the Act, as prima facie it is not, on the account, the property of the applicants. In coming to this conclusion the learned Civil Judge relied on rule 1 of the Rules framed under the U. P. Encumbered Estates Act, which requires an applicant to attach a certified extract from the most recent khewat of all the mahals in which his landed property lies. From this he drew an inference that no landed property could be included in the proceedings by an applicant, which was not recorded in his name in the khewat. He also recorded the conclusion that the entry in the name of the applicant in a khewat about the landed property has been fixed by this rule to be a standard from which it can be found out that that property is the property of the applicant; and consequently no property which is not mutated in the name of the applicant should prima facie be taken and treated to be his property.

We are of opinion that the learned Judge was clearly in error in not deciding the title to the property upon such evidence as the parties wished to produce in support of their respective cases and relying merely on rule 1 as precluding the applicant's claim to the property by reason of the absence of khewat in his name. Under S. 8, U. P. Encumbered Estates Act, the applicant is required to file a written statement showing the nature and extent of his proprietary rights in land and the nature and extent of his property which is liable to attachment and sale under S. 60, Civil P. C., exclusive of his proprietary rights in land. Under S. 11 of the Act the Special Judge is required to publish a notice in the manner specified in S. 9 specifying the property mentioned by the applicant under S. 8. Clause (2) of S. 11 lays down that any person having any claim to the property mentioned in such notice shall within a period of three months from the date of the publication of the notice in the Gazette make an application to the Special Judge stating his claim and the Special Judge shall determine whether the property specified in the ex-claim, or any part thereof, is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

It appears therefore that the Special Judge has to determine whether the property specified in the claim put forward by an objector is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. In the present case the objector has preferred a claim to the property which is mentioned by the applicants as belonging to them. The Special Judge has, therefore, to determine whether the property belongs to the applicants or to the objector. If it belongs to the applicants, it is liable to attachment, sale or mortgage in satisfaction of their debts. If, however, it does not belong to the applicants, but on the other hand, it belongs to the objector, it shall not be liable to attachment, sale or mortgage for the applicant's debt. The Special Judge is required to record a finding upon this point by examining the rights of both parties and by receiving such oral and documentary evidence in support of their title as they may wish to produce. It is well settled law that an entry in the khewat does not confer any title but is made merely for fiscal purposes. The fact that the khewat does not stand in the names of the applicants does not preclude them from establishing their title to the property in question. The learned Special Judge in our opinion was wrong in not adjudicating the question upon the merits. The learned Judge stated that the point was not taken by the objector in his objections under S. 11 but was taken by him suo motu. Learned counsel appearing on behalf of the objector in this Court has frankly conceded that he is unable to support the order of the lower Court on this point. The result, therefore, is that the appeal is allowed with costs, the order of the learned Special Judge is set aside and the case is sent back to him for disposal according to law.

G.N./R.K. *Appeal allowed.*

(28) A. I. R. 1941 Oudh 561

GHULAM HASAN J.

Ram Dhani and another — *Plaintiffs* — *Applicants*

v.

L. Nagar Mal and others — *Defendants* — *Opposite Party.*

Civil Revn. Appln. No. 154 of 1939, Decided on 8th April 1941, for revision of order of Dist. Judge, Gonda, D/- 30th August 1939.

Civil P. C. (1908), S. 151, O. 41, Rr. 23, 25 & 27 — Appellate Court has ample power to remand case apart from provisions of O. 41, Rr. 23 and 25 — It has ample power to remand case under S. 151 — Appellate Court finding trial Court's refusal to allow party to produce and examine certain witness not justified — It can remand case under S. 151 for further evidence and decision of issues in light of that evidence—O. 41, R. 27, does not apply.

An appellate Court's power of remand is not circumscribed within O. 41, Rules 23 and 25. The appellate Court has ample power to remand case apart from the aforesaid provisions. [P 562 C 1, 2]

Where the appellate Court finds that the refusal of the trial Court to allow a party to produce and examine a certain witness was not justified and that the witness should have been examined by the trial Court, the appellate Court has jurisdiction to remand the case under S. 151 to the trial Court, for further evidence and a decision on the issue in the light of that evidence. O. 41, R. 27 has no application to such a case : ('37) 24 A I R 1937 Oudh 338, *Rel. on* ; 92 I C 1045 (Mad) and ('18) 5 A I R 1918 Oudh 170, *Disting.* [P 562 C 1]

Mahabir Persad Srivastava — for Applicants.

L. S. Misra — for Opposite Party 1 to 9.

Order. — This is a revision application under S. 115, Civil P. C., against an order of the District Judge of Gonda remanding the case to the trial Court for recording the evidence of a witness and for a fresh finding upon the issues after taking into consideration the said evidence. The suit out of which this present application arises was one for recovery of damages for malicious prosecution. Issues were framed in the case, and when the evidence of the plaintiffs was closed, the defendants applied for the adjournment of the case to enable them to examine one Pandit Badri Prasad as their witness. This application was rejected by the trial Court. The result was that the suit was partly decreed. The defendant-opposite-parties went in appeal to the District Judge of Gonda, and, in addition to challenging the decree of the trial Court on the merits, they objected in paragraph 7 of their grounds of appeal that the lower Court had erred in law in not allowing an opportunity for examining the appellant 3, Pandit Badri Prasad, as a witness in the case. The learned District Judge was of opinion that the trial Court was not justified in refusing the application of the defendants-opposite-parties to examine Pandit Badri Prasad in the case. He consequently remanded the case to the trial Court for recording the evidence of Pandit Badri Prasad as the defendants' witness and for coming to fresh findings on the issues after taking that evidence into consideration. This order of remand was made conditional upon payment of Rs. 25 by the defendants to the plaintiffs. He ordered the appeal to be fixed before him on 13th October 1939 after the findings had been received from the trial Court. It is against the order of remand that the present revision application is directed. It has been contended on behalf of the plaintiffs-applicants that the order of remand was neither one under R. 23 nor R. 25 of order 41, Civil P. C., but the case clearly fell within the purview of R. 27 of O. 41, Civil P. C., and in these circumstances the learned District Judge acted illegally in remanding the case to the trial Court for recording the evidence of the witness, whereas he should have recorded that evidence himself under the provisions of R. 27 of O. 41, Civil P. C. Reliance has been placed in this connexion on two decisions, namely 5 O L J 139[1] and 92 I C 1045.[2] On behalf of the defendants-opposite-parties it has been argued that the order of remand was not one under R. 27 of O. 41, Civil P. C., but was under the inherent powers of the Court. It has also been contended that the provisions of R. 27 of O. 41, Civil P. C. are no bar to the exercise by the Court of its inherent powers of remand. Rule 27 of O. 41, Civil P. C., opens with these words :

> The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court.

This shows clearly that the production of additional evidence, whether oral or documentary, is to be not before the trial Court but before the appellate Court. The rule however goes on to say :

> But if :
>
> (a) the Court against whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
>
> (b) the appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause,
>
> the appellate Court may allow such evidence or document to be produced, or witness to be examined.

1. ('18) 5 A I R 1918 Oudh 170 : 45 I C 832 : 5 O L J 139, Fida Abbas v. Rahim Bakhsh.
2. ('26) 92 I C 1045 (Mad), V. Venkatarama Aiyar v. Sundaram Aiyar.

There is no doubt that in either of the two cases which may arise before the appellate Court, the latter will be entitled in its discretion to allow the production of evidence or document or the examination of a witness. Having regard to the circumstances of the case, it was no doubt open to the appellate Court to have acted under R. 27 (1) (a) of O. 41, C. P. C., and recorded the evidence of Pandit Badri Prasad itself and then given its own finding upon the issues in the case. Instead of acting under Rule 27 (1) (a), the lower appellate Court preferred to remand the case in its inherent powers for the examination of Pandit Badri Prasad by the trial Court and for obtaining its finding upon the issues in question after taking into consideration that evidence. In my opinion the course adopted by the lower appellate Court was neither illegal nor unreasonable. Learned Counsel on behalf of the plaintiffs-applicants concedes that apart from the provisions of Rr. 23 and 25 of O. 41, Civil P. C., an appellate Court has ample jurisdiction to remand a case. The case in 1937 O W N 377[3] may also be referred to in support of this view.

There is no indication on the record to show that the defendants wanted to produce Pandit Badri Prasad before the lower appellate Court. On the other hand, ground No. 7 of the memorandum of appeal states that the defendants' grievance was that the trial Court was not justified in refusing to give an opportunity to produce Pandit Badri Prasad and that the witness should have been examined by the trial Court. This being the state of facts before the lower appellate Court, the question of examining Pandit Badri Prasad before the lower appellate Court did not arise at all, and the only question which the lower appellate Court was called upon to determine was whether the lower Court was justified in declining to give an opportunity to the defendants to produce the witness or not. The lower appellate Court upon a consideration of the circumstances of the case came to the conclusion that the evidence of Pandit Badri Prasad should have been examined by the trial Court and in this view of the matter the lower appellate Court rightly remanded the case presumably under its inherent powers, for the examination of that witness. Under these circumstances no question of the applicability of Rule 27 of O. 41 arose, and the decision of the learned Additional Judicial Commissioner in 5 O L J 139[1] has no application to the facts of the present case. There the lower appellate Court had remanded the suit for rehearing ab initio under the provisions of O. 41, R. 23, Civil P. C. Under the provisions of O. 41, R. 23 in a case where the trial Court had refused to record certain evidence, which the lower appellate Court considered ought to have been recorded by him, it was held that the provisions of O. 41, R. 23 had no application to such a case though the lower appellate Court could utilize the provisions of O. 41, R. 27 in any manner which appeared proper. In the present case the order was not made under R. 23 of O. 41, Civil P. C., under any mistaken apprehension of law, and having regard to the trend of the order, it seems to me that the lower appellate Court acted under S. 151, Civil P. C., in directing the trial Court to record the evidence of Pandit Badri Prasad.

In 92 I C 1045[2] the Subordinate Judge had remanded the case while he had directed the trial Court to re-try only issues 5 and 6. All that the learned Judges of the Madras High Court laid down was that this order was without jurisdiction and that the proper course for the Subordinate Judge was to direct the trial Court to take further evidence he wished and submit it to his Court, whereupon he would record his own finding. In the present case there is only one principal issue, namely whether the complaint of defendants was false, malicious and without any responsible and probable cause. Issue 2 merely relates to the quantum of damages. If issue 1 is found in the affirmative, issue 2 will necessarily arise for decision, but if the issue is found in the negative, the question of damages will not arise at all, although the Court will no doubt give a finding on both the issues. In 1937 O W N 377[3] it was observed that:

> It cannot be laid down that an appellate Court has no power to remand a case to the trial Court unless the case falls strictly within the purview of R. 23 or R. 25 of O. 41, Civil P. C. Rules 23 and 25 of O. 41, Civil P. C., do not make provision to meet the contingency where the evidence on the record is not considered sufficient by the appellate Court for a correct decision on the point in issue. Where, however, there is no reason to think that the parties did not get an opportunity of producing all the evidence that they desired to produce before the trial Judge, order of remand is not a very proper order.

This decision is an authority for two propositions, firstly that an appellate Court's power of remand is not circumscribed within Rr. 23 and 25 of O. 41, Civil P. C., and

3. ('37) 24 AIR 1937 Oudh 338 : 167 I C 922 : 13 Luck 209 : 1937 O W N 377, Hira Lal v. Sri Ram Janki.

secondly that an order of remand under S. 151 would be a proper order, if it is made by the appellate Court in a case in which the evidence on the record is not sufficient for a correct decision on the point at issue, to obtain further evidence before the trial Court which had refused to give an opportunity to produce that evidence. The order of remand passed by the lower appellate Court discloses no illegality which vitiates the said order and renders it liable to interference under S. 115, Civil P. C. On the merits also the plaintiffs-applicants can have no legitimate ground for complaint. After Pandit Badri Prasad has been examined before the trial Court, the trial Court will be in a position to record its own findings after a consideration of that evidence and return those findings to the lower appellate Court, which will have a right to examine those findings in the light of the fresh evidence. It seems to me clear that the order directing the trial Court to record the evidence of Pandit Badri Prasad instead of taking his evidence itself has caused no prejudice to the plaintiffs-applicants and in any event the order of remand was eminently just and reasonable upon the merits. The application, therefore, fails and is dismissed with costs.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 563

YORKE AND BENNETT JJ.

Birja — Appellant

v.

Emperor.

Criminal Appeal No. 90 and Capital Sentence No. 10 of 1941, Decided on 25th April 1941, against order of Addl. Sess. Judge, Kheri, D/- 8th March 1941.

(a) Evidence Act (1872), S. 26—Choukidar is police officer within S. 26—Confession by accused after his arrest by choukidar and while being escorted under his control is inadmissible —Possibility of its having been made during choukidar's temporary absence cannot affect its admissibility.

A village choukidar is a police officer for the purpose of S. 26: ('34) 21 A I R 1934 Oudh 19 and ('33) 20 A I R 1933 Oudh 192, *Rel. on.* [P 565 C 2; P 566 C 1]

Consequently, a confession made by an accused after his arrest by the choukidar and while being escorted under his control is inadmissible in evidence. The possibility of the confession having been made during the temporary absence of the village choukidar does not affect its admissibility : 20 Bom 165, *Rel. on.* [P 565 C 2]

(b) Evidence Act (1872), S. 26 — Accused pointing out place of murder to police officer— Pointing of place being evidence of confession of his guilt is inadmissible.

The pointing out of the place of murder by an accused to a police officer is really evidence of a confession of his guilt and therefore is inadmissible: ('35) 22 A I R 1935 Oudh 1 and ('19) 6 A I R 1919 Bom 162, *Rel. on.* [P 566 C 1]

(c) Criminal trial — Evidence — Witness deposing to seeing murder but not giving information—Evidence cannot be free from suspicion.

Though it cannot be said that the evidence of a person who says he had seen a murder committed but did not give any information thereof is little better than that of an accomplice yet his evidence cannot be free from suspicion. ('34) 21 A I R 1934 Oudh 315, *Rel. on.* [P 566 C 2]

Mohammad Haider — for Appellant.

Government Advocate — for the Crown.

Judgment.—This is an appeal by a man named Birja, caste Bot, aged 20 years, who was convicted by the Additional Sessions Judge of Kheri on a charge under S. 302, Penal Code, and sentenced to death. The case has also been referred by the Additional Sessions Judge for confirmation of this sentence. Birja was charged with three other men named Gumani, Badlu and Thakuri with the murder of a man named Noor Khan Pathan on or about 15th September 1940. The other three men charged were acquitted. The prosecution case was that on or about 11th September 1940, Birja enticed away Noor Khan's wife Mt. Saliman. Noor Khan went in search of her, but did not return. Some five weeks later, information was received by a man named Gauhar Khan, who is married to Noor Khan's sister, that Mt. Saliman was in the jungle which adjoins the village of Darabojhi where the appellant Birja lived.

On receipt of this information he took a party to search the jungle, the party including a man named Ajodhia who is the chaukidar of the village Barsola where Gauhar Khan lives. This village is about two miles south of Darabojhi. The party found Birja and Mt. Saliman several hours after sunset on the night of 19th October in a place called "the bungla of Basant." Birja and Mt. Saliman tried to escape, but were caught. Statements are said to have been made both by Birja and by Mt. Saliman to members of the party which arrested them. Birja and Mt. Saliman were brought to Barsola for the night and early the next morning they were taken back to the jungle by the same party and various places are said to have been pointed out by Birja. In particular human bones were found in a place pointed out by him and near this place were found a shaluka (Ex. 1) and a dhoti or lungi (Ex. 2).

The first report of the occurrence was made orally by the chaukidar Ajodhia at

the Nighasan police station at 7 P. M. on 20th October. Nighasan is 14 miles south west of Darabojhi. This report shows that Ajodhia had been sent for the previous day by Gauhar Khan and had met him and other persons who were with him some time after nightfall. He was informed by Gauhar Khan that Birja had eloped with the wife of his brother-in-law Noor Khan about a month and a quarter before, and that they were hiding in the jungle to the north. Gauhar Khan asked the chaukidar to accompany him with a view to effecting their arrest. They found Birja and the woman at Basant's hut. Birja tried to escape but was pursued and struck down. They were secured and brought back to Barsola where both made statements. The statement made by Mt. Saliman was given in some detail in the report: it showed how her husband had found her in the jungle and had attempted to seize her. Birja had thereupon grappled with Noor Khan, and the other accused, Gumani Thakuri and Badlu had come up and assisted him to throttle her husband. She had appealed to Bhikari and other persons who were guarding their crops on antas or machans in the vicinity, but they had not responded to her appeal. Mt. Saliman had also told them how the corpse had been disposed of, and how she and Birja had continued after the murder to wander about in the jungle. The report then referred briefly to a confession made by Birja in the presence of all members of the party and stated that that morning Birja and Mt. Saliman had been taken back to the jungle where they had pointed out where Noor Khan was killed and where his bones had been taken and buried.

The chaukidar's report was recorded by Babu Ram, the second officer of the Nighasan police station, who went to the village the following morning, that is, the morning of 21st October and examined the place where the bones and clothes had been found. The bones were sent for medical examination. Details of them are given in the post mortem report and in the medical evidence of the Civil Surgeon, Captain S. N. Kapur. The evidence shows that they were of an adult male human being and that the cause of death could not be ascertained. Mt. Saliman gave evidence confirming in detail the story attributed to her in the first information report, and three other witnesses, Bhikari, Kallu and Dwarka corroborated her story in certain details. They said that they had been sitting on their machans watching their crops on the night in question, and that they heard the voice of Noor Khan calling out for help and saying that he was being attacked by the four accused. They also said that Noor Khan's wife Mt. Saliman had run towards the machan of Bhikari asking him to save her husband, and that Bhikari had replied that they were not likely to kill him and that it was only an ordinary quarrel.

We may say at once that we do not consider that any reliance can be placed on these witnesses, Bhikari, Kallu and Dwarka. Apart from the fact that they took no action at the time, two of them, Bhikari and Kallu, admitted that they said nothing about the incident to anyone until they told their stories to the Sub-Inspector. Dwarka stated that he told his master about it, and that his master warned him not to mention it to anyone. We are doubtful whether these witnesses would have recognized the voice of Noor Khan, who was a resident of Barsola and not of Darabojhi. It was a dark night. It is doubtful also whether they could have seen Mt. Saliman clearly or recognized her voice. There is evidence that the Darabojhi villagers had discovered some time prior to the arrest of the accused that some person had recently been killed in this jungle. A man named Jori Lal deposed that he had seen the dead body of a man lying in the jungle, being eaten by vultures, and had mentioned the fact to various persons including Shambhu, Birja's brother. It was apparently thought at one time that the Musalmans might have killed Birja because he had abducted Noor Khan's wife. Jori Lal went with Shambhu and another man to the place where he had seen the dead body, but they are said to have found only a jaw bone there and a shaluka. This second visit of Jori Lal appears to have been made two days after the discovery by him of the dead body. According to the evidence of Jori Lal Shambhu took up the shaluka and said that it did not belong to Birja.

Another man who received information about this discovery was Nanda who also gave evidence in the case. According to Jori Lal Nanda asked Shambhu to go and report the discovery at the police station, but Shambhu did not do this. This, it has been argued, suggests that on finding that the shaluka was not that of his brother Birja, Shambhu realized that the bones might be of Noor Khan in which case Birja might have been responsible for his murder. He was consequently unwilling to make a re-

port. The evidence both of Nanda and of Jori Lal shows that four days after the discovery of the jaw bone and the shaluka a panchayat was held at which it was decided that the matter should be hushed up. Jori Lal stated that the view taken by the panchayat was that as Noor Khan, his wife Mt. Saliman, and Birja had disappeared, it could not be said whose corpse it was until one or more of these three persons had been traced. It would certainly seem that members of Birja's baradri were reluctant to give any information which might lead to his arrest. Kallu, one of the witnesses referred to above as having been watching crops from a machan on the night of the alleged murder, stated that he had told his story to this panchayat. But there is no corroboration of this and as Kallu also said that the Sub-Inspector was the first person to whom he told it he is clearly unreliable.

Mt. Saliman identified the shaluka and lungi as that of Noor Khan. She said that the shaluka was purchased by Noor Khan from a man named Daha Darzi. This man gave evidence in the case, corroborating this statement of Mt. Saliman. At the same time he admitted that he had sold two or four shalukas of similar cloth to other men, so it is doubtful whether he was really in a position to say with certainty that he had sold this particular shaluka to Noor Khan. His evidence may however be considered to constitute some corroboration of the statement of Mt. Saliman. The sketch plan Ex. 5 prepared by the Sub-Inspector purports to show the scene of the murder and the various places where the body or bones were afterwards deposited. It also shows the antas or machans of Bhikari, Kallu, and Dwarka and other persons. It will be seen that the body was carried about six furlongs from the place of occurrence and that after it had been devoured by vultures or wild animals the bones were thrown into a small dry pit, only a few paces away. The clothes were found near the bones. We think that Jori Lal and other Darabojhi villagers cannot have failed to notice all the bones and both the shaluka and lungi, although we are told that after the first discovery of the body by Jori Lal only a jaw bone and shaluka were found by the party which visited the place two days later.

It is also quite clear that the bones and clothes were seen by the party which accompanied the chaukidar to the place after the arrest of the appellant and Mt. Saliman, and consequently there is no question of anything having been discovered by the Sub-Inspector for the first time during his investigation, though the evidence rather suggests that he found the dhoti or lungi, as if it had not been seen there before. What is not so clear is whether the party with the chaukidar found the bones and the clothes in consequence of information given by the appellant and Mt. Saliman. It may be presumed that the Darabojhi villagers knew all about them. It is not so likely that the Barsola villagers did, but we feel some doubt nevertheless whether the chaukidar and his party were dependent solely on the information given to them by the appellant and Mt. Saliman. The Additional Sessions Judge relied on the evidence of Mt. Saliman, Bhikari, Kallu and Dwarka as against the appellant notwithstanding his belief that they had all falsely implicated the other accused, Gumani Badlu and Thakuri. He rejected the alleged confession of Birja but he held that :

> the statement of Birja, accused, that Noor Khan was murdered and that he took the chaukidar, Gauhar Khan and others and pointed out to them the place No. 1 where Noor Khan was murdered, the talaiya No. 2, where his dead body was thrown after the murder, the bush No. 8, where the dead body was removed from the talaiya, and the pit No. 10, in which Birja, accused, had thrown the bones after picking them up from the place No. 9 in site plan Ex. 5 where the skeleton of the dead body of Noor Khan was lying after its flesh had been eaten away by wild birds and animals, can very well be used against him in evidence.

He held that the prosecution had failed to prove that the shaluka and lungi belonged to Noor Khan and that he was wearing them when murdered. The Additional Sessions Judge rightly, in our opinion, rejected the alleged confession of Birja. According to the evidence it was made during the temporary absence of the chaukidar and we may say that we feel somewhat suspicious about this story. But in any case, having regard to the authorities on this point, the view taken by the Sessions Judge was justified. He said that the confession was made while Birja was in police custody after he had been arrested by the chaukidar and was being escorted under his control and therefore the possibility of its having been made during the temporary absence of the chaukidar did not affect its admissibility. This was the view taken by the Bombay High Court in 20 Bom 165.[1] We considered whether a chaukidar should be considered a police officer for the purpose of S. 26, Evidence Act. The question was answered by this Court

1. ('96) 20 Bom 165, Empress v. Lester.

in the affirmative in A I R 1934 Oudh 19[2] and 8 Luck 410.[3] But even if it had been answered in the negative, we should not have been disposed to place any reliance on the alleged confession of the appellant in the present case. While the story of Mt. Saliman is narrated in detail it is nowhere — either in the first report or in the evidence — stated what actually Birja said. We are only told that he confessed or concurred in what Mt. Saliman said and promised to point out the places referred to. Gauhar Khan in deposing about the pointing out of these places by Birja and Mt. Saliman stated : "Birja did not tell me the above-mentioned facts easily. He told me when I pressed him." We are inclined on a consideration of the evidence as a whole to think that only Mt. Saliman narrated the details of the occurrence and that no actual statement was made by Birja.

We also doubt whether any fact of an admissible nature was discovered in consequence of information given by Birja. We do not consider that the Additional Sessions Judge was entitled to rely upon the fact that Birja pointed out certain places to the chaukidar and others, namely the places where Noor Khan was murdered and the body and bones thrown unless something was found at those places in consequence of the information given by him. For the reasons which we have already given we are doubtful whether the places where the bones and clothes were found were discovered on information given by Birja. As regards the place of occurrence nothing was found there and the pointing out of this place is really evidence of a confession of his guilt and is therefore inadmissible under S. 26, if the chaukidar is held to be a police officer. This was the view taken by a Bench of this Court in A I R 1935 Oudh 1[4] and also by the Bombay High Court in A I R 1919 Bom 162.[5]

We are therefore dependent almost entirely on the evidence of Mt. Saliman both for the identification of the clothes as those of her husband and for the circumstances in which he met his death. Other evidence establishes in our opinion that Birja took Mt. Saliman away and that Noor Khan went in search of his wife. But this evidence does not show where he went. It is proved that Noor Khan never returned and it is therefore extremely probable that he was murdered. At the same time the evidence shows that he was of a weak constitution and he may therefore have met a natural death. The Additional Sessions Judge did not consider that the evidence of Mt. Saliman and the other evidence about the clothes was sufficient to establish the fact that they belonged to Noor Khan and that he was wearing them when he was murdered. We agree with this view. In 11 O W N 661,[6] it was held by a Bench of this Court that though it cannot be said that the evidence of a person who says he had seen a murder committed but did not give any information thereof is little better than that of an accomplice, yet his evidence cannot be free from suspicion. It is clear in the present case that Mt. Saliman made no attempt to disclose the crime to anyone prior to her arrest. And it would seem that when she was surprised in the jungle she attempted to run away with Birja. The criticism which arises out of her failure to make any statement shortly after the occurrence would apply with even more force to the other witnesses, Bhikari, Kallu and Dwarka. We are satisfied in these circumstances that the conviction of the appellant cannot be maintained, being based on evidence which cannot be regarded as above suspicion. We accordingly allow this appeal, set aside Birja's conviction and sentence and direct his release.

G.N./R.K. *Appeal allowed.*

2. ('34) 21 A I R 1934 Oudh 19 : 148 I C 475 : 35 Cr L J 664 : 11 O W N 119, Jangli v. Emperor.
3. ('33) 20 A I R 1933 Oudh 192 : 143 I C 846 : 34 Cr L J 653 : 8 Luck 410 : 10 O W N 348, Emperor v. Pancham.
4. ('35) 22 A I R 1935 Oudh 1 : 152 I C 473 : 36 Cr L J 166 : 10 Luck 281 : 11 O W N 1383, Turab v. Emperor.
5. ('19) 6 A I R 1919 Bom 162 : 52 I C 601 : 20 Cr L J 681 : 21 Bom L R 724, Emperor v. Hira Gobar.
6. ('34) 21 A I R 1934 Oudh 315 : 148 I C 1045 : 35 Cr L J 836 : 9 Luck 687 : 11 O W N 661, Sunder Lal v. Emperor.

(28) A. I. R. 1941 Oudh 566

GHULAM HASAN AND AGARWAL JJ.

Hari Ram — Creditor — Applicant

v.

B. Shyam Bahadur and others, Debtors and others, Creditors—Opposite Party.

Civil Revn. Appln. No. 6 of 1939, Decided on 25th July 1941, from order of Special Judge, 1st Grade, Hardoi, D/- 5th August 1939.

(a) **U. P. Encumbered Estates Act (25 of 1934), S. 46—Power of revision under S. 46 is confined to proceedings pending in Court.**

The power of calling for a record in revision under S. 46 relates only to proceedings in a case

under the Act pending in a Court. The Special Judge sent the decree to the Collector for execution under S. 19 of the Act on 26th May 1938. The case terminated on that date so far as the Special Judge was concerned. The application for correction of the decree was made on 11th May 1939, and the order allowing the correction was passed on 5th August 1939. The application for revision of the order allowing correction of decree was filed in the High Court on 15th November 1939 :

Held that the revision application was not maintainable under S. 46 as no case was pending before the Special Judge on the date of its presentation : ('39) 26 A I R 1939 All 648 and ('38) 25 A I R 1938 Oudh 162, *Rel. on.* [P 567 C 1]

(b) U. P. Encumbered Estates Act (25 of 1934), S. 47 and S. 14, Rules under, R. 6—S. 115, Civil P. C., does not apply to orders passed under Act.

Section 115, Civil P. C., is not applicable to orders passed under the Encumbered Estates Act as the application of that section would be inconsistent with S. 47 of that Act. [P 567 C 2]

R. N. Shukla — for Applicant.

Nasir Ullah Beg — for Opposite Party No. 2.

Order.—This is an application for revision under S. 46, Encumbered Estates Act, against an order of the Special Judge, Hardoi, allowing an application for correction of a decree. A preliminary objection has been taken that the revision is not maintainable. Section 46, Encumbered Estates Act, enacts as follows :

Any Court empowered under S. 45 to hear an appeal under this Act may of its own motion or on the application of any person concerned, call for the record of proceedings in any case under this Act pending in a Court from which appeals lie to such Court and after giving due notice to the parties concerned, pass such orders thereon consistent with the provisions herein contained as it thinks fit and such order shall be final.

It is clear that under the provisions of this section, a Court can call for the record of proceedings in any case which is pending in a Subordinate Court. In this case the Special Judge sent the decree to the Collector for execution under S. 19, Encumbered Estates Act, on 26th May 1938. The case terminated on that date so far as the Special Judge was concerned. The application for correction of the decree was made on 11th May 1939, and the order complained of was passed on 5th August 1939. This application was filed in this Court on 15th November 1939. No case was pending before the Special Judge when this application was presented. It is therefore not maintainable in our opinion under S. 46, Encumbered Estates Act. It was held by this Court in 1938 O W N 494[1] that the power of calling for a record in revision given by S. 46, Encumbered Estates Act, relates only to proceedings in a case under the Act pending in a Court. The Allahabad High Court took the same view in A I R 1939 ALL 648.[2] It was argued before us that this application may be treated as one under S. 115, Civil P. C. The provisions of the Code of Civil Procedure have been made applicable to proceedings under the Encumbered Estates Act by R. 6 made under S. 14 of the Act. It runs as follows :

Proceedings under this Act shall be governed by the provisions of the Code of Civil Procedure of 1908 for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of these rules.

Section 47 provides :

Except as provided in Ss. 45 and 46 no proceedings of the Collector or the Special Judge under this Act shall be questioned in any Court.

We think that if S. 115, Civil P. C., were made applicable to orders passed under the Encumbered Estates Act, it would be inconsistent with S. 47 of the Act. We are of opinion that S. 115, Civil P. C., is not applicable to orders passed under the Encumbered Estates Act. This application is therefore not maintainable and we dismiss it with costs.

G.N./R.K. *Application dismissed.*

1. ('38) 25 A I R 1938 Oudh 162 : 174 I C 736 : 1938 O W N 494, Ashiq Ali v. Abdus Sayeed Khan.

2. ('39) 26 A I R 1939 All 648 : 1939 A L J 673, Mohammad Ali v. Mt. Bhari Dulhin.

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(28) A. I. R. 1941 Oudh 567

GHULAM HASAN J.

Israr Husain and another—*Appellants*

v.

Emperor.

Criminal Appeal No. 77 of 1941, Decided on 17th May 1941, against order of Assist. Sess. Judge, Malihabad, Lucknow, D/- 22nd February 1941.

(a) Criminal P. C. (1898), S. 297 — Charge to jury — Omission to analyse evidence and to place facts favourable to accused before jury amounts to misdirection.

In his charge to the jury the Judge should not merely reproduce the documentary and oral evidence in the case and leave the jury to believe one or the other. An omission on the part of the Judge to analyse the relevant evidence in the case with precision and to place before the jury all the facts and circumstances which could be legitimately construed in favour of the accused amounts to a misdirection. [P 569 C 2]

(b) Penal Code (1860), S. 366 — Minor abandoning guardian's house of her own accord without intention of returning — She cannot be said to continue in keeping of lawful guardian.

Where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian :

('26) 13 A I R 1926 Cal 467 and ('15) 2 A I R 1915 All 390, *Rel. on.* [P 571 C 1]

(c) Criminal P. C. (1898), S. 297 — Charge to jury—Judge should explain to jury constituent elements of offence with which accused is charged and should not merely reproduce section dealing with offence—Offence under S. 368, Penal Code—Judge must explain to jury ingredients of offence and indicate that jury should find on evidence whether accused had knowledge of kidnapping of girl by other accused — Omission to do so vitiates verdict of jury.

In his charge to the jury, the Judge should explain to the jury the constituent elements of the offences with which the accused was charged and should not merely reproduce the sections dealing with those offences and content himself by saying that that was all the law which the jury was required to know in connection with the case. Consequently, in the case of an offence under S. 368, Penal Code, the Judge must explain to the jury the ingredients of the offence and indicate that the jury should find upon the evidence whether the accused had any knowledge whether the girl alleged to be concealed by him was kidnapped by the other accused or not. His omission to do so vitiates verdict of the jury : ('32) 19 A I R 1932 Oudh 28 and ('39) 26 A I R 1939 Bom 457, *Rel. on.* [P 571 C 1, 2]

(d) Criminal P. C. (1898), S. 423 (2) — Jury's verdict perverse — Verdict can be set aside.

A verdict of the jury can be set aside on the ground that it is perverse : ('28) 15 AIR 1928 Oudh 277 and Jury Ref. No. 1 of 1941, *Rel. on.*

[P 571 C 2; P 572 C 1]

H. G. Walford and S. M. Yusuf — for Appellants.

Government Advocate — for the Crown.

Judgment.—The appellant Israr Husain alias Babu has been convicted by the Assistant Sessions Judge of Malihabad, Lucknow, of an offence under S. 366, Penal Code, for kidnapping a minor girl and sentenced to five years' rigorous imprisonment. Mehdi Hussain, appellant, who is the father of Israr Husain, has been convicted under S. 368, Penal Code, for wrongfully concealing or confining a minor girl and sentenced to three years' rigorous imprisonment. The accused were tried with the help of a jury, which returned an unanimous verdict of guilty. The learned Assistant Sessions Judge of Malihabad, Lucknow, agreeing with the verdict of the jury, convicted and sentenced the accused as stated above.

The facts leading to the offence may be briefly stated. Phulia, a minor girl, khatik by caste, disappeared from her house in Lucknow on 11th September 1938. Phulia's parents are dead. Phulia's father Mangal had a brother Sukhi with whom Phulia lived along with her elder brother Munna and another sister who is married. After the death of the parents Phulia, was brought up by Sukhi and lived with her uncle along with her brother and sister. Her age according to the prosecution was stated to be less than 16 years. Munna, after having made an unsuccessful search of Phulia, made a report of her disappearance at police station Wazirganj on the following day, namely the 12th September 1938 at about 8.45 P. M. In this report he stated that he did not remember the age of Phulia but she had become jawan. He further stated that Phulia disappeared between 11 P. M. and 2 A. M. on the night between 11th and 12th September 1938 with only a dhoti and in spite of search she had not been traced. According to Munna, he continued the search of his sister till 25th April 1940, when he received information that his sister was present in the house of the appellants. He thereupon sought the assistance of one Vishnu Swarup, a preacher of Arya Samaj, to recover his sister from the house of the accused. Vishnu Swarup gave the information in writing to the Wazirganj police, whereupon a cadet Sub-Inspector with a police guard was deputed to go to the house of the accused and recover the girl. The police party formed a cordon round the accused's house, and after a vain search in the rooms of the house for some time they eventually secured her by ascending a stair-case where the girl was hiding herself in the dark. The girl was taken into custody by the police and was sent to the District Jail. She was produced before the Civil Surgeon of Lucknow on the very next day for medical examination. Lt. Col. Clide, the Civil Surgeon, expressed the opinion that the girl was about 15 years of age but might be less. The two accused were then sent up to stand their trial under Ss. 366 and 368, Penal Code. The charge against Israr Husain was that he had kidnapped Mt. Phulia from her house on the night of 11th September 1938 and after kidnapping her had kept her as his wife, while the charge against Mehdi Husain, his father, was that he kept the girl concealed and confined for full 19 months and 13 days in his house for the same purpose.

The prosecution produced evidence in regard to the disappearance of the girl and her subsequent recovery from the house of the accused. Evidence was also produced to show that the girl was under 16 years of age. Both the accused pleaded not guilty to the charge. Israr Husain denied having kidnapped or married the girl. He denied that the girl ever lived in his house as his wife or that he had ever had illicit intercourse with her. He also denied the recovery of

the girl from his house on 25th April 1940. Mehdi Husain made a similar denial. These were their statements before the committing Magistrate. In the Court of Session Israr Husain stated that Phulia came to his house a year ago in the morning and complained that her uncle and brother had turned her out about a year ago, from the house after beating her and that she had been serving different people here and there. She asked the accused to keep her in his house to do sundry jobs. On her insistence and weeping, the accused kept her in his house for making purchases from the market and for doing other jobs. Mehdi Husain admitted in his statement that he and his son lived in the house jointly. He also corroborated the statement of Israr Husain and added that he and his son used to give the girl food and clothes for her services which she rendered to all the members of the family.

The accused Israr Husain in his defence produced EX. A, certificate of Rai Bahadur Dr. R. N. Bhatia, to prove that the girl was about 19 years of age on 18th May 1940 when Phulia was examined by him under the orders of Court on the application of the accused. He also produced Sheo Prasad, vernacular record keeper of the Lucknow Municipal Board, (D. W. 2), to prove certain entries in the register of births and deaths showing that Munna, her brother, was born on 5th April 1916, that Mt. Bilasa, her mother, died on 3rd June 1923, and Mangal, her father died on 28th April 1928. From these entries read with oral evidence, it was sought to prove that Mt. Phulia was above 16 years of age at the time of her disappearance. The learned Assistant Sessions Judge in his charge to the jury in the first instance mentioned the law applicable to the case and then referred to the prosecution and defence evidence in the case.

The learned counsel on behalf of the accused has argued that the verdict of the jury unanimously holding the accused guilty is erroneous as there was a misdirection by the Judge in his charge to the jury, and his clients are entitled to acquittal on that ground. Reference has been made in this connexion to the fact that the entire evidence for the prosecution or for the defence had not been properly analysed and important evidence favourable to the accused had not been referred to in his charge to the jury by the learned Assistant Sessions Judge. In particular, it has been emphasised that the jurors were not informed of the very important facts favourable to the accused, namely that the accused and Phulia lived in the same muhalla before the latter's disappearance, that she used to go about making purchases for the accused, and that neither her uncle nor her brother could possibly have been unaware of her free movements taking place before their very eyes. Another circumstance of some weight was also not brought to the notice of the jury, namely the question of the girl's age, with particular reference to the evidence afforded by the municipal register, and lastly the fact that the girl left of her own accord without any enticement by the accused. In so far as Mehdi Husain is concerned, it has been urged that the essential requisites of an offence under S. 368, Penal Code, had not been explained to the jury.

I have read the charge to the jury carefully, and it seems to me that the charge is defective in these respects and the verdict given by the jury is, therefore, vitiated by errors of law on account of the non-direction or misdirection by the Judge. It is admitted by Sukhi (P. W. 2), the uncle of the girl, that the accused lives behind his muhalla at a distance of about 50 paces from his house and that he knows the two accused for a long time. D. W. 1 Banney Sahib states that Phulia used to come to his shop to make the purchases for the accused. Phulia herself states that her house is at a distance of 10 or 20 paces from the house of the accused and a nala lies between her house and the accused's house. She further states that her khala used to go and see her at the accused's house and once her mausi also visited her. She says that she was never concealed nor was she ever prevented from doing anything and often remained and stayed at the main door of the accused's house in the view of the passers-by. Munna also states that he knows both the accused since his infancy as they are residents of his muhalla and their house is 20 paces from his own house. This evidence does not appear to have been mentioned in the summing up to the jury. It cannot be denied that the evidence, whether true or false, has an important bearing on the case, and, if true, is sufficient to negative the case of enticement, confinement or concealment. The jury were entitled to know the entire evidence for and against the accused, and the fact that this was not brought to the notice of the jury amounts to a non-direction. The accused have a legitimate grievance that an important piece of evidence favourable to them was withheld from

the jury, thus resulting in a miscarriage of justice.

As regards the question of age, no doubt the charge to the jury does refer to the evidence of the two doctors as well as to the other prosecution evidence. The charge, however, fails to give an analysis of the evidence furnished by the entries in the municipal registers. It appears from EX. C, which is a copy of an entry from the death register of the Lucknow Municipal Board, that Mt. Bilasa, wife of Mangal Khatik, died on 3rd June 1923. It is not disputed that Mt. Bilasa was the mother of Mt. Phulia. It further appears from EX. D that Mangal, the father of Mt. Phulia, died on 28th April 1928. Exhibit B shows that a son was born to Mangal Khatik on 5th April 1916. It being admitted by the uncle and Munna himself that only one son was born to Mangal, the entry must unquestionably refer to Munna. Munna was, therefore, 22 years old in 1938 and 24 years old in 1940. Munna gave his age as 17 or 18 years before the committing Magistrate when he was examined in 1940. He also stated that his sister was three or four years younger than him. This statement was admittedly made by guess. This reduces Munna's age by six years from that given in EX. B. It further shows that Phulia was aged 14 in 1940 and 12 in 1938. In other words, she was born in 1926, three years after her mother's death which is obviously impossible. According to the statement of Munna before the committing Magistrate's Court, Munna was only a baby at the time of his mother's death. His uncle Sukhi however states that he was seven or eight years at the time of his mother's death. The statement of Munna in the committing Magistrate's Court is obviously wrong. Munna stated before the Sessions in 1941 that he was 23 or 24 years old and Phulia was seven or eight years younger than him. According to this calculation Phulia was 16 years old in 1941 and was 13 years old in 1938. In other words, she was born in 1925, two years after her mother's death. Sukhi states that Phulia was a baby of 1½ months old in 1923 and according to that calculation her age in 1941 should be 18 years and not 16 years according to the ages given by Munna. Munna explains that by mentioning Phulia as jawan in the report he meant that she was 16 or 17 years old.

The learned Assistant Sessions Judge in his charge to the jury merely reproduced what EXS. B, C and D showed and then referred to the evidence of Sukhi on the one hand and the evidence of D. W. 3, who had stated that Phulia was 2½ or 3 years old at the time of her mother's death on the other hand and then left the jury to believe one or the other and did not endeavour to analyse the relevant evidence on this point with precision as he should have done to enable the jury to return a proper verdict. The learned Judge misdirected himself in not properly analysing the evidence in the case and in not placing before the jury all the facts and circumstances which could be legitimately construed in their favour. I am clear in my mind that had these circumstances been fairly placed before the jury the verdict may have been entirely different. As regards the kidnapping of the girl from the lawful guardianship of her uncle, Mt. Phulia stated in her examination-in-chief that Israr Husain took her away from her uncle's place more than two years ago. In cross-examination she stated that her uncle and aunt used to beat her prior to her running away from her house. Her brother also used to beat her and she was sick of her life on account of the beating. She further stated that her uncle had beaten her at home on the day on which she ran away. She was going to commit suicide that night but she did not do so and wandered about here and there for about a year. She came to Israr Husain's house after a year of her disappearance and cajoled him to keep her in his house but he was not willing to do so. In re-examination she explained the words "here and there" by saying that she lived wherever she got service at Mahomedans' houses at Lucknow and Benares. She further stated that Israr Husain did not take her away from her house and that she asked Israr Husain to take her to Benares which he did. In answer to questions put by the Court Mt. Phulia stated :

> This is true that Babu did not take me or entice me away. I went to Babu on leaving my house in the night. But he did not keep me in his house.

She further stated that she took up service in various houses and ultimately came to Babu's house and asked him to keep her when he agreed. She further stated that she made her statement in examination-in-chief at the bidding of one Basishth, an Arya Samajist. There is no other evidence on the record in support of the charge of enticement or kidnapping. Leaving the examination-in-chief and cross-examination of the witness, which contain

conflicting statements upon the point, it is perfectly clear that in answer to detailed questions put by the Court at the end of her deposition Phulia clearly stated that she was not enticed away by the accused and that she left her house on account of the harsh treatment she received at the hands of her uncle and brother. There is no doubt whatever in my mind that had the case been tried by the Court without the aid of the jury, he could not but have come to the conclusion that the charge of kidnapping broke down on the strength of the statement. The verdict of the jury on this part of the case was unreasonable and perverse, and it is somewhat amazing that the learned Judge readily accepted such a perverse verdict. There is considerable authority in support of the view that where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian: *vide* A I R 1926 Cal 467[1] and 37 ALL 624.[2]

As regards the law applicable to the case the charge to the jury shows that the learned Assistant Sessions Judge merely reproduced Ss. 361, 366 and 368, Penal Code. He made no attempt whatever to explain to the jury the constituent elements of the offences under the two sections with which the accused were charged. After reproducing the sections he contented himself by saying that that was all the law which the jury was required to know in connexion with the case. Coming to the end of the charge the learned Assistant Sessions Judge summed up as follows:

> In case you hold that Phulia was above 16 years of age at the time of her disappearance as well as that she was never enticed away by Babu, but that she went to his house of her own accord, there remains no case of kidnapping against Babu and consequently his father Mehdi Husain cannot be held guilty under S. 368 of having concealed or confined a kidnapped girl in his house. If however you find the charge of kidnapping proved against Babu you must decide also whether his father was or was not guilty under S. 368, Penal Code.

It was the clear duty of the Judge to explain the ingredients of the offence under S. 368, Penal Code, and to indicate to the jury that they had to find upon the evidence produced in the case whether Mehdi Husain had any knowledge or not that a minor girl had been kidnapped by his son Israr Husain. His omission to do so vitiated the verdict of the jury. It was held in 8 O W N 1325[3] that where in his charge to the jury the Sessions Judge does not adequately bring out the difference between common knowledge, and the existence of grounds for belief or suspicion and at any rate the jury fails to understand the importance of the difference between those two things for the purposes of a conviction under S. 368, Penal Code, the verdict of the jury should be considered erroneous within the meaning of S. 423, sub-s. (2), Criminal P. C. In this case it was also held that where the accused had no such knowledge of the girl having been kidnapped or abducted he does not render himself liable to punishment under S. 368, Penal Code, and his conviction under that section is not justified in law. In A I R 1939 Bom 457[4] it was held that under S. 297 it is the duty of the Judge to explain to the jury all the essential elements of the offences charged against the accused and to give directions on the law so as to make the law clear in relation to the facts of the case and the evidence adduced. The mere reading of the sections to the jury does not amount to explanation of the law. This provision of the law is imperative, but in order to set aside the verdict of the jury S. 537 (d), Criminal P. C., requires that the misdirection of the charge should be such as to vitiate the trial or the proceedings. This case[4] also laid down that the verdict of the jury should not be lightly interfered with. On the particular facts of that case it was held that the Sessions Judge had summed up the evidence very clearly and fairly on both sides and had left the matters which were within the province of the jury entirely for their consideration. They therefore refused to interfere with the verdict of the jury which had been accepted by the Sessions Judge.

The learned Government Advocate has contended that the verdict of the jury cannot be set aside on the ground that it is perverse. I am unable to accept this contention. It was held in 5 O W N 281[5] that it

1. ('26) 13 A I R 1926 Cal 467 : 87 I C 513 : 26 Cr L J 977 : 30 C W N 215, R. W. Valliant v. N. Eleazer.
2. ('15) 2 AIR 1915 All 390 : 30 I C 647:16 Cr L J 663 : 37 All 624 : 13 A L J 848, Emperor v. Ewaz Ali.
3. ('32) 19 A I R 1932 Oudh 28 : 136 I C 243 : 33 Cr L J 275 : 8 O W N 1325, Emperor v. Zamin.
4. ('39) 26 AIR 1939 Bom 457 : 185 I C 382 : I L R (1939) Bom 648 : 41 Cr L J 176 : 41 Bom L R 965, Emperor v. Jhina Soma.
5. ('28) 15 AIR 1928 Oudh 277 : 112 I C 103 : 29 Cr L J 983 : 3 Luck 494 : 5 O W N 281, Mohammad Hadi Husain v. Emperor.

is not the practice of the High Court to interfere with a jury-verdict if it in any way is a reasonable verdict but where the verdict of the majority in a case is both unreasonable and perverse, the High Court will not have the slightest hesitation in setting it aside. In a case decided by a Bench of this Court recently on 9th April 1941, Jury Ref. No. 1 of 1941,[6] not reported, the verdict of the jury was set aside on a reference made by the Sessions Judge on the ground that it was perverse. I therefore hold that there was a clear misdirection by the Assistant Sessions Judge in this case, that the verdict of the jury on that ground was erroneous and that the misdirection was on material points which has resulted in miscarriage of justice. On these grounds therefore the verdict of the jury must be set aside. It is not necessary to send this case back for a retrial as in my opinion no useful purpose will be served by adopting that course. The evidence produced in the case is wholly insufficient to sustain the convictions of the two accused of the offences with which they were charged. I therefore allow the appeal, set aside the verdict of the jury and the convictions and sentences passed by the learned Assistant Sessions Judge upon the accused and order that the accused shall be released forthwith.

G.N./R.K. *Appeal allowed.*

6. Jury Ref. No. 1 of 1941, Emperor v. Joti Bhushan.

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(28) A. I. R. 1941 Oudh 572

YORKE AND AGARWAL JJ.

B. Banwari Lal — Plaintiff — Appellant

v.

Municipal Board, Lucknow — Defendant — Respondent.

Second Appeal No. 373 of 1937, Decided on 1st May 1941, against order of Dist. Judge, Lucknow, D/- 11th May 1937.

Tort — Action for — Damage—Wrongful act is actionable without damage — Claim for damage caused by wrongful act—Damage must be direct consequence of unlawful act — Cause and effect must not be too remote—Application by plaintiff under S. 178, U. P. Municipalities Act, for permission to build — On Municipal Board's failure to reply plaintiff serving board with notice under S. 180 (3) of Act — Board in reply stating that plaintiff's construction without Board's permission would be at plaintiff's risk and responsibility and would make him liable to prosecution — Plaintiff after complying with S. 180 (3) of Act instead of starting construction as he was entitled to do suspending it and bringing suit for damages on ground that Board's reply to his notice amounted to a wrongful prohibition — Board's reply held mere empty threat within plaintiff's knowledge — Even if aforesaid reply was interference on part of Board it was too remote to serve as cause of action for plaintiff's damage.

A wrongful act is actionable without there being any damage caused, but in a claim for damage caused by the wrongful act the damage caused, must be the direct consequence of the unlawful act. Generally a man is only liable for the natural and probable consequences of his act, and the rule is that cause and effect must not be too remote. [P 574 C 2]

The plaintiff applied to the Municipal Board under S. 178, U. P. Municipalities Act, for permission to build. Since he received no reply, he served a notice on the Board as required by S. 180 (3) of the Act to the effect that if no sanction were received within a fortnight from the date of the notice the Board would be deemed to have sanctioned the construction absolutely and that he would be entitled to proceed therewith. To this the Board replied that if the plaintiff started construction without Board's permission he would be doing so at his own risk and responsibility and would render himself liable to prosecution. The plaintiff after complying with the provisions of S. 180 (3) of the Act was entitled to start the construction but did not do so on account of the alleged prohibition contained in the reply by the Board and instituted a suit for damages for the wrongful act of the Board in prohibiting the construction:

Held that the reply of the Board to the plaintiff's notice under S. 180 (3) of the Act was not a prohibition to start work but was an empty threat which to the knowledge of the plaintiff was empty, and even if it amounted to an interference on the part of the Municipal Board the interference was not such as could lead the plaintiff to do more than consult a lawyer and not such as should have led him to refrain from starting his constructions, and therefore as a cause of damage alleged to have been sustained, if at all a cause, it was much too remote: ('24) 11 A I R 1924 Cal 240, *Rel. on*; (1897) 2 Q B 57 and (1919) 2 K B 316, *Disting.* [P 574 C 2; P 575 C 1]

S. B. Bajpai and M. L. Tirvedi — for Appellant.

Mahammad Ahmad — for Respondent.

Judgment. — This is a second appeal by one Banwari Lal whose suit for damages and compensation was dismissed by the learned Sessions and Civil Judge, Lucknow, whose decree was upheld by the learned District Judge of Lucknow. On 1st October 1935, the plaintiff obtained a 20 years' lease of a plot in the city of Lucknow at a rent of Rs. 14 per mensem for the purposes of starting a saw-mill and a timber shop, and for this purpose he wanted to erect a pucca building on the plot, and he is said to have purchased an engine and machinery. He proceeded to put a boundary wall on three sides of this plot and on 23rd November 1935, he applied to the executive officer of the Municipal Board of Lucknow under Sec. 178, Municipalities Act, for permission to

build, submitting the necessary plans with his application. To this application he received no reply. It was the duty of the board to take action under S. 180, Municipalities Act, and either to refuse sanction or sanction the constructions either absolutely or subject to such directions as are mentioned in (a) and (b) of sub-s. (1) of Sec. 180. Sub-section (3) of the same section provides that :

> Should the board neglect or omit for one month after the receipt of a valid notice under S. 178 to make and deliver to the person who has given such notice an order of the nature specified in sub-s. (1) in respect thereof, such person may by a written communication call the attention of the board to the omission or neglect, and, if such omission or neglect continues for a further period of 15 days, the board shall be deemed to have sanctioned the proposed work absolutely.

It is quite clear from his own letters that the plaintiff-appellant was well aware of the provisions of the law. He, however, did not on the expiry of one month give a further notice as provided by sub-s. (3) of S. 180. It was not until 31st January 1936, that he gave a notice, Ex. 18, mentioning that he ought to have got permission within one month but that more than two months had passed but no sanction had yet been received, further mentioning that he had suffered certain financial losses and further stating that by this letter he gave notice that if the sanction is not received within 15 days, it would be deemed that the board had sanctioned the proposed work absolutely and the work would be started soon after. In answer to this letter the municipal board sent the applicant a notice informing him that he was not entitled to build without permission and that he would be responsible for the consequences if he did so. It is of course obvious that, presuming the original notice and the subsequent notice to be valid, there could be no legal consequences of any kind. The plaintiff was not satisfied with this reply and on 17th February 1936, he sent a further notice to the board again giving them 15 days, and saying that if he got no reply in 15 days, it would be deemed that the board had sanctioned the work absolutely. He seems to have taken the formal notice sent by the board to the effect that he would be responsible for the consequences of his act as an order deterring him from beginning his constructions. The board to this application replied in practically the same terms as to the application of 21st January, but in the reply, Ex. 14, it was added that legal action would be taken. To this the applicant replied to the board that he would not make any construction until the permission was received but that the board would be liable for all his losses and damages which had been and might be sustained by him for intentionally withholding of the sanction. None the less he again wrote on 17th March protesting against the notice of 25th February, which he interpreted as prohibiting him from building. To this letter the executive officer replied the same day informing the applicant that his application would be laid before the board on 19th March and the orders would be communicated to him when received. The letter concluded with the words,

> under the circumstances, I should like you to take note that if you start the building operations without awaiting board's order in the matter, you shall do so at your own risk and responsibility and shall render yourself liable to prosecution.

Apparently the executive officer was of opinion that if the appellant began construction without getting the orders, he would render himself liable to prosecution despite the provisions of S. 180, Municipalities Act. On 23rd March 1936, the plaintiff gave notice of a suit and subsequently filed the present suit on 28th May 1936, having meanwhile on 6th May 1936, received the permission of the board to make the constructions subject to a note that in case the land was acquired by the Improvement Trusts, he would not be entitled to compensation for any buildings which he might erect.

On behalf of the municipal board a number of defences were taken. It was said that the suit was not maintainable, that there was no interference with the plaintiff, that the plaintiff was entitled under the provisions of S. 180 to start his constructions and that in any case the letters of the plaintiff were not addressed to the municipal board. The learned civil Judge dismissed the suit. On issue 5 he held that the notice given to the municipal board was not defective, on issue 4 that the Court had jurisdiction to entertain the suit, and under issue 1 he held that in view of the neglect and omission of the municipal board the sanction for building was to be deemed to have been granted by the board in view of the provisions of sub-s. (3) of S. 180. On issues 2 and 3 he held that the municipal board did not prohibit the plaintiff from erecting the building, and as it did not do so, the plaintiff had no cause of action against the board. The learned District Judge in appeal confirmed the finding of the trial Court that the board never prohibited the plaintiff

from beginning his constructions and hence the plaintiff had no cause of action.

Only one question really arises in this appeal, namely whether the board did or did not interfere with and obstruct the plaintiff, and thereby cause him loss. Learned counsel for the appellant has been unable to quote to us any case which is at all comparable to the present case. His contention is that the municipal board by the remarks contained in the notices and the remark in the letter of the executive officer, to which we have referred above, prohibited him from doing what he was in law entitled to do, and thereby committed a wrongful act which has caused him loss, for which loss he is entitled to compensation. The two Courts below have both held that neither the municipal board nor its executive officer did any wrongful act or prohibited the plaintiff from beginning his constructions. At their worst the remarks contained in these notices and in the letter appear to us to be in the nature of threats of possible legal action. These were threats conveyed to a person whose own statement in his letter shows that he was aware of the law and who had at all time access to lawyers to ascertain his correct legal position. So far as appears on the face of the record, the appellant was fully entitled, after he had made his application, had allowed a month to expire and had then served a proper notice upon the municipal board to proceed after 15 days, to start his constructions. Any threats and such threats as there were in the two notices were of a very feeble nature, he was entitled to disregard.

The question really is whether the uttering of such admittedly empty threats which to the knowledge of the person threatened were empty threats could possibly be actionable. Learned counsel for the plaintiff-appellant has referred us to two English cases reported in (1897) 2 Q B 57[1] and (1919) 2 K B 316[2] but these were cases where the effect of, in the first case, a false statement made to a woman by way of a practical joke and in the second case, a false statement made to a woman with the intention of frightening her, was immediate and in no sense remote. In the first case the woman was rendered very ill. She had a nervous break-down as a result of being told that her husband had sustained a serious accident, and the effect created in the second case was of a similar nature. The other cases quoted from 27 Bom 344[3] and 31 I C 62[4] at p. 67 are completely inapplicable to the present case. Now it may be that a wrongful act is actionable without there being any damage caused, but in the present case the claim of the plaintiff is a claim for damage caused by the wrongful act and in such cases it has to be seen whether the damage caused is the direct consequence of the unlawful act or not. Speaking generally a man is only liable for the natural and probable consequences of his act, and the rule is that cause and effect must not be too remote. In the cases quoted the effect was direct and clearly traceable to the wrongful act. In the present case on the other hand the plaintiff was aware of his legal rights but sought to place upon the municipal board the duty, which was not imputable to it, of acknowledging the plaintiff's right to proceed with his constructions in view of the provisions of sub-s. (3) of S. 180. It is therefore clear that the failure of the plaintiff to proceed with his constructions was not the result of his receiving a prohibition, since he never did receive any prohibition and only received a warning which was, so far as appears, a legitimate warning. The warning only amounted to this that in case he should be found not to have properly complied with the law, he would be responsible for the results of what he might do. The board was not under any duty to acknowledge that it had received a valid application and a valid notice and that the appellant was entitled to proceed with his building, and it was, we should suppose, more proper for it to warn him that whatever he might do, he would do it at his own risk. In fact the true position is that it was not because of the notices received from the municipal board that the appellant did not proceed with his constructions but because he was too thrifty to consult a lawyer and make certain that he would be on sound ground if he proceeded to start his constructions before receiving the formal permission of the municipal board.

The two Courts below have held that there was no prohibition by the municipal board and that the issuing of a warning by the board under what may have been a

1. (1897) 2 Q B 57 : 66 L J Q B 493 : 76 L T 493 : 45 W R 525, Wilkinson v. Downton.
2. (1919) 2 K B 316 : 88 L J K B 1231 : 121 L T 179 : 63 S J 430 : 35 T L R 360, Janvier v. Sweeney.
3. ('03) 27 Bom 344 : 5 Bom L R 405, H. H. The Gaekwar v. Katchar Abal.
4. ('15) 2 AIR 1915 Nag 79 : 31 I C 62 : 11 N L R 132, Municipal Committee, Saugar v. Nilkanth.

mistaken view of the law, could not give the plaintiff a cause of action. We think that if there was any interference on the part of the municipal board, it was not such that it could lead the plaintiff to do more than consult a lawyer and not such as should have led him to refrain from starting his constructions, and therefore as a cause of the damage alleged to have been sustained, if at all a cause, it is much too remote. In this connection we may refer to a case quoted on behalf of the appellant himself: A I R 1924 Cal 240[5]: headnote (d). In our opinion the trial Court rightly dismissed the plaintiff's suit and the learned District Judge rightly dismissed his appeal. There is no force in this second appeal which therefore fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

5. ('24) 11 AIR 1924 Cal 240 : 83 I C 757 : 50 Cal 667, Sundermull v. Ladhuram Kaluram.

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(28) A. I. R. 1941 Oudh 575

GHULAM HASAN J.

Diwan — Complainant — Applicant

v.

Raja Ram and others — Accused — Opposite Party.

Criminal Ref. No. 5 and Criminal Revn. No. 25 of 1941, Decided on 23rd May 1941, made by Sess. Judge, Rae Bareli.

(a) Criminal P. C. (1898), Ss. 258 (1) and 367 — S. 258 (1) is mandatory — Order sheet is no substitute for judgment — Judgment silent as to conviction or acquittal — Mere mention of fact of acquittal or conviction in order sheet amounts to most flagrant disregard of Ss. 258 and 367.

Under S. 258 (1) the provisions of which are mandatory, it is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty he shall record an order of acquittal. The order sheet is no substitute for the judgment. The mere mention of the fact of acquittal or conviction in the order sheet without there being any order of acquittal or conviction in the judgment itself amounts to a most flagrant disregard of the provisions of law contained in Ss. 258 and 367. [P 576 C 2]

(b) Criminal trial — Acquittal — Accused charged with certain offence — Fact of his not being convicted amounts to implied acquittal though there may not be express order to that effect.

The fact that the accused has not been convicted of certain offence although charged therewith may well be regarded as his implied acquittal of that offence although there is no express order to that effect : ('28) 15 A I R 1928 P C 254, *Rel. on.* [P 576 C 2]

Government Advocate — for the Crown.

Jagdish Shankar Pathak — for Applicant.

Siraj Husain — for Opposite Party 1 to 18.

Order. — Both, the criminal reference and the criminal revision arise out of the same facts. They are as follows : Seventeen persons were convicted by a Special Magistrate of the first class under Ss. 323, 147 and 426, Penal Code, and sentenced to a fine of Rs. 10, Rs. 5 and Rs. 5 under the aforesaid sections separately. It appears from the order sheet of the record that one Raja Ram, who was also one of the accused, was acquitted, although there is no mention whatever in the judgment passed by the Special Magistrate. All the seventeen accused appealed, and the learned Additional Sessions Judge of Rae Bareli dismissed their appeal. The learned Additional Sessions Judge noted the fact that in his judgment the Special Magistrate had sentenced 16 accused only but it appears from the order sheet that Bhagwan Bakhsh, one of the accused, had also been convicted. This accused had also appealed and his appeal had also been dismissed. The learned Additional Sessions Judge treated this as a mere irregularity and not an illegality. He noted the fact that there was no order of acquittal about Raja Ram accused but since the order sheet mentioned that he had been acquitted, this also amounted to an irregularity and not an illegality. The learned Judge further expressed the opinion that the Magistrate had convicted the accused under S. 323 and not under S. 325, Penal Code, although the complainant Diwan had received grievous injury. As a revision by Diwan before the learned Sessions Judge for enhancement of the sentence was already pending, he declined to consider that question in appeal. He added however that the Special Magistrate had passed a lenient sentence.

The seventeen accused filed a criminal revision in this Court on 11th February 1941, in which they referred to the fact that a reference had been made by the learned Sessions Judge to this Court on the application of Diwan for enhancement of sentences passed upon the applicants. The learned Sessions Judge made a reference to this Court by his order dated 22nd January 1941 which will now be considered along with revision application. Briefly stated, the facts are that Diwan Pasi held a patta in respect of certain plots in village Bahadurpur from the Kapurthala estate, which was the original proprietor of this village, which was subsequently sold to Raja Ram. Diwan had a grove on these plots, it is stated, for a long time, and Raja Ram on acquiring

the village attempted to dispossess him from the plots and challenged the genuineness of the patta granted to him by the Kapurthala estate. The prosecution case was that Diwan was working in his field on 15th November 1939, at about 10 or 11 A.M., when he was informed by his son, Sita Ram, that Padum Prasad and other applicants were cutting his trees. He hurried to the spot and found that the applicants were armed with lathis and some of them were cutting the trees. He remonstrated with the applicants whereupon Padum Prasad is alleged to have said that he was doing so under the orders of his master Raja Ram. Diwan was beaten by the applicants, along with certain cosharers of his, who had arrived on the spot. Diwan received six injuries of which one was grievous and it was a fracture of the left ulna. The injuries received by the other members of his party were simple. Diwan made a report at police station kotwali on 15th November 1939. On the same day Sital, one of the applicants, made a report against Diwan and certain other persons under S. 147, I. P. C. The police investigated both the complaints but chalaned the applicants on the complaint of Diwan and did not proceed with the complaint of the opposite party. Although Diwan had received a grievous hurt the Special Magistrate convicted the applicants under S. 323 and not under S. 325, I. P. C. He stated in the beginning of his judgment that the applicants had been sent up for action under Ss. 325, 147 and 526, I. P. C. The Special Magistrate committed the further irregularity of recording no order of conviction or acquittal in respect of Bhagwan Bakhsh and Raja Ram.

The learned Sessions Judge in his order of reference points out all these irregularities and further says that Raja Ram admittedly, according to the prosecution case, was not present at the time of the marpit and he could not be directly charged either under S. 323 or S. 147 or S. 426, I. P. C., but that upon the evidence produced in the case he should have been charged with the abetment of the offences of mischief and marpit. He also expressed the opinion that it was adequately proved that the offence of grievous hurt had been committed in the prosecution of the common object of an unlawful assembly and recommended to this Court that either the applicants should be convicted under Ss. 325 and 149, I. P. C., or a retrial for these offences should be ordered. In making a final recommendation to this Court he, however, recommended a retrial of the accused Raja Ram for an offence of abetting and instigating hurt and mischief and a retrial of the remaining accused for the offence of being members of an unlawful assembly in prosecution of the common object of which grievous hurt was caused to Diwan Pasi under Ss. 325 and 149, Penal Code. He added that the retrial should include the offence under S. 426, Penal Code, as well. The special Magistrate in his explanation states that he forgot to observe in his judgment that Raja Ram was acquitted although the order-sheet of even date made it clear. He, however, admitted the error with regret.

I have heard arguments at some length in these cases, both on behalf of the applicants and the Crown. I have also heard counsel for Diwan complainant. In my opinion there is no doubt whatever from a perusal of the record and the judgment of the special Magistrate that the case has been completely mishandled. Under S. 258 (1), Criminal P. C., it is imperative that if in any case in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal. The provisions of this section are mandatory. It appears from the judgment of the special Magistrate that they have been honoured more in breach than in observance. There is absolutely no order in his judgment either about the conviction or the acquittal of Raja Ram. The order-sheet to which the special Magistrate refers is no substitute for the judgment. According to S. 367 (2), Criminal P. C., every judgment shall specify the offence (if any) of which and the section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. Under cl. (4) if it be a judgment of acquittal it shall state the offence of which the accused is acquitted and direct that he be set at liberty. I regret to note that the judgment of the special Magistrate discloses a flagrant disregard of the provisions of law contained in Ss. 258 and 367, Criminal P. C. Similar observations apply to the case of Bhagwan Bakhsh about whom there is no order of conviction or acquittal in the judgment itself but there is a reference in the order sheet.

The fact that the applicants have not been convicted under Ss. 325/149, Penal Code, although charged may well be regarded as their implied acquittal of that offence although there is no express order to that

effect as held in 55 I A 390[1] by their Lordships of the Privy Council. Having regard to the fact that the case has been tried in a most perfunctory and unsatisfactory fashion and the record discloses a complete lack of appreciation of the essentials of the case, I consider it expedient in the interests of justice that this case should be retried by a stipendiary Magistrate. This will enable the applicants to put up a proper defence and to lead evidence in support thereof. Learned counsel for the applicants has taken me through the record and has argued upon the merits of the case that the prosecution evidence must fail on its intrinsic weakness. He has also complained that his clients were not able to produce certain evidence which was essential to their case and they have been materially prejudiced by the action of the special Magistrate. It is obviously undesirable for me to express any opinion on the merits of the case. I refrain from doing so. The Magistrate to whom this case is transferred will frame proper charges against the accused in the light of the prosecution case and will give full opportunity to the accused to put up their defence. I, therefore, accept the reference, allow the revision, quash the convictions and sentences of the 17 applicants and order their retrial. Raja Ram shall be tried for the offence of abetment and mischief. The record will be forwarded to the District Magistrate for disposal of the case by a stipendiary Magistrate.

G.N./R.K. *Case remanded.*

1. ('28) 15 AIR 1928 P C 254 : 111 I C 332 : 29 Cr L J 828 : 50 All 722 : 55 I A 390 (PC), Kishan Singh v. Emperor.

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(28) A. I. R. 1941 Oudh 577

AGARWAL J.

Pahlad Upadhyay and another —
Judgment-debtors—Appellants

v.

B. Udai Bhan Pratap Singh, Decree-holder and another—Judgment-debtor —*Respondents.*

Execution of Decree Appeal No. 27 of 1940, Decided on 18th July 1941, against order of Dist. Judge, Fyzabad, D/- 6th April 1940.

U. P. Tenancy Act (17 of 1939), S. 296—Rent decree—Execution of—Objection by judgment-debtor under S. 151, Oudh Rent Act of 1886 that decree-holder could not proceed against his immovable property without first exhausting his moveable property, allowed — Pending appeal, U. P. Tenancy Act 17 of 1939 coming into force and repealing S. 151 of Act of 1886 — Appellate Court held justified in giving effect to S. 296 of Act 17 of 1939.

1941 O/73 & 74

An appellate Court can take cognizance of a change of circumstances or the law having a retrospective effect made during the pendency of the appeal. Consequently, where in proceedings in execution of a rent decree an objection by the judgment-debtor under S. 151, Oudh Rent Act of 1886, was allowed by the executing Court and during the pendency of the appeal by the decree-holder, the U. P. Tenancy Act 17 of 1939 came into force and repealed S. 151 of the Act of 1886, the appellate Court is justified in giving effect to S. 296 of Act 17 of 1939 by overruling the judgment-debtor's objection and allowing execution to proceed against the judgment-debtor's immovable property : ('41) 28 A I R 1941 Oudh 81, *Disting.*

[P 578 C 1]

Akhtar Husain—for Appellants.

Judgment. — This is a second appeal in an execution matter. The respondent Babu Udai Bhan Pratap Singh obtained a decree for arrears of rent against the present appellants and respondent 2. He applied for execution of the decree by attachment of some moveable property of the judgment-debtors and a portion of the decretal amount was realized. It does not appear clearly whether the amount was paid by the judgment-debtors or the moveable property was sold. He again applied for the attachment of some immovable property of the judgment-debtors. They preferred an objection that execution proceedings could not proceed against their immovable property as no efforts had previously been made to realize the full decretal amount by taking action against their moveables. This objection found favour with the learned Assistant Collector on 10th October 1939. The decree-holder preferred an appeal to the District Judge of Fyzabad some time in the year 1939. The appeal was decided on 6th April 1940 and the new Tenancy Act had come into force on 1st January 1940. Under S. 151 of the old Oudh Rent Act which has been repealed by the new Tenancy Act, a decree-holder could not proceed against the immovable property of his judgment-debtor, other than for attachment of that property, unless satisfaction of the decree could not be obtained against his moveable property. Under S. 296 of the new Tenancy Act a decree which was outstanding at the commencement of the Act is to be executed in accordance with the provisions of the new Act. The learned District Judge held that under the new Tenancy Act there was no limitation on the power of the decree-holder to execute his decree by proceeding against the immovable property of the judgment-debtor without first exhausting his moveable property and therefore he could proceed against the immovable property.

It has been argued by the learned counsel for the appellants that the old Oudh Rent Act was in force when the appeal was filed and so the learned District Judge was wrong in applying the provisions of the new Tenancy Act. The point for decision before the learned District Judge was whether the decree-holder was entitled to execute his decree by sale of the immovable property and whether he could do so under the new Tenancy Act. An appellate Court can take cognizance of a change of circumstances or the law having a retrospective effect made during the pendency of the appeal. If the learned District Judge had refused the decree-holder's application, he could very well have approached the Court of first instance and put in an application for execution praying that the immovable property of the judgment-debtor be sold. The learned counsel for the appellants has relied on the case in A I R 1941 Oudh 81.[1] In that case it was held that the word "suit" in S. 296 does not include an appeal. The point before me was not decided in that case. I think the learned Judge was right in giving effect to S. 296 of the new Tenancy Act and allowing the decree-holder to proceed against the immovable property of the judgment-debtors. The appeal is accordingly dismissed. I make no order as to costs as the respondents are absent.

G.N./R.K. *Appeal dismissed.*

1. ('41) 28 A I R 1941 Oudh 81 : 191 I C 762 : 16 Luck 529 : 1940 O W N 1123, Sheo Rakhan Lal v. Sundar Lal.

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* (28) A. I. R. 1941 Oudh 578

BENNETT AND GHULAM HASAN JJ.

Sheo Saran — Plaintiff — Appellant

v.

Mt. Sukhrani and others — Defendants — Respondents.

Misc. Appeal No. 66 of 1939, Decided on 25th July 1941, against order of Civil Judge, Partabgarh, D/- 12th May 1939.

* Provincial Small Cause Courts Act (1887), Sch. 2, Art. 41—Plaintiff cosharer paying share of rent of other cosharers to superior landlord on account of his joint liability with them—Suit by plaintiff against other cosharers to recover amount paid falls under Art. 41 — Fact that plaintiff had already paid his share of rent before he was obliged to pay share of rent due from other cosharers makes no difference.

A suit by the plaintiff cosharer against other cosharers to recover from them money paid by him in respect of their share of rent, due to the superior proprietor, on account of his joint liability with them being a suit for contribution and not for reimbursement falls under Art. 41. The fact that the plaintiff had already paid his share of the rent before he was obliged to pay the share of the rent due from his cosharers makes no difference: ('15) 2 AIR 1915 Cal 278 ; ('34) 21 AIR 1934 Cal 626 and ('22) 9 AIR 1922 Pat 337, *Expl.* [P 579 C 1, 2]

S. N. Srivastava — for Appellant.

P. N. Chaudhari — for Respondents 1 to 3.

Judgment. — This is a miscellaneous appeal against the judgment and decree dated 12th May 1939, passed by the learned Civil Judge of Partabgarh in an appeal against the judgment and decree dated 2nd August 1938, passed by the learned Additional Munsif of Partabgarh. A suit was brought by a cosharer against other cosharers to recover from them money paid by the plaintiff in respect of their share of the rent due to the superior proprietor for the years 1340 and 1341F. The suit was tried by the Munsif on the regular side. One of the pleas taken by the defendants was that the suit was triable by the Small Cause Court and therefore should not be tried by the Munsif on the regular side. The Munsif accepted this plea and found on issue 1 that the suit was triable by the Small Cause Court, but relying on a ruling of this Court in 1937 O W N 263[1] he held that as the suit had been tried on the regular side the plaint should not be returned for presentation to the Small Cause Court.

The Civil Judge in appeal, accepting the finding of the Munsif that the suit was triable by the Small Cause Court, held that the ruling cited was no authority for the view taken by the Munsif that it was unnecessary in the circumstances to return the plaint for presentation to the proper Court. Finding that it should have been so returned the Civil Judge set aside the judgment and decree of the Munsif and ordered the plaint to be returned for presentation in the proper Court. In the present appeal it is contended that Art. 41 of Sch. 2, Provincial Small Cause Courts Act, bars the cognizability of this suit by a Court of Small Causes and therefore the suit was rightly tried by the Munsif on the regular side. It is also contended that even if the suit was triable by the Court of Small Causes, the plaint should not be returned for presentation to the proper Court after the suit had been fully tried on the regular side. We have heard arguments mainly on the first point. Article 41 provides that a suit for contribution by a sharer in joint property in respect of a payment

1. ('37) 24 AIR 1937 Oudh 244 : 167 I C 557 : 1937 O W N 263 : 13 Luck 204, Ram Charan v. Kedar Nath.

made by him of money due from a cosharer shall be excepted from the cognizance of a Court of Small Causes, but the argument which found favour with the Munsif was that the suit was a suit for reimbursement and not a suit for contribution. In support of this view, the Munsif referred to two rulings of the Calcutta High Court, namely 24 I C 259[2] and A I R 1934 Cal 626.[3] In the first case it was said that:

'Contribution' signifies payment by each of the parties interested of his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares. Therefore, where the plaintiffs deny that they were to any extent liable to satisfy the judgment-debt which they satisfied and which was recoverable from the defendants alone, it is not a case of satisfaction of a joint liability.

In the second case cited 'contribution' was defined in the same way. In this case a rent decree was passed against brothers and the entire amount was recovered from one of them by execution. He sued the other brothers for the recovery of the amount so paid on the ground that he was not liable to pay any amount, but that only the others were liable, there having been a partition between them as a result of which the other brothers had become liable for the entire share and he had ceased to have any interest in the land. It was held that the suit was not one for contribution.

In the present case it appears that all the cosharers were jointly liable to pay the rent to the superior proprietor. It was found that the plaintiff had previously paid the amount which was due from him in respect only of his share and that the amount which was subsequently recovered from him by suit was due only from the other cosharers on a consideration of their separate interests in the land. The Munsif was therefore of opinion that because the plaintiff was suing in respect only of that portion of the rent for which he was not personally liable on a consideration of the separate interests of the cosharers, the suit was one not for contribution but for reimbursement. In our opinion, this view is not justified. In the first place it is, we consider, immaterial that the separate share of the plaintiff had been paid by him to the superior proprietor before he was sued by the latter for the balance. Secondly it is not the case that the plaintiff was no longer liable to the superior proprietor after payment of his individual share. The liability was a joint liability and he remained liable for the balance even after payment of his own share. Consequently the rulings cited are no authority for the view that a suit of this kind is a suit for reimbursement and not a suit for contribution. Other cases also to which we were referred do not support such a view. For instance we were referred to 64 I C 226[4] where payment had been made by a certain person to avoid the sale of certain property in which he himself had an interest and who thereafter sued to recover the amount under S. 69, Contract Act. It was held that such a claim did not fall within the scope of Art. 41 and was cognizable by a Small Cause Court. In such a case there is no joint liability of the person making the payment with the persons whom he sues to recover the amount paid on their behalf and therefore the position of a plaintiff in such cases is different from the position of a plaintiff who sues to recover from other cosharers the amount which he was obliged to pay because he was jointly liable with them.

The purpose of the exclusion of suits for contribution by a sharer in joint property in respect of a payment made by him of money due from other cosharers from the jurisdiction of a Small Cause Court is presumably that suits which involve questions of shares and their extent are unsuitable for trial by such a Court. The judgment of the Munsif in the present case shows the kind of questions which arise in such cases. For these reasons, we are of opinion that the Munsif was not justified in holding that the suit was triable by the Small Cause Court. We find that it was rightly tried by the Munsif on the regular side. It is unnecessary to consider the further question whether the plaint should or should not have been returned for presentation to the proper Court after full trial on the regular side. We accordingly allow this appeal, set aside the order passed by the Civil Judge and restore the Munsif's decree. The plaintiff appellant will recover his costs in this Court and in the Court of the Civil Judge.

G.N./R.K. *Appeal allowed.*

2. ('15) 2 AIR 1915 Cal 278 : 24 I C 259 : 18 C W N 1308 : 20 C L J 196, Satya Bhushan v. Krishnakali.

3. ('34) 21 AIR 1934 Cal 626 : 151 I C 626 : 38 C W N 532, Radhasyam Dutta v. Ananga Munjari Dassi.

4. ('22) 9 AIR 1922 Pat 337 : 64 I C 226 : 3 P L T 122, Suradhani Debi v. Hari Charan Mahton.

(28) A. I. R. 1941 Oudh 580

GHULAM HASAN AND MADELEY JJ.

Rameshwar — Appellant

v.

Ajodhia Prasad and others — Respondents.

First Appeal No. 134 of 1938, Decided on 4th August 1941, against order of Special Judge, 1st Grade, Unao, D/- 3rd November 1938.

U. P. Encumbered Estates Act (25 of 1934), Ss. 45 and 11 — Appeal from order rejecting objections under S. 11—All creditors originally impleaded as parties to application under Act are necessary parties to appeal—Some creditors not opposing objection is no ground for not impleading them as parties to appeal—Limitation for appeal against creditors not joined as respondents expiring—They cannot be made parties to appeal not being persons interested within Civil P. C., O. 41, R. 20.

All the creditors who were impleaded as parties to the application under the Act are necessary parties to an appeal by the objector against an adverse order passed against him under Sec. 11. The fact that some of the creditors did not oppose the objections is no reason for not impleading them as respondents to the appeal. Where the period of limitation for appeal against the creditors not made parties to the appeal has expired they cannot be impleaded as respondents and the appeal must fail, because they must be deemed to have also acquired a valuable right in their favour, and also because they cannot be said to be persons interested in the result of the appeal within the meaning of O. 41, R. 20, Civil P. C. : ('27) 14 AIR 1927 P C 252; ('32) 19 A I R 1932 Oudh 288 and 13 Luck 659, *Rel. on.* [P 581 C 2; P 582 C 1, 2]

P. N. Chaudhri — for Appellant.

Sri Ram and R. N. Shukla — for Respondents 1/1 to 1/3, and 3, respectively.

Judgment. — This is a first appeal under S. 45, U.P. Encumbered Estates Act, against an order of the Special Judge, first grade, Unao, dated 3rd November 1938, making a declaration that certain property in possession of the objector, if sold by the Collector should be sold subject to the right of maintenance in favour of the objector. The facts leading to the appeal are as follows : One Ram Lal has three sons, Rameshwar, Shambhu Dayal and Mahadeo Prasad. It is not disputed that Shambhu Dayal owned eight annas and eight pies in village Ratosia Namdarpur, Pergana Purwa, district Unao. On 3rd April 1923, Shambhu Dayal made a mortgage of four annas four pies out of the aforesaid share in village Ratosia Namdarpur in favour of Brij Behari Lal for Rs. 4500. Shambhu Dayal died in the same year leaving a widow Mt. Ganga Dei. Upon his death it appears that disputes arose between Mt. Ganga Dei on the one hand and her father-in-law Ram Lal on the other hand in the mutation Court. These disputes were settled by a compromise dated 1st February 1924, (*vide* EX. H-1) under which it was agreed that out of eight annas eight pies share in dispute the name of Mt. Ganga Dei shall be mutated in the revenue records in respect of the four annas four pies share as a Hindu widow by way of maintenance for her lifetime free from debts. The collection of the entire eight annas eight pies share was to be done by Ram Lal, who was directed by the compromise to pay the profits of the four annas four pies share at the end of Jeth to Mt. Ganga Dei during her lifetime. In the event of default of payment Ganga Dei was given the right to realise those profits through Court. The compromise also shows that other properties were also in dispute in the mutation case and Mt. Ganga Dei relinquished her rights not only to four annas four pies share in village Ratosia Namdarpur but also in other villages in favour of Ram Lal. The compromise was given effect to by entries made in the khewat of four annas four pies share in village Ratosia Namdarpur in Mt. Ganga Dei's favour.

Brij Behari Lal obtained a preliminary decree for sale on foot of the mortgage of 1923 on 26th November 1931, and this was made final on 12th November 1932. On 6th February 1933, Brij Behari Lal applied for execution of the decree against Ram Lal, Rameshwar, Mahadeo Prasad and Mt. Ganga Dei. Mt. Ganga Dei filed objections to the effect that her share of four annas four pies was exempt from the mortgage of 1923 and was not liable to be proceeded against (EX. H-7). On 12th December 1935, the Court accepted the objections and ordered that the objector's share shall be released and only the remaining four annas four pies share standing in the name of Ram Lal shall be liable for the realization of the decretal amount. On 28th February 1934, Ram Lal and his two sons made an application under S. 4, U. P. Encumbered Estates Act. In this application the applicants showed ten creditors including Brij Behari Lal, creditor 7 and Mt. Ganga Dei, creditor 8. The applicants did not mention in the detail of the property the four annas four pies share which stood in the name of Mt. Ganga Dei. Accordingly on 15th February 1938, Brij Behari Lal filed an objection pointing out the omission and stated that the applicants are its owners and the same should be declared to be the property of the applicants. Accordingly this property was shown in the

notice published under S. 11, U. P. Encumbered Estates Act, as the property of the applicants. Thereupon, Mt. Ganga Dei preferred the objection, out of which the present appeal arises, to the effect that the applicants were not the owners of the aforesaid four annas four pies share but, on the other hand, she was the owner in her right of maintenance as a Hindu widow and her name stood in the khewat as owner.

The learned Special Judge is not quite correct in stating that her objection was to the effect that her right of maintenance in the share in dispute be safeguarded. Be that as it may, the learned Special Judge held, though not in express terms, that Ram Lal was the owner of the aforesaid share claimed by Mt. Ganga Dei, but that the latter had a right of maintenance over it and a declaration must be made with regard to that right. The operative portion of his order is :

I, therefore, declare that in case the Collector proposes to sell the share in possession of the objector he will sell it subject to the right of maintenance of the objector. Her possession cannot be disturbed during her life time.

This order was passed on 3rd November 1938. Rameshwar filed the present appeal on 9th December 1938, against the aforesaid order in which he impleaded Brij Behari Lal, Gopi Shah, one of the creditors, and Mt. Ganga Dei. Brij Behari Lal died during the pendency of the appeal and his sons were substituted as his legal representatives on the record. The memorandum of appeal questions the order of the learned Special Judge and urges that Mt. Ganga Dei was the owner as a Hindu widow for life and that the applicants were not the owners as it could not be said who would be the reversioners on the death of the lady when the succession would open. Paragraph 9 of the memorandum of appeal is to the following effect :

That this appeal has been filed by the appellant under O. 41, R. 4, Civil P. C., for the benefit of the applicants and the objector Mt. Ganga Dei has also been made opposite party, the other creditors who did not join in alleging this property to be the property of the applicants have not been impleaded.

It has been argued before us by learned counsel on behalf of the appellant that the learned Special Judge was wrong in construing the compromise as giving Mt. Ganga Dei merely a right to the usufruct in four annas four pies share and that the learned Judge should have held that it gave absolute right to the four annas four pies share to Ram Lal and life interest as a Hindu widow to Mt. Ganga Dei in the remaining four annas four pies share. If this construction is correct, then the declaration made by the Special Judge is wrong as the property being owned by Mt. Ganga Dei as a Hindu widow for life in lieu of her maintenance cannot be sold in satisfaction of the debts of the applicants. It appears, however, that Mt. Ganga Dei, against whom an adverse order was passed by the learned Special Judge, has not chosen to appeal and the appellant, who is one of the possible reversioners after the death of the lady, states in the memorandum of appeal that the appeal has been filed for her benefit as well. Mt. Ganga Dei is represented by a counsel, who says that he has no objection to the appeal being allowed. It has also been urged on behalf of the appellant that the reversioners' rights are prejudicially affected by the order under appeal inasmuch as if it is allowed to stand the property will be sold in satisfaction of applicants' debts and would not be available to them in case they succeeded as reversioners on the death of Mt. Ganga Dei. We do not consider it necessary to go into the question whether the appellant has any *locus standi* to maintain the appeal on the ground that Mt. Ganga Dei has acquiesced in the decision passed against her and has not chosen to file an appeal or joined the appellant in this appeal, nor is it necessary to determine whether O. 41, R. 4, Civil P. C. applies to the case.

In our opinion, there is a fatal objection to the maintainability of the appeal on the ground that all the creditors, who were originally impleaded as parties to the application, have not been made respondents to this appeal. The only reason given by the appellant in para. 9 of the memorandum of appeal is that "the other creditors who did not join in alleging the property to be the property of the applicants have not been impleaded." This, however, is no ground for the omission to implead them as respondents in the appeal. If the contention raised on behalf of the appellant, that the property in dispute should not be sold as being the property of the applicants, is accepted and the appeal is allowed the result would be that this property would not be shown as liable to attachment, sale or mortgage in satisfaction of the debts of the applicants when the decree is sent to the Collector under S. 19, Encumbered Estates Act. On the other hand, as seven out of the ten creditors originally impleaded in the

application have not been joined as respondents in the present appeal, the decision of this Court in appeal will not be binding upon the creditors who have been left out. The result will be obviously absurd inasmuch as the Special Judge will have to make two conflicting orders, namely one in favour of the creditors who have not been impleaded in the appeal to the effect that the property should be sold to satisfy the applicants' debts and another order against the other creditors so joined to the effect that the property cannot be sold. Such a state of things neither accords with reason nor is contemplated by the provisions of the U. P. Encumbered Estates Act. Confronted with this dfficulty, learned counsel on behalf of the appellant has suggested that this Court should add those creditors who have been left out as respondents in the appeal under the provisions of O. 41, R. 20, Civil P. C. We regret we are unable to accede to this request. There is no doubt whatever that the right of appeal against the seven creditors who have not been impleaded as respondents to the present appeal has become time-barred and they have acquired a valuable right in their favour which they would be deprived of if they were now impleaded as respondents in order to make the decision binding upon them. Further, we are of opinion that the seven creditors who have not been impleaded cannot be said to be interested in the result of the appeal within the meaning of O. 41, R. 20, Civil P. C. We may refer in this connexion to a decision of their Lordships of the Privy Council in 55 I A 7,[1] where it was held that the defendant who had been exonerated in the lower Court and no appeal had been filed against him within the period of limitation, was not interested in the result of the appeal filed by the plaintiff against other defendants.

This decision was applied in a partition case in 9 O W N 687,[2] where it was held that where a person had not been impleaded in an appeal and the right of appeal against him had become barred by limitation, in an appeal against other persons in which the person omitted is also a necessary party, the Court cannot make such other person a respondent in the appeal under O. 41, R. 20, Civil P. C. A similar point arose in an insolvency case decided by a Bench of this Court in 13 Luck 659.[3] There it was held that where in an appeal by the receiver of the insolvent, against the dismissal of his application under S. 53, Provincial Insolvency Act, application is made to implead the transferee who is a necessary party to the appeal, long after the expiry of the limitation for the appeal, he cannot be impleaded as a respondent under O. 41, R. 20, Civil P. C., and where he is not impleaded the appeal cannot proceed against the other respondents.

We hold, therefore, that we cannot allow the request of the appellant's counsel to implead the seven creditors as respondents to the appeal under the provisions of O. 41, R. 20, Civil P. C. We further hold that the appeal cannot satisfactorily and effectively proceed in the absence of the creditors who ought to have been made respondents to this appeal. Without deciding therefore the question whether the compromise conferred upon Mt. Ganga Dei the rights of a Hindu widow for life or whether she was granted merely a right of maintenance out of the usufruct of the property without any interest in the corpus of the property, we reluctantly come to the conclusion that this appeal must fail. The appellant must thank himself for the consequences brought about by his negligence to implead the necessary respondents in the appeal. The cross-objections were not pressed and are dismissed without costs. The appeal fails and is dismissed with costs.

G.N./R.K. *Appeal dismissed.*

1. ('27) 14 A I R 1927 P C 252:107 I C 237:6 Rang 29: 55 I A 7 (PC), Chokalingam v. Seethai Ache.
2. ('32) 19 A I R 1932 Oudh 288 : 140 I C 483 : 8 Luck 115: 9 O W N 687, Munir Uddin v. Mt. Raisul-Nisa.
3. ('37) 13 Luck 659 : 171 I C 896 : 1937 O W N 1179, Hari Shankar v. Mendi Lal.

(28) A. I. R. 1941 Oudh 582

BENNETT AND MADELEY JJ.

Thakur Shambhu Singh and others — Objectors — Appellants

v.

Thakur Jagdish Bakhsh Singh and others — Respondents.

First Appeal No. 22 of 1939, Decided on 8th August 1941, against decree of Special Judge, First Grade, Unao, D/- 17th January 1939.

Transfer of Property Act (1882), S. 58 (c) — Proviso in S. 58 (c)—Effect—Transaction whether mortgage by conditional sale or out and out sale — Provision for reconveyance is not conclusive—Test indicated — Transaction held mortgage by conditional sale and not out and out sale.

The effect of the proviso to S. 58 (c) is only that a transaction shall not be deemed to be a mortgage unless the condition mentioned in S. 58 (c) is

embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. The provision for reconveyance is not conclusive on the point. For determining whether a transaction is an out and out sale or a mortgage by conditional sale, the Court should examine the terms of the document in the light of the surrounding circumstances and ascertain the true intention of the parties. The period during which the property may be repurchased and the adequacy of consideration are some of the tests. If the period of time given to the vendor during which he can repurchase is a short one, it does suggest that it is an out and out sale with a right to re-purchase, but where a long period of time is given to the vendor to repurchase, it does suggest that there is no out and out sale at all, but merely a transfer of the property as a security : ('37) 24 A I R 1937 All 724 and ('39) 26 A I R 1939 All 713, *Rel. on.*

[P 584 C 1, 2]

The best general test as to the nature of the transaction is the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such repurchase : if there is no such power, there is no mortgage: also if the amount agreed upon as the price of re-purchase was the same as the consideration for the original sale the deed is a mortgage by conditional sale and not a sale with condition of re-purchase.

[P 585 C 1, 2]

H. K. Ghose and Jagdish Chandra —

for Appellants.

Judgment. — This is an appeal under S. 45 (1), U. P. Encumbered Estates Act, against the order passed by a Special Judge of the first grade under that Act on 17th January 1939, holding and declaring that a certain transaction was not a sale but a mortgage by conditional sale. The transaction in question was entered into on 15th July 1933, by Thakur Jagdish Bakhsh Singh acting on his own behalf and as guardian of one Rabindra Bahadur Singh minor, his brother, on the one side, and Thakur Shambhu Singh, Thakur Jageshwar Singh and Thakur Raghunath Singh on the other. The deed recites that the executant was in possession as proprietor on his own behalf and as guardian of his minor brother of a village called Gadaria Khera. This village together with other property had been mortgaged without possession for Rs. 46,000. Thakur Jagdish Bakhsh Singh had made a conditional sale of the village in the previous April for Rs. 10,000, leaving that sum as dehanid for redeeming the mortgage, but the transferee had not paid off the mortgage and had subsequently executed a deed of relinquishment in favour of Thakur Jagdish Bakhsh Singh and his brother. Thakur Jagdish Bakhsh Singh found it necessary to pay the money due under the mortgage deed, the debt being an ancestral debt incurred for the legal necessity of a joint Hindu family. Consequently, Thakur Jagdish Bakhsh Singh effected this conditional sale and sold the whole property of himself and his brother in this village of Gadaria Khera for Rs. 10,000 in favour of Shambhu Singh, Jageshwar Singh and Raghunath Singh, leaving the entire consideration money dehanid towards the amount due under the simple mortgage for Rs. 46,000. He had put the vendees in proprietary possession and occupation of the property sold and they had acquired all his proprietary rights and powers therein. Neither he nor his heirs retained any right or claim of any sort in respect of this property. He undertook to have mutation effected in the names of the vendees. Towards the end of the deed, it was added that it had also been agreed upon between the executant and the vendees that after the expiry of nine years, that is from the beginning of the tenth year up to its end, if he paid the entire consideration money to the vendees the sale deed would become null and void: otherwise it would take absolute effect as a sale deed. After the details of the property had been appended, it was added that mutation of names would not be effected in the names of the transferees as vendees unless they paid the consideration money to Gajadhar Prasad, the mortgagee.

The transferees applied for mutation on the basis of this deed as vendees and mutation was recommended accordingly by the patwari. The application was not contested but the Naib Tahsildar ordered mutation to be made in the names of the transferees as mortgagees and entered the names of the transferors as mortgagors. This order was not challenged by the transferees. Thakur Jagdish Bakhsh Singh showed the property as his proprietary property in proceedings by him under the Encumbered Estates Act, and it was then for the first time that Thakur Shambhu Singh claimed that the deed of 15th July 1933 was a sale deed and not a mortgage deed. This claim was contested by Thakur Jagdish Bakhsh Singh and the Special Judge then framed issues these being :

1. What is the market value of the property in dispute ? 2. Is the transfer in question a mortgage by conditional sale or a sale with condition of repurchase ?

Some evidence was produced on issue 1, but the Special Judge came to no finding on that issue and merely held that the deed evidenced a mortgage by conditional sale. He pointed out that the delivery of

possession to the transferees was conditional on their paying the entire consideration to the mortgagee Gajadhar Prasad and that the sole necessity for executing the document was the payment of the earlier transaction. He was of opinion that the amendment made in S. 58, T. P. Act in 1929 left no room for doubt that the transaction was a mortgage by conditional sale, the reference being to the addition of the proviso to the definition of mortgage by conditional sale. Finally, the Special Judge referred to Mukerji's Commentary on the Law of Transfer of Property and the opinion expressed therein that where the condition of re-purchase is included in the deed the transaction should invariably be held to be a mortgage. Thakur Shambhu Singh and the other transferees have appealed against this decision. The respondents are neither present in person nor represented. Learned counsel for the appellants has referred first of all to certain pronouncements of their Lordships of the Privy Council in 12 ALL 387[1] and 38 ALL 570,[2] but in both these cases the deeds under consideration by their Lordships were prior to the enactment of the Transfer of Property Act, being of the year 1835 in the first case and of the year 1852 in the other. Consequently, they are not applicable to the present case. The definition of mortgage by conditional sale in cl. (c) of S. 58, T. P. Act, reads as follows :

> Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that, on such payment being made, the sale shall become void, or on condition that on such payment being made, the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale : Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale.

The Special Judge was of opinion that the addition of the proviso left no room for doubt that the present transaction was a mortgage by conditional sale. In terms the proviso clearly does not have this effect. Its effect is only that a transaction of this kind shall not be deemed to be a mortgage unless the condition is embodied in the document. It does not necessarily follow that if the condition is embodied in the document the transaction shall be deemed to be a mortgage. It is true that in para. 125 of his Commentary on the Law of Transfer of Property, Mukerji expressed the opinion that when there is a sale, and there is a condition attached at the time of the execution of the sale deed that, on a refund of the price, the property would be reconveyed, the transaction ought to and must come under the definition of mortgage by conditional sale, but that view has not been invariably adopted. In A I R 1937 ALL 724[3] it was held by a single Judge of the Allahabad High Court that the provision for reconveyance, though made at the time of the execution of the deed, is not conclusive on the point. For determining whether a transaction is an out and out sale or a mortgage by conditional sale, the Court has to examine the terms of the document in the light of the surrounding circumstances and to ascertain what was the true intention of the parties. It was also said that the period during which the property may be repurchased and the adequacy of consideration are some of the tests. If the Court comes to the conclusion that the parties intended an out and out sale, then the document cannot be construed as a mortgage by conditional sale. This decision was affirmed by a Bench of the Allahabad High Court in A I R 1939 ALL 713.[4] It was expressly held by the Bench that the amendment in S. 58, T. P. Act, that is the addition of the proviso, does not mean that if a transaction is embodied in one document it must of necessity be regarded as a mortgage by conditional sale and not an out and out sale. There is, however, one distinguishing feature of some importance between the Allahabad case and the case now under consideration. We have referred to the period during which the property might be re-purchased as one of the tests laid down in that case. In that case however the period for re-purchase was one year only and with regard to this it was said :

> If the period of time given to the vendor during which he can re-purchase is a short one, it does suggest that it is an out and out sale with a right to re-purchase, but on the other hand where a long period of time is given to the vendor to re-purchase it does suggest that there is no out and out sale at all, but merely a transfer of the property as a security.

In the case under consideration the transferor is allowed to repurchase at any time during the tenth year, while in A I R 1939

1. ('90) 12 All 387 : 17 I A 98 : 5 Sar 557 (PC), Bhagwan Sahai v. Bhagwan Din.
2. ('16) 3 A I R 1916 P C 49 : 36 I C 38 : 38 All 570 : 43 I A 284 (PC), Jhanda Singh v. Wahid-ud-din.
3. ('37) 24 A I R 1937 All 724 : 171 I C 802 : 1937 A L J 849, Bishan Lal v. Banwari Lal.
4. ('39) 26 A I R 1939 All 713 : 185 I C 487 : 1939 A L J 946, Bishan Lal v. Banwari Lal.

ALL 713[4] the executant could re-purchase within a year after the execution of the deed. The provision in the present case is, we think, as consistent with a mortgage as with a sale: indeed we think that it rather suggests the former. It has, however, been argued that the provision that if the entire consideration money is not paid by the executant to the vendees before the expiry of the tenth year the sale deed shall be deemed to be an absolute sale deed militates against the view that the deed is a mortgage deed because if it is a mortgage deed that provision is ineffective. In the case of a mortgage deed, the mortgagor would have sixty years to redeem the property. It is contended therefore that the inclusion of this provision strongly suggests that the parties intended that the transaction should be a sale and not a mortgage. But, as a reference to the definition of mortgage by conditional sale will show that in all cases of mortgage by conditional sale there must be an ostensible sale of the property by the mortgagor, and one of the conditions expressly provided is that on default of payment of the mortgage money on a certain date the sale shall become absolute, although that effect cannot legally occur in the case of a mortgage. Consequently, the inclusion of this provision in no way operates against the theory of mortgage: on the contrary, it supports it. After consideration of other cases and other authorities we are of opinion that the view taken by the lower Court as to the nature of this transaction is correct. As we have mentioned the Special Judge did not come to any finding on the issue as to the market value of the property in dispute, and the parties are naturally not agreed on that point. Thakur Jagdish Bakhsh Singh put the value at Rs. 20,000 to Rs. 25,000 but certain statements of profits filed by the patwari for the year 1345F suggest that this may be an exaggeration. On the whole however we do not think that on the evidence we can form any reliable opinion as to the market value of the property, and consequently this test cannot be applied.

Many authorities have held that the best general test as to the nature of the transaction is the existence or non-existence of a power in the original purchaser to recover the sum named as the price for such re-purchase: and that if there is no such power, there is no mortgage: also that if the amount agreed upon as the price of re-purchase was the same as the consideration for the original sale (as in the present case) the deed is a mortgage by conditional sale and not a sale with condition of re-purchase. Although we might not agree that where there is a condition for re-purchase in the same document the transaction should invariably be regarded as a mortgage by conditional sale, we should not be prepared to hold that it was a sale unless such an intention was clearly indicated. We have in the present case all the necessary constituents of a mortgage by conditional sale, and we do not find that either the terms of the instrument or the attendant circumstances are such as to establish that the intention of the parties was that the transaction should be a sale. We accordingly accept the view taken by the lower Court and dismiss this appeal, passing no order as to costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 585

AGARWAL J.

Nawab Hasan Bahadur — Appellant

v.

Mt. Abida Begam and another — Respondents.

Second Appeal No. 71 of 1938, Decided on 25th April 1941, against order of Sess. and Civil Judge, Lucknow, D/- 7th December 1937.

(a) Easements Act (1882), S. 13 (a)— Portion of house sold — Owner of remaining portion is entitled to get way up to public road—No other passage from house excepting one claimed — Owner can use it as easement of necessity — It is for other side to show that owner has access to public road through another's property.

Where a portion of a house has been sold the owner of the remaining portion (the plaintiff) is entitled to get a way up to the public road for enjoying his property. When there is no other passage from the house excepting the one claimed by him, he is entitled to use it as an easement of necessity. It is for the defendant to show that the plaintiff has a right to go to the public road through another person's property. [P 587 C 1, 2]

(b) Easements Act (1882), S. 13 (a) — Lower appellate Court failing to fully appreciate nature of easement of necessity—Second appellate Court can find whether such easement exists.

Where the lower appellate Court fails to fully appreciate what an easement of necessity is, the second appellate Court can find whether such an easement exists. [P 587 C 1]

H. H. Zaidi for Haider Husain — for Appellant.

L. S. Misra and Ali Raza — for Respondent 1.

Judgment. — This second appeal arises out of a suit brought by the plaintiff-appellant for the opening of a passage alleged to have been closed by the respondent Mt. Abida Begam. One Mt. Ramzani Begam

had three sons, Ghulam Husain, Ulfat Husain and Hasan Bahadur, plaintiff, and a daughter Akhtari Begam. Akhtari Begam died leaving four sons, Ghulam Raza, Baqar Raza, Qazim Raza and Ali Raza. Mt. Ramzani Begam and her sons, Ulfat Husain and Ghulam Husain, executed a mortgage deed of a house and a bawarchi khana on 2nd October 1906 in favour of Lala Girdhari Lal. Lala Girdhari Lal brought a suit on his mortgage and obtained a preliminary decree for sale on 5th October 1931 which was made final on 11th May 1932. He applied for execution of the decree and purchased the house on 30th November 1932. On 10th October 1932, Lala Girdhari Lal applied for the amendment of his plaint and decree and wanted to include the bawarchi khana also. That application was withdrawn on 17th December 1932. He again applied for the same amendment on 4th January 1933, but that application was filed on 27th March 1933. He applied for a third time for the same relief on 8th April 1933, and that application was allowed on 19th December 1933. One of the judgment-debtors, Qasim Raza, came up to the Chief Court for revision, and a compromise was made between him and Lala Girdhari Lal in this Court. The compromise was to the effect that :

If Qazim Raza Khan pays into Court the sum of Rs. 200 for payment to the decree-holders within six weeks from 11th January 1935, the decree-holders opposite parties shall give up their claims to the house known as bawarchi khana and the applicant, that is, Qazim Raza, shall close the door "VX" marked in red ink by the Honourable Court in the map attached to the decree, so as to close the right of ingress and egress through it.

And this amount of Rs. 200 was paid. The plaintiff was a judgment-debtor, but he had acquiesced in the order of the Court allowing the amendment and had not joined with Qazim Raza Khan in taking the matter to the Chief Court. Lala Girdhari Lal sold the house purchased by him to the respondent Mt. Abida Begam. The plaintiff, as one of the co-owners of the bawarchi khana, brought the present suit on the allegation that he had been using the door VX for ingress and egress and that was the only outlet from bawarchi khana. He claimed the opening of the door which had been closed under the compromise. That door is between the bawarchi khana and the house of Mt. Abida Begam which she has purchased from Lala Girdhari Lal. The learned Munsif framed the following issues :

(1) Has the plaintiff a right of easement to pass through the door and the court-yard of the defendant's house? (2) Was the door closed more than two years ago as alleged? If so what is the effect thereof? (3) Is the suit barred by S. 11, Civil P. C.? (4) Is the plaintiff estopped from bringing the suit? (5) Are the defendants protected by Sec. 41, T. P. Act?

The other three issues are not material. He came to the finding that the plaintiff has not acquired a right of easement by user, but that he had a right of necessity and that the suit was not barred by time. The plea of res judicata was not pressed before him, and he held that the plaintiff's suit was not barred by the principle of estoppel or by S. 41, T. P. Act. He allowed a passage to the plaintiff from the bawarchi khana. There was an appeal to the learned District Judge and he held that the plaintiff had failed to prove that he had an easement of necessity. He, therefore, allowed the appeal and dismissed the plaintiff's suit. The plaintiff has come up in second appeal. It has been decided by both the Courts below that the plaintiff has not acquired any right of easement by user. It has been argued before me that the plaintiff has got an easement of necessity. It is contended on behalf of the respondents that this case of necessity was not set up in the pleadings. It was stated in para. 4 of the plaint that the door and the passage in question were very old and were in existence since a long time and that was the only passage from the house known as bawarchi khana. Both the Courts below appeared to have thought that the plaintiff had claimed an easement of necessity. I do not think that the question of the easement of necessity was not raised by the plaintiff. The learned Munsif held that the bawarchi khana was surrounded on all sides by houses. The plan on the file which was before this Court in the revision case filed by Qazim Raza Khan against the amendment allowed by the lower Court shows that to the north and east of the bawarchi khana is the house of Mustafa Husain, to the west is the house of Mt. Abida Begam and to the south is the house of Akhtari Begam, one of the daughters of Mt. Ramzani Begam. The learned Munsif held that the report of the Commissioner appointed in the case of Lala Girdhari Lal showed that there was an opening in the wall between the bawarchi khana and the house of Akhtari Begam but it was blocked, and there being no other passage from the bawarchi khana excepting that in question, the plaintiff was entitled to use it. The learned Civil Judge held that it was not proved that the opening in the wall between the bawarchi khana and the house of Akhtari Begam was blocked, and

it was proved by the defendants' evidence that the bawarchi khana was used as a kitchen both for the house of defendant 2 and the house of Akhtari Begam. He also held that the door in the wall between the bawarchi khana and Akhtari Begam's house could be used by the plaintiff. He therefore dismissed the suit without deciding other points.

I am bound to accept the finding of the learned Civil Judge that there was a door between the bawarchi khana and the house of Akhtari Begam, but under S. 13 (a), Easements Act, the plaintiff is entitled to get a way for enjoying his bawarchi khana. He is entitled to a way up to the public road and not to the house of Akhtari Begam. The finding of the learned Civil Judge is not that the plaintiff was entitled to go out to the public road through Akhtari Begam's house. As the bawarchi khana was the common kitchen of Akhtari Begam and the house now purchased by Mt. Abida Begam, it is just possible that the owner of the bawarchi khana may be entitled to go to Akhtari Begam's house and not further. If the bawarchi khana was used by Akhtari Begam it follows that she could go in it through a door in the wall between her house and the bawarchi khana but it does not necessarily follow from it that the owner of the bawarchi khana also could go to the Akhtari Begam's house through that door. I think the learned Civil Judge did not fully appreciate what an easement of necessity is, and so I can find in second appeal whether such an easement exists. When there is a house of Akhtari Begam to the south of bawarchi khana, it is for the defendant to establish that the plaintiff had a right to go through it to the public road. That right is not established only by the existence of a door between bawarchi khana and the Akhtari Begam's house. I think the plaintiff has got a right of necessity.

The learned counsel for the respondents has argued that the plaintiff is estopped from maintaining the suit. His first argument is that there is evidence of the respondent's witness Qazim Husain that the compromise between Qazim Raza Khan and Lala Girdhari Lal was made with the plaintiff's consent. This witness is the agent of Lala Girdhari Lal, and I am not prepared to believe him. The other argument based on the evidence of Ramzan is that the plaintiff told defendant 2, Mt. Abida Begam, that there was no door between the bawarchi khana and the house that she was going to purchase. This witness was not believed by the learned Munsif and I agree with him. It is also argued that the plaintiff had not questioned the order allowing the amendment under which the bawarchi khana was also included in the decree for sale and Qasim Raza Khan alone appealed and got the bawarchi khana released, so the plaintiff is not entitled to maintain the suit. I think this argument has got no force. The plaintiff was bound by the amendment but its effect was not to make Lala Girdhari Lal an owner of the bawarchi khana. Under the compromise the bawarchi khana was not given to Qazim Raza Khan alone but Lala Girdhari Lal admitted that he had no claim to it, so it became the property of all the original owners including the plaintiff. I think the plaintiff's claim is not barred by the principle of estoppel. It is argued that the plaintiff released the easement under S. 38, Easements Act. Reliance is placed on the fact that the wall between the house of Akhtari Begam and the bawarchi khana has been demolished. This does not amount to the release of the easement. I have already observed that I do not believe Ramzan who says that the plaintiff told defendant 2 before she purchased the house that there was no passage between the bawarchi khana and the house she was going to purchase. I think the easement has not been extinguished. I hold that the plaintiff has got an easement of necessity. I therefore allow the appeal with costs throughout, set aside the judgment and decree of the learned Civil Judge and restore that of the learned Munsif.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Oudh 587

BENNETT AND GHULAM HASAN JJ.

Mt. Tulsa Devi—Petitioner—Applicant

v.

Pt. Suraj Narain — Plaintiff —

Opposite Party.

Civil Revn. Appln. No. 80 of 1939, Decided on 25th July 1941, for revision of order of Munsif, East Hardoi, D/- 27th March 1939.

(a) Decree — Construction — Executability— Objections to — Award made rule of Court — Judgment-debtor to pay Rs. 1015 to decree-holder by instalments — Immovable property hypothecated for creditor's satisfaction to remain so until liability fully satisfied — On default of any instalment entire balance to become immediately payable and entire hypothecated property to be deemed to have been sold in favour of decree-holder who was given right to take proprietary possession of same and rights of judgment-debtor to be entirely extinguished

—On default of instalment, decree-holder taking possession of property in full satisfaction of decree — Ten months after, judgment-debtor's widow applying under S. 151, Civil P. C., to set aside decree on ground of its being merely declaratory and its being nullity for want of registration and to set aside order delivering possession to decree-holder — Decree held not declaratory but executable — Application under S. 151, Civil P. C., to set aside decree held incompetent — Proper remedy held by regular suit.

The decree-holder and judgment-debtor referred their disputes about certain debts to arbitration by an agreement dated 13th July 1935. Before the arbitrator both parties filed a compromise, which was duly incorporated by the arbitrator in his award. The material terms of the award which was made a rule of Court on an application by the parties under Sch. 2, para. 2, Civil P. C., were that the judgment-debtor was to pay Rs. 1015 to the decree-holder by instalments, which were specified in the compromise. It was also provided that certain immovable property was hypothecated for the satisfaction of the creditor and would stand hypothecated until the liability had been fully satisfied. There was also a condition that in default of payment of any instalment the entire balance would become immediately payable in a lump sum and the entire hypothecated property would be taken to have been sold in favour of the decree-holder who was also given the right to take proprietary possession over the property sold in lieu of his debt and the rights of the judgment-debtor would be entirely extinguished. Default having occurred in the payment of instalments the decree-holder applied for delivery of possession of the hypothecated property on 22nd December 1937. Possession was duly delivered to the decree-holder on 25th February 1938 and the case was consigned to record, in full satisfaction of the decree. On 10th December 1938, the widow filed an application under S. 151, Civil P. C., whereby she challenged the decree as being not executable on the ground (1) that it was merely declaratory and (2) that it was a nullity on the ground that it was not registered and the Court passing it had no pecuniary jurisdiction to pass it. The relief claimed in the application was that the order for delivery of possession be set aside and the possession be restored to the applicant :

Held that having regard to the allegations contained in the application, the appropriate remedy of the applicant widow if she was so advised was a regular suit in the civil Court and not by an application invoking the inherent powers of the Court. The objections to the validity of the decree and to its executability might well have been raised at the time when the decree was made a rule of Court and at the time when the decree was put in execution but after the decree had been fully satisfied and possession of the property under the terms of the decree had actually been delivered to the decree-holder, no such objection could properly be raised by means of a miscellaneous application under S. 151, Civil P. C. [P 589 C 1]

Held further that the decree was not declaratory but one capable of execution : ('34) 21 A I R 1934 Pesh 3 and 22 Cal 859, *Disting.* [P 589 C 2]

(b) Registration Act (1908), S. 49 proviso — Defences open to party under S. 49 proviso cannot be defeated by other party by resort to summary remedy instead of regular suit.

In the case of an unregistered document a party cannot be allowed to defeat the defences that may be open to the other party under S. 49 proviso by resorting to a summary remedy instead of filing a regular suit : ('37) 24 A I R 1937 All 282, *Expl.* [P 590 C 2]

(c) Jurisdiction—Waiver.

A plea of want of jurisdiction when not raised in the trial Court must be deemed to have been waived by the parties. [P 590 C 2]

M. L. Saksena — for Applicant.

B. K. Dhaon — for Opposite Party.

Order.—This revision application under S. 115, Civil P. C., is directed against the order of the Munsif, East Hardoi, dated 27th March 1939, dismissing the petition of the applicant under S. 151, Civil P. C., to have a certain decree declared inexecutable and a nullity. The facts are that the opposite party, Pandit Suraj Narain held a decree against Jaipal Singh, the husband of the applicant, on 9th January 1934. He also held a bond dated 27th May 1935 in his favour for Rs. 360 against Jaipal Singh. Suraj Narain and Jaipal Singh referred their disputes about these debts and certain other debts to arbitration by an agreement dated 13th July 1935. Before the arbitrator both parties filed a compromise, which was duly incorporated by the arbitrator in his award made on the same day. Thereafter, both parties moved the Court of the Munsif of Hardoi under para. 2 of Sch. 2, Civil P. C., to have the award filed and made a rule of Court. The Court accepted the application and made the award a rule of Court as desired by the parties. The material terms of the award were that Jaipal Singh was to pay Rs. 1015 to Suraj Narain by instalments, which were specified in the compromise. It was also provided that certain immovable property was hypothecated for the satisfaction of the creditor and would stand hypothecated until the liability had been fully satisfied. There was also a condition that in default of payment of any instalment the entire balance would become immediately payable in a lump sum and the entire hypothecated property would be taken to have been sold in favour of Suraj Narain. Suraj Narain was also given the right to take proprietary possession over the property sold in lieu of his debt and the rights of Jaipal Singh would be entirely extinguished.

Default having occurred in the payment of instalments Suraj Narain applied for delivery of possession of the hypothecated property on 3rd August 1937. This application was consigned to the record for default of appearance of both parties. Another ap-

plication was made on 22nd December 1937, by Suraj Narain and it appears that on 26th January 1938, Mt. Tulsha was substituted in place of Jaipal Singh who had died. Possession was duly delivered to Suraj Narain on 25th February 1938 and the case was consigned to record, in full satisfaction of the decree. On 10th December 1938, the present applicant filed an application under S. 151, Civil P. C., before the Munsif, East Hardoi, whereby she challenged the decree as being not executable on the ground, (1) that it was merely declaratory and (2) that it was a nullity on the ground that it was not registered and the Court passing it had no pecuniary jurisdiction to pass it. The relief claimed in the application was that the order for delivery of possession be set aside and the possession be restored to the applicant. We have heard learned counsel in support of this application and are satisfied that the lower Court was justified in rejecting the application under S. 151, Civil P. C. It is clear from the narration of facts given above that no exception was taken to the decree for two years by Jaipal Singh, the original judgment debtor, till he died. The applicant also took no action in the matter until nearly ten months after the case had been consigned to the record and the decree had been fully satisfied. We are of opinion that having regard to the allegations contained in the application, the appropriate remedy of the applicant if she was so advised was a regular suit in the civil Court and not by an application invoking the inherent powers of the Court. The objections that have been raised to the validity of the decree and to its executability might well have been raised at the time when the decree was made a rule of Court and at the time when the decree was put in execution, and it seems to us clear that after the decree has been fully satisfied and possession of the property under the terms of the decree has actually been delivered to the decree-holder, no such objection can properly be raised by means of a miscellaneous application under S. 151, Civil P. C. Another ground for our non-interference with the order passed by the learned Munsif is that he considered all the objections of the applicant on the merits and refused to exercise his discretion in her favour and to upset the decree, which had long been consigned to the record as having been satisfied. The learned Munsif was perfectly entitled to decide these objections in the manner he did, and in doing so we do not think that he committed any illegality or material irregularity. It cannot be contended that he exercised jurisdiction which was not vested in him by law nor that he failed to exercise jurisdiction so vested in him. No case for interference therefore arises under S. 115, Civil P. C.

Apart from the reasons stated above, we consider that the decision of the lower Court is justified on the merits. The first contention raised is that the decree in question was purely declaratory and could not be executed. Reliance is placed in support of this contention on A I R 1934 Pesh 3[1] and 22 Cal 859.[2] We have reproduced the material terms of the decree in the preceding portion of this judgment and are of opinion that the decree is not declaratory but one capable of execution. The decree was made immediately payable in default of payment of any instalments, which were clearly specified. It was further provided that in default of payment of those instalments the property hypothecated by the judgment-debtor was to be taken as foreclosed in favour of the decree-holder and the rights of the judgment-debtor were to be deemed as extinguished from that date. These terms clearly gave the decree-holder the right to apply for delivery of possession of the property in the event of the default of payment of his decree. The decree dealt with in A I R 1934 Pesh 3[1] was altogether of a different nature. After determining the amount due to the decree-holder from the judgment-debtor it was declared that certain property of the judgment-debtor was to be considered as mortgaged with possession to the decree-holder and the judgment-debtor was to occupy that property at a certain rent. The period of the mortgage was fixed at two years and it was stated that the rent and the mortgage sum after that period were to be realized by execution. There was however no term in the aforesaid decree that the money due from the judgment-debtor to the decree-holder was to be payable immediately by the former to the latter. The learned Judicial Commissioner himself pointed out that in the decree before him there was no immediate order for the recovery of the amount. That case is therefore clearly distinguishable upon the facts.

In the Calcutta case, 22 Cal 859,[2] the decree passed by consent directed that the defen-

1. ('34) 21 A I R 1934 Pesh 3: 147 I C 837, Tikaya Ram Khushal Ram v. Ghansham Das.
2. ('95) 22 Cal 859, Aubhoyessury Dabee v. Gouri Sunkar Panday

dant was to pay the plaintiff a certain sum by instalments and that the said sum should be a charge on certain immovable properties of the defendant set out in a schedule attached to the decree. In default of payment of any instalment the plaintiff was to be at liberty to execute the decree only in respect of the sum falling due and remaining unpaid. Default in payment of instalment having occurred the plaintiff applied for execution and for sale of the property charged. It was held that a separate suit must be brought under S. 67, T. P. Act, to enforce the charge. The learned Judges observed in the course of the judgment :

If the decree had said that in default of payment in Calcutta of the said sums, etc., the same shall immediately become due and realizable by execution by the attachment and sale of the properties set forth in the schedule, there might have been some force in the argument.

In the present case the decree states that in default of payment of the instalments the entire balance becomes immediately due and in lieu thereof the property hypothecated is to be deemed as foreclosed and the rights of the judgment-debtor are to be deemed extinguished from that date. The Calcutta case, therefore, is clearly inapplicable upon the facts. The second contention is that the decree was compulsorily registrable under S. 17 (2) (vi), Registration Act, and not having been registered it could not be received as evidence of any transaction affecting the immovable property under S. 49, Registration Act. This contention ignores the proviso to S. 49, which was added to the section by the Amending Act, 21 of 1929. The proviso runs thus :

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chap. 2, Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of S. 53A, T. P. Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.

Assuming for a moment that the decree in question which was not based on a compromise but followed an award based on a compromise, is required to be registered by reason of S. 17 (2) (vi), Registration Act, the same can be received as evidence of a contract in a suit for specific performance or as evidence of part performance of a contract for the purposes of S. 53A, T. P. Act. If and when the applicant institutes a suit for recovery of possession against the opposite party, she is likely to be confronted with the defence contemplated under the proviso to S. 49, Registration Act, and it seems to us that the applicant, in order to get rid of the difficulty which might arise in the suit, has chosen to resort to a summary remedy of a miscellaneous application under S. 151, Civil P. C. The case in 1937 A L J 120[3] does not help the applicant, as the decision in that case that a certain compromise decree was incapable of execution by reason of the absence of registration was arrived at in execution proceedings themselves, which were carried in second appeal to the High Court, and not by way of an application under S. 151, Civil P. C.

Lastly it has been contended that the learned Munsif exceeded his pecuniary jurisdiction in passing the decree on the basis of the award. It is stated that he had jurisdiction over property not exceeding Rs. 2000 in value while the property involved in the present case was worth Rs. 50,000. It is conceded that the amount decreed under the award was below Rs. 2000. No objection was raised at the time to the jurisdiction of the Court. The learned Munsif, therefore, rightly held that the objection, if any, to the jurisdiction should be deemed to have been waived by the parties. There is no evidence on the record to show the valuation of the property, and the learned Munsif rightly refused to entertain the plea of jurisdiction upon a mere allegation in the application that the property was worth Rs. 50,000. We hold therefore that there is no substance in this revision application, which is consequently dismissed with costs.

G.N./R.K. *Application dismissed.*

3. ('37) 24 A I R 1937 All 282 : 168 I C 642 : 1937 A L J 120, Ataat Husain v. Mushtaq Ali.

(28) A. I. R. 1941 Oudh 590

THOMAS C. J. AND GHULAM HASAN J.

Mathura Prasad and another — *Appellants*

v.

Kanhaiya Lal and another—*Plaintiffs* — *Respondents.*

Second Appeal No. 328 of 1938, Decided on 22nd July 1941, against order of Addl. Civil Judge, Unao, D/- 13th October 1938.

(a) Civil P. C. (1908), Ss. 96 and 2 (2) — Appeal is creature of statute—Appellant claiming right of appeal against trial Court's finding must show that it amounts to decree within Section 2 (2).

An appeal is a creature of statute and does not exist unless the right is given expressly by the statute. In order to succeed that an appeal lies against the finding arrived at by the trial Court,

the appellant must show that the finding in question amounts to a decree within the definition of that term in S. 2 (2). [P 591 C 2]

(b) Civil P. C. (1908), Ss. 2 (2) and 96 — Adjudication on preliminary point resulting in dismissal of suit is decree — Adjudication not putting end to suit is not decree — Affirmative finding on preliminary question whether suit for partial pre-emption was maintainable is not decree within S. 2 (2) and hence is not appealable.

Where the adjudication on a preliminary point raised in defence in a suit results in dismissal of the suit on that point alone, the adjudication amounts to a formal expression conclusively determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication comes into existence as the adjudication does not amount to a decree as defined in S. 2 (2). [P 592 C 1]

An affirmative finding on the preliminary question whether the suit for partial pre-emption was maintainable is not a decree within the meaning of S. 2 (2) and therefore is not appealable: ('14) 1 A I R 1914 Bom 149 (FB), *Approved;* ('33) 20 A I R 1933 All 473 and ('34) 21 A I R 1934 Oudh 307, *Expl.;* ('38) 25 A I R 1938 All 557 (FB) and ('28) 15 A I R 1928 Rang 132, *Disting.*; ('31) 18 A I R 1931 Mad 471, *Ref.* [P 593 C 2]

B. K. Dhaon, Siddheshwar Shukla and M. K. Seth — for Appellants.

Sri Ram — for Respondents.

Judgment.—This second civil appeal by the defendants is directed against the appellate order of the Additional Civil Judge of Unao dismissing the appellants' appeal as not maintainable against the findings of the Munsif of North Unao deciding certain preliminary issues. The facts are that the plaintiffs-respondents filed a suit for pre-emption against the vendor and the vendees. The sale which was sought to be pre-empted was made on 18th May 1937, by the vendor of his one-third share in the proprietary and mortgagee interests which he had jointly purchased along with the two plaintiffs in 1922.

Various pleas were raised in defence by the vendees, one of them being that the sale of the mortgagee rights not being pre-emptible, the plaintiffs could not maintain the suit for piecemeal pre-emption of the proprietary interest as well. This plea formed the subject-matter of issue 6. The other plea embodied in issue 7 involved the question whether the mortgagee rights in certain plots were pre-emptible. The learned Munsif framed 11 issues in all in the case upon the pleadings of parties, but for the purposes of the present appeal issues 5, 8 and 9 alone may be referred to. Issue 5 related to the question whether the Court had jurisdiction to try the case. Issue 8 was whether there was any custom which barred pre-emption and issue 9 was whether the plaintiffs were estopped from claiming pre-emption. As regards issue 7, the parties admitted before the trial Court that the mortgagee rights were not pre-emptible. Counsel for both parties desired the Court to decide issues 6 and 7 first and postpone the settlement of the other issues to a later date. It was stated by counsel before the trial Court that if issues 6 and 7 were answered in the negative the suit would be dismissed, but if they were answered in the affirmative or in any other way the suit would proceed on other issues. The learned Munsif decided issue 7 in terms of the agreement of the parties, and as regards issue 6 he held that pre-emption of the entire pre-emptible property, namely the zamindari rights as distinguished from the mortgagee rights, though it is part of the property conveyed under the sale deed, is permissible.

In this view of the matter the suit would normally have proceeded for the determination of other issues. It appears, however, that the vendees filed an appeal challenging the decision of the trial Court as to the rights of the plaintiffs to pre-empt part of the property sold. A preliminary objection was raised that no appeal lay against the finding of the trial Court. The learned Additional Civil Judge upheld the preliminary objection and held that the appeal was not maintainable. His main ground for the view taken by him was that the decision of the trial Court did not amount to a decree within the meaning of S. 2 (2), Civil P. C., and consequently no appeal lay under S. 96, Civil P. C. He also observed that had the trial Court given a contrary finding then obviously the suit would have been dismissed and an appeal could have lain. He, therefore, dismissed the appeal as being incompetent without deciding the question whether partial pre-emption could be claimed by the plaintiffs.

We have heard learned counsel for both parties and are of opinion that the decision of the lower appellate Court upon this point is correct. It cannot be denied that an appeal is a creature of statute and cannot be held to exist unless the right is given expressly by the statute. In order to succeed that an appeal lay against the finding arrived at by the trial Court in the plaintiffs' favour, the appellants have to show that the finding in question amounts to a decree within the definition of that term in S. 2 (2), Civil P. C., and as such an appeal

lies under S. 96, Civil P. C. Section 2 (2), Civil P. C., defines "decree" as

> the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

Although the finding by the trial Court is conclusive as regards that Court on the question whether the plaintiffs could maintain the suit for partial pre-emption, it cannot be said that there is any formal expression of that adjudication. It amounts to a pure finding as regards the maintainability of the suit but does not determine the suit itself inasmuch as, apart from other issues relating to facts, the issues about jurisdiction, custom forbidding pre-emption and estoppel are still to be disposed of. Where a preliminary point raised in defence in a suit may possibly be decided against the plaintiffs and may terminate in dismissal of the suit on that point alone, the adjudication would no doubt amount to a formal expression conclusively determining the rights of the parties, but where such an adjudication does not put an end to the suit, no right of appeal against such an adjudication will come into existence as the adjudication does not amount to a decree as defined in section 2 (2), Civil P. C. To hold otherwise would lead to *reductio ad absurdum* and would enable every finding on every issue arrived at by a trial Court to be assailed by way of appeal to the higher Court irrespective of the fact whether there was a decree or not. Order 14, R. 2, Civil P. C., permits a trial Court to record its finding on issues of law first if in its opinion the suit can be disposed of on those issues without going into the issues of fact arising in the case. If the decision of the Court on the issues of law results in the defendant's favour the plaintiff's suit must stand dismissed and the trial Court need not proceed to determine the issues of fact. In that case the decision having resulted in a decree will be appealable under S. 96, Civil P. C. But where the decision of the preliminary issues is in favour of the plaintiff, no decree follows and the suit must proceed for the settlement of other issues in the case. A Full Bench of the Bombay High Court in 39 Bom 339[1] held that a decision in favour of the plaintiff upon a preliminary issue that the Court had jurisdiction to try the suit did not amount to a preliminary decree attracting the provisions of S. 97, Civil P. C., and no appeal lay. Reference has been made on behalf of the appellants to the following decisions: A I R 1933 ALL 473,[2] A I R 1938 ALL 557,[3] A I R 1931 Mad 471,[4] A I R 1928 Rang 132[5] and A I R 1934 Oudh 307.[6]

The decision in A I R 1933 ALL 473[2] is clearly inapplicable to the facts of the present case. That was a case in which the lower Court had decreed the suit holding that the entire consideration of the deed was borrowed either for payment of antecedent debts or for legal necessity. In first appeal against the decree two learned Judges differed as regards the amount which would be allowed on the ground of necessity or payment of antecedent debts. Upon this difference of opinion on the question whether the decree appealed from should be varied so far as the Judges composing the Bench agreed that it should be varied and the appeal dismissed as regards the rest, or whether the appeal should be dismissed in toto, the learned Judges after referring to the definition of the word "decree" in S. 2 (2) and S. 98, Civil P. C., observed:

> If there are several matters in controversy in suit the formal expression of adjudication as regards each of those matters is a decree so that in that sense adjudication as regards every item in dispute between the parties is a decree.

This decision, therefore, does not help the appellants in so far as the point arising before us is concerned.

The case in A I R 1938 ALL 557[3] is altogether a different case. All that was held in that case was that where a Court had set aside an award and superseded an arbitration and proceeded with the suit, the Court could not be considered to have decided the case under S. 115, Civil P. C., and no revision lay against that order.

In A I R 1931 Mad 471[4] it was held that where a Court, even though it does not conform to the form of a final decree, conclusively determines the rights of the parties with regard to controversial matters in

1. ('14) 1 A I R 1914 Bom 149 : 26 I C 885 : 39 Bom 339 : 16 Bom L R 954 (F B), Chanmalswami Rudraswami v. Gangadharappa.

2. ('33) 20 A I R 1933 All 473 : 150 I C 262 : 55 All 672 : 1933 A L J 1425, Harakh Narain Singh v. Babban.

3. ('38) 25 A I R 1938 All 557 : 177 I C 981 : I L R (1938) All 805 : 1938 A L J 813 (F B), Govind Das v. Mt. Indrawati.

4. ('31) 18 A I R 1931 Mad 471 : 132 I C 654 : 54 Mad 337 : 60 M L J 167, Adinarayana v. Narasimha Chetty.

5. ('28) 15 A I R 1928 Rang 132 : 110 I C 386 : 6 Rang 169, Syed Khan v. Syed Ebrahim.

6. ('34) 21 A I R 1934 Oudh 307 : 148 I C 1052 : 9 Luck 701 : 11 O W N 606, Mohammad Sadiq Ali Khan v. Fakhr Jahan Begum.

suit, but describes its decision as "decretal order" it nevertheless is a decree, the proper remedy over which is by way of appeal and not by revision. In that case a decree had been made by the Court settling a scheme for the proper management of the temple and its property. There was also a direction that either the plaintiffs or the defendants should apply for the appointment of the Commissioner to go into the accounts as between the defendants and the temple and the trustees were to take possession of the temple property only on payment to defendant 1 the amount found due to him by the Commissioner. In pursuance of that decree, the Court ordered that the defendants were to pay certain moneys to the trustees of the temple and execute the decree on payment of proper court-fee. Defendant 1 filed a civil revision against the order of the trial Court. It was held that the decision of the Court was a decree as contemplated in S. 2, Civil P. C., and that an appeal should have been filed and that no revision lay.

The decision in A I R 1928 Rang 132[5] is equally inapplicable. There a suit claiming a right of pre-emption was dismissed on the ground that the right of pre-emption could not be claimed under the Mahomedan law in Burma. The High Court in appeal held in 1925 that the right of pre-emption existed, and remanded the case. The case was eventually decreed on the merits in favour of the plaintiff after the remand and the appeal against it was also dismissed in 1927. The defendant filed an application for leave to appeal not only on the points decided in 1927 but also on the point decided in 1925. It was held that it was not competent for the applicant to challenge the correctness of the order of 1925 and that leave to appeal on that ground could not be given. In A I R 1934 Oudh 307[6] the plaintiffs brought a suit for contribution against the taluqdari estate of the defendant and the Court gave a finding that the plaintiffs were entitled to contribution against the defendant but the amount was not determined. It was held that the finding amounted technically to a preliminary decree and the appeal was competent from it under S. 96, Civil P. C. The learned Judges said that the Subordinate Judge gave his findings on all 21 issues in favour of the plaintiffs, and the only thing that remained was the determination of the respective valuations of the taluqdari and non-taluqdari property and the sum of money for which the decree will be made in favour of the plaintiffs against the defendant. They also observed that

> so far as his rights and liabilities are concerned, they have all been adjudicated upon in the judgment, and what remains, as we have already stated, is merely to find out the arithmetical figure to the amount of which a decree should be made in favour of the plaintiffs and against the defendant in respect of the liability of the taluqdari estate.

All substantial and essential matters in controversy in that suit had been conclusively determined while the same cannot be said in the case before us. This decision does not therefore advance the case of the appellants at all. We accordingly hold that no appeal lay against the finding arrived at by the trial Court and the appeal was rightly rejected by the lower appellate Court as being not maintainable. We therefore dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 593

GHULAM HASAN AND AGARWAL JJ.

Babu Har Narain Kapur —
Plaintiff — Appellant

v.

Babu Ram Swarup Nigam and another
— Defendants — Respondents.

Second Appeal No. 340 of 1940, Decided on 9th May 1941, against decree of Dist. Judge, Lucknow, D/- 13th August 1940.

(a) Contract Act (1872), S. 23 — Under S. 23 agreement is void when entire consideration or portion thereof is agreement not to prosecute or to drop pending prosecution — This applies equally to case of guarantee — No portion of consideration traceable to agreement not to prosecute criminally or to withdraw pending prosecution — Surety cannot escape liability on ground of unlawful consideration—Motive and consideration are distinct—Pre-existing liability of debtor sole consideration for security given—Transaction is protected even if security be given with motive of being saved from risk of criminal prosecution.

Under S. 23 an agreement is void if the entire consideration or a portion thereof was the agreement not to prosecute or to drop a prosecution which had already been started. This applies equally to the case of a guarantee but where no portion of the consideration can be traced to an agreement not to prosecute criminally or not to withdraw a pending criminal prosecution, the surety cannot escape the liability on the ground of an unlawful consideration. There is a clear cut distinction between the motive prompting an act and a consideration. If the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given with the motive of being saved from the risk of a criminal prosecution. Though the motive of the execution of a document may be the withdrawal of a non-compoundable criminal case, the consideration of an enforceable pre-existing liability is quite legal : *Case law reviewed.* [P 596 C 2 ; P 597 C 1, 2]

(b) Civil P. C. (1908), S. 107—Decree against debtor and surety — Appeal by surety alone — Decree cannot be set aside against non-appealing debtor.

Where a decree is passed against the principal debtor and the surety and the principal debtor acquiesces in the decree against him but the surety alone appeals, the appellate Court has no power to set aside the decree against the non-appealing principal debtor. [P 598 C 1]

Niamat Ullah and R. N. Shukla — for Appellant.

L. S. Misra — for Respondent 1.

Judgment. — This is a plaintiff's second appeal arising out of a suit for recovery of Rs. 2000 principal and Rs. 170 interest brought against the two defendants-respondents. Babu Manohar Lal, defendant 1, was sued as the debtor while Babu Ram Sarup Nigam, defendant 2, was sued as a surety for the former. The plaintiff is Government treasurer in Lucknow, Rae Bareli and Sitapur districts and also in the Chief Court of Oudh at Lucknow. He manages the treasuries at these places through his agents and servants, and he himself supervises the management. The plaintiff is responsible to the Government for all moneys coming into the treasuries and is liable for all losses under the terms of his agreement (Ex. 12). Babu Manohar Lal, defendant 1, was employed as his agent in charge of the treasury work at the Sadar Treasury, Lucknow, attached to the Collectorate, with a number of other persons working under him as his subordinates. The Lucknow treasury is a banking treasury and the cash belonging to it is kept in the Imperial Bank of India, Lucknow Branch, and only a small sum of money necessary for payment of pensions and other miscellaneous requirements is kept in the treasury. The treasury has two chambers, known as single lock and double lock, and the treasury officer and the treasurer are in charge of the whole treasury. They are responsible for all that is kept in the double lock and they put their own separate locks on it. It is not denied that the plaintiff's security as treasurer is Rs. 30,000 and any amount exceeding that security is to be kept in the double lock for which there is a remittance box placed in the double lock. The plaintiff's case was that Babu Manohar Lal was his agent in the Government treasury at Lucknow and was responsible for all moneys coming into the treasury and for any losses which may arise. Shankar Nath is a stamp vendor, who was employed under defendant 1 and used to officiate for him during his absence on leave.

On 20th August 1937, the treasury officer at Lucknow discovered a shortage in the cash balance to the extent of Rs. 2000. Babu Manohar Lal was on leave on 20th August 1937 and Shankar Nath was working for him on that date. The treasury officer informed the plaintiff of the said shortage. Babu Manohar Lal, being questioned by the plaintiff to pay the money forthwith, asked for time to enable him to arrange the money or realize the same from Shankar Nath, who according to him had actually embezzled the money. Babu Manohar Lal told the plaintiff that on 17th August 1937, Shankar Nath had told him that the treasury officer had ordered that Rs. 2000 should be placed in the double lock, that he took this money from the rokaria and handed it over to Shankar Nath, who either embezzled it or forgot to place it in the double lock. The plaintiff agreed to give Babu Manohar Lal time for payment up to 23rd August 1937, provided some responsible person stood surety for him. Babu Ram Swarup Nigam, who is the maternal uncle of Babu Manohar Lal, agreed to stand as surety for him and promised to pay the plaintiff a sum of Rs. 2000 in case Babu Manohar Lal failed to pay till 23rd August 1937. Exhibits 1 and 2 were executed by Manohar Lal and Ram Swarup Nigam acknowledging the liability to pay the sum of Rs. 2000 under the circumstances stated above. The plaintiff thereupon deposited the sum of Rs. 2000 on 20th August 1937, in the Government treasury. Both Babu Manohar Lal and Shankar Nath were prosecuted on a charge of embezzlement, but they were acquitted by the Sessions Court upon the verdict of the jury being in their favour. The plaintiff therefore prayed for a decree for Rs. 2170 including interest as against both the defendants.

Both the defendants denied the claim. They filed separate written statements but their defence is substantially the same. Several pleas were raised in defence with which we are no longer concerned in the present appeal. The only material defence which now survives for discussion is whether the agreement evidenced by Exs. 1 and 2 was void and inoperative. The learned Civil Judge decreed the suit for Rs. 1800 against both the defendants with the condition that the plaintiff will first realize his dues from defendant 1 and when he fails to recover the same he will execute the decree against defendant 2. The amount of Rs. 2000 was reduced to Rs. 1800 on the ground that the plaintiff held a sum of Rs. 200 as cash

security from defendant 1. The learned Civil Judge held that the agreements embodied in EXS. 1 and 2 are not void on the ground that their consideration was unlawful within the meaning of S. 23, Contract Act. He observed that these documents were not obtained to stifle prosecution and were therefore not unenforceable. Babu Manohar Lal acquiesced in the decree and did not appeal. Babu Ram Swarup Nigam alone appealed and the learned District Judge allowed his appeal and set aside the decree passed against him. In the operative portion of the judgment he said :

I therefore allow this appeal and set aside the decree of the lower Court. Appellant will get his costs in both Courts.

Apparently his intention was to set aside the decree in so far as it was against Babu Ram Swarup Nigam, the appellant before him, and there was no question of disturbing the decree passed against Babu Manohar Lal, who had preferred no appeal. The order however shows that the decree of the lower Court was set aside in its entirety. We shall advert to this aspect of the matter later in our judgment. The learned District Judge held that Babu Ram Swarup Nigam was not liable as a surety under EX. 2 executed by him because in his opinion it was executed for the purpose of stifling prosecution and was therefore not enforceable under S. 23, Contract Act. The plaintiff challenges the decree of the learned District Judge by way of this second appeal. It has been contended on behalf of the appellant that the decision of the learned District Judge is legally unsustainable inasmuch as he did not direct his attention to a material part of the defence contained in the pleadings which had great bearing upon the alleged illegality of the transaction and further that he failed to draw a distinction between a consideration for the contract which was unlawful and the motive inducing the contract. Reference has been made in this connexion to para. 26 of the written statement filed by defendant 1. The relevant portion is as follows :

Ultimately it was agreed that the answering defendant would deposit the sum in the treasury on the next opening date so as to avoid any trouble and that the plaintiff would thereafter look into the whole matter and (if Shankar Nath was found liable) he would get the money returned to the answering defendant, and the matter would not be brought to the notice of the authorities, and there would be no prosecution.

Defendant 2 in para. 18 of his written statement makes a similar assertion and states that it was agreed between the plaintiff and defendant 1 that the question, whether defendant 1 was liable or Shankar Nath, will be decided privately afterwards, but the amount of shortage should be replaced so that the matter may not come to the notice of the authorities. In para. 22 it is stated that the undertaking given by defendant 2 was without consideration and in any case for an unlawful object of consideration or for a consideration which failed. It is perfectly clear from the defence referred to above, that the liability of defendant 1 or Shankar Nath in the matter was, according to the arrangement arrived at between the parties, to be determined subsequently upon proper enquiries being made for that purpose. This shows that upon the defendants' own showing the plaintiff was absolutely uncertain as to which of the two had embezzled the money and was criminally liable. The learned District Judge slurred over this defence and did not attach to it the importance which it deserved. He concentrated his attention upon the other defence whether the consideration was unlawful and in arriving at a finding upon that point he committed the irregularity of not giving any weight to the other defence and the evidence relating thereto. He relied upon the circumstance that defendant 2 could not have had any motive in undertaking his liability as a surety except to save his nephew from a criminal prosecution. He accepted the evidence, which he was entitled to do, of Mashuq Ali (D. W. 6) and Ram Swarup Nigam (D. W. 8) and recorded his finding in the following words :

In my opinion there are very strongest reasons for thinking that the document and endorsement were executed for the purpose of stifling prosecution quite apart from this evidence and I have not the slightest difficulty in believing these witnesses.

D. W. 6 admitted that he did not hear Har Narain Kapoor dictating to Manohar Lal and Ram Swarup Nigam that there would be no prosecution of Manohar Lal if the money was paid. He also stated that he did not recollect if either Manohar Lal or Ram Swarup Nigam suggested to Har Narain Kapoor to get something about the prosecution mentioned in the writing. Babu Ram Swarup wrote that he was becoming surety of the money payable by Manohar Lal. Defendant 2 as D. W. 8 stated that he endorsed the writing of Manohar Lal on the clear understanding between himself and Har Narain Kapoor that Manohar Lal will not be prosecuted and that Har Narain will also try to find out the person responsible for the loss as promised by him. He

endorsed the writing of Manohar Lal as surety merely to save Manohar Lal from criminal prosecution and also to save his honour and the honour of Manohar Lal. Turning to the two documents (Exs. 1 and 2), it appears that the first one was addressed to the plaintiff by defendant 1 and merely stated that the latter, as agent to the treasurer, will deposit Rs. 2000 which was in dispute, on 23rd August 1937, for which he admitted that he was liable. Exhibit 2, which was written by defendant 2, ran thus :

I shall be responsible for the money Rs. 2000 (Rupees two thousand only) in case of Manohar Lal's failure to pay the money on 23rd August 1937.

Accepting the evidence, which was believed by the learned District Judge, and taking into consideration the writings (Exs. 1 and 2) we are unable to uphold the finding of the learned District Judge that Ex. 2 was executed for a consideration which was unlawful within the meaning of S. 23, Contract Act. The learned District Judge was largely influenced in arriving at his finding by the fact that there could be no motive for the undertaking on the part of defendant 2 other than his anxiety to save his nephew from prosecution and therefore the consideration of Ex. 2 must be regarded as being due to the promise of the plaintiff to forbear to prosecute defendant 1. Section 127, Contract Act, lays down :

Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

From the facts found in this case, it seems to us clear that the consideration for Exs. 1 and 2 was the discharge of the liability, qua defendant 1, and the promise to pay Rs. 2000 in the treasury on the same day in so far as defendant 2 was concerned. The learned Judge remarks :

It is true that Manohar Lal knew that the treasury officer had heard of the missing money, but it is quite possible that he may still have thought that the treasurer could get him out of trouble.

The treasurer could not possibly have got the man out of trouble nor even the treasury officer, as the matter lay in the hands of the Deputy Commissioner. If therefore Manohar Lal was aware that the treasury officer had come to know of the loss of the money, it is difficult to see how the plaintiff was able to hold forth a promise that he will not prosecute Manohar Lal. Defendant 2 apparently thought that there was a risk of prosecution of his nephew Manohar Lal, that if the plaintiff fulfilled his promise to deposit the sum of Rs. 2000 the same day into the treasury there was a reasonable prospect of his being saved from the criminal prosecution. There is no doubt that he was clearly interested in saving his honour and the honour of his nephew, as he admits in his deposition, and it is only reasonable to assume that he agreed to undertake the liability to indemnify the plaintiff if the latter deposited the money the same day. The promise made or undertaking given by the plaintiff to pay Rs. 2000 on the critical day, namely 20th August 1937, was a sufficient consideration within the meaning of S. 127, Contract Act, for the execution of Exs. 1 and 2. There can be no doubt that Manohar Lal was liable to reimburse the plaintiff for the loss of Rs. 2000 by reason of his position as his agent. There was therefore a pre-existing civil liability on the part of Babu Manohar Lal. There was at the same time the risk of a possible prosecution. The plaintiff was primarily responsible to make good the loss but he was not bound to do so on the same day. He may well have obtained time to pay up the shortage and the fact that he did actually pay on the same day clearly indicates that he did so on account of the acknowledgment of liability by Babu Manohar Lal and the undertaking of his uncle Babu Ram Swarup Nigam. It cannot be said therefore that the consideration of Exs. 1 and 2 was the forbearance on the part of the plaintiff to prosecute Babu Manohar Lal, though the evidence establishes that the motive which impelled Ram Swarup Nigam to stand as surety for his nephew Manohar Lal was none other than that of saving him from the risk of prosecution. There is a clear-cut distinction between the motive prompting an act and a consideration. This has been recognized in a number of judicial decisions of which the following may be referred to: A I R 1927 Lah 530,[1] A I R 1929 Lah 564,[2] 53 Cal 51[3] and A I R 1922 Pat 502.[4]

In the first of these cases the learned Judge held that where the withdrawal of the complaint is due to the debtor having executed a promissory note in favour of the creditor, but such withdrawal is not the consideration of the promissory note and the liability is not made contingent upon

1. ('27) 14 AIR 1927 Lah 530 : 103 I C 444 : 28 P L R 388, Shanti Sarup v. Lal Chand.
2. ('29) 16 AIR 1929 Lah 564 : 117 I C 74 : 30 P L R 445, Tek Chand v. Harjas Rai Arjan Das.
3. ('26) 13 AIR 1926 Cal 59 : 89 I C 200 : 53 Cal 51 : 42 C L J 90 : 29 C W N 825, Dwijendra Nath v. Gopiram Gobindaram.
4. ('22) 9 AIR 1922 Pat 502 : 70 I C 295 : 1 Pat 164, Adhikanda Sahu v. Jogi Sahu.

the complaint being dismissed or withdrawn, the promissory note is not invalid. Though the motive of the execution of the document may be the withdrawal of a non-compoundable criminal case, the consideration is quite legal provided there is an enforceable pre-existing liability. In the Patna case it was observed that the distinction between the motive for coming to an agreement and the actual consideration for the agreement must be kept carefully in view and this care must be particularly exercised in a case where there is a civil liability already existing which is discharged or remitted by the agreement. In A I R 1937 Mad 223[5] it was held that in order to prove that the consideration of a promissory note is illegal the Court must be satisfied that the promissory note was given in pursuance of an agreement to stifle prosecution. The mere possibility of a talk of criminal proceedings at some stage or another will not make the transaction illegal. Further, it is not a principle of law that whenever a third person undertakes the liability of another person in whom he is interested, the third person's promise is either without consideration or vitiated by illegality. In 28 ALL 718,[6] it was held that where a bona fide debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by the debtor to a third party as security for the debt constitutes a valid agreement.

Learned counsel on behalf of Babu Ram Swarup Nigam has referred to 57 I A 117= A I R 1930 P C 100[7] in support of his contention that the consideration of an agreement is unlawful within the meaning of S. 23, Contract Act, irrespective of the fact that the prosecution in law has been started or not. This proposition is not open to question. Their Lordships of the Judicial Committee in that case observed that the real question arising before them in that case was whether any part of the consideration of the reference or the ekrarnama was unlawful, and not whether any prosecution within the meaning of the Criminal Procedure Code had been started or dropped. Their Lordships proceeded to say that if it was an implied term of the reference or the ekrarnama that the complaint would not be proceeded with, then in their Lordships' opinion the consideration of the reference or the ekrarnama as the case may be, is unlawful, and the award or the ekrarnama was invalid, quite irrespective of the fact whether any prosecution in law had been started.

The decision of a single Judge on the original side in 11 Bom 566[8] does not help the respondents' case. There it was definitely held that as a consideration for the guarantee the creditors were to abstain from taking criminal proceedings against the debtor for 15 days, and by implication were to abstain from taking such proceedings altogether if the said debts were paid within that time. In these circumstances it was held that the guarantee could not be enforced by the creditors. Reference has also been made by the learned counsel on behalf of the defendant-respondent to A I R 1938 Cal 840,[9] A I R 1940 Cal 337[10] and 57 Bom 678.[11] In the first case, A I R 1938 Cal 840,[9] it was clearly found that a part at least of the consideration for entering into the ekrarnama was the withdrawal of the criminal proceeding that was clearly started. After referring to a number of decisions it was observed by Mukherjea J. that:

> The position, in my opinion, is that if the pre-existing liability of the debtor was the sole consideration for the security which he gives, the transaction will be protected, even if it were given under threat of criminal proceedings; but if the dropping of prosecution was also a matter of bargain between the parties, and constituted a part of the consideration apart from the pre-existing debt, the security cannot be enforced in law.

A similar principle was enunciated in A I R 1940 Cal 337[10] and 57 Bom 678.[11] The principle deducible from these cases is that an agreement is void under S. 23, Contract Act, if the entire consideration or a portion thereof was the agreement not to prosecute or to drop a prosecution which had already been started. This will apply equally to the case of a guarantee but where no portion of the consideration can be traced to an agreement not to prosecute criminally or not to withdraw a pending criminal prosecution, the surety cannot escape the liability on the ground of an unlawful consideration.

5. ('37) 24 AIR 1937 Mad 223 : 169 I C 435 : (1937) 1 M L J 414, Lakshmanaswamy v. Narasimha Rao.
6. ('06) 28 All 718 : 3 A L J 506 : 1906 A W N 212, Jai Kumar v. Gauri Nath.
7. ('30) 17 AIR 1930 P C 100 : 123 I C 187 : 57 Cal 1302 : 57 I A 117 (PC), Kamini Kumar Basu v. Birendra Nath Basu.
8. ('87) 11 Bom 566, Kessowji Tulsidas v. Hurjivan Mulji.
9. ('38) 25 A I R 1938 Cal 840: 179 I C 210: 43 CWN 147, Sudhindra Kumar v. Ganesh Chandra.
10. ('40) 27 A I R 1940 Cal 337: 190 I C 295: I L R (1940) 1 Cal 372: 71 C L J 215: 44 C W N 304, Srish Chandra Nandy v. Supravat Chandra.
11. ('33) 20 A I R 1933 Bom 413: 147 I C 1096: 57 Bom 678: 35 Bom L R 850, Sayamma v. Punamchand Raichand.

Having given our best consideration to this case, we are of opinion that the finding of the learned District Judge is vitiated by an error of law and must be set aside. It may be mentioned that the learned District Judge was in any case wrong in setting aside the entire decree in so far as defendant 1 was concerned. As we have arrived at the conclusion that his judgment and decree should be set aside altogether it is unnecessary to pursue this point any further. The result is that we set aside the judgment and decree of the lower appellate Court, allow the appeal with costs and restore the judgment and decree of the trial Court.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Oudh 598

THOMAS C. J. AND AGARWAL J.

Pt. Ram Gopal—Plaintiff — Appellant

v.

Pt. Ram Shankar and others — Defendants — Respondents.

Misc. Appeal No. 18 of 1938, Decided on 25th August 1941, against order of Civil Judge, Lucknow, D/- 15th November 1937.

(a) Civil P. C. (1908), S. 104 (c), Sch. 2, Para. 16 and O. 43, R. 1 (m) — Court directing office to make necessary adjustments in award as agreed to by parties — Objection to amendment made by office—Order deciding objection is not open to appeal or revision — Proper remedy is appeal from decree.

Where the Court directs the office to make the necessary adjustments in the award as agreed to by the parties and an objection is taken to the amendments made by the office, the order deciding the objection is not open to appeal and being an interlocutory order is not open to revision as well. The proper remedy for the party aggrieved is to appeal from the decree. [P 599 C 1]

(b) Civil P. C. (1908), S. 115 — High Court does not interfere with interlocutory order or when remedy by way of appeal is open.

The High Court does not interfere in revision with an interlocutory order and also when a party coming up in revision has a remedy by way of appeal. [P 599 C 1]

R. B. Lal — for Appellant.

Harish Chandra — for Respondents 1 to 6.

Judgment. — This miscellaneous appeal arises out of the following circumstances : The appellant, Pandit Ram Gopal, brought a suit for partition of the family property, moveable and immovable, against his brothers Ram Das, Ram Shankar and Parshotam Das. Ram Shankar and Parshotam Das are respondents in this appeal. Ram Das died during the pendency of the suit and is represented by his sons, respondents 3 to 6. The case was referred to arbitration and the arbitrator filed his award on 15th April 1937, and ten days time was allowed to the parties to file objections. Objections were filed by the plaintiff. On 12th July 1937, the parties made a statement before the Court that the award of the arbitrator may be modified in some respects. This was followed by an order of the Court which is :

The award is modified in the above terms as agreed between the parties. Let a decree be prepared in terms of the award as modified by the consent of the parties. The necessary adjustment will be made in the award by the office and will be shown to the counsel of the parties.

The office made some modifications in the award and the counsel for the parties were informed of it. The plaintiff filed objections to the modifications made in the award. Those objections were disposed of by the learned civil Judge on 15th November 1937. He has wrongly stated in his order that the application before him was for the amendment of a decree prepared on the basis of an award. No decree had actually been prepared when this order was passed. The decree was actually signed by the presiding officer on 10th February 1938. The learned civil Judge held that the decree prepared by the office on the basis of the modified award, agreed by the parties was in his opinion perfectly correct. He probably meant that the modifications made in the award were properly made. The plaintiff has come up in appeal, and has also prayed that if an appeal does not lie, his memorandum of appeal may be treated as an application for revision.

A preliminary objection has been taken that neither an appeal nor a revision lies. The appellant has described the appeal to be under S. 104 (c) and Sch. 2, Para. 16, Civil P. C., from the order dated 15th November 1937, read with order dated 12th July 1937. The order dated 12th July 1937 is a decree. The decree was actually prepared by the office later on and was signed by the presiding officer on 10th February 1938. The appellant has not appealed from that decree. It is prayed before us that this appeal may be treated as an appeal from that decree. We see no reason to do it. The appellant chose to appeal from an order and we see no reason why we should allow him to change his position after about three and a half years. The appellant contends that he is entitled to appeal under S. 104, cl. (c) which provides for an appeal from an order modifying or correcting an award. The order dated 15th November 1937, is not in our opi-

nion an order modifying or correcting an award. It is only an order deciding an objection made by the plaintiff to the amendment of the award made by the office. The order of 12th July directing that necessary adjustment be made in the award might have been an order correcting or modifying an award had it been passed separately from the order directing that a decree be prepared in terms of the award. Reliance is also placed on Para. 16 (2) of Sch. 2, Civil P. C. It provides that upon the judgment pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award. This also contemplates an appeal from a decree.

It is also argued that the appeal might be treated as one under O. 43, R. 1, cl. (m) which provides for an appeal from an order under R. 3 of O. 23, recording or refusing to record an agreement, compromise or satisfaction. We are of opinion that the order of 15th November 1937, is not such an order. The Court had already recorded the agreement arrived at between the parties on 12th July 1937. We are of opinion that no appeal lies under any of the provisions relied on by the learned counsel for the appellant. We cannot treat the appeal as a revision because the order of 15th November 1937 is only an interlocutory order. It only provides that the amendment made by the office was correct. The appellant's proper remedy was to appeal from the decree. This Court does not interfere in revision with an interlocutory order and also when a party coming up in revision has a remedy by way of appeal. We hold that no appeal or revision lies. We accordingly dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 599

THOMAS C. J. AND GHULAM HASAN J.

Sarfaraz Ali and others — Accused Appellants

v.

Emperor.

Criminal Appeal No. 171 of 1941, Decided on 13th August 1941, against order of Addl. Sess. Judge, Lucknow, D/- 16th May 1941.

(a) Criminal trial — Evidence — Fact that witness was not mentioned in first information report is not ground per se to reject his evidence.

The fact that the name of the witness was not mentioned in the first information report is not a ground per se to reject his evidence if it shows that he was present on the spot and witnessed the occurrence. [P 605 C 1]

(b) Criminal trial — Evidence — Public Prosecutor should examine in Sessions Court all witnesses mentioned in list submitted by committing Magistrate — He cannot refuse to produce witness on ground of his having turned hostile.

It is the duty of the Public Prosecutor to produce and examine in the Sessions Court all the witnesses mentioned in the list submitted by the committing Magistrate. The Public Prosecutor cannot refuse to produce or tender for cross-examination a witness on the ground that he was declared hostile in the committing Magistrate's Court : ('15) 2 A I R 1915 Cal 545 and ('29) 16 A I R 1929 Pat 275, *Rel. on* ; ('36) 23 A I R 1936 P C 289, *Expl.* ; 16 All 84 (F B) and ('32) 19 A I R 1932 Cal 118, *Not foll.* ; ('34) 21 A I R 1934 All 908 and ('40) 27 A I R 1940 All 46, *Approved.* [P 606 C 2 ; P 607 C 2]

(c) Criminal P. C. (1898), S. 540 — Court's power and duty to examine witnesses — Witness declared hostile in committing Magistrate's Court — Sessions Court should examine witness under S. 540 even if Public Prosecutor is unwilling to examine him on ground of his being hostile.

Whatever the power of the Public Prosecutor to produce or withhold evidence, there is no doubt that the power of the Court is neither circumscribed nor fettered in any way to arrive at the truth in a criminal trial. Section 540 gives ample powers to the Court to examine any person as a witness, whose evidence appears to it essential to the just decision of the case. [P 608 C 2]

The witnesses mentioned in the list submitted by the committing Magistrate should be kept in attendance in the Sessions Court and the Sessions Judge should exercise his power under S. 540 and himself examine any witness who was declared hostile in the committing Magistrate's Court even if the Public Prosecutor is unwilling to examine him on the ground that he had turned hostile : 16 All 84 (F B) ; ('34) 21 A I R 1934 All 908 ; ('40) 27 AIR 1940 All 46 ; ('32) 19 A I R 1932 Cal 118 and ('36) 23 AIR 1936 P C 289, *Ref.* [P 608 C 2]

(d) Criminal trial — Evidence — Hostile witness — Murder case — Prosecution witness is not hostile merely because he states that nothing was recovered from accused's possession at time of his arrest.

A witness for the prosecution in a murder case produced in the committing Magistrate's Court cannot be characterized as untruthful and hostile merely because he stated that nothing was recovered from the possession of the accused at the time of his arrest. [P 608 C 2]

H. G. Walford — for Accused.

Government Advocate — for the Crown.

Judgment. — This appeal arises out of a riot case, which has resulted in the loss of three lives and grievous injuries to two of the victims of the assault on the morning of 3rd July 1940, at a distance of two miles from village Bhikampur, district Lucknow, at the junction of Kursi and Itaunja Roads. In order to understand fully the significance of the prosecution case it is necessary to

look at the background of the events which led up to the riot accompanied with murders. Chandrika Bakhsh Singh, the former taluqdar of Bhikampur estate, created a trust of his entire property with the exception of two villages, Mahagawan and Narosa, which he gifted to his wife Rani Dhiraj Kunwar (known as Bari Rani) and got mutation of names effected in her favour in his lifetime. Chandrika Bakhsh Singh died in December 1936 leaving his only son, Kumud Pratap Narain Singh who succeeded to the estate left by him. Kumud Pratap Narain Singh was married to Rani Deoraj Kunwar (known as Chhoti Rani). After the death of the taluqdar, differences arose between the Bari Rani and the Chhoti Rani over the possession of the two villages, which had been gifted to the Bari Rani by her husband and whose attempt to obtain possession of the same was successfully frustrated by the Chhoti Rani. One Shitab Rai was the manager and supporter of the Bari Rani, who was alleged to be carrying on with him. This conduct of the Bari Rani aroused indignation of her son Kumud Pratap Narain Singh and his wife, the Chhoti Rani, who did not approve of the retention of Shitab Rai as the manager. Both the Ranis found a considerable number of supporters and adherents in carrying out their object. These supporters were mostly the servants or the tenants. It appears that on 28th April 1938, the nose of Shitab Rai was cut under some suspicious circumstances. The report (Ex. 15) made by Ajudhia Prasad, zilladar of Bhikhampur estate, on 28th April 1938, at police station Itaunja shows that Shitab Rai had been beaten by many persons of village Narosa and Mahagawan between 3 and 4 P. M. and that his nose had been cut off. No names of the assailants were mentioned in the report. A number of persons, including Sarfaraz Ali, Baqridi and Rameshwar, the alleged servants and supporters of the Chhoti Rani, were sent up to stand their trial in the Court of Session but they were all acquitted on 26th October 1938, by the Sessions Judge. This incident is alleged to have led the Bari Rani to wreck vengeance against the Chhoti Rani and her supporters. Sarfaraz Ali or Sarfaraz is an ordinary cultivator and a shopkeeper, who used to reside at Mahagawan but has now shifted to Lucknow.

The extent to which the feelings between the Bari Rani and the Chhoti Rani were strained will appear from the report of the Sub-Inspector of Itaunja (Ishwari Singh) made on 21st November 1938, (*vide* Ex. 28). The Sub-Inspector stated in this report that Kumud Pratap Narain Singh had been missing from 5th/6th May 1938, and since his disappearance the management of the estate had gone from bad to worse. The estate was carried on by certain trustees, two of whom were the Raja Sahib of Dayya, district Allahabad, the son-in-law of the Bari Rani, and Shitab Rai, her manager. This Shitab Rai was also the manager of Chandrika Bakhsh Singh, the former taluqdar. The report refers to the illicit intimacy between the Bari Rani and Shitab Rai. The Bari Rani had shifted to Lucknow along with Shitab Rai after the latter's nose had been cut off and began to live in Lucknow. Her son, Kumud Pratap Narain Singh, disappeared from this house between the night of 5th and 6th May 1938. The trust committee appointed one Kunj Behari Lal as manager in place of Shitab Rai, but later appointed Mata Dayal, a son of one of the trustees, as manager. This appointment was not approved of by the Bari Rani and Shitab Rai. The two Ranis became independent and hostile to each other and wanted to take possession of Garhi Bhikhampur and made deliberate preparations to achieve that object. The Chhoti Rani succeeded in taking possession of Garhi Bhikhampur and prevented Bari Rani from reaching there. Mata Dayal, the manager, began to live with the Chotti Rani at Garhi Bhikhampur. The Bari Rani, with the help of certain members of the trust, held a meeting and dismissed Mata Dayal and appointed another manager Bhagwan Bakhsh Singh as manager of the estate. This accentuated the differences between the two Ranis and a spirit of anarchy prevailed in the estate. Each party tried to get an upper hand in the management of the estate and began to get adherents. The Sub-Inspector, therefore, reported that there was an apprehension of a breach of the peace at any time and proceedings under S. 107, Criminal P. C., be taken against 11 persons belonging to the party of the first Rani and 11 persons belonging to the party of the second Rani. The two Ranis, with their managers Shitab Rai and Mata Dayal figure as first in the lists. Baqridi and Sarfaraz were also mentioned as persons belonging to the party of the Chhoti Rani, against whom action was sought.

The Deputy Superintendent of Police, to whom this report was submitted, forwarded it to the Sub-Divisional Officer, Malihabad for favour of binding over the parties under S. 107, Criminal P. C., with the exception of

the two Ranis. It is not at all clear to us why the Deputy Superintendent of Police thought fit to except the two Ranis from the preventive action which the station officer had recommended against them, particularly in view of the fact that the entire responsibility for disturbance of the peace lay on their shoulders. We have examined the original record of the case and find that a notice under S. 112, Criminal P. C., was issued by the District Magistrate of Lucknow against the parties complained against, except the two Ranis, to show cause why they should not be required to execute a personal bond and produce two sureties to keep the peace for a period of one year. The notice does not bear any date.

We find, however, that on 23rd February 1939, an application was made by nine members of the Bari Rani's party in which it was stated that the taluqa of Bhikhampur had been attached for arrears of revenue and a zilladar had been appointed by the authorities and there was, therefore, no longer any apprehension of a breach of the peace. The applicants asked that the notice may be discharged. The Sub-divisional Officer of Malihabad asked for a police report on 30th March 1939; the station officer (Ishwari Singh) reported that he had recommended proceedings under S. 107, Criminal P. C., against the parties, as in his opinion there was an apprehension of a breach of the peace and that the parties were now trying to contrive measures to get out of the clutches of the law. The report added that if the Court was satisfied that there was no further apprehension of a breach of the peace, he (the station officer) had no objection to the notice being discharged. On 31st March 1939, the Sub-divisional Magistrate cancelled the notice on the ground that as the estate had been taken under the direct management of the district authorities, it was not necessary to bind the parties. He, however, added:

> S. O. who still apprehends breach of the peace will report the grounds on which he wants to have the parties bound over.

We cannot help expressing our regret at the unfortunate order passed by the Sub-divisional Magistrate cancelling the notice against the parties. In the first place, we think there was absolutely no reason for making an exception in favour of the two Ranis as regards the advisability of taking action against them under S. 107, Criminal P. C. As a matter of fact, in the interests of the peace and good administration, it was highly desirable that action should have been taken against the two Ranis under the preventive powers vested in the Magistracy. Again, there was no justification whatever for dropping the proceedings against the active adherents of the two Ranis, who had done everything to stir trouble and create a situation which was fraught with consequences dangerous to peace. We are led to make these remarks because we feel that had preventive measures been adopted against the two Ranis and their supporters at the proper time, the present unfortunate riot and murderous assault would have easily been prevented.

We now pass on to another stage of the case. On 20th October 1939, Sarfaraz made a report (Ex. 8) at the police station of Itaunja against certain employees of the Bhikhampur estate, including Baqridi and Babu Ram, under S. 426/506, Penal Code. In this report Sarfaraz stated that he had planted a grove in Mahagawan on a land granted to him by Chandrika Bakhsh Singh, the deceased taluqdar. A servant of the Chhoti Rani had demanded nazrana from him for the grove which he had planted and he refused to pay. Upon this, the report alleged, the accused uprooted his mango trees. The accused also went to his shop, threw away his articles and threatened him with dire consequences. This report was followed by a complaint (Ex. 20) made by Sarfaraz on 27th October 1939, against 12 persons, including the Chhoti Rani, her manager Mata Dayal, Babu Ram and Baqridi. In this complaint he referred to the uprooting of his trees and the looting of his grain, milk and khoya shop. Sarfaraz admitted that he was tenant and riyaya of the Bari Rani. He stated that the police had reprimanded him for making a report and had recorded a wrong report. Sarfaraz for fear of danger to his life and property from the Chhoti Rani and her manager had shifted to Lucknow and informed the Superintendent of Police of Lucknow about the fact. He also alleged that he had come to know from his relations that the Chhoti Rani had got the crop of his fields forcibly reaped by her tenants. He prayed for proceedings under S. 106, Criminal P. C., being taken against the 12 persons named by him.

On 23rd March 1940, Sarfaraz Ali filed an application (Ex. 32) before the District Magistrate of Lucknow stating the previous facts and adding that he expected no justice from the police and asking that action be taken immediately to enable him to live peace-

fully. He followed it up by another application on 28th March 1940 to the Magistrate to the same effect asking for immediate action (Ex. 31). The station officer of Itaunja (Ishwari Singh) made a report (Ex. 31-A) on 20th April 1940, in which he practically recorded his conclusion that there was no evidence of loot and arson at the house of Sarfaraz Ali and that the house had been burnt at the instance of Sarfaraz himself and his own grandson Amin Husain. From a narration of these facts, it appears to us clear that relations between the Bari Rani and the Chhoti Rani had been strained since after the death of Chandrika Bakhsh Singh, that each wanted to oust the other from the management of the estate and that in order to acquire absolute control and authority in the estate both of them had gathered their own supporters and adherents. It also shows that Sarfaraz Ali, who was at one time on the side of the Chhoti Rani had since 1939, made several complaints against her and her supporters and harboured grievance against her.

We now come to the last and important stage of the case. It appears that on 8th January 1939, Mohan Lal, a servant of the Bari Rani, made a report against 24 persons who belonged to the party of the Chhoti Rani that they committed a riot and caused injuries to him and his companions in Itaunja with bows, arrows, spears and lathis. This list of 24 persons includes the names of Babu Ram, Baqridi, Baijnath Singh and Paltan Singh. These persons were alleged in the report to be the members of the party of the Chhoti Rani. The report stated that two of the persons had been seriously injured and were unlikely to survive. The Chhoti Rani's men, including Babu Ram and Baqridi, were challaned and 3rd July 1940 was fixed in that riot case. Mata Dayal (P. W. 27), manager of the Chhoti Rani, was a defence witness in the said case.

According to the prosecution case on 3rd July 1940, Shyam Behari and Kashi Din, brothers, Babu Ram, nephew of Kashi Din Gaya Prasad and his son, Sheo Prasad, a boy aged 14 years, and Baqridi, left Mahagawan for Lucknow at about 3.30 or 4 A. M. Baqridi and Kashi Din walked on foot while the others sat in the addha. At Bhikhampur, which is at a distance of two or three furlongs from there, the party picked up Mata Dayal (P. W. 27) manager of the Chhoti Rani. Mata Dayal sat in the addha while Gaya Prasad had got ahead and met the party near a culvert, where he was offered a seat by Mata Dayal on the addha. When the party reached the crossing of the Kursi and Itaunja Roads and the addha turned towards Itaunja, the nine accused who were lying in wait for Mata Dayal and his party and were armed with lathis, spears and knives, suddenly emerged out of a dense dhak jungle and surprised Mata Dayal and his party and assaulted them. The accused are alleged to have given spears and knife thrusts and lathi blows in consequence of which Babu Ram and Baqridi died on the spot and Shyam Behari whose lungs were punctured, expired on the way to the thana. Gaya Prasad also received three injuries from lathi blows out of which two were contusions and one was a contused wound 1″ × 3/8″ over the forehead just above the left eyebrow. His son Sheo Prasad received no injury and both he and his son managed to escape and ran away to Kumhrawan, about two furlongs or so from the spot. Mata Dayal received one punctured wound 1″ × ⅓″ × ½″ deepest in the centre right thigh 6″ above the right knee joint. Babu Ram was dragged from the addha by the accused and the noses of both Babu Ram and Baqridi were cut by the accused. Kashi Din hid himself in a bush and is alleged to have witnessed the attack. Sarupe, the driver of the addha, also ran away and hid himself behind a bush. Bipat Pasi who happened to come from the Kursi side, seeing the attack raised an alarm, which attracted the people of Kumhrawan to the scene of the occurrence. The prosecution story proceeds that another addha was sent for from Bhikhampur to carry the injured persons. The two deceased persons were taken on the addha and Shyam Behari and Mata Dayal were carried on cots. Kashi Din accompanied them and was joined by Gaya Prasad, who returned from village Kumhrawan and then the entire party proceeded to police station Itaunja, which is at a distance of six miles from the scene of occurrence, where the first information report was lodged at 9 A. M.

The report was dictated by Kashi Din (P. W. 1). All the nine accused were mentioned in the first information report. The report states that the nine accused were the men of the Bari Rani, and Shyam Behari, Babu Ram and Baqridi deceased were the men of the Chhoti Rani. It further says that Sarfaraz was originally on the side of the Chhoti Rani but some time ago he turned against her and had joined the service of the Bari Rani, that he having left his residence at Mahagawan settled down in

Lucknow with the members of his family, where the Bari Rani was also living. The story of the party leaving Mahagawan to attend the hearing of the riot case, which was fixed on that date, and the assault upon them at the junction of Kursi and Itaunja Roads by the nine accused is repeated in the first information report. The report further states that the accused removed Rs. 100 from the waistfolds of Shiam Behari and Rs. 49 from the waistfolds of Babu Ram, which they had taken with them when they had started from their houses. Rameshwar accused cut off the noses of Baqridi and Babu Ram. It also says that when Paltan Singh, Baijnath Singh and Bipat Pasi reached the spot and raised a hue and cry, then the accused ran towards Kursi Road. People of Kumhrawan are also stated to have reached there but no names are mentioned. Rameshwar accused is alleged to have taken away the box of Mata Dayal, which was said to contain clothes and Rs. 88.6.0 cash.

The second officer, M. Nurul Hasan of Itaunja, on receipt of the information arrived at the spot at about 8.30 P. M. and took down the statements of some of the witnesses. He sent Mata Dayal and Gaya Prasad to the dispensary at Itaunja for examination of their injuries. The dead bodies of Shyam Behari, Babu Ram and Baqridi were sent for post mortem examination which was held on 4th July 1940. The post mortem examination of Baqridi shows that he received one incised wound $1\frac{1}{2}'' \times \frac{1}{4}''$ scalp deep on the middle of the forehead and multiple incised wounds over an area of $5'' \times 1\frac{1}{2}''$ bone deep which was cut on the right head, two inches above the right ear and a contused wound $1\frac{1}{4}'' \times \frac{1}{2}''$ scalp on the left side of the head above the left ear. He also received a punctured wound $1'' \times \frac{1}{2}''$ bone deep on the back portion of the right arm cutting the bone in the lower portion. His nose was cut. In addition to these he received some contusions on the arm, thigh and the back. His death according to the medical evidence was due to the fracture of the skull bones. Babu Ram also received several incised wounds and his nose was cut. His death was also due to the fracture of the skull bones. Shyam Behari received a punctured wound $1\frac{1}{2}'' \times \frac{3}{4}''$ on the left side of the back in the middle six inches below the root of the neck, and an incised wound $1\frac{1}{2}'' \times \frac{1}{2}''$ bone on the outer side of the right knee joint. The pleura was punctured under injury No. 1 and about half a pint of blood was present in the left pleural cavity. The left lung was punctured. His death was due to injury to the chest and lung caused by some sharp pointed weapon.

On the side of the accused Kallu was found to have five injuries which were of a simple nature. No other accused had any injury. Out of the accused, Hamid Husain, Amin Husain and Iqbal Husain are the grandsons of Sarfaraz Ali accused. Kallu and Abdul Haq are the nephews of Sarfaraz. Rameswar and Sarju accused are brothers and Bhallar is a cousin of Rameshwar accused. All the accused pleaded not guilty. Sarfaraz accused stated that he had been implicated on account of the fact that he was on terms of enmity with the Chhoti Rani and Satrohan Singh (the brother of the husband of the Bari Rani) and Mata Dayal, manager. He stated that he was in Shahjahanpur on the day of the occurrence. Hamid Husain, Amin Husain, Abdul Haq, Kallu and Iqbal Husain stated that they were related to Sarfaraz and had been implicated on account of enmity. They also alleged that they were at different places on the day of the occurrence. Rameshwar and Sarju made similar statements. Bhallar stated that the Chhoti Rani had asked him to set fire to the house of Sarfaraz and to cut his crop and as he refused to do so, she got him falsely implicated in the case. He also set up a plea of alibi.

Sarfaraz Ali, Hamid Husain, Amin Husain, Kallu and Rameshwar have been found guilty of the offence under S. 302 read with S. 149, Penal Code, and have been sentenced to death. Abdul Haq, Iqbal Husain, Sarju and Bhallar have been sentenced to transportation for life under S. 302 read with S. 149, Penal Code. All the accused have also been convicted under S. 147, Penal Code, and sentenced to one year's rigorous imprisonment. They have also been convicted under S. 325/149, Penal Code, and sentenced to five years' rigorous imprisonment and a fine of Rs. 30 each. The accused have also been convicted under S. 326/149, Penal Code, and have been sentenced to five years' rigorous imprisonment. The sentences of imprisonment are to run concurrently. The accused were also charged under S. 395, Penal Code. The offence under this section was triable with the aid of jury while the other offences with which the accused were charged were triable with the aid of assessors. The jury returned an unanimous verdict of not guilty. The learned Judge

thereupon accepted the verdict of the jury and acquitted the accused of an offence under S. 395, Penal Code.

All the nine accused have appealed against their convictions and sentences, and the record has also been submitted to us by the Additional Sessions Judge of Lucknow for confirmation of the death sentences. The prosecution case is that Sarfaraz Ali was the leader of the party of the accused and belonged to the party of the Bari Rani and that the accused got together in furtherance of the common object of causing hurt to the men of the Chhoti Rani and killing them. It is stated that the Bhikhampur estate owed some money to Sarfaraz, which the Bari Rani did not pay. The Chhoti Rani won over Sarfaraz to her side and his men also joined the side of the Chhoti Rani. The Chhoti Rani got the nose of Shitab Rai cut with the help of Sarfaraz and other persons. Sarfaraz later on being dissatisfied with the Chhoti Rani joined the side of the Bari Rani and the present offences are alleged to have been committed on the men of the Chhoti Rani in order to vindicate the assault which had been made on Shitab Rai, the manager of the Bari Rani. The evidence in support of the attack consists of eight eye witnesses ; Kashi Din (P. W. 1), Ram Swaroop (P. W. 3), Sheo Prasad (P. W. 4), Gaya Prasad (P. W. 7) and Mata Dayal (P. W. 27) are the witnesses who formed the members of the party which left Mahagawan on the fateful morning of 3rd July 1940 on their way to Lucknow. Bipat (P. W. 2) is a Pasi, resident of Mahagawan who happened to be going to village Korwa from Mahagawan in the morning and saw the occurrence when he reached the crossing. Mangal (P. W. 8) is a resident of Rampurwa, which is at a distance of five furlongs from the scene of occurrence, and was ploughing his field at the time when he heard an alarm about the marpit going on near the crossing. Dullar (P. W. 14) is also a resident of Rampurwa and was scraping grass in a field near the road at that time.

A careful consideration of the evidence produced in the case leaves no doubt in our mind that the party left Mahagawan on 3rd July 1940, in the morning for Lucknow with the intention of taking a morning train at Itaunja. It appears from the time table that there were two trains in the morning, one of which left Itaunja at 4-12 A. M. and reached Lucknow City Station at 5-10 A. M. and the other left Itaunja at 7.34 A. M. and reached Lucknow City Station at 8-30 A. M. There was a third train leaving Itaunja at 12-13 mid-day, but we do not think that the party could have delayed their departure so late as they had to attend the hearing of the riot case. It is regrettable that several points in the evidence which had great bearing on the case have not been cleared by the prosecution, for instance it was not shown why the party left Mahagawan so early, whether they were taking a train at Itaunja or they were travelling by lorry, assuming that a lorry was available.

As regards the actual time of the departure from Mahagawan, Kashi Din states that they started at about 4 A. M. Sheo Prasad and his father Gaya Prasad state that they started at 3.30 A. M. while Sarupe, who is illiterate states that they left in the short hours of the night while Mata Dayal, who was the best educated man in the party, states that they left at about 3 A. M. It is not unlikely that Mata Dayal would have possessed a watch but no attempt was made to clear this point and it is difficult to say how he came to mention the time as 3 A. M. Assuming that the evidence of Mata Dayal on this point is correct, as we may safely hold to be, as against the evidence of other witnesses, we have to determine the time at which the assault took place. According to his evidence it was at day-break at about 5 A. M., when the attack was made. The distance between Mahagawan and Bhikhampur is about half a mile and Bhikhampur is at a distance of two miles from the occurrence. If the party left at about 3 A. M. as deposed to by Mata Dayal, it is incredible that the addha would take two hours to cover a distance of $2\frac{1}{2}$ miles. It is not disputed that the addha travelled on a cart road from Mahagawan to the scene of the occurrence. We are not prepared to believe having regard to our knowledge and experience of the speed at which an average addha usually travels, that it would have taken two hours to reach the scene of the occurrence.

In our opinion, at the most conservative estimate, the addha would have covered the distance of $2\frac{1}{2}$ miles in three quarters of an hour. If this estimate is correct, the party would have reached the scene of the occurrence long before 4 A. M. when the light for recognition would have been extremely meagre if at all. We are not satisfied that the incident took place at 5 A. M. as alleged by the prosecution witnesses but that it took place much earlier when there was not adequate light to assist identification of the

assailants. We find, however, that it is proved from the prosecution evidence that the assault took place at the junction of the Kursi and Itaunja roads on 3rd July 1940 in the early morning when identification was rendered difficult by reason of absence of light and that the party were attacked and injured with the result that Babu Ram, Baqridi and Shyam Behari were killed. As a matter of fact, it has not been contended on behalf of the defence that the three deceased persons were not murdered in the course of the attack and simple and grievous injuries were not caused to the other victims. It remains for us to see how far the evidence of the alleged eye-witnesses proves the participation of all or any of the accused in the crime. (After going through the prosecution evidence their Lordships proceeded.) Mangal (P.W. 8) and Dullar (P.W. 14) both belong to Rampurwa, which is a hamlet of Kumhrawan. Their names were not mentioned in the first information report. That however is not a ground per se to reject their evidence if it shows that they were present on the spot and witnessed the occurrence. (Their Lordships discussed the prosecution evidence and proceeded.) Having given our best consideration to the case we are not prepared to hold that the story given by the prosecution witnesses is free from reasonable doubt. Doubt as to the truth of the prosecution story is raised in our minds by various circumstances, which have been fully set out above. To these may be added the attempt to introduce a dying declaration, which the learned Additional Sessions Judge in our opinion has rightly rejected as worthless.

The next question arising in the case is the question of motive. Motive in the special circumstances of this case is apt to be pressed too far. Although there is some evidence to show that Sarfaraz had changed to the side of the Bari Rani, there is the very significant fact that from 27th October 1939 he was continuously complaining against the conduct of the Chhoti Rani, her manager, and other servants, including the two deceased Babu Ram and Baqridi. His complaints, according to him were not attended to by the police, and it is urged by learned counsel on his behalf that Sarfaraz and his family have been implicated in this case on account of the reports and complaints made by Sarfaraz against the Chhoti Rani and her men. There is no doubt whatever that serious allegations of loot and arson were made by Sarfaraz against the Chhoti Rani and her men. The Chhoti Rani was acting through her manager, Mata Dayal, in all these matters, and it seems to us remarkable that Mata Dayal should have been so cheaply let off by Sarfaraz and his party if they were the actual assailants. We have already rejected the story that Mata Dayal continued to sit in the addha and watched the whole affair. If this story were accepted, it is utterly improbable that Mata Dayal, the main target of the attack, should not have been killed instantaneously. In our opinion it is as likely that the attack was organized by the accused upon the party of the Chhoti Rani as that the accused were falsely implicated by her owing to bitter animosities existing between the two Ranis and their adherents.

Another noteworthy fact in this connexion is that there was already a riot case pending upon the complaint of a servant of the Bari Rani against 24 persons, including the deceased Baqridi and Babu Ram and it is this case which was fixed for hearing on 3rd July 1940 in Lucknow. Sarfaraz and his party had no concern whatever with this case as the allegations in the report (Ex. 4) made by Mohan Lal will show. A number of persons are mentioned in this report to have been assaulted by the Chhoti Rani's men. Those who were assaulted in this riot had undoubtedly a strong grievance against Baqridi and Babu Ram. From the prosecution case it appears that Baqridi and Babu Ram were the chief object of attack and it was they whose noses were cut off by the assailants. Shyam Behari received a punctured wound from a spear, according to the medical evidence, which injured his chest and lung and caused his death. He did not receive multiple injuries like Baqridi and Babu Ram. This shows that the object of the assailants was to concentrate their attack upon Baqridi and Babu Ram. It is however not necessary for us to go deeper into this matter beyond referring to the possibility that the assailants of the Chhoti Rani might well have been those who harboured ill-feelings towards them on account of the pending riot case. On the whole therefore we are not satisfied that the case against the accused has been established by any satisfactory or reliable evidence.

As regards Iqbal Husain, the learned Additional Sessions Judge takes into consideration the evidence of the recovery of a bloodstained lathi, which he states was recovered from Iqbal Husain's house. This is certainly not correct. The evidence of Fateh Bahadur constable (P. W. 16) shows that he

arrested Iqbal Husain on 7th July 1940, in the Umariya jungle and that Iqbal had a lathi which had blood spots. The constable mentions that Shambhu and Faqire were present at the time of the recovery of the lathi and they went with him and Iqbal to the thana where the lathi was deposited. It is not correct, therefore, to say that the lathi was recovered from his house. Shambhu (P. W. 31) supports the constable. He admits that he is chaukidar of the Chhoti Rani and he further states that Faqire and Kashi Gaddi were with him at the time of the arrest. As regards the lathi, he says that the blood on it had dried and did not look fresh. Kashi Gaddi was not produced before the committing Magistrate but Faqire was produced and was declared hostile. A request was made on behalf of the accused that he should be tendered for cross-examination but this was refused by the learned Additional Sessions Judge. A reference to EX. 11 (police diary) will show that the persons present at the time of the recovery of the lathi were Faqire Gaddi and Bachchu Pasi. Shambhu is not mentioned as one of the persons present. Bachchu has not been produced by the prosecution.

We consider the circumstances of the recovery of the lathi as highly suspicious. It is incredible that Iqbal Husain would not have thrown away an ordinary lathi if it had blood stains, or would not have taken care to obliterate all traces of blood from the lathi. Having regard to the circumstances, we are not inclined to attach any weight to this piece of evidence against Iqbal Husain accused. As regards Kallu accused, it appears that he had one abrasion over the left forehand near the wrist joint and four contusions on the right and left thighs. The explanation of these injuries given by Kallu accused was that a wooden plank of the shop had fallen on his hand and had thus caused injuries. He also said that the Sub-Inspector of Hasanganj had struck him with a wooden stick, i. e., a ruler. Kallu was arrested in Lucknow by the Hasanganj police on 4th July 1940, and was taken to Itaunja, where he was kept in the lock-up up to 6th July 1940. According to the report of the Sub-Inspector of Hasanganj (Ex. 43) Kallu was examined with his consent and was found to be free from fresh injuries. In the description roll of Kallu, however, it was mentioned that there were three lathi marks on the right thigh and one lathi mark on the left thigh. The fifth injury, which is mentioned in the injury report is not accounted for in this report. We do not think, therefore, that the explanation given by the accused is altogether improbable. A point of law was raised on behalf of the appellants regarding the refusal of the Public Prosecutor to tender Faqire, one of the prosecution witnesses, who was examined before the committing Magistrate, for cross-examination. Faquire, as we have already stated, was one of the witnesses in whose presence, according to Fateh Bahadur constable (P. W. 16) the blood-stained lathi was recovered from Iqbal Husain at the time of his arrest. This witness was produced before the Committing Magistrate but was not produced in the Court of Session. His name was mentioned in the list of witnesses submitted by the committing Magistrate as

P. W. 29, Faqire (hostile witness)—will state that Iqbal accused was arrested in the jungle of Umariya in his presence but nothing was recovered from his possession (turned hostile).

The Government Pleader did not examine him on the ground that he was declared hostile before the committing Magistrate. He also refused to tender him for cross-examination although requested by counsel for the accused to do so. The learned Additional Sessions Judge relying upon a decision of the Full Bench in 16 ALL 84[1] held that the prosecution was not bound to tender the witness for cross-examination if in the opinion of the Public Prosecutor he was a false or hostile witness, because if he did so, "he will be required to do a thing adverse to the interest of the case for the Crown." We understand that Faqire was not even in attendance in the Court of Session on the day when this request was made. The Full Bench held that there was nothing in the Code of Criminal Procedure which imposes an obligation on a Public Prosecutor to call all the witnesses entered in the calendar as witnesses for the prosecution in a Sessions trial and it is not the duty of a Public Prosecutor acting on behalf of the Government to call or put into the witness-box for cross-examination a witness whom he believes to be a false or an unnecessary witness. It was observed, however, that a Public Prosecutor should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respects be favourable to the defence. If a Public

1. ('94) 16 All 84 : 1894 A W N 7 (F B), Queen-Empress v. Durga.

Prosecutor is of opinion that a witness is a false witness or is likely to give false testimony if put into the witness-box, he is not bound to call that witness or to tender him for cross examination. It appears from the facts of the case that the witness had been examined in the committing Magistrate's Court but the Government Pleader refused to examine him in the Court of Session. He was, however, kept in attendance in order that he might, if needed, be examined for the defence; but the defence declined to examine him. The learned Judges upon this part of the case observed :

In cases in which a prisoner is undefended in a Sessions trial, the presiding Judge should in our opinion look at the deposition of any witness appearing in the calendar as a witness for the Crown, and not called on behalf of the Crown or tendered for cross-examination, in order to ascertain whether he should not himself take action under S. 540, Criminal P. C., 1882. All witnesses returned in the calendar as witnesses for the Crown are, whether they are called or not by the Crown, bound to be in attendance until the conclusion of the trial, unless they are released from attendance by order of the Court; and before releasing them from attendance the Court should satisfy itself that their evidence will not be required either by the prosecution or by the defence.

We find, however, that in two cases at least, namely 57 ALL 267[2] and A I R 1940 ALL 46,[3] this principle was not followed and the judgment of the Full Bench is not referred to in either of these two cases. In the former cases, a Bench of the Allahabad High Court consisting of Thom and Kisch JJ., observed that in a criminal trial the prosecution authorities have no right to take it upon themselves to decide whether a witness, who gives vital evidence tending to establish the innocence of the accused, is not a reliable witness and to withhold his evidence on that ground. It is the function of the Court to decide upon his reliability and the prosecution have no right to usurp that function. The witness in that case was withheld by the Public Prosecutor on the ground that he was not telling the truth. In A I R 1940 ALL 46[3] Rachhpal Singh and Mohammad Ismail JJ. observed that in a case where the prosecution comes to know of some further evidence which may possibly throw doubt on the prosecution story, the proper and fair course for the prosecution is to place the fresh evidence or information before the Court which has to adjudicate the question of guilt or innocence of the accused persons. It is a well established rule of law that it is the bounden duty of the prosecution to place before the trial Court all evidence relating to the case which is at its disposal and then invite a judicial decision. Prosecution takes a very grave risk if it takes upon itself the duty of withholding evidence relating to the crime. It is not the function of the prosecution to decide which portion of the evidence is true and which portion is false. The case which is often referred to upon the point is the decision in 42 Cal 422[4] in which two eye-witnesses of the occurrence were not examined by the Public Prosecutor notwithstanding the request by the accused's counsel. The witnesses had not been examined before the committing Magistrate. Sir Lawrence Jenkins C. J. observed :

The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the police, but the Crown, and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.

It was also observed that the Public Prosecutor should, in a capital case, place before the Court the testimony of all the available eye-witnesses, though brought to the Court by the defence, and though they give different accounts. The rule is not a technical one, but founded on common sense and humanity. The case in 42 Cal 422[4] was explained by a Bench of the Calcutta High Court in 58 Cal 1335.[5] There the case was that certain persons mentioned in the first information report as being witnesses of the occurrence had not been produced by the prosecution. It was held that the only witnesses whom the prosecution need call are those who know the facts and are able and willing to give truthful evidence which is relevant to the charge. If persons, primarily the police, whose duty it is to investigate the occurrence and examine those who are alleged to be eye-witnesses, come to the conclusion that they are not eye-witnesses and cannot give any relevant evidence, it is no part of the duty of the prosecution to

2. ('34) 21 A I R 1934 All 908 : 152 I C 741 : 36 Cr L J 152 : 57 All 267, Emperor v. Nem Singh.
3. ('40) 27 A I R 1940 All 46 : 186 I C 192 : 41 Cr L J 258 : 1939 A L J 966, Abdul Subhan v. Emperor.
4. ('15) 2 A I R 1915 Cal 545 : 27 I C 554 : 16 Cr L J 170 : 42 Cal 422 : 19 C W N 28, Ram Ranjan Roy v. Emperor.
5. ('32) 19 A I R 1932 Cal 118 : 135 I C 443 : 33 Cr L J 135 : 58 Cal 1335, Girishchandra Namdas v. Emperor.

call them. These observations in our opinion are not quite consistent with the view taken by the Bench in 42 Cal 422.[4] There it was clearly stated that it was undoubtedly the duty of the Public Prosecutor in a capital case to place before the trial Court the testimony of all available eye-witnesses and leave it to the jury to draw their own conclusion as to the real truth of the matter. The Bench however remarked that the decision in 42 Cal 422[4] and the remarks contained therein were quite correct and the incorrectness arose only in the application of the decision. The view propounded in 42 Cal 422[4] has been followed by a Bench of the Patna High Court in 8 Pat 289.[6] We need only refer to one more case on the point, namely the decision of their Lordships of the Privy Council in A I R 1936 P C 289.[7] This was a criminal appeal by special leave from the Supreme Court of the Island of Ceylon. In that case after a witness had given evidence hearsay evidence was admitted as to statements which that witness had made without previous cross-examination of the witness as to such statements. Their Lordships of the Privy Council deprecated the practice as being not permitted by the law of evidence in vogue in Ceylon and remarked :

It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness on the principle laid down in such a case as 42 Cal 422.[4]

They observed that :

Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that the prosecution ought to discharge the functions both of prosecution and defence. If it does so confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

Their Lordships added the significant remark :

As to some of the other witnesses, there might have been both less confusion and a fairer trial, if though their names were on the indictment, they had been put into the box to be questioned as to other than formal matters by the defending counsel.

We are disposed to accept the view enunciated by Sir Lawrence Jenkins in 42 Cal 422[4] as sound and conducive to the administration of justice. We are also of opinion that the decision of their Lordships of the Privy Council does not conflict with that view, rather it lends support to that view inasmuch as it clearly lays down that witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution. A good deal no doubt will depend on the circumstances of each case.

Whatever view may be held on the question of the power of the Public Prosecutor to produce or withhold evidence, there is no doubt in our mind that the power of the Court is neither circumscribed nor fettered in any way to arrive at the truth in a criminal trial. Section 540, Criminal P. C., gives ample powers to the Court to examine any person as a witness, whose evidence appears to it essential to the just decision of the case. We are of opinion that Faqire should have been in attendance in Court so that he could be examined by the Court under S. 540, Criminal P. C. The learned Additional Sessions Judge should have exercised his powers under this section and examined the witness himself, even if the Public Prosecutor was unwilling to examine Faqire as a witness in the Court of Session on the ground that he had turned hostile. There was also no reason whatever why he should not have been tendered for cross-examination. The Public Prosecutor must have satisfied himself as to the reliability of the witness before he was produced in the committing Magistrate's Court, and the mere fact that he stated in that Court that nothing was recovered from the possession of Iqbal Husain accused at the time of his arrest is not sufficient to characterise the witness as untruthful and hostile. The question whether he should have been produced in the Court of Session or tendered for cross-examination in that Court is purely academical as we have decided to acquit the accused. We have recorded our opinion on the question of law raised before us as we were invited to do so by counsel for the accused.

6. ('29) 16 A I R 1929 Pat 275 : 116 I C 770 : 30 Cr L J 675 : 8 Pat 289 : 10 P L T 549, Kunja Subudhi v. Emperor.
7. ('36) 23 A I R 1936 P C 289 : 164 I C 545 : 37 Cr L J 963 (P C), Stephen Seneviratne v. The King.

Having given our best consideration to the prosecution evidence and to the circumstances of the case we have arrived at the conclusion that the evidence on the record does not establish the complicity of the appellants in the offences of which they have been convicted. We have come to this conclusion with a certain amount of reluctance due entirely to the fact that a case in which three lives have been lost should go unpunished. Since we are not satisfied as to the guilt of the present appellants, there is no alternative left to us but to give them the benefit of the doubt and acquit them. We accordingly allow the appeal, set aside the convictions and sentences of the appellants and direct their immediate release.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Oudh 609

AGARWAL J.

L. Lakshmi Nath Seth — Applicant

v.

Pt. Kanhaiya Lal and others — Opposite Party.

Civil Revn. Appln. No. 3 of 1941, Decided on 18th August 1941, for revision of order of Civil Judge, Unao, D/- 28th November 1940.

(a) Execution—Appeal or revision in — Law applicable is that prevailing at time of execution application and not that prevailing at time of institution of suit—S. 276, U. P. Tenancy Act, applies even though suit was filed before U. P. Tenancy Act.

The right of appeal in a suit will be governed by the law prevailing at the date of the institution of the suit, but an application for execution will be governed as regards appeal and revision by the law prevailing at the date it is presented. An application for execution is a fresh proceeding and not always a continuation of the suit. Therefore where an execution application is filed after the U. P. Tenancy Act comes into force, S. 276 of the Act applies even though the suit is filed before the Act. [P 610 C 1]

(b) U. P. Tenancy Act (17 of 1939), S. 271—S. 271 applies to orders on applications made after Tenancy Act.

Section 271 is applicable to orders passed on applications made after the new Tenancy Act came into force. [P 610 C 1]

(c) U. P. Tenancy Act (17 of 1939), S. 271—Order staying execution under S. 7, U. P. Encumbered Estates Act is order under S. 47, Civil P. C., and is therefore appealable under S. 271, U. P. Tenancy Act.

There can be an order under S. 47, Civil P. C., which may not amount to a decree, and therefore not appealable under the Civil Procedure Code but an order under S. 47, Civil P. C., will be appealable under S. 271, U. P. Tenancy Act, whether it amounts to a decree or not. An order that the execution proceedings be stayed till the decision of the case under the Encumbered Estates Act is an order under S. 47, Civil P. C., and is therefore appealable under S. 271, U. P. Ten. Act : ('36) 23 AIR 1936 Oudh 369, *Disting.* [P 610 C 2; P 611 C 1]

(d) Civil P. C. (1908), Ss. 47, 2 — Question relating to stay of execution—Order on, is not appealable.

A question relating to the stay of execution is one relating to execution but the decision thereon cannot be said to be one on the rights of the parties and consequently cannot amount to a decree and is therefore not appealable. [P 610 C 2]

N. Banerji—for Applicant.

B. K. Dhaon—for Opposite Party (P. Kanhaiya Lal).

Order.—This is an application for revision under S. 276, U. P. Tenancy Act. It has arisen out of the following circumstances. The present applicant Lala Lakshmi Nath Seth obtained a decree for arrears of rent against Pandit Kanhaiya Lal opposite party and others. The decree-holder applied for the execution of his decree on 26th February 1940, Kanhaiya Lal preferred an objection that one other judgment-debtor Sultan Singh had applied under S. 4, Encumbered Estates Act, and so the execution proceeding should be stayed under S. 7 of that Act. That application was allowed by the Assistant Collector who was executing the decree. The decree-holder preferred an appeal to the District Judge who transferred it to the civil Judge for disposal. The civil Judge was of opinion that no appeal lay to the District Judge and returned the plaint for presentation to the proper Court. The decree-holder has come up in revision to this Court.

The learned civil Judge relied on 1937 R D 300,[1] for the view that an appeal from the order of the Assistant Collector lay to the Board of Revenue. This point was not decided in that case. He also held that the order was not a final one, and so no appeal lay. He relied for this proposition on A I R 1936 Oudh 369.[2] It is argued before me that no revision lies because there was no revision in this case under the Oudh Rent Act which was in force up to the end of 1939, and as the suit which resulted in the decree which was sought to be executed was instituted before the present Tenancy Act came into force, this application is governed as regards appeal and revision by the provisions in force when the suit was instituted. I think that an application for execution is a fresh proceeding and not always a continuation of the suit. Under the Oudh Rent Act appeal was allowed in certain cases

1. ('37) 24 A I R 1937 All 533 : 170 I C 30 : 1937 R D 300 : 1937 A L J 567, Hiba Ahmad v. Mt. Ram Piari.
2. ('36) 23 A I R 1936 Oudh 369 : 164 I C 424 : 1936 O W N 664, Suraj Mohan Dayal v. Sarup Narain.

from some orders passed in some suits under S. 119, but it was held by this Court in 1940 O W N 561,[3] that no appeal lay under S: 119 from an order passed in execution proceedings. No doubt it was held by the Full Bench of the Allahabad High Court in 50 ALL 965,[4] that the right of appeal in a suit will be governed by the law prevailing at the date of the institution of the suit, but that will be no authority for the proposition whether an application for execution will be governed as regards right of appeal according to law prevailing at the date of the application or according to the law prevailing at the date of the institution of the suit which resulted in the decree sought to be executed. I think an application for execution will be governed as regards appeal and revision by law prevailing at the date it is presented and therefore as the application for execution in this case was made after the new Tenancy Act came into force, its provisions are applicable. Section 276 therefore is also applicable. This Court will have jurisdiction to interfere, if the learned District Judge has failed to exercise the jurisdiction vested in him. Before the enactment of this section it was held that the High Court could not interfere in revision under S. 115, Civil P. C., with an order passed by a District Judge on appeal in a revenue case, and because the District Judge was not subordinate to the High Court in revenue matters.

Under this section the High Court or the Chief Court can interfere with a decision of subordinate revenue Court in which an appeal lies to the District Judge, if the District Judge or such subordinate Court has exercised a jurisdiction not vested in him or it by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of his or its jurisdiction illegally or with material irregularity. I think I can interfere if the District Judge has failed to exercise his jurisdiction. Under S. 271, U. P. Tenancy Act, an appeal lies to the District Judge from orders mentioned in S. 47, Civil P. C., and made by an Assistant Collector of the first class. This section was applicable in my opinion to orders passed on applications made after the new Tenancy Act came into force. If the order in question passed by the Assistant Collector was one under S. 47, Civil P. C., the appeal lay to the District Judge. The learned Civil Judge thought that it was not a final order and so it was not appealable. The order in question is that the execution proceedings be stayed till the decision of the case under the Encumbered Estates Act. This is an order under section 47. All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree are orders under S. 47, Civil P. C. In the ruling of the A I R 1936 Oudh 369,[2] the High Court had passed an order that proceedings in execution be stayed in the Court of the Subordinate Judge of Sitapur on the judgment-debtors furnishing a security of rupees 15,000 to the satisfaction of the executing Court. The judgment-debtors accordingly furnished a hypothecation bond on 11th July 1935. The Court accepted the security bond and the appeal was from that order but it was held that no such appeal lay.

The question before me is not whether an appeal lies under the Code of Civil Procedure from an order of stay. Under the Code of Civil Procedure an appeal lies from a decree, and the definition of decree includes the determination of any question within S. 47, Civil P. C. There can be an order under S. 47, Civil P. C., which may not amount to a decree, and therefore not appealable under the Code of Civil Procedure, but an order under S. 47, Civil P. C., will be appealable under S. 271, U. P. Tenancy Act, whether it amounts to a decree or not. It was held by Boys J., in A I R 1924 ALL 808[5] that the phrase "determination" in S. 2 (definition of decree) does not make every decision of any question within S. 47 into a decree any more than every decision in a suit is a decree, but only those determinations are decrees which are formally expressed as adjudications and which are conclusive so far as regards the Court expressing them. Here I have not to find out whether the order is a decree or not, but whether it is an order under Sec. 47, Civil P. C. The consensus of opinion appears to be that a question relating to the stay of execution is one relating to execution but that the decisions thereon cannot be said to be one "on the rights of the parties" and consequently cannot amount to a decree and are therefore not appealable. These cases are mentioned in Chitaley's Code of

3. ('40) 27 A I R 1940 Oudh 387 : 189 I C 297 : 1940 O W N 561 : 16 Luck 27, Mulla v. Mt. Ram Dulari.

4. ('28) 15 A I R 1928 All 437 : 111 I C 6 : 50 All 965 : 26 A L J 998 (FB), Ram Singha v. Shankar Dayal.

5. ('24) 11 AIR 1924 All 808 : 83 I C 1035 : 46 All 733 : 22 A L J 706, Husain Bhai v. Y. Beltu Shah.

Civil Procedure, Vol. 1, 2nd Edn. p. 422 in footnote 5. I think the order staying execution is an order relating to the execution of the decree and as such under S. 47, Civil P. C., and therefore appealable under S. 271, U. P. Tenancy Act. The rulings under the Code of Civil Procedure that such an order is not appealable do not apply. I am of opinion that the order of the Assistant Collector was appealable to the District Judge under S. 271, U. P. Tenancy Act, and as he has failed to exercise the jurisdiction vested in him, I have jurisdiction to interfere in revision. I therefore accept this revision and order the lower Court to hear the appeal on the merits. Costs to abide the result.

K.S./R.K. *Revision accepted.*

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(28) A. I. R. 1941 Oudh 611

THOMAS C. J. AND GHULAM HASAN J.

Ram Avadh Pande — Defendant — Appellant

v.

Ghisa Pande, Plaintiff, and others, Defendants — Respondents.

Second Appeal No. 431 of 1937, Decided on 11th August 1941, against order of Civil Judge, Fyzabad, D/- 27th August 1937.

(a) Pre-emption—Estoppel — Plaintiff never putting himself forward as deceased's legal representative—Decree-holder seeking to execute decree obtained against deceased for specific performance of contract to execute sale deed alleging plaintiff among others to be deceased's legal representative — Finally Court executing sale deed on behalf of deceased's widow as his sole legal representative to exclusion of plaintiff and others—Plaintiff cannot be said to be party to deed so as to estop him from claiming pre-emption.

Where the plaintiff never put himself forward as an heir of the deceased in the first instance but the decree-holder himself proceeded to execute against him a decree for specific performance of a contract to execute a sale deed obtained against the deceased, alleging him among others to be the legal representative of the deceased and the sale deed was finally drawn up by the Court on behalf of the widow of the deceased as his sole legal representative to the exclusion of the plaintiff and others the plaintiff cannot be said to be a party to the deed so as to estop him from claiming pre-emption of the property conveyed by the sale deed: (1880) 15 Ch D 96, *Approved*; ('29) 16 A I R 1929 P C 259, *Ref.*; ('19) 6 AIR 1919 Oudh 1; ('27) 14 A I R 1927 Oudh 86 and 1937 O W N 1113, *Disting.*; ('33) 20 A I R 1933 Oudh 134 (F B), *Expl.* [P 612 C 2; P 614 1]

(b) Pre-emption — Decree for specific performance of contract to execute sale deed — Court executing deed in execution of decree does so not as vendor but for and on behalf of judgment-debtor — Property conveyed by deed can be pre-empted.

Where in execution of a decree for specific performance of a contract to execute a sale deed, the Court executes the deed, it does so not as a vendor but for and on behalf of the judgment-debtor acting as the machinery of law for enforcing the execution of the deed with the result that the property conveyed by the deed is open to pre-emption : 1898 A W N 115; 25 All 334; 1 A L J 247; ('28) 15 AIR 1928 All 67; ('31) 18 A I R 1931 All 741 and S. A. No. 307 of 1937, *Disting.* [P 612 C 2; P 613 C 1]

Haider Husain and H. H. Zaidi — for Appellant.

M. Wasim and K. M. Shamim — for Respondents 1 and 5.

Judgment. — This is a defendant's appeal arising out of a pre-emption suit. Ram Samujh, the husband of Mt. Lekhraji, defendant 3, was owner of patti Ram Samujh which had been formed as a result of the partition of mahal Patan Din in village Damodarpur, district Fyzabad, in 1927. Ram Samujh agreed to sell a portion of the property in this patti to Kamta Prasad, defendant 1, by an agreement dated 6th June 1929. It was also agreed between them that in order to avoid pre-emption a perpetual lease instead of a sale deed may be executed. On 15th June 1929, Ram Samujh made a gift of this property in Damodarpur to Ram Avadh Pande, defendant 2. Ram Samujh refused to execute the deed in pursuance of the agreement with the result that Kamta Prasad filed a suit for specific performance of the contract and obtained a decree on 27th August 1930, against Ram Samujh, Ram Avadh Pande, defendant 2, and certain other persons (Exs. 5 and 6). Ram Samujh died on 10th October 1930, Kamta Prasad took out execution of the decree for specific performance and the Court executed a deed in his favour on behalf of Mt. Lekhraji, the widow of Ram Samujh, on 23rd September 1935 : *vide* EX. 1. On 27th April 1936, Kamta Prasad gifted his rights in the property to Ram Abadh Pande, defendant 2. The latter therefore stepped into the shoes of Kamta Prasad and became the owner of the property in dispute. On 22nd September 1936, Ghisa Pande, plaintiff respondent 1, filed the present suit for pre-emption alleging that he was a cosharer in patti Ram Samujh and had a preferential right of pre-emption being a collateral of Ram Samujh as against defendant 2 who had no relationship with him.

The defence of defendant 1 was that he had transferred his rights in favour of defendant 2, who was the owner of the property, and the transaction agreed upon between the parties was not one of sale but a perpetual lease. Defendant 1 took no further part in the case after filing the written

statement and absented himself. Defendant 2 contended in defence that the transfer was not liable to pre-emption as it was a perpetual lease and not a sale. He also contended that the plaintiff was estopped from maintaining the suit. The learned Munsif held that the plaintiff had a preferential right to pre empt the property in suit. He also held that the transaction between the parties was a sale out and out and not a perpetual lease. He decided the plea of estoppel against the plaintiff and dismissed the suit. In appeal by the plaintiff the learned District Judge upheld the finding of the trial Court that the transaction was a sale out and out but disagreed with it on the question of estoppel and consequently decreed the suit. Ram Avadh Pande defendant 2, has preferred this second appeal. Two questions have been argued before us by learned counsel on behalf of the appellant. It has been argued that the view taken by the learned District Judge on the question of estoppel is not correct and secondly as the transfer evidenced by EX. 1 was made by a Court of law in execution of a decree for specific performance of contract, the same was not subject to pre-emption under the law.

As regards the question of estoppel, the circumstances on which it is founded may be shortly stated. It appears that after the death of Ram Samujh, which took place on 10th October 1930, Kamta Prasad decree-holder applied for execution of the decree against Ghisa Pande plaintiff and his two brothers, Data Din and Bikram, alleging them to be the heirs and legal representatives of the deceased judgment-debtor Ram Samujh (*vide* EX. B-2). Ghisa Pande filed objections on 8th May 1931, in which he challenged the decree obtained by Kamta Prasad on grounds of fraud, misrepresentation, want of consideration under agreement for perpetual lease and various other grounds. In para. 5 of the objections it was stated that even if the agreement of perpetual lease dated 6th June 1929, be proved to be a valid and enforceable agreement the objector as an heir was not bound by the decree: (*vide* EX. B-3). The objector's pleader also made a statement before the Court in which he admitted that his client was the legal representative of the deceased Ram Samujh but he said that his client did not want to press the objections raised by him and that the same may be rejected for the purposes of that case (EX. B-4). This statement was made on 3rd July 1931. It appears however that the Court did not accept Ghisa Pande as the legal representative of the deceased Ram Samujh, and it is for this reason that the decree-holder on that date obtained further time from the Court in order to show the relationship of certain other persons as representatives of the deceased judgment-debtor. The deed of perpetual lease was executed by the Court on 23rd September 1935, and this deed purports to be for Mt. Lekhraji, the widow and legal representative of Ram Samujh deceased. It shows that Rs. 225 had been paid as premium of the lease at the time of the agreement and the balance of the consideration, namely Rs. 925 was deposited in Court to the credit of Mt. Lekhraji, the legal representative of the deceased.

It has been contended on behalf of the appellant that the result of withdrawing the objections by counsel on behalf of Ghisa Pande was that he agreed to be the legal representative of the judgment-debtor and the deed which was executed four years later must be deemed to have been executed on his behalf. We are unable to accept this contention. It is clear that Ghisa Pande never put himself forward as an heir of the deceased Ram Samujh in the first instance but that the decree-holder himself proceeded to execute the decree against him alleging him to be such legal representative. It does not appear from the record as to what other proceedings took place in the execution case but it is manifest from a reference to the proceedings on record that the decree-holder was trying to execute the decree against some other persons whom he alleged to be the legal representatives of Ram Samujh and the fact that finally the deed was drawn up on behalf of Mt. Lekhraji, the widow of the deceased Ram Samujh, leaves no room for doubt that the widow alone, to the exclusion of the collaterals or reversioners, was held to be the sole legal representative of the deceased Ram Samujh. Ghisa Pande was certainly not a party to the deed which was executed for Mt. Lekhraji alone and not on his behalf or on behalf of any other collateral. We may also dispose of another contention advanced in this connexion that the deed of perpetual lease was executed by a Court as a vendor and consequently no right of pre-emption arose against the action of that Court in executing the deed. This contention is hardly worth serious notice as the deed itself clearly and unmistakably purports to have been executed by the Court for and on behalf of Mt. Lekhraji, as is

always the case in a decree for specific performance of a contract to execute a deed. The person who commits breach of a contract for specific performance, or his successor-in-interest in the event of his death, is the real executant of the deed which he should have executed had he not broken the contract, and the Court in executing the deed on his behalf after decreeing specific performance of contract against him acts as the machinery of law for enforcing execution of the deed.

Learned counsel for the appellant referred to 56 I A 356,[1] 22 O C 323,[2] 3 O W N 356,[3] 10 O W N 113,[4] and 1937 O W N 1113.[5] In the Privy Council case, 56 I A 356,[1] it appeared that the appellant had purchased one out of several blocks of property which had been offered for sale and the other blocks had been purchased by the respondents under agreements completed at a later date. It appeared that the appellant knowing the fixed prices had definitely told the vendors' agent that he did not wish to buy any other block and that he had acquiesced in an oral agreement already made for the sale of some of the blocks to one of the respondents. It was held that if the appellant had a right to pre-empt he had waived it by his conduct, even though no formal notice of an intention to sell was given to him under S. 10, Oudh Laws Act. In 22 O C 323[2] the facts were altogether different. There it was admitted that the plaintiff had consented to the sale being effected in favour of the defendants. It was held that a formal offer to the pre-emptor to purchase the property is not necessary, when it is obvious from the attendant circumstances that the pre-emptor is neither willing nor able to pay the purchase money.

In 3 O W N 356[3] the trial Court had found that the vendee had called the plaintiff and had asked him if he wished to purchase the property and that the plaintiff had expressed his inability to make the purchase for want of funds. It was therefore rightly held that the plaintiff was barred by the rule of estoppel by acquiescence from maintaining the suit. The case in 10 O W N 113[4] was a Full Bench decision in which the question decided by the Full Bench was whether a sale by public auction made by the Secretary of State for India in Council is immune from a claim for pre emption by reason of the provisions of section 3, Crown Grants Act, 15 of 1895. Two of the learned Judges held that the sale was not liable to pre-emption while the third Judge, Bisheshwar Nath Srivastava J., held to the contrary. Bisheshwar Nath Srivastava J. observed on the plea of estoppel as follows:

> There is a long catena of decisions of the late Court of the Judicial Commissioner of Oudh as well as of this Court in which it has been held with reference to the provisions of S. 10, Oudh Laws Act, that where estoppel by acquiescence, as distinct from estoppel by prescribed notice is pleaded, it is necessary that there must be an offer specifying the price at which it was proposed to sell the property and refusal to purchase it.

This observation really helps the case of the plaintiff-respondent and not the appellant. A Bench of this Court in 1937 O W N 1113[5] referred to the above observation, which was relied upon before them on behalf of the defendants and observed:

> But owing to the decision of the majority of the Full Bench in this case, the question whether or not the plaintiff was estopped from claiming right of pre-emption had become unnecessary and so the other two Judges did not express an opinion on the point.

In 1937 O W N 1113[5] all that the Bench held was that there can be a waiver of the right of pre-emption by conduct even though no formal notice of an intention to sell is given under S. 10, Oudh Laws Act. This conclusion accords with the view enunciated by the Privy Council in 56 I A 356.[1] In the particular case before the learned Judges the facts were that there were two suits for pre-emption and it was found that both the sale deeds were executed not only on the same day but at the same time, that both the deeds were scribed by the same scribe and attested by the same witnesses, that both the sales were made at the same rate of consideration and that both the deeds were presented for registration at the same time and both the sets of vendees were present at the time of registration. It was held that from the above circumstances it appears quite clearly that each set of the vendees was perfectly aware of the sale simultaneously made to the other, and that since the pre-emptors failed to assert their rights after fully knowing of the sale in favour of the other vendees, they had lost their rights. Learned counsel on behalf of

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1. ('29) 16 A I R 1929 P C 259 : 119 I C 627 : 4 Luck 421 : 56 I A 356 (P C), Pateshwari Partab Narain Singh v. Sita Ram.
2. ('19) 6 A I R 1919 Oudh 1 : 54 I C 520 : 22 O C 323, Hanuman Singh v. Adiya Prasad.
3. ('27) 14 A I R 1927 Oudh 86 : 98 I C 640 : 1 Luck 68 : 29 O C 327 : 3 O W N 356, Jagannath Pershad v. Chandi Pershad.
4. ('33) 20 A I R 1933 Oudh 134 : 142 I C 566 : 8 Luck 322 : 10 O W N 113 (F B), Gur Bakhsh Singh v. Harnam Singh.
5. ('37) 1937 O W N 1113, Ekram Husain v. Pheru Husain.

the respondents has referred to (1880) 15 Ch D 96[6] where Fry J. enunciates the equitable doctrine of acquiescence. The following passage from the judgment may be quoted with advantages:

> It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act(not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do.

No such fraud on the plaintiff's part as is contemplated in the above passage is established in the present case. We are satisfied therefore that the plea of estoppel is unfounded and must be overruled. As regards the second question, the argument in substance is that the sale deed was executed in execution of a decree for specific performance and such a sale does not fall within the purview of the Oudh Laws Act so as to render it liable to pre-emption. The cases relied upon on behalf of the appellant in this connexion are: (1898) A W N 115,[7] 25 ALL 334,[8] 1 A L J 247,[9] 50 ALL 454,[10] 53 ALL 100,[11] and an unpublished judgment of a Bench of this Court, Second Appeal No. 307 of 1937[12] decided on 16th August. It may be stated at once that neither of the cases referred to above is a case of a sale deed executed in lieu of a decree for specific performance of contract. An auction sale held in execution of a decree is altogether different in its nature and incidents from a sale deed which is executed by a Court in pursuance of a decree for specific performance of contract brought at the instance of a party who has suffered by the violation thereof. In such a case the Court does what the defendant was under a legal obligation to do and the execution of the deed is only an outcome of the decision of the Court giving effect to the agreement to transfer arrived at between the plaintiff and the defendant which is broken by the defendant. We are not aware of any case and none has been cited before us on behalf of the appellant in which it has been held that a sale deed executed by a Court in execution of a decrée for specific performance of contract is not liable to pre-emption.

In (1898) A W N 115,[7] it was held that a sale in execution of a decree does not give any right of pre-emption as the sale is not a transfer of a share by a cosharer in contravention of any contract or custom, but is a sale in invitum by order of the Court. It was also observed that S. 310, (O. 21, R. 88), Civil P. C., provides the means by which a cosharer can prevent a share sold in execution passing to a stranger, but in order to avail himself of this section the cosharer must attend and bid at the sale.

In 25 ALL 334[8] it was laid down that no suit for pre-emption will lie, the basis of which is a decree for pre-emption in another suit. In order to claim a pre-emptive right the plaintiff has to show that there has been an effective alienation of the property in which he is interested.

In 1 A L J 247[9] the real question that arose for decision was whether the claim for pre-emption was governed by Art. 10, Limitation Act. The sale in this case took place in 1899 but the property was wrongly described in the sale deed. The vendee thereupon brought a suit in 1902 for possession of the share which had actually been sold and a decree was passed in his favour in terms of the compromise awarding possession to him over the share claimed. It was held that the suit brought in 1902 was barred under Art. 10 of Sch. 2, Limitation Act, and the claim for pre-emption could not be based

6. (1880) 15 Ch D 96 : 43 L T 95 : 28 W R 911, Willmott v. Barber.
7. ('98) 1898 A W N 115, Mahabal Singh v. Abdul Majid Khan.
8. ('03) 25 All 334 : 1903 A W N 63, Abdur Razzaq v. Mumtaz Husain.
9. ('04) 1 A L J 247, Intizar Husain v. Jamna Prasad.
10. ('28) 15 AIR 1928 All 67 : 107 I C 682 : 50 All 454 : 26 A L J 214, Paras Ram v. Neksal.
11. ('31) 18 A I R 1931 All 741 : 131 I C 242 : 53 All 100 : 1930 A L J 1564, Bindraban v. Rajpat Singh.
12. Second Appeal No. 307 of 1937, Sultan Singh v. Birbejal Singh.

upon the decree passed in the suit for possession. It was observed relying on an observation in 25 ALL 334[8] that a right of pre-emption does not arise upon a transfer effected by virtue of a decree, and that there must be a person acquiring property by a contractual relation of sale or transfer for the accrual of the right of pre-emption.

In 50 ALL 454[10] a decree was passed on the basis of a compromise to the effect that the two defendants were under the obligation of handing over a certain property to the plaintiff. A pre-emptor came forward to pre-empt the transfer which had been sanctioned by the compromise. It was held that the decree of the Court could not be regarded as a transfer or sale for the purposes of pre-emption under the Agra Pre-emption Act.

In 53 ALL 100[11] it was found that under a compromise the property was transferred to the family of the vendees by the vendor on a consideration paid by the former to the latter. According to S. 4 (10), Agra Pre-emption Act, a sale which is pre-emptible must be strictly a sale as defined in the Transfer of Property Act. It was held that a transfer of property in exchange for a price, but effected by means of a compromise decree and not by a registered instrument of sale as required by S. 54, T. P. Act, cannot be treated as a sale as defined in that Act and is, therefore, not pre-emptible.

In Second Appeal No. 307 of 1937[12] a Bench of this Court held that a sale held by a Collector under S. 5, U. P. Regulation of Sales Act (26 of 1934) passed an indefeasible title to the purchaser and is not liable to pre-emption under the provisions of the Oudh Laws Act.

All the above decisions are, therefore, clearly inapplicable to the facts and circumstances of the present case. We hold therefore that there is no substance in either of the contentions raised on behalf of the appellant and dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Oudh 615

GHULAM HASAN AND MADELEY JJ.

Laltu Singh and others —
Plaintiffs — Appellants
v.
Mangau Singh and another —
Defendants — Respondents.

Second Appeal No. 396 of 1937, Decided on 29th July 1941, against order of civil Judge, Hardoi, D/- 4th September 1937.

(a) Civil P. C. (1908), S. 100—Omission to consider part of evidence—Finding of fact can be interfered with.

Where the lower Court fails to consider a part of the evidence produced by the parties its finding of fact can be interfered with in second appeal.

[P 617 C 1]

(b) Civil P. C. (1908), S. 47—Person obtaining decree for possession but not executing same as he was in actual possession — Subsequent dispossession—Suit for possession is not barred.

A person who having obtained a decree for possession does not execute the decree as it was not necessary for him to do so since he was already in actual possession is not debarred from suing for possession when his possession is interfered with : 15 Bom 238 and ('16) 3 A I R 1916 All 163, *Rel. on.* [P 617 C 1, 2 ; P 618 C 1]

M. Wasim and Ali Hasan — for Appellants.

H. Husain — for Respondents.

Judgment.—This is an appeal by the plaintiffs-appellants against the appellate decree dated 4th September 1937, passed by the civil Judge of Hardoi dismissing the appellants' suit and reversing the decree passed by the Munsif of Hardoi, who had decreed the suit. The facts leading to the present litigation are that one Chhattar Singh owned 1 biswa 6 biswansis 13 kachwansis and 6⅔ nanwansis in village Manpur and some property in village Amkharwa. Chhattar Singh executed a registered deed of will on 9th January 1917, in favour of Laltu Singh, plaintiff 1, Umarai Singh, plaintiff 2, Bhudhar Singh, father of plaintiffs 3 and 4, and Sardar Singh, a grandson of Bhikham Singh, the brother of Chhattar Singh. Sardar Singh is plaintiff 5. The pedigree given in para. 5 of the plaint shows that the legatees are the next reversioners of Chhattar Singh. On 30th April 1919 Chhattar Singh made a gift of the same property in favour of Mangau Singh and Mahram Singh defendants 1 and 2, who are his daughter's sons. On 15th September 1919 the plaintiffs-appellants filed a suit for cancellation of the aforesaid gift on various grounds. The suit resulted in a decree based upon a compromise arrived at on 16th January 1920 (Ex. 3), under which the deed of gift was cancelled in respect of half the share owned by Chhattar Singh in village Manpur and was upheld in respect of the other half. The gift in respect of Amkharwa village was set aside in its entirety. The result of this litigation was that the share owned by Chhattar Singh in village Manpur was divided in equal moities between his daughter's sons on the one hand and his reversioners on the other. Chhattar Singh died some time after the passing of the above decree.

On 3rd April 1925, however, the defendants who were minors sued through a next friend for possession of the property of Chhattar Singh which had been awarded to the plaintiffs by the compromise decree of 1920 alleging that the compromise was not for the minors' benefit and had been brought about by collusion with the plaintiffs. A compromise was effected between the parties on 2nd December 1925, (EX. 4) according to which the half share of Chhattar Singh in village Manpur was decreed to the minors along with Rs. 400 as costs and mesne profits. The result of this decree was that the plaintiffs were deprived of the half share which they had obtained by the decree of 1920 and the defendants became owner of the entire share in Manpur. The plaintiffs were naturally dissatisfied with this decision as it did not accurately express the intention of the parties to the compromise and as the plaintiffs had never agreed to forgo the half share which had been allotted to them by the compromise decree of 1920. Consequently, on 11th February 1927, they filed a suit for rectification of the error in the compromise decree dated 2nd December 1925. The grievance was that the share in Manpur had been divided half and half between the parties, that in the suit of 1925 only half share was in suit and not the entire share as was wrongly considered by the petition-writer who scribed the compromise and that the defendants having taken advantage of the error had obtained delivery of possession from the Court in respect of the plaintiffs' half share as well. This suit was referred to arbitration for decision. The arbitrators awarded possession in respect of half the share in village Manpur to the plaintiffs against the defendants and a decree followed on the basis of this award on 18th October 1927 (EX. 6). The plaintiffs alleged that they had been in actual possession and occupation of their half share from November 1920 up to the date of the suit and consequently they did not execute the decree and obtain possession through Court in respect of the decreed share. For similar reasons they were unable to file an application for an entry of their names in the khewat.

The plaintiffs on 9th April 1936, applied for correction of khewat on the basis of the decree dated 18th October 1927, passed in their favour under S. 33, U. P. Land Revenue Act. The Revenue Court rejected the plaintiffs' application on the ground that they did not execute the decree and did not take possession. The defendants also sued the plaintiffs under S. 127, Oudh Rent Act. The plaintiffs therefore alleged that the aforesaid actions of the defendants cast a cloud on their title in respect of the half share in village Manpur and consequently they were obliged to file a suit for the settlement of their rights. The relief claimed in the plaint was a relief for a declaration in favour of the plaintiffs against the defendants to the effect that the plaintiffs are owners of the haqiat zamindari to the extent of 13 biswansis 6 kachwansis 6 $\frac{2}{3}$rd nanwansis situate in village Manpur, which represents the half share owned by Chhatar Singh in that village. They also sued for possession in the alternative, if in the opinion of the Court it was found that their possession was not proved.

Two main defences were raised in the suit. One was that the plaintiffs never obtained possession of the property in suit in 1927 or continued to remain in possession of it after the defendants had obtained delivery of possession through Court after the litigation of 1925. The defendants asserted possession in themselves. It was urged therefore by the defendants that the plaintiffs having failed to execute the decree dated 18th October 1927, they were now barred by S. 47, Civil P. C., from maintaining the suit. The trial Court framed two issues on the point. Issue 1 was the legal issue relating to the alleged bar under S. 47, Civil P. C., and the other issue related to the question whether the plaintiffs were in possession of the property in suit as alleged by them.

The learned Munsif in discussing these issues considered the compromise dated 2nd December 1925 (EX. 4) and came to the conclusion that the plaintiffs never lost the share which had been previously decreed to them by the decree of 1920 and that the defendants never became owners of the entire share possessed by Chhattar Singh in Manpur. In other words, the title which the plaintiffs had already acquired in 1920 still subsisted and the subsequent litigation in 1927 set at rest whatever doubts might have existed with respect to the correct interpretation of the compromise dated 2nd December 1925. As regards the question of possession the learned Munsif discussed the evidence produced by both parties upon the point and gave a definite finding that the plaintiffs had never been dispossessed from the property in suit and the formal delivery of possession to the defendants in 1926

did not constitute a break in the continuity of their possession. In this view of the matter, he recorded a finding that as the plaintiffs were already in possession, it was not necessary for them to obtain possession through Court after the decree in their favour in 1927, and consequently S. 47, Civil P. C., did not bar the present suit. The result was that he decreed the suit both for declaration and possession.

The learned civil Judge in appeal did not differ from the finding that the plaintiffs' title to half of the share in village Manpur had been finally settled by the decree of 1927 (Ex. 6) and the only question to which he addressed himself was whether the present plaintiffs lost possession of the share in suit after the defendants had obtained a decree for possession against them in 1925. The learned Judge held that the suit of 1927 was for possession and dispossession and clearly contained the allegation that the plaintiffs' half share had gone into the possession of the defendants by virtue of the decree of 1925. From this he concluded that the plaintiffs were not in possession of the share in suit and referred to the dakhal dehani proceedings, which took place in 1926 as a result of the decree of 1925 (Ex. 4). In this connexion the learned Judge remarked that after having been dispossessed in 1926 the plaintiffs ought to have obtained possession by taking execution proceedings or that they should have obtained such possession out of Court. The learned Judge further remarked "but admittedly they did not do either of the two things."

It appears from the judgment of the learned civil Judge that he did not discuss the evidence which was considered at length by the trial Court and did not express his dissent from the finding arrived at by that Court upon a consideration of the entire evidence on the record on the question of possession. All that was apparently urged in the lower appellate Court by the plaintiffs was that symbolical possession obtained by the defendants did not put an end to their actual possession although in point of law it had that effect. The learned Judge was clearly in error in not considering the evidence of possession produced by the parties in the case and in not coming to an independent finding upon that point. In order to obviate the necessity of a remand we have thought it fit to examine that evidence ourselves with the assistance of counsel of both sides and having considered that evidence we are satisfied that the finding of the learned Munsif to the effect that the plaintiffs, and not the defendants, are in possession of the land in suit from the year 1926 to 1936 is fully justified by the materials on the record.

According to the evidence of P. W. 1 Sardar Singh, P. W. 2 Bhikharo, P. W. 3 Thakur Prasad, P. W. 4 Ramdin, P. W. 5 Ghurai, P. W. 6 Ram Charan and P. W. 7 Hori Lal, it appears that the collections were made by the plaintiffs from the tenants and the Government revenue was also paid by them. Exhibit 9 is the siyaha, which was dictated to the patwari by the plaintiffs, which is corroborative of these facts. On the side of the defendants D. W. 1 Durga Singh was produced but the learned Munsif disbelieved his evidence and in our opinion rightly. It also appears from the evidence that the plaintiffs lived on the spot while the defendants lived at a considerable distance from the village and no karinda or agent had been appointed on their behalf to make any collections from the tenants of the land in suit. If this finding is upheld, there is no doubt whatever that the plaintiffs are entitled to succeed. Interference with their possession having been made by reasons of certain decrees obtained by the defendants against tenants and against the plaintiffs and in other ways as alleged, their right to a decree for possession cannot be barred.

In 15 Bom 238[1] the facts were that a purchaser brought a suit against his vendor to obtain possession and got a decree but did not execute it. The vendor died and after his death and while his daughter (the plaintiff) was a minor, the purchaser took forcible possession of the land. The plaintiff on attaining majority filed a suit to recover the land. The lower Court held that the purchaser having failed to execute his decree for possession was wrong in taking possession during the minority of the plaintiff without the intervention of a Court; that in so doing he was a trespasser, and that the plaintiff, as vendor's heir was entitled to have possession given to her, until ousted in due course of law. It was held, reversing the decree of the lower Court, that there was no reason for holding that in India the rightful owner dispossessing another was a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law.

1. ('91) 15 Bom 238, Bandu v. Naba.

In 38 ALL 509[2] the plaintiff had obtained a decree for possession of certain immovable property which she did not put into execution for over three years, but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession over the property. It was held that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within 12 years of such dispossession.

We hold therefore that the plaintiffs being in actual possession of the property in suit and their possession having been interfered with, they are entitled to sue for possession. The fact that they did not execute their decree did not debar them from suing for possession, as under S. 47, Civil P. C., it was not necessary for them to seek possession through execution when they were already in possession. The result therefore is that we allow the appeal, set aside the judgment and decree of the lower appellate Court and restore the decree of the trial Court with costs throughout.

G.N./R K. *Appeal allowed.*

2. ('16) 3 A I R 1916 All 163 : 35 I C 601 : 38 All 509 : 14 A L J 709, Dhanraj Singh v. Lakhrani Kuar.

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(28) A. I. R. 1941 Oudh 618

GHULAM HASAN J.

Nand Lal — Appellant

v.

Emperor.

Criminal Appeal No. 269 of 1941, Decided on 25th August 1941, against order of Sess. Judge, Rae Bareli, D/- 23rd May 1941.

(a) Evidence Act (1872), S. 114, illus. (a) — Recovery of incriminating articles from accused and identification of accused held sufficient for proving guilt of accused — No necessity for presumption under S. 114, illus. (a).

Where the Court holds that the evidence of the recovery of the incriminating articles from the accused and the identification of the accused by the three identifying witnesses as true and reliable to prove the participation of the accused in the offence of dacoity, there is no room for any presumption under S. 114, illus. (a). [P 620 C 1, 2]

(b) Evidence Act (1872), S. 114, illus. (a)— Presumption under — Before raising it, Court must consider explanation of accused.

The onus in a criminal case always rests on the prosecution and never shifts on to the accused. Before raising a presumption of guilt under S. 114, illus. (a) the jury or the Court, as the case may be, will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not, and to find out for itself whether the explanation given by the accused, even though not believed in its entirety, is such as to raise a reasonable doubt in the mind of the jury or Court as to the guilt of the accused. The accused is not bound to prove affirmatively that he came by the incriminating goods innocently. It is sufficient for him to give an explanation which may raise doubt in the mind of the Court as to his guilt. Where the explanation given by the accused is disbelieved by the Court it must be held that the accused had failed to satisfactorily account for the possession of the articles in question and the prosecution is entitled to rely on the presumption under S. 114, illus. (a) that the accused is either a thief or a receiver of the stolen goods : ('33) 20 A I R 1933 All 893, *Expl.* ; ('31) 18 A I R 1931 Cal 617 ; ('30) 17 A I R 1930 Oudh 353 and Cri. Revn. No. 78 of 1941, *Rel. on.* [P 620 C 2; P 621 C 1]

R. F. Bahadurji and J. P. Asthana — for Appellant.

Asst. Government Advocate — for the Crown.

Judgment. — Nandlal Ahir, resident of Bhukara, District Unao, appeals against his conviction and sentence under S. 395, Penal Code, to five years rigorous imprisonment by the learned Sessions Judge of Rai Bareli. The appellant was committed for trial for having committed a dacoity along with eight other persons on the night of 7/8th November 1940, in the hamlet of Ranikhera, village Rajamau, at the house of one Raghunandan Prasad. The inmates of the house at the time of the commission of the dacoity were the complainant Raghunandan Prasad (P. W. 1) who was sleeping inside his courtyard on the night in question along with his wife, Mt. Jagdei (P. W. 2), and his brother Babu Lal (P. W. 3), who was sleeping outside his door. The learned Sessions Judge of Rae Bareli acquitted seven persons including two brothers of Nandlal, appellant, and convicted the appellant and another man Pancham of an offence under S. 395, Penal Code, and sentenced them to five years rigorous imprisonment. Pancham has not filed any appeal. The only eye-witnesses of the occurrence were the three inmates of the house, namely Raghunandan Prasad, Jagdei and Babu Lal. The learned Judge held that the identification of the accused was not convincing. He was, however, convicted upon the recovery of three articles from his house, namely Ex. 10, a piece of yellow cloth, Ex. 11, gold earring, and Ex. 12, silver bangle. Nandlal pleaded not guilty and his defence was that the evidence of search witnesses was tainted owing to enmity and that the articles recovered belonged to him. He also put forward the defence that he had been falsely implicated by the investigating officer who had demanded from him a bribe which he had refused to pay.

The accused along with others was arrested on 1st December 1940, when the police carried out a raid in village Bhupkhera. The identification was held on 11th December 1940, and the identification chart (Ex. 10) shows that all the three inmates of the house identified the appellant correctly. The identification chart also shows that Raghunandan Prasad identified six persons correctly and made three mistakes. His wife Jagdei identified seven persons correctly and made two mistakes. Babu Lal identified five persons correctly and made four mistakes. The nine accused were mixed up with 40 under-trials. It is noted in the identification chart that the appellant had stated that Raghunandan knew him previously. There is no suggestion whatever that any of the other eight accused were known to the identifying witnesses or were shown to them before. The learned Judge observes that all the identifying witnesses took care to identify exactly nine persons. This fact in his opinion threw into suspicion the bona fide nature of the effort of the identifying witnesses. He observes that "this along with the number of mistakes committed suggests that the identification becomes a complete hit and miss-affair" and in this connexion he goes on to observe that

> once the bona fide nature of an identifying witness' evidence is suspected as it must be suspected in this case the value of such identifying evidence may have some corroborative worth but cannot by itself form the basis of a conviction.

In this connexion the learned Sessions Judge criticises the police for the great delay that took place in the carrying out of a raid upon the residents of Bhupkhera and concludes therefrom that the police did not think much of the clue leading in the direction of Bhupkhera and consequently did not conduct this raid before. In his opinion the delay was inexplicable and this led him to fall back upon the only other evidence left in the case, namely the identification of the property. The learned Judge however does not ignore the fact that the identification by the three inmates of the accused can be used as corroborative evidence in respect of such persons from whom property alleged to be stolen was actually recovered.

As regards the recovery of the incriminating articles, it appears that they were recovered in the presence of witnesses, Durga Din and Ram Baran (P. Ws. 16 and 17). The articles were correctly identified by Raghunandan, Mt. Jagdei and Babu Lal in the presence of the Magistrate. Exhibit 10 is a piece of yellow coloured cloth, which bears stains of water. The cloth is of the same length as other pieces of cloth (Exs. 2 and 8), which are of white colour. The learned Sessions Judge thinks that the cloth may have been dyed after it was stolen as it bears the same stains of rain water as the other pieces of cloth (Exs. 2 and 8) I am not prepared to endorse this conclusion. In my opinion it is not satisfactorily proved that Ex. 10 is part of the same length of which Exs. 2 and 8 are parts. The learned Assistant Government Advocate also conceded that he did not rely upon this piece of evidence. Exhibit 11 is a gold earring. It corresponds to No. 6 in the list of stolen property (Ex. 1). In the aforesaid list four gold earrings are mentioned and their approximate weight is mentioned as eight mashas. Exhibit 11 was found to weigh three mashas. It is argued therefore on behalf of the appellant that Ex. 11 is not one of the four earrings mentioned in Ex. 1. The learned Judge observes that the weight given in the list was approximate and the difference of a masha was negligible.

Exhibit 12 is a silver bangle. It corresponds to No. 14 of the list, where 28 amirtidar silver bangles weighing Rs. 70 approximately are mentioned and it is put down that they were purchased from Kundan Lal, Sarraf of Aminabad, Lucknow. The only criticism against this article was that this was fairly common. The learned Judge however rightly remarked that Ex. 12 corresponds exactly with the silver bangles mentioned in the list. It also appears that at the time of the search 14 articles of jewellery were recovered from the house of Nandlal. A reference to this list will show that, except one silver hamel, one hansuli, one pongi gold, one gold earring and one silver lachcha, all the other articles which were recovered were found in pairs. Out of the five single articles, silver hamel, hansuli and pongi are always worn in singles. As regards the other two articles, namely the earring and the silver lachcha, although they are always worn in pairs, these are the only two articles which were found in singles. The fact that the two incriminating articles were found in singles, and not in pairs, is a circumstance not without weight. I am satisfied therefore in agreement with the view taken by the learned Sessions Judge, that at any rate the two articles (Exs. 11 and 12) were recovered from the house of the appellant in a search which

was perfectly above reproach and that these articles were the articles which had been stolen at the time of the dacoity. The recovery of these incriminating articles, along with the identification of the appellant by the inmates of the house, leaves no room for doubt in my mind that the accused is guilty of the offence with which he has been charged. The learned Sessions Judge at one place appears to throw some doubt upon the question of sealing of the incriminating articles and refers to the evidence of two search witnesses on this point. Durga Din's evidence shows that EXS. 10, 11 and 12 were definitely sealed. To the same effect is the statement of Ram Baran (P. W. 17), though the latter is unable to say whether the other articles in addition to these were also sealed or not. Nandlal stated before the committing Magistrate that the property recovered from his house belonged to him. He gave no further explanation as to how he came to possess them, whether by gift, purchase or pawn or in any other manner. The learned Sessions Judge observed in the course of his judgment that Nandlal made no attempt to prove how he came by the incriminating articles or to prove by the evidence of the household inmates and neighbours that these articles were honestly acquired. The learned Judge proceeded to say :

> Once therefore we can presume that they fall within the description of stolen property so as to leave no doubt that they are stolen property this presumption will hold good until satisfactorily explained by the accused.

At another place he observed that the onus shifted to the accused and if he could establish without doubt that he had acquired these articles honestly, he would have destroyed the presumption of the prosecution. Learned counsel for the appellant has challenged this statement of the law and has strenuously argued that the onus in a criminal case always rests on the prosecution and never shifts to the accused. He has referred in this connexion to 56 ALL 250[1] and A I R 1931 Cal 617.[2] As a matter of fact this question is purely academical for the purposes of the present case inasmuch as I hold the evidence of the recovery of the incriminating articles and the identification of the appellant by the three identifying witnesses as true and reliable to prove the participation of the appellant in the offence of dacoity, and there is no room for any presumption under S. 114 (a), Evidence Act. As the point has been raised it is as well to dispose of it in a few words.

The case in 56 ALL 250[1] is inapplicable as there the accused actually made the statement that he had bought the goods from one Gajodhar and produced evidence in support of his defence. The learned Sessions Judge held that the evidence produced by the accused was not very reliable. The learned Judge (Bajpai J.), who heard the matter in revision, expressed the opinion that the evidence produced by the accused was fairly satisfactory. In so far as the proposition of law is concerned, it is perfectly true to say that the onus in a criminal case always rests on the prosecution and never shifts on to the accused. It is also true to say that before raising a presumption of guilt under S. 114 (a), Evidence Act, the jury or the Court, as the case may be, will be entitled to take into consideration the explanation of the accused in defence, whether supported by evidence or not, and to find out for itself whether the explanation given by the accused, even though not believed in its entirety, is such as to raise a reasonable doubt in the mind of the jury or Court as to the guilt of the accused.

In A I R 1931 Cal 617,[2] it was held that the accused is not bound to prove affirmatively that he came by the incriminating goods innocently. It is sufficient for him to give an explanation which may raise doubt in the mind of the Court as to his guilt. That was a jury case in which the Sessions Judge told the jury that since the stolen goods had been found in the possession of the accused the onus of proof shifted on to him under S. 114, Evidence Act, and that unless the accused proved affirmatively that he acquired the property lawfully the jury must convict him. The learned Judges held that this explanation of S. 114, Evidence Act, was wrong and the charge amounted to misdirection vitiating the trial. On the other hand it has been held by a Bench of this Court in 7 O W N 527,[3] that where the identity of the stolen articles is established the identity of the thief or the receiver of the stolen goods is presumed to be established. In this case the accused had attempted to prove that the articles in question belonged to his family but this evidence was rejected by the learned Sessions Judge

1. ('33) 20 A I R 1933 All 893 : 148 I C 141 : 35 Cr L J 621 : 56 All 250 : 1933 A L J 1534, Emperor v. Hori Lal.
2. ('31) 18 A I R 1931 Cal 617 : 134 I C 1071 : 33 Cr L J 40 : 35 C W N 291, Bhutnath Mondal v. Emperor,
3. ('30) 17 A I R 1930 Oudh 353 : 127 I C 247 : 31 Cr L J 1210 : 7 O W N 527, Hazari v. Emperor.

as manufactured. It was thereupon held that the accused had failed to account for his possession of the articles in question.

In Cri. Revn. No. 78 of 1941,[4] which is not yet reported, it was held by the Hon'ble the Chief Judge that where the accused stated in defence that he had purchased the incriminating articles from a man whom he did not know and produced evidence which was disbelieved by both the Courts below, it must be held that the accused had failed to satisfactorily account for the possession of the articles in question and the prosecution was entitled to rely on the presumption under S. 114 (a), Evidence Act, that the accused was either a thief or a receiver of the stolen goods. I hold, therefore, that the appellant has been rightly convicted by the learned Sessions Judge. I maintain the conviction and sentence and dismiss the appeal.

K.S./R.K. *Appeal dismissed.*

4. Cri. Revn. No. 78 of 1941, Gur Prasad v. Emperor.

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(28) A. I. R. 1941 Oudh 621

AGARWAL J.

Bhairondin Singh — Defendant — Applicant

v.

Raja Syed Mohammad Mehdi — Plaintiff — Opposite Party.

Civil Revn. Appln. No. 1 of 1941, Decided on 5th August 1941, from order of Dist. Judge, Fyzabad, D/- 22nd October 1940.

(a) U. P. Tenancy Act (17 of 1939), Ss. 265, 289 (2)—Order of District Judge that appeal lay to Commissioner and presentation of appeal to Commissioner — Order of Commissioner that appeal lay to District Judge—Subsequent appeal to District Judge held did not lie unless his previous order was set aside — Commissioner held ought to have taken action under S. 289 (2).

District Judge holding that the appeal lay to the Commissioner and not to him ordered the memorandum of appeal to be presented to the proper Court. When the appeal was filed before the Commissioner, he however ordered the appeal to be presented to the District Judge as, in his opinion, the appeal lay to the District Judge. Thereupon the appeal was filed before the District Judge who rejected the appeal on the ground that his previous order had not been set aside :

Held that the order of the District Judge was correct. [P 622 C 1]

Held also that the Commissioner ought not to have returned the memorandum of appeal for presentation to the District Judge ; he should have taken action under S. 289, cl. (2) : ('22) 9 A I R 1922 Pat 368, *Rel. on.* [P 621 C 2]

(b) U. P. Tenancy Act (17 of 1939), S. 289 — "Rejected" includes return of appeal for presentation to proper Court.

The word "rejected" in S. 289 (2) includes return of a memorandum of appeal for presentation to the proper Court. [P 622 C 1]

Mahabir Prasad Srivastava — for Applicant.

M. H. Kidwai — for Opposite Party.

Order.—This is an application under S. 276, U. P. Tenancy Act, against an order dated 22nd October 1940, passed by the District Judge of Fyzabad rejecting an appeal filed by the applicant. An ex parte decree was passed against the applicant in favour of the opposite party on 27th June 1939. The present applicant applied for setting aside that ex parte decree but his application was dismissed on 14th August 1939. He then filed an appeal before the District Judge of Fyzabad against the order refusing to set aside the ex parte decree. That appeal came on for hearing on 6th April 1940, and the District Judge was of opinion that the appeal lay to the Commissioner and not to him. He therefore ordered the memorandum of appeal to be returned for presentation to the proper Court. The appeal was filed before the Commissioner on 19th April 1940. He however ordered the memorandum of appeal to be returned for presentation to the District Judge as in his view based on a decision of this Court reported in 1940 O W N 621[1] the appeal lay to the District Judge and not to him. This complication and difference of views arose on account of the new Tenancy Act, which came into force on 1st January 1940. The District Judge was of opinion that the appeal was governed by the new Act under which an appeal lies to the Commissioner but a different view was taken by this Court in the case above quoted. The applicant again filed the memorandum of appeal before the District Judge on 4th September 1940. He held that the previous order returning the memorandum of appeal for presentation to the Commissioner had not been set aside and he therefore rejected the appeal. He has relied on a case of the Patna High Court : A I R 1922 Pat 368.[2] I think the view taken by the learned District Judge is correct. The order passed by him on 6th April 1940 is binding on the parties unless it is set aside by a superior Court. The Commissioner ought not to have returned the memorandum of appeal for presentation to the District Judge; he should have taken action under Sec. 289, cl. (2), U. P. Tenancy Act, which runs as follows :

1. ('40) 27 A I R 1940 Oudh 364 : 189 I C 248 : 16 Luck 42 : 1940 O W N 621, Bhagwati Prasad v. Ram Lautan.
2. ('22) 9 A I R 1922 Pat 368: 64 I C 496: 2 P L T 739, Razaur Rahman v. Athar Hussain.

Where any suit, application or appeal, having been rejected either by a civil Court or by a revenue Court on the ground of want of jurisdiction, is subsequently filed in a Court of the other description, the latter Court, if it disagrees with the finding of the former, shall submit the record, with a statement of the reasons for its disagreement to the High Court or the Chief Court as the case may be.

Sub-section (4) of S. 289 provides :

On any such reference being made, the High Court, or the Chief Court, as the case may be, may order the Court either to proceed with the case, or to return the plaint, application or appeal for presentation to such other Court as it may declare to be competent to try the same.

Sub-section (5) of the same section provides :

The order of the High Court or the Chief Court as the case may be shall be final and binding on all Courts subordinate to it or to the Board.

Had action been taken under sub-s. (2) of S. 289, the order of the Chief Court would have been binding on the District Judge as well as on the Commissioner. The applicant acquiesced in that wrong order of the Commissioner. His remedy was to apply in revision to the Board of Revenue and the Board could entertain the application for revision because the order of the Commissioner was such that he could not legally make. As the applicant did not take proper steps to have the order of the Commissioner set aside, he has himself to blame if he finds himself without any remedy. It is argued that the words in sub-s. (2) of S. 289 are "Where any suit, application or appeal having been rejected," and as the memorandum of appeal was not rejected by the District Judge on 6th April 1940, but was returned for presentation to the proper Court, this sub-section is not applicable. I agree with the learned District Judge that the word "rejected" includes return of a memorandum of appeal for presentation to the proper Court. A memorandum of appeal is not rejected on the ground of want of jurisdiction but is only returned for presentation to the proper Court. As the applicant filed the appeal before the District Judge after his previous order that no appeal lay to him, the District Judge was justified in rejecting the appeal. I think the order of the District Judge is correct. It is argued that I may revise the previous order of the District Judge dated 6th April 1940. I do not think it proper to do so in this case as the applicant has applied only for the revision of the last order of the District Judge. This application fails and is dismissed with costs.

K.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Oudh 622

AGARWAL J.

Nanhe Singh and others —
Defendants — *Appellants*

v.

Ram Narain and another —
Plaintiffs — *Respondents.*

Misc. Appeal No. 16 of 1941, Decided on 25th August 1941, against order of Civil Judge, Unao, D/- 1st March 1941.

(a) Court-fees Act (1870 as amended by U. P. Act 19 of 1938), Sch. 2, Art. 17 and S. 7 (iv) (b) —Suit for profits— Mere fact that accounts may have to be gone into cannot convert it into suit for accounts — Sch. 2, Art. 17 and not S. 7 (iv) (b) applies.

The mere fact that in a suit for profits accounts may have to be gone into for determining plaintiff's share of profits cannot convert the suit into a suit for accounts. The mere addition by the plaintiff in the prayer that whatever sum be found due to him be decreed cannot convert the money suit into a suit for accounts. Consequently, the suit will be governed by Sch. 2, Art. 17 and not by S. 7 (iv) (b) : ('18) 5 A I R 1918 Cal 1037 and 7 O C 84, *Rel. on.* [P 623 C 1]

(b) Court-fees Act (1870 as amended by U. P. Act 3 of 1932), Sch. 2, Art. 17 — Suit for profits — Preliminary decree for accounts — Appeal against—Sch. 2, Art. 17 applies.

In an appeal against a preliminary decree for accounts in a suit for profits it is not possible to estimate at a money value the subject-matter in dispute, the only question in appeal being whether the appellant is liable to render accounts, there being no decree against him for any specific amount. In such a case the court-fee of Rs. 15 is payable on the memorandum of appeal. [P 623 C 2]

P. N. Chaudhari — for Appellants.

I. A. Abbasi — for Respondents.

Judgment. — This is a miscellaneous appeal under S. 6-A, Court-fees Act, against the order of the Civil Judge asking the appellants to pay Rs. 79-8-0 deficiency in the court-fee within 20 days. The respondents, Ram Narain and Raja Ram, brought a suit for their share of profits against the defendants-appellants. The respondents are sharers in village Dhura Mohal Mohan Singh and the defendants' father was lambardar. The plaintiffs brought a suit for recovery of Rs. 900 or whatever sum be found due to them after proof and inquiry. It was alleged in para. 3 of the plaint that Ram Baksh Singh father of the appellants died, that the defendants were the sons and legal heirs and were in possession of the zamindari share of Mohal Mohan Singh in village Dhura and that the defendants were liable to pay profits due to the plaintiffs on the basis of accounts for the years in suit. It was further alleged in para. 4 that the deceased Thakur Ram Baksh Singh, father

of the defendants, and after his death the defendants explained no accounts of profits to the plaintiffs nor did they pay any sum as profits to the plaintiffs. The learned Munsif in whose Court the suit was instituted passed a preliminary decree for accounts. The defendants had contested their liability to account and had alleged that only Rs. 130 were due from them. The defendants went in appeal and valued the memorandum of appeal at Rs. 130. They paid court-fees on that amount. The learned Civil Judge has held that the defendants ought to have paid a court fee on Rs. 900, the approximate amount which was due to the plaintiffs according to the plaint.

The first point to be determined in this appeal is whether it is a suit for accounts. The plaintiffs' claim is for the recovery of profits. The mere fact that accounts may have to be gone into in determining the plaintiffs' share of profits will not convert it into a suit for accounts. It was held in 21 C W N 784[1] that a suit for recovery of a specific sum of money does not assume the character of a suit for accounts merely because in the determination of the question in controversy accounts may have to be examined. In 7 O C 84[2] the plaintiff had prayed for two reliefs, (1) that an order be passed for the rendition of accounts, and (2) that on accounts being made up, his claim may be decreed.

It was held that if a plaintiff claims a share of profits whether he asks for a settlement of accounts or not as a necessary preliminary to ascertaining what his share really is, that is a suit for a share of the profits and that the only case for a settlement of accounts would be where the plaintiff asked for settlement of accounts pure and simple and did not claim a money decree as the result. I am of opinion that the suit is not one for accounts. The plaintiffs claimed for the recovery of Rs. 900. The mere fact that they added in the prayer that whatever sum be found due to them be decreed does not convert the money suit into a suit for accounts. If it is not a suit for accounts, S. 7, cl. (iv) (b) will not apply. The case will be governed by Sch. 2, Art. 17 Court-fees Act. It provides for a plaint or memorandum of appeal in a suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided by the Act. Suit as defined in the Court-fees Act includes an appeal. I think it is not possible to estimate at a money value the subject matter in dispute in the appeal filed in the lower Court. The only question in this appeal is whether the defendants-appellants are liable to render accounts. There is no decree against them for any specific amount and so no money value can be given to the subject-matter in appeal. I therefore hold that the defendants are liable to pay Rs. 15 court fee on the memorandum of appeal filed in the lower Court. The order of the learned Civil Judge, Unao, is set aside and the defendants-appellants are ordered to pay Rs. 15 court-fee on the grounds of the appeal minus the sum already paid within a month from this date. No order as to costs of this appeal.

G.N./R.K. *Order set aside.*

1. ('18) 5 A I R 1918 Cal 1037 : 41 I C 929 : 27 C L J 96 : 21 C W N 784, Kshetranath Bhuiya v. Kali Dasi Dasi.
2. ('04) 7 O C 84, Bhaiya Brij Raj Singh v. Ram Parghat.

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(28) A. I. R. 1941 Oudh 623

AGARWAL J.

Mt. Ram Pyari — Defendant —
Applicant
v.
Govind Prasad and another —
Plaintiffs — Opposite Party.

Civil Revn. Appln. No. 26 of 1941, Decided on 29th August 1941, for revision of order of Munsif, Kaisarganj, Bahraich, D/- 25th February 1941.

Civil P. C. (1908), S. 115 and O. 6, R. 17 — Order allowing amendment of plaint — No revision lies.

An order allowing amendment of a plaint being an interlocutory order is not open to revision: ('36) 23 AIR 1936 Oudh 22 (F B) and ('34) 21 AIR 1934 All 785, *Rel. on*; ('40) 27 AIR 1940 Oudh 367, *Expl.*; ('35) 22 A I R 1935 All 353, *Not approved.*

[P 624 C 1, 2]

Raj Kumar Srivastava — for Applicant.
Siraj Husain — for Opposite Party.

Order. — This is an application for revision under S. 115, Civil P. C., against two orders of the Munsif Kaisarganj at Bahraich dated 25th February 1941 and 21st January 1941. The opposite parties Govind Prasad and Dhondhey Das brought a suit in the Court of the Munsif, Kaisarganj, on the allegation that Govind Prasad, one of the plaintiffs, was owner of some shops which he let out to Shadi Lal and Babu Ram for one year and the term of tenancy expired in May 1936 and then he let them out to the other plaintiff, Dhondhey Das, that Babu Ram died in the year 1936 and Shadi Ram died on 6th May 1940 leaving his widow Mt. Ram Piari, the defendant in the case, and that she was in unlawful possession of the

shops. They sued for possession of the shops and damages for unlawful occupation. The defendant Mt. Ram Piari pleaded that the suit was not within the jurisdiction of the Court and the court-fees paid were insufficient. Two issues were framed by the Court: (1) Has this Court jurisdiction to entertain the suit? (2) Is the court-fee paid sufficient?

After this the plaintiffs applied for the amendment of the plaint and converted the suit as if it were against a tenant. They claimed ejectment instead of possession and rent in place of damages. The learned Munsif allowed this amendment and decided the two issues in favour of the plaintiffs. It is from these two orders that this revision has been filed. It was held by a Full Bench of this Court in 1935 O W N 1158[1] that no revision lies from an interlocutory order. The learned counsel for the applicant has argued that the order in question in the Full Bench case was one about court fees and not for amendment. The Full Bench decided the case on the ground that an interlocutory order does not decide a case within the meaning of S. 115, C. P. C. Reference was made to the case in 3 A W R 474[2] that no revision lies against an order amending a plaint. Reference was also made to another case, 4 A W R 802.[3] In that case it was held by the Allahabad High Court that a revision lies from an order refusing to allow an amendment. It was observed by King C. J. who was one of the members of the Full Bench that that decision of the Allahabad High Court was in opposition to the general trend of rulings of that Court The same learned Judge made the following observation :

> The alteration of the language used in S. 622 of the old Code (corresponding to S. 115 of the present Code) seems at first sight to make no appreciable difference in the meaning. The Legislature must, however, have had some object in altering the language and the effect of the alteration seems to me to make it clear beyond all doubt that the case must have been decided before the record of the case is called for .... Now in the present case what record of a decided case could be sent? There is no such record as distinct from the record of the pending suit, and S. 115 does not authorize the High Court to call for the record of a pending suit. It has been suggested that the record of the decided case (that is the record of the decision of the preliminary issue regarding the court-fee) consists of that part of the record of the pending suit which relates to the decision on the question of court-fee. A little reflection will, I think, show that it would be impossible to separate the so-called record of the decided case from the record of the pending suit and thus to send the record of the decided case while leaving the record of the pending suit in the trial Court.

The case before the Full Bench was in respect of an order about the payment of court fees but the reasoning will apply in this case also. The learned counsel for the applicant has relied on (1940) O W N 500.[4] In that case the appellate Court had allowed an amendment and remanded the case. There was an appeal to this Court. It was held that no appeal lay but their Lordships treated the memorandum of appeal as a memorandum for revision and held that the lower appellate Court was not justified in allowing the amendment. There was a decided case before the Chief Court in that case and so that case does not in any way touch the decision in the Full Bench case above referred to. If no revision lies, I need not see whether the order of amendment was proper or not and I need not refer to the case law of other High Courts when there is a Full Bench case of this Court which is quite applicable to this case in my opinion. I am of opinion that no revision lies from the order allowing amendment. If the order of amendment stands, it cannot be said that the two issues of jurisdiction and court fee had been decided wrongly by the lower Court. There are, no doubt, some cases in which a revision was allowed from an order deciding the question of jurisdiction but here it cannot be said that the question of jurisdiction has been wrongly decided if the amendment is proper. I see no reason to interfere. The application is dismissed with costs.

G.N./R.K. *Application dismissed.*

1. ('36) 23 A I R 1936 Oudh 22 : 158 I C 949 : 11 Luck 529 : 1935 O W N 1158 (F B), Paras Nath v. Ran Bahadur.
2. ('34) 21 A I R 1934 All 785 : 152 I C 886 : 1934 A L J 757 : 3 A W R 474, Sunder Lal v. Mt. Razia Begam.
3. ('35) 22 AIR 1935 All 353 : 153 I C 65 : 57 All 459 : 1934 A L J 989 : 4 A W R 802, Rurmal Ram Nath v. Kapilman Misir.
4. ('40) 27 A I R 1940 Oudh 367 : 188 I C 893 : 1940 O W N 500 : 16 Luck 65, Mt. Lachmin v. Bhairon Bakhsh Singh.

END

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1941

Judicial Commissioner :

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Judges :

The Hon'ble K. B. Kazi Mir Ahmed Khan, B.A., LL.B.

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" Wazirzada Gul Mahomed Khan, Advocate for Bannu Dist.

" L. Roshan Lal for Dera Ismail Khan Dist.

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ALMOND J. C. AND MIR AHMAD J.

Ghulam Sarwar Faqir Mohd. Teli — Petitioner

v.

Nabi Bakhsh Faju Teli and others — Respondents.

Civil Revn. No. 282 of 1939, Decided on 22nd October 1940, against order of Addl. Judge, Peshawar, D/- 2nd May 1939.

* *Civil P. C. (1908), O. 3, R. 4 — Mechanical act of handing over appeal to clerk of Court is only ministerial work and does not amount to "acting" under O. 3, R. 4—Another counsel can present appeal on behalf of counsel appearing in case without written authority.*

The mechanical act of handing over an appeal to the clerk of Court or another officer appointed for receiving appeals does not amount to "acting" as contemplated by O. 3, R. 4. It is only a ministerial work and similar in nature to the payment of process-fee, etc., which the clerks of counsel usually do. Consequently another counsel can present an appeal on behalf of the counsel duly authorized under O. 3, R. 4 without a document in writing authorizing him to do so : A I R 1939 Rang 1, *Foll.*; 20 Mad 87, *Rel. on*; A I R 1928 Lah 841; A I R 1930 All 112; A I R 1931 All 507; A I R 1931 All 767 and A I R 1936 Lah 500, *Disting.* [P 3 C 2]

L. Jiwanda Mal — for Petitioner.

G. C. Kohli — for Respondent (Plaintiff).

Mt. Mirzanoor in person.

Mir Ahmad J.—Nabi Bakhsh and Abdur Rehman obtained a decree for possession of half of a house against Mt. Mirzanoor and Ghulam Sarwar. Lala Jiwanda Mal was the pleader who represented Ghulam Sarwar in the trial Court. Ghulam Sarwar again engaged Lala Jiwanda Mal, Pleader, to file an appeal. Lala Jiwanda Mal prepared the memorandum of appeal and signed it. He practises at Haripur. The appeal had to be filed at Abbottabad. He therefore asked Qazi Mohammad Ashraf Pleader, who was going to Abottabad, to hand in the appeal there on his behalf. There are two notes on the memorandum of appeal. One is by Lala Jiwanda Mal that his power of attorney was on the file of the lower Court and had not been cancelled by his client, and the other is by Qazi Mohammad Ashraf that he was filing the appeal in Court for Lala Jiwanda Mal, Pleader.

At the hearing, counsel for the plaintiff-respondents objected that the appeal had not been properly presented and should therefore be dismissed. The argument taken was that Qazi Mohammad Ashraf was "acting" for Lala Jiwanda Mal when he presented the appeal, and, as under O. 3, R. 4, Civil P. C., he could not act without a written power to do so, there was no properly presented appeal before the Court. This argument prevailed with the learned Additional Judge. He dismissed the appeal on this ground. Ghulam Sarwar has come up on revision to this Court. As the decision of this petition affects the general routine of the Bar the case was referred to a Bench by a single Judge for an authoritative decision. The law on the subject is quite clear. Order 3, R. 4, sub-r. (1), Civil P. C., is in the following words :

> No pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing signed by such person or by his recognized agent or by some other person duly authorized by or under a power of attorney to make such appointment.

If Qazi Mohammad Ashraf was "acting" for Lala Jiwanda Mal then it is indisputable that he required a written power to do so. But the point is whether in fact the handing over of the appeal to the clerk of Court amounts to "acting" or not. Counsel for the petitioner has referred us to two rulings in support of the proposition that it is only a ministerial act and does not amount to "acting" under O. 3, R. 4, Civil P. C. One of the authorities is A I R 1939 Rang 1[1] and

1. ('39) 26 A I R 1939 Rang 1 : 180 I C 565 : 1939 R L R 108, Sawarmal v. Kunjilal.

another is 20 Mad 87.[2] Counsel for the plaintiff-respondents quoted A I R 1928 Lah 841,[3] A I R 1930 ALL 112,[4] A I R 1931 ALL 507;[5] A I R 1931 ALL 767[6] and A I R 1936 Lah 500,[7] to show that a written power was necessary for a counsel to enable him to present an appeal on behalf of another counsel. We will first deal with the rulings quoted by counsel for the plaintiff-respondents. In A I R 1928 Lah 841[3] there occurs a remark that the Judge of the lower Court should not have announced the judgment to the clerk of the counsel. There is nothing else besides this sentence in this judgment and we do not think it has any bearing on the case before us. In A I R 1930 ALL 112[4] an appeal was filed by a counsel in whose power of attorney the name of the counsel was not written nor was the power duly accepted in writing by the counsel himself. The appeal was therefore rejected. The party filed another appeal duly supported by a regularly drawn up power of attorney though beyond time. Their Lordships of the High Court held that the subsequent appeal was maintainable and that the rejection of the previous appeal did not bar the later appeal on the ground of res judicata. They extended the time under S. 5, Limitation Act, and thus condoned the period by which the subsequent appeal had become time-barred. It appears to us that this case also is not the direct authority for the proposition put forward by counsel. A I R 1931 ALL 507[5] refers to verification of plaints. It was held that the failure to verify a plaint was a mere irregularity and could be cured by getting the verification subsequently done. This case is not in point at all.

In A I R 1931 ALL 767[6] the name of the pleader was not given in the power of attorney. The trial Judge therefore returned the plaint to the plaintiff with the direction that the plaint should be presented again with a properly drawn up power of attorney attached to it. The plaintiff appealed to the District Judge who upset that order and directed that the case should proceed. Their Lordships of the High Court restored the order of the original Court and ordered that the plaint should be returned and presented again after correction had been made in the power of attorney. It is patent that this ruling is also irrelevant to the question in dispute. A I R 1936 Lah 500[7] is again dissimilar. Counsel who was given the power of attorney by the client did not sign the memorandum of appeal. The memorandum of appeal was signed by another counsel who noted that he was acting for the counsel originally briefed. It was held that the signing of the appeal amounted to "acting" and therefore the appeal was not properly presented. The review of the authorities cited by the counsel for the plaintiff-respondents has made it clear that these authorities do not help us in deciding the present case. We will now turn to the cases cited by the counsel for the petitioner. 20 MAD 87[2] was a criminal case. Their Lordships of the Madras High Court made the following observations in their judgment:

> The Deputy Magistrate's reason for not accepting the appeal at first made by the four petitioners was that it was not presented by themselves or their pleader, but only by their pleader's clerk. Such presentation has been held by this Court to be equivalent to a presentation by the pleader himself, when the petition of appeal is signed by the pleader and he is duly authorized as was the case here.

A I R 1939 Rang 1[1] is a Letters Patent appeal and is on all fours with the case now before us. The appeal was signed by Mr. Sarkar who held a power of attorney from his client, but it was presented by Mr. Ganguly for him. The question was whether the presentation amounted to "acting" and was therefore invalid because there was no written power of attorney authorizing Mr. Ganguly to act for Mr. Sarkar. Dunkley J. with whom Roberts C. J. agreed, made the following remarks:

> So far as India (and Burma) are concerned, the classic definitions of the expression "to act" as used in forensic parlance, are contained in 19 W R Cr 8[8] and 6 Cal 585.[9] In the earlier case Phear J. said at p. 9: 'I think that the word "act" there means the doing of something as the agent of the principal party, which shall be recognized or taken notice of by the Court as the act of that principal; such for instance as filing a document.' In the later case White J. said at page 590: 'To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the

2. ('97) 20 Mad 87 : 2 Weir 470, Queen-Empress v. Karuppa Udayan.
3. ('28) 15 A I R 1928 Lah 841 : 110 I C 177, Begg Sutherland & Co. v. Bahadur Chand.
4. ('30) 17 A I R 1930 All 112 : 121 I C 546 : 1930 A L J 394, Muhammad Qamar Shah Khan v. Mohammad Salamat Ali Khan.
5. ('31) 18 AIR 1931 All 507 : 134 I C 26 : 54 All 57 : 1931 A L J 777 (S B), Wali Mohammad Khan v. Ishak Ali Khan.
6. ('31) 18 A I R 1931 All 767 : 132 I C 566 : 1931 A L J 983, Chitta v. Jafo.
7. ('36) 23 A I R 1936 Lah 500 : 163 I C 141 : 17 Lah 610 : 38 P L R 258, K. L. Gauba v. Indo-Swiss Trading Co. Ltd.
8. ('73) 19 W R Cr 8, In re Fazzle Ali.
9. ('80) 6 Cal 585 : 7 C L R 562, Kali Kumar Roy v. Nobin Chunder.

Court.' With the greatest respect, I am prepared to adopt these definitions; but in my opinion there is nothing in O. 3, R. 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. A ministerial act, in relation to this matter, is an act which does not require the personal skill or attention of the pleader and which can be done without consideration of facts or circumstances. To hold otherwise would result in complete chaos in the administration of justice and would, within a short time bring about a state of affairs which would render it impossible for the Courts of law to carry on their work. For, the payment of court-fee, translation and copying fees and the like, merely ministerial acts are "acting" just as much as the presentation of a plaint or a memorandum of appeal is "acting"; and if the judgments of the Assistant District Court and this Court on second appeal are correct, the result would be that the officers of the Courts could receive such payments only from the hands of the parties themselves or their pleaders duly appointed, obviously an impossible state of affairs. It is conceded, and no doubt it is correct, that the drafting of a plaint or a memorandum of appeal, or acts of the same nature, which can only be done on consideration of facts and circumstances, must be done by the duly appointed pleader, and therefore such documents must be signed by him, and such acts cannot be done or such documents cannot be signed on his behalf by another pleader. But the same consideration does not apply to acts which are merely mechanical, such as handing over a bundle of paper. To such acts, in my opinion the maxim *qui facit per alium, facit per se* must be held to apply, and the presentation of the plaint or appeal must be taken to be that of the signatory thereto, although the actual handing over may be performed by a servant or agent.

Later in the judgment he said :

Order 4, R. 1, sub-r. (1) says that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. There is nothing in the rule to show that the presentation must be at a particular place or at a particular time or by a particular person, so long as it is a presentation to the Court or to the officer appointed by the Court. O. 41, R. 1, sub-r. (1) is even more explicit. It says : 'Every appeal shall be preferred in the form of a memorandum signed by the appellant, or his pleader and presented to the Court or to such officer as it appoints in this behalf.' The rule lays down that the memorandum must be signed by the appellant or his pleader, but it expressly refrains from stating that it must be presented by the appellant or his pleader.

He therefore concluded as follows :

In my opinion, when a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under O. 3, R. 4, there is nothing contrary to the provisions, or the intention, or the spirit of that rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader, to whom the duty of performing that act has been delegated by the duly authorized pleader.

After giving the matter our careful attention we have come to the conclusion that the view taken by the Judges of the Rangoon High Court is sound. We think that the mechanical act of handing over the appeal to the clerk of Court or another officer appointed for receiving appeals does not amount to "acting" as contemplated by the Civil Procedure Code. It is only a ministerial work and similar in nature to the payment of process-fee etc., which the clerks of counsel usually do. On this view of the case Qazi Mohammad Ashraf could present the appeal on behalf of Lala Jiwanda Mal without a document in writing authorizing him to do so. The appeal is therefore accepted. The order of the lower Appellate Court is set aside and the case is remanded to the lower Appellate Court for decision on merits. Costs shall follow the event.

G.N./R.K. *Appeal accepted.*

A. I. R. 1941 Peshawar 3

MIR AHMAD AND SOOFI JJ.

Peoples Bank of Northern India Ltd. (in liquidation) through Bhagwati Shankar, Official Liquidator, Lahore and another — Petitioners

v.

Firm Lekhu Ram and Sons —

Respondents.

Civil Revn. No. 316 of 1938, Decided on 4th October 1940, against order of Dist. Judge, Dera Ismail Khan, D/- 12th July 1938.

(a) Limitation Act (1908), Arts. 181 and 178 —Art. 178 applies only to applications under Civil Procedure Code—Art. 181 is not restricted to applications under Civil Procedure Code but extends to applications not provided for in schedule—Application to file award passed under Arbitration Act is governed by Art. 181.

Article 181 is not restricted to applications under the Civil Procedure Code but extends to all applications not provided for in the schedule. An application to file an award passed under the Arbitration Act, is governed by Art. 181 and not by Art. 178 which applies only to applications under the Civil Procedure Code : A I R 1927 Pat 177 and A I R 1927 Rang 263, *Rel. on.* [P 4 C 2]

(b) Limitation Act (1908), S. 14 — Award between Bank and private individual—Bank in good faith carrying on proceedings for execution of award in Sub-Judge's Court — Subsequent ruling declaring that awards such as one in question were cognizable by District Judge—Bank held entitled to benefit of S. 14.

In the arbitration between the Bank, a limited liability company, and a private individual an award was passed in favour of the Bank, which diligently and in good faith prosecuted proceedings for the execution of the award in the Sub-Judge's Court believing that Court to have jurisdiction. Subsequently it was ruled that awards such as the one in question were cognizable by District Judge :

Held that the Bank was entitled to the benefit of Section 14. [P 5 C 1, 2]

(c) Principal and Agent — Bank by power of attorney authorizing agent to sign agreements, generally sign for Bank and to take any legal proceedings on behalf of Bank — Agent held had authority to enter into reference to arbitration.

Where the Bank by a power of attorney authorized its agent to sign any agreements, generally sign for the Bank, and take any legal proceedings on behalf of the Bank :

Held that the agent had authority to enter into a reference to an arbitration. [P 5 C 2]

S. Saran Singh—for Petitioner 1.

Diwan Chand and Sher Khan—for Respondents (except Padam Lal and Shanti Lal).

Mohd. Akbar Jan an Official of the Court — for Shantilal (Minor).

Mir Ahmad J. — The firm Lekhu Ram & Sons owed some money to the Peoples Bank. Mr. Kulbir the agent of the Bank entered into an arbitration with the firm and the arbitrator gave an award on 23rd December 1932. He directed that Rs. 10218-5-0 with future interest at 9 per cent. per annum should be paid by the firm to the Bank. He fixed some monthly instalments. The award was filed in the Court of the Senior Sub-Jugde Bannu on 7th January 1933 and was accepted by the parties. The Court passed a decree in accordance with the award on 9th January 1933. Several applications for execution were presented. The Bank realised Rs. 4400 out of the amount decreed. The Bank then went into liquidation. The fourth execution application was filed by the Bank on 5th December 1935. In the meantime, this Court gave a ruling in which it was held that arbitration entered into between a limited liability company and a private individual, was governed by the Arbitration Act and that the award of the arbitrator on such a reference should be presented to the Court of the District Judge. The official liquidator therefore applied on 10th December 1935 that the award should be returned to him so that he should present it to the District Judge. The Senior Sub-Judge returned the award to him. On 3rd January 1936 the arbitrator applied to the Court of the District Judge for filing the agreement and the award. The application was contested. The District Judge dismissed it on the ground that the application did not lie because there was a subsisting decree of the Senior Sub-Judge which had not been set aside by a competent Court. A Judge of this Court in chambers set aside that order on 23rd October 1937 and remanded the application for disposal of the other issues raised. The District Judge dismissed the application again on two grounds; firstly that the application was barred by time under Arts. 178 and 181, Limitation Act, and secondly that Mr. Kulbir had no power to refer the matter to arbitration. The arbitrator and the Bank have come up on revision to this Court against this order. We need not discuss Art. 178 because it applies only to applications under the Civil Procedure Code. Article 181 runs thus :

181.—Applications for which no period of limitation is provided elsewhere in this schedule or by S. 48 of the Code of Civil Procedure 1908.	Three years	When the right to apply accrues.

It will be observed that it is a residuary Article for applications just as Art. 120 is a residuary Artictle for suits. It lays down the period of limitation for all the applications which have not been already provided for in the schedule. The schedule, it may be noted, deals with applications only. It cannot be denied that the arbitrator has to bring the award to the notice of the Court for the purpose of filing it. There is no other way of doing it except by means of an application. There is no provision in the the schedule for any such application. It naturally follows that Art. 181, Limitation Act, would apply to it. It was contended that Art. 181 applied only to applications under the Civil P. C. and the view of some of the High Courts in India was quoted in support of this proposition. On the other hand A I R 1927 Pat 177[1] and A I R 1927 Rang 263[2] were quoted to show that Art. 181 applied to all applications which had not been provided for in the schedule and not necessarily to applications under the Civil P. C. which had not been mentioned in the schedule. We are inclined to agree with the Patna and Rangoon view in the matter for, if we were to restrict the scope of Art. 181 to applications under the Civil P. C. many applications ,will remain for which there will be no article in the Limitation Act and the *reductio ad absurdum* would be that the applicants in those cases would have a free hand to put in applications whenever they liked. An application for filing of an award of this kind by an arbitrator would be a case in point. On this view an arbitrator may keep the award in his pocket for ten years and then he may file it with impu-

1. ('27) 14 AIR 1927 Pat 177 : 101 I C 564 : 6 Pat 366 : 8 P L T 186, Ananta Charan v. Nimai Bahu.
2. ('27) 14 A I R 1927 Rang 263 : 104 I C 816 : 5 Rang 384, Jhan Bahadur Singh v. Bailiff, District Court Toungoo.

nity. We hold, therefore, that this case is covered by Art. 181 and that the arbitrator had three years to file the application from the date on which it was given that is to say 31st December 1932. The question arises next whether the presentation of the application to the senior Sub-Judge for filing the award and the subsequent proceedings in that Court for some time, were not proceedings undertaken with due diligence and prosecuted in good faith which from defect of jurisdiction the senior Sub-Judge could not entertain and were therefore not covered by S.14 (2), Limitation Act. Counsel for the petitioners urges that they were and that he was entitled to the benefit of that section. The words of S. 14 are as follows:

14. (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance, or in a Court of appeal, against the defendant shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance, or in a Court of appeal, against the same party for the same relief shall be excluded where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

Explanation 1.—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—For the purposes of this section a plaintiff, or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation 3.—For the purposes of this section, mis-joinder of parties, or of cause of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

We have already noted above that this Court ruled in 1934 that such awards were cognizable by the District Judge. It is therefore clear that up to that point of time the Bank and the arbitrator were under the wrong impression that the Senior Sub-Judge, whose designation had become "Senior Sub-Judge" by the enforcement of the Frontier Courts Regulation in 1931 and who was designated "District Judge" before the Regulation became law, was competent to entertain the proceedings. The Bank diligently and in good faith prosecuted the proceedings in the Court of the Senior Sub-Judge and the defendants also acquiesced in those proceedings and paid Rs. 4400 in pursuance of the terms of the award. It was only when the Bank took the award back and presented it to the District Judge that the defendants resorted to obstructive methods. We therefore hold that the petitioner is entitled to the benefit of S. 14, Limitation Act. Under that section we have to deduct the period taken by the Bank in prosecuting the proceedings in the Court of the Senior Sub-Judge, when computing the period of three years required under Article 181 for filing the award. It is clear that after the deduction is made, the presentation of the application on 3rd January 1936, was within time.

We will now turn to the second point on which the learned District Judge has thrown out the application. Clauses 9, 10 and 11 of the power of attorney given by the Bank to Mr. Kulbir are to the following effect:

9. The said Bakhshi Kulbir by virtue of these presents, will have the power for the purposes of aforesaid or any of them to sign, make, execute and do on behalf and in the name of the said Bank all cheques, contracts, agreements, deeds transfers, assignments, instruments and other things whatsoever; he will also have the power to renew, vary and discharge all such contracts and agreements and do all things requisite for obtaining a renewal, variation and discharge thereof.

10. The said Bakhshi Kulbir will have the power so long as he continues to serve the said Bank as the manager, to do generally everything requisite for all or any of the aforesaid purposes and also for other general banking business, usually done by joint stock and other banks, and sign generally on behalf and in the name of the Bank.

11. The said Bakhshi Kulbir in virtue of these presents will have the power to demand, collect, receive and give effectual bona fide discharge of, in the name and on behalf of the said Bank all debts, advances and claims due to the said Bank; *he will have further the power to take and use all lawful proceedings and means for recovering and receiving the said debts* and advances and also to commence and prosecute and to defend at law all actions, suits, claims, demands and disputes, *and to adjust and settle and to compromise all accounts. Suits, claims and demands*, and for all or any of the purposes aforesaid *to execute and do such instruments* and things as shall be thought necessary or expedient.

The underlines (here italicized) are ours.

It will be seen that under cl. 9, Mr. Kulbir could sign any agreements, under cl. 10 he could generally sign for the Bank, and under cl. 11 he could take any legal proceeding on behalf of the Bank. We do not see why these three clauses should not be taken to authorize Mr. Kulbir to enter into a reference to an arbitration. The reference

was therefore perfectly legal. We consequently disagree with the lower Court on both the points on which it has given its findings against the petitioners. We accept the petition and order that the award be filed. The petitioner shall have his costs in this Court. Pleader's fee Rs. 50.

G.N./R.K. *Petition accepted.*

A. I. R. 1941 Peshawar 6

ALMOND J. C. AND MIR AHMAD J.

Karam Din Nawab Din — Appellant

v.

Anant Ram Lala Hukum Chand Dhal and another — Respondents.

Appeal No. 90/31 of 1939, Decided on 30th September 1940, from order of Addl. Judge, Peshawar, D/- 4th March 1939.

(a) Partnership Act (1932), Ss. 2 (b), 4 and 69 — Solitary transaction of money lending by two persons jointly would not make those persons partners in firm — Their registration is not necessary under S. 69.

Section 2, cl. (b) read with S. 4 is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in S. 8 of the Act presumes the existence of a partnership as defined in S. 4 and therefore a fortiori the existence of a business mentioned in S. 2, cl. (b). A solitary transaction in which two persons have jointly lent money to another would not make those persons partners in a firm and hence their registration is not necessary under S. 69 of the Act.

[P 7 C 1]

(b) Contract Act (1872), Ss. 126 and 134 — A offering cheque to B in satisfaction of B's claim against C — A is not surety and cannot take advantage of S. 134.

Where a decree-holder has attached his judgment-debtor's property and *A* offers a cheque to the decree-holder in satisfaction of his claim against the judgment-debtor *A* is not surety for the judgment-debtor and if *A* stops payment of cheque the deceree-holder has independent cause of action against *A* and *A* cannot take advantage of S. 134.

[P 7 C 2]

(c) Contract Act (1872), S. 2 (d) — Consideration — Attachment by decree-holder of judgment-debtor's property—A paying amount in satisfaction of decree-holder's claim against judgment-debtor — Consideration for payment consists in decree-holder not insisting on attachment of property.

Where a decree-holder has attached property of his judgment-debtor and *A*, a relative of the judgment-debtor pays certain amount in satisfaction of decree-holder's claim against the judgment-debtor, the consideration for payment consists in the decree-holder not insisting on attachment of the judgment-debtor's property. *A* is therefore liable to the decree-holder if he withholds payment.

[P 7 C 2]

(d) Practice — New plea — Second appeal — Question of undue influence cannot be allowed to be raised for first time in second appeal.

Where question of undue influence is not raised in Courts below it cannot be allowed to be raised for the first time in second appeal because evidence would have been necessary to prove or disprove the exercise of undue influence if raised in trial Court.

[P 7 C 2]

Sheik Mohd. Shafi — for Appellant.

Krishan Chandra — for Respondents.

Mir Ahmad J. — On 27th March 1936 Anant Ram and Tara Chand, the respondents before us brought a suit on a pronote against Abdur Rashid. They asked for a decree for Rs. 3600. The principal amount was Rs. 3500, interest Rs. 56-8-0, and miscellaneous expenses Rs. 43-8-0. An attachment before judgment was ordered on 30th March 1936. The bailiff went on 10th April 1936 to carry out the order by attaching the property of Abdur Rashid at Risalpur. At Risalpur one Karamdin, who is said to be a relation of Abdur Rashid, gave the plaintiffs a cheque for Rs. 4000. The plaintiffs accepted the cheque in full satisfaction of their claim. Karamdin also gave them a covering letter. In this letter he referred to the cheque and stipulated that if the cheque was not honoured he and his property would be responsible for the payment of its value. The bailiff therefore desisted from making the attachment and returned. The cheque was payable at Lahore. It was presented but not cashed because payment was stopped by the drawer.

The plaintiffs then asked the Court in which their suit was pending that Karamdin should be impleaded. Later, however, on 24th June 1936 they presented an application to the Judge intimating that there was a new contract between them and Karamdin, that there was no use impleading him in the old suit against Abdur Rashid, and that they wished to withdraw their suit against Abdur Rashid. It was permitted to be done and the suit was dismissed. The plaintiffs filed a suit against Karamdin on 4th May 1937 for Rs. 4000 principal and Rs. 255 interest. Several objections were raised by Karamdin but they did not prove of any avail. A decree was granted by the Sub-Judge for Rs. 4255 with costs against the defendant. An appeal against that order was presented to the District Court at Peshawar without success. Karamdin has come up on further appeal to this Court: His counsel has raised the objection that the plaintiffs could not bring the suit because they were a firm and had not got themselves registered as such

with the Registrar of firms as required by the Partnership Act. It was admitted by him that the two plaintiffs were not doing any other business together and that they were also not related to each other. Partnership is defined in S.4, Partnership Act as follows :

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the firm name.

Section 2, cl. (b) of the Act relates to the term 'business' and says "business includes every trade, occupation and profession". Section 8 lays down "a person may become a partner with another person in particular adventures or undertakings." The question is whether the fact that these two persons jointly lent money to Abdur Rashid is "business" as contemplated by S. 4 and S. 2, cl. (b) or an adventure or undertaking as laid down in S. 8. It does not require any long discussion to show that the answer should be in the negative. Section 2, cl. (b) read with S. 4 is intended to mean a continued participation of two or more persons in a trade, occupation or profession with the intention of sharing profit accruing from it. An adventure or an undertaking mentioned in S. 8 presumes the exitence of a partnership as defined in S. 4 and therefore *a fortiori* the existence of a business mentioned in S. 2, cl. (b). A solitary transaction of this nature even though entered into by more than one person would not in our judgment make those persons partners in a firm so that their registration should be necessary under S. 69, Partnership Act. We therefore overrule this objection. Counsel next argued that the position of Karamdin was that of a surety under S. 126, Contract Act, and that the plaintiffs having withdrawn their suit against the principal debtor the surety was discharged by the operation of S. 134 of that Act. Section 126 defines a surety as follows :

A contract of guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. The person who gave the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Section 134, Contract Act, lays down that the surety is discharged by any contract between the creditor and the principal debtor, by which the principal is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Now it is obvious that to be a surety a person should promise to pay if the principal debtor commits a default. In this case no such promise was made by Karamdin. Karamdin offered a cheque which is a legal tender and to all intents and purposes he paid off the decree-holder. It is by his subsequent act of stopping the cheque that he forced the plaintiffs to come into Court. We hold that Karamdin was not a surety. Rather we think that he made a new contract—to wit that his banker shall pay the plaintiffs a sum of Rs. 4000. It follows that the plaintiffs had an independent cause of action to bring a suit against him alone and he cannot take advantage of S. 134, Contract Act. Counsel then adverted to the question of consideration. He said that there was no consideration for Karamdin to pay the amount and he is therefore not liable for it. We are very clear that the consideration consisted in the plaintiffs' not insisting on the attachment of the property of Abdur Rashid. If Karamdin had not offered the cheque the property would have been attached. Counsel made a feeble attempt to show that the cheque was handed over to the plaintiffs under undue influence. He did not plead undue influence in the lower Courts and we are not prepared to allow him to raise this point at this stage, because evidence would have been necessary to prove or disprove the exercise of undue influence if it had been taken up as a line of defence in the trial Court. Counsel also denied the original liability of Abdur Rashid and wanted to argue that Abdur Rashid did not owe any money to the plaintiffs. We cannot agree with him on this point also. His client gave a cheque for Rs. 4000 to the plaintiffs and this conduct of his estops him from now saying that the amount was not due from Abdur Rashid. The points raised by counsel have been disposed of. They have all gone against him. We find ourselves in perfect agreement with the concurrent findings of the two Courts below that Karamdin is liable for the amount for which he passed a cheque to the plaintiffs on 10th April 1936 which was not honoured. The plaintiffs have also been rightly awarded interest on this amount. We dismiss the appeal with costs. Pleader's fee Rs. 150.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Peshawar 8

ALMOND J. C.

Diwan Panna Lal and another —
Appellants

v.

Raizada Dewan Narindar Nath —
Respondent.

Civil Appeals Nos. 72/24 and 75 of 1940, Decided on 1st June 1940, against order of Senior Sub-Judge, Kohat, D/- 12th March 1940.

(a) N.-W. F. P. Agriculturists Debtors' Relief Act (4 of 1939), S. 9—Order declining to interfere on application under S. 9 is not appealable.

An order declining to interfere on an application made under S. 9 is not a decision under S. 47, Civil P. C. Hence no appeal lies from such order. [P 8 C 2]

(b) N.-W. F. P. Courts Regulation, S. 34 — Questions whether petitioners were agriculturists within meaning of N.-W. F. P. Agriculturists Debtors' Relief Act and whether they had made such payments as to entitle them to relief under that Act are questions of fact.

Questions whether the petitioners were agriculturists within the meaning of N.-W. F. P. Agriculturists Debtors' Relief Act 4 of 1939 and whether they had made such payments as to entitle them to relief under the Act are purely questions of fact which are precluded from consideration by the Judicial Commissioner's Court under the provisions of S. 34, N.-W. F. P. Courts Regulation. [P 8 C 2]

Gul Mohd — for Appellants.

L. Charanjit Lal — for Respondent.

Judgment.—This order will cover appeals Nos. 72 and 75 of 1940. The former is presented by D. Pannalal and D. Basharam two brothers against an order of the senior subordinate Judge, Kohat, declining to interfere on an application made by them under S. 9, N.-W. F. P. Agriculturists Debtors' Relief Act, 4 of 1939. The decree-holder in that case is Raizada Diwan Narindar Nath. The second is presented by D. Pannalal alone against a similar order of the same Court refusing to interfere in a decree held by R. B. Makhansingh. The trial Court held in both cases that D. Pannalal was an agriculturist within the meaning of the Act but that in the first case the decree-holder had not been allowed any interest and in the second case Pannalal had not paid more than double the amount of the original debt and was therefore not entitled to any relief. He held that D. Basharam was not an agriculturist within the meaning of the Act.

The first question which arises in these two cases is whether any appeal lies against the order of the senior subordinate Judge. It is contended by learned counsel for the appellants that the decision of the original Court is one under S. 47, Civil P. C., and is therefore appealable as a decree. It may be noted that in the Act itself no provision has been made either for appeals or revisions against orders passed under that section: nor does the Act say in so many words that the finding of the Court which passed the decree is to be final. In my opinion these decisions cannot be regarded as decisions under S. 47, Civil P. C. In the first place the section itself states that relief is to be given under the section notwithstanding anything contained in the Civil Procedure Code. Furthermore it is clear that circumstances would arise in which a decision would have to be given under S. 9 which could not possibly be considered to be a decision under S. 47 of the Code. Under S. 9 of the Act it is the Court which passed the decree which has to entertain the application; under S. 47 of the Code it is the Court which is executing the decree which has to make the decision. It is obvious that these two Courts are not always the same. Under S. 39, Civil P. C., the Court which passed a decree can send the decree for execution to a Court outside its territorial jurisdiction or to a competent Court of jurisdiction subordinate to it. Take the instance of a decree which has been transferred by the Court which passed it to a Court of competent jurisdiction subordinate to it. If an application were made under S. 47, Civil P. C., it would have to be decided by the subordinate Court. If however an application under S. 9 of Act 4 had to be decided it would have to be decided by the Court which passed the decree. It is clear therefore in my opinion that the decision in these two appeals are not decisions under S. 47, Civil P. C., and therefore no appeal lies. There is some doubt as to whether an application for revision would lie, but I take it for the purposes of these two appeals that such an application would lie. There are no grounds for interfering on the revision side. The only two questions before the Court below were: whether the petitioners were agriculturists within the meaning of Act 4 of 1939 and whether they had made such payments as to entitle them to relief under the Act. Those questions are purely questions of fact which are precluded from consideration by this Court under the provisions of S. 34, N.-W. F. P. Courts Regulation. I see therefore no reason for treating these appeals as revisions. I dismiss the appeals with costs on the ground that no appeals lie. Pleader's fee Rs. 30.

D.S./R.K. *Appeals dismissed.*

A. I. R. 1941 Peshawar 9

ALMOND J. C.

Dost Muhammad Qutab Din —
Petitioner

v.

Municipal Committee, Haripur Hazara
— Respondent.

Criminal Revn. No. 250 of 1940, Decided on 18th September 1940, against order of Addl. Sess. Judge, Peshawar at Camp Abbottabad, D/- 25th May 1940.

(a) Punjab Municipal Act (3 of 1911), S. 228 — Municipal Committee giving sanction for prosecution without mentioning any section but after reciting facts constituting offence under S. 172— S. 228 held sufficiently complied with.

The sanction of the Municipal Committee for a prosecution was given in general terms without mentioning any section but after reciting the facts which the Committee considered to constitute an offence and which were found to constitute an offence under S. 172. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts :

Held that in the circumstances the Committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them and therefore the provisions of S. 228 were sufficiently complied with : A I R 1931 Lah 98, *Disting.* [P 9 C 2]

(b) Criminal P. C. (1898), Ss. 242, 537—Object of S. 242 stated—Facts on which case under S. 172, Punjab Municipal Act, was based fully set out by prosecution and accused specifically asked to explain case — Non-compliance with S. 242 held mere irregularity curable by S. 537, Criminal P. C.

The primary object of the proceeding prescribed by S. 242, Criminal P. C., is to determine whether the accused pleads guilty to the charge or demands to be tried. [P 10 C 1]

Where the facts on which the case under S. 172, Punjab Municipal Act, was based were fully set out by the prosecution and the accused was specifically asked to explain the case :

Held that in the circumstances failure to comply with the provisions of S. 242, Criminal P. C., amounted merely to an irregularity which was cured under S. 537: A I R 1932 Nag 127, *Rel. on* ; A I R 1927 Cal 196, *Not approved* ; 25 Mad 61 (P C) and A I R 1927 P C 44, *Ref.* [P 10 C 2]

Sh. Abdulla — for Petitioner.

L. Asa Nand — for Respondent.

Advocate-General — for the Crown.

Order.—The petitioner in this case, Dost Muhammad had been convicted of an offence under S. 172, Municipal Act, for building a verandah in front of his shop which encroaches on a public street. He petitioned for revision of his conviction to the Sessions Judge who dismissed his application and he now petitions this Court for revision of his conviction and sentence. It has been suggested by learned counsel for the petitioner that the verandah in question has been built on the petitioner's own land, but there can in my opinion be no doubt whatsoever that the decision of the trial Court on this point is correct. There was formerly litigation between the Municipal Committee of Haripur and this petitioner respecting the land between his shop and the drain running along the street which was eventually decided by this Court in review application No. 4 of 1926. In that case it was definitely held that the petitioner's property did not extend up to the street drain. It is proved from the evidence of the municipal overseer that the present encroachment has been built up to the drain.

The principal arguments of the learned counsel for the petitioner have been directed to legal points which are two in number. He contends that there was no sanction of the Municipal Committee to the prosecution of the offender under S. 172 of the Act as required by S. 228, and that the Municipal Committee by its resolution really intended to prosecute the petitioner for refusal to comply with a notice issued to him to demolish the building within a period of two days. In connexion with this part of his arguments learned counsel has referred to some cases but only one of them appears to me to have any bearing on the question and that is a case reported in A I R 1931 LAH 98.[1] The facts of that case are however distinguishable from the facts of the present case. In that case sanction for a prosecution specifically under S. 172 had been given and the accused was convicted of an offence under S. 219 of the Act. In the present case the sanction was given in general terms without mentioning any section but after reciting the facts which the Committee considered to constitute an offence. These facts were that the petitioner had built on municipal land without permission, that he had been served with a notice to demolish the building within two days and had not complied with it. The complaint prayed that the accused be punished for these acts. It appears to me in these circumstances that the Committee sanctioned the prosecution for such offence as might be found proved on the facts stated by them. I am therefore of opinion that there is no defect of non-compliance with the provisions of S. 228 of the Act. It has also been suggested in connexion with this part of the arguments that the conviction

1. ('31) 18 A I R 1931 Lah 98 : 31 P L R 967, Gobind Ram v. Emperor.

under S. 172 could not be maintained as only two days' notice to demolish the building was given whereas under S. 195 of the Act 30 days' notice was required. It is apparent however as pointed out by the trial Court that no notice to demolish is required at all where a building has been erected on a public street and a prosecution can be instituted forthwith without giving any notice to demolish at all.

The second legal point which is taken is that the provisions of S. 242, Criminal P. C., were not complied with. It is admitted that there was no compliance with this section of the Criminal Procedure Code. In a case reported in A I R 1927 Cal 196[2] which was decided by a Bench of the Calcutta High Court it was held that failure to comply with the provisions of that section vitiated the trial on the principles laid down in the Privy Council ruling reported in 25 Mad 61.[3] In a later case before the Judicial Commissioner's Court of Nagpur reported in A I R 1932 Nag 127[4] a contrary view was taken by the Judicial Commissioner who considered both, the Privy Council ruling reported in 25 Mad 61[3] and the Calcutta case[2] as well as subsequent pronouncement of the Privy Council reported in A I R 1927 P C 44.[5] In the case reported in 25 Mad 61[3] it was held that the trial of an accused person on a multiplicity of charges expressly prohibited by the Code of Criminal Procedure vitiated the trial. In the later Privy Council case, it was held that failure to read over the depositions of witnesses under S. 360, Criminal P. C., was merely an irregularity. In my opinion the view which was taken by the Judicial Commissioner of Nagpur is the correct one. The primary object of the proceeding prescribed by S. 242, Criminal P. C., is to determine whether the accused pleads guilty to the charge or demands to be tried. In the present case, the facts on which the complaint was made were clearly stated in the written complaint. Detailed evidence of the facts alleged by the complainants was given by the prosecution witnesses. The accused himself after the close of the case for the prosecution was specifically asked whether he had encroached upon Government land and constructed a verandah without permission. He was further questioned as to whether he had failed to comply with the notice given to him. When all the evidence had been completed, it appears that the Court began to see the difficulty in recording a conviction under S. 219 of the Act in view of the fact that no legal notice had been given to the petitioner, and he called upon the counsel for the complainants to justify the issuing of a notice for demolition within a period of less than 30 days and it was clearly because the complainants' counsel was unable to justify the legality of the notice that there was no conviction under S. 219. The facts on which the case under S. 172 was based however were fully set out by the prosecution and the accused was specifically asked to explain that part of the case. I am of opinion that in these circumstances failure to comply with the provisions of S. 242, Criminal P. C., amounts merely to an irregularity which can be cured under S. 537, Criminal P. C., and that there has as a matter of fact been no miscarriage of justice from this irregularity. For these reasons I am of opinion that there is no case made out for interference and accordingly dismiss this application.

G.N./R.K. *Application dismissed.*

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2. ('27) 14 AIR 1927 Cal 196 : 99 I C 411 : 28 Cr L J 155 : 54 Cal 359 : 44 C L J 575 : 31 C W N 167, Gopal Krishna Saha v. Matilal Singh.

3. ('02) 25 Mad 61 : 28 I A 257 : 11 M L J 233 : 8 Sar 160 (PC), Subrahmaniya Iyer v. Emperor.

4. ('32) 19 AIR 1932 Nag 127 : 140 I C 113 : 28 N L R 163 : 33 Cr L J 938, Lahani v. Khushal.

5. ('27) 14 AIR 1927 P C 44 : 100 I C 227 : 28 Cr L J 259 : 54 I A 96 : 5 Rang 53 (PC), Abdul Rahman v. Emperor.

* A. I. R. 1941 Peshawar 10

ALMOND J. C. AND MIR AHMAD J.

Gurmukh Dass L. Duni Chand — *Decree-holder* — Petitioner

v.

Mohamad Khan Namdar Khan — *Judgment-debtor* — Respondent.

Civil Revn. No. 261 of 1938, Decided on 24th September 1940, against order and decree of Addl. Judge, Peshawar Division, Peshawar, D/- 6th May 1938.

* *Limitation Act (1908), Arts. 180 and 182 — Application for possession by decree-holder auction-purchaser is governed by Art. 180 and not by Art. 182.*

An application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, Sch. 1, Limitation Act and not by Art. 182. There is nothing to indicate that the Legislature intended Art. 180 to apply only to those auction-purchasers who were strangers : AIR 1935 Mad 803 (FB), *Foll.*; A I R 1934 P C 134, *Rel. on.* [P 12 C 1]

L. Wazir Chand — for Petitioner.

L. Madan Lal — for Respondent.

Mir Ahmad J. — On 16th February 1934, the petitioner obtained a decree for Rs. 500 against the respondent and also against a house belonging to the respondent. The

decree was not framed according to O. 34, Civil P. C. In execution of this decree, the house was auctioned and purchased by the decree-holder himself. The sale was confirmed on 2nd July 1934 and sale certificate was issued. On 18th December 1934, the decree-holder auction-purchaser applied for possession of the house bought by him. After some proceedings the application was filed on 27th June 1935. The final order is as follows :

> The decree-holder is absent. The judgment-debtor is also for the present absconding. The papers be filed.

On 14th January 1938, the decree-holder auction-purchaser presented the application which is now before us. He asked for possession of the house to be delivered to him and referred to the previous petition which was filed on 27th June 1935. Objection was taken by the judgment-debtor that this second petition of the decree-holder auction-purchaser was barred under Art. 180, Limitation Act. The trial Judge rejected the plea and held that Art. 182, Limitation Act, applied. An appeal was preferred to the District Court at Peshawar. The Additional Judge accepted the plea of the judgment-debtor. He followed A I R 1935 Mad 803.[1] The appeal therefore prevailed and the application for delivery of possession was rejected. The decree-holder auction-purchaser has come up on revision to this Court. The matter was referred by a Judge of this Court to the Bench because an interesting question of law was involved. The question to decide is whether Art. 180 of Sch. 1, Limitation Act, applies to the application dated 14th January 1938 or Art. 182. Article 180 runs thus :

180. By a purchaser of immovable property at a sale in execution of a decree for delivery of possession.	Three years.	When the sale becomes absolute.

The relevant portion of Art. 182 is as follows :

For the execution of a decree or order of any civil Court not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908.	Three years ; or where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or . . . 5. (Where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order, or . . .

The learned counsel for the petitioner has argued that a decree-holder is a party to the execution proceedings and when he becomes an auction-purchaser he continues to be such a party and consequently his application for taking possession should be treated as an application for execution under Art. 182, Limitation Act. He asked that in the circumstances the previous application given by his client on 18th December 1934 should be considered as a step-in-aid under Art. 182. He pointed out that if the date on which that application was disposed of *i. e.* 27th June 1935 is taken as the starting point for fresh limitation, then the present application was within time.

The learned counsel for the respondent on the other hand argued that Art. 180, Limitation Act, was a specific article governing applications for delivery of possession presented by auction-purchasers. He contended that the execution was completed and fully satisfied when the sale certificate was issued and the decree-holder paid up, and consequently there were no execution proceedings in force to be governed by Art. 182. He therefore concluded that Art. 182 did not apply and Art. 180 applied which gives three years to the auction-purchaser from the date when the sale was made absolute and does not allow any fresh starting point of limitation in the shape of a step-in-aid. He maintained that the order of the lower appellate Judge was correct on this view of the case.

The only authority directly bearing on the point is that of the Full Bench of the Madras High Court which is reported in A I R 1935 Mad 803.[1] It is in favour of the respondent. There is also a remark in the judgment of their Lordships of the Privy Council in A I R 1934 P C 134[2] which supports the view of the respondent. We would for convenience sake reproduce the relevant passages for reference. Their Lordships of the Madras High Court observed as follows :

> As Art. 180 applies to an application for possession by a decree-holder purchaser, the residuary Art. 181 does not apply. Nor can the application for delivery be regarded as an application for execution. So Art. 182 cannot apply; Art. 180 being the more specified article must therefore apply.

1. ('35) 22 A I R 1935 Mad 803 : 159 I C 279 : 58 Mad 893 : 69 M L J 821 (FB), Abdul Aziz Sahib v. Chokkan Chettiar.
2. ('34) 21 AIR 1934 P C 134 : 150 I C 11 : 61 I A 248 : 61 Cal 945 (P C), Chandramani Saha v. Anarjan Bibi.

The question involved in the case before their Lordships of the Privy Council was as to the terminus a quo for applications to which Art. 180 applies. The words used in the article are "when the sale becomes absolute." It was urged on one side that the sale became absolute when it was confirmed. On the other side, it was contended that it became absolute when all proceedings including appeals and revisions relating to the sale had been concluded. Their Lordships held that the sale became absolute on the date when the appeal against the order refusing to set aside the sale was disposed of. Their Lordships when discussing the case remarked as follows :

There is no doubt that Art. 180, Limitation Act, 1908, is applicable to the matter now under consideration. It provides that a purchaser of immovable property at a sale in execution of a decree for delivery of possession, must take the application within three years from the time when the sale becomes absolute.

We are of the opinion that the view taken by their Lordships of the Madras High Court is correct and an application for possession by an auction-purchaser, whether he is a decree-holder or a stranger, is governed by Art. 180, sch. 1, Limitation Act. There is nothing to indicate that the Legislature intended this article to apply to those auction-purchasers who were strangers and we do not see any justification for reading into the article any such exception as that suggested by the petitioner's counsel. We may note that there was no such provision in the previous Limitation Act and Art. 180 was specially introduced in the Limitation Act of 1908. The Legislature was, therefore, devising a special limitation, and distinction between a decree-holder auction-purchaser and a stranger auction-purchaser, if intended would have been clearly brought out when enacting the article. Moreover, the remark of their Lordships of the Privy Council also means that their Lordships were of the view that Art. 180 applies to an application by a decree-holder auction-purchaser for possession. In the case before their Lordships the auction-purchaser was a decree-holder as is indicated by the following sentence :

The question for determination is whether the appellants who purchased with the leave of the Court at two auction sales certain mortgaged property in execution of two mortgage decrees in their favour are entitled to delivery of possession of the said property.

It was argued by the learned counsel for the petitioner in the alternative that the second application should be considered a continuation of the first application, because nothing definite was done in connexion with the first application. In support of this proposition he referred us to a passage in the head note of A I R 1935 Mad 803[1] which reads as follows :

An application for possession of property was made by the purchaser within three years of the confirmation of sale. An order on this application was made by the Court, which order was not on merits of the case and did not amount to a refusal of any of the reliefs claimed by the applicant hence not compelling him to prefer an appeal against the order. Another application was then presented by the applicant within a year of the last application requesting for possession of the property purchased:

Held, that the latter application was the continuation of the previous one and therefore was within time.

To understand this head note, which lays down more or less an abstract proposition, we would reproduce the portion of the judgment which deals with the facts relating to this aspect of the case :

Within three years of the High Court's order i. e., 1st September 1930 the decree-holder by M. P. No. 561 of 1930 applied for delivery of possession of the properties purchased. The properties purchased comprised a house and certain lands. The house was item 2 of the application. When the Amin proceeded to deliver possession of the house, one Abdul Ghaffar Sahib claiming that his wife Amina Bi has a share in the house bolted the outer door from inside and locked the same and prevented the Amin and the auction-purchaser from going inside. Afraid of a disturbance the Amin returned and sent his report on 11th September 1930. Nothing is stated by the Amin as to the delivery of possession of the lands. When the matter came up before the District Munsif, he passed the following order 'possession was not given on account of obstruction. Petition dismissed. This is dated 26th September 1930 i. e , four days before the end of the quarter.

It is our duty to point out that this order is a very improper order. In the first place nothing was done by the Amin as to the other item, viz., the lands. Even as to the house, the obstruction was by a person claiming a share in it. It is true that the house is probably not divided by metes and bounds and it is difficult to deliver physical possession of the remaining share as to which there was no obstruction. But in such a case the Court ought to deliver such possession as the intangible interest may be capable of. Instead of doing this the District Munsif simply says that the petition is dismissed. One thing is noticeable that throughout, i. e., at the time of the attempted delivery and at the time of the order there was no obstruction or opposition on the part of the judgment-debtors. When there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, there is no reason why the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtors should not be delivered. And it is also clear that the District Munsif never meant to refuse such a relief. The order is passed in a mechanical way without adverting to the details of the matter before him, the desire obviously being to close the petition and to show that it was not pending at the end of the quarter. It has again and again been held that such a disposal is not a

judicial disposal on the merits. It cannot be regarded that any relief claimed by the petitioner was refused to him so as to compel him to appeal to an appellate Court.

We do not think that in this case any such question arises. The decree-holder absented himself and the Court had to dismiss his petition. He had therefore to thank himself for the consequences. Consequently, we hold that this argument does not apply to the present case. In the result, we agree with the lower appellate Court that the application is not competent and we dismiss the petition for revision with costs. Pleader's fee Rs. 16.

D.S./R.K. *Petition dismissed.*

A. I. R. 1941 Peshawar 13

ALMOND J. C. AND MIR AHMAD J.

Mt. Madara widow of Pir Said Shah — Appellant

v.

Secretary of State — Respondent.

Civil Appeal No. 87/29 of 1939, Decided on 7th November 1940, from the order of Addl. Dist. and Sess. Judge, Peshawar at Kohat, D/- 17th January 1939.

Land Acquisition Act (1894), S. 23 — Market value of acquired land is to be determined from average rental of that land and similar lands in vicinity.

It is wrong to say that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The market value of the acquired land is to be ascertained "from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity: 34 Cal 599, *Foll.*

[P 13 C 2]

Abdul Rab Nishtar and S. Ajit Singh — for Appellant.

Abdul Latif Khan — for the Crown.

Mir Ahmad J. — Some land has been acquired for the construction of quarters for Indian Commissioned Officers in the Kohat Cantonment. The land belongs to Mt. Madara and is within the barbed wire. It is situated close to the District Courts. The Collector awarded Mt. Madara Rs. 3575 as the price of the land. Rs. 170-4-0 were given to her for trees and Rs. 82-8-0 for standing crops by compromise. She was also given 15 per cent. compensation for forcible acquisition. The total came to Rs. 4389-8-0. Mt. Madara asked for a reference to Court and the case was consequently put up to the District Court at Peshawar and was tried by the Additional District Judge. The land in dispute consists of 13 kanals, 19 marlas chashmi dofasli and 14 marlas chashmi yakfasli. The Collector adopted the rate which was paid in 1926 for obtaining the land for European cemetery in the neighbourhood of the land in dispute. It is situated at 100 paces from it. The land was purchased at Rs. 250 per kanal. The Collector fixed this rate so far as the chashmi dofasli land was concerned. The price of chashmi yakfasli land was assessed at half of this rate, i. e., Rs. 125 per kanal. The Additional District Judge after going into detail of the leases and sales put forward by the objector came to the conclusion that the rate accepted by the Collector for chashmi dofasli land was correct. He, however, found that chashmi yakfasli land should also be paid for at the same rate. The Judge therefore added Rs. 100-8-0 to the price awarded by the Collector and assessed the total price at Rs. 4490 which includes the price of trees, 15 per cent. compensation, etc.

Mt. Madara has come up to this Court and has asked for an increase of Rs. 4000 in the price of the land. Some sales and leases were referred to but we do not propose to discuss them, because they have no bearing on the case. The only transaction which is relevant is a lease by the Cantonment authorities in favour of one Nadir Ali Shah of 7 kls. 12, marlas of land. The lease was executed in 1930 for Rs. 265 a year and the lease money was raised to Rs. 270 in 1935. It was not denied before us that this land adjoined the land in dispute. This lease was considered by the learned Additional District Judge. He however rejected it on the ground that the lease money of the land in dispute could only be taken for calculating its value and not the lease money of the lands in the neighbourhood. No other criticism was offered by the learned Additional District Judge to this piece of evidence. Their Lordships of the Calcutta High Court have held in 34 Cal 599[1] that the market value of the acquired land is to be ascertained

> from recent instances of sale in the same or in the adjoining locality and from the average rental of these and similar lands in the vicinity.

We agree with the view of the Calcutta High Court and think that the learned trial Judge was wrong in holding that only the lease money of the land in dispute could be considered for arriving at its value and not the lease money accruing from the lands in the vicinity. The learned counsel for the respondent has not been able to impeach the genuineness of the transaction of lease executed by the Cantonment Board in favour of Nadir Ali Shah. We think that

1. ('07) 34 Cal 599, Fink v. Secretary of State.

his is a correct precedent for us to follow. The learned counsel for the respondent has argued that the lady, who is the owner of the plot in dispute, has not been able to get as much money out of it as the Cantonment Board have been receiving for the land given to Nadir Ali Shah. In support of this argument he has relied on the statement of the sadar qanungo, who has valued the annual income of the land in dispute at a much lower figure than that obtained by the Cantonment Board from Nadir Ali Shah. He has used this argument to prove that the land in dispute is inferior to that given to Nadir Ali Shah.

We do not agree with him in this contention. The plaintiff is a widow and a pardahnashin lady. She has perforce to engage a tenant. This disability is bound to reduce the return which she gets from the land as compared to the income derived by the Cantonment authorities for their piece of land. Capitalising the lease money by taking 20 years income, which is usually done the price of the land leased to Nadir Ali Shah comes to Rs. 5400, that is to say about Rs. 710 per kanal. At this rate the price of the land in dispute is higher than the sum claimed by the appellant. We therefore accept the appeal and enhance the price of the land in dispute from Rs. 4490 to 8490. The appellant shall in addition get 15 per cent. compensation of Rs. 4000 which will make the total Rs. 9090. She shall also get her costs on Rs. 4000 in this Court as well as in the Court below. Pleader's fee Rs. 150.

D.S./R.K. *Appeal allowed.*

A. I. R. 1941 Peshawar 14

ALMOND J. C.

Sardar Mohd. Ali Jan S. Azimullah Jan — Appellant

v.

Mirza Abdul Hakim Mirza Ghulam Mohiuddin Khan and another — Respondents.

Civil Appeal No. 140/44 of 1940, Decided on 15th October 1940, against order of Addl. Dist. Judge, D/- 4th June 1940.

Pre-emption — Jurisdiction — Appeal — Decree for pre-emption on payment of price plus compensation — Forum must be determined on basis of price.

The value of a pre-emption suit which is decreed on payment of price and compensation for improvements, does not include the amount of compensation for improvements for purposes of appeal. The appellate forum must be determined on the basis of price made payable : AIR 1923 Lah 107, *Foll.* ; AIR 1928 Lah 670 ; AIR 1926 Lah 376 and A I R 1938 Lah 311, *Disting.* [P 15 C 2]

Sh. Allah Bakhsh — for Appellant.

Sh. Mohd. Shafi — for Respondent (Vendee).

Judgment. — Sardar Mohd. Ali Jan brought a suit for pre-emption of a house situated in Peshawar City on payment of Rs. 2800. The learned senior subordinate Judge who heard the suit dismissed it on the ground that the plaintiff was a minor and had sued without a next friend. He, however, came to the decision on all the issues amongst which are the following :

No. 4. Was the price Rs. 3000 fixed or paid in good faith ?

He found that it had been so paid.

No. 5. If, not what is the market value ?

He found the market value to be Rs. 3000.

No. 7. Was the defendant entitled to make any improvements and is he, therefore, entitled to compensation ? If so what ?

He found that the defendant was entitled to receive compensation of Rs. 3100 on account of improvements.

The plaintiff appealed to the District Judge who returned the appeal for presentation in this Court on the ground that the value of the suit for purposes of jurisdiction was Rs. 6100 i. e., Rs. 3000 market price of the house and Rs. 3100 on account of improvements. Against that order the plaintiff has appealed to this Court. He has also put in a subsidiary application praying that if the appeal is decided against him, the original appeal be heard in this Court and he be given an extension of time to bring it within the period of limitation.

Under the provisions of S. 30, N.-W. F. P. Courts Regulation, the appeal lies to the Court of the District Judge in a suit of value not exceeding Rs. 5000. The question of the valuation of suits for possession of houses is not covered by the Suits Valuation Act nor by any rules which have been made. In the tabular statement which is given in the "instructions on the subject of Suits Valuation Act, 7 of 1887 and the rules made thereunder for determining the value of certain classes of suits for purposes of court-fees and jurisdiction" issued by the Chief Court, Punjab and published as an appendix to the Court-fees and Suits Valuation Act of Sabharwal, and Anand, it is stated that the valuation for purposes of jurisdiction in such cases is "the market value presumably but this must be left to judicial decision" and it is on the basis of judicial decisions of the Lahore High Court that the learned additional Judge came to the conclusion that the suit was of the value of Rs. 6100. The cases to which he

referred were A I R 1928 Lah 670,[1] A I R 1926 Lah 376[2] and A I R 1938 Lah 311.[3] Those cases, learned counsel for the appellant before me seeks to distinguish from the present case, and he in his turn relies upon A I R 1923 Lah 107[4] which cites with approval two earlier cases, 38 P L R 1902[5] and 96 P L R 1912.[6] Of the cases which were relied upon by the learned Additional Judge A I R 1928 Lah 670[1] did not contain any question of compensation for improvements. The plaintiff in that case had sued to pre-empt certain property for Rs. 2000 although 7000 had been stated in the sale deed. It was decreed by the original Court on payment of Rs. 7000. An appeal was preferred to the District Judge who held that the market price was Rs. 2000 and he therefore entertained the appeal. It was held by the High Court that the value for purposes of jurisdiction was that which was found by the trial Court and not that which the plaintiff had stated in his plaint. It also referred to A I R 1923 Lah 107.[4] A I R 1926 Lah 376[2] was a Full Bench ruling but it related to a suit for redemption and in this connexion learned counsel points out that the amount which is to be paid on a redemption of mortgage is not based on any equitable considerations, as is the amount to be paid as compensation for improvements in a pre-emption suit. A I R 1938 Lah 311[3] also did not raise any question of compensation for improvements. It may further be noted at this stage that when the learned Additional Judge was dealing with the case reported in A I R 1928 Lah 670[1] he quoted a passage which was itself quoted from the 1926 case[2] in which the words "pre-emption of a mortgage" occur. It is however obvious that the word "pre-emption" is a misprint for the word "redemption" and this may have influenced the learned Additional Judge in coming to his conclusion.

The case relied upon by learned counsel for the appellant namely A I R 1923 Lah 107[4] is a direct authority on the problem now before me. In that case the plaintiff had sought pre-emption on payment of Rs. 60 and he was granted a decree on payment of Rs. 60 as the pre-emption price and on payment of Rs. 71 as compensation for improvements. The appeal was heard by a senior subordinate Judge who would not have jurisdiction to hear it had the value of the suit been Rs. 131 but who had jurisdiction to hear it if the value of the suit was Rs. 60. It was held by the learned Judges who decided the question in the High Court that the value of the suit for purposes of jurisdiction should not include any amount awarded as compensation for improvements. It was pointed out that the claim of the plaintiff was not to take over the improvements but to be substituted for the vendee as owner of the property as it was when it was sold to the vendee, that the grant of compensation for improvements was discretionary, that the vendee might be allowed to remove his improvements or even be made to forego any compensation for them. I accept the reasoning given in this judgment and hold that this appeal lay to the District Court and not to this Court. The appeal is therefore accepted and the memorandum of appeal will be returned to the District Judge for disposal on its merits. The subsidiary application no longer arises and is accordingly dismissed. There will be no order for costs on that application and the costs of the main appeal in this Court will be costs in the District Judge's Court. Pleader's fees Rs. 32.

G.N./R.K. *Appeal accepted.*

1. ('28) 15 AIR 1928 Lah 670 : 111 I C 129, Ilahi Jan v. Rahmat Ullah.
2. ('26) 13 AIR 1926 Lah 376 : 96 I C 890 : 7 Lah 570 : 27 P L R 605 (F B), Jaswant Ram v. Moti Ram.
3. ('38) 25 AIR 1938 Lah 311 : 177 I C 686 : 40 P L R 88, Sis Ram v. Sohan Lal.
4. ('23) 10 AIR 1923 Lah 107 : 68 I C 890 : 3 Lah 386, Chiragh Din v. Seraj Din.
5. ('02) 38 P L R 1902, Dharam Chand v. Girdhari Lal.
6. ('12) 96 P L R 1912 : 13 I C 428 : 68 P W R 1912, Lal Hussain v. Hassa Khan.

A. I. R. 1941 Peshawar 15

ALMOND J. C. AND MIR AHMAD J.

Amir Fahim — Petitioner

v.

Ajun Isa and others — Respondents.

Civil Revn. Petn. No. 20 of 1940, Decided on 29th November 1940, from order of Addl. Judge, Peshawar, D/- 4th November 1939.

N.-W. F. P. Muslim Personal Law (Shariat) Application Act (6 of 1935), S. 2 — Suit by reversioners for declaration that alienation by woman holding life estate is not binding on them is not maintainable after passing of Act.

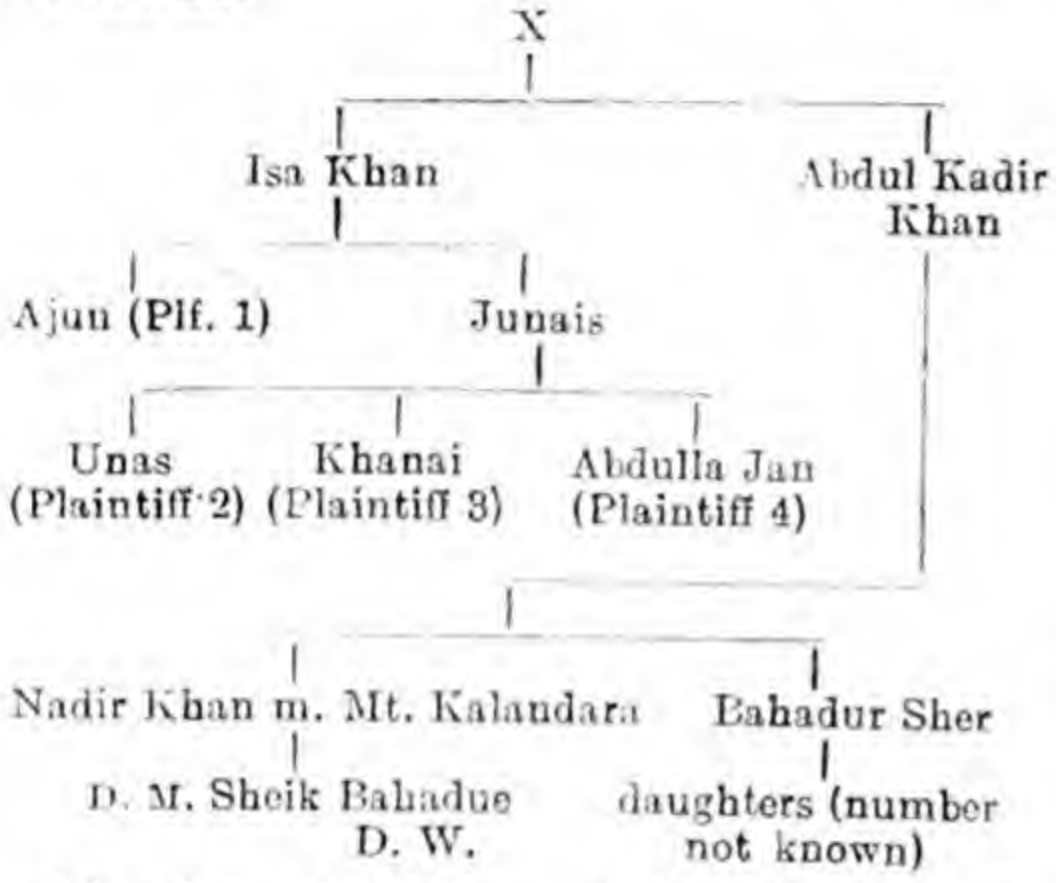
In all suits instituted after the passing of the N.-W.F.P. Muslim Personal Law (Shariat) Application Act the Court must determine the rights of the parties under Mahomedan law and not according to custom. A reversioner is unknown to Mahomedan law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate. His right under custom is based on a spes successionis, which is also unknown to Mahomedan law. Hence, after the passing of the Muslim Personal law (Shariat) Application Act, the reversioners have no locus standi to sue for declaration that alienation made by woman holding life estate is not binding on them : A I R 1940 Pesh 52, *Rel. on.* [P 16 C 1, 2]

Mian Ziauddin — for Petitioner.

L. Basheshar Nath — for Respondents 1 to 4.

Respondent 5 in person.

Almond J. C.—This is an application for revision of the order of the Additional Judge, Peshawar, dismissing the petitioner's appeal against the decree of the Sub-Judge 4th class, Peshawar, dated 23rd December 1937. The pedigree-table below shows all the parties to the suit with the exception of Amir, defendant 2, who is the petitioner before us:



The four plaintiffs sued for a declaration that the sale of the suit land by Mt. Kalandara, defendant 1, to Amir was invalid under custom and would not affect the plaintiff's reversionary rights. They alleged that Mt. Kalandara had only a life estate in the suit land which had been the property of her husband Nadir. Both the Courts below found that the alienation by Mt. Kalandara was not for legal necessity and was therefore invalid under the custom by which the parties were bound. The petition has been argued before us solely on the ground that in view of the enactment of the Muslim Personal Law (Shariat) Application Act, VI of 1935, the question must be decided according to Mahomedan law and not according to custom. In a recent judgment of this Court in Civil Appeal No. 94/24 of 1938[1] it was explicitly laid down by a Bench that in all suits instituted after the passing of that Act the Courts must determine the rights of the parties under Mahomedan law and not according to custom whether the inheritance had opened up either before or after the passing of the Act. A reversioner is unknown to Mahomedan law. It is under custom that a reversioner is entitled to question sales made by a widow or other woman holding a life estate. His right under custom is based on a spes successionis, which is also unknown to Mahomedan law. We are therefore of opinion that the plaintiffs have no locus standi to sue under Mahomedan law for the relief which they now claim. We therefore accept this petition and setting aside the decrees of the Courts below dismiss the plaintiff's suit. As the petitioner has succeeded on a point raised for the first time, we direct that the parties bear their own costs in all the Courts.

D.S./R.K. *Petition allowed.*

1. *Reported in* ('40) 27 AIR 1940 Pesh 52, Fazal Haq Dilzada v. Dawar Shah.

A. I. R. 1941 Peshawar 16

ALMOND J. C. AND MIR AHMAD J.

Haji Habib Gul Jan Gul — Judgment-debtor—Appellant

v.

Gopi Chand Singh Jawahar Mal and others—Decree-holders—Respondents.

Appeal No. 163/58 of 1939, Decided on 15th November 1940, from decision of Senior Sub-Judge, Mardan, D/- 28-9-1939.

N. W. F. P. Agriculturists Debtors Relief Act (4 of 1939), S. 2, proviso (1)—House or shop property mortgaged—Proviso does not contemplate that equity of redemption should not be worth more than Rs. 500.

The proviso does not contemplate that in a case of mortgaged property the equity of redemption should not be worth more than Rs. 500. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500.

[P 17 C 1]

P. C. Kapur — for Appellant.

S. B. Sardar Raja Singh — for Respondents.

Almond J. C.—This is an appeal preferred by Habibgul whose application for relief under S. 9, Agriculturists Debtors Relief Act, 4 of 1939, was dismissed on the ground that he was not an agriculturist in view of proviso 1 to S. 2 of the Act. It is not disputed before us that the petitioner was the owner of a Mandi including shops in the Municipality of Hoti and that a mortgage decree amounting Rs. 19,000 had been passed against the petitioner on the basis of the mortgage of that property. It is contended however by learned counsel for the appellant that the petitioner was not given an opportunity of proving that the value of the equity of redemption was less than Rs. 500 the sum mentioned in the proviso. The proviso reads as follows:

Provided that a person who owns house other than his own residential house or shop property within municipal or cantonment limits of the value of Rs. 500 or more will not be considered an agriculturist.

Learned counsel has contended that the proviso contemplates that in a case of this nature the equity of redemption should not be worth more than Rs. 500. That however is not what the section states. It merely states that relief will be denied to a person who is the owner of shops in municipal limits and that the value of those shops is more than Rs. 500. It is clear that the petitioner is the owner of shops and as they were mortgaged originally for Rs. 10,000 they are certainly worth more than Rs. 500. We find that the decision of the original Court was correct and therefore dismiss this appeal with costs. Pleader's fee Rs. 32.

D.S./R.K. *Appeal dismissed.*

A. I. R. 1941 Peshawar 17

ALMOND J. C. AND MIR AHMAD J.

Mt. Jasodan Devi w/o Bhai Jwala Singh — *Plaintiff* — Appellant

v.

Jai Gopal and others — *Defendants* — Respondents.

Civil Appeal No. 118/46 of 1939, Decided on 15th November 1940, from order and decree of Dist. Judge, Peshawar, D/- 3rd April 1939.

Hindu Law — Maintenance—Widow—Estoppel —Mortgage by son of house left by deceased father —Widow of deceased signing mortgage deed after hearing its contents —She is estopped from claiming right of residence and maintenance as against mortgagee.

Where a house left by a Hindu father is mortgaged by his son and the widow of the deceased has signed the mortgage deed after hearing its contents and as token of consent, the widow has acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance, she is estopped from claiming those rights against the mortgagee : A I R 1922 P C 20, *Expl.;* A I R 1934 Pat 93, *Applied.* [P 18 C 2]

L. Wazir Chand — for Appellant.

Dewan Charanjit Lal — for Respondent 1 (Jai Gopal).

Mir Ahmad J.—Jwala Singh died leaving a widow, Mt. Jasodan Devi, and a son Mela Ram. Mela Ram was married to Mt. Manoran Devi also known as Mt. Ramesro Devi. Jwala Singh left a house. On 8th January 1932, Mela Ram mortgaged this house to Mt. Ram Ditti for Rs. 1000. He then mortgaged the house to one Hari Chand on 5th January 1933, for Rs. 3000. Mela Ram paid off Rs. 1000 due to Mt. Ram Ditti out of this amount. Mela Ram died and so did Hari Chand. Jai Gopal, the grandson of Hari Chand, obtained a decree for sale of the property under O. 34, Civil P. C. Mt. Jasodan Devi brought this suit for a declaration that she had a right of residence and of maintenance in the house. The counsel for Mt. Jasodan Devi has admitted before us that what he meant in the plaint was that this house should be sold subject to his client's rights of residence and maintenance. The defence taken was that the debt was incurred for legal necessity and that the rights of residence and maintenance could not therefore be claimed in the encumbered property. It was also pleaded that Mt. Jasodan Devi was estopped by her conduct from claiming the rights of residence and maintenance because she had witnessed the mortgage deed. The following issues were framed by the trial Judge :

1. Is the plaintiff not entitled to right of residence and maintenance in the house in question? On defendants.
2. Is the plaintiff estopped from bringing this suit by her own conduct? On defendants.
3. Can the suit not lie in its present form, and is not properly stamped? On defendants.
4. To what relief is the plaintiff entitled? On defendants.

Hari Chand, the scribe of the mortgage deed, definitely stated that the two ladies signed the mortgage deed in his presence. They were identified by Mela Ram to be his mother, Mt. Jasodan Devi, and his wife Mt. Manoran Devi. The witness read out the contents of the documents to them. Amir Chand, a marginal witness, deposed that he was the broker who arranged the transaction, that Hari Chand, mortgagee, told Mela Ram to get his mother and wife to sign the mortgage deed and that they did so in his presence. Pandit Rup Chand averred that the mother of Mela Ram did not observe pardah from him and the witness was certain that the two ladies who signed the mortgage deed were Mt. Jasodan Devi and the wife of Mela Ram. Mt. Jasodan Devi appeared in Court and the last sentence she uttered was that she had not signed the document. Counsel for Jai Gopal presented a petition to the trial Judge, after the statement of Mt. Jasodan Devi had been recorded, that the thumb impression of Mt. Jasodan Devi on the mortgage deed should be sent to Phillaur for comparison with her admitted thumb mark. This application was rejected. The trial Judge found that the woman had a right of residence; that the debt was not contracted for legal necessity and that her thumb impression on the mortgage deed did not estop her, because the Privy Council had laid down in the ruling reported in AIR 1922 P C 20[1] that mere attes-

1. ('22) 9 A I R 1922 P C 20 : 65 I C 954 : 49 I A 16 : 49 Cal 334 : 18 N L R 1 (P C), Pandurang Krishnaji v. M. Tukaram.

tation of a document did not amount to estoppel as to the contents of the document. The trial Judge also held that the suit had been properly framed and stamped. The Judge granted a declaratory decree to the plaintiff. The decree was worded as follows:

It is ordered that a decree for declaration to the effect that the plaintiff has the right of residence in the house in suit and therefore it is not liable to attachment and sale in execution of the decree of defendant 1 against defendants 2 and 3 so far as her rights are concerned, be and the same is hereby passed in plaintiff's favour.

An appeal was preferred by Jai Gopal to the District Court. The District Judge remanded the case to the trial Judge for recording his findings as to the right of maintenance. The trial Judge found that the plaintiff was entitled to the right of maintenance also. At the final hearing the District Judge came to the conclusion that Mt. Jasodan Devi could not have her right of maintenance enforced against the property because she had not managed to make it a charge on the house either by decree or by a private agreement. He held that Mt. Jasodan Devi had surrendered her rights in the house at the time when the mortgage was being effected because she had signed the deed. The appellate Judge therefore accepted the appeal and dismissed the plaintiff's suit with costs throughout. Mt. Jasodan Devi has come up on further appeal to this Court. In our opinion the judgment of the lower Court should be maintained on the point of estoppel only. Their Lordships of the Privy Council have, in the ruling reported in AIR 1922 P C 20,[1] laid down the following proposition :

Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication any knowledge of the contents of the document, and it ought not to be put forward alone for the purpose of establishing that a man consented to the transaction which the document effects. It is, of course, possible, as was pointed out by their Lordships in the case of *Banga Chandra Dhur* v. *Jagat Kishore Acharjya*[2] that an attestation may take place in circumstances which would show that the witness did in fact know of the contents of the document but no such knowledge ought to be inferred from the mere fact of the attestation.

It is obvious that their Lordships did not mean to extend the dictum laid down by them as regards the effect of attestation to cases where the person signing the document had become cognisant of the text of the document and had signed it in token of consent. This was the interpretation of their Lordships' judgment made by a single Judge of the Patna High Court, in the ruling reported in AIR 1934 Pat 93.[3] The Judge said:

Where an attesting witness is present at the transaction and attests the deed having heard its contents, he is estopped from challenging the right of the transferee.

We have given above the names of the witnesses who appeared and said that Mt. Jasodan Devi had signed the document after hearing its contents and that the reason for her signing it was that the mortgagee insisted that she should do so in token of consent. We do not see any reason for disbelieving them. Applying the principle laid down above we think Mt. Jasodan Devi had acquiesced in the transaction to the extent of surrendering her rights of residence and maintenance. She is now estopped and cannot claim those rights against the mortgagee. The decree of the lower appellate Court is consequently maintained. The appeal is dismissed with costs.

D.S./R.K. *Appeal dismissed.*

2. ('16) 3 A I R 1916 P C 110 : 36 I C 420 : 44 Cal 186 : 43 I A 249 (P C).

3. ('34) 21 A I R 1934 Pat 93 : 150 I C 765, Bhagwat Rai v. Gorakh Rai.

A. I. R. 1941 Peshawar 18

ALMOND J. C. AND MIR AHMAD J.

Sohan Lal Gulab Rai — Plaintiff — Appellant

v.

Firm Mohd. Din Mohd. Yunis through Mohd. Din and others—Defendants— Respondents.

Civil Appeal No. 172/67 of 1939, Decided on 28th November 1940, from order and decree of Addl. Judge, Peshawar, D/- 18th September 1939.

(a) Provincial Small Cause Courts Act (1887), S. 35 — New Small Cause Court Judge having no pecuniary jurisdiction to execute decree passed by his predecessor — He can transfer it to himself on regular side and deal with it as Sub-Judge — Attachment order in latter capacity is valid.

Where a new Small Cause Court Judge has no pecuniary jurisdiction to execute a decree passed by his predecessor, he can transfer it to himself on the ordinary side and deal with it as a Sub-Judge. Consequently, attachment order by him in his latter capacity would be perfectly valid : AIR 1938 Pesh 70, *Disting.*; A I R 1915 All 219, *Rel. on;* (See also A I R 1941 Lah 109). [P 20 C 1]

(b) Civil P. C. (1908), S. 64, Explanation, and S. 73—Explanation to S. 64 indicates that applications for rateable distribution go hand in hand with execution application — Court ordering execution application to be filed but mentioning in order that attachment should subsist — No such order made on application for rateable distribution which was also filed—Decree-holder for rateable distribution can take advantage of order on execution application.

Section 64, Explanation clearly indicates that applications for rateable distribution go hand in

hand with execution application. Consequently, where the Judge orders an execution petition to be filed but mentions in the order that the attachment shall continue but no separate order for the attachment to subsist is made on the application for rateable distribution which is also ordered to be filed as infructuous, the decree-holder can take advantage of the order regarding subsistence of attachment on the execution application. [P 20 C 2]

Sardar Raja Singh — for Appellant.

Abdul Latif Khan, and Manohar Lal Oberoi — for Respondents 1, 2 and 4, and 3, respectively.

Mir Ahmad J. — On 12th January 1932 Firm Mohd Din Mohd Yunis of Nowshera Cantonment obtained a decree against Chaudhri Abdur Rahim of the same cantonment for Rs. 496-13-0 from the Judge of the Court of Small Causes. It so happened that the Judge who passed the decree was transferred and his successor had powers of trying small cause cases of the value of Rs. 100 only. He, however, exercised the powers of a Sub-Judge on the ordinary side which gave him jurisdiction to execute decrees for Rs. 500. The decree-holders took out execution in 1934 and asked for the attachment of house No. 503 situated in Nowshera Cantonment. The Sub-Judge dealt with the case on the ordinary side. Attachment was ordered which was effected on 16th February 1934. A suit had been instituted about the house by a third party in the meanwhile. The proceedings were therefore filed on 17th February 1934 and the attachment was ordered to subsist. This latter order was obviously made under order 21, Rule 57, Civil P. C., as amended by this Court.

In 1935 the executive officer, Nowshera Cantonment, took out the execution of a decree which had been passed in his favour against Chaudhri Abdur Rahim and asked for the sale of house No. 503. Mohd. Din Mohd. Yunis applied to the executing Court for rateable distribution. The house was not sold, however, because the application of the executive officer was filed on 28th July 1936. He stated that he did not wish to proceed with it further. It was mentioned in the order that the attachment shall continue. The application of Mohd. Din Mohd. Yunis was also filed infructuous on the same day at their own request. No separate order for the attachment to subsist was made on this application. In 1937 another application was presented by Mohd. Din Mohd. Yunis for the execution of their decree. It was requested that house No. 503 should be sold. On 22nd June 1937 the Court ordered that notice of sale should be issued. The Judge took it for granted that the old attachment subsisted. On 23rd June 1937 Chaudhri Abdur Rahim executed a mortgage deed in favour of one Sohan Lal. He mortgaged house No. 503 to him for Rs. 2000 and agreed to pay Rs. 17-8-0 per month as rent. The consideration for the mortgage consisted of old debts. On 25th August 1937, one Abdul Qayum purchased house No. 503 for Rs. 1505 in the auction ordered by Court. On 31st December 1937 Ch. Abdur Rahim executed another tacking mortgage in favour of Sohan Lal for Rs. 99 and agreed to pay Re. 1-8-9 per month more to him. On 5th January 1938 Sohan Lal objected to the sale. His objection was dismissed.

Sohan Lal brought the present suit for a declaration that the sale was subject to his mortgagee rights. He failed in the Court of the trial Judge and also in the Court of first appeal. He has come up on further appeal to this Court. The learned counsel for the appellant argued that the original decree being that of a Court of Small Causes the Judge who took up execution on the ordinary side had no jurisdiction to proceed with it. He therefore urged that the order of the Judge dated 17th February 1934 to the effect that the attachment shall continue was ultra vires. We do not find ourselves in agreement with this proposition of law. Section 35, Small Cause Courts Act, runs thus:

35 (1). Where a Court of Small Causes, or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court, which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit.

(2) Nothing in this section applies to cases for which special provision is made in the Civil Procedure Code, as extended to Courts of Small Causes, or in any other enactment for the time being in force.

It is admitted that at the time when the application for execution was presented in 1934 there was no Judge of the Court of Small Causes available having power to execute a decree of the Court of Small Causes of the value of Rs. 500. It may therefore safely be presumed that the Judge meant to act under S. 35, Small Cause Courts Act, when he took over the case on the ordinary side. Learned counsel for the appellant has referred to a ruling reported in A I R 1938 Pesh 70.[1] In that ruling a Bench of this Court has laid down that a Judge of the

1. ('38) 25 A I R 1938 Pesh 70: 178 I C 127, Sital Ram Kali Charan v. Thakur Das.

Court of Small Causes cannot attach immovable property in execution of a decree passed by him and for the purpose of avoiding this result the Judge cannot transfer the decree to the ordinary side and then proceed to do so. Learned counsel argued that the act of the Sub-Judge in executing the Small Cause Court decree as a Sub-Judge amounted to a transfer of the execution from the small cause side to the ordinary side. The facts of the case dealt with by the ruling referred to above were different from those which are before us in this appeal. There the Judge had power as a Judge of the Court of Small Causes to execute the decree. He found that he could not attach immovable property when executing it as such Judge and therefore transferred the case to the ordinary side of the Court to be able to do it. It was held that the Judge could not arrogate to himself the power of attaching the immovable property by merely transferring the case to the ordinary side. In the present case the Judge had no jurisdiction to execute the decree and under S. 35, Small Cause Courts Act, had the only alternative to deal with it on the ordinary side. The ruling which really bears on the facts of this case is AIR 1915 ALL 219.[2] Their Lordships of the Allahabad High Court have held that where a new Judge has no small cause powers he can transfer the Small Cause Court work to the ordinary side under S. 35 of the Act and deal with it as a Sub-Judge.

The result is that we hold that the attachment made on 16th February 1934 and ordered on 17th February 1934 to continue was validly effected. The next point taken by the learned counsel for the appellant is that although the original attachment was ordered to continue on 17th February 1934 it ceased to subsist after 28th July 1936 when the application for rateable distribution of Mohd. Din Mohd. Yunis was filed infructuous. He pointed out that although there was an order dated 28th July 1936 on the application of the executive officer that attachment should subsist there was no such order on the application of Mohd. Din Mohd. Yunis for rateable distribution and he concluded that the attachment in their case therefore ceased to operate from the date on which their application was filed, that is to say on 28th July 1936. We do not see any force in this contention also. The application for rateable distribution went with the application for execution presented by the executive officer. They were both filed on the same day. Section 64, Civil P. C., runs thus:

> Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.
>
> *Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

The proviso to S. 64, Civil P. C., clearly indicates that applications for rateable distribution go hand in hand with the application for execution. Mohd. Din Mohd. Yunis can therefore take advantage of the order made by the execution Judge on the application of the executive officer to the effect that the attachment shall subsist. The attachment having been held by us to be valid from the very beginning and to have subsisted throughout till the sale was made, S. 64, Civil P. C., would come into play and the first mortgage for Rs. 2000 in favour of Sohan Lal plaintiff is consequently void as against the claim of the auction-purchaser. The tacking mortgage had been executed after the property had been sold. It is absolutely clear that this mortgage is invalid because at the time when it was made Ch. Abdur Rahim had no subsisting interest in the house to encumber. The two Courts below have arrived at a correct conclusion. We dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

2. ('15) 2 A I R 1915 All 219 : 29 I C 996 : 37 All 450 : 13 A L J 689, Sarju Parshad v. Mahadev Pande.

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MIR AHMAD J.

Municipal Committee, Peshawar — *Defendant* — Petitioner

v.

Abdullah Jan Mian Agha Jan, Plaintiff and others — *Defendants* — Respondents.

Civil Revn. No. 152 of 1940, Decided on 31st October 1940, from order of Addl. Judge, Peshawar, D/- 6th February 1940.

Punjab Municipal Act (3 of 1911), S. 93 — Fire Brigade independent unit under control of Crown's officer—Fact that Municipal Committee pays for it does not make it responsible for its acts or omissions.

The Fire Brigade maintained by the Peshawar Municipal Committee is not its agent. The Fire Brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Municipal Committee pays for it does not make it liable for its acts or omissions. [P 21 C 2]

Nur Ilahi Khan — for Petitioner.

L. Wazir Chand and Abdur Rauf Khan, and Sher Khan — for Respondents 1, and 2 and 3 respectively.

Order. — On the night between 6th and 7th June 1937 the fuel collected by Abdullah Jan at his brick kiln outside Lahori gate caught fire. The fire brigade under the leadership of Arbab Attaullah Khan went to the spot but they did not take any steps to extinguish the fire and returned. The A. S. P. City, who is in fact the Officer Commanding of the Fire Brigade, was informed at the club. He rushed to the scene of fire and took the fire brigade a second time and threw water on the smouldering heap that remained of the fuel. Abdullah Jan, the owner of the fuel, has brought this suit for recovery of Rs. 875 as damages for the loss he has sustained on account of the failure of the fire brigade to take active steps on arrival at the scene of fire. He impleaded the Peshawar Municipal Committee, Mr. Field A. S. P., Mir Nawaz S. I. Fire Brigade and the Crown through Collector. The Municipal Committee pleaded that the fire brigade was not its agent and the Municipal Committee was therefore not responsible for the acts or omissions of that brigade. It so happened that the plaintiff withdrew his case against the Crown at the time when the issues were framed. One of the issues framed was : "Is the Municipal Committee liable for the negligence of the fire brigade"? and the onus was placed on the plaintiff, Abdullah Jan.

The trial Judge found that the fire brigade was guilty of negligence in refusing to extinguish the fire when they arrived at the scene on the first occasion, that the fire brigade was the agent of the Peshawar Municipal Committee and that therefore the Municipal Committee was liable for the damages. He relied on the report of a Municipal Commissioner in assessing the quantum of damages. The Municipal Commissioner had assessed it at Rs. 400. The Judge found that Mr. Field had done his duty and was therefore not liable and that Mir Nawaz was under the orders of Arbab Attaullah Khan and was consequently not responsible for what happened. He exonerated them from all liability. The Judge passed a decree against the Municipal Committee only for the payment of Rs. 400 and dismissed the suit with costs against the other two defendants. An appeal was preferred to the Court of the District Judge by the Municipal Committee, Peshawar. The Additional Judge came to the same conclusion as the trial Judge about the negligence of the fire brigade. With respect to the liability of the Municipal Committee he referred to the statement of the secretary of the following words :

> It is admitted and proved from the evidence of the Secretary, Municipal Committee, that the Fire Brigade is maintained at the expense of the Municipal Committee, but the control is not with the Committee but under the A. S. P. City and in his absence the City Inspector.

He did not definitely find whether the Municipal Committee was liable for the acts or omissions of the fire brigade. In the result, however, he dismissed the appeal with costs. The Municipal Committee has come up on revision to this Court. The learned counsel for the Municipal Committee has adverted to the statement of the secretary which has been summarized in the paragraph quoted from the appellate judgment above. He also pointed out that Mr. Field said that he used his discretion in the matter of putting out fire. He stated that Mr. Field was admittedly an A. S. P. under the Crown and Arbab Atta Ullah Khan was also a servant of the Crown being an Inspector of Police. He contended that there was consequently no doubt that the personnel of the fire brigade was under these officers and the Municipal Committee had no control over their activities. The mere fact that the Municipal Committee maintained the brigade did not, in the opinion of the counsel, necessarily mean that its members were controlling the actions of the brigade and were therefore responsible for its mistakes or negligence.

The learned counsel for the respondent relies on S. 93, Punjab Municipal Act, which enjoins that the Municipal Committee should establish and maintain a fire brigade. I cannot feel persuaded to agree with the learned counsel for the respondent that the fire brigade is the agent of the Peshawar Municipal Committee. The fire brigade is an independent unit under the control of an officer of the Crown and the mere fact that the Peshawar Municipal Committee pays for it does not make it liable for its acts or omissions. Consequently, I hold that the two Courts below have committed a material irregularity in passing a decree against the Peshawar Municipal Committee which has nothing to do with the loss sustained by the plaintiff-respondent. The petition is accepted and the suit is dismissed. As the litigation was due to a false legal notion regarding the position of the Peshawar Municipal Com.

mittee which the plaintiff could not comprehend I direct that the parties shall bear their own costs throughout. This shall not affect the order of the trial Judge that Abdullah Jan, plaintiff, shall pay the costs of Mr. Field and Mir Nawaz.

G.N./R.K. *Petition accepted.*

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* A. I. R. 1941 Peshawar 22

ALMOND J. C. AND SOOFI J.

Mt. Hassan Pari—Accused—Appellant

v.

Emperor.

Criminal Appeal No. 374 of 1940, Decided on 16th October 1940 against order of Addl. Sess. Judge, Peshawar, D/- 19th September 1940.

(a) Penal Code (1860), Ss. 302 and 318 — Prosecution seeking to prove offence under both S. 302 and S. 318 — Charges should be framed under two heads — Accused found guilty under both Ss. 302 and 318 should be convicted under both sections and not in alternative.

A conviction in the alternative should be made where on the facts proved it is not certain under which section the offence falls, but where the prosecution seeks to prove both offences under S. 302 and S. 318 the charges should be framed under two heads and not in the alternative and where the accused is found guilty of both offences he should be convicted under both the sections and not in the alternative : AIR 1917 All 29, *Ref.* [P 22 C 2]

(b) Criminal trial — Confession — Murder — Magistrate recording confession asking accused "Did you throw born child into well as result of which he died of drowning" — Accused replying "Yes" — Answer is no admission of child being born alive.

The question put to the accused by the Magistrate recording the confession of the accused in a murder case was to the following effect: "Did you throw the born child into the well as the result of which he died of drowning?" To this the answer given was "Yes":

Held that the question being composite in nature it was almost impossible to give a direct answer 'yes' or 'no'. Therefore from the accused's answer it could not be inferred that the accused did actually admit that the child was born alive. [P 23 C 1]

(c) Evidence Act (1872), S. 114 — Young woman giving birth to first child entirely unattended during process—Child cannot reasonably be presumed to be born alive.

In the case of a young woman giving birth to her first child and entirely unattended during the process no presumption can reasonably be made under S. 114 that the child was born alive. [P 23 C 1]

** (d) Evidence Act (1872), S. 26 — Accused sent in charge of police head constable for medical examination making confession to doctor during examination though not in head constable's immediate presence — Confession is inadmissible as made while in police custody.*

The accused was sent in charge of a head constable of police to the hospital for medical examination. While being medically examined but not in the immediate presence of the head constable she made a confession to the doctor:

Held that the accused was in the custody of the police when she made the confession to the doctor and therefore it was inadmissible under S. 26 : AIR 1928 Lah 282; 20 Bom 165, AIR 1917 Bom 130 and AIR 1924 Rang 173, *Rel. on.*; AIR 1936 Rang 455, *Disting.* [P 24 C 1]

Lala Manohar Lal — for Appellant.

Advocate-General — for the Crown.

Almond J. C.— In this case Mt. Hassan Pari, an unmarried girl aged 17-18, has been convicted under S. 302, Penal Code, or in the alternative under S. 318, Penal Code, for the murder of her illegitimate child and for subsequently throwing it into a well and has been sentenced to transportation for life under S. 302, Penal Code, and in the alternative to two years' rigorous imprisonment under S. 318, Penal Code. We may state at the outset that we are of opinion that the charges should have been framed under two heads in this case and not in the alternative, for the prosecution set out to prove both that the appellant had murdered her child and had also secretly disposed of the body by throwing it into a well. On the facts which were found by the Sessions Judge she should have been convicted under both the sections and not in the alternative. A conviction in the alternative should be made where on the facts proved it is not certain under which section the offence falls. There is an illustration of such a case reported in A I R 1917 ALL 29[1] in which it was not certain on the facts proved whether the offence fell under S. 489A or S. 420, Penal Code. In that case a conviction was recorded in the alternative and one sentence was imposed which had to be not greater than that permitted for the minor offence.

The facts of this case are very simple and the only points raised in the appeal are legal points. At the trial the appellant admitted that she had given birth to an illegitimate child and that out of shame she had thrown it into a well. She stated that the child was born dead. Before the committing Magistrate she stated that she did not know whether the child was born dead or alive. In view of advanced decomposition, the medical witness was unable to say whether the child was born dead or alive. The prosecution relied for establishing the principal charge on three confessions made by the appellant. The first of these was made to a police officer and was

1. ('17) 4 A I R 1917 All 29: 41 I C 310: 18 Cr L J 790 : 15 A L J 587, Hiranand v. Emperor.

ruled out as inadmissible by the learned Additional Sessions Judge under the provisions of S. 25, Evidence Act. Of the other two confessions one was made to a lady doctor who examined the appellant and in that confession she unequivocally admitted that the child had been born alive. The third confession which was made to a Magistrate did not specifically state whether the child was born alive or dead. At any rate that is the interpretation of the confession which has been made by the learned Additional Sessions Judge.

The learned Advocate-General has argued before us that that confession also admits that the child was born alive. He relies in this connexion on the second question put to the appellant by the Magistrate recording the confession which is to the following effect: "Did you throw the born child into the well as the result of which he died of drowning?" To this the answer given was "Yes." It is clear that that question was put in an unfortunate form as it is a question composite in nature to which it is almost impossible to give a direct answer 'yes' or 'no,' and we cannot therefore infer from it that the appellant did actually admit that the child was born alive. We are therefore of opinion that if the confession made to the lady doctor is inadmissible in evidence there is no evidence on the file to show that the child was born alive. The learned Advocate-General has suggested that we might presume that all children are born alive under the provisions of S. 114, Evidence Act. Such a presumption could not, in our opinion, be reasonably made especially in the case of a young woman giving birth to her first child and entirely unattended during the process. Learned counsel for the appellant has contended that the confession made to the lady doctor was inadmissible under the provisions of S. 26, Evidence Act, as it was made while the appellant was in the custody of the police. This point does not appear to have been argued before the learned Sessions Judge who heard the case but in our opinion it must prevail. When the body was taken from the well the appellant had been called by the police to identify it and she made before the police officer the statement which has been ruled out as being inadmissible. She was then sent in charge of a lance head constable of police to the hospital to be medically examined. While she was being medically examined but not in the immediate presence of the lance head constable she made the confession to the doctor. The question is therefore whether the appellant was at the time this confession was made, in the custody of a police officer.

Learned counsel for the appellant has referred us to three cases reported in A I R 1928 Lah 282,[2] A I R 1924 Rang 173[3] and A I R 1936 Rang 455.[4] We have in addition consulted two cases referred to in Woodroffe and Amirali's Law of Evidence, namely 20 Bom 165[5] and 42 Bom 1.[6] In A I R 1928 Lah 282[2] the facts were that a post office official was accused of an offence. He was in the custody of the police but was sent to a superior official of the post office department and left with him alone for about three hours. He was alleged to have made a confession to this superior post office official and the learned Judges refused to admit the confession into evidence as the procedure was taken with a view to evade the mandatory rule enacted by S. 26, Evidence Act. In A I R 1924 Rang 173[3] it was alleged by the prosecution in order to secure the admission of a confession that the accused at the time had not been formally arrested. It was held that the question of formal arrest did not affect the merits of the case as the accused was actually detained by the police at the time. A I R 1936 Rang 455[4] does not appear to be a direct authority on the point as the section there applied was S. 24 and not S. 26, Evidence Act. The two Bombay cases however are directly in point. In the first of them an accused person was being taken in a tonga. In front of him was riding a policeman. The policeman left the tonga to go to a roadside village and get another horse. In the meantime the tonga with the accused proceeded for some miles and during that period it was said that the accused had made a confession to a fellow passenger. It was held that the accused was still in the custody of the police when the confession was made. The second Bombay case, namely 42 Bom 1[6] is still more analogous to the facts of the present case. In that case an accused had been taken by a policeman to a hospital. The policeman stayed outside in the verandah while the accused is said to have made a confession inside the hospital but

2. ('28) 15 A I R 1928 Lah 282 : 108 I C 398 : 29 Cr L J 386, Emperor v. Sheoram.
3. ('24) 11 A I R 1924 Rang 173 : 77 I C 429 : 25 Cr L J 381 : 1 Rang 609, Mg. Lay v. Emperor.
4. ('36) 23 A I R 1936 Rang 455 : 165 I C 319 : 37 Cr L J 1137, Sit Ro Saw v. Emperor.
5. ('96) 20 Bom 165, Empress v. Lester.
6. ('17) 4 A I R 1917 Bom 130 : 42 I C 597 : 18 Cr L J 981 : 42 Bom 1 : 19 Bom L R 683, Emperor v. Nallangowda Parwatgowda.

out of the hearing of the policeman. It was held that the accused was still in the custody of the policeman.

In our opinion there can be no doubt that in the present case the accused was in the custody of the police when she made the confession to the doctor and therefore its admissibility is ruled out by S. 26, Evidence Act. There remains therefore no evidence that the child was born alive and the conviction under S. 302, Penal Code, cannot be sustained. The conviction under S. 318, Penal Code, however is obviously correct for even at the trial the accused admitted having secretly thrown the child into the well with a view to hiding her shame. We set aside the conviction of the appellant under S. 302, Penal Code, and acquit her of that charge. We maintain the conviction and sentence passed upon her under S. 318, Penal Code.

G.N./R.K. *Order accordingly.*

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ALMOND J. C.

Gokal Chand — Petitioner

v.

Said Ali — Respondent.

Criminal Ref. No. 329 of 1940, Decided on 8th November 1940, from order of the Magistrate, First Class, Hazara District, D/- 11th June 1940.

Criminal P. C. (1898), S. 250—S. 250 applies to warrant cases also.

Section 250 clearly applies to trial of warrant cases as well as summons cases : A I R 1926 All 159, *Expl. and dissented;* AIR 1927 Oudh 175, *Rel. on.* [P 24 C 2]

Petitioner in person.

Respondent in person.

Advocate-General — for the Crown.

Order.—The petitioner Gokal Chand was ordered to pay compensation of Rs. 50 to Said Ali, respondent, under S. 250, Criminal P. C. He applied for revision of the order to the Sessions Judge, Hazara, who, without going into the merits of the case, has recommended that the order be set aside on the basis of a ruling of a single Judge of the Allahabad High Court reported in AIR 1926 ALL 159.[1] In that case the learned Judge made a remark that the provisions of S. 250, Criminal P. C., occurring as they do in Chap. XX of the Code apply only in the case of cases tried as summons cases. The remarks were however in the nature of obiter dicta for the question for decision in that case was whether compensation can be awarded in a case where some of the charges were triable by the Sessions Court and some by a Magistrate. The dictum was definitely dissented from in a subsequent judgment of the Oudh Chief Court reported in A I R 1927 Oudh 175[2] and is in my opinion not a correct statement of law. The marginal note to S. 250, Criminal P. C., is "False, frivolous or vexatious accusations" without restriction to summons cases and the body of the section does not give any indication that it applies to summons cases only. In fact there are clear indications to the contrary, for, it refers to the award of compensation in a case in which an accused person is discharged. No person who is tried for an offence which is triable as a summons case can be discharged : he must either be acquitted or released without an order of conviction or acquittal. In my opinion S. 250, Criminal P. C., clearly applies to trial of warrant cases as well as summons cases.

On the merits I am of opinion that there are no grounds for interfering with the findings of the trial Magistrate. The facts briefly were that the complainant had delivered to the accused who is a lorry driver a consignment of salt to take from Havelian to Srinagar. The salt was not delivered at Srinagar. The accused's defence was that owing to the breach of the road he could not proceed beyond Bararkot which is the last village in British territory, that he delivered the goods there to one Sitaram and some days later took the munshi of the complainant, Sohan Lal, with him to Bararkot and there handed over a receipt which he had taken from Sitaram. He produced Sitaram as his defence witness and Sitaram admitted that these consignments of salt had been deposited with him by the accused though he makes no mention of Sohan Lal having gone there. He said that the salt was still with him and could be handed over to the accused if he produced the receipt therefor. The learned Magistrate was of opinion that the complainant knew throughout that the salt was deposited in Bararkot and he also referred to the fact that this complaint had been brought a year after the salt had been lying at Bararkot. In my opinion, there are grounds on which the trial Court could conclude that the prosecution was false and vexatious and I am not prepared to interfere with its order.

D.S./R.K. *Order accordingly.*

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1. ('26) 13 AIR 1926 All 159: 91 I C 38: 27 Cr L J 6 : 48 All 166 : 23 A L J 1056, Harihar Dat v. Maksud Ali.

2. ('27) 14 AIR 1927 Oudh 175 : 101 I C 482 : 28 Cr L J 450 : 4 O W N 392, Paighambar v. Emperor.

A. I. R. 1941 Peshawar 25

ALMOND J. C. AND MIR AHMED J.

Mt. Rameshri w/o S. Manmohan Singh and others — Appellants

v.

Mt. Vaishno Ditti d/o B. Gurmukh Singh — Plaintiff — Respondent.

Appeal No. 37/22 of 1940, Decided on 2nd December 1940, from order of Addl. Judge, Peshawar District, D/- 24th January 1940.

(a) Civil P. C. (1908), O. 21, R. 35 (2) — Proceedings under R. 35 (2) — Failure to affix warrant or to proclaim by beat of drum is fatal.

The conditions precedent for effecting delivery of possession under O. 21, R. 35 (2) are the affixing of the warrant to the property and the beat of drum. The omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. [P 25 C 2]

(b) Cosharers — Decree for possession not executed — Decree-holder does not become cosharer with judgment-debtors and is not entitled to share profits.

Without executing a decree for possession a decree-holder cannot become a shareholder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. [P 26 C 1]

S. B. Sardar Raja Singh and S. Anup Singh — for Appellants.

S. Beant Singh — for Respondent.

Mir Ahmed J. — On 20th July 1928, Mt. Vaisno Ditti obtained a decree from their Lordships of the Privy Council* for possession of one-fourth of the moveable and immovable property left by one Bal Mokand. That decree was executed in Peshawar. Amongst other properties the executing Judge ordered that joint possession should be given to her of a cinema which has burnt down subsequently. The report of the bailiff dated 19th November 1931 shows that he handed over joint possession of the property to the decree-holder by beat of drum.

The present suit was instituted by Mt. Vaisno Ditti on 15th July 1937 for mesne profits for a period of three years. She claimed Rs. 1800. Inter alia, the defence was taken that the decree-holder had not taken possession according to law and was therefore not entitled to the income of the property. Evidence was led. The bailiff said that his report was correct, and no one else was questioned as to the procedure adopted by the bailiff for delivering possession. The decree-holder took up the attitude that even if possession was not delivered according to law she was entitled to a share in the income of the property as damages or compensation for the use of it by the other cosharers.

The trial Judge found that possession was delivered by beat of drum only and the warrant of possession was not affixed to the property as required by O. 21, R. 35 (2), Civil P. C. He held that the failure to affix the warrant vitiated the proceeding, and that consequently joint possession was never taken by the decree-holder. As regards the contention that the decree-holder was entitled to a share in the profits of the property independently of the execution proceedings he was of the opinion that the decree-holder had no such independent right. He therefore dismissed the suit.

The decree-holder presented an appeal to the District Court at Peshawar against that order. The learned Additional Judge agreed with the trial Judge that the possession was not delivered according to law and that the delivery of possession should therefore be ignored. He however held that the plaintiff had an independent right of recovering her share in the profits from the judgment-debtors. He calculated her share of income at Rs. 14 a month and gave a decree for Rs. 504. He also gave interest on that amount at 8% per annum for three years. The judgment-debtors have come up on further appeal to this Court. Order 21, R. 35 (2), Civil P. C., runs thus :

> (2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode at some convenient place, the substance of the decree.

It is obvious that the conditions precedent for effecting delivery of possession under O. 21, R. 35 (2), Civil P. C., are the affixing of the warrant to the property and the beat of drum. The weight of authority is clearly in favour of the proposition that the omission to take any one of these two steps is fatal to the proceedings and there is no delivery in law. Counsel for the parties have not denied the correctness of this view. We therefore maintain the concurrent findings of the two Courts below that possession was not handed over to the decree-holder under the decree.

The argument of the learned counsel for the respondent that his client is entitled to a share in the income of the property independently of the decree, is void of all force. No doubt parties put forward their respective claims during the litigation and make an attempt to substantiate them. But when once those claims have been adjudicated upon, the decree represents the rights and liabilities possessed by them and it is the decree which has to be consulted for

* See A I R 1928 P C 294.

the purpose of ascertaining as to how they stand in the matter. They cannot fall back on the rights which they alleged they possessed before the decree was passed even though those rights may have been confirmed by the decree. Again, an executory decree has to be enforced in order that it should be effective. A successful suitor cannot say that he has become a shareholder by merely obtaining a decree for possession. In fact if the decree is not executed there is a likelihood of the original right to possess which had merged into the decree being lost by the efflux of time. It follows therefore that without executing a decree for possession a decree-holder cannot become a shareholder with the judgment-debtors and cannot consequently ask for a share in the profits of the property. As a result we find that the view of the lower appellate Court is wrong. We accept the appeal, set aside the order of the lower appellate Judge and restore that of the trial Court with costs throughout.

G.N./R.K. *Appeal accepted.*

A. I. R. 1941 Peshawar 26

ALMOND J. C. AND MIR AHMED J.

Inzar Gul Said Anwar and another — Appellants

v.

Hajab Gul Taza Gul and others — Respondents.

Appeal No. 122/22 of 1939, Decided on 15th November 1940, from order of Addl. Judge, Peshawar, D/- 22nd May 1939.

Pre-emption — Pre-emption suit decreed — Vendee withdrawing amount deposited by pre-emptor in Court — During execution proceedings for possession pre-emptor and vendee entering into compromise under which vendee paid certain amount to vendor before Court which ordered execution to be filed in full satisfaction—Compromise held out and out sale.

A pre-emption suit was decreed on payment of Rs. 1800. This sum was deposited in Court and was taken out by the vendees. Subsequently, the pre-emptor applied for execution of his decree by being put in possession of the land and during the execution proceedings the pre-emptor and the vendee entered into a compromise whereby the vendees paid Rs. 2000 to the pre-emptor to cover the cost of the land and the expenses incurred by him in the litigation and the pre-emptor agreed that the suit should be considered as dismissed. Rs. 2000 was paid in the presence of the Court which passed an order that the execution should be filed in full satisfaction :

Held that the question of whether a sale was a sale of land or not must depend on the circumstances of each particular case, and that there was an out and out sale of land by virtue of the compromise inasmuch as the land had vested in the pre-emptor by virtue of the decree when he deposited Rs. 1800 in Court and he was at the time of the compromise the absolute owner of the property of which he could get possession by execution : *Case law referred.* [P 27 C 2 ; P 28 C 1]

K. B. Saaduddin Khan — for Appellants.

R. B. Diwan Chand — for Respondents 1 and 2.

Respondent 4 in person.

Almond J. C. — On 13th March 1935 the brothers of one Mohammad Nabi sold certain land to Hijabgul and Nawabgul, two brothers. On 12th March 1936, Mohammad Nabi, through his maternal uncle as his next friend, sued for pre-emption of this land and was given a decree on payment of Rs. 1800. This sum was deposited in Court and was taken out by the vendees. Subsequently, Mohammad Nabi applied for execution of his decree by being put in possession of the land and on 7th July 1936 he and the vendees entered into a compromise whereby the vendees paid Rs. 2000 to the minor to cover the cost of the land and the expenses incurred by Mohammad Nabi in the litigation and Mohammad Nabi agreed that the suit should be considered as dismissed. Rs.2000 was paid in the presence of the Court and the Court passed an order that the execution should be filed in full satisfaction. On 8th July 1937, Inzar Gul and Redi Gul sued to pre-empt this sale effected by the compromise on payment of Rs. 1500. They sued with respect to a portion of the land only as regards which they had a right of pre-emption. Their suit was decreed on payment of Rs. 1500 and Hijabgul and Nawabgul appealed to the District Judge against the decree. An Additional Judge accepted their appeal on the ground that what was sold by the compromise of 7th July 1936 was not land but "a chose in action." Inzargul and Redigul have presented a further appeal to this Court and the only point for decision by us at this stage is whether there was a sale of land by the compromise so as to give right to a claim for pre-emption.

The learned Additional Judge in coming to his conclusion relied on the commentary in Shadilal's Law of Pre-emption, Edn. 3, p. 116. That commentary refers to two decisions of the Lahore High Court reported in 1 Lah 109[1] and 61 I C 331.[2] Learned counsel for the appellants contends that those rulings are in his favour. Learned counsel for the respondents, on the other hand, relies on the following cases : 41 I C 467,[3] 52 I C 170,[4] 94 P R

1. ('20) 7 A I R 1920 Lah 421 : 55 I C 865 : 1 Lah 109 : 96 P L R 1920, Masihuddin v. Matu Ram.
2. ('21) 61 I C 331, Bhagta v. Bir Singh.
3. ('17) 4 A I R 1917 Oudh 80 : 41 I C 467, Ghutur Singh v. Angad Pande.
4. ('19) 6 A I R 1919 Oudh 175 : 52 I C 170, Lachhman Prasad v. Chamela.

1902,[5] 42 P R 1917[6] and 296 P L R 1913=20 I C 566.[7] It will be necessary to examine those cases in some detail. In 1 Lah 109[1] property belonging to a lunatic was sold by his wife in 1883 to a man who was already the mortgagee. In 1912, after the lunatic had died, his sons sued for possession of that land on the ground that the sale was void and also for redemption from the mortgagee. They abandoned their suit in consideration of the receipt of Rs. 500 from the vendee. It was held that the sons of the lunatic had merely abandoned their rights to obtain a decision of the Court in a case which was genuinely contested and that there had not been a sale of land. In the course of the hearing of the case it was argued that to hold that the transaction was other than one of sale would defeat the law of pre-emption because all that had to be done was to go through the farce of a suit and compromise. The Judges who decided that case remarked that this result did not follow, and where the facts of the case indicated that the suit and compromise are sham there was nothing to prevent the Courts from holding that the transaction was in reality a sale. It is therefore clearly indicated in that case that there might be cases in which a compromise in Court could amount to a sale. In 61 I C 331[2] one Birsingh had sold land and a house to Belasingh for Rs. 6000. A pre-emption suit was brought for the land and was decreed on payment of Rs. 4635-6-0. Belasingh then sued Birsingh for recovery of Rs. 1264-10-0 which he had lost after giving credit of Rs. 100 for the house. During the hearing of that parties agreed that the house should be reconveyed to Birsingh for the sum of Rs. 100 and a decree was passed for this Rs. 100 in favour of Belasingh. Birsingh then by a separate suit obtained possession of the house. Belasingh's son then sued for pre-emption of the sale of this house for Rs. 100. The learned Judge held that the compromise made in the suit brought by Belasingh amounted to a sale of the house and allowed it to be pre-empted.

In 41 I C 467[3] which is a judgment of the Judicial Commissioner's Court of Oudh the pre-emptor after obtaining a decree had failed to obtain possession of the land by execution within the period allowed by law and when his right to obtain possession had lapsed the vendees had repaid to him the amount for which the property had been decreed. It was held that in those circumstances there was no sale but merely a lapse of the pre-emptor's rights and that there was no transaction which could be subsequently pre-empted. It was pointed out in that case that there was a considerable difference between the sale of a subsisting right and the lapsing of that right by reason of the operation of the law of limitation and it was held that the original pre-emptor had no subsisting right which he could transfer to the vendees after the period of limitation for obtaining possession had passed. 52 I C 170[4] is also a judgment of the Judicial Commissioner's Court of Oudh. In that case a person who was in possession of a certain piece of land was sued but the suit was withdrawn on terms. It was held that the compromise did not amount to a sale. The learned Judge remarked in the course of the judgment that he did not say that circumstances could not arise in which such a transaction might amount to a sale. In 94 P R 1902[5] one Mahtab Singh had obtained a decree for pre-emption on payment of a certain sum of money. The following day, before he had deposited that money, he transferred his rights in the property to his grandson Isharsingh. It was held that the property had never vested in Mahtab Singh as it could not do so until he had fulfilled the conditions of the decree and deposited the amount in Court and that therefore he had not sold the property but only a right to obtain the property on satisfying the conditions laid down in the decree. 42 P R 1917[6] was a case in which a man had obtained a decree for possession of certain property on payment of Rs. 300. He was unable to pay Rs. 300 and therefore sold his rights. It was held that the transaction was not a sale of land but was a sale of his rights under the decree which could not be pre-empted.

In 296 P L R 1913[7] A had sold his reversionary rights to B. On the death of the widow who had a life interest A repudiated the sale and B sued him. A compromise was effected whereby half the land was decreed in B's favour. The son of A filed a suit for pre-emption and it was held that the compromise did not amount to a sale of land. In the present case we are of opinion that there was an out and out sale of land by virtue of the compromise of 7th July 1936. The land had vested in Mohamad Nabi by virtue of the decree when he deposited Rs. 1800 in Court and he was at the time of

5. ('02) 94 P R 1902 : 134 P L R 1902, Lashkari Mal v. Ishar Singh.
6. ('17) 4 A I R 1917 Lah 256 : 38 I C 658 : 42 P R 1917, Shams-ud Din v. Gulam Husain.
7. ('13) 296 P L R 1913 : 20 I C 556, Attar Chand v. Umar Hayat.

the compromise the absolute owner of the property of which he could get possession by execution. The question of whether a sale is a sale of land or not must depend on the circumstances of each particular case. In the present case there was no genuine dispute between the parties as to their respective rights. Mohamad Nabi was absolutely entitled to get possession of the land by execution of his decree at the time when he entered into a compromise and the practical effect of his action was to sell the land to Hijabgul and Nawabgul. We therefore reverse the finding of the learned Additional Judge on this preliminary point and remand the case under O. 41, R. 23 to the Court of the District Judge for decision of the remaining points. Stamp on appeal to be refunded: other costs in this Court to follow the event. Parties present, i. e., both plaintiffs and respondents 1 and 2 instruct to appear before District Judge on 2nd December 1940.

G.N./R.K. *Order accordingly.*

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ALMOND J. C. AND MIR AHMED J.

Mt. Motai w/o Fazal Shah and another — Petitioners

v.

Lt.-Col. Sir Mohd. Akbar Khan, Chief of Hoti, and others — Respondents.

Appeal No. 33/12 of 1939, Decided on 19th October 1940, against order of District Judge, Peshawar, D/- 17th January 1939.

(a) Suits Valuation Act (1887), S. 8—Mortgage — Redemption suit — Value for jurisdiction is amount found due on mortgage.

In a suit for redemption of a mortgage of immovable property the value for purposes of jurisdiction is the amount of money which is found to be due on the mortgage. The market value of the property can on no account be ever the value for jurisdiction in a redemption suit: A I R 1926 Lah 376 (F B), *Rel. on*; A I R 1927 Rang 304, *Not approved.* [P 29 C 2]

(b) N. W. F. P. Courts Regulation, Section 31 (1) (b) — Property mortgaged for Rs. 8 — Equity of redemption sold for Rs. 25,000 — Redemption suit—Second appeal is competent—Consequently first appellate Court's order of remand is appealable.

The mortgagor mortgaged his immovable property for Rs. 8 and subsequently sold the equity of redemption for Rs. 25,000. In the suit for redemption by the purchaser:

Held that a second appeal being competent under S. 31 (1) (b) the first appellate Court's order of remand was appealable under O. 43, R. 1 (u), Civil P. C. [P 30 C 1]

(c) Civil P. C. (1908), S. 107 and O. 41, R. 23 —Unsuccessful litigant in lower Court cannot be allowed to patch up weak parts of case and fill up omissions by recourse to S. 107 and O. 41, R. 23 in appeal.

The provisions of S. 107 as elucidated by O. 41, R. 23 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Court, to patch up the weak parts of the case and fill up omissions in the Court of appeal: A I R 1931 P C 143, *Rel. on.* [P 30 C 2]

Qazi Mohd. Aslam — for Appellant.

Lala Hukum Chand, and Peer Bakhsh, and Ghulam Mohd.—for Respondents 1, and 2, 4, 7 and 8, and 6, respectively.

Respondents 3, 8 and 9 in person.

Mir Ahmed J. — 6 kls., 5 mls., of land situated in Mahal Mardan and represented by Khasra Nos. 1545 and 1546 were originally owned by one Burhanuddin. In the records of 1885-86 the land is shown as mortgaged to one Fazal Shah for Rs. 8. Fazal Shah died and the land was then shown in the records in the names of his four widows. Three of the widows transferred their mortgagee rights to one Sherdil. Burhanuddin, the owner, also died. His sons Mohiyuddin and Rahmanuddin sold the equity of redemption to the Nawab Sahib of Hoti for Rs. 25,000. Sherdil died as well. His son Shah Sawar transferred the mortgagee rights in a portion of the land to several persons, who will be referred to in this judgment as "transferees."

The Nawab Sahib of Hoti has filed this suit for possession by redemption of the land originally owned by Burhanuddin on payment of Rs. 8. He impleaded Mt. Motai, widow of Fazal Shah, Shah Sawar, son of Sherdil, and the "transferees." The suit was resisted inter alia on the ground that it was not within time. The trial Judge pointed out that the suit was filed on 27th August 1936, that the plaintiff had to prove that the mortgage was effected on or after 27th August 1876, that the plaintiff could only prove that the mortgage was mentioned in the records of 1885-86, and that he therefore failed to prove that the mortgage was effected on or after 27th August 1876 and not before it. He therefore held that the suit was time-barred and dismissed it. He did not adjudicate on the other issues. An appeal was preferred to the District Court at Peshawar. At the time of the hearing, the plaintiff's counsel produced before the District Judge a copy of a mutation by which Burhanuddin obtained a piece of land from a widow by inheritance in 1883-84. The learned counsel asked the Judge that the case should be remanded and he should be allowed to search the land records in order to find out if there was any other information in those records with regard to this case. The appellate Judge admitted the

document produced by counsel and directed that it should be placed on the original file. He remanded the case under O. 41, R. 23, Civil P. C., to enable the plaintiff to produce land records in his favour. He directed that the issue regarding limitation and the other issues in the case should all be again taken into consideration in the light of the fresh evidence produced. The transferees have presented an appeal to this Court, and Mt. Motai, the surviving widow of Fazal Shah, and Shah Sawar, the son of Sherdil, have jointly instituted another appeal against the same order. They have in both appeals asked for the setting aside of the order of remand. This judgment will cover both cases.

Two preliminary points arose for decision in these appeals. Firstly, whether the trial Judge had pecuniary jurisdiction to hear the case. The property was sold for Rs. 25,000 although the mortgage money secured was Rs. 8. It was suggested that the value for jurisdiction should have been Rs. 25,000 and not Rs. 8, and that the trial Judge, who was Sub-Judge, fourth class, could not therefore hear the case. Secondly, whether a further appeal lay. The value for jurisdiction was only Rs. 8 and the same value was adopted in the Court of appeal. The single Judge of this Court who heard the case, referred the appeals to a Bench. Two rulings were cited before us on the question of valuation. They are A I R 1926 Lah 376[1] and A I R 1927 Rang 304.[2] The Lahore High Court has held in A I R 1926 Lah 376[1] that

> in a suit for the redemption of immovable property the value for purposes of jurisdiction is the amount found by the Court to be the value of the mortgagee's charge on the property and not the amount alleged by the plaintiff to be due to the mortgagee.

The Rangoon High Court has on the other hand laid down in A I R 1927 Rang 304[2] that the market value of the property should be the criterion. We have consulted other authorities also which the learned counsel did not care to produce. We find that the Allahabad, Madras and Nagpur High Courts have held that the value for jurisdiction in a redemption suit should be the amount of the principal debt secured, and that the Bombay and Calcutta High Courts have laid down that the value should be the amount due on the mortgage. Section 7 (ix), Court-fees Act, governs the court-fee payable in redemption suits. It is to the following effect :

> In suits against a mortgagee for the recovery of the property mortgaged . . . . according to the principal money expressed to be secured by the instrument of mortgage.

Section 8, Suits Valuation Act, is as under :

> Where in suits other than those referred to in the Court-fees Act, 1870, S. 7, paras. V, VI and IX and para. X, cl. (d), court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

It will be observed that in S. 8, Suits Valuation Act, the Legislature deliberately excluded suits under S. 7 (ix), Court-fees Act, from the category of those cases in which the value for the purposes of jurisdiction was directed to be the same as that for court-fee. A scrutiny of the Suits Valuation Act shows that no provision has been made in that Act for the valuation of redemption suits for purposes of jurisdiction. In redemption suits the court-fee has to be paid on the principal money secured. But there are other amounts besides the principal debt which have also to be paid to the mortgagee before a mortgagor gets back his property. One of them is interest. It may be due to this that the matter of valuation for jurisdiction was left to the Court to decide on the data which is placed before it in the form of a complete list of charges which the mortgagor has to pay before redemption is decreed. In the alternative it may be a lacuna in law. Whatever may be the cause we think that the Lahore view which is supported by the views of the Bombay and Calcutta High Courts is sound. We hold therefore that the value for jurisdiction is the amount of money which is found to be due on the mortgage. We may observe with due respect that the view of the Rangoon High Court is not correct. The market value of the property mortgaged could on no account be ever the value for jurisdiction in a redemption suit. The property under mortgage is split into two bundles of rights. One bundle of rights is called the "equity of redemption" and the other bundle of rights is called the "mortgagee rights." There is no controversy in redemption suits about the "equity of redemption." The controversy is about the "mortgagee rights." So to say that the two bundles together go to form the subject-matter of the suit and their price is the value for jurisdiction does not appear to be correct. In this particular case the sum of Rs. 8 is the only amount payable

1. ('26) 13 AIR 1926 Lah 376 : 96 I C 890 : 7 Lah 570 : 27 P L R 605 (F B), Jaswant Ram v. Moti Ram.
2. ('27) 14 A I R 1927 Rang 304 : 105 I C 412 : 5 Rang 499, Ma Hla Saing v. Ma Su We.

on the footing of the mortgage. We consequently find that the value for jurisdiction is Rs. 8 and the trial Judge (Sub-Judge fourth class) had jurisdiction to decide the case. Next we proceed to discuss the question of further appeal. Section 31 of the N. W. F. P. Courts Regulation contains rules regarding further appeals. We reproduce it verbatim below :

31 (1). A further appeal shall lie to the Court of the Judicial Commissioner in any of the following cases from an appellate decree of a District Court on any ground which would be a good ground of appeal if the decree had been passed in an original suit, namely :

(a) in a small cause of unclassed suit,

(i) if the value of the suit is one thousand rupees, or upwards, or the decree involves directly some claim to, or question respecting property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below, or

(ii) if the value of the suit is two thousand five hundred rupees or upwards, or the decree of the District Court involves directly some claim to, or question respecting, property of like value;

(b) in a land suit,

(i) if the value of the suit is two hundred and fifty rupees or upwards, or the decree involves directly some claim to, or question respecting property of like value, and the decree of the District Court varies or reverses otherwise than as to costs the decree of the Court below or

(ii) if the value of the suit is one thousand rupees or upwards or the decree of the District Court involves directly some claim to or question respecting property of like value.

(2) The provisions of O. 41, Civil P. C., 1908, other than R. 35 of the said order, shall apply as far as may be to further appeals under this section and to the execution of decrees passed on such appeals.

Clause (b) allows a further appeal in a land suit if the value of the suit is Rs. 250 or upwards or if the decree involves directly some claim to, or question respecting property of like value, that is to say Rs. 250 or upwards. In this case the decree involves a question respecting property of the value of Rs. 25,000 for if the suit is time-barred the Nawab of Hoti will lose the equity of redemption which he has purchased for that amount. It follows that a further appeal would have been competent to this Court if the District Judge had finally decided the case. Under O. 43, R. 1 (u), Civil P. C., therefore an appeal is competent from the order of remand to this Court. We hold accordingly. Now we have to see whether the lower appellate Judge was right in remanding the case. Curiously, we do not find the document produced by the plaintiff with his memorandum of appeal either on the appellate file or on the file of the original Court. We could not trace it. However, we had the benefit of seeing a copy of it which was in the possession of the learned counsel for the plaintiff. The document produced has no relevancy whatsoever in this case. The net result of the remand is therefore to allow the plaintiff to fish out evidence in order to prove his case and make up the lacuna which at the present moment exists. Their Lordships of the Privy Council have not approved of this method in the ruling reported in A I R 1931 P C 143.[3] The portion of the headnote which is apposite may be reproduced as follows :

The provisions of S. 107 as elucidated by O. 41, R. 23 are clearly not intended to allow a litigant, who has been unsuccessful in the lower Court, to patch up the weak part of the case and fill up omissions in the Court of appeal.

We are therefore of opinion that the order of remand was not justified. We accept the appeals to this extent that we set aside the order of remand. We send back the case to the lower appellate Judge with the direction that he should now proceed to decide the case on merits. The costs will abide the result. Pleader's fee Rs. 32.

G.N./R.K. *Order accordingly.*

3. ('31) 18 AIR 1931 P C 143 : 132 I C 721 : 10 Pat 654 : 58 I A 254 (P C), Parsotim Thakur v. Lal Mohar Thakur.

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ALMOND J. C. AND MIR AHMED J.

Islamuddin Jumma Din — Plaintiff — Appellant

v.

Firm Jiwa Shah Ram Chand and others — Defendants — Respondents.

Civil Appeal No. 181/69 of 1939, Decided on 4th November 1940, from order of the Addl. Dist. Judge, Peshawar, D/- 26th October 1939.

Registration Act (1908), S. 17 (1) Proviso and S. 17 (1) (d) — Word "reserve" in S. 17 (1) (d), S. 17 (1) Proviso and in Punjab Government Notification No. 29 of 1888—Meaning explained —It is equivalent to "fix."

The word "reserve" in S. 17 (1) (d), in S. 17 (1) Proviso and also in the Punjab Government Notification No. 29 of 4th July 1888 is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee, and in common parlance it is equivalent to the word "fix." [P 32 C 1]

Ganesha Khan — for Appellant.

Lala Lal Chand — for Respondent No. 1.

Roidar and Abdul Manaf, (Respondents Nos. 2 and 3), in person.

Mir Ahmed J. — Firm Jiwan Shah Ram Chand obtained a decree for Rs. 647-8-0 with costs against Roidar and Abdul Manaf on 28th June 1938 and in execution of that

decree proceeded to attach standing crops of the land belonging to the judgment-debtors. Islamuddin objected that the land of the judgment-debtors had been leased to him by two lease deeds dated 14th April 1938 and 6th May 1938. The objection was dismissed. Islamuddin therefore brought the present suit for a declaration that the land belonging to the judgment-debtors was under lease to him and that therefore he was the owner of the crops standing thereon. The decree-holder pleaded that the documents on the basis of which the plaintiff claimed his rights were inadmissible in evidence, because they were not registered. The trial Judge did not frame any issue on the point of registration. He granted a decree to the plaintiff as prayed for. An appeal was preferred by the decree-holder to the District Court at Peshawar. The Additional Judge who heard the appeal was of the view that the two documents required registration. He also incidentally remarked that the lease deeds were not acted upon. He accepted the appeal and dismissed the suit.

Islamuddin has come up on further appeal to this Court. We would first give a description of the two lease deeds. By the first lease deed dated 14th April 1938 Roidar leased 40 kanals of land for two years to Islamuddin. The yearly rent was fixed at Rs. 75. It was mentioned in the document that the lessor had received one year's rent in advance which was to be taken as the rent for the second year, and that he would receive the rent for the first year after the expiry of that year. By the document dated 6th May 1938 Abdul Manaf leased 32 kls. of land at a rent of Rs. 96 a year for three years. He admitted in the document that he had received the sum of Rs. 288, the rent for three years, in advance.

Counsel for the appellant has admitted that the two documents on which he bases his title would require registration under S. 17 (1) (d), Registration Act. He however takes refuge under a notification of the Punjab Government issued as No. 29 of 4th July 1888. It was issued under the proviso to S. 17 of Act 8 of 1871 and exempted from registration agricultural leases the terms granted by which did not exceed five years and the annual rents reserved by which did not exceed Rs. 50. We may reproduce the proviso for facility of reference below:

> Provided that the Local Government may by order published in the Official Gazette exempt from the operation of the former part of this section any leases executed in any district or part of a district the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed Rs. 50.

The proviso to S. 17 (1) of Act 16 of 1908 which is now in force is practically to the same effect. It may be noted that by operation of S. 25, General Clauses Act, the notification will hold good under the new Act also and although this Province has been separated from the Punjab the notification has the force of law in the N. W. F. P. by virtue of S. 6 of the N. W. F. P. Law and Justice Regulation 7 of 1901. Now we have to see whether the lease deeds are covered by the exemption contained in the notification and were therefore wrongly considered by the lower appellate Judge to be inadmissible in evidence. The terms of the two leases are no doubt less than five years. The rent in one case is however Rs. 75 a year and in the other Rs. 96 a year. Prima facie the rent being more than Rs. 50 the exemption would not apply.

The learned counsel for the appellant has urged that the word "reserve" does not necessarily mean "fix." He quoted two rulings in support of this proposition. One of them is A I R 1935 Mad 305.[1] In this case the term of lease was three years. It was stipulated that in the third year the lessor would receive Rs. 400 from the lessee. It was held by a single Judge that no annual rent was "reserved" within the meaning of the exemption and therefore the document was not compulsorily registrable. It may be noted that the notification in Madras is similar to that made by the Punjab. It is obvious that this ruling has no application to the case before us. In the second case reported in A I R 1939 Lah 558[2] a tenancy at will was created, that is to say the tenancy was terminable at the will of the landlord. Rent was however fixed and a period for the lease was also specified. It was held that there was no reservation of annual rent in the sense in which it was contemplated by the notification. In the present case no such power of cancellation has been given to the lessor and this ruling also has no bearing on the point. The word "reservation" has been defined in Wharton's Law Lexicon, 10th Edn., by J. M. Lely as "a keeping aside or providing." Again in Halsbury's Laws of England, Vol. 18, p. 427, note 887 the term reservation has been defined as follows:

> The term 'reservation' may be used in a wide sense as meaning any benefit in respect of the

1. ('35) 22 A I R 1935 Mad 305 : 156 I C 825, Gopalaswami Naidu v. Lakshmi Ammal.
2. ('39) 26 A I R 1939 Lah 558 : 186 I C 106 : 41 P L R 646, Mengh Raj v. Nand Lal.

subject-matter of the grant which is kept by the grantor for himself. Thus, it may imply a keeping back of a physical part of the thing, in which case it is equivalent to an exception, and accordingly, when the context requires it, the word 'reserving' is construed as making an exception; or the word may imply that the grantor reserves to himself some equivalent for the use of the land, such as rent or services in the nature of rent, and this is the only meaning of 'reservation' when used in its strict legal sense.

It is manifest that the word "reserve" in S. 17 (1) (d), Registration Act, and also in the notification is a technical expression used for keeping to himself by the lessor of a yearly rent in making the grant of the land to the lessee and in common parlance it is equivalent to the word "fix." We therefore arrive at the conclusion that the exemption contained in the notification of 1888 does not apply to the documents before us. It follows that the lower appellate Judge has rightly held that the documents are inadmissible in evidence and the suit has been correctly dismissed. We dismiss the appeal with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Peshawar 32

ALMOND J. C. AND MIR AHMED J.

Secretary of State — Appellant

v.

Mohd. Saifur Khan Naqibullah Khan and others — Respondents.

Appeal No. 105/39 of 1939, Decided on 11th November 1940, against decree and judgment of Dist. Judge, Peshawar Division, D/- 30th March 1939.

Land Acquisition Act (1894), S. 23 — Market value of land — Sale prices after notification for acquisition, fact of land being used for building purposes and proposal for converting sub-division in which it was situate into district can be taken into account.

Under S. 23 in determining the market value of the land to be acquired the sale prices of similar types of land in similar position in the past as well as after the notification under S. 4 (1) of the Act; the fact that the land was at the time of determining its value being used for building purposes; a proposal to convert the sub-division in which the land was situate into a district resulting in acceleration of high price for the land, can all be taken into account even though the aforesaid factors have come into being after the notification under S. 4 (1) of the Act: A I R 1939 P C 98, *Rel. on.* [P 33 C 1, 2]

Arbab Taj Mohd. Khan, Government Pleader — for Appellant.

L. Hukam Chand, and S. M. Abbasi — for Respondents 1 and 2, and other respondents, respectively.

Mir Ahmed J. — The Government required land for building a hydro-electric sub-station at Mardan. A notification was therefore issued on 15th October 1935 for acquiring 12kls. 13mls. 6srs. of land belonging to Mohd. Saifur Khan, Abdul Gafur Khan, Saadullah, Mehr Dil, Mahmud and Purdil. The Collector offered to pay Rs. 280-10-0 per kanal for the land. The owners did not accept this price. They asked for a reference to Court under S. 18, Land Acquisition Act. The matter was therefore sent up to the District Court and the District Judge tried the case. The District Judge found that this piece of land was situated in the midst of a new growing suburb. He referred to a sale by Fateh Mohd Khan to Ghulam Haider of 10 marlas of land for Rs. 750. According to a copy of the mutation which has been entered to record the sale took place on 14th October 1935. The Judge also referred to a judgment of a single Judge of this Court dated 15th August 1935. It was in a case of pre-emption. The land in dispute was situated in the neighbourhood of the land now in suit and was one kanal in area. This Court held that the sum of Rs. 800 which had been paid before the Sub-registrar was the correct price of the land under pre-emption. The District Judge also pointed out that Mardan had been converted into a district. (It was made a district on 1st January 1937). He observed that in expectation of the conversion of Marden into a district from a subdivision the price had been gradually rising round about that town. He also adverted to the sales of lands belonging to Attar Singh in a court auction. These sales took place on 31st March 1937, 1st April 1937 and 6th April 1937. The land was sold at an average rate of Rs. 149-11-8 per marla. He mentioned the fact that the owners had stated before the Collector that the land was at least worth .90 per marla. Taking all these factors into consideration the Judge arrived at the conclusion that Rs. 80 per marla, or in other words Rs. 1600 per kanal, was a fair average price of the land in suit. He therefore increased the price payable to the owners accordingly.

The Secretary of State has come up on appeal to this Court. The learned counsel has pointed out that besides the copy of the mutation which has not been attested, no proof has been produced to show that Fateh Mohd. Khan sold 10mls. of land to Ghulam Haidar at Rs. 750. He referred to S. 23 (1), Land Acquisition Act, in which the market value of the land in the neighbourhood on the date of the sale has been laid down as the criterion for assessing the price to be paid to the owner for forcible acquisition. He

objected to the admissibility of the evidence with regard to the sales of Attar Singh's lands. He said that the sales took place long after the notification had been issued for the acquisition of the land in suit. Counsel did not attach any value to the fact that the land was situated near the other habitations and also remarked that there was nothing to indicate that the proposal to convert Mardan into a district had anything to do with the rise of prices in the locality in which the land is situated. We have given the matter our careful consideration. It is in the award of the Collector that a police station was built close to this land in 1923. It is not therefore a matter for surprise that the proximity of the police station encouraged the building of houses in this locality. In fact the Collector has said :

> As I have remarked in my previous award good many houses have been built in the vicinity and many more are being built. The land became more costly being suitable for the construction of houses near the civil lines.

We are satisfied therefore that the land should be treated as one used for building purposes and that in view of its potentiality as a building site the most lucrative and advantageous price should be fixed for its forcible acquisition. We are fortified in this opinion by the remarks of their Lordships of the Privy Council in a ruling reported in A I R 1939 P C 98.[1] At p. 102 their Lordships have remarked :

> It is perhaps desirable in this connexion to say something about this expression 'the market price.' There is not in general any market for land in the sense in which one speaks of a market for shares or a market for sugar or any like commodity. The value of any such article at any particular time can readily be ascertained by the prices being obtained for similar articles in the market. In the case of land, its value in general can also be measured by a consideration of the prices that have been obtained in the past for land of similar quality and in similar positions, and this is what must be meant in general by 'the market value' in S 23. But sometimes it happens that the land to be valued possesses some unusual, and it may be, unique features as regards its position or its potentialities. In such a case the arbitrator in determining its value will have no market value to guide him, and he will have to ascertain as best he may from the material before him, what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities. For it has been established by numerous authorities that the land is not to be valued merely by reference to the use to which it is being put at the time at which its value has to be determined (that time under the Indian Act being the date of the notification under S. 4 (1)), but also by reference to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self-evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes but which at the valuation date is waste land or is being used for agricultural purposes, that the owner, however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be. It is plain that in ascertaining its value, the possibility of its being used for building purposes would have to be taken into account.

We think that the rate of Rs. 80 per marla fixed by the lower Court is a fair and reasonable price. It is approximately the rate at which Fateh Mohd. Khan sold his land to Ghulam Haidar and is nearly half of the peak price reached when the lands of Attar Singh were sold in 1937. A copy of the deed of sale by Fateh Mohd. Khan to Ghulam Haider has been produced in another case, Secretary of State v. Abdul Ghafur, which is also before us today and its correctness is not denied by the counsel for the appellant. The mutation is therefore a reliable piece of evidence. No doubt the sales of Attar Singh's lands were subsequent to the notification for the acquisition of the land in suit but they indicate the high water mark of the rise in prices which most probably began in 1923 and was accelerated by the proposal to convert Mardan into a district. They are therefore useful in assessing the price of the land in dispute and cannot be ignored. We do not see any ground for disagreeing with the lower Court and dismiss the appeal with costs. Pleader's fee Rs. 150, half to be paid to Mohd. Saifur and Abdul Ghafur and the other half to the remaining set of respondents in equal shares.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Peshawar 33

ALMOND J. C. AND MIR AHMAD J.

Civil Appeal No. 10/5 of 1940, Decided on 11th December 1940, from judgment and decree of Addl. Judge, Peshawar, D/- 22nd December 1939.

Mt. Zamo d/o Sherdil Khan and others Defendants — Appellants

v.

Habib Khan Qadir and others, Plaintiffs and others, Defendants — Respondents.

(a) N. W. F. P. Law and Justice Regulation, S. 34 — Land in suit valued at Rs. 388-2-0 and other property at Rs. 1900-8-0 — Two values cannot be combined — Second appeal does not lie.

1. ('39) 26 A I R 1939 P C 98 : 181 I C 230 : I L R (1939) Kar 167 : I L R (1939) Mad 532 : 66 I A 104 (P C), Narayana Gajapatiraju v. Revenue Divisional Officer, Vizagapatam.

The value for jurisdiction of the land in suit was Rs. 388-2-0 and the like value of the other property was Rs. 1900-8-0 :

Held that the value of each portion of the suit being below the prescribed limit, the two values could not be combined to make the case liable to further appeal under S. 34. [P 34 C 2]

(b) N. W. F. P. Muslim Personal Law (Shariat) Application Act (6 of 1935), S. 27—Succession — Questions coming up before Court after Act came into force — Mahomedan law must be applied irrespective of fact whether succession opened after or before Act.

All questions of succession which come up before the Courts after Act 6 of 1935 came into force must be decided according to Mahomedan law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after : A I R 1940 Pesh 52, *Foll.* [P 34 C 2]

Pir Bakhsh — for Appellants.

Abdur Rab Nishtar, Kazi Abdul Wahab and Pandit Anup Chand—for Respondents 1 to 5.

Mir Ahmad J. — The facts of this case have been given in great detail in the judgment of the trial Judge and have also been briefly noticed by the lower appellate Court. One Sherdil Khan died in 1933 leaving a widow Mt. Bibi Aisha, a married daughter, Mt. Zamo Jan, a married sister, Mt. Nawab Jan and an unmarried sister, Mt. Babo Jan. His wife died in 1933-34. The property left by Sherdil was mutated in the name of Mt. Babo Jan, his sister, who died in 1937. Some collaterals of Sherdil have brought this suit for possession of their customary law share in the property left by him. One of the defences taken was that the Shariat Act (6 of 1935) having come into force on 6th December 1935, the plaintiffs had no locus standi to bring the suit because the daughter and the sister of Sherdil were his only heirs under the Muslim Personal Law. The trial Judge gave decree to the plaintiffs for 23/32 share in the estate left by Sherdil. An appeal was preferred by the daughter of Sherdil, her husband and the sister of Sherdil to the District Court at Peshawar. The District Judge agreed with the original Court and dismissed the appeal. The same persons have come up on further appeal to this Court.

A preliminary objection was taken that no appeal lies. The value for jurisdiction of the land in suit is Rs. 388 2.0 and the like value of the other property is Rs. 1900-8-0. According to S. 34, Law and Justice Regulation, the value in a land suit should be Rs. 1000 or upward and in an unclassed suit it should be Rs. 2500 or upward in order to entitle a party to a further appeal. In this case the value of each portion of the suit is below the prescribed limit. Judicial Record Volume I case No. 76 is the authority for the view that the two values cannot be combined to make the case liable to further appeal. We consequently hold that the appeal does not lie and we treat it as an application for revision. A Bench of this Court has held in the ruling reported in A I R 1940 Pesh 52[1] that all questions of succession which come up before the Courts after Act 6 of 1935 has come into force shall be decided according to Mahomedan law irrespective of the fact as to whether the person whose estate is in dispute had died before that Act came into force or after. The rule of decision, therefore, in this case would be Mahomedan law and we have to see whether the plaintiffs can bring a suit for possession of a portion of the estate of Sherdil as heirs under Mahomedan law. The plaintiffs are distant collaterals and have under that law no right to inherit the property left by Sherdil in preference to his daughter and sister. This is not denied by the learned counsel who appeared for the respondents. The plaintiffs-respondents have therefore, no right to maintain the suit. The two Courts below have wrongly decided this case. They have committed a material irregularity in applying custom. We therefore, accept the petition, set aside the order of the two Courts below and dismiss the suit of the plaintiffs-respondents with costs throughout.

G.N./R.K. *Petition accepted.*

1. ('40) 27 AIR 1940 Pesh 52 : 192 I C 343, Fazal Haq Dilzada v. Dawar Shah.

A. I. R. 1941 Peshawar 34

ALMOND J. C.

Civil Revn. No. 591 of 1940, Decided on 7th January 1941, from order of Sub-Judge, First Class, Peshawar, D/- 26-10-1940.

Waqf Masjid—Defendant—Petitioner

v.

Sardar Khan Sharif Khan, Plaintiff and another, Defendant —

Respondents.

Civil P. C. (1908), Ss. 10, 151 and 115—Order under S. 10 refusing stay of subsequent suit pending previous one — Order though not open to revision held could be interfered with under S. 151.

In the case which was instituted by *A* in the first instance the defendant *B* did not object to the valuation of the suit at Rs. 300 put upon it by the plaintiff but later when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of

Rs. 1200 on to the suit and virtually created a situation in which conflicting decisions may be given by two different Courts. The Court in which the subsequent suit was filed by *B* refused to stay it under S. 10 pending the previous suit on the ground that the Court in which the suit was previously instituted by *A* had no pecuniary jurisdiction to try the suit :

Held that the order under S. 10 refusing to stay the subsequent suit was not subject to revision and though the powers conferred by S. 151 should not be exercised lightly the case was eminently one in which they should be exercised in order to avoid an idle multiplicity of suits by ordering the subsequent suit to be stayed pending the decision of the previous suit: A I R 1925 Lah 144; A I R 1926 All 212 and A I R 1929 Lah 12, *Ref.* [P 36 C 1, 2]

Kazi Mohammad Shafiq and L. Lal Chand— for Petitioner.

Kazi Mohtadulla — for Respondent 1.

Order. — This is an application for revision of the order of the Sub-Judge, first class, Peshawar, refusing to stay under S. 10, Civil P. C., a suit pending in his Court. The prayer in revision is that I should make an order staying the suit under the provisions of Ss. 10 and 151, Civil P. C. The facts of this case are as follows: On 5th July 1939 Waqf Masjid and Hujra through Ghulam Sarwar Khan brought a suit against Sardar for possession of a house. He alleged that he was the mutwalli of a certain wakf which owned 300 jaribs of land, that in order to arrange for the cultivation of this land he had built the house in suit in 1933-34 and had put the defendant, Sardar, who was cultivating some of the wakf land in possession of the house on condition of his paying Khakshora, Tora and other customary dues, that as Sardar did not cultivate the land in accordance with the plaintiff's wishes, he ejected him from the land in 1937, that he now required possession of the house which Sardar refused to give denying the ownership of the plaintiff. He therefore prayed for possession of the house and for Rs. 100 on account of Khakshora and Tora. He valued the suit at Rs. 300, i. e., Rs. 200 value of the house and Rs. 100 value of the other relief claimed. This case was pending in the Court of the Sub-Judge, fourth class, Charsadda. On 18th July 1939, Sardar put in his written statement in which he denied the allegations of the plaintiff and alleged that he had been in possession of the site on which the house is built for more than 12 years, that he had spent a considerable amount of money in filling and levelling the site and had then built a house upon it. He denied that the plaintiff was the owner of the house. He further alleged that he was entitled to improvements and that the suit was time-barred. As regards the valuation of the suit he merely said that the matter was a question of law.

The suit proceeded in that Court and had not yet been decided when on 15th January 1940 Sardar brought a suit against Wakf Masjid and Hujra through Ghulam Sarwar Khan and, secondly, Abdul Hinan. This suit was transferred to the Court of the Sub-Judge, first class, Peshawar. Sardar sued for a declaration that the house which is admittedly the subject of the first suit was situated in khasra No. 130 and not in No. 129, that the plaintiff was the owner in possession for 14 years and that defendant 1 had no connexion with the house. He valued the suit for purposes of jurisdiction at Rs. 1200. In his plaint he alleged that the house in dispute was situated in khasra No. 130 which he had acquired from defendant 2, Abdul Hinan, by an oral exchange more than 12 years ago, that he had subsequently built on the site, that he had spent much money on levelling the site, that as a precaution against any dispute arising between his heirs and Abdul Hinan an exchange deed was written on 15th November 1937 to give effect to this exchange and that a mutation was attested thereon on 1st May 1939. He then referred in paras. 5 and 6 to the suit pending in Charsadda and alleged that defendant 1, i. e., Ghulam Sarwar Khan had brought a suit and was trying to prove in that suit that the house was situated in khasra No. 129 and not in No. 130, that Ghulam Sarwar Khan was making an entirely unjust attempt to get a decree against him and therefore the necessity for a declaratory suit had arisen. The declaration which he asked for was that the house in dispute was situated in khasra No. 130 and not in khasra No. 129 and that defendant 1 had no connexion with it.

In his written statement, the defendant Ghulam Sarwar Khan reiterated the case which he had set up as plaintiff in the Charsadda Court and said that the exchange deed of 15th November 1937 was not really an exchange deed at all but it had been drafted as an exchange deed in order to defeat pre-emptors and that he himself had brought a suit for pre-emption of the land mentioned in that document. He further alleged that the land referred to in that document was not the same as the one which was covered by the house which was in dispute between him and the defendant. He asked that the suit should be stayed under S. 10, Civil P. C. Abdul Hinan was

proceeded against ex parte. The subordinate Judge of the first class, Peshawar issued a commission for the valuation of the house and came to the conclusion in spite of the report of the commissioner that it was worth Rs. 1200. He therefore held that he could not stay the suit under S. 10, Civil P. C., as the Court at Charsadda being empowered to hear cases only up to Rs. 1000 was not a Court which had jurisdiction to grant the relief claimed by Sardar.

In the revision application before me learned counsel for respondent Sardar has argued that as the order of the trial Court is an interlocutary one, it cannot be subject of revision in view of many rulings of this Court. That contention is undoubtedly correct as it has frequently been held in this Court that no revision application can lie against an interlocutory order. The question is therefore whether I should interfere under the provisions of S. 151, Civil P. C. That course has been taken in circumstances somewhat similar to those of the present case in three cases to which I have been referred by learned counsel for the petitioner. They are, A I R 1926 ALL 212,[1] A I R 1925 Lah 144[2] and A I R 1929 Lah 12.[3] In the first of these cases it was held that the High Court had inherent powers to make an order under S. 151, Civil P. C. In the second case it was held that the High Court could make the order under S. 115, and in the last case reference was merely made to the inherent powers of the Court and its power of superintendence. In my opinion, the present case is clearly one in which the powers conferred by S. 151 should be employed. The subject-matter in the two suits is obviously identical. In the case which was instituted in the first instance Sardar did not object to the valuation of the suit put upon it by Ghulam Sarwar Khan but later when apparently he thought that he had not raised a defence which might have been of benefit to him he approached another Court over the same subject-matter, put a valuation of Rs. 1200 on to the suit and virtually creates a situation in which conflicting decisions may be given by two different Courts. The powers conferred by S. 151, Civil P. C., should not be exercised lightly but I think the present case is eminently one in which they should be exercised in order to avoid what has been described as "an idle multiplicity of suits." For these reasons I accept this application and under the provisions of S. 151, Civil P. C., direct that the proceedings in the Court of the Sub-Judge, Peshawar, be stayed pending the decision of the suit in the Charsadda Court. The petitioner will have his costs of his application in this Court and pleader's fee is fixed at Rs. 16.

G.N./R.K. *Application accepted.*

1. ('26) 13 A I R 1926 All 212 : 93 I C 285 : 48 All 356 : 24 A L J 375, Harnand Lal v. Chaturbhuj.
2. ('25) 12 AIR 1925 Lah 144 : 82 I C 234, Mehtab Shah v. Ali Haider Shah.
3. ('29) 16 AIR 1929 Lah 12 : 113 I C 783, Kodumal Jethanand v. Tilakram.

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* A. I. R. 1941 Peshawar 36

MIR AHMAD AND SOOFI JJ.

Civil Revn. Petn. No. 315 of 1939, Decided on 21st January 1941, from order of Addl. Judge, Peshawar, D/- 11th July 1939.

Mashahur and others — Petitioners

v.

Subhan Din and others — Respondents.

* Civil P. C. (1908), O. 22, Rr. 3, 4 and 11 and O. 41, R. 4—Lower Court's decision jointly affecting all appellants — Death of one — Legal representative not brought on record within time — Appeal does not abate against all appellants.

Where a suit against several defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam in order to enable the plaintiffs to do so is decreed, the decision jointly affects all the defendants and if in appeal by them one of them dies and his legal representative is not brought on record within time, the appeal does not abate against all the appellants: A I R 1935 Pesh 126, *Disting.;* A I R 1918 Lah 227 ; A I R 1933 All 733 ; A I R 1934 Cal 703 and A I R 1933 Mad 655, *Rel. on.* [P 37 C 2]

Gul Mohd. Khan — for Petitioners.

S. Jaman Singh — for Respondents 1 to 5.

Mir Ahmad J. — Five persons, who are respondents 1 to 5 before us, brought a suit against 11 defendants for a declaration that the plaintiffs were entitled to water their lands from a particular stream at a specified point and for a perpetual injunction that the defendants should remove their dam shown in the plaint in order to enable the plaintiffs to do so, and that the defendants should not interfere with their enjoyment of those water rights in future. The trial Judge decreed the claim. Out of 11 defendants nine appealed to the District Judge, the remaining two having been made respondents along with the five plaintiffs. Of the nine appellants one Khada Mir died and his legal representatives were not brought on the record within 90 days. The Additional Judge following A I R 1935 Pesh 126[1]

1. ('35) 22 A I R 1935 Pesh 126 : 157 I C 994, Boota Mal v. Farid Khan.

held that the appeal abated so far as all the appellants were concerned. He dismissed the appeal. The eight persons who were appellants in the lower appellate Court and also the legal representatives of Khada Mir have jointly presented this application for revision against the order of the Additional Judge. Order 22, Rr. 3, 4 and 11, Civil P. C., read thus:

Rule 3. (1) Where one of two or more plaintiffs dies and the right to sue does survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. (2) Where within the time limited by law no application is made under sub-r. (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Rule 4. (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant. (3) Where within the time limited by law no application is made under sub-r. (1) the suit shall abate as against the deceased defendant.

Rule 11. In the application of this order to appeals, so far as may be the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

It is clear that if an appellant or a respondent dies and his legal representatives are not brought on the record within the limitation provided for the purpose, the appeal abates so far as that person is concerned. In case there are more than one appellant or respondent and the appeal has abated the question arises whether the appeal can be proceeded with by the other appellants or against the other respondents. In the case reported in A I R 1935 Pesh 126[1] the plaintiff had appealed against several respondents. One of the respondents had died and his legal representatives were not brought on the record within 90 days. As the plaintiff wanted a decree against all the respondents jointly a Bench of this Court held that the appeal had abated against them all. This is a correct view. The judgment of the lower Court had become final so far as the respondent who had died was concerned. If the appellate Court were to decide the case otherwise with regard to the other respondents there would have been two conflicting decrees in the same suit. The appeal could not therefore be carried on by the appellants against the other respondents and the appeal was consequently dismissed. Now the case where one of the appellants dies is different. Order 41, R. 4, Civil P. C., is in the following terms:

Rule 4. Where there are more plaintiffs or more defendants than one in suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal .... from the whole decree and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

It is obvious that where the decision of the lower Court jointly affects all the appellants the appellate Court has the power to reverse the decision with regard to all the persons concerned even though one of them may have appealed against it. As this rule enables the appellate Court to set aside the whole decree at the instance of one of the several persons affected by it, there can be no question of the case becoming res judicata so far as those appellants who have not appealed, are concerned. In other words, the Court when reversing the order can reverse it in toto and thus avoid the consequence of there being two contradictory decrees in the same suit. The corollary is apparent that the abatement of the appeal with respect to one of such appellants does not necessarily lead to the result that the whole of the appeal abates and should consequently be dismissed. It follows that in this case the appellate Judge could hear the appeal and if he thought that the decree should be set aside he could set it aside in favour of all the defendants in the lower Court even though one of them was not a party to the appeal by reason of abatement. This view was taken in the following cases: The Division Bench of the Lahore High Court had come to this conclusion in A I R 1918 Lah 227.[2] The headnote runs thus:

During the pendency of an appeal one of the appellants died and no application was made to bring his legal representatives on the record till after the period of limitation had expired. It was contended that the appeal had abated in toto: *Held* that the decree of the trial Court having been passed on a ground common to all the defendants the case was covered by O. 41, R. 4 and the appeal could therefore proceed.

The Division Bench of the Allahabad

2. ('18) 5 A I R 1918 Lah 227: 46 I C 50: 84 P R 1918, Piyare Lal v. Chura Mani.

High Court has taken a similar view in A I R 1933 ALL 733.[3] The headnote is as under:

A sale deed purported to transfer the entire property jointly in favour of all the vendees for one consolidated amount and there was no specification of different interests of the various vendees in the sale deed. The trial Court also treated the purchases as a joint one and passed one joint decree for pre-emption against all the vendees. One of the vendees died pending appeal and his legal representative was not brought on record. *Held* that the mere fact that one of the vendees had dropped out, would not prevent the other vendees from prosecuting their appeal, because they were interested in the entire property transferred and were entitled to press their appeal as against the plaintiff on a ground common to all the vendees and that the appeal did not abate as a whole.

A Division Bench of the Calcutta High Court has said the same in A I R 1934 Cal 703.[4] The headnote is to the following effect :

A suit was brought by the plaintiffs for a declaration of their title to certain lands and for recovery of khas possession in respect of the same. The first Court granted a declaration of the plaintiff's title to a fractional share in the lands in suit but dismissed the plaintiff's suit for khas possession. On appeal the lower appellate Court set aside that decision and decreed the plaintiff's suit in full. Defendant 1 died during the pendency of the appeal in the lower appellate Court and his two sons were substituted as his heirs in the record of the appeal. A second appeal was filed on behalf of both the sons. One of the sons died during the pendency of the second appeal and his heirs were not brought on the record within the time allowed by law. *Held* that O. 41, R. 4 enables one of the two heirs of the defendant to maintain the appeal from the whole decree, and it was competent to the appellate Court to reverse or vary the decree in favour of all the plaintiffs or all the defendants as the case may be, although one of the defendants or one of the defendant's heirs did not join in the appeal.

A Division Bench of the Madras High Court has laid down this proposition in A I R 1933 Mad 655.[5] The headnote is in the following terms :

During the pendency of an appeal, appellants 2 and 5 died; the legal representatives of appellant 2 were brought on the record, but an application by an alleged representative of appellant 5 was dismissed. *Held* that the lower Court's decree could be dealt with as a whole as it stood against all the appellants under O. 41, R. 4 even though the legal representative of appellant 5 was absent on the record.

The case before us is therefore distinguishable from A I R 1935 Pesh 126[1] and the authorities quoted above apply to it. We consequently hold that the lower appellate Court has committed a material irregularity in deciding the case on the strength of an authority which is not applicable to the case at all. The petition is accepted, the order of the lower appellate Court set aside and the case remanded for decision on merits. Costs in this Court shall follow the event.

D.S./R.K. *Case remanded.*

3. ('33) 20 A I R 1933 All 733: 146 I C 511: 1933 A L J 1049, Jamna Bhagat v. Oudh Behari Mal.
4. ('34) 21 A I R 1934 Cal 703: 154 I C 147; 61 Cal 879: 59 C L J 362: 38 C W N 743, Satulal Bhattacharjee v. Asiraddi.
5. ('33) 20 A I R 1933 Mad 655: 146 I C 26, Chenchuramayya v. Venkatasubhayya Chetty.

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* A. I. R. 1941 Peshawar 38

ALMOND J. C. AND SOOFI J.

First Appeal No. 26/10 of 1939, Decided on 12th December 1940, against order and decree of Senior Sub-Judge, Peshawar, D/- 26th October 1938.

B. Kala Ram S. Bhag Singh —
Plaintiff — Appellant

v.

Fazal Bari Khan and others —
Defendants — Respondents.

(a) Evidence Act (1872), S. 32 (5)—Entry by father in his pocket book regarding birth of his sons proved to be in his handwriting by witnesses acquainted with his handwriting — Fact that they saw his handwriting long ago does not shake value of their evidence.

Where entry by father in his pocket book regarding the births of his various sons which is relevant under the provisions of S. 32 (5) is proved to be in his handwriting by witnesses acquainted with his handwriting in their official capacity, the fact that it is a very long time since any of them saw his handwriting would not shake the value of the evidence which they have given. [P 39 C 1, 2]

(b) Evidence Act (1872), S. 35 — Entry in school register regarding age of boy admitted is admissible.

There is a presumption that when a boy is admitted into the school he was accompanied by some close relative of his who must have been aware of his age. The entry regarding the age of the boy in the school register is therefore admissible. [P 39 C 2]

*** (c) Minor—Minor representing to be major entering into contract—Contract is void—Minor cannot be compelled to refund money received by him.**

Where a minor representing to be a major has entered into a contract, the contract is void and unenforceable against the minor. The minor cannot even be compelled to refund the money received by him under the contract : A I R 1937 All 610 (F B), *Approved* ; A I R 1928 Lah 609 (F B), *Dissent.* [P 40 C 1, 2]

L. Ram Labhaya and L. Wasirchand — for Appellant.

Abdul Latif — for Respondents.

Almond J. C.—This is an appeal against the order of the senior subordinate Judge, Peshawar dismissing the plaintiff's suit. The plaintiff Kalaram sued the defendant Fazal Bari for recovery of Rs. 5000, principal and Rs. 5000, interest or rent on the basis of

a mortgage deed executed by Fazal Bari on 5th January 1930. The defendant Fazal Bari has died during the pendency of this appeal and his representatives have been brought on the file. The defence of the defendant was that he was a minor at the time of the execution of the mortgage deed which therefore could not be enforced against him. He also denied the execution of the deed. The following issues were framed by the trial Court :

1. Did the defendant execute the mortgage deed in question ?

2. If so, was the defendant minor at the time of the execution of the deed and is therefore not liable?

3. Did the defendant pay Rs. 500 on account of interest, and if so, what is its effect ?

4. What is the defendant's share in the property in suit ?

5. To what relief is the plaintiff entitled ?

The trial Court found that the mortgage deed had been executed by the defendant, that he was a minor at the time of its execution, that he did not make any false representation as to his age and therefore the plaintiff was entitled to no relief. In the appeal before us learned counsel has not contested the finding on the question of the execution of the document. He has however made the following points: 1. That it is not proved that the defendant was a minor at the time of the execution of the deed. 2. That he did make a false representation as to his age to the plaintiff, and 3. That if the first point is found against him and the second in his favour he is entitled to restitution of the original sum of Rs. 5000 advanced. These are the three points for decision in this case.

As regards the question of the age of the defendant the evidence is based entirely on entries in certain documents. The first of these is made in a pocket book which is said to have belonged to the minor's father Juma Khan who was in service in Baluchistan in 1912 when the defendant is said to have been born. The father is said to have made the entries in this book regarding the births of his various sons and the birth of the defendant is shown to have taken place on 3rd April 1912. To prove that this entry which is relevant under the provisions of S. 32 (5), Evidence Act, was in the handwriting of the defendant's father one witness M. Sadulla Jan, a pleader, was examined at the trial and two others who are senior E. A. C.s in Baluchistan were examined on commission. All these three witnesses state that they served under the defendant's father in Baluchistan and thus became acquainted with his handwriting in their official capacity. They express the opinion that the entry in dispute is in the handwriting of Juma Khan. These three witnesses are entirely independent and there is no reason for doubting the opinion which they have expressed. The only criticism which learned counsel for the appellant can make on their evidence is that it is a very long time since any of them saw the handwriting of Juma Khan, but that would not in our opinion shake the value of the evidence which they have given.

The other piece of documentary evidence relates to entries in documents at schools which the defendant attended. He first attended the Islamia High School in Peshawar where he was admitted in 1919 and the admission register shows his date of birth as 3rd April 1912. He went into the Edwards High School in 1922 where his birth was again shown as 3rd April 1912. An entrance form for the school-leaving certificate was sent by the latter school to the Punjab University and was proved by an official of the University. In that application the date of birth is also given as 3rd April 1912. Learned counsel has contended in connexion with these entries in the school registers which are admissible under S. 35, Evidence Act, that they can have little value in view of the fact that we are in the dark as to the persons who caused the entries to be made. There is a presumption however that when the boy was admitted into the school he was accompanied by some close relative of his who must have been aware of his age. All these entries in the various documents were made long before the present dispute arose and when there was no occasion to forge the age of the boy. There is also a further entry in the service book of the defendant kept by Government for he entered Government service after leaving school and his date of birth is also given there as 3rd April 1912. On these facts we agree with the learned trial Judge that the defendant was a minor at the time of the execution of the document.

We now turn to the second point, namely whether the defendant made a false representation as to his age at the time of the execution of the document. The document was written on 5th January 1930 by Waishnu Das, a deed-writer. He says that at the time he wrote it there was no mention in it of the age of the defendant. The document was registered on 8th January and bears an interlineation giving the age of the defen-

dant as 22 years. The defendant denies that he made this addition with his own hand, though he admits that he initialled the addition and says that he did so at the instigation of his step-brother Mohd. Sadiq who has been traceless for the last five years. Lalchand, P. W. 5, the broker who arranged this contract, says that he was present at the time the deed was registered and that the addition regarding the age of the defendant was made by the defendant in his own hand at the instance of the Sub-Registrar. This witness Lalchand is an independent witness and his evidence appears to us to be in accordance with the probabilities of the case. Sub-Registrars before registering a document are required to satisfy themselves that an executant is not a minor and it seems to have been for this reason that the addition was made. The learned trial Judge was of opinion that as this fact was established, the plaintiff should therefore have been put on his guard as regards the age of the defendant and that as he took no steps to inquire about the real age of the defendant, he could not have been misled by the statement of the defendant as to his age. We are of opinion that there was a definite misrepresentation by the defendant as to his age. He stated that he was 22 years old. The plaintiff had no means of ascertaining the correctness of this and we think that it was on the basis of this representation of the defendant that the money was then advanced.

There remains the last legal point. Learned counsel concedes that in view of the decision of the Judicial Committee of the Privy Council in 30 Cal 539[1] the contract between the plaintiff and the defendant is void and is unenforceable. It is also conceded that in view of the decisions of all the High Courts in India the defendant is not estopped from pleading his minority under the provisions of S. 115, Evidence Act. He contends however that the plaintiff is entitled to restitution of the sum of Rs. 5000 which he advanced under this contract. There is a violent conflict of opinion on this point between the High Courts in India. The case on which the appellant relies is a judgment of a Full Bench of the Lahore High Court in AIR 1928 Lah 609.[2] The decision in that case was given by a Bench of five Judges out of whom four were of opinion that in circumstances like the present case the minor defendant could be compelled to restore the money which he received under the contract: one Judge dissented from this view and held that the minor could not be compelled to restore the money which he had received. That judgment was followed by a single Judge of the Calcutta High Court in A I R 1936 Cal 567.[3] The opposite view was taken by the Allahabad High Court in AIR 1937 ALL 610.[4] That case was decided by three Judges who after considering the Lahore case all came to the conclusion that the minor defendant could not be compelled to restore money which he had received under the contract. The law on the subject has been discussed in extreme detail in all these three judgments and nothing can be added to the arguments which have been set forth in them. It only remains to be said that we consider that the view of the Allahabad High Court is the correct one. To hold otherwise would, in our opinion, be to evade the provisions of the Contract Act as interpreted by the Privy Council in 30 Cal 539.[1] The following passage in the Allahabad case appears to us to be particularly pertinent:

> To pass a decree against a minor enforcing his pecuniary liability would while holding that the contract is void and unenforeable, at the same time be passing a decree against him on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor under the cloak of equitable doctrine.

There were remarks to a similar effect by their Lordships of the Privy Council in the Calcutta case referred to. They cited with approval a dictum of Romer L. J. given in an English case to the following effect:

> The short answer is that a Court of equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void.

We are therefore of opinion that the decision of the Court below is correct though on different grounds. We accordingly dismiss this appeal with costs. Pleader's fee Rs. 150.

D.S./R.K. *Appeal dismissed.*

1. ('03) 30 Cal 539 : 30 I A 114 : 7 C W N 441 : 8 Sar 374 (P C), Mohori Bibee v. Dharmodas Ghose.
2. ('28) 15 AIR 1928 Lah 609 : 111 I C 175 : 9 Lah 701 : 30 PLR 60 (F B), Khan Gul v. Lakha Singh.
3. ('36) 23 A I R 1936 Cal 567 : 165 I C 863 : I L R (1937) 1 Cal 283 : 41 C W N 115, Manmatha Kumar Saha v. Exchange Loan Co. Ltd.
4. ('37) 24 AIR 1937 All 610 : 170 I C 934 : I L R (1937) All 860 : 1937 A L J 688 (F B), Ajudhia Prasad v. Chandan Lal.

(28) A. I. R. 1941 Peshawar 41

ALMOND J. C. AND MIR AHMAD J.

Mirza Jan Ghulam Haidar

v.

Ghulam Raza Mian Mohammad

Appeal No. 82/32 of 1940, Decided on 23rd December 1940, from judgment and decree of Addl. Judge, Peshawar, D/- 28th March 1940.

(a) Civil P. C. (1908), O. 22, R. 4—Execution sale set aside — Suit by auction purchaser for recovery of sale price against decree-holder *A*, judgment-debtor *B* and other decree-holder *C* who shared sale proceeds rateably with *A*, decreed — At hearing of first appeal by *A*, *B* and *C*, *B* dying and his representatives substituted — Appeal allowed — Auction purchaser filing second appeal against *A*, *B* and *C*—Appeal held abated only against representatives of *B* but not against *A* and *C*.

On the setting aside of the execution sale the auction purchaser instituted a suit for the recovery of the sale price against the decree-holder *A*, the judgment-debtor *B*, and another decree-holder *C* who had shared the sale proceeds rateably along with *A*. The suit was decreed. At the hearing of the first appeal by *A*, *B* and *C*, *B* died and his representatives were substituted in his place. The appeal having been allowed the auction purchaser filed a second appeal against *A*, *B* and *C* in spite of the fact that *B* had died as aforesaid :

Held that the appeal abated only against representatives of *B* but not against *A* and *C* inasmuch as the auction purchaser could sue on his claim *A* and *C* even if he never made *B* a party to the suit at all. [P 42 C 1]

(b) Limitation Act (1908), Arts. 97 and 62 — Execution sale confirmed — Objections allowed and confirmed in revision — Suit by auction purchaser for recovery of purchase price falls under Art. 97 and not Art. 62 — Cause of action arises on date on which objections were allowed or date on which they were confirmed in revision.

Where an execution sale is confirmed, and the objections to the sale are subsequently allowed and also confirmed in revision a suit by the auction purchaser for recovery of the purchase price on failure of consideration for sale falls under Art. 97 and not under Art. 62, and the cause of action arises either from the date of the order allowing the objections or from the date of the order in revision confirming the objections : A I R 1937 All 689 and A I R 1931 Lah 448, *Rel. on* ; 19 Cal 123 (P C) and A I R 1930 Sind 12, *Expl. and Rel. on.* [P 42 C 1, 2]

(c) Civil P. C. (1908), O. 21, Rr. 90 to 93 — Execution sale — Judgment-debtor proved to have no title to property sold — Auction purchaser cannot maintain suit to recover purchase money—His remedy is under O. 21, R. 93.

An auction purchaser at court sale is not entitled to maintain a suit for the recovery of purchase money in the event of the judgment-debtor being proved not to have any title to the property sold. His remedy is confined within the limits of O. 21, R. 93 : A I R 1938 All 593 (F B) and A I R 1938 Pat 150, *Foll.* : A I R 1932 Lah 401 (F B) and A I R 1926 Cal 971, *Dissent.* [P 42 C 2; P 43 C 1]

(d) Pleadings — Fraud.

Where fraud is alleged it must be specifically pleaded. [P 43 C 2]

Sh. Mohammad Shafi — for Appellant.

Sh. Allah Baksh and L. Nanak Chand — for Respondent 1.

Almond J. C. — The facts of this litigation are as follows : Ghulam Raza obtained a decree for Rs. 300 against Ahmad Bakhsh and Ram Singh in 1924. The decree-holder got the house now in suit put up for auction in execution of his decree and sold on 19th January 1932 to Mirza Jan for Rs. 700 subject to a mortgage of Rs. 2000 in favour of one Inzar Gul. On 20th February 1932, this sale was confirmed. Before it was confirmed, objections to the sale had been put in by Abdul Latif, Mt. Amina Begam and Iqbal Sultan, the representatives-in-interest of Mustaqim who had also been a defendant in Ghulam Raza's suit, and those objections were also dismissed on 20th February 1932. Abdul Latif thereafter died and further proceedings on the objections were continued by Mt. Amina Begam and Iqbal Sultan and eventually their ownership of the property was established by the order of the Additional Judge, Peshawar, dated 7th March 1935 in Civil Appeal No. 7 of that year. The finding was confirmed on an application for revision made to this Court—Civil Revn. No. 156 of 1935[1] decided on 17th June 1935. One other preliminary fact need be stated viz., that out of the sum of Rs. 700 paid by Mirza Jan for the house, Rs. 318-8-0 were paid to the decree-holder, Ghulam Raza, Rs. 175 were paid to Tila Mohammad who had made an application for rateable distribution of the assets and Rupees 146-8-0 were paid to Ahmad Bakhsh the judgment-debtor. The balance of the sum went in the expenses of the sale. Mirza Jan has now brought a suit against Ghulam Raza, Ahmad Bakhsh and Tila Mohammad for the recovery of Rs. 700 principal and Rs. 399 interest on the failure of the consideration for the sale. His suit was decreed by the trial Court in the following form : Ghulam Raza was ordered to pay Rs. 318-8-0 plus costs of the sale and the other two defendants were ordered to pay the sums which they had actually received.

Against that decree, Ghulam Raza alone appealed to the District Court, but the Additional Judge set aside the decree in toto. He held that in the first place the suit was time-barred and in the second place that even if the plaintiff had any cause of action for recovery of the purchase money in

1. *Reported in* ('36) 23 A I R 1936 Pesh 41 : 160 I C 895, Ghulam Raza v. Mt. Ikbal Sultan.

equity, there were clearly no equities in his favour in the present case as he had brought the suit with some delay and in the meantime the remedy of Ghulam Raza against his judgment-debtor had become time-barred. Against that decree of the District Court the plaintiff has presented this further appeal. The appeal was filed against the three original defendants in spite of the fact that at the hearing of the appeal before the District Judge Ahmad Bakhsh had already died and his legal representatives were substituted for him as respondents in that case. Learned counsel for the contesting respondent have argued that the appeal abates in toto as it was filed against a defendant who was dead. Learned counsel for the plaintiff-appellant concedes that his appeal must fail as against the representatives of Ahmad Bakhsh but contends that it does not abate in toto. We are of opinion that the appeal does not abate against the remaining respondents for it is evident that on the plaintiff's claim he is entitled to sue Ghulam Raza and Tila Mohamad even if he never made Ahmad Bakhsh a party to the suit at all. We are therefore of opinion that the appeal does not abate as against the remaining respondents.

The two other points which have been argued in this appeal are the question of limitation and the question whether a suit lies for the relief which the plaintiff claims. As regards the question of limitation learned counsel for the appellant contends that Art. 97 applies, whereas learned counsel for the respondent contends that Art. 62 applies but even on the cases on which counsel for respondent relies Art. 97 is clearly applicable. The two cases which he refers to are 19 Cal 123[2] and 118 I C 203.[3] In the first of these cases it was held that either Article 97 or Art. 62 applied and in the latter case it was laid down that Art. 62 applied if the sale was void ab initio and that Art. 97 applied if the consideration subsequently failed. That is also the ratio decidendi which has been given in the two cases relied upon by counsel for the appellant namely 171 I C 923[4] and A I R 1931 Lah 448.[5] We have no doubt that Art. 97 applies and that the cause of action arose either from the order of the District Judge in March 1935 or from the subsequent order of this Court in June 1935. From either of those dates the suit is within time.

As regards the maintainability of the suit there are conflicting rulings. The leading cases on the subject are, A I R 1932 Lah 401[6] and A I R 1926 Cal 971,[7] on the one side, and A I R 1938 ALL 593[8] and A I R 1938 Pat 150[9] on the other. These latter two rulings do not appear to have been brought to the notice of the trial Court which referred to rulings of earlier dates. The Lahore and Calcutta view is to the effect that a suit for the repayment of the sale money lies on equitable grounds. In the Calcutta case relief was actually refused to the plaintiff on the ground that there were no equities in his favour as the decree-holder had represented the property sold, by inadvertence or perhaps by carelessness, to be that of the judgment-debtor and that in the meantime the decree-holder's right to recover from the judgment-debtor had become time-barred. The Lahore view goes beyond this and holds that there is always an implied representation by the decree-holder that the judgment-debtor has some interest in the property which the decree-holder gets up for sale and if the judgment-debtor has no such interest, then the auction purchaser is entitled to recover his purchase money from the decree-holder unless there are equities against the auction purchaser. The view of the Allahabad and the Patna High Courts is that the remedy of an auction purchaser in cases in which the judgment-debtor has no interest in the property is confined to a right to recover his purchase money under O. 21 R. 93, when the sale has been set aside under R. 92, and that apart from that right he has no equitable relief by way of suit. In this connexion they referred to the fact that R. 93, reproduced S. 315 of the Code of 1882 with an important modification. Section 315 of the old Code read as follows :

> When a sale of immovable property is set aside under S. 310-A, S. 312 or S. 313 or when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold and the purchaser is for that reason deprived of it, the pur-

2. ('92) 19 Cal 123 : 18 I A 158 : 6 Sar 91 (PC), Hanuman Kamat v. Hanuman Mandur.
3. ('30) 17 A I R 1930 Sind 12 : 118 I C 203 : 24 S L R 172, Abdul Rahim Fateh Mahomed v. Kadu.
4. ('37) 24 A I R 1937 All 689 : 171 I C 923 : 1937 A L J 812, Hans Ram Singh v. Kishore Lal.
5. ('31) 18 A I R 1931 Lah 448 : 135 I C 63 : 13 Lah 1 : 32 P L R 457, Chanan Mal v. Maharaj.
6. ('32) 19 A I R 1932 Lah 401 : 138 I C 47 : 13 Lah 618 : 33 P L R 649 (FB), Mehar Chand v. Milkhi Ram.
7. ('26) 13 A I R 1926 Cal 971 : 96 I C 64 : 53 Cal 758 : 43 CLJ 418, Reshee Case Law v. Manik Molla.
8. ('38) 25 A I R 1938 All 593 : 178 I C 1 : ILR (1938) All 922 : 1938 A L J 955 (FB), Amar Nath v. Firm Chotelal Durga Prasad.
9. ('38) 25 A I R 1938 Pat 150 : 175 I C 347 : 19 P L T 80, Paliram v. Laheria Sarai Central Co-operative Bank Ltd.

chaser shall be entitled to receive back his purchase money from any person to whom the purchase money has been paid.

The present rule reads as follows:

When a sale of immovable property is set aside under R. 92, the purchaser shall be entitled to an order for the repayment of his purchase money against any person to whom it has been paid.

The argument of the Allahabad and Patna High Courts is to the effect that the Legislature by removing the additional clause in re-enacting the Code in 1908 intended to deprive the auction purchaser of any remedy except that given by the new rule. The argument of the Lahore and Calcutta Courts on the other hand is that the additional clause was removed by the Legislature as it was unnecessary in view of the fact that the auction purchaser had already another remedy by way of equitable relief to be sought in a separate suit. Under S. 9, Civil P. C., the Courts have jurisdiction to try all suits of a civil nature except suits of which their cognizance is expressly or impliedly barred, and the question for decision in this case is whether this suit is impliedly barred by the provisions of O. 21, R. 93, Civil P. C.

We are of opinion that it is so impliedly barred. When the Legislature removed the additional clause in re-enacting the Code of Civil Procedure, they must have done so deliberately. There was no other provision of statute law under which the auction purchaser could recover the sale money when he was ousted by a paramount title and we think that the reasonable inference was that the Legislature intended that the rights of the auction purchaser to get a sale set aside were to be confined within the limits of O. 21, R. 93. In dealing with the general subject of execution provision has been made in which under certain circumstances suits can be brought to establish rights which have been denied in execution. No such provision has now been made in O. 21 in the case of an auction purchaser who is subsequently ousted by a paramount title although he had some remedy under the old Code. To grant the relief which the plaintiff now seeks by a separate suit would, in our opinion, amount to nothing more than granting him a relief which the Legislature meant to deny him. The plaintiff in the present case sued solely on the basis of failure of consideration. At the hearing of this appeal, learned counsel did make a suggestion that there had been some sort of misrepresentation or fraud on the part of the plaintiff who was well aware at the time he got the property put up to auction that the judgment-debtor had no interest in it, but that case was not set out in the plaint and where fraud is alleged it must be specifically pleaded. We are, therefore, not prepared to hold that the plaintiff has any other cause of action except the failure of consideration. We accordingly dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Peshawar 43

ALMOND J. C. AND MIR AHMAD J.

Mt. Kunti Devi — Defendant — Petitioner

v.

L. Bhola Ram — Plaintiff — Respondent.

Civil Revn. No. 427 of 1939, Decided on 23rd January 1941, from order of Sub-Judge, First Class, Peshawar, D/- 28th October 1939.

* Civil P. C. (1908), Sch. 2, Para. 1—Suit for restitution of conjugal rights can be referred to arbitration.

The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there is nothing in Sch. 2, Civil P. C., to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award: *Case law referred.* [P 44 C 2; P 45 C 1]

Wazir Chand — for Petitioner.

P. C. Kapur — for Respondent.

Mir Ahmad J.—In this case Bhola Ram, respondent sued, Mt. Kunti Devi, the petitioner, for restitution of conjugal rights. The marriage was not denied but certain circumstances were pleaded as a bar to the grant of a decree for restitution of conjugal rights. The parties appointed R. S. Pandit Mool Chand as an arbitrator. The arbitrator gave his award to the effect that the plaintiff should be given a decree subject to certain conditions. The trial Judge passed a decree in accordance with the award. Mt. Kunti Devi has come up on revision to this Court. The learned counsel for the petitioner has raised the point that a suit for restitution of conjugal rights could not be referred to arbitration. He quoted 37 P R 1895[1] (a Division Bench ruling), A I R 1918 Lah 357[2] (a single Judge ruling), A I R 1929 Lah 177[3] (a single Judge ruling), A I R 1929 Lah 394[4] (a single Judge ruling) and A I R

1. ('95) 37 P R 1895, Hira v. Dina.
2. ('18) 5 A I R 1918 Lah 357 : 45 I C 163 : 78 P L R 1918, Mt. Kalabatu v. Prabhdial.
3. ('29) 16 A I R 1929 Lah 177 : 118 I C 464 : 30 P L R 600, Faiz Ali v. Ashraf Khatun.
4. ('29) 16 A I R 1929 Lah 394 : 116 I C 215 : 30 P L R 122, Malka v. Sardar.

1933 Lah 532[5] (a single Judge ruling). Counsel for the respondent quoted A I R 1934 Oudh 494[6] (a Division Bench ruling). As an interesting question of law was involved, the case was placed before a Bench of this Court. In the case reported in 37 P R 1895[1] the point which really persuaded the Judges to set aside the reference was that the parties were minors and that the Court had not given a sanction under O. 32, R. 7, Civil P. C., for reference to arbitration. A general remark was however made that the Court was not competent to delegate to the arbitrators the question whether or not a claim for custody of a wife should be decreed, such question, especially when either party is a minor, being entirely one for the discretion of the Court. Their Lordships remarked :

This is a function which cannot be delegated to arbitrators, and the present case therefore was particularly one in which it was not for the benefit of the minor that the adjudication of the case should be entrusted to a tribunal not subject to ordinary rules of procedure, and whose decisions are final.

The headnote of the case reported in A I R 1918 Lah 357[2] which was decided by a single Judge is to the following effect :

It is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration. Where therefore in a suit for restitution of conjugal rights, the Munsif delegated the entire suit to persons appointed by parties as their arbitrators :

Held that the Court could not delegate its function to arbitrators and the case should be tried on its merits.

The discussion is very short and 37 P R 1895[1] has been relied upon. In A I R 1929 Lah 177[3] the headnote runs thus :

In a suit for restitution of conjugal rights the question as to the validity of a marriage can be referred to arbitration.

The principle enunciated is the ipse dixit of the Judge. A I R 1918 Lah 357[2] was distinguished. In A I R 1929 Lah 394[4] the headnote is in the following terms :

A criminal complaint cannot be referred to arbitration and therefore the award following it cannot be made a rule of a civil Court. The question of restitution of conjugal rights cannot be referred to arbitration as that matter must be decided by the the Court itself.

It was during the inquiry under S. 202, Criminal P. C., of a criminal complaint instituted by the husband against the wife that a reference to arbitration was made and the reference was set aside, because a criminal complaint could not be referred to arbitration. The other general remark was therefore only by way of obiter. The Judge who decided A I R 1933 Lah 532[5] did not give his own reasons and depended on 37 P R 1895[1] and A I R 1929 Lah 394[4] in laying down that a suit for restitution of conjugal rights could not be referred to arbitration. In A I R 1934 Oudh 494[6] the view taken was that a suit for restitution of conjugal rights may be referred to arbitration but the Judge may not accept the award in the matter of the exercise of discretion in granting the decree. The headnote is to the following effect :

Although it is entirely within the discretion of the civil Court to grant or refuse to grant a decree for restitution of conjugal rights, a suit for conjugal rights can be referred to arbitration as such suits come within the purview of para. 1, Sch. 2. The function of the Court to grant or refuse to grant a decree for restitution of conjugal rights is not delegated to arbitrators when such a suit is referred to the decision of arbitrators under the provisions of Sch. 2. The Court has ample powers to remit the award for reconsideration to the arbitrators or to refuse to make the award a decree of the Court. Even if it be deemed that to some extent the discretionary powers of the civil Court to grant or refuse to grant a decree for restitution of conjugal rights have been taken away from it, when such a suit is referred to arbitration, in the absence of any provision to that effect, it comes within the purview of para. 1, Sch. 2.

Now para. 1 of Sch. 2, Civil P. C., runs thus :

(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

There is no restriction in this paragraph as to the matter which can be referred to arbitration. Every matter in dispute could be so referred, and the subsequent paragraphs lay down the procedure which the Court as a supervising authority has to adopt. Under para. 16, the Court has to proceed to pronounce judgment according to the award if the award is not open to any of the objections laid down in the previous paragraphs of the schedule. The question whether a person should be given a decree for restitution of conjugal rights against his wife is a matter in difference between the husband and wife in suits for restitution of conjugal rights and there seems to be no legal bar in Sch. 2, Civil P. C., to its being referred to arbitration. We have given the gist of the rulings referred to. The learned Judges of the Lahore High Court have not applied themselves to this aspect of the

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5. ('33) 20 A I R 1933 Lah 532 : 144 I C 179 : 34 P L R 282, Nathu v. Sarnun.
6. ('34) 21 A I R 1934 Oudh 494 : 152 I C 90 : 10 Luck 228 : 11 O W N 1203, Rup Narain v. Mt. Nandrani.

matter at all. The Judges of the Oudh Court have however pointed out that the statute does not debar such reference to arbitration. In our opinion there is nothing in the statute to prevent a reference of the whole suit for restitution of conjugal rights to arbitration and to a decree being passed in accordance with the award. We therefore hold that the reference in this case is legal. There is no ground for interference in the decree of the lower Court otherwise. The petition is dismissed with costs.

D.S./R.K. *Petition dismissed.*

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(28) A. I. R. 1941 Peshawar 45

ALMOND J. C. AND MIR AHMAD J.

Kalu Ram Diyala Ram—Defendant—Appellant

v.

Mian Feroz Shah Mian Rahim Shah, Plaintiff and another, Defendant — Respondents.

Appeals Nos. 26/3 and 32/19 of 1939 and Cross-objections No. 17 of 1941, Decided on 13th January 1941, from judgment and decree of Senior Sub-Judge, Peshawar, D/- 30th October 1939.

(a) Deed—Validity—Execution — Document not signed by all by whom it purports to be executed—Validity — Intention of parties must be looked to.

Where the intention of the parties to a contract is that the document shall not be complete till it is signed by all by whom it purports to have been executed the document cannot be taken into consideration. But if the intention is that the signatures of those who have signed the document shall be enough to perfect the contract then the document is complete and the contract contained therein can be enforced : 25 Mad 389 and A I R 1916 Mad 692, *Rel. on* ; A I R 1921 Nag 66, *Approved and held obiter.* [P 47 C 1]

(b) Transfer of Property Act (1882), S. 130 — Transfer of Property Act not applicable—Hundi can be assigned orally independently of Negotiable Instruments Act.

In provinces where the Transfer of Property Act does not apply, hundi can be assigned orally subject to all equities as a chose in action independently of the Negotiable Instruments Act so as to give the assignee a locus standi to sue thereon : A I R 1919 Lah 85 and A I R 1932 Lah 30, *Rel. on.* [P 47 C 2; P 48 C 1]

(c) Negotiable Instruments Act (1881), Ss. 69 and 76 (d)—Proper presentment not made to maker of hundi at place specified — S. 69 discharges maker unless no damage is shown to result — Maker can prove that damage was caused to him and that Section 76 (d) cannot be availed of — Drawer and drawee of hundi same — No question of damage arises.

Section 69 discharges the maker of a hundi, if a proper presentment is not made to him at the place specified in the hundi unless S. 76 (d) comes in to relieve the holder against the effect of S. 69 and if no damage could have occurred by the non-presentment. It is open however to the maker to prove that damage had been caused to him by the non-presentment and that consequently the holder is not entitled to take advantage of the provisions of S. 76 (d) : A I R 1936 Pesh 202, *Rel. on* ; A I R 1935 Pesh 132, *Ref.* [P 48 C 1, 2]

Where the drawer and the drawee are one and the same person, no question of damage to the drawer arises on account of the non-presentation on the due date: A I R 1927 Lah 72, *Foll.* [P 48 C 2]

Hukam Chand and Ch. Ude Bhan (in 26/3 of 1939) — for Appellant (Kalu Ram).

Pir Bakhsh (in 32/19 of 1939) — for Appellant.

L. Charanjit Lal (in Cross-Objections No. 17 of 1941) — for Objector (Lal Chand).

Pir Bakhsh and L. Charanjit Lal (in 26/3 of 1939) — for Respondents (Mian Feroz Shah and Lal Chand, respectively).

Hukam Chand and Ch. Ude Bhan and L. Charanjit Lal (in 32/19 of 1939) — for Respondents (Kalu Ram and Lal Chand, respectively).

Pir Bakhsh (in Cross-Objections No. 17 of 1941) — for Respondent (Mian Feroz Shah).

Mir Ahmad J. — This is the third time that this unfortunate case has come up to this Court. This suit was instituted by K. B. Mian Feroz Shah against Kalu Ram and Lal Chand on the basis of hundis. He asked for a decree for Rs. 13,859 consisting of Rs. 10,800 principal, Rs. 3039 interest, and Rs. 20 on account of expenses of notices issued to the defendants. The plaint was far from clear as to whether the plaintiff wanted a decree against a firm or against two individuals. Apparently the suit was instituted against the two individuals, but in the heading they were referred as Kalu Ram and Lal Chand through Kalu Ram. The Sub-Judge, Mardan, passed a decree for Rs. 13,859 against the firm, Kalu Ram Lal Chand. An appeal was presented to this Court and it was pointed out that the plaint did not justify the passing of the decree against the firm. Counsel for the plaintiff however insisted that he wanted a decree against the firm. The case was remanded by this Court and permission was given to the plaintiff to amend the plaint. The amended plaint was more confused. In the heading the defendants were mentioned as Kalu Ram and Lal Chand, members of the timber firm known as Kalu Ram Lal Chand. In the plaint itself, the two defendants were referred to as the owners of the firm known as Kalu Ram Lal Chand. It was mentioned that the hundis were signed by Kalu Ram Lal Chand per Kalu Ram. Eventually, the decree was asked for against the two individuals Kalu Ram and Lal Chand and it was suggested that in case Lal Chand be not held liable

a decree be given against Kalu Ram only. Interest was also claimed at Re. 1 per cent. per mensem from the date of the institution of the suit till realization. The senior Sub-Judge, Peshawar, who heard the suit after amendment, held that the amendment had not been carried out as directed by the Court of Judicial Commissioner and that the amendment was made after time. He therefore rejected the plaint.

An appeal was preferred to this Court against this order. A Bench of this Court held that the amendment did not purport to convert the suit to one against the firm. It was observed however that this did not necessarily mean that the plaint should be rejected. It was found that the plaintiff could continue with his original plaint which was against the two individuals Kalu Ram and Lal Chand. The case was consequently remanded for decision of the suit as presented in the original plaint. The following issues were then tried :

1. Were the hundis of an aggregate value of Rs. 13,200 executed by defendant in favour of plaintiff on 26th September 1928 ?
2. Were logs delivered to defendant ?
3. Were the hundis in dispute sold to the Peoples Bank by the plaintiff ?
4. If issue 3 is decided in the affirmative, what is the legal effect ?
5. Were the hundis in question presented for payment by the Peoples Bank ?
6. To what interest, if any, is plaintiff entitled ?
7. Is plaintiff entitled to costs of notice ?
8. If so, has plaintiff any cause of action against Lal Chand ?
9. Is the suit within time against Lal Chand ?
10. Can the suit not lie against Lal Chand ?

Evidence was recorded. The trial Judge held that Kalu Ram had signed the hundis and that it amounted to a completed contract. He therefore decided issue 1 in favour of the plaintiff. His decision on issue 2 was that logs were actually received by the defendants. He took issues 3 and 4 together. He was of the opinion that the hundis were given to the Peoples Bank of Northern India for collection and that the Peoples Bank of Northern India having returned the hundis to the plaintiff the latter was entitled to sue on them. On issue 5 he found that the hundis were duly presented. With respect to issues 6 and 7, he was of the view that the plaintiff was entitled to interest at Re. 1 per cent. per mensem from 26th September 1928 up to the date of the suit. He disallowed Rs. 20 which was claimed on account of cost of notices sent to the defendants. He dealt with issues 8, 9 and 10 together. He found that Lal Chand was not bound to pay the sum due under the hundis. In the result he passed a decree for Rs. 13,839 against Kalu Ram only with proportionate costs and allowed 6 per cent. per annum interest from the date of the institution of the suit till realization of the amount decreed. He did not pass any order as to costs of Lal Chand.

Kalu Ram has come up on appeal to this Court against this decree. K. B. Mian Feroz Shah has also filed an appeal. He has asked that Lal Chand should be made responsible for the decretal amount jointly with Kalu Ram, that Rs. 20 should be given to him as cost of notices, and that future interest should also be awarded to him at the rate of 1 per cent. per mensem. Lal Chand has presented cross-objections asking that he should be given costs of the suit. This judgment will cover all three cases. We will deal with the case of Kalu Ram first. The learned counsel for the appellant pointed out that the hundis purport to have been executed by Kalu Ram and Lal Chand and that they were signed by Kalu Ram only. He argued that in the circumstances they were incomplete documents and that the suit could not be based on them. In support of this allegation he quoted 25 Mad 389,[1] 39 Mad 597[2] and 64 I C 726.[3] In 25 Mad 389[1] a hypothecation bond was drawn up and was intended to be signed by the whole family. It was, however, signed by the eldest brother only. Bhashyam Ayyangar J., held (Benson J. concurring) that the document was incomplete and that the suit did not lie even against the signatory. The following passage is quoted from the ruling to show the reasons for the Judge's coming to this conclusion :

> But, in my opinion, the appellant's contention that Ex. J was intended both by the plaintiff and defendant 1 to be executed by all the members of the family, and that it was not intended that defendant 1 alone, by signing it, was to bind himself, or, in his capacity as managing member, bind the whole family, is well founded. When a document is intended to be executed by several persons, but is executed only by some of them, the question whether it takes effect as against those who have executed it, notwithstanding that the rest have declined to join in the execution of the document, rests upon the intention of the parties. Without laying down as a general proposition that whenever an instrument is drawn up, making every member of an undivided Hindu family party to it by name, it will not take any effect if one or more of them do not join the rest in executing it, I am clearly of

1. ('02) 25 Mad 389 : 12 M L J 17, Sivasami Chetty v. Sevugan Chetty.
2. ('16) 3 A I R 1916 Mad 692 : 30 I C 713 : 39 Mad 597 : 29 M L J 291, Nethiri Menon v. Gopalan Nair.
3. ('21) 8 A I R 1921 Nag 66 : 64 I C 726, Ramchandra v. Bapurao.

opinion, that under the circumstances of the present case, the only reasonable inference to be drawn as to the intention of the plaintiff and of defendant 1 when he executed Ex. J is that it was to take effect only on defendant 3 and Pothu Chetti also joining in its execution.

In 39 Mad 597[2] the question was whether a mortgage deed drawn up on behalf of a body of charitable trustees but signed by the majority was binding on them all. In the judgment of the Division Bench the following passage occurs :

> As to the first point, the law is well settled and clearly understood both in this country and in England. The majority of a body of charitable trustees can legally bind the whole body, ... but if a document is drawn up in the name of all and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so : *see* 25 Mad 389[1] and Latch v. Wedlake.[4] It is a question of fact as to what was the intention of the parties . . . .

Coming to the merits, their Lordships of the Madras High Court disagreed with the finding of the lower Court that it was the intention that all the trustees should sign the document and held that all the trustees were bound by the deed. The case reported in 64 I C 726[3] is a decision of a single Judge of the Nagpur High Court on an application for revision. The Judge reiterated the principles laid down in 25 Mad 389.[1] He held that the document before him having not been signed by all the persons on whose behalf it was drawn up, was incomplete. But he considered it unjust to dismiss the suit. The observations made by the Judge are therefore in the nature of obiter dicta.

It will be observed from what has been said above that it has to be found out in every case as to what was the intention of the parties. If the intention was that the document shall not be complete till it is signed by all by whom it purports to have been executed then the document cannot be taken into consideration. But if the intention is that the signatures of those who have signed the document shall be enough to perfect the contract then the document was complete and the contract contained therein could be enforced. There is no evidence whatsoever that Lal Chand took any active interest in the transaction of buying logs which ended in the drawing up of the hundis. In the later stages of this case some servants of the plaintiff have said that Lal Chand was present when the measurements of the logs had been taken, but no one has said that he was present when the hundis were being signed by Kalu Ram. Kalu Ram and Lal Chand being brothers and owners of a firm most probably Kalu Ram intended to sign on behalf of his brother also but there is nothing to indicate that there was an intention that Lal Chand should also sign the documents. We therefore find that the hundis are completed and they can form the basis of a suit.

The next point urged was that the hundis having been assigned to the Peoples Bank of Northern India became the property of the Bank, and that the suit by K. B. Mian Feroz Shah on the strength of those hundis was incompetent in the absence of a re-endorsement in his favour. The evidence on the record clearly shows that the hundis were sold to the bank. The plaintiff and the bank had been sending notices to the defendants asking them to pay the money to the bank and threatening that the bank will charge them interest and bring a suit against them, if they did not pay : *vide* pp. 58 and 59 of paper book No. 1. The entries in the account books of the plaintiff with respect to these hundis also show that they had been sold and the money was refunded to the bank when fourteen out of the seventeen hundis (it will be remembered that three hundis were honoured) were returned by the bank to the plaintiff : *vide* p. 47 of paper book No. 3 and pp. 54 and 55 of the paper book No. 1. All this clearly indicates that the hundis were discounted and were not given for collection. The lower Court was therefore wrong in thinking that the hundis were handed over to the bank for collection only. The question is whether the return of the hundis by the bank to the plaintiff made the hundis the property of the plaintiff and entitled him to sue for the amount due on them. Section 130, T. P. Act, enjoins that the transfer of an actionable claim should be in writing. The Transfer of Property Act does not apply to the Punjab and N.-W. F. P. It follows that in provinces where the Transfer of Property Act does not apply a hundi could be assigned orally subject to all equities as a chose in action independently of the Negotiable Instruments Act. If any authority be needed for this proposition, we will quote the headnote of the judgment of the Division Bench of the Punjab Chief Court reported in 51 I C 250[5] which is as follows :

. . . .

> An endorsement is not the only mode by which a negotiable instrument may be transferred. It

4. (1840) 11 A & E 959 : 3 P & D 499 : 9 L J (N S) Q B 201 : 52 R R 552.

5. ('19) 6 A I R 1919 Lah 85 : 51 I C 250 : 29 P R 1919, Panna Lal v. Hargopal.

may be assigned otherwise, and the assignee can sue in his own name, the only difference being that an assignee has only the right, title and interest of the assignor, while an endorsee has all the rights of a holder in due course.

An assignment need not necessarily be in writing and may be oral.

Where it was found that the plaintiff was the real beneficiary under a hundi to whom the money was to be ultimately paid, that he was the holder of the hundi and that the nominal endorsee did not claim any interest adverse to him :

Held that it must be presumed that there was an oral assignment of the hundi in favour of the plaintiff and that he had a right to sue upon it.

The same view was taken by a single Judge of the Lahore High Court in A I R 1932 Lah 30.[6] We do not find any substance in this argument also and hold that the plaintiff has a locus standi to sue. Counsel has next pointed out that only 8 hundis were actually protested by the Notary Public, Lahore. He urged that the other six hundis were not properly presented and protested, and that the suit could not therefore be based on them. He quoted S. 64, Negotiable Instruments Act, which runs thus :

Promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor, or drawee thereof respectively, by or on behalf of the holder, as hereinafter provided. In default of such presentment the other parties thereto are not liable thereon to such holder.

He also quoted a judgment of the bench of this Court which is reported in A I R 1935 Pesh 132.[7] It was laid down in this judgment that a suit cannot be based on a pronote which had not been properly presented. Counsel for the plaintiff-respondent has, however, referred to A I R 1936 Pesh 202[8] in which it was held by a bench of this Court that presentment of a document was not necessary and the instrument was dishonoured on the due date as against the drawer, if the drawer could not suffer damage from the want of such presentment. The Bench had relied on S. 76 (d), Negotiable Instruments Act, in coming to this conclusion. The headnote of this case is as follows :

Section 69 discharges the maker of a pronote if a proper presentment is not made to him at the place specified in the pronote unless S. 76 (d) comes in to relieve the holder against the effect of S. 69 and if no damage could have occurred by the non-presentment. It is open, however, to the maker to prove that damage had been caused to him by the non-presentment and that consequently the holder is not entitled to take advantage of the provisions of S. 76 (d).

We are of opinion that A I R 1936 Pesh 202[8] is applicable and S. 76 (d) comes into play. The fact that the drawer and the drawee are the same makes it obvious that the drawer could not suffer any damage on account of non-presentment. If any authority be needed on this point we will quote the Division Bench ruling of the Lahore High Court reported in A I R 1927 Lah 72.[9] Its headnote is in the following terms :

Under the provisions of S. 76, cl. (d) the presentation on the exact date of the maturity of the hundi is not necessary when the drawer and the drawee are one and the same person as in such a case no question of damage arises on account of the non-presentation on the due date.

The presentation of these hundis was therefore not necessary and the question of non-presentment does not arise at all. Counsel then took up the question of interest. He referred to S. 80, Negotiable Instruments Act, and said that interest could not be granted at more than 6 per cent. per annum. Section 80 runs thus :

When no rate of interest is specified in the instrument, interest on the amount due thereon shall notwithstanding any agreement relating to interest between any parties to the instrument, be calculated at the rate of 6 per cent. per annum from the date at which the same ought to have been paid by the party charged until tender or realization of the amount due thereon or until such date after the institution of a suit to recover such amount as the Court directs.

No interest was specified in the hundis in suit. It is said that a contemporaneous document (described as zaribadal) was executed by Kalu Ram in which it was stipulated that interest at 1 per cent. per mensem would be paid if the hundis were not honoured on due date. But it cannot help the plaintiff, for, according to S. 80, Negotiable Instruments Act, a Court cannot allow more than 6 per cent. per annum interest when decreeing a claim based on a negotiable instrument in which interest is not specified notwithstanding the fact that there is a separate agreement as regards the interest to be paid. The trial Judge was therefore wrong in allowing 1 per cent. per mensem interest to the plaintiff. A faint attempt was made to show that the logs were not received by the defendants. We are not prepared to believe that Kalu Ram did not receive the logs for which he signed the hundis. He kept quiet and did not make any protest when notices were served by the plaintiff and by the Peoples Bank. Nay,

6. ('32) 19 A I R 1932 Lah 30 : 134 I C 121 : 33 P L R 120, Lacharam v. Hemraj.
7. ('35) 22 A I R 1935 Pesh 132 : 158 I C 89, Sher Mohammad Khan v. Ahmad Gul.
8. ('36) 23 A I R 1936 Pesh 202 : 166 I C 675, Arjan Singh v. Mahomed Yakub.
9. ('27) 14 A I R 1927 Lah 72 : 99 I C 875 : 28 P L R 24, Shankar Das v. Dittoo Ram Idan.

the sum of Rs. 2400 was paid in response to the notices without any remonstrance. We do not propose therefore to discuss this point at length. It is void of all force.

These were the points which were raised by counsel for Kalu Ram. The result of our decision on them is that we accept the appeal of Kalu Ram to this extent that we reduce the interest allowed to the plaintiff on the principal sum up to the date of institution from 12 per cent. per annum to 6 per cent. per annum. In other words, the decree shall now be for Rupees 10,800 principal and Rs. 1519.8.0 interest totalling Rs. 12,319-8-0. The appellant shall get his costs on Rupees 1519-8-0 in this Court and the plaintiff shall get his costs in the lower Court on Rupees 12,319.8.0. Turning to the appeal of the plaintiff we find ourselves in agreement with the trial Judge that the plaintiff has not proved that Lal Chand was liable for the amount due on the hundis. Lal Chand had not signed the hundis. There is nothing to show that he was a contracting party. The suit is not against the firm or joint family. Consequently by no stretch of reasoning could Lal Chand be made responsible for the amount due. There is again no evidence to show that Rs. 20 were paid as fee for notices. The trial Judge has correctly disallowed this item also. Lastly the claim to future interest at 1 per cent. per mensem cannot be allowed because S. 80, Negotiable Instruments Act, is against it. The appeal of the plaintiff is consequently dismissed with costs. Pleader's fee Rs. 150. Lal Chand pleaded that he was not bound to pay the money. He succeeded. We do not understand why he was not given his costs. It is an accepted principle of law that costs shall follow the event. We, therefore, accept the cross-objections of Lal Chand and direct that he should have his costs in the trial Court. He shall also have his costs in this Court.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Peshawar 49

MIR AHMAD AND SOOFI JJ.

Qazi Abdul Qayum Khan — Appellant

v.

Mt. Turi d/o Bhai Nirmal Singh and another — Respondents

Civil Appeal No. 166/39 of 1940, Decided on 17th February 1941, against order of Addl. Judge, Peshawar, D/- 24th May 1940.

(a) Transfer of Property Act (1882), S. 70 — Scope — Superstructure built on mortgaged site is accession available to mortgagee.

The superstructure, the newly built house on the mortgaged site is an accession to the mortgaged property within the meaning of S. 70 of the Act; and it is as much available to the mortgagee as the site : ('31) 18 A I R 1931 All 277 (F B) and ('30) 20 A I R 1933 Lah 771, *Foll.* [P 50 C 2]

(b) Transfer of Property Act (1882), Ss. 56 and 81—Ss. 56 and 81 do not apply to N.-W. F. Province but their principles are applicable as principles of equity, justice and good conscience.

Sections 56 and 81 of the Act do not apply to N.-W. F. Province but their principles are applicable as principles of equity, justice and good conscience. [P 51 C 1]

Equity demands that the mortgagee should not be permitted to unequally distribute the mortgage money on two different properties and to release one lightly and burden the other more than it normally should be. A pro rata share should be recovered from the property which has been proceeded against if the mortgagee has released another property which was also liable for the security. [P 51 C 2]

Two properties *A* and *B* were mortgaged for Rs. 2400 on 11th April 1933. On 3rd February 1938, the mortgagee received Rs. 1190 and released property *B* from the incumbrance. After this the mortgagee brought a suit for recovery of principal of Rs. 1210 and interest of Rs. 852 up to 3rd February 1938 the date of release of property *B* and asked for a decree against the property *A* only :

Held that so far as the principal was concerned it should have been equally distributed amongst the properties *A* and *B* and the mortgagee was bound to recover Rs. 1200 from the property *B*. The mortgagee had only recovered Rs. 1190. A sum of Rs. 10 therefore was released so far as principal was concerned. Out of the interest of Rs. 852, the amount of Rs. 426, half of the total interest, was a burden on the property *B*. Hence the mortgagee was not entitled to recover from property *A* Rs. 426 and Rs. 10 : ('26) 13 A I R 1926 Bom 31; 34 All 606; ('27) 14 A I R 1927 Cal 195; 31 Mad 333 and ('18) 5 A I R 1918 Mad 1030 (F B), *Ref.* [P 51 C 2; P 52 C 1]

L. Charanjit Lal — for Appellant.

Achraj Ram Tandan — for Respondent 1.

Mir Ahmad J. — Mohd. Yaqub possessed two properties which may for convenience sake be called properties 'A' and 'B'. Property 'A' was mortgaged by Mohd. Yaqub to Sant Singh for Rs. 1200 on 21st December 1926. Abdul Qayum stood surety for the payment of the sum. On 11th April 1933 Mohd. Yaqub executed a mortgage deed in favour of Mt. Turi who is the sister of the wife of Sant Singh. He mortgaged both properties 'A' and 'B' for Rs. 2400. There is no reference to Sant Singh's mortgage in this document; Rs. 700 were paid before the Sub-Registrar. As to the balance, it was stated that the amount would be paid to the mortgagor after 15 days and a receipt given for it. The mortgagor kept possession and agreed to pay rent. On 20th May 1933 a receipt was written by Sant Singh in favour of Mohd. Yaqub acknowledging the receipt of Rs. 1200 due to him on the footing of the mortgage

dated 21st December 1926. On 22nd May 1933, property 'A' was sold by Mohd. Yaqub to Abdul Qayum for Rs. 2000. Sant Singh's name appears as a witness to the document. The mortgage in favour of Mt. Turi was not mentioned in the deed. On 12th August 1933, Mohd. Yaqub executed a tacking mortgage for Rs. 200 in favour of Mt. Turi. The amount was recovered as follows : Rs. 72 rent, Rs. 50 paid in cash, Rs. 78 paid before the sub-registrar. On 23rd February 1934 another tacking mortgage for Rs. 200 was executed by Mohd. Yaqub in favour of Mt. Turi. The amount was recovered as follows : Rs. 120 rent, Rs. 50 paid in cash, Rs. 30 paid before the sub-registrar. In 1935 there was a fire in the locality and both the properties were burnt down. Abdul Qayum built a house on the site of the burnt property 'A'. On 24th January 1938 the site of property "B" was sold by Mohd. Yaqub to one Haji Gul for Rs. 1700. The amount was paid as under : Paid to Mt. Turi Rs. 1190. Earnest money Rs. 200. Paid to Sant Singh on account of a bond Rs. 215. Paid in cash before the sub-registrar Rs. 60. Cash for expenses Rs. 35. Mt. Turi has brought this suit for recovery of Rs. 1210 principal and Rs. 1152 rent. She has asked for a decree against the newly built house of Abdul Qayum which was constructed on the burnt site of property "A." She has not included the tacking mortgages in her claim. Mohd. Yaqub pleaded that only Rs. 700 were paid to him that the remaining amount of the mortgage money was fictitious and that he had paid what was due from him. Abdul Qayum put up several legal defences. The following issues were framed :

1. Did defendant 1 receive only Rs. 700 by way of consideration on the mortgage dated 18th April 1933 whose execution he admits ? And has he repaid this amount with interest, the total amount repaid being Rs. 1190 ?

2. Is the plaintiff estopped by her conduct from claiming the amount in suit against the mortgaged property ?

3. Has the plaintiff, by relinquishing the security on property *B* in the plaint, relinquished her security on property *A* also ?

4. Has defendant 2 rebuilt the house after its destruction by fire; if so at what expense, and with what effect on the suit ?

5. To what amount is the plaintiff entitled on account of capital and interest ?

The trial Judge found that Abdul Qayum has spent Rs. 2000 in building the house. The Judge gave all the issues against the defendants and granted the plaintiff a decree for Rs. 1210 principal and Rs. 852 interest up to 3rd February 1938 when she received Rs. 1190 from property "B" and Rs. 153 10.0 interest for the period subsequent to that date. In other words he granted her a decree under O. 34, R. 4, Civil P. C., for a total sum of Rs. 2215-10-0. He allowed her proportionate costs and future interest at 6 per cent. per annum. An appeal was preferred by Abdul Qayum against this order to the District Court. The additional Judge agreed with the findings of the trial Judge and dismissed the appeal. Abdul Qayum has come up on further appeal to this Court.

We do not propose to disturb the concurrent findings of the two Courts below on issue 1. We also find the decision on issue 2 to be correct. There is nothing to show how the plaintiff is estopped from suing for the mortgage money. As regards issue 4, we agree with the Courts below that the appellant spent Rs. 2000 on the house, that the superstructure is an accession to the mortgaged property within the meaning of S. 70, T. P. Act, and that it is as much available to the mortgagee as the site. If any authority be needed for this proposition, we would quote the Full Bench ruling of the Allahabad High Court reported in A I R 1931 ALL 277[1] and a Division Bench ruling of the Lahore High Court reported in A I R 1933 Lah 771.[2] The only issue which remains for discussion is issue 3. Learned counsel for the appellant has urged that the plaintiff could not release property "B" by accepting Rs. 1190 and let the burden of the remaining principal and interest fall on property "A." He quoted Ss. 56 and 81, T. P. Act. He urged that the principles underlying these two sections should be applied to this case, and as the plaintiff could recover Rs. 1700 from property "B" the difference between Rs. 1700 and Rs. 1190 should be remitted in the present case and should not be made a burden on the house in dispute. Sections 56 and 81, T. P. Act, run thus :

56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties.

81. If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the

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1. ('31) 18 A I R 1931 All 277 : 132 I C 401 : 53 All 334 : 1931 A L J 273 (F B), Nannu Mal v. Ram Chandar.
2. ('33) 20 A I R 1933 Lah 771 : 149 I C 104 : 14 Lah 749: 35 P L R 550, Amar Singh v. Bhagwan.

subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisfied out of the property or properties not mortgaged to him, so far as the same will extend but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties.

These sections do not apply to the N..W. F. Province but their principles are applicable as principles of equity, justice and good conscience. We will first state the views on this point of the Courts functioning in the Provinces where the Transfer of Property Act applies. The headnote of the ruling of a Division Bench of the Bombay High Court reported in A I R 1926 Bom 31[3] is to the following effect:

A mortgagor who is only an owner of a part of the equity of redemption of mortgaged properties is entitled to redeem that portion on paying a proportion of the amount of the mortgage money when the mortgagee has acted in such a way as to release a portion of the property from the mortgage deed. It makes no difference that such a case is not contemplated by any of the provisions of the Transfer of Property Act. The Act is not exhaustive and the High Court as a Court of equity is entitled to administer the principles of equity as laid down in decided cases which are not distinctly prohibited by statute.

It will be observed that two principles have been enunciated, firstly, that the Transfer of Property Act is not exhaustive and the High Court as a Court of equity can administer the principles of equity even in the Provinces where the Transfer of Property Act applies, provided they do not conflict with the statute; and secondly that where the mortgagee has released a portion of the property the mortgagor owning the other portion has a right of paying a proportionate amount in order to redeem it. The same view has been taken by the Division Bench of the Allahabad High Court in 34 ALL 606.[4] The headnote is to the following effect:

Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property.

The Calcutta High Court has in Division Bench ruling reported in A I R 1927 Cal 195[5] laid down the following dictum:

Mortgagee after relinquishing his claim on a portion of the mortgaged property cannot throw the whole burden of the mortgaged debt on the remainder of the property.

The Madras High Court has in 31 Mad 333[6] accepted the same proposition and has laid down that

where the mortgagee voluntarily releases a portion of the mortgaged property from the liability to satisfy the mortgage debt, he can recover from the other portion of such property subsequently mortgaged or sold to a third person only a rateable share of the mortgage debt.

But it has so happened that the Madras High Court has in a later Full Bench ruling reported as 40 Mad 968[7] disagreed with this view. They decided the case strictly in accordance with the provisions of the Transfer of Property Act and S. 82 of that Act persuaded them to come to this conclusion. We may note that the Calcutta High Court has in the ruling referred to above, A I R 1927 Cal 195[5] disagreed with this later view of the Full Bench of the Madras High Court. This being the state of law in the provinces where the Transfer of Property Act applies, we have now to decide as to what should be the rule in the N..W. F. Province where the Transfer of Property Act is not applicable. We think equity demands that the mortgagee should not be permitted to unequally distribute the mortgage money on two different properties and to release one lightly and burden the other more than it normally should be. The Madras High Court has in 31 Mad 333[6] laid down that a pro rata share should be recovered from the property which has been proceeded against if the mortgagee has released another property which was also liable for the security. Applying this principle to the present case it appears to us that the values of the two properties were equal and so far as the principal is concerned it should have been equally distributed amongst them. Mt. Turi was therefore bound to recover Rs. 1200 from property "B." She has only recovered Rs. 1190. A sum of Rs. 10 therefore was released so far as the principal was concerned. According to the finding of the trial Judge the interest due on the date on which the property "B" was released was Rs. 852. Again dividing it equally between the two properties we find that the amount of interest which should have been a burden on property "B" was Rs. 426. We think that this sum of Rs. 426 and Rs. 10 out of the principal (total Rs. 436) the plaintiff is not entitled

3. ('26) 13 A I R 1926 Bom 31 : 91 I C 978 : 27 Bom L R 1449, Maya Shankar Mulshankar v. Burjorji Merwanji.
4. ('12) 34 All 606 : 16 I C 401 : 10 A L J 211, Jugal Kishore Sahu v. Kedar Nath.
5. ('27) 14 A I R 1927 Cal 195: 98 I C 504, Muktakeshi Pal v. Ramani Mohan.
6. ('08) 31 Mad 333, Ponnusami Mudaliar v. Srinivasa Naicken.
7. ('18) 5 A I R 1918 Mad 1030 : 42 I C 352 : 40 Mad 968 : 33 M L J 211 (F B), Peru Mal Pillai v. Raman Chettiar.

to recover from property "A." We therefore disagree with the lower Courts on issue 3 and accepting the appeal modify the decree by reducing the decretal amount to Rupees 1779-10-0. The order as to future interest at 6 per cent. per annum shall stand. The plantiff shall have her costs on Rs. 1779-10-0 in the trial Court. The parties shall bear their own costs in the lower appellate Court and also in this Court.

N.K./R.K. *Appeal partly allowed.*

(28) A. I. R. 1941 Peshawar 52

ALMOND J. C. AND MIR AHMAD J.

Peshawari Lal Channa Shah —
Defendant — Appellant.

v.

Dharam Chand Channa Shah and another, Defendants and another,
Plaintiff — Respondents.

Civil Appeals Nos. 126/46, 127/47, 105/30 and 287/103 of 1940, Decided on 28th January 1941, from order and decree of Dist. Judge, Peshawar, D/- 4th March 1940.

(a) Pre-emption—Question whether purchase by pre-emptor is benami has no bearing—Pre-emptor with requisite qualifications producing money—Court must grant decree.

In the case of a claim for pre-emption the question whether the purchase by the pre-emptor is benami is an inadmissible notion. If the pre-emptor produces money and has the requisite qualifications for pre-empting, the Court has no cause for going into his bona fides or to trace the origin of the money which he has offered to pay. The basic principle is that after all the statutory right to pre empt depends on certain qualifications and the production of money, and when those requirements are met with nothing else remains but to grant a decree : 11 I C 708, *Foll.* [P 53 C 1]

(b) Pre-emption—Price paid by vendee—Proof of — Fact that bulk of amount was paid before sub-registrar is best evidence — Court need not determine market value by other evidence.

In a claim for pre-emption where the vendee establishes that the bulk of the amount stated in the sale deed was paid before the sub-registrar, it is the best evidence of what has been paid. It is not then necessary for the Court to determine the market price of the property sought to be pre-empted by other evidence : ('36) 23 AIR 1936 Pesh 12 and 75 I C 271, *Rel. on.* [P 53 C 1]

Sardar Raja Singh (in Nos. 126/46 and 127/47); L. Charanjit Lal (in No. 105/30) — for Appellant (Peshawari Lal and Gopi Chand Singh, respectively).

L. Charanjit Lal and Abdul Latif Khan (in Nos. 126/46 and 127/47) — for Respondents 2 and 3 (Gopi Chand Singh and Isa Khan, respectively).

Abdul Latif Khan (in No. 105/30) — for Respondent (Isa Khan).

Abdul Latif Khan (in No. 287/103) — for Objector (Isa Khan).

L. Charanjit Lal (in No. 287/103) — for Gopi Chand Singh.

Mir Ahmad J. — Channa Shah and his two sons Dharam Chand and Peshawari Lal formed a joint Hindu family firm. It was adjudicated insolvent in 1933 in Bombay. Later on, a composition scheme was approved of by the Insolvency Court and the adjudication was annulled. According to the composition deed trustees were appointed for administering the property of the family. In 1936 the trustees sold 207 kls. 9 mls. of land belonging to the firm to one Narain Das for Rs. 5500. Dharam Chand instituted a pre-emption suit and was successful. He therefore obtained the land. On 31st August 1938 Dharam Chand sold the land to Gopi Chand Singh. It was stated in the deed of sale that Rs. 1000 had been paid in advance. Rs. 10,000 was actually paid before the sub-registrar. On 1st September 1939 Isa Khan instituted a suit to pre-empt this sale to Gopi Chand Singh. On the same day Peshawari Lal the brother of Dharam Chand also brought a similar suit. The cases were consolidated. The following issues were framed:

1. Whether Rs. 11,000 were paid or fixed in good faith ? 2. What is the market price ? 3. Whether Gopi Chand Singh is entitled to Rs. 500 on account of improvements ? 4. Whether the plaintiff has a superior right against the rival pre-emptor? 5. Whether the claim of Peshawari Lal is Benami ? 6. Whether Peshawari Lal is an undischarged bankrupt and cannot sue ? 7. Whether Peshawari Lal has attained majority.

The trial Judge found that Peshawari Lal was of age and that his claim was superior to that of Isa Khan. He however held that he was not seeking his own benefit. As to the price he held that the sum of Rs. 10,000 which was paid before the sub-registrar, was the price paid. It may be noted that the market price was found by the Court to be Rs. 8282-7-6. It was based on the quinquennial sale price of similar lands. The Court refused to accept the plea of Gopi Chand Singh that he had spent Rs. 500 on improving the land. As a result Peshawari Lal's suit was dismissed, and Isa Khan was given a decree for possession of the land on payment of Rs. 10,000.

Peshawari Lal preferred two appeals to the District Court at Peshawar, one against the dismissal of his own suit and another against the order decreeing the suit of Isa Khan. Isa Khan also went up on appeal challenging the price assessed by the trial Court. The District Judge maintained the order of the trial Judge with regard to Peshawari Lal and dismissed his appeals. He accepted the appeal of Isa Khan and reduced the price to Rs. 8282-7-6. His reason for doing so was that it was not certain as to what price was paid and in the circum-

stances the market value was the only criterion available. Against these judgments Peshawari Lal has presented two further appeals to this Court. Gopi Chand Singh has also come up on further appeal with the request that the decree of the trial Court be restored so far as the price was concerned. Isa Khan has filed cross-objections in which he has urged that the price should be reduced to Rs. 5500. This judgment will cover all four cases.

In our opinion, the two Courts below have misunderstood the legal position with regard to Peshawari Lal. Benami purchaser is admittedly an inadmissible notion. If a person produces money and has the requisite qualifications for pre-empting the suit property the Courts have no cause for going into his bona fides or to trace the origin of the money which he has offered to pay. This has been the consistent view of the Lahore High Court of late. We may as an instance quote 11 I C 708.[1] The basic principle is that after all the statutory right depends on certain qualifications and the production of money, and when those requirements are met with nothing else remains but to grant a decree. It should be remembered that if the pre-emptor transfers the property to some other person and he must do so in order to give the property to the real owner who has paid for it, there is again the chance for the pre-emptor to pre-empt the sale. So this view does not in any way hurt any rival pre-emptor. We consequently hold that Peshawari Lal has a superior right of pre-emption and that there is no bar to his obtaining a decree. It has been admitted before us that Isa Khan has the next best right to pre-empt the land.

Turning to the price of the land, whatever may have been the motive for giving Rs. 1000 in advance, it is established that Rs. 10,000 was paid before the Sub-Registrar, and there is no evidence to show that it has been returned. Thus the bulk of the amount stated in the deed has been paid before the Sub-registrar. We think that this is the best evidence of what has been paid. This has been the view of this Court previously also, *vide* 75 I C 271[2] and A I R 1936 Pesh 12.[3] We therefore hold that the price paid is Rs. 10,000. As a result we accept the two appeals of Peshawari Lal and the appeal of Gopi Chand Singh and dismiss the cross-objections of Isa Khan. We pass the following order under O. 20, R. 14, Civil P. C., read with S. 28, Pre-emption Act :

Peshawari Lal shall deposit the sum of Rs. 10,000 in the trial Court on or before 27th February 1941. If he does so he shall be entitled to take over the land and shall get his costs from Isa Khan throughout. If he fails to do so his suit shall stand dismissed. In the latter event, Isa Khan shall deposit the sum of Rs. 10,000 in the trial Court on or before 27th March 1941 and on doing so he shall take the possession of the land and shall also get his costs from Peshawari Lal throughout. If he also fails in doing so his suit shall stand dismissed. In the event of both the suits being dismissed, Gopi Chand Singh shall have his costs from both the pre-emptors. No costs in the appeal of Gopi Chand Singh and in the cross-objections of Isa Khan. Pleader's fee Rs. 150.

G.N./R.K. *Order accordingly.*

1. ('11) 11 I C 708, Mahmad Baksh v. Hassan Baksh.
2. ('23) 75 I C 271, Ahmadji Khan v. Gulmir.
3. ('36) 23 A I R 1936 Pesh 12 : 160 I C 452, Ali Akbar v. Multan.

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* (28) A. I. R. 1941 Peshawar 53

ALMOND J. C., AND MIR AHMAD J.

Mahmud Jan Mir Hamzah Khan — Judgment-debtor — Appellant

v.

Firm Gutta Singh Ajab Singh — Plaintiffs — Respondents.

Civil Appeal No. 173/41 of 1940, Decided on 6th March 1941, against order of Addl. Judge, Peshawar, D/- 16th May 1940.

*** (a) Civil P. C. (1908), S. 60 (1) (c)—Mortgage decree—House of agriculturist cannot be sold.**

The house of an agriculturist cannot be sold in execution even of a mortgage decree passed against that property : 11 I C 646 ; ('24) 11 A I R 1924 All 328 (F B) and ('35) 22 A I R 1935 Lah 164, *Not foll.*; ('19) 6 A I R 1919 All 222, *Foll.*; ('36) 23 A I R 1936 Lah 930; ('37) 24 A I R 1937 Lah 939; ('39) 26 A I R 1939 Lah 316 and ('40) 27 A I R 1940 Lah 126, *Ref.* [P 56 C 1]

(b) Civil P. C. (1908), S. 60, Proviso—'Or'—Scope—'Or' is used to include decrees in which no attachment is necessary.

The word 'or' is used to include decrees in which no attachment is necessary such as the mortgage decree. [P 55 C 2]

S. Mohd. Aurangzeb Khan — for Appellant.

S. Anoop Singh — for Respondents.

Mir Ahmad J.—Mahmud Jan mortgaged a hujra (guest house) and seven houses to Gutta Singh Ajab Singh. The latter instituted a suit for the recovery of the money. A compromise decree was passed in favour of firm Gutta Singh Ajab Singh against Mahmud Jan for Rs. 2100 in the following terms :

Decree for Rs. 2100 is hereby passed in favour of the plaintiff against the mortgaged and other property of the defendant in accordance with the terms of the compromise deed.

The compromise deed fixed instalments and on the failure of the defendant to pay two instalments made the whole amount payable in a lump sum. The decree-holder took out execution and attached the property against which the decree had been passed. The judgment-debtor pleaded that he was an agriculturist, and that his houses and hujra could not be attached and sold. The executing Judge found that he was an agriculturist but held that as it was in execution of a mortgage decree that the property was being proceeded against, the protection afforded by S. 60 (1) (c), Civil P. C., did not extend to it. An appeal was preferred by the judgment-debtor. The Court of appeal agreed with the view of the original Judge. The appeal was consequently dismissed. The judgment-debtor has come up on further appeal to this Court. At the hearing, the learned counsel for the judgment-debtor admitted that no appeal was competent and asked us to treat his appeal as a petition for revision. He urged that an important question of law was involved and that a petition for revision was therefore entertainable. We agree with him. There seems to be a conflict of authority as regards the question whether S. 60 (1) (c), Civil P. C., governs the property sought to be sold under a mortgage decree. A Full Bench of three Judges of the Allahabad High Court considered it in the ruling reported as 11 I C 646.[1] Two Judges were of opinion that S. 60 (1) (c), Civil P. C., did not apply to a mortgage decree. They were Richards C. J. and Tudball J. Bannerji J. however dissented. The view of the majority was explained by Richards C. J. and we could do no better than to quote his own words to show the reasons which made him form this opinion :

In my judgment, the decisions of the Courts below were incorrect. Prima facie, a man is entitled to mortgage his property if he pleases; and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property. The only aspect in which the decree of the Court below can be supported is on the ground that the proviso to S. 60 by implication enacts that the mortgage of a house of an agriculturist is illegal. Such a contention, in my opinion, cannot be sustained. The Code of Civil Procedure is an Act which deals entirely with matters of procedure; and prima facie it is very improbable that the Legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Tenancy Act has so enacted. It seems to me also that it would be a very strained construction to give to S. 60 to hold that it applied to the execution of mortgage decrees. The section itself is headed "attachment." In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made. The section begins "The following property is liable to attachment and sale in execution of a decree." It seems quite clear that these words only apply to simple money decrees. Then follows the proviso, where it is true that the words are not "attachment and sale" but "attachment or sale." It must however be remembered that the proviso is a proviso to S. 60, cl. (1) which deals with simple money decrees. The words 'such attachment or sale' also appear in the proviso, clearly showing that the proviso relates to what immediately precedes. It is argued that the word 'or' appearing in the proviso instead of the word 'and,' necessarily shows that the section relates to mortgage decrees. I do not agree with this argument. There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely when there has been already an attachment prior to judgment or on foot of another decree.

Banerji J.'s note of dissent is on the other hand in the following words :

If the Legislature forbids the sale of such a house, a Court cannot by its decree order that a house of that description should be sold. In my opinion the law forbids the sale of such a house. S. 51 (b) provides that a Court may order execution of a decree by attachment and sale, or by sale without attachment of any property. Section 60 of the Code specifies the different classes of property which are liable to attachment, where attachment is necessary, and to sale.

The proviso to the section is to the effect that certain particulars, among which are houses and other buildings belonging to and occupied by an agriculturist, shall not be liable to attachment or sale. At the commencement of the section the word "and" is used and in the proviso we find the word "or." The proviso, as I understand it, forbids both attachment and sale; that is to say, where an attachment must precede a sale, it forbids attachment as well as sale; and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids a sale. Therefore in my opinion S. 60 and the proviso to it take away from the Court power to order a sale of property of the description mentioned in the proviso.

The object of the Legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that, in the case of a simple decree for money, the dwelling-house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of Court. I fail to see why if an unsecured creditor of an agriculturist cannot proceed against the debtor's dwelling-house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases.

In A I R 1919 ALL 222[2] a Divisional Bench of the Allahabad High Court consisting of Banerji J. who was the dissenting Judge in 11 I C 646,[1] and Rafiq J. held that the house of an agriculturist was not liable to attachment and sale in execution of a decree

1. ('11) 8 ALJ 1045:11 IC 646, Bhola v. Kishori.

2. ('19) 6 AIR 1919 All 222 : 51 I C 553, Nladar Singh v. Sabit Khan.

obtained upon the mortgage of that house made by the agriculturist. 11 I C 646[1] was referred to. A Full Bench of the Allahabad High Court consisting of Walsh, Ryves and Mukerji JJ. again considered this question in the case which is reported in 84 I C 749.[3] Ryves J. followed the line adopted by Banerji J. and held that the house of an agriculturist could not be sold in execution of a mortgage decree passed against the house. The other two Judges however followed the majority view taken in 11 I C 646.[1] It was stressed by them that the chapter in which S. 60 occurs is headed "attachment and sale" and not only "sale." The pronouncement of the Lahore High Court on the point was made by a Division Bench in a case reported in A I R 1935 Lah 164.[4] It is a very short judgment. The reason given for refusing to extend the benefit of S. 60 to the property of an agriculturist, which is subject of a mortgage decree was that it would amount to making mortgages by an agriculturist illegal. No authorities were referred to. A I R 1936 Lah 930,[5] A I R 1937 Lah 939,[6] A I R 1939 Lah 316[7] and A I R 1940 Lah 126[8] are all single Judge rulings of the same Court which followed the Division Bench view reported in A I R 1935 Lah 164.[4] We will now proceed to give an interpretation of S. 60 (1) (c), Civil P. C. The relevant portion of S. 60 runs thus :

60. (1) The following property is liable to attachment *and* sale in execution of a *decree*, namely, lands, houses or other buildings, goods, money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, bonds or other securities for money, debts, shares in a corporation and save as hereinafter mentioned, all other saleable property, moveable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment *or* sale, namely :

* * * *

(c) houses and other buildings (with the material and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

The underlines (here in italics) are ours. Section 51, Civil P. C., is in the following terms :

Subject to such conditions and limitations as may be prescribed, the Court may on the application of the decree-holder, order execution of the decree : (a) by delivery of any property specifically decreed ; (b) by attachment and sale or by sale *without attachment of any property* ; (c) by arrest and detention in prison ; (d) by appointing a receiver ; or (e) in such other manner as the nature of the relief granted may require.

The underline (here in italics) is ours. It is obvious that S. 51 (b) contemplates that an execution of a decree may be carried out by attachment and sale or by sale only. This fact therefore takes away all the importance attached to the heading of the chapter which is "attachment and sale." The use of the word "or" in the beginning of the proviso is not an accident for, the Legislature does not use words by accident but by deliberation. This again shows that the Legislature did not mean that the chapter only dealt with cases in which "attachment and sale" took place and to no others. Rather the contrast is significant. In the beginning of the section permission for "attachment and sale" of property is given but where the proviso starts "attachment or sale" are prohibited. To us it is absolutely clear that the word 'or' was used to include decrees in which no attachment is necessary and we know that mortgage decree is one of this class. At this point, we will advert to the fact that O. 34 was made a part of Civil Procedure Code when the Civil Procedure Code of 1908 was enacted. It was a part of Transfer of Property Act before. The draftsman therefore knew that there were such decrees as mortgage decrees and he would have excepted mortgage decrees from the operation of this section in so many words if it was the intention to do so. He would not have left the Courts to infer it from the cryptic heading "attachment and sale." It should be remembered that the words "a decree" have been used in the beginning of the section. The Courts have on the other hand read the word 'money' in between the 'a' and 'decree' when holding that mortgage decrees are beyond the purview of S. 60, Civil P. C. There is no warrant for this reading of the word 'money' into it. We think that the Legislature would have inserted the word if there was the idea to restrict the section to money decrees only.

Again as pointed out by Banerji J. it is undoubted that the Legislature was anxious

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3. ('24) 11 AIR 1924 All 328 : 84 I C 749 : 46 All 489:22 ALJ 321 (FB), Mubarak Husain v. Ahmad.
4. ('35) 22 AIR 1935 Lah 164, Chittar Mal v. Mt. Ram Devi.
5. ('36) 23 AIR 1936 Lah 930 : 38 P L R 691, Ram Chand v. Co-operative Society, Kharar.
6. ('37) 24 AIR 1937 Lah 939 : 170 I C 896, Sita Ram v. Phusal Singh.
7. ('39) 26 AIR 1939 Lah 316 : 42 P L R 398, Natha Singh v. Bhag Mal.
8. ('40) 27 AIR 1940 Lah 126 : 189 I C 782, Khazanchi Shah v. Niaz Ali.

to protect the property of the agriculturist from being sold. An agriculturist borrows money voluntarily and it does not make any difference whether he borrows on his personal security or on the security of his property. In either case he has the right to do so and we see no point why in one case the money should not be recovered from his property while in the other it should be done. To us it appears that the protection is absolutely independent of his own acts and has been deliberately provided so that he should not be without a roof over his head and without his tools and seed, etc. It would be quoting a truism if we were to say that the Legislature can make such exemptions and has made them. The Punjab Land Alienation Act is a case in point. We consequently disagree with the two Courts below and hold that the house of an agriculturist cannot be sold in execution of a mortgage decree passed against that property. Although it has been admitted in this case that the petitioner is an agriculturist it has not been decided as to what house or houses are exempt under S. 60 (1) (c) and what are not. The learned counsel for the respondent has urged that all the houses are not protected. We therefore accept the appeal, set aside the finding of the Courts below and remand the case to the executing Judge with the direction that he should now decide as to which house or houses fall within the purview of S. 60 (1) (c), Civil P. C. The costs of this petition shall follow the event. Pleader's fee Rs. 32.

N.K./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Peshawar 56

MIR AHMAD AND SOOFI JJ.

Indar Sain L. Ishar Das and another— Appellants

v.

Sohan Chand Mehta Bansi Dhar and others — Respondents.

Civil Misc. Appeal No. 122/41 of 1940, Decided on 12th February 1941, against order of Senior Sub-Judge, Hazara, D/- 1st February 1940.

Civil P. C. (1908), O. 34, R. 6—Order refusing application under O. 34, R. 6 is decree— Appeal must bear ad valorem Court-fee under Sch. 1, Art. 1, Court-fees Act.

An application under O. 34, R. 6 is definitely in the nature of a claim for the recovery from the person or other property of the mortgagor of the balance, left over after the proceeds of the sale of the property have been appropriated. The refusal to recover the amount from the person and other property of the mortgagor amounts to a decree as defined by S. 2 (2), Civil P. C., and therefore an appeal therefrom must bear full ad valorem court-fee under Sch. 1, Art. 1, Court-fees Act : ('18) 5 A I R 1918 All 97, *Ref.* [P 56 C 2]

L. Wazir Chand — for Appellants.

L. Ram Saran — for Respondents.

Order. — The appellants had a decree against the respondents under O. 34, R. 4, Civil P. C. The property was sold and it was found that the proceeds were not sufficient to pay off the amount decreed. The appellants, therefore, applied under O. 34, R. 6, Civil P. C., for a decree against the persons and other property of the respondents. The application was dismissed on the ground that the Court, which passed the preliminary decree, had taken into consideration the question of the personal liability of the respondents and had held that they were not personally responsible. The appellants have come up on appeal to this Court against this order. They have affixed a court-fee of Rs. 4 on the appeal. A preliminary objection has been taken that the appeal is insufficiently stamped. It is urged that the court-fee payable on the appeal should be ad valorem on the amount for which the decree is asked for. A decision of the Allahabad High Court reported in A I R 1918 ALL 97[1] has been quoted as an authority for this proposition.

An application under O. 34, R. 6, Civil P. C., is definitely in the nature of a claim for the recovery from the person or other property of the mortgagor of the balance, left over after the proceeds of the sale of the property have been appropriated. The refusal to recover the amount from the person and other property of the mortgagor amounts to a final adjudication of the matter in controversy between the parties and therefore amounts to a decree as defined by S. 2 (2), Civil P. C. It follows that an appeal from such an adjudication must bear full ad valorem court-fee under Art. 1 of Sch. 1, Court-fees Act. We consequently hold that the appeal before us is insufficiently stamped. The point was not free from difficulty. We are, therefore, of opinion that the appellants have not deliberately understamped the appeal. Under S. 149, Civil P. C., we allow the appellants to make up the court-fee. We give them time up to 4th March 1941 for doing so. In case the court-fee is produced the appeal shall be heard on 18th March 1941, otherwise the case shall come up on 4th March 1941 for orders.

G.N./R.K. *Order accordingly.*

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1. ('18) 5 A I R 1918 All 97 : 47 I C 561 : 40 All 553 : 16 A L J 438, Mahomed Iltifat Husain v. Alimunnissa.

(28) A. I. R. 1941 Peshawar 57

MIR AHMAD AND SOOFI JJ.

Mt. Begam Jan w/o Arsalla Khan — *Appellant*

v.

Malik Aman and another — *Respondents.*

Appeal No. 172/69 of 1940, Decided on 4th March 1941, from order and decree of Addl. Judge, Peshawar, D/- 10th June 1940.

Limitation Act (1908), Arts. 97 and 62 — Mahomedan transferring land to wife in lieu of her dower debt and promising to have mutation attested and deed registered but failing to do so before his death — Subsequently mutation proceedings by widow in pursuance of deed rejected on objections by her stepsons — Suit by widow against stepsons for possession of land and in alternative for recovering dower money — Transfer held being perfectly valid to begin with—Art. 97 applied—Cause of action accrued when mutation was rejected.

By a document dated 16th June 1923, a Mahomedan transferred some land to his wife in lieu of amount of dower money due to her. He promised in the document to get a mutation attested in her favour. He however failed to get the document registered and to have a mutation duly attested and died in 1934. On 15th May 1936 a mutation was entered to give effect to the document of 16th June 1923. On 6th December 1936 the document was shown to the revenue officer. But the stepsons of the widow objected to the attestation of the mutation which was therefore rejected. On 18th October 1938 the widow brought a suit against her step-sons for possession of the land and asked in the alternative for recovery of Rs. 2000, her dower money :

Held that the transfer of the land to the woman was perfectly valid to begin with and hence Art. 97 applied to the suit inasmuch as the husband might have registered the document and got a mutation attested. The cause of action accrued to the plaintiff when the mutation was rejected : 11 All 47 (P C); 19 Cal 123 (P C) and ('24) 11 A I R 1924 Cal 600, *Rel. on.* [P 59 C 1]

A. R. Nishtar — for Appellant.

Ram Lubhaya — for Respondents.

Mir Ahmad J. — Arsalla Khan, a landlord of village Bhogarmang, married Mt. Begum Jan in 1922 and a sum of Rs. 2000 was fixed as her dower. By a document dated 16th June 1923 he transferred some land to his wife Mt. Begum Jan in lieu of the amount of dower money due to her. He promised in the document to get a mutation attested in her favour. He however failed to get the document registered and to have a mutation duly attested. He died in 1934. On 15th May 1936 a mutation was entered to give effect to the document of 16th June 1923. On 24th August 1936 Malik Aman, a son of Arsalla Khan by another wife and thus a step-son of Mt. Begum Jan, presented an application to the revenue officer. In this application he stated that Rs. 2000 were due to his step-mother on account of dower, that his father had given land to the lady to discharge the debt, that a mutation had been entered, that there was a possibility of his going away from the country and being absent when the mutation came up for attestation, and that he therefore wanted to place it on the record that he had no objection to the attestation of the mutation. Sarfraz, a brother of Malik Aman and another step-son of Mt. Begum Jan, took exception to the mutation, when it came up for attestation. The revenue officer adjourned the proceedings and ordered that the deed should be produced before him. On 6th December 1936 the document was shown to the revenue officer. Both Malik Aman and Sarfraz were present on that day and objected to the attestation of the mutation. It was therefore rejected. On 18th October 1938 Mt. Begum Jan brought this suit against her step-sons Malik Aman and Sarfraz for possession of the land and asked in the alternative for recovery of Rs. 2000, her dower money.

The defendants resisted the suit. The trial Judge refused to give possession of the land because the document transferring the land to the plaintiff was not registered. He held that Art. 103, Limitation Act, applied to the suit for the recovery of dower money. He pointed out that such a suit could be brought within three years of the death of the husband under that Article, and as the suit had been brought four years after the death of Arsalla Khan he held that it was time barred so far as Sarfraz was concerned. With respect to Malik Aman he was of the view that his application dated 24th August 1936 was an admission of a liability under S. 19, Limitation Act, and extended the period to three years from that date. He therefore found the suit within time against Malik Aman. He passed a decree in favour of Mt. Begum Jan against Malik Aman for Rs. 1000. Mt. Begum Jan appealed against this order and requested that a decree for Rs. 1000 should also be passed against Sarfraz. Malik Aman presented an appeal as well, asking that he should be relieved of the liability. The appeal of Mt. Begum Jan was found to be time-barred in the District Court. It was therefore dismissed.

The learned Additional Judge disagreed with the lower Court respecting the liability of Malik Aman. He was of the opinion that Malik Aman's application dated 24th August 1936 did not amount to an acknowledgment

of liability as contemplated by S. 19, Limitation Act. He consequently accepted the appeal of Malik Aman and dismissed the suit of Mt. Begum Jan against him also. Mt. Begum Jan has come up on further appeal to this Court and has requested that the decree of the trial Court be restored, that is to say that a decree may be given to her for Rs. 1000 against Malik Aman. Learned counsel for the appellant has urged that the debt due to Mt. Begum Jan was discharged by the transfer of the land to her in 1923, that the consideration for the discharge of that debt failed on 6th December 1936 when the mutation was rejected, that under Art. 97, Limitation Act, the cause of action to bring a suit for the recovery of the original debt arose on 6th December 1936, and that her suit was therefore within time. In the alternative the learned counsel has argued that the application of Malik Aman amounted to an acknowledgment.

Learned counsel for the respondent replied that Art. 97, Limitation Act, applied to suits for recovery of consideration in cases where a transaction was voidable and had been avoided. He however emphasized the point that where the transaction was void ab initio the transaction failed at once and Art. 62, Limitation Act, applied. He contended that the transaction of the transfer of land in this case was void ab initio for want of registration, that the suit to recover the dower money was therefore governed by Art. 62, Limitation Act, and was time-barred. As regards acknowledgment he invited our attention to the fact that Malik Aman did not admit his own liability but only stated that his father had given land to the plaintiff to pay off the dower debt. He urged that such a statement did not fall within the purview of S. 19, Limitation Act. It will be observed that neither counsel has relied on Art. 103, Limitation Act. They are agreed that we have to decide whether the transfer of land to Mt. Begum Jan was void ab initio or not. They do not deny that Article 62 applies if it was void ab initio and Art. 97 applies if it was not. For facility of reference we will reproduce the two Articles below :

62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.
97. For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure.

In the former case the terminus a quo is the date when the money is received. In the latter case the starting point is the date of the failure of the consideration, for it is only when the consideration fails, that is to say the document becomes ineffective, that the cause for refund arises. There are two rulings of their Lordships of the Privy Council which directly bear on the point in issue. We will first proceed to discuss them. In 11 ALL 47[1] the transaction fell through because one of the parties failed to complete it. Their Lordships held that Art. 97 applied. The case is analogous to the one which is before us and it will be useful to reproduce the headnote which runs thus :

> Money due on an account stated which would, as such, have been barred in three years from the statement under Act 15 of 1877, Sch. ii, Art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.
>
> In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.
>
> *Held* that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of Art. 97.
>
> The matter might also be regarded as falling under S. 65, Contract Act, 9 of 1872, under which when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it."

In 19 Cal 123[2] the coparceners had objected to the transfer and it was therefore set aside. The suit was for refund of consideration. Their Lordships explained in this judgment that Art. 62 applied to cases where the transaction was void ab initio because the consideration failed at once and Art. 97 governed transfers which were valid to begin with but became inoperative owing to events which supervened later on. In that particular case their Lordships held that the suit was within time under both articles. A Division Bench of the Calcutta High

1. ('89) 11 All 47 : 15 I A 211 : 5 Sar 260 (P C), Bassu Kuar v. Dhum Singh.
2. ('92) 19 Cal 123 : 18 I A 159 : 6 Sar 91 (P C), Hanuman Kamat v. Hanuman Mandur.

Court have also taken a similar view of the general principle in the ruling reported in A I R 1924 Cal 600.[3] Notes (e) and (f) of that ruling are in point and are as follows :

(e). Ordinarily limitation runs from the earliest time at which an action can be brought and after time has commenced to run there may be a revival of a right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is reanimated. Whenever proceedings are being conducted between the parties bona fide in order to have their natural rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable, wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities.

(f) The true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result.

Applying the principles laid down in the authorities quoted above we are of opinion that the transfer of the land to the woman was perfectly valid to begin with and hence Art. 97 applies to the suit. The husband may have registered the document. He may have got a mutation attested. In fact one of the step-sons was also anxious to get the transaction enforced and it was not till 6th December 1936 that he made a *volte face* and went back on his application of 24th August 1936. Transactions are void ab initio only when they are not enforceable from the very beginning for instance a contract by a minor or a contract against public policy or in contravention of a provision of law. In view of our finding that Art. 97, Limitation Act, applies, the cause of action accrued to the plaintiff when the mutation was rejected. The suit of the plaintiff is therefore within time from that date viz., 6th December 1936, and the question of acknowledgment of Malik Aman does not arise. We consequently accept the appeal, set aside the order of the lower appellate Court and restore that of the trial Judge. The plaintiff shall have her costs throughout from Malik Aman.

G.N /R.K. *Appeal accepted.*

3. ('24) 11 A I R 1924 Cal 600 : 79 I C 520 : 39 C L J 40, Dwijendra Narain v. Jogeschandra.

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(28) A. I. R. 1941 Peshawar 59

ALMOND J. C. AND SOOFI J.

Firm R. S. Hira Singh Attar Singh — *Plaintiff — Appellant*

v.

Mohd. Afzal Khan and others — *Defendants — Respondents.*

Civil Appeal No. 29/17 of 1940, Decided on 17th March 1941.

(a) Civil P. C. (1908), O. 14, R. 1—Failure to frame issue is not necessarily fatal to suit provided substantial justice is done — Defendant raising plea for applying S. 41, T. P. Act — Arguments addressed—No issue framed—Court is justified in applying principles of S. 41, T. P. Act: ('39) 26 AIR 1939 Pesh 44 : 184 IC 433, *OVERRULED.*

The failure to frame an issue is not necessarily fatal to a suit, provided substantial justice has been done. Where the plea of the applicability of S. 41, T. P. Act, is raised in the defence, arguments are addressed to the Court and the matter has been before the parties during the case, the Court is justified in applying the principles of S. 41, T. P. Act, even though no issue was framed on that point : 13 M I A 573 (P C), *Rel. on*; ('39) 26 A I R 1939 Pesh 44 : 184 I C 433, *OVERRULED.*

[P 60 C 2]

(b) Transfer of Property Act (1882), S. 41 — Mortgagee is not bound to have mortgage entered in land revenue records or sue for possession before limitation expires—Anomalous mortgage —Mortgage simple for certain period after which mortgagee entitled to possession — Mortgage duly registered but not entered in land revenue papers — Mortgagor transferring his interest in mortgaged property — S. 41 does not apply — Mortgagee can sue for possession any time within limitation.

There is no legal obligation on the mortgagee either to have his mortgage entered in the land revenue records or to sue for possession under his mortgage deed before the period of limitation for suing expires. Consequently, where an anomalous mortgage which is to be simple for a certain period after the expiry of which the mortgagee is entitled to possession is duly registered but not entered in the land revenue papers and subsequently the mortgagor transfers his interest in the mortgaged property to a third person, the mortgagee is not estopped from suing for possession by the principles of S. 41 and is entitled to sue for possession any time within limitation : Civil Appeal No. 106/40 of 1939, *Rel. on;* ('31) 18 AIR 1931 Nag 144, *Approved*; ('27) 14 AIR 1927 Lah 666; ('29) 16 A I R 1929 Rang 117 and ('29) 16 A I R 1929 Rang 333, *Disting.*; ('36) 23 AIR 1936 Lah 405, *Dissent.*; ('21) 8 AIR 1921 P C 112, *Expl.* [P 61 C 2; P 62 C 1]

Hukamchand — for Appellant.

K. B. Saaduddin Khan, R. S. Pandit Moolchand and M. Bahramkhan — for Respondents 8, 9, 10 and 15.

Ram Singh and Zaidullah (Agents) — for Respondents 2 and 3, and 4, respectively.

Respondents 5, 6 and 11 in person.

Mohammad Salim, Official Receiver, Respondent 19, in person.

Almond J. C. — This is a further appeal by the plaintiffs Hira Singh Attar Singh through Sultan Mohammad Khan, receiver of the firm, against the concurrent findings of the two Courts below dismissing their suit for possession of 160 ks. of land. There were originally 18 defendants to the suit, and the Official Receiver was added as defendant 19 by an order of this Court dated 27th August 1937. The plaintiffs' case was that on 2nd December 1920 defendant 1, Mohammad Afzal mortgaged to them the

land in suit together with one-third share in a house which is not in suit for Rs. 10,000, that the mortgage for the first three years was to be a simple mortgage carrying interest; that if the mortgage debt was not paid within the period of three years then the plaintiffs were entitled to take possession. They alleged further that defendants 2 to 18 were shown in the revenue records as being in possession of the various portions of the land and therefore they were made parties to the suit.

For the purpose of this appeal it is only necessary to say that the general line taken by the defendants was that subsequent to the mortgage in favour of the plaintiffs Mohammad Afzal had transferred his proprietary rights in the land to one Muzaffar Khan from whom the defendants claimed their titles. Twenty-one issues in all were framed and of these five were decided by the trial Court in a preliminary order dated 26th November 1937. The decision of the trial Court has not been challenged on any of those issues with the exception of the following : (1) Is the suit against the Official Receiver within time? The trial Court had held that it was not within time. Thereafter, in a final order, the trial Judge disposed of the remaining points in suit by the decision on issue 5 which reads as follows : Is the plaintiff entitled to sue for possession under the mortgage in suit? The trial Judge applying the principles of S. 41, T. P. Act, and in particular relying upon a judgment of the Lahore High Court reported in A I R 1936 Lah 405,[1] held that the plaintiffs were estopped by their conduct from claiming possession. The plaintiffs appealed to the District Court. Amongst the points raised in the grounds of appeal was the question of limitation against the Official Receiver. This question was not referred to in the judgment of the learned Additional Judge. The other points argued at the appeal were that the plaintiffs were not estopped from seeking possession of the land and that it was wrong to decide the point against them on this ground without framing a definite issue. The Additional Judge dismissed the plaintiffs' appeal, and the plaintiffs have presented this further appeal. Again it is noted in the grounds of appeal that the lower appellate Court was wrong in not deciding the question of limitation as against the Official Receiver, but no arguments have been addressed to us on that point, and we must, therefore, consider that it is abandoned. The other two points have been argued before us, namely (1) whether the Courts below could apply the principles underlying S. 41, T. P. Act, without a definite issue being framed on the subject and (2) whether the plaintiffs are estopped by the principles underlying that section.

As regards the first point, it is to be noted that when the case was virtually ripe for judgment some of the defendants put in an application on 22nd January 1938 that further issues should be framed including one on the applicability of S. 41, T. P. Act. The Court refused to accept this application at that stage and adjourned the case for judgment to 14th February 1938. In the meantime the plaintiffs' counsel on 31st January 1938 put in an application objecting to the framing of further issues but without making any specific reference to S. 41, T. P. Act. Learned counsel for the appellants has referred to a case decided by a single Judge of this Court and reported in A I R 1939 Pesh 44.[2] In that case it was held that it is necessary that the Court should frame issues on any matter in dispute between the parties and that the failure to do so cannot be condoned by the fact that substantial justice has been done. It does not appear that any authority was cited when that case was heard, and we do not think that the judgment given therein can be considered as good law for there is direct authority of the Privy Council in 13 M I A 573[3] to the effect that the failure to frame an issue is not necessarily fatal to a suit. If therefore substantial justice has been done there is no ground for remanding the case merely on this technical ground. It is not disputed that the application of the principles of S. 41, T. P. Act, was raised in the defences of defendants 8 to 10 and 15 and arguments on this point were addressed to the trial Court. There had been no attempt until the final stage of the suit to have a definite issue framed on the point and in fact the matter must have been before the attention of the parties during the case. Furthermore, in our opinion, the point is sufficiently proved by issue 5 itself, for there does not appear to be any other ground on which the right of the plaintiffs to possession was resisted other than on this ground. We therefore find that the Courts below

1. ('36) 23 AIR 1936 Lah 405 : 166 I C 147 : 38 P L R 1097, Arur Singh v. Mt. Santi.

2. ('39) 26 A I R 1939 Pesh 44 : 184 I C 433, Dhanpat Rai Khem Raj v. Firm Harichand Gobindram.

3. (1869-70) 13 M I A 573: 15 W R 15: 6 Beng L R 148 : 2 Suther 387 : 2 Sar 626 (P C), Mt. Mitna v. Syud Fuzal Rub.

were entitled to take up this point without any issue having been framed.

We now come to the point as to whether the plaintiff is estopped in any way by his conduct from obtaining possession, for under the terms of the document he was undoubtedly entitled to take possession after the expiry of three years from the execution of the document. The mortgage was an anomalous mortgage being simple for the first three years with a stipulation that possession might be taken after that period. The principal case which is relied upon by the defendants is that to which reference has already been made, namely, A I R 1936 Lah 405.[1] In that case the facts were similar to the present case. The owner of the land had effected a registered mortgage deed in favour of the mortgagee. The mortgagee had had his deed registered but had not got it entered in the revenue papers, nor had he sued for possession upon it until the period of limitation was about to expire. In the meantime the owner had transferred the lands to other people and some lands had been built upon. It was held in these circumstances that the mortgagee was estopped by his conduct in not getting his mortgage entered in the revenue papers and in not suing for possession until the period of limitation was about to expire. The case referred to a previous decision of the Lahore High Court reported in A I R 1927 Lah 666,[4] but the facts of the two cases were not in any way similar, for the earlier Lahore case did not involve a contest between a mortgagee and subsequent purchasers of the property. The Lahore ruling also referred to a case reported in A I R 1931 Nag 144[5] in which a Judge of the Nagpur Chief Court had held that the provisions of S. 41, T. P. Act, did not at all apply to a case between a mortgagee and a subsequent purchaser, for the mortgagee in allowing the mortgagor to remain in possession had not allowed an ostensible owner but the real owner to remain in possession. The learned Judges who decided the latter Lahore case preferred not to follow that judgment. A I R 1936 Lah 405[1] has been subsequently followed in other cases in that Court by Judges sitting singly.

Two other cases to which reference is necessary are A I R 1929 Rang 117[6] and A I R 1929 Rang 333.[7] In both those cases the mortgagee was held to be estopped from asserting his mortgage under the provisions of S. 41, T. P. Act, but in both those cases there were special circumstances. In the first case the mortgage had not been correctly indexed in the registration office owing to the fault of the mortgagee, and in the second case the mortgagee had not got his mortgage entered in the Town Land Rolls and had allowed the land to be built on. It must be said therefore that the only case on which the judgments of the Courts below proceed is that reported in A I R 1936 Lah 405.[1] With due respect we are unable to accept the principles laid down in that judgment. There is no legal obligation on the mortgagee either to have his mortgage entered in the land revenue records or to sue for possession under his mortgage deed before the period of limitation for suing expires. The mortgagee in the present case did all that he was legally bound to do, and he did not attempt to conceal anything. He had the mortgage duly entered in the Sub-Registrar's office. The defendants, on the other hand, did not take elementary precautions which one would expect from persons buying land. Although it has been held by their Lordships of the Privy Council in a case reported in AIR 1921 P C 112[8] which has been relied upon by the defendants before us that the registration of a document is no notice in all cases, yet it is nowhere laid down in that judgment that a prospective purchaser of land is exempted from the ordinary precaution of searching the registration office for encumbrances.

A similar view was taken in an unpublished judgment of a Bench of this Court in Civil Appeal No. 106/40 of 1939.[9] In that case it was held that a person who fails to search the registration office for encumbrances on the property which he proposes to buy could not be considered to have taken reasonable care to ascertain that the transferor had power to make the transfer. As that case was apparently not argued as fully as the present one has been, we have considered it better to give our reasons in detail for our decision rather than merely to rely on that case as a precedent. We are of opinion therefore that issue 5 was wrongly decided and that

4. ('27) 14 AIR 1927 Lah 666: 103 I C 45, Muhammad Din v. Mt. Sardar Bibi.
5. ('31) 18 A I R 1931 Nag 144 : 134 I C 676 : 27 N L R 144, Narayan v. Purushottam.
6. ('29) 16 A I R 1929 Rang 117 : 117 I C 580 : 7 Rang 118, K. V. Galliara v. U Thet.
7. ('29) 16 A I R 1929 Rang 333 : 119 I C 217 : 7 Rang 276, P. L. T. A. R. Chettyar Firm v. Maung Kyaing.
8. ('21) 8 A I R 1921 P C 112 : 57 I C 465 : 48 Cal 1 : 47 I A 239 (P C), Tilakdhari Lal v. Khedan Lal.
9. Civil Appeal No. 106/40 of 1939, Fida Mohammad v. Khush Mir.

the plaintiffs are not estopped from taking possession merely on account of the principles laid down in S. 41, T. P. Act. We therefore reverse the finding of the trial Court on issue 5 and hold that the plaintiffs are entitled to take possession of the land in suit under their mortgage subject to the decision of the other issues in the case which have not yet been decided. Some of those issues raise the question of whether part of the land was transferred to some of the defendants by transactions prior to the plaintiffs' mortgage. In one case it is alleged that the property which is claimed by a particular defendant was not the property of Mohammad Afzal at all. It will be necessary to remand the case to the trial Court for a decision on the remaining issues which have not been decided. We treat the decision on issue 5 as having been one on preliminary point. We remand the case to the trial Court under O. 41, R. 23, Civil P. C., for a decision of the remaining issues. The stamp on appeal in this Court will be refunded and other costs in this Court will follow the event. Pleader's fee Rs. 150.

G.N./R.K. *Case remanded.*

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(28) A. I. R. 1941 Peshawar 62

ALMOND J. C. AND MIR AHMAD J.

Qamar Din Saaduddin and others — *Plaintiffs — Petitioners*

v.

Lt. K. S. Abdul Hamid Khan — *Defendant — Respondent.*

Civil Revn. No. 111 of 1939, Decided on 6th January 1941, from order and decree of Additional Judge, Peshawar, D/- 18th February 1939.

(a) Punjab Tenancy Act (16 of 1887), S. 77 (3) — Jurisdiction of revenue Court — Suit which does not dispute 'haq' to be village cess but merely seeks decision as to liability to pay 'haq' is cognizable exclusively by revenue Court.

When a suit is clearly one which is not brought to dispute the question as to whether a particular 'haq' is or is not a village cess but is one which is brought with a view to having a decision given as to whether the plaintiff individually is liable to pay that 'haq,' it is one which is triable exclusively by a revenue Court : ('38) 25 A I R 1938 P C 219, *Ref.* [P 630 1]

(b) Punjab Tenancy Act (16 of 1887), S. 77 (3) (j)—Person seeking declaration as to his liability to village cess — Whether suit in revenue Court lies *(Quære).*

It is doubtful whether a person can bring a suit for declaration in the revenue Court, to the effect that he is not liable to a village cess. It appears to be contemplated by the Legislature that the plaintiff's remedy in such a case is limited to a defence in an action brought by the village proprietor who is suing for such cess.' [P 63 C 1]

S. B. Raja Singh — for Petitioners.

Sheikh Mohammad Shafi — for Respondent.

Almond J. C.—In this case Lieut. Abdul Hamid Khan, the Khan of Zaida, obtained in the Court of the Assistant Collector on 1st June 1937, a decree against Qamardin for Rs. 10 on account of haq tora which he claimed as being a village cess payable to him. Qamardin has now died and his representatives have been brought on the record of this Court but for the sake of convenience will be referred to as Qamardin. Qamardin did not appeal against the decree of the Assistant Collector but on 26th July 1937 instituted in a civil Court a suit for a declaration that he was a proprietor in the village and not a hamsaya of Lieut. Abdul Hamid Khan and was therefore not liable to pay the cess. The question of the jurisdiction of the civil Court to hear this suit was raised by Lieut. Abdul Hamid Khan and was decided in favour of Qamardin by a preliminary order dated 18th August 1937. The Court then dealing with the merits of the suit granted Qamardin the relief he prayed for on 30th November 1937 holding that the custom was against justice, equity and good conscience. An appeal was preferred to the District Court by Lieut. Abdul Hamid Khan and the learned Additional Judge relying on a judgment of the Privy Council reported in A I R 1938 P C 219[1] held that the suit was cognizable by a revenue Court. He accepted the appeal with costs and directed that if the plaintiff wished to pursue his relief he must take back his plaint and present it in a revenue Court. Qamardin has presented this application for revision against the order of the Additional Judge. As the question was regarded as one of some importance it was referred to a Bench.

Two points have been argued by learned counsel for the plaintiff-petitioner. The first is that on the very decision of their Lordships of the Judicial Committee on which the learned Additional Judge relied this suit is one which is triable by a Civil Court and the second point is that even if it were correctly held by the Additional Judge to be triable exclusively by a revenue Court, it was his duty under S. 100, Tenancy Act, to submit the record of the suit to this Court with a view to this Court making an order under sub-s. (2) of that section. He further prays that if it is held that the suit is triable by a revenue Court, action should now be

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1. ('38) 25 A I R 1938 P C 219 : 175 I C 769 : 65 I A 301 : 32 S L R 835 : I L R (1938) Lah 514 (P C), Mahomed Nawaz Khan v. Bhagata Nand.

taken by this Court under sub-s. (3) of S. 100. In dealing with the first point the learned counsel for the petitioner has referred to that portion of the judgment of the Judicial Committee at p. 221 to the effect that

had the suit brought in the civil Court been a suit to declare that "haq buha" was not a village cess within the meaning of the Act of 1887 and that the revenue Courts had not jurisdiction in respect thereof, such a suit could not have been regarded as incompetent.

We are of opinion, however, that the present suit does not come within the hypothetical circumstances to which their lordships referred in that judgment. The present suit is clearly one which is not brought to dispute the question as to whether "haq tora" is or is not a village cess: it is one which is brought with a view to having a decision given as to whether the plaintiff individually is liable to pay that tax and it comes precisely within the scope of the decision given by their Lordships of the Judicial Committee in that case. We therefore agree with the finding of the learned additional Judge that the suit was triable by a revenue Court.

There remains the question as to whether we should order the decree of the Subordinate Judge to be registered as a decree of a revenue Court, and we are of opinion that there are no grounds for doing so in the present case. In the first place the plaintiff has already had a decision on the question now in dispute from a revenue Court. In the second place we are doubtful whether the plaintiff could bring a suit for declaration in the revenue Court. Clause (j) of sub-s. (3) of S. 77, Tenancy Act, refers to suits brought for sums payable on account of village cesses or village expenses and does not refer to a suit for declaration that a particular person is not liable to such a cess. It appears to be contemplated by the Legislature that the plaintiff's remedy is limited to defence in an action brought by the village proprietor who is suing for such cesses. For these reasons we arrive at the conclusion that the decree of the Subordinate Judge should not be registered in a revenue Court. We accordingly dismiss this petition with costs.

N.K./R.K. *Petition dismissed.*

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(28) A. I. R. 1941 Peshawar 63

ALMOND J. C.

Sher Mohd., and others—Petitioners

v.

Emperor.

Criminal Revn. No. 90 of 1941, Decided on 10th May 1941, to revise order of District Magistrate, Mardan, D/- 15th February 1941.

(a) Criminal P. C. (1898), S. 107 — Person executing bond under S. 107 committing offence under S. 396, Penal Code — Offence involves breach of peace and entails forfeiture of bond—Forfeiture of whole amount of bond is justified in such case.

The commission of an offence by a person under S. 396, Penal Code, involves a breach of the peace, especially where fire-arms are used and death is caused, and therefore entails a forfeiture of the bond executed by him under S. 107, Criminal P. C. In such a case the forfeiture of the whole amount of the security is justified : ('19) 6 A I R 1919 Mad 770, *Rel. on.* [P 63 C 2 ; P 64 C 1]

(b) Criminal P. C. (1898), S. 515—Revision—District Magistrate can raise amount of security ordered to be forfeited by original Court.

The plain meaning of S. 515 is that the District Magistrate can pass on revision any order which the original Magistrate himself might have passed. Consequently, the District Magistrate can revise the order of the original Court so as to raise the amount of security to be forfeited. [P 64 C 1]

L. Beli Ram — for Petitioners.

Advocate-General — for the Crown.

Order.—The six petitioners in this case stood surety under S. 107, Criminal P. C. for Abdul Ghani. During the period of the security Abdul Ghani was convicted of an offence under S. 396, Penal Code. The Magistrate called upon the sureties to show cause why their bond should not be confiscated. He confiscated it to the extent of Rs. 300. An application was made by the police to the District Magistrate under S. 515, Criminal P. C., to revise the order and direct that the whole of the amount of security namely Rs. 1000 should be forfeited. The District Magistrate made this order after giving notice to the petitioners.

Two points have been taken on this application before me. The first is that an offence under S. 396, Penal Code, does not amount to a breach of the peace so as to warrant the forfeiture of the bond. I have perused the judgment of this Court in which the conviction of Abdul Ghani was maintained. It was for a dacoity committed upon the house of a Patwari in which some of the dacoits, though not Abdul Ghani himself, used fire-arms. There is a case reported in 47 I C 445[1] where it was held that an offence under S. 392, Penal Code, could involve a breach of the peace. In dacoity there is always an element of violence. A dacoity is a robbery committed by five persons and one of the essential ingredients of the offence of robbery is that the persons committing it should voluntarily cause or attempt to cause death or hurt or wrongful restraint or fear of instant death or of instant hurt or

1. ('19) 6 A I R 1919 Mad 770 : 47 I C 445 : 19 Cr L J 929, In re Savarajuhlu Naidu.

of instant wrongful restraint. If robbery can involve a breach of the peace, it is obvious that a dacoity committed by a number of persons can cause a still greater breach of the peace and in the present case when Abdul Ghani was concerned in an offence in which fire-arms were used and one man was killed, there was in my opinion obviously a breach of the peace.

The second point taken is that the District Magistrate could not revise the order of the original Court so as to raise the amount of security to be forfeited. It is admitted both by the learned counsel for the petitioners as well as by the learned Advocate-General that they have been unable to find any authority on this point. It appears to me that the plain meaning of S. 515, Criminal P. C., is that the District Magistrate can pass on revision any order which the original Magistrate himself might have passed. If he were only in a position to reduce the amount of security forfeited or to set aside the order of forfeiture, there would be little object in giving him powers of revision at all for that object could always be achieved by an appeal by the person against whom an order of forfeiture had been made. I therefore hold that the order of the District Magistrate was a legal order and on the merits it appears to me that this was eminently a case in which the whole amount of security should have been forfeited. The offence of which Abdul Ghani was convicted was a very serious one and there are six sureties to the bond of Rs. 1000. I dismiss this application.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Peshawar 64

ALMOND J. C.

In re Messrs. Ganeshdas Ram Singh and others — Petitioners.

Misc. Case No. 154 of 1940, Decided on 18th March 1941.

Income-tax Act (1922), Ss. 25-A and 66(3) — Question whether Hindu family is divided is one of fact.

The question whether a Hindu family is divided or undivided is a question of fact which is not within the competence of the High Court to decide: ('25) 12 A I R 1925 All 298; ('36) 23 A I R 1936 Pat 476; ('33) 20 A I R 1933 Lah 827 and ('32) 19 AIR 1932 Lah 575, *Foll.* [P 64 C 2]

R. B. Diwan Chand and L. Gordhan Lal — for Petitioners.

Ch. Abdullah (Income-tax Officer) and Sh. Allahbakhsh—for Commissioner of Income-tax.

Order. — This is an application under S. 66 (3), Income-tax Act, for an order requiring the Commissioner of Income-tax to state a case and refer it to this Court. Briefly the facts are that the petitioners have been assessed as a joint Hindu family for purposes of income-tax and they contend that the family has been disrupted. The Income-tax Officer by his order dated 31st March 1939 held that they were members of a Hindu undivided family. The application is resisted by the Income-tax Commissioner who contends amongst other points that the question is simply one of fact which is not within the competence of this Court to decide and it appears to me that this contention must prevail. There was some evidence produced before the Income-tax Officer to the effect that a decree of a Court had been granted on an arbitration award separating the family, but the Income-tax Officer was of opinion that there had in reality been no disruption of the family. The relevent section of the Income-tax Act as applicable to this case is S. 25-A before the amendments of Act of 1939 and the Income-tax Officer has to be satisfied that a separation of the members of a family has taken place and that the joint family property has been partitioned amongst the various members or the groups of members in definite proportions. To my mind this question is purely one of fact and the question has been treated as a question of fact in those decisions which have been cited before me by the learned counsel for the Commissioner of the Income-tax. Those cases are 1 I T R 215,[1] 138 I C 187,[2] 4 I T R 279[3] and A I R 1925 ALL 298.[4] Learned counsel for the petitioners has not been able to cite before me any reported case in which the question of whether a Hindu family is divided or undivided has been treated as question of law. In these circumstances, I am of opinion that no case has been made out for requiring the Commissioner of Income-tax to state the case and I accordingly dismiss this application with costs. Pleader's fees Rs. 30.

G.N./R.K. *Application dismissed.*

1. ('33) 20 AIR 1933 Lah 827 : 147 I C 862 : 1 I T R 215, Pyare Lal v. Commissioner of Income-tax.
2. ('32) 19 AIR 1932 Lah 575 : 138 I C 187 : 14 Lah 134 : 33 P L R 947, Jattu Shah Nathu Shah v. Commr. of Income-tax.
3. ('36) 23 AIR 1936 Pat 476 : 164 I C 799 : 4 I T R 279, Lachhi Ram Baldeodas v. Commissioner of Income-tax.
4. ('25) 12 AIR 1925 All 298 : 86 I C 27 : 23 A L J 40, In the matter of Mukhan Lal Ram Sarup.

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(28) A. I. R. 1941 Peshawar 65

ALMOND J. C.

Mian Sharif Gul — Defendant
— Appellant

v.

Said Gul and others — Plaintiffs
— Respondents.

Appeals Nos. 298/86 of 1940 and 52/7 of 1941, Decided on 2nd May 1941, from judgment of Addl. Judge, Peshawar, D/- 10th December 1940.

(a) Co-owners — Partition — Portion of joint estate divided — Presumption that whole of it was divided is one of fact and depends on particular facts of case — All property jointly owned by plaintiff and defendant divided except hujra —Agricultural land though shown joint held separately almost in equal shares — No compensation shown to have been given to plaintiff —Hujra held not partitioned.

Where one portion of a joint estate has been divided, the presumption that the whole of it has been divided is merely presumption of fact and depends on the particular circumstances of each case. [P 66 C 2]

All the property jointly owned by the plaintiffs and defendant with the exception of hujra had been divided although their agricultural land was still shown as owned by them all jointly though held separately almost in equal shares. It was not shown what compensation was given to the plaintiffs if the hujra remained solely the property of the defendant :

Held that the circumstances led to the conclusion that there was no partition of the hujra: ('27) 14 AIR 1927 P C 208 ; 107 I C 275 (Lah) and ('36) 23 AIR 1936 Lah 511, *Ref.* [P 66 C 2]

(b) Limitation Act (1908), Art. 47 — Proceedings between plaintiff and defendant under S. 145, Criminal P. C. — Order under S. 145, Criminal P. C., declaring defendant to be in possession — Suit by plaintiff for possession of his share of property falls under Art 47.

Where in the proceedings under S. 145, Criminal P. C., between the plaintiff and the defendant, the Magistrate declares the defendant to be in possession of the property in dispute, a suit by the plaintiff for possession of his share of the property falls within the purview of Art. 47 : ('37) 24 A I R 1937 All 800 and ('30) 17 A I R 1930 Cal 612, *Approved*; 163 I C 370 (Cal), *Not foll.* [P 67 C 1]

(c) Limitation Act (1908), Art. 47 — Order under S. 145, Criminal P. C.—Person not party to proceedings is not bound by order — Art. 47 does not apply to such person.

A person who is not a party to the proceedings under S. 145, Criminal P. C., is not bound by an order passed under that section and consequently Art. 47 cannot apply to him : ('35) 22 A I R 1935 Lah 115, *Rel. on*; ('30) 17 AIR 1930 Cal 63, *Expl.* [P 67 C 2]

(d) Cosharers — Adverse possession—Fact of one cosharer building extensively on portion of joint land does not of itself amount to ouster of other cosharer who was minor at that time.

The act of a cosharer in building extensively on a portion of the joint land cannot by itself amount to an ouster of the other cosharer who was a minor at that time. [P 67 C 2]

Hukam Chand and Abdul Rauf — for Appellant (Defendant in 298/86 of 1940).

Mohd. Shafi and Baij Nath — for Appellants (Plaintiffs in 52/7 of 1941).

Judgment. — In this case Said Gul and Anwar Gul, sons of Mian Gul, and Zafir Gul, son of Ghias Gul, sued Sharif Gul, defendant for possession of two-thirds of a hujra situated in village Phandu. The relationship of parties is given in the judgment of the trial Court. The plaintiffs' case was that they were joint owners and that the hujra had never been partitioned. The defendant resists the suit on the grounds that the site of the hujra had fallen to him on private partition, that he himself had built a hujra thereon 15 or 16 years ago, that the suit was time barred, that the suit was insufficiently valued for purposes of court-fee, that he had held adverse possession, that the plaintiffs were estopped from suing and that he was at any rate entitled to the costs of improvements if a decree were passed against him.

On the pleadings of the parties the following issues were framed by the trial Judge apart from the issue on the question of valuation which was decided by a preliminary order and is not in dispute now :

1. Whether the plaintiffs' suit is within time?
2. Whether the plaintiffs are owners of a two-third share in the hujra in suit?
3. Whether the defendant is the owner of the entire hujra on account of a private partition?
4. Whether the plaintiffs are estopped by their conduct?
5. Whether the defendant became owner of the hujra by adverse possession?
6. Whether the defendant has effected any improvements, and if so whether he is entitled to the value thereof?
7. Relief?

The trial Judge found issue 1 in favour of plaintiff 3 but against plaintiffs 1 and 2. On issues 2 and 3 he came to the conclusion that there had been a private partition and that the hujra had fallen to the share of the defendant. He found issue 4 against the defendant on the ground that there was nothing to show that the plaintiffs were estopped by any conduct of theirs. He found issue 5 in favour of the defendant and he found issue 6 in favour of the defendant to the extent of holding that the improvements which he had effected amounted to Rupees 535-14-6. He therefore dismissed the suit on the basis of issues 1 to 3. The plaintiffs appealed to the District Judge who found that the suit was within time as regards all the plaintiffs, that there had been no partition, that the amount of compensation assessed by the trial Judge was correct. He therefore gave the plaintiffs a decree for

possession of two-thirds of the hujra on payment of Rs. 357-4-0 representing two-thirds of the improvements. He directed that parties should bear their own costs on the appeal. Both sides have appealed against that decree. The defendant prays for the dismissal of the plaintiffs' suit and the plaintiffs ask for their costs. This order will cover both the appeals. It may however be noted that the appeal of the plaintiffs themselves was not argued, their learned counsel contenting himself with rebutting the appeal of the defendant-appellant. The points which have been taken by learned counsel for defendant-appellant are as follows : In the first place it has been argued that there was a partition by which the hujra in question fell to the share of the defendant. The second point taken is that the improvements should be assessed at Rs. 3000 and not at the amount accepted by the lower Courts. It is argued in the third place that the suit was barred against all three plaintiffs, that the defendant was in adverse possession and also that the plaintiffs are estopped.

As regards the question of whether there had been a private partition prior to this suit, it is said by the defendant in his evidence that there was a partition between him and the father of plaintiff 3 in 1906 and that there was a document relating to that partition. He further stated that in 1913 there was an oral partition between him and the father of plaintiffs 1 and 2 which had the effect of dividing the lands and houses of the parties as well as this hujra. Other facts proved in this case are that adjoining the site in suit plaintiffs 1 and 2 are in possession of an area of 2 kls. on which they have built another hujra, plaintiff 3 is in possession of an area of 2 kls. 4 mls. and the defendant himself is in possession of an area of 2 kls. 6 mls. It is admitted by both parties that with the exception of this hujra all the other property which they jointly owned has been divided although their agricultural land is still shown as owned by them all jointly though held separately. It is also admitted by both parties that the defendant built extensively on this site in about 1924 and 1925 when all the plaintiffs were minors. The plaintiffs now allege that they contributed a share of the cost of those buildings but their evidence on the point cannot, in my opinion, be accepted and it has been held by both the Courts as a matter of fact that the entire expenditure was borne by the defendant. Three cases were cited before the trial Judge to show that where one portion of a joint estate has been divided, there is a presumption that the whole of it has been divided. The cases referred to were A I R 1927 P C 208,[1] 107 I C 275[2] and A I R 1936 Lah 511.[3] There was also a reference to a judgment of my own in the judgment of the trial Court but that does not appear to be relevant to the case. In any case the presumptions which are made as regards partition are merely presumptions of fact and must depend on the particular circumstances of each case. There are in my opinion indications that this hujra was left joint in the general partition. In the first place a hujra is a place which is commonly used for entertainment purposes by all members of the family. The agricultural land which is in possession of all three branches of the family is approximately equal in area and it is not shown what compensation was given to the plaintiffs if the hujra remained solely the property of the defendant. All these circumstances lead me to the conclusion that there has been no partition of this hujra.

The second point dealt with is the question of limitation and in this connexion it is to be noted that on 9th February 1934 an order was passed by a Magistrate in proceedings under S. 145, Criminal P. C., which took place between the defendant on the one hand and the first two plaintiffs on the other whereby he declared the defendant to be in possession of the property. The question is whether Art. 47 applies to the facts of this case and if so, whether it applies only to the first two plaintiffs or to plaintiff 3 as well. The trial Judge was of opinion that Art. 47 was applicable and he referred to the commentary in Mitra's Limitation and Prescription which book has not been cited before me or shown to me. Learned counsel for the appellant relies upon two cases reported in A I R 1937 ALL 300[4] and A I R 1930 Cal 612.[5] In the first of these cases there had been proceedings under S. 145, Criminal P. C., between the antecedents-in-interest of the plaintiff and the antecedents-in-interest of the defendant regarding the pos-

1. ('27) 14 A I R 1927 P C 208 : 104 I C 92 (PC), Abdul Waheb Khan v. Tilakdhari Lal.
2. ('28) 107 I C 275 (Lah), Mt. Plungun v. Mt. Jasodhan.
3. ('36) 23 A I R 1936 Lah 511 : 164 I C 262 : 39 P L R 367, Ghazanfar Ali v. Muzzafar Ali.
4. ('37) 24 A I R 1937 All 300 : 169 I C 125 : 1937 A L J 225, Mt. Jaidevi Kuari v. Dakshini Din.
5. ('30) 17 A I R 1930 Cal 612 : 128 I C 106 : 51 C L J 461, Atale Sunarri v. Talib Husain.

session of the southern half of a certain plot of land. It had been decided in favour of the defendant's antecedents-in-interest. More than three years after the decision of that case, the plaintiff sued for the price of trees cut by the defendant and for an injunction to restrain him from cutting trees in future in the whole of the plot. It was held by a single Judge of the Court that the provisions of Art. 47 applied to the case. The learned Judge referred to certain decisions of the Bombay High Court which had apparently drawn a distinction between a person suing for exclusive possession of a site and a co-sharer suing for joint possession or for partition, and he held that no such distinction should be made. In the Calcutta case relied upon the following remarks occur near the end of the judgment:

> We are also of opinion that a suit for partition which seeks for partition of property or to have a share in it the title to which has already been extinguished by reason of no suit having been instituted to recover possession within three years of the order under S. 145, Criminal P. C., and by virtue of Art. 47 and of S. 28 of the Act is another name for a suit for recovery of possession and a mere device to evade the provisions of the statute.

Learned counsel for the plaintiffs-respondents on the other hand relies upon a later case of the Calcutta High Court reported as 163 I C 370[6] in which it was held as follows:

> There can be no doubt that the provisions of Art. 47 are applicable to a suit for possession of an undivided share of the property in respect of the whole of which there was a final order under s. 145, Criminal P. C. It is not contemplated by the provisions contained in Art. 47 that the title of the cosharer to any joint property must be held to be extinguished and that therecould not be any claim for joint possession or for partition in view of an order passed by the criminal Court not having been challenged by a suit by the cosharer.

The case refers with approval to the previous Calcutta case but appears to me to make a decision contrary to what was laid down in A I R 1930 Cal 612.[5] There is therefore undoubtedly a conflict of opinion on this point, but in my opinion the plain meaning of Art. 47 is that it should apply to a suit like the present one. The relevant portion of the article reads as follows:

> By any person bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, ... to recover the property comprised in such order.

In my opinion, the present suit is one to recover property comprised in the order of 9th February 1934, and was brought more than three years after the date of that order. It is therefore time barred as regards the first two plaintiffs. Learned counsel for the defendant-appellant has contended that it is also time barred as regards plaintiff 3 in view of a case reported as A I R 1930 Cal 63.[7] That was a criminal case in which it was held that persons who had taken possession of certain property as regards which an order had been passed under S. 145, Criminal P. C., were guilty of an offence under S. 188, Penal Code, although they were not actual parties to the order. It was however found that they were cognizant of the order and that they took possession in collusion with parties who were bound by the order. It does not appear to me that this is a sufficient authority for the proposition which is put forward by learned counsel. Learned counsel for plaintiffs-respondents has cited A I R 1935 Lah 115[8] which lays down that a person who is not a party to proceedings under S. 145, Criminal P. C., cannot be bound by the order. I am, therefore, of opinion that the suit of Zafir Gul, plaintiff 3, is within time, provided that the defendant has not held adverse possession for more than 12 years. The only fact which is relied upon as proving such adverse possession is the fact that he built extensively on the site in suit about 1924 and 1925. That cannot of itself amount to an act of ouster of plaintiff 3 who was a minor at the time. The same argument, namely, the buildings which took place in 1924 is used by learned counsel for defendant-appellant on the question of estoppel. I do not think that there has been any conduct on the part of the plaintiffs which could operate as estoppel against them.

There remains the question of improvements. A Commissioner was appointed who assessed the value of the whole of the property at Rs. 3000. He stated specifically that the value of improvements effected by the defendant amounted to Rs. 2000. The defendant produced certain invoices (Exs. D1-8) showing the amount that had been spent on timber for the purposes of building. Those invoices amount to the sum of Rs. 535-14-6 which has been taken as the value of the improvements effected by him. Several of the plaintiffs' witnesses admitted that the value of the improvements was between 500 and 600 and one of them admitted that it was between 700 and 800. It is obvious that the defendant must have spent more

6. ('35) 39 C W N 853: 163 I C 370, Jogesh Chandra v. Suresh Chandra.

7. ('30) 17 A I R 1930 Cal 63: 125 I C 858: 31 Cr L J 945 : 33 C W N 1002, Satya Chandra De v. Emperor.

8. ('35) 22 A I R 1935 Lah 115, Mt. Maya Devi v. Diwan Chand.

money than is represented by the invoices produced by him. There must be in addition to timber, bricks and also labour involved in construction. I can see no reason why the estimate of the Commissioner should be rejected. I, therefore, fix the value of the improvements at Rs. 2000. For these reasons I accept the appeal of the defendant to the extent that plaintiff 3 will have a decree for possession of one-third of the hujra in dispute on payment of Rs. 666 representing one-third of the improvements effected. The suit of the first two plaintiffs is dismissed. As the plaintiffs have succeeded to a portion only of their claim I direct that the parties shall bear their own costs throughout the proceedings. The appeal of the plaintiffs-appellants as regards costs is dismissed with costs.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Peshawar 68

MIR AHMAD J.

Sardar Mohammad Jan — Appellant

v.

S. S. Kirpal Singh and others — Respondents.

Appeal No. 200/29 of 1939, Decided on 20th February 1941, from order of Addl. Judge, Peshawar, D/- 16th September 1939.

Civil P. C. (1908), S. 60 (1) (c)—House lived in by agriculturist and other buildings occupied by him are exempt—While occupying residential house agriculturist need not put it to some agricultural use to attract S. 60 (1) (c).

By the deliberate use of the two words "houses and buildings" in S. 60 (1) (c) the Legislature meant that not only the residential house lived in by the agriculturist but also the other buildings occupied by him should be exempt. On a plain reading of the clause, there are only two conditions governing the exercise of this privilege. Firstly the person claiming it should be an agriculturist and secondly he should occupy the house and the buildings. There is nothing in S. 60 (1) (c) to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors: *Case law referred.* [P 69 C 1]

L. Ladha Ram — for Appellant.

S. Anup Singh — for Respondents (Representatives of S. S. Kirpal Singh).

Other Respondents in person.

Judgment.—The late S. S. Kirpal Singh had a decree against Sardar. In execution of his decree he attached half of the house in which Sardar lived. The other half belonged to Amir. Sardar objected that he was an agriculturist and that the house was therefore exempt under S. 60 (1) (c), Civil P. C. The trial Judge admitted that Sardar was an agriculturist. He said in his judgment that the only question to decide was whether the house in suit was used for agricultural purposes or not. He answered the question in the negative. He depended for his decision on the statement of Abnashi Singh witness for the decree-holder who said that the house was primarily residential, that "khakshora" could not be stored in the house, that the door of the house was so small that no animal could pass through it, and that Sardar tied his cattle in the serai of Lala Duni Chand. The objection was consequently dismissed. An appeal was preferred to the District Court at Peshawar by Sardar. The learned Additional Judge paid a surprise visit to the house. He observed that it was a pakka double-storied house with a paved floor. He did not find any cattle there nor any other indications that the house was used for agricultural purposes. He therefore agreed with the trial Judge that the house was not used for agricultural purposes and dismissed the appeal. Sardar has come up on further appeal to this Court. Counsel on either side has produced rulings which helped his case. There is a conflict as to the exact interpretation of the words of S. 60 (1) (c), Civil P. C.: *vide* A I R 1926 Lah 230,[1] A I R 1934 Lah 680[2] and 141 P L R 1909[3] on one side, and A I R 1937 Lah 200,[4] A I R 1937 Lah 113[5] and A I R 1938 Lah 459[6] on the other. In my opinion the words are so simple that they do not require the aid of rulings to interpret them. Section 60 (1) (c), Civil P. C., reads thus :

. . . . . .

Provided that the following particulars shall not be liable to such attachment or sale, namely . . . . (c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenent thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him.

Now "building" is a generic term. It covers all constructions of brick and mortar and is defined in the Oxford Dictionary as follows : "That which is built, a structure, edifice." House which is a species of building is described in that dictionary as under:

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1. ('26) 13 A I R 1926 Lah 230: 92 I C 759, Noor Din v. Sulakhan Mal.
2. ('34) 21 A I R 1934 Lah 680: 149 I C 428: 35 P L R 509, Jagat Singh v. Phuman Singh.
3. ('09) 65 P R 1909: 2 I C 983: 141 P L R 1909, Attar Singh v. Bhagwandas.
4. ('37) 24 A I R 1937 Lah 200: 172 I C 412: 39 P L R 418, Balwant Singh v. Jagdish Saran.
5. ('37) 24 A I R 1937 Lah 113: 171 I C 932, Ch. Mohammad Ali v. L. Ram Dass.
6. ('38) 25 A I R 1938 Lah 459: 178 I C 195: 40 P L R 793, Kala Singh v. Boota Singh.

"A building for human habitation especially a dwelling place." I have no doubt whatsoever that the Legislature used these two words advisedly and instead of using the general term "building" only deliberately used the name of one form of a building viz., a house first and then named the class as a whole. It does not require any argument to show that by doing so the Legislature meant that the residential house lived in by the agriculturist should be protected and that the other buildings occupied by him should also be exempt. On a plain reading of the clause there are only two conditions governing the exercise of this privilege. Firstly the person claiming it should be an agriculturist and secondly he should occupy the house and the buildings. According to Oxford Dictionary "occupy" means "to hold possession of, to reside in." There is not a word in the clause to show that when occupying his residential quarter the agriculturist should also put it to some other agricultural use for enabling him to keep it safe from his creditors. Why should we read the words "as such" at the end of the clause when they do not occur there and unless one reads "as such" into it the clause cannot bear this construction. Even from common sense point of view, the proposition that the house of an agriculturist is protected only if he uses it for some object of husbandry is devoid of all force. If the agriculturist is such a sacred person that his houses and buildings which he uses for his avocation cannot be touched by his creditors why should he have not the privilege of having a roof over his head and over the head of his family undisturbed by attachments and sales. To reduce it to absurdity the position taken up by the decree-holder leads to this result: If the agriculturist sleeps in a room and also tethers a goat there whose dung can be used for manuring the fields he cultivates, the room is exempt under S. 60 (1) (c), Civil P. C., but if he sends the goat to his son's house next door his room can be attached and sold.

For the reasons given above I hold that the two Courts below have committed a material irregularity in thinking that the house could not be exempted, because although used for residence by an agriculturist it is not utilized for some agricultural object. The two Courts have admitted that Sardar is an agriculturist. Abnashi Singh the witness for the decree-holder has not denied that Sardar ties his cattle in the serai of Duni Chand which shows that he has his cattle to tether. People living in the town are rather fastidious. Probably he does not take the cattle to the house for the sake of cleanliness and therefore ties them in the serai. There is nothing to prevent him from tying them in the house if occasion arises. I am not prepared to believe the statement of Abnashi Singh that no cattle can pass through the door. If a human being can enter the house, an animal could also do so. It follows that Sardar is entitled to the benefit of S. 60 (1) (c), Civil P. C. As a result I accept the appeal, set aside the orders of the two Courts below and release half of the house belonging to Sardar from attachment and sale. Sardar shall have his costs throughout. Pleader's fee Rs. 32.

G.N./R.K. *Appeal accepted.*

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(28) A. I. R. 1941 Peshawar 69

ALMOND J. C. AND SOOFI J.

Kazi Mukarram Khan Kazi Abdul Wahab Khan and another —
Defendants — Appellants
v.
S. Hardit Singh S. Narinjan Singh, Plaintiff and another, Defendant —
Respondents.

Appeals Nos. 201/49 and 217/86 of 1940, Decided on 22nd May 1941, from order and decree of Addl. Judge, Peshawar, D/- 4th May 1940.

(a) Court-fees Act (1870), S. 7 — Land with building thereon comes within definition of "houses" in S. 7—Water-mill assessed to land revenue should be assessed to court-fee on its market value.

The distinction which is drawn in S. 7 between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and therefore a mill assessed to land revenue should be assessed for purposes of court-fee on its market value : 24 All 218 and Further Appeal No. 116 of 1925, *Rel. on.* [P 71 C 2]

(b) Civil P. C. (1908), S. 149 and O. 7, R. 11 —Appeal memo insufficiently stamped—Court has discretion under S. 149 to grant time to make up deficiency—S. 149 is general rule while O. 7, R. 11 is particular and applies to plaints only.

It is not incumbent upon the Court to grant time to an appellant to make good the court-fee on his memorandum of appeal on the analogy of O. 7, R. 11. S. 149 is the general rule, giving the Court a discretion to allow time for making up a deficiency of court-fee while O. 7, R. 11 is a particular rule which applies in the case of plaints only : ('14) 1 AIR 1914 Bom 249, *Not foll.*; ('27) 14 AIR 1927 Lah 884 and ('29) 16 AIR 1929 All 75, *Approved; Case law referred.* [P 72 C 1]

(c) Practice—New plea—Waiver—Point that plaintiff had no cause of action not taken before or even at settlement of issues—No issue framed —Point not pressed in trial Court—Point must be presumed to have been waived.

Where the point that the plaintiff has no cause of action was not taken before or even at the settlement of issues and no issue was framed thereon nor was it pressed in the trial Court the point must be presumed to have been waived and hence cannot be raised in appeal. [P 72 C 2]

(d) Adverse possession — Plaintiff obtaining possession of property through Court and leasing it to defendant 1 by registered lease to which defendant 2 was marginal witness—Defendants 2 and 3 taking sub-leases from defendant 1—Defendants' adverse possession cannot commence until expiry of leases.

The plaintiff had obtained possession of the property through Court. He leased the land to defendant 1 by a registered lease to which defendant 2 himself was a marginal witness. Defendents 2 and 3 then took a registered sub-lease from defendant 1. Both these leases were perfectly valid and genuine:

Held that the defendants' adverse possession could not commence until after the expiry of the leases. [P 72 C 2]

(e) Cosharers — One cosharer can sue trespasser without impleading other cosharers.

One cosharer can maintain a suit against a trespasser without impleading the other cosharers. [P 72 C 2]

S. B. Raja Singh and Ganesha Khan, and Abdul Ghafur Khan—for Appellants (in 217/86 and 201/49 of 1940, respectively.)

Respondent (Fateh Mohd.) in person.

Almond J. C. — Hardit Singh sued (1) Fateh Mohd., (2) Kazi Mukarram and (3) Kazi Fazal Ilahi, son of Kazi Mukarram, for the following reliefs : (1) Possession of 143 kls. 15 mls. of land. (2) Possession of a water-mill. (3) Possession of four houses and a vacant site attached to them. (4) Rs. 220 on account of mesne profits of the water-mill for three years. He alleged in his plaint that on 26th March 1918 he and his father Narinjan Singh obtained a decree for possession of this property from a civil Court against defendant 2 and others and that he obtained possession of the property through Court in 1920. On 6th May 1921 the plaintiff and his father leased the whole of this property to defendant 1 with the consent of defendant 2 for a period of seven years, that defendant 2 signed the lease deed as a witness, that on 7th May 1921 defendant 1 sub-leased the property to defendants 2 and 3, that the lease expired on 6th May 1928 and defendants 2 and 3, who were still in possession, refused to surrender possession. He further added that in 1933 he had brought a suit against the defendants in a civil Court which held that the suit was triable by a revenue Court, that on an application for revision to this Court an Additional Judicial Commissioner held on 26th August 1936 that the suit was triable by a civil Court and had remanded it, and that on 16th August 1937 the plaint had been rejected for his failure to make up the deficiency in court-fee as ordered by the trial Court.

Defendant 1 admitted the lease of 1921 but denied that the plaintiff had ever delivered possession to him under the lease. He said that defendants 2 and 3 were in possession even before the lease, that the lease was a nominal transaction and was fictitious in nature and that the defendant had no concern with the dispute. Defendants 2 and 3 challenged the correctness of the valuation of the suit as regards the houses and mill for purposes of jurisdiction. They contended that the suit was cognizable by a revenue Court and that it was time barred against them. They alleged that as the previous suit had been dismissed the plaintiff could not sue again on the same cause of action. They said that they were in adverse possession of the property for more than 12 years. They denied that the plaintiff or his father obtained possession under the decree of 1918. They also alleged that the lease given to defendant 1 was fictitious and without consideration and denied that they themselves ever took a sub-lease of the property. They further alleged that the plaintiff was a non-agriculturist and was therefore not entitled to possession. Lastly they alleged that the plaintiff could not sue alone and they claimed costs of improvements. There was one other defendant to the suit, Mt. Gujri, the widow of plaintiff's brother. She was proceeded against ex parte. On the pleadings of the parties 11 issues were framed. Of these it is now only necessary to refer to Nos. 3 and 5 to 8 : none of the others remain in dispute. These issues were as follows :

(3) Whether the suit as against defendants 2 and 3 is within time? (5) Whether defendants 2 and 3 have been in adverse possession of the property in suit for over 12 years ? (6) Whether the lease deed in favour of defendant 1 was validly executed and was for consideration ? (7) In case issue 6 is proved in the affirmative, how will this circumstance affect defendants 1 to 3's rights ? (8) Whether plaintiff alone cannot sue for the entire property ?

On issues 3 and 5 the trial Court found that the suit was within time as regards all the properties except the water-mill. He held that it was time barred as regards the mill because the mill was expressly excluded from the sub-lease granted to defendants 2 and 3. He held that defendants 2 and 3 had been in possession of the mill from before the time of the leases and that by expressly refusing to take a sub-lease of it from defendant 1 they had thereby asserted a title hostile to the plaintiff. He held that

as regards the land and houses the suit was within time as the land had been validly leased first to defendant 1 and by him to defendants 2 and 3 and the plaintiff's cause of action did not arise until the expiry of those leases in 1928. In deciding issues 6 and 7 he referred to his decision on issues 3 and 5 and held that the leases were valid. On issue 8 he held that one co-owner could sue to eject a trespasser even if the other co-owner did not join with him in the suit, and that in the present case defendant 4 Mt. Gujri, although impleaded as a party, had not appeared to contest the plaintiff's right to possession. He therefore decreed the suit as regards the land and houses with the site attached to the houses and dismissed it as regards the mill and the mesne profits thereof.

Defendants 2 and 3 appealed to the District Judge and the plaintiff was served with a notice of the appeal on 29th February 1940. He presented cross-objections on 1st April 1940. The cross-objections were dismissed on the ground that they had been presented beyond the period for limitation. The appeal of defendants 2 and 3 was dismissed on the merits. Against the decision of the Additional Judge the two contesting defendants and the plaintiff have both presented further appeals and this order will cover both cases. The appeal of the defendants is with a view to having the whole of the suit dismissed. The appeal of the plaintiff is with a view to obtaining a decree for the water-mill also, and in addition to have a decree for Rs. 20 costs wrongly allowed against him.

The plaintiff valued his memorandum of appeal for purposes of court-fee on the mill at five times the land revenue which he fixed at Rs. 36. An objection was taken by the office that it should be valued for purposes of court-fee on the market value of the mill. The plaintiff persisted in his objection and now it is argued that the appeal has not been presented within time. In this connexion the first question for decision is whether the water-mill which is admittedly assessed to land revenue is to be assessed for purposes of court-fee as "land" within the meaning of S. 7 (v) (b) or as a "house" within the meaning of S. 7 (v) (e). No authority on this problem has been cited by either party, but there is a published authority of the Allahabad High Court in 24 ALL 218[1] in which a similar question arose. In that case the property was a factory situated on land which was assessed to land revenue and it was held that the valuation for purposes of court-fee was the market value of the factory and not 30 times the land revenue. There is also an unpublished case of this Court (Further Appeal No. 116 of 1925) in which the appellant was required to stamp his appeal ad valorem on the value of the mill. We think that the distinction which is drawn in S. 7, Court-fees Act, between land, houses and gardens indicates that lands with buildings upon them come within the definition of 'houses' and we accordingly hold that the mill should have been assessed for purposes of court-fee on its market value.

The further question arises whether the appellant should be granted time under S. 149, Civil P. C., or under O. 7, R. 11 for the purpose of making good the deficiency in court-fee. This point was not argued before us at the hearing of the appeal, but as it is a point which obviously arises for decision we have consulted the authorities which are referred to in Mulla's edition of the Civil Procedure Code in the commentary on S. 149 of the Code and those in the commentary on O. 7, R. 11 in Chitaley's edition of the Civil Procedure Code at Note 6. It is apparent that there is a conflict of opinion between the various High Courts. The Bombay High Court is of opinion that it is incumbent upon the Judge when a memorandum of appeal is presented insufficiently stamped to grant time under O. 7, R. 11 before rejecting the memorandum of appeal. The authority on this point is reported as 21 I C 337.[2] The Madras High Court in A I R 1938 Mad 316[3] after considering the Bombay case has definitely ruled that O. 7, R. 11 does not apply to a memorandum of appeal but only to plaints and it was pointed out that the real question in the case of appeals was whether time should be extended under S. 5, Limitation Act. The High Court of Patna in a short judgment reported as A I R 1939 Pat 432[4] has endorsed the view of the Bombay High Court. The Lahore High Court has been consistent in holding that it is a matter within the discretion of the appellate Judge to allow time for stamping the appeal or not. The leading

1. ('02) 24 All 218 : 1902 A W N 27, Durga Singh v. Bisheshar Dayal.

2. ('14) 1 A I R 1914 Bom 249 : 21 I C 337 : 38 Bom 41 : 15 Bom L R 902, Achut Ramchandra v. Nagappa Bab Balgaya.

3. ('38) 25 A I R 1938 Mad 316 : 177 I C 453 : (1938) 1 M L J 514, Sitaramayya v. Ramayya.

4. ('39) 26 A I R 1939 Pat 432 : 180 I C 791 : 20 P L T 426, Ramgati Singh v. Shitab Singh.

cases of this Court are 102 I C 615,[5] 57 I C 215[6] and 54 I C 400.[7] The Allahabad High Court takes approximately the same view as the Lahore High Court. The leading authority of that Court is 118 I C 228=A I R 1929 ALL 75.[8] The only Calcutta ruling referred to, 138 I C 643,[9] can scarcely be regarded as an authority either way. The Oudh view as given in A I R 1930 Oudh 104[10] is that time ought to be allowed without definitely saying that it is obligatory upon the Court to grant time.

We have come to the conclusion that it is not incumbent upon the Court to grant time to an appellant to make good the court-fee on his memorandum of appeal on the analogy of O. 7, R. 11. It appears to us that S. 149, Civil P. C., is the general rule, giving the Court a discretion to allow time for making up a deficiency of court-fee and that O. 7, R. 11 is a particular rule which applies in the case of plaints only. The question therefore remains whether the appellant in the present case is entitled to the discretion of this Court in his favour. We think there are obvious reasons for not exercising this discretion in his favour. When the plaintiff-appellant brought his first suit in 1933 he valued the mill for purposes of court-fee and jurisdiction at Rs. 100. A Commissioner was appointed who found the market value of the mill to be Rs. 600. Plaintiff was ordered to make good the deficiency and failed to do so. His plaint was therefore rejected. No appeal was filed against that order rejecting the plaint although an appeal lay. Furthermore, the plaintiff himself when he brought the present suit valued the mill for purposes of court-fee and jurisdiction at Rupees 600. He valued it also at Rs. 600 for the purposes of his cross-objections in the lower appellate Court. We hold therefore that there is no properly framed appeal from the plaintiff before us and accordingly dismiss his appeal with costs. As regards the appeal of the defendants the first point which is raised is in connexion with a certain application which was made by Fazal Ilahi after the issues were framed. He put in an application before the trial Court to the effect that the plaintiff had no cause of action against him and that an issue should be framed on this point. No issue was however framed. The point was again raised before the lower appellate Court. It was overruled for three reasons: (1) that the point had not been taken before or even at the settlement of the issues, (2) that it must have been presumed to be waived as it was not pressed in the trial Court, and (3) that on the face of the case there obviously was a cause of action to the plaintiff. We are in full agreement with the appellate Court on this point. The plaintiff had an obvious cause of action.

The next point argued is that the defendants' possession as regards the land and houses is adverse for more than 12 years. On the material before the trial Court, we have no hesitation in endorsing the findings of both the Courts below that the defendants' possession was not adverse. The plaintiff had obtained possession of the property through Court. He leased the land to defendant 1 by a registered lease to which defendant 2 himself was a marginal witness. Defendants 2 and 3 then took a registered sub-lease from defendant 1. Both these leases are perfectly valid and genuine leases and defendants' adverse possession could therefore not commence until after the expiry of the leases and the suit was brought within 12 years of that period. The other objection taken by learned counsel for defendants-appellants is that the plaintiff should only have been given three-fourth share in the property as one-fourth is recorded as regards the land in the land revenue records as being owned by Mt. Gujri. Learned counsel has however cited no authority to rebut what has been held by the Courts below to be the legal position, namely that one cosharer can maintain a suit against a trespasser without impleading the other cosharers. We are therefore of opinion that as regards the defendants' appeal the decisions of the Courts below are correct and we therefore dismiss their appeal also with costs.

G.N./R.K. *Appeals dismissed.*

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5. ('27) 14 A I R 1927 Lah 884 : 102 I C 615 : 28 P L R 338, Gursaran Das v. District Board, Jullundur.

6. ('20) 7 A I R 1920 Lah 92 : 57 I C 215 : 1 Lah 234 : 144 P L R 1920, Lekh Ram v. Ramji Das.

7. ('19) 6 A I R 1919 Lah 65 : 54 I C 400 : 1 Lah 220 : 1 P L R 1920, Mt. Satto v. Amar Singh.

8. ('29) 16 A I R 1929 All 75 : 118 I C 228 : 50 All 980 : 26 A L J 1199, Brijbhu khan v. Tota Ram.

9. ('32) 19 A I R 1932 Cal 482 : 138 I C 643 : 59 Cal 388, Jnanadasundari Shaha v. Madhabchandra Mala.

10. ('30) 17 A I R 1930 Oudh 104 : 124 I C 420 : 5 Luck 474 : 6 O W N 1105, Deoraj v. Kunj Behari.

* (28) A. I. R. 1941 Peshawar 73

MIR AHMAD J.

S. Amar Shah Singh Sri Karam Shah Singh—Plaintiff—Petitioner

v.

Khattar Electrical Engineering and General Supply Co., Ltd.—Defendant—Respondent.

Civil Revn. Petn. No. 511 of 1940, Decided on 29th May 1941, against order of Senior Sub-Judge, Dera Ismail Khan, D/- 13th July 1940.

* Electricity Act (1910), S. 12 — Questions whether bracket should be fixed on particular private wall by licensee under Act and whether owner of wall should be given compensation — District Magistrate alone can decide — Civil Court has no jurisdiction.*

The civil Courts have no jurisdiction to decide as to whether a bracket should be fixed on a particular private wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it. It is entirely for the District Magistrate to decide these questions : ('36) 23 A I R 1936 Pat 87, *Rel. on.* [P 74 C 1]

Sher Khan and G. C. Kohli—for Petitioner.

L. Charanjit Lal—for Respondent.

Order. — S. Amar Shah Singh brought this suit for a permanent injunction and recovery of Rs. 40 against the Khattar Electrical Engineering and General Supply Co., Dera Ismail Khan. He said in his plaint that the company had fixed a bracket on a wall of a private Gurdwara belonging to him and that he therefore wanted the bracket to be removed and also Rs. 40 to be given to him as rent for the use of the wall by the company for the eight months previous to the suit. Inter alia the defence was taken that the suit was barred, because a special procedure was provided by S. 12, Electricity Act, for deciding such disputes. It was pointed out that the District Magistrate or the Provincial Government were the authorities who had the jurisdiction to deal with such questions. The trial Judge agreed with the view. He held that civil Courts had no jurisdiction to try the suit. He therefore dismissed the suit. An appeal was preferred to the Senior Sub-Judge, Dera Ismail Khan. He also agreed with the trial Judge and dismissed the appeal. S. Amar Shah Singh has come up on revision to this Court. Section 12, Electricity Act, is as under :

12. (1) Any licensee may, from time to time but subject always to the terms and conditions of his license, within the area of supply, or, when permitted by the terms of his license to lay down or place electric supply-lines without the area of supply, without that area :

(a) open and break up the soil and pavement of any street, railway or tramway; (b) open and break up any sewer, drain or tunnel in or under any street, railway or tramway; (c) lay down or place electric supply-lines and other works; (d) repair, alter or remove the same; and (e) do all other acts necessary for the due supply of energy.

(2) Nothing contained in sub-s. (1) shall be deemed to authorize or empower a licensee, without the consent of the local authority or of the owner or occupier concerned as the case may be, to lay down or place any electric supply-line, or other work in, through or against any building, or on, over or under any land not dedicated to public use whereon, whereover or whereunder any electric supply-line or work has not already been lawfully laid down or placed by such licensee;

Provided that any support of an aerial line or any stay or strut required for the sole purpose of securing in position any support of an aerial line may be fixed on any building or land or, having been so fixed, may be altered, notwithstanding the objection of the owner or occupier of such building or land, if the District Magistrate or, in a Presidency Town (* * *) the Commissioner of Police by order in writing so directs;

Provided, also, that, if at any time the owner or occupier of any building or land on which any such support stay or strut has been fixed, shows sufficient cause, the District Magistrate, or in a Presidency Town (* * *) the Commissioner of Police may by order in writing direct any such support, stay or strut to be removed or altered.

(3) When making an order under sub-s. (2), the District Magistrate or the Commissioner of Police, as the case may be, shall fix the amount of compensation or of annual rent, or of both, which should in his opinion be paid by the licensee to the owner or occupier.

(4) Every order made by a District Magistrate o a Commissioner of Police under sub-s. (2) shall be subject to revision by the Provincial Government.

(5) Nothing contained in sub-s. (1) shall be deemed to authorize or empower any licensee to open or break up any street not repairable by the Central Government or the Provincial Government or a local authority, or any railway or tramway, except such streets, railways or tramways (if any) or such parts thereof, as he is specially authorized to break up by his license, without the written consent of the person by whom the street is repairable or of the person for the time being entitled to work the railway or tramway, unless with the written consent of the Provincial Government :

Provided that the Provincial Government shall not give any such consent as aforesaid until the licensee has given notice by advertisement or otherwise as the Provincial Government may direct, and within such period as the Provincial Government may fix in this behalf, to the person above referred to, and until all representation or objections received in accordance with the notice have been considered by the Provincial Government.

It is clear that the intention of the Legislature was that the District Magistrate should have the authority to permit the fixing of brackets on private walls, taking of lines over private property, and other similar acts required for installing the machinery for electric supply. It will be observed that he has the jurisdiction to fix compensation for the use of private building for the purpose. It follows that the civil Courts have no jurisdiction to go into these matters, and

if any authority be needed I will refer to A I R 1936 Pat 87.[1] The following portion of the head-note of this judgment is worth reproduction :

If a right is given to an individual by a statute and the mode of obtaining that right is provided in the statute itself, a suit to enforce the right is not maintainable in the civil Court. There is no right to receive compensation for acts done under the authority of the law unless the law itself gives such a right. If the right to receive compensation exists independently of a statute and the statute only affirms it and provides a particular form of remedy, that remedy is exclusive and the jurisdiction of civil Courts is barred by implication.

I am of opinion that the civil Courts have no jurisdiction to decide as to whether a bracket should be fixed on a particular wall or not by a licensee under the Electricity Act and whether the person whose wall is being used should be given any compensation for it. It is entirely for the District Magistrate to decide this question and the appeal lies to the Provincial Government under S. 12 of the Act. I therefore agree with the two Courts below and dismiss the petition with costs.

G.N./R.K. *Petition dismissed.*

1. ('36) 23 A I R 1936 Pat 87 : 160 I C 915 : 15 Pat 246 : 16 P L T 877, Secy. of State v. Kameshwar Singh.

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* (28) A. I. R. 1941 Peshawar 74

ALMOND J. C. AND SOOFI J.

Shivan Ditta Banarsi Dass Kapur — Plaintiff — Appellant

v.

Rai Sahib Radha Kishan Kapur and another—Defendants — Respondents.

First Appeal No. 289/71 of 1940, Decided on 14th July 1941, from decree of Senior Sub-Judge, Peshawar, D/- 14th March 1940.

* (a) Limitation Act (1908), S. 12 — Time for obtaining copy of decree — Period between date of judgment and date of signing of decree will be excluded provided copy of decree is applied for with due diligence even though decree is not signed.

In case an application for obtaining a copy of the decree has already been made, and a decree is signed later on, the period which thus elapses, would be deemed to be the time requisite for the obtaining of the copy, because the signing of the decree is a matter which is not within the control of the applicant. By the mere act of applying for the copy the applicant does whatever is within his power with due diligence and caution to obtain the benefit of S. 12. But if he does not put in the application for a copy till after the decree has been signed, he cannot be said to have exercised due diligence and caution, and in that case the period which elapses between the date of the judgment and the date of the signing of the decree cannot be considered to be the time requisite for obtaining the copies : *Case law discussed.* [P 76 C 1]

(b) Limitation Act (1908), Art. 156 — Date of decree—Time should be computed from date of pronouncement of judgment and not date of signing of decree.

The date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be. Hence the time for the presentation of the appeal should be computed not from the date of the signing of the decree, but from the date of the pronouncement of the judgment. [P 75 C 2; P 76 C 1]

(c) Limitation Act (1908), S. 5 — Conflict of views on certain point—Delay caused by adopting one view—Time may be extended.

Where there are conflicting views on a certain point and the delay caused in filing the appeal is caused by adopting one of the views, even though the Court takes the contrary view, it can extend the time under S. 5 : 39 Cal 766, *Rel. on.* [P 76 C 1]

Hukam Chand and L. Vaishno Ditta Mal — for Appellant.

L. Charanjit Lal — for Respondents.

Soofi J.—This appeal arises out of a suit for partition in which the plaint was presented on 27th January 1932, the preliminary decree was passed on 12th October 1936, and the final decree was granted on 14th March 1940. Various questions in connexion with the final decree had already been decided from time to time, while certain others had to be left open when the final decree was passed. In the judgment the learned trial Judge remarked that it would be indeed an arduous task for the office to make out the final decree, but that it would be possible to prepare it. The decree sheet was signed on 28th September 1940. This appeal was presented on 11th December 1940. As it happened to be a very lengthy case, it was considered desirable to issue notice to the other party on the question of limitation to start with. Prima facie the appeal is time barred. The appellant in order to bring it within the period of limitation gave his reasons in the grounds of appeal. The learned counsel for the appellant has taken two positions which are as follows : (1) In case the time for the presentation of appeal is computed from the date of the signing of the decree, i. e., 28th September 1940, then the appeal is within time. (2) In case the time is computed from the date of the passing of the decree, i. e., 14th March 1940, the appeal is prima facie time barred, but it is a case in which the Court may show indulgence under Sec. 5, Limitation Act.

As regards the first point there are two different views. For one view the leading case is 13 Cal 104,[1] a decision given by a

1. ('86) 13 Cal 104 (FB), Bani Madhub Mitter v. Matungini Dassi.

Bench of five Judges of that Court. It was held that where a suitor is unable to obtain a copy of a decree from which he desires to appeal by reason of the decree being unsigned, he is entitled under S. 12, Limitation Act, to deduct the time between the delivery of the judgment and the signing of the decree in computing the time taken in presenting his appeal. The same view was taken by a Bench of six Judges of the Patna High Court in A I R 1936 Pat 45.[2] A similar view was adopted in some subsequent cases decided by single Judge of Calcutta, Patna and some other High Courts. A I R 1928 P C 103[3] cited by the learned counsel for the appellant to support the same proposition, cannot be considered to be an explicit authority on the point, because it is not possible to ascertain from the judgment whether the application for the copy was made before the decree was signed, or afterwards. What is laid down in this ruling is that the word "requisite" is a strong word; it may be regarded as meaning something more than the word "required". It means "properly required" and it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his fault. The leading case for the contrary view is a decision by a Bench of four Judges in 12 ALL 461.[4] In that case the judgment was pronounced by the Court of first instance on 23rd May 1887. The decree was signed on 31st May 1887. An application for the copy was made on 31st May. The information about the estimate of costs was supplied by the copying agency on 1st June.

The estimated amount was not deposited till 9th June. The copies were delivered on 11th June. The memorandum of appeal was filed in the lower appellate Court on 30th June. It was held that the appeal was barred by limitation. It was laid down that in computing the time which is to be excluded under S. 12, Limitation Act, from the period of limitation, i. e., the "time requisite for obtaining a copy," does not begin until an application for copies has been made. If therefore after judgment, the decree remains unsigned, such interval is not to be excluded from the period of limitation unless an application for copies having been made, the applicant is actually and necessarily delayed, through the decree not having been signed. The rule in 13 Cal 104[1] was dissented from. The same view was taken in A I R 1925 Oudh 600,[5] a single Judge decision; in 15 I C 59,[6] a Calcutta decision of a Bench of two Judges; in A I R 1927 Nag 1,[7] a decision by a Bench of three Judges and in A I R 1929 Rang 116,[8] a decision by a single Judge. Let us now examine the law on which the above-mentioned rulings are based. Section 12, Limitation Act, reads as follows :

> *12.* (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.
>
> (2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.
>
> (3) Where a decree is appealed from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.
>
> (4) In computing, the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

In sub-s. (2) of this section we find that the day on which the judgment complained of was pronounced and the time requisite for obtaining a copy of the decree appealed from shall be excluded. The question for determination is what should be considered to be the date of the decree of which the copy is to be attached. Order 20, R. 7 of Sch. 1, Civil P. C., resolves the difficulty, and may be quoted here :

> The decree shall bear date the day on which the judgment was pronounced, and when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

Chitaley in his commentary under this rule has noted that the date of the decree must correspond to the date on which the judgment is pronounced, no matter what the date of the signing of the decree may happen to be. The reason for that is that the decree becomes operative from the time

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2. ('36) 23 A I R 1936 Pat 45 : 160 I C 447 : 15 Pat 284 : 16 P L T 849 (FB), Gabriel Christian v. Chandra Mohan.
3. ('28) 15 AIR 1928 P C 103 : 109 I C 1 : 6 Rang 302 : 55 I A 161 (P C), Jijibhoy N. Surty v. T. S. Chettyar.
4. ('90) 12 All 461 : 1890 A W N 149 (F B), Bechi v. Ahsanullah Khan.
5. ('25) 12 A I R 1925 Oudh 600 : 89 I C 479 : 2 O W N 420, Mahomed Mehdi Ali Khan v. Lal Bahadur Singh.
6. ('12) 39 Cal 766 : 15 I C 59, Harish Chandra v. Chandpur Co. Ltd.
7. ('27) 14 A I R 1927 Nag 1 : 98 I C 1057 (F B), Umda v. Rupchand.
8. ('29) 16 A I R 1929 Rang 116 : 117 I C 251 ; 7 Rang 18, Maung Po Kyaw v. Ma Lay.

of the pronouncement of the judgment. No subsequent event can affect the decree. So the date on which the decree is signed is immaterial. Section 12, Limitation Act, excludes the time requisite for obtaining the copy of the judgment and the decree. So in case an application for obtaining a copy of the decree has already been made, and a decree is signed later on the period which thus elapses would be deemed to be the time requisite for the obtaining of the copy, because the signing of the decree is a matter which is not within the control of the applicant. By the mere act of applying for the copy the applicant does whatever is within his power with due diligence and caution to obtain the benefit of S. 12. But if he does not put in the application for a copy till after the decree has been signed, he cannot be said to have exercised due diligence and caution, and in that case the period which elapses between the date of the judgment and the date of the signing of the decree cannot be considered to be the time requisite for obtaining the copies. This view of ours finds support in 12 ALL 461,[4] the leading Allahabad case, and the subsequent decisions noted above. We consequently hold that the time for the presentation of the appeal should be computed not from the date of the signing of the decree, but from the date of the pronouncement of the judgment.

So far as the second point is concerned, we are inclined to give the benefit of S. 5, Limitation Act, to the appellant, because an equally good authority, i. e., 13 Cal 104,[1] is in support of the view contrary to ours. The advantage of S. 5 was given in 15 I C 59[6] referred to above for the same reason. For the reasons given above, we treat the appeal as within time by extending the period of limitation under the provisions of S. 5, Limitation Act. It shall be heard on merits. The costs of this hearing shall be borne by the parties.

K.S./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Peshawar 76

MIR AHMAD J.

Tila Mohd. Haji Mohd. Azim and another — Plaintiffs — Petitioners

v.

Municipal Committee, Peshawar — Defendant — Respondent.

Civil Revn. No. 184 of 1941, Decided on 26th June 1941, for revision of decree and order of Addl. Judge, Peshawar, D/- 15th February 1941.

(a) Civil P. C. (1908), O. 29, R. 1—Suit against municipality — Secretary can engage counsel under general power of attorney given to him—Special authorization by municipality is not necessary.

Under O. 29, R. 1, the secretary of a municipality can sign and verify the written statement, and the fact that he has been generally empowered to institute and defend suits is enough to authorize him to engage a counsel to defend actions against the municipality. Defending an action is certainly different from instituting an action. The latter step requires initiative which should certainly come from the municipality itself and not from its agent. Hence a special authorization by the municipality is not necessary as is required for instituting suits: ('32) 19 A I R 1932 Lah 388 and ('35) 22 A I R 1935 Lah 345, *Disting.* [P 77 C 2]

(b) Limitation Act (1908), Art. 146A and S. 28 — Municipality not filing suit for possession of land encroached upon for 30 years loses its right to demand removal of encroachment and possession of land.

A municipality loses its right to demand the removal of an encroachment and to recover the land encroached upon if a suit for possession of the land is not instituted on its behalf within 30 years of its having been dispossessed of it : ('36) 23 A I R 1936 Lah 182, *Commented upon, and not foll.*; ('25) 12 A I R 1925 Mad 64, *Expl.*; ('20) 7 A I R 1920 Bom 9; ('22) 9 A I R 1922 Bom 111 and ('19) 6 A I R 1919 Cal 807, *Rel. on.* [P 78 C 1]

(c) Limitation Act (1908), Art. 146A — Open assertion of hostile title is not necessary to start limitation.

An open assertion of hostile title is not necessary to start limitation under Art. 146A. Possession, provided it is not permissive or in the alternative discontinuance of possession by the municipality is quite sufficient to make limitation run against the municipality. [P 78 C 2]

(d) Civil P. C. (1908), S. 115—"Material irregularity"—Failure to note that certain decision followed does not apply to the case.

Failure by the lower Court to notice that a certain ruling which it has followed does not apply to the case is a case of material irregularity. [P 78 C 2]

Abdul Rab Khan Nishtar and Sheikh Naqshband Khan — for Petitioners.

Nur Ilahi Khan — for Respondent.

Order. — The Municipal Committee, Peshawar, prosecuted Tila Mohd. and Bashir Ahmad for having a platform adjacent to their shops on a municipal street. As a consequence Tila Mohd. and Bashir Ahmad brought this suit against the Municipal Committee, Peshawar, for a declaration that they were the owners of the platform and the site underneath it. They asked in the plaint that the municipality should be restrained from removing the platform. The municipality denied that the plaintiffs were the owners of the site and the platform. The municipal draftsman and the rent inspector were produced by the plaintiffs. They said that the plaintiffs had this platform on the street since 1902 and that they had never paid any rent for occupying the land which was under the platform. The trial Judge

found that the plaintiffs had been in possession of the site underneath the platform since 1902. He observed that Art. 146A, Limitation Act, would apply if the municipality sued for the possession of the land and that the period of 30 years prescribed by that article having expired the municipality would be non-suited on the ground that its rights were extinguished by operation of S. 28, Limitation Act. The Judge however referred to the ruling reported in A I R 1936 Lah 182,[1] in which it was held by a single Judge of the Lahore High Court that in spite of Art. 146A, Limitation Act, a municipality could remove an encroachment. He decided to follow the authority and dismissed the suit. An appealwas preferred by the plaintiffs to the District Judge. Counsel for the appellants objected to the locus standi of counsel for the municipality to appear for the municipality. He pointed out that the municipal secretary had signed the power of attorney of counsel in pursuance of a general power of attorney given to him by the municipality and urged that the said officer could not by law brief the counsel on the strength of that general power of attorney. On the merits it was contended that the judgment of the trial Judge was wrong. The appellate Judge rejected both the arguments and dismissed the appeal. The plaintiffs have come up on revision to this Court.

Counsel for the petitioners has reiterated the objection that Mr. Nur Ilahi Khan is not duly authorized to appear on behalf of the municipal committee. He referred me to A I R 1932 Lah 388[2] and A I R 1935 Lah 345,[3] in which it was held that the municipal secretary could not under general delegation file a suit on behalf of the municipality. Their Lordships of the Lahore High Court have laid down that there should be a special authorization by the municipality in every case for instituting a suit. Had this suit been filed by the municipality I would have certainly dismissed the suit on this ground. But I think the view expressed by their Lordships of the Lahore High Court does not apply to defending suits. I think under O. 29, R. 1, Civil P. C., the secretary could sign and verify the written statement, and the fact that he has been generally empowered to institute and defend suits is enough to authorize him to engage a counsel to defend actions against the municipality. Defending an action is certainly different from instituting an action. The latter step requires initiative which should certainly come from the municipality itself and not from its agent'. I therefore hold that Mr. Nur Ilahi Khan is properly authorized to appear for the Peshawar Municipality. I will now discuss the question whether the municipality has lost its right to the portion of the street under the platform by the operation of Art. 146A, Limitation Act, read with S. 28 of that Act. Article 146A, Limitation Act, runs thus:

Article 146A. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years.	The date of the dispossession or discontinuance.

Section 28, Limitation Act, is in the following terms:

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Now the combined effect of these two sections is apparent. If a person had been in possession of a street for more than 30 years and the municipality failed to file a suit for recovering possession of the street from him within that period of 30 years the title of the municipality to the land is extinguished. In other words, the land no longer remains a highway or a part of the street. It follows that the municipality has no right to obtain possession of the land in dispute in this case for admittedly the plaintiffs have been in possession of it since 1902 and steps were taken by the municipality for the first time in 1939 to remove the platform and get back the street. The two Courts below have not denied that the title of the municipality to the street has been extinguished by prescription. They have however relied on the judgment of the Lahore High Court referred to above, viz., A I R 1936 Lah 182.[1] In this ruling his Lordship of the Lahore High Court has referred to a ruling of the Madras High Court reported in A I R 1925 Mad 64[4] and said that it

1. ('36) 23 A I R 1936 Lah 182 : 159 I C 639 : 38 P L R 744, Municipal Committee, Amritsar v. Mt. Gujri.

2. ('32) 19 A I R 1932 Lah 388 : 137 I C 253 : 33 P L R 956, Secretary, Notified Area Committee, Okara v. Kidar Nath.

3. ('35) 22 A I R 1935 Lah 345 : 158 I C 346 : 17 Lah 35 : 38 P L R 394, Notified Area Committee, Okara v. Kidar Nath.

4. ('25) 12 A I R 1925 Mad 64 : 81 I C 894 : 25 Cr L J 1070 : 47 Mad 716 : 47 M L J 470, Public Prosecutor v. Varadarajulu Naidu.

was an authority for the view that Art. 146A and S. 28, Limitation Act, did not take away the right of the municipality to remove an encroachment. He was swayed by this authority in coming to the same conclusion. A reference to A I R 1925 Mad 64[4] shows that the Judge came to this conclusion on the strength of the amendment of the Madras Municipal Act in which it was definitely provided that in spite of the lapse of the period of limitation prescribed by the Limitation Act the municipality shall continue to have the power to remove an encroachment on payment of compensation. The relevant portion of the amended section was quoted by the Judge who gave that ruling and is also reproduced below for facility of reference:

1. The chairman may by notice require the owner of any premises to remove or alter any projection, encroachment or obstruction situated against, in front of such premises and in or over any street.

2. If the owner . . . . of the premises proves that any such projection, encroachment or obstruction *has existed for a period sufficient under the law of limitation to give any person a prescriptive title thereto or* . . . . the municipal council shall make reasonable compensation to every person who suffers damage by the removal or alteration of the same.

The underlines (here italicized) are mine. The Punjab Municipal Act has got no such provision in it and consequently I must remark with due respect that his Lordship of the Lahore High Court has applied the ruling to the Lahore case under a misapprehension. There are several reported cases in support of the view that a municipality loses its right to demand the removal of an encroachment and to recover the land encroached upon if a suit for possession of the land is not instituted on its behalf within 30 years of its having been dispossessed of it: *vide* A I R 1920 Bom 9,[5] A I R 1922 Bom 111[6] and A I R 1919 Cal 807.[7] It should be remembered that the Legislature has used different words for describing the *terminus a quo* in col. 3 of Art. 146A and Art. 144, Limitation Act. The words in col. 3 of Art. 146A are "The date of dispossession or discontinuance", while the words in col. 3 of Art. 144 are "When the possession of the defendant becomes adverse to the plaintiff". It is significant, for it clearly shows that overt denial of title is not required for the beginning of the period of limitation prescribed by Art. 146A and mere dispossession or discontinuance of possession is enough to start limitation. Consequently I am not prepared to accept the proposition that an open assertion of hostile title is necessary to start limitation under Art. 146A. I am of opinion that possession, provided it is not permissive or in the alternative discontinuance of possession by the municipality is quite sufficient to make limitation run against the municipality.

I therefore hold that the Municipality of Peshawar has lost its right to remove the platform and recover the land under the platform. The land underneath the platform is no longer a part of the street and has become private property of the plaintiffs. The two Courts below have committed a material irregularity in failing to notice that the ruling of the Lahore High Court does not apply to the case. I accept the petition, set aside the orders of the Courts below and grant the plaintiffs a decree as prayed for. They shall get their costs from the municipality throughout.

K.S./R.K. *Petition accepted.*

5. ('20) 7 A I R 1920 Bom 9 : 58 I C 326 : 22 Bom L R 951, Tayabali Abdullabhai Vohra v. Dohat Municipality.

6. ('22) 9 A I R 1922 Bom 111 : 64 I C 202 : 46 Bom 335 : 23 Bom L R 1028, Abaji Ragho v. Municipality of Jalgaon.

7. ('19) 6 A I R 1919 Cal 807 : 49 I C 93 : 28 C L J 494, Ashutosh Sadhu Khan v. Corporation of Calcutta.

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(28) A. I. R. 1941 Peshawar 78

ALMOND J. C. AND MIR AHMAD J.

Umar Bakhsh Musa Khan—Petitioner

v.

Emperor and another—Opposite Party.

Criminal Revn. Petn. No. 172 of 1941, Decided on 14th June 1941, from order of Dist. Magistrate, Peshawar, D/- 24th April 1941.

Criminal P. C. (1898), S. 514 — Security to keep peace—Magistrate convicting accused for offence involving forfeiture of security—Magistrate can order forfeiture subsequently.

A Magistrate who convicts a person of an offence involving the forfeiture of the security bond to keep the peace executed by that person can subsequently take action against that person by forfeiting the security bond: 13 P R 1913 Cr, *held not good law*; ('36) 23 A I R 1936 Pesh 141, *Approved*; ('39) 26 A I R 1939 Lah 70 (FB), *Foll.* [P 79 C 1]

Khawaja Mohd. Khan — for Petitioner.

Advocate-General — for the Crown.

Almond J. C.—One Yusafzai was bound down under S. 109, Criminal P. C., and Umar Bakhsh stood surety for him. Within the period of the bond Yusafzai was convicted of an offence under S. 457/511, Penal Code, on 30th January 1941. On the same day the Magistrate who convicted him called upon the principal and the surety to show cause why the bond should not be forfeited and on 18th February he forfeited the bond to the extent of Rs. 200 out of Rs. 500. An appeal was made by the surety to the District

Magistrate who reduced the sum to be forfeited from Rs. 200 to Rs. 100. Against the order of the District Magistrate the surety has preferred this application for revision. At the preliminary hearing of the case his counsel relied upon a case reported in 13 P R 1913 Cr,[1] a judgment of a Full Bench of the Punjab Chief Court which laid down that unless a Magistrate who was aware of the existence of a surety bond proceeded at once on recording a conviction to order its confiscation, he could not do so by subsequent proceedings. In view of this judgment which was cited at the preliminary hearing the case was referred to a Bench.

From the arguments which have been addressed to us today it is clear that the law laid down in 13 P R 1913Cr[1] can now be no longer considered to be good law. It was dissented from in a judgment of a single Judge of this Court in a case reported in A I R 1936 Pesh 141[2] and it has subsequently been overruled by another Full Bench of the Lahore High Court in a case reported in A I R 1939 Lah 70.[3] The ground on which the application for revision is made can therefore not now be sustained. The petition is accordingly dismissed.

G.N./R.K. *Petition dismissed.*

1. ('13) 13 P R 1913 Cr: 18 I C 403: 39 P L R 1913: 14 Cr L J 67, Emperor v. Mawaz.
2. ('36) 23 A I R 1936 Pesh 141 : 163 I C 443 : 37 Cr L J 849, Miramshah v. Emperor.
3. ('39) 26 A I R 1939 Lah 70 : 180 I C 849 : 40 Cr L J 505 : I L R (1939) Lah 283 : 41 P L R 69 (F B), Rasulkhan v. Emperor.

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* (28) A. I. R. 1941 Peshawar 79

ALMOND J. C. AND MIR AHMAD J.

Emperor through Advocate-General, N.-W. F. P. — Appellant

v.

Takbirullah Wahidullah—Respondent.

Criminal Appeal No. 122 of 1941, Decided on 9th June 1941, against order of the Magistrate, 1st Class, Mardan, D/- 23rd February 1941.

* Penal Code (1860), S. 456—Person entering house of another to commit adultery with unmarried woman by invitation and actually committing adultery — Case does not fall under S. 456 : 58 J R, *OVERRULED.*

Where a man enters the house of another person with intent to commit clandestine adultery with an unmarried woman by invitation and actually commits adultery, not only does he not intend to insult or annoy any other person in the house but he desires above all things that his presence should not be known to the other occupants, and consequently he cannot be held to be guilty under S. 456 : 58 J R, *OVERRULED*: ('37) 24 AIR 1937 Pesh 92 and ('38) 25 A I R 1938 Lah 534 (F B), *Rel. on.* [P 79 C 2]

Advocate-General — for Appellant.

Malik Khuda Bakhsh — for Respondent.

Almond J. C.—This is an appeal by the Provincial Government against the order of a Magistrate of the first class, Mardan, dated 23rd February 1941, acquitting the respondent of an offence under S. 456, Penal Code. The facts as alleged by the prosecution and which we accept as true are that Takbirulla, the respondent, late in the evening entered a house which was jointly occupied by Sarfaraz, the complainant his mother Mt. Malko and his invalid sister with intent to commit adultery with Mt. Malko who was a widow and actually committed adultery with her. Sarfaraz who was absent at the time unexpectedly returned from the hujra and encountered the respondent as he was leaving the house. The question is whether under these circumstances the respondent was guilty of an offence under S. 456, Penal Code.

The learned Magistrate hearing the case referred to a judgment of this Court reported in 58 J. R. but distinguished it on the ground that in the present case the real person who was in possession of the house was Mt. Malko who had invited the respondent into her house in order to commit adultery. In 58 J R it is held that a man who enters into the house of another person with the intention of committing adultery with his unmarried daughter must be presumed to have the intention of causing insult and annoyance to the girl's relatives. In a case decided by a Bench of this Court and reported in A I R 1937 Pesh 92[1] we had occasion to express our dissent from the principles laid down in that ruling and our view is now further confirmed by a later judgment of a Full Bench of the Lahore High Court, AIR 1938 Lah 534.[2] We are unable to agree with the reasoning given in 58 J R, for it appears to us obvious that if a man enters the house of another person with the intention of committing clandestine adultery with an unmarried woman, not only does he not intend to insult or annoy any other person in the house, but he desires above all things that his presence should not be known to the other occupants. We are therefore not prepared to follow the principles laid down in J. R. No. 58. The appeal of the Provincial Government is dismissed.

G.N./R.K. *Appeal dismissed.*

1. ('37) 24 A I R 1937 Pesh 92 : 171 I C 346 : 39 Cr L J 35, Mohtasham v. Emperor.
2. ('38) 25 A I R 1938 Lah 534 : 176 I C 497 : 39 Cr L J 756 : 40 P L R 806 (F B), Abdul Majid v. Emperor.

(28) A. I. R. 1941 Peshawar 80

ALMOND J. C.

Ghulam Rasul Ilahi Baksh —
Petitioner

v.

Hafiz Mohd. Amin Mohd. Zarin —
Respondent.

Civil Revn. No. 281 of 1940, Decided on 4th June 1941, against order of the Senior Sub-Judge, Peshawar, D/- 23rd May 1940.

N.-W. F. P. Courts Regulation (1 of 1931), S. 30 — Order by Subordinate Judge under S. 476, Criminal P. C.— Appeal under S. 476B, Criminal P. C., lies to District Judge and not Senior Sub-Judge.

An appeal under S. 476B, Criminal P. C., from an order of the Subordinate Judge lies to the District Judge and not to the Senior Sub-Judge. The proviso to S. 30, N.-W.F. P. Courts Regulation, merely provides special circumstances in which some appeals can be preferred to a Subordinate Judge and even then the Subordinate Judge dealing with them is deemed to be the Court of the District Judge : ('21) 8 A I R 1921 Lah 28, *Ref.*

[P 80 C 2]

Ganesha Khan — for Petitioner.
L. Charanjit Lal — for Respondent.

Order.—This is an application for revision of the order of the Senior Subordinate Judge, Peshawar, refusing to entertain an appeal from an order of the Sub-Judge, second class, directing that a complaint under S. 193, I. P. C., be made against the petitioner under S. 476, Criminal P. C. The Senior Subordinate Judge held that under S. 476B read with S. 195 (3), Criminal P. C., the appeal lay to the District Judge's Court. He therefore returned the appeal for presentation in the proper Court. Instead of complying with that order the petitioner has applied for revision of the Senior Sub-Judge's order on the ground that he failed to exercise a jurisdiction vested in him by law. Learned counsel for the petitioner relies upon a judgment of a Bench of the Lahore High Court reported in 61 I C 53[1] in which it was held that in view of the delegation of certain of the District Judge's functions to a Senior Sub-Judge under S. 39, Punjab Courts Act, the Court of the Munsif was subordinate to the Court of the Subordinate Judge for the purposes of S. 195 (3), Criminal P. C.

Learned counsel for the respondent contends that in that judgment sufficient attention has not been paid to the word "ordinarily" appearing in S. 195 (3), Criminal P. C., and to the word "Court." He points out that under S. 30, N.-W. F. P. Courts Regulation, which corresponds to S. 39, Punjab Courts Act, ordinarily appeals from the subordinate Courts lie to the Court of the District Judge in suits of value not exceeding Rs. 5000 and in other cases to the Court of the Judicial Commissioner and where the Court of the Judicial Commissioner with the sanction of the Local Government directs that appeals lying to the Court of the District Judge may in certain cases be dealt with by a Subordinate Judge, it merely allows the appeals to be preferred to a Subordinate Judge and that when the Subordinate Judge deals with the appeals, he is deemed to be the Court of the District Judge for the purposes of the appeals so preferred. Learned counsel contends that when Subordinate Judges deal with appeals they are exercising the functions of a District Judge and not of a Court of the Subordinate Judge. Furthermore if appeals under S. 476B were invariably to lie to the Court of the Senior Sub-Judge, then the word "ordinarily" in sub-s. (3) of S. 195, Criminal P. C., would have no meaning, for proviso (a) to that sub-section would deal fully with every single case in which an appeal lay. If some appeals from a Subordinate Judge of the second class could lie to the Senior Sub-Judge and some to the District Judge, then according to the proviso they would invariably be presented to the Senior Sub-Judge and the word "ordinarily" in the main sub-section would have no meaning.

I am of opinion that appeals from Subordinate Judges ordinarily lie to the Court of the District Judge and not to the Senior Sub-Judge. The proviso to S. 30, N.-W.F.P. Courts Regulation, merely provides special circumstances in which some appeals can be preferred to a Subordinate Judge and even then the Subordinate Judge dealing with them is deemed to be the Court of the District Judge. I therefore hold that the Senior Sub-Judge was correct in returning the appeal for presentation in the proper Court. I accordingly dismiss this application with costs. Learned counsel for the petitioner has asked that the papers returned to him by the Senior Subordinate Judge which have been filed in this Court in connexion with the revision application, should be returned to him so that he may now present them in the Court of the District Judge. These papers should be returned to him. Pleader's fees Rs. 30.

G.N./R.K. *Application dismissed.*

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1. ('21) 8 A I R 1921 Lah 28 : 61 I C 53 : 22 Cr L J 325 : 2 Lah 57 : 66 P L R 1921, Dina Nath v. Mohd. Abdulla.

(28) A. I. R. 1941 Peshawar 81

ALMOND J. C. AND SOOFI J.

L. Jhangi Ram L. Khan Chand and another — Appellants

v.

Abdul Rahman Khan Rab Nawab Khan — Respondent.

Civil Misc. Appeal No. 90/28 of 1940, Decided on 3rd July 1941, from order of Senior Sub-Judge, Dera Ismail Khan, D/- 11th April 1940.

(a) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 9 — Application under S. 9 not accepted — No appeal lies — Application under S. 9 accepted—Appeal is competent.

Where an application has not been accepted under S. 9, no appeal lies, but where an application under S. 9 has been accepted a new decree is passed which is open to appeal: ('40) 27 A I R 1940 Mad 418, *Approved; Case law referred.* [P 82 C 2; P 83 C 1]

(b) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 9—Proceedings under S. 9—Account books — Non-production — Adverse inference — Transactions between parties commencing in 1914—Transactions to which account books prior to 1925 related either closed or renewed — No adverse inference held could be drawn from non-production of account books prior to 1925.

The transactions between the parties commenced in 1914. The transactions to which the account books prior to 1925 related were either closed or renewed. In proceedings under S. 9 the decree-holder failed to produce the account books prior to 1925 :

Held that no adverse inference could be drawn from the non-production of account books prior to 1925. [P 83 C 2; P 84 C 1]

(c) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 9—Burden of proof.

The burden of proof in an application under S. 9 is on the judgment-debtor. [P 84 C 1]

(d) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 5—Meaning and applicability.

The meaning of S. 5 is that if any debt has at any time borne interest at more than 9 per cent. simple interest or compound interest of any sort, then relief must be granted under that section. So that even if the debt were actually bearing simple interest at less than 9 per cent. and there was a stipulation for the payment of interest over 9 per cent. or of compound interest, the provisions of S. 5 will apply. [P 84 C 2]

(e) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 11 — Decree passed on 15th August 1935 — Six years expiring in less than two months from date of decision on application under S. 9 of Act — Instalments held should be refused.

The decree which was dealt with under S 9 of the Act was passed in 1935 and the period of six years under S. 11 was to expire in less than two months from the date of the disposal of the application under S. 9 of the Act :

Held that there were sufficient grounds for refusing instalments. [P 85 C 1]

S. B. Raja Singh — for Appellants.

Malik Khuda Bakhsh — for Respondent.

Almond J. C. — This is an appeal by Jhangi Ram and his son Kauraram, decree-holders, against the order of the Senior Subordinate Judge, D. I. Khan, accepting the judgment-debtor respondent's petition under S. 9, N.-W. F. P. Agriculturists Debtors Relief Act, 4 of 1939, and declaring that the debtor is discharged of the decree against him. The case was referred to a Bench for an authoritative finding as to whether an appeal lies in such cases. The arguments were opened by learned counsel for the judgment-debtor respondent who raised the preliminary objection that no appeal lies. He referred in the first instance to the fact that no appeal lies unless the right to appeal is expressly conferred by statute and in this connexion he referred to a judgment of the Privy Council reported as A I R 1935 P C 5.[1] He further relied in this connexion on A I R 1934 Mad 103[2] as an instance of a case in which no appeal lies. That however does not appear to us to be a case on all fours with the point now in issue in this case. The relevant section of the law in the Madras case was to the following effect :

A trustee affected by a decision under sub-s. (1) may within one year apply to the Court to modify or set aside such decision, but subject to the result of such application the order of the Board shall be final.

The wording in that Act is not at all similar to the wording of S. 9 of Act 4 of 1939. The two cases which are relevant and are relied upon by learned counsel for the respondent are two Madras cases reported as A I R 1939 Mad 796[3] and A I R 1940 Mad 418.[4] The former of these judgments dealt with an appeal under S. 23, Madras Agriculturists' Relief Act, 4 of 1938. Section 23 of that Act reads as follows :

Where in execution of any decree any immovable property in which an agriculturist had an interest has been sold or foreclosed on or after 1st October 1937, then notwithstanding anything contained in the Limitation Act, 1908, or in the Code of Civil Procedure, 1908, and notwithstanding that the sale has been confirmed, any judgment-debtor, claiming to be an agriculturist entitled to the benefits of this Act, may apply to the Court within 90 days of the commencement of this Act, to set aside the sale

1. ('35) 22 A I R 1935 P C 5 : 153 I C 896 (P C), Obeno Moore v. Akesh Tayee.
2. ('34) 21 A I R 1934 Mad 103 : 148 I C 54, Venkatarama Das v. Bheema Rao.
3. ('39) 26 A I R 1939 Mad 796 : (1939) 2 M L J 398, S. Viswanatha Ayyar v. Narayanaswami Ayyar.
4. ('40) 27 A I R 1940 Mad 418 : (1940) 1 M L J 422, Muhammad Tharayanar v. Syed Sahib.

or foreclosure of the property, and the Court shall, if satisfied that the applicant is an agriculturist entitled to the benefits of the Act, order the sale or foreclosure to be set aside and thereupon the sale shall be deemed not to have taken place at all :

Provided that no such order shall be made without notice to the decree-holder, the auction purchaser and other persons interested in such sale or foreclosure and without affording them an opportunity to be heard in the matter.

The judgment given in this case is a brief one and the relevant portion of it may usefully be reproduced :

We uphold the preliminary objection that no appeal lies from the order under S. 23, Madras Act, 4 of 1938. This is not a question relating to the execution, discharge or satisfaction of the decree under S. 47, Civil P. C. Moreover on the merits the appellants have no case.

It does not appear from this judgment whether the original Court had interfered under S. 23 or not. The second Madras case dealt with an application under S. 19 of the Madras Act, which reads as follows :

S. 19. Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on application by any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such a decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction as the case may be :

Provided that all payments made or amounts recovered, whether before or after the commencement of this Act, in respect of such decree shall first be applied in payment of all costs as originally decreed to the creditor.

In this case the original Court had refused to interfere under S. 19 of the Act, and a Bench of the Madras Court held that the order was not appealable. They further observed, however, that

if the decree were scaled down, an appeal would lie from the new decree, but if the application were dismissed no appeal could lie.

We now turn to the judgments of this Court which are relied upon by learned counsel for the appellants. Before mentioning the judgments we quote the relevant section of the N.-W. F. P. Act :

Every Court which passed a decree shall, on the application made within 90 days of the commencement of this Act of any judgment-debtor who is an agriculturist apply the provisions of this Act, to such decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter full satisfaction as the case may be :

Provided that all payments made or amounts recovered whether before or after the commencement of this Act in respect of only such decree shall first be applied in payment of all costs as originally decreed.

The first interpretation of whether an appeal lies against a decision under this section was given by a single Judge in a case reported as A I R 1941 Pesh 8.[5] The date of the judgment is 1st June 1940. It was held therein that no appeal lay from a decision given under S. 9 of the Act. The case was one in which relief had actually been refused. The second case to which reference may be made is one reported as A I R 1941 Pesh 16.[6] In that case there had been no interference by the trial Court. The appeal was entertained and disposed of on 15th November 1940. The question now at issue was not raised in the course of arguments. The third case was decided by a single Judge in Civil Revn. No. 345 of 1940.[7] In that case it was held that where there had been interference by the original Court an appeal lay as the order of the original Court amounted to a new decree. In this connexion a reference was made to the latter of the two Madras cases and also to a judgment of the Federal Court reported as A I R 1940 F C 1.[8] The fourth case was also decided by a single Judge and he relying on the case of the Federal Court, the second case from Madras and on Civil Revn. No. 345 of 1940[7] also held that an appeal lay. The decision was given in Civil Revn. No. 469 of 1940.[9] In that case also relief had been given on the application. Neither of the learned counsel appearing in this case considers that the decision of the Federal Court has any direct bearing on the matter. It will be seen therefore that as regards the decisions of this Court there has been really no divergence of opinion. It has been held in one case that no appeal lies against an order dismissing an application. It has been held in two cases that an appeal does lie against an order which accepts an application and that is the view which was expressed in A I R 1940 Mad 418.[4] The question is not free from doubt and we think we should follow the decisions which have already been given in this Court and which are supported by the Division Bench of the Madras High Court. We therefore find that where an application has not been accepted under S. 9, no appeal lies but that where an applica-

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5. ('41) 28 A I R 1941 Pesh 8 : 192 I C 716, Diwan Panna Lal v. Raizada Diwan Narendar Nath.
6. ('41) 28 A I R 1941 Pesh 16 : 193 I C 560, Hajl Habib Gul Jan Gul v. Gopichand Singh.
7. Civil Revn. No. 345 of 1940, Chandar Bhan v. Khadim Khan.
8. ('40) 27 A I R 1940 F C 1 : 185 I C 1, Ramnandan Prasad v. Goshwami Madhwanand.
9. Civil Revn. No. 469 of 1940, Lorinda Ram v. Makhan.

tion has been accepted a new decree is passed which is open to appeal.

We now turn to the merits of this case. Two issues were framed on the application: (1) Whether the judgment-debtor is an agriculturist under Act 4 of 1939. (2) Whether the disputed debt ought to be considered as discharged under S. 5 of Act 4 of 1939. Both these points were found in favour of the judgment-debtor-petitioner. The decision on the first point is not challenged by learned counsel for appellants. As regards the decision of issue 2 it is necessary to go into accounts in some detail. It is admitted by both parties that the transactions began between the appellants and Rabnawaz the father of the judgment-debtor in the year 1914 with a loan of Rs. 2000. The judgment-debtor himself admits taking additional loans of Rs. 520 after that date. He has also produced a receipt for Rs. 700 paid by him on 1st November 1918 which is not disputed. He has furthermore put in evidence a statement made by Jhangi Ram on 4th December 1917 in other litigation which is marked as EX. D-A. That is to the following effect :

> I had dealings with Rabnawaz which commenced about three years ago by Rabnawaz taking Rs. 2000. Rabnawaz and Akbarkhan his brother executed two bonds. Rabnawaz had paid Rs. 1500 or 1600 out of that but had during the pendency of the litigation taken further loans amounting to Rs. 1400 or 1500 and the amount due now is Rs. 3000 or 4000.

When the statement of the witness had gone thus far the Court made an order that the evidence could not proceed until the documents and bonds were produced. The decree-holders have stated that they have no books prior to 1925. They do not allege that those books have been lost but say that there was a partition between them and their cousins and that the cousins may have got the books. They have searched for them but are unable to find them. The decree-holders allege that on 25th January 1925 something over Rs. 9000 was due from Abdul Rahman and from his uncle Mohd. Akbar and that on that day a pro-note for Rs. 610 was executed by Abdul Rahman alone and three pro-notes respectively for Rs.3100, 2883 and 3000 were jointly executed by Abdul Rahman and Akbar Khan, that in addition to those sums Rs. 122.8.0 was due on a book account from Abdul Rahman which included Rs. 100 for the price of a shot-gun and 22.8.0 cost of stamps. The decree-holders allege that these pro-notes were to bear interest at 1-2-0 per cent. per mensem and that the debtors considered the rate of interest too high and therefore paid off the whole of the debt on 30th January 1925. They allege that subsequently on 13th February 1925 Abdul Rahman took a cash loan of Rs. 3850 and that he and his two uncles took a joint loan of Rs. 4500 on 28th February 1925 for which sums two pro-notes were executed. These pro-notes were both renewed on 5th February 1928 for sums respectively Rs. 5216 and Rs. 6000. The pro-notes of 25th January 1925 have not been produced in original but a deed-writer Rishi Ram was produced as decree-holders' witness 2. He produced his registers in which these four pro-notes are entered. We consider that his evidence on this point should be accepted. The statement that the judgment-debtor completely paid off their debts on 30th January 1925 depends on the statement of Kalaram alone. It is not supported by any entry in his books and we are unable to accept it as true. We are of opinion that those pro-notes of 25th January 1925 were renewed by two pro-notes of 13th and 28th February 1925 either because the decree-holders had agreed to reduce the rate of interest or because it was more convenient to have two pro-notes instead of four. The judgment-debtor himself admits that he did execute the pro-note for Rs. 3850 but cannot remember he executed the one for Rs. 4500. Neither of these pro-notes of 13th and 28th February 1925 has been produced but they are referred to in the renewed notes of 5th February 1928 the execution of which is not disputed.

We now proceed to draw our conclusions as to the amount of principal which was advanced in this case. The trial Court found that the original sum advanced was Rs. 2000 only, that Rs. 520 was subsequently taken by Abdul Rahman as admitted by him, that Rs. 122-8-0 was due for the shot-gun and stamps and that a cash sum of Rs. 9 was taken in one of the pro-notes of 5th February 1928 and as against that he has taken the admission of Jhangi Ram made on 4th December 1917 as showing Rs. 1400 or Rs. 1500 had been recovered. He has also drawn presumption against the decree-holders from the non-production of the books prior to 1925. We are unable to agree with the finding of the learned trial Judge on this point. In the first place we consider that if the statement of Jhangiram of 4th December 1917 is taken into consideration at all, it should be taken into consideration as a whole and it should be accepted that further sums in addition to the Rs. 2000

had been advanced. Nor do we think that it is fair to make presumptions against the decree-holders in this case on account of non-production of their books before 1925. Those books are now very old and we cannot presume that they would be kept for such a long period after the transactions to which they refer have been closed or renewed. Apart from that the statement of the judgment-debtor alone cannot be accepted as proving what was borrowed and what was paid. The burden of proof in an application under S. 9 of the Act is on the judgment-debtor, and we must assume that the debts evidenced by the pro-notes of 13th February 1925 and 28th February 1925 represented principal and not principal and interest. From that date onwards the facts are much clearer. The first pro-note of 5th February 1928 for Rs. 5216 which was executed by Abdul Rahman alone represented Rs. 3850 on account of previous pro-note and Rs. 1357 interest at 1 per cent. per mensem and Rs. 9 on account of stamp, etc. The second pro-note of 5th February 1928 which was executed by Abdul Rahman and his two uncles represented principal Rs. 4500 and interest Rs. 1500 making a total of Rs. 6000.

In 1931 the parties referred their disputes over their debts to the arbitration of one Tulsi Das whose award is given in EX. D-C. The award was between the creditors on the one hand and Abdul Rahman and his uncle Akbar Khan on the other hand and the findings as regards the debt of Abdul Rahman were as follows : The portion of the Rs. 6000 pro-note which was due from Abdul Rahman amounted to Rs. 2000 and interest on that sum had been recovered by the creditors taking the produce of certain land which belonged to Abdul Rahman and his brothers. The amount which has been allowed on that account by the trial Court is Rs. 1440. We do not think that such a large sum should have been allowed, but it is immaterial for the purposes of our decision. The pro-note of Rs. 5216 was also admitted and as that pro-note was not bearing interest the arbitrator gave an award for Rs. 7214 against Abdul Rahman and directed that it should be paid by annual instalments of Rs. 500. There was a stipulation for payment of interest at the rate of Re. 1-4-0 per cent. per mensem in case the instalments were not paid on due dates. A decree was passed on this award on 30th January 1931 and Rs. 1000 was paid by the judgment-debtor towards that decree. A second application for execution was taken out and the disputes were again referred to the arbitration of Mohd. Hussain who gave his award on 10th August 1935. Without going into any details as to the accounts he gave a finding that Rs. 6800 was due from Abdul Rahman on that date and directed that the decree be executed by instalments.

We proceed to apply the provisions of S. 5 to the facts thus found. Learned counsel for the decree-holders has contended that the section is not at all applicable as it is not shown that the decree-holders have realized interest at more than 9 per cent. or compound interest. As regards the portions of the debt, it is true that on some occasions interest at less than 9 per cent. has been charged. For instance on the pro-note for Rs. 5216 no interest was charged. On the other hand, it is proved beyond any doubt that on portions of the debt and for certain periods of time interest has been charged at more than 9 per cent. and has also been charged as compound interest, for instance on the pro-note of 13th February 1925 interest was charged at 1 per cent. and again the pro-note of 28th February 1925 when renewed on 5th February 1928 had interest capitalized in the latter pro-note. It appears to us that the meaning of S. 5 is that if any debt has at any time borne interest at more than 9 per cent. simple interest or compound interest of any sort ; then relief must be granted under that section. There is an Explanation to sub-s. (2) of S. 5 to the following effect :

> This sub-section shall also apply to any case where there is a stipulation for payment in any contingency of simple interest at a rate higher than 9 per cent. per annum or of compound interest or of interest on interest.

So that even if the debt were actually bearing simple interest at less than 9 per cent. and there was a stipulation for the payment of interest over 9 per cent., or of compound interest, the provisions of the section would apply. There is a stipulation in the decree of 30th January 1931 for payment of interest in certain contingencies at the rate of 16 per cent. We are therefore of opinion that the judgment-debtor is entitled to relief under S. 5. We calculate the extent of the relief as follows: The following is the capital taken by the judgment-debtor:

Rs.	3850-0-0 :	on 13-2-1925
	1500-0-0 :	on 28-2-1925
	9-0-0 :	on 5-2-1928
	122-8-0 :	at some date in 1925 on a/c of shot-gun and stamps.
	5481-8-0	Total of principal.

Rs. 1000-0-0: paid on the decree of 1931
1470-0-0: recovered in execution of the present decree
1440-0-0: allowed on a/c of receipt of produce

3910-0-0 Total payment.

The appellant has therefore not paid more than double the principal and is not entitled to a discharge from the debt. He is however entitled to be relieved of any further interest under sub-s. (1) of S. 5 and under sub-s. (3) he is not liable to pay more than the actual principal. We therefore accept this appeal to the extent that we declare that the amount which is now due under the decree is the sum of Rs. 5481-8-0 and that this sum at any rate shall bear no further interest. There remains the question of the application of S. 11. This section directs that

A Court at the time of passing or even if it has passed a decree for money against an agriculturist shall, unless for reasons to be recorded in writing it otherwise directs, order that the total amount found due for principal, interest and costs as provided by this Act shall be paid by such instalments as the Court considers proper under the circumstances of the case :

Provided that the period of such instalments shall not extend beyond six years from the date of the decree.

The decree in this case was passed on 15th August 1935 and the period of six years will therefore expire in less than two months from now. There are therefore in our opinion sufficient grounds for refusing instalments in this case. The sum of Rs. 5481-8-0 together with costs of the case are recoverable immediately. Pleader's fees Rs. 64.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Peshawar 85

MIR AHMAD J.

Mohd. Azim and others — Judgment-debtors — Petitioners

v.

Bhagat Ram Bhawan Dass and another Decree-holder — Creditors — Respondents.

Civil Revn. Petn. No. 18 of 1941, Decided on 27th May 1941, against order of S. S. Judge, Hazara at Abbottabad, D/- 15th May 1940.

(a) Limitation Act (1908), S. 14—Order under N.-W. F. P. Agriculturist Debtors Relief Act, 4 of 1939—Whether appeal or revision competent difficult to ascertain from N.-W. F. P. Act, 4 of 1939 — Trend of decision on aforesaid point not known—Appeal by judgment-debtor — Judicial Commissioner's judgment holding appeal incompetent — Appellate Court in pursuance of aforesaid judgment dismissing appeal—Revision by judgment-debtor — Judgment-debtor held entitled to deduct time spent in prosecuting appeal under S. 14, Limitation Act.

An order under N.-W. F. P. Agriculturist Debtors Relief Act, 4 of 1939, was passed against the judgment-debtor. From the provisions of the aforesaid Act it was difficult to say definitely whether an appeal or revision would be competent. The judgment-debtor went up in appeal to the District Court because he did not know the trend of decisions with regard to appeals or revisions under the N.-W. F. P. Act, 4 of 1939. When the appeal was heard a judgment of the Judicial Commissioner holding that orders under the aforesaid Acts were not appealable was brought to the notice of the District Court which in pursuance thereof dismissed the appeal. Thereupon the judgment-debtor went up in revision :

Held that the judgment-debtor was entitled to deduct the time spent in prosecuting the appeal in computing the period of limitation for revision under S. 14, Limitation Act. [P 86 C 2]

(b) N.-W. F. P. Agriculturist Debtors Relief Act (4 of 1939), S. 9—Joint decree against more than one judgment-debtor—Any of them who is agriculturist can apply under S. 9—Decree can be reopened for benefit of all judgment-debtors including those who are non-agriculturists.

A joint decree against more than one judgment-debtor can be reopened under S. 9 at the instance of any of them who happens to be an agriculturist for the benefit of all the judgment-debtors including those who are not agriculturists. [P 87 C 1]

Peer Bakhsh — for Petitioners.

L. Charanjit Lal — for Respondents.

Order. — Mohd. Azim and Mohd. Afsar are brothers. They belong to village Malsa (tehsil Abbottabad). Mohd. Azim is a patwari. Their father had dealings with Uttam Chand Mal of Dhamtaur and then with his son Ghanisham. It appears that they used to execute bonds from time to time in favour of the creditor. The transactions can be traced back to 1908 from the document on the record. The last bond was executed on 16th December 1928. It was for Rs. 780 and interest was promised to be paid. The debt was sold by Ghanisham to Bhagat Amir Chand. Bhagat Amir Chand transferred it to Bhagat Ram. Bhagat Ram brought a suit for the recovery of the amount and on 13th November 1935 a decree for Rs. 1200 with future interest was passed. On 20th August 1937 Bhagat Ram applied for the arrest of Mohd. Azim in execution of the decree. On 13th January 1938 Mohd. Azim gave a petition to the execution Judge in which he said that he was ready to pay money by instalments and that he was also prepared to give to the decree-holder the house of his son which was worth Rs. 3500 in lieu of the decretal amount. Another application was given by Mohd. Azim on 28th March 1938 in which he made a similar request with regard to the house but he referred to the house as "my house in kehal." He alluded

to his previous application to the same effect. On 21st February 1939 both the brothers gave a petition and in this also they said that they were ready to give their house for liquidation of the decretal debt. All this happened before N.-W. F. P. Act, 4 of 1939, came into force. On 4th February 1939 after the Act became law the two judgment-debtors separately applied for relief under S. 9 of that Act. They alleged that they had paid much more than twice the amount of the debt and that therefore the decree should be held to have been discharged. The execution Judge seems to have consolidated the two applications into one proceeding. He went into the account and the decree was reduced to Rs. 263-8-0. It was directed that it should be paid by six-monthly instalments of Rs. 100.

Two appeals were preferred from this order to the District Court, one by the decree-holder against the scaling down of his decree and the other by the judgment-debtors for declaring the whole debt to have been discharged. On 26th January 1940, the Additional Judge accepted the appeals and sent the case back to the execution Judge for de novo trial. He pointed out that it was essential to find out the source of the income of Mohd. Azim who was in Government service and also to go into the accounts more carefully. On receiving the file from the Court of appeal the Judge gave date for evidence. Evidence was recorded. Parma Nand and Daulat Ram, witnesses for the decree-holder, definitely said that the house in kehal belongs to Mohd. Azim and it was within the municipal limits of Abbottabad. The patwari stated that Mohd. Afsar had lands and paid land revenue. The execution Judge referred to the three applications which I have already mentioned above and held that as Mohd. Azim had a house within the municipal limits worth Rs. 3500 he was not an agriculturist within the meaning of S. 2 (i) of the Act. For facility of reference I will reproduce the relevant portion of the section. It is as under :

> Provided that a person who owns house, other than his own residential house, or shop property within municipal or cantonment limits of the value of Rs. 500 or more will not be considered an agriculturist.

The Judge also remarked that it was not clear as to whether Mohd. Azim's income from land was more than his income from service as patwari and that it was necessary that it should be more to make him an agriculturist. He was disqualified on that score also. The learned Judge therefore threw out the applications of the two brothers. Mohd. Azim and Mohd. Afsar went up on appeal to the District Court from this order. It so happened that when the case was heard by the District Judge an unpublished judgment of the Honourable the Judicial Commissioner came to the notice of the Judge in which the Honourable the Judicial Commissioner had held that no appeal lay where a Court refused to interfere under N.-W.F.P. Act, 4 of 1939. The Judge therefore held the appeal incompetent and dismissed it with costs.

Mohd. Azim and Mohd. Afsar have come up on revision to this Court and have asked that under S. 14, Limitation Act the time taken by them in prosecuting their appeal in the District Court should be deducted for computing the period of limitation for revision. If it is deducted the petition is within time. I am prepared to extend the benefit of S. 14, Limitation Act to the petitioners because when filing the appeal they did not know the trend of the decision with regard to the appeals and revisions under the Act, and also because the Act has no provision for appeal and it is so difficult that one cannot definitely say whether an appeal or revision would be competent from an order passed under one of its sections. I, therefore, admit the petition as within time. Now the execution Judge has committed a material irregularity in dismissing the application of Mohd. Afsar when he held that Mohd. Azim was not an agriculturist. Mohd. Afsar lives in a village called Malsa. There is evidence on the record to show that he has land and is, therefore, an agriculturist. He has no house in the municipal limits. No doubt the learned counsel has laid stress on the application dated 21st January 1939 in which both the brothers offered the house, but this statement is rebutted by the fact that the house was mentioned by Parma Nand and Daulat Ram in their evidence as the sole property of Mohd. Azim. Moreover Mohd. Azim has stated in the first application that the house belonged to his son and in the second that it belonged to him alone. The offer in the third application, therefore, meant that Mohd. Azim was ready to help his brother by getting the whole debt discharged in the manner suggested. Now S. 9 of the Act is in the following terms :

> Every Court which passed a decree shall on the application, made within 90 days of the com-

mencement of this Act, *of any judgment-debtor* who is an agriculturist apply the provisions of this Act, *to such decree* and shall, notwithstanding anything contained in the Code of Civil Procedure 1908, *amend the decree* accordingly or *enter full satisfaction* as the case may be :

Provided that all payments made or amounts recovered whether before or after the commencement of this Act in respect of any such decree shall first be applied in payment of all costs as originally decreed.

The italics are mine. I would emphasise the words "of any judgment-debtor." It shows that the matter can be reopened at the instance of any judgment-debtor if there are more than one judgment-debtor. In the circumstances, it is clear from the italicized portions of the section that the case can be reopened at the instance of Mohd. Afsar and as the decree is joint interference could be made in the whole of the decree for the benefit of both the judgment-debtors. For analogy sake I would refer to O. 41, R. 33, Civil P. C., under which the appellate Court can, at the instance of one of the parties to the suit, make any order as regards parties who have not appealed against or objected to the decree of the lower Court. The mistake which has been committed by the execution Judge is due to the fact that in that Court the two applications were not kept separate although they were presented separately and the disability attached to Mohd. Azim has been extended to Mohd. Afsar although Mohd. Afsar's qualifications were quite different from those of his brother. This amounts to a material irregularity. I, therefore, accept this petition, set aside the order of the execution Judge and hold that the case can be reopened at the instance of Mohd. Afsar for the benefit of both the judgment-debtors. The case shall go back to the execution Judge who shall now carefully go into the accounts and pass orders according to law. Costs in this Court as well as in the lower appellate Court shall follow the event. Pleader's fee Rupees. 32.

G.N./R.K. *Petition accepted.*

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(28) A. I. R. 1941 Peshawar 87

ALMOND J. C.

Lt. Col. Nawab Sir Mohd. Akbar Khan — Plaintiff — Petitioner

v.

Mian Musharaf Shah and another — Defendants — Respondents.

Civil Revn. No. 334 of 1940, Decided on 2nd June 1941, from judgment and decree of Additional Judge, Peshawar, D/- 18th March 1940.

(a) Attachment — Attachment of immovable property — Effect.

A mere attachment of the land does not create any interest in that land in the person attaching it so as to give him a right to sue for mesne profits especially against a person in lawful possession of the same : 30 Mad 413, *Disting.*; ('24) 11 A I R 1924 Cal 786; 2 I C 18 (Mad) and 21 I C 330 (Bom), *Expl.* [P 88 C 1, 2]

(b) Mesne profits — Suit for, against person not in possession.

No decree for mesne profits can be passed against a person who is not in possession of the property and is not alleged to be in possession. [P 88 C 2]

L. Hukam Chand — for Petitioner.

L. Wazir Chand — for Respondent 1.

Order.— The petitioner before me Nawab Sir Mohd. Akbar Khan of Hoti held a decree against Amirnawaz Khan, respondent 2, and attached 250 kanals of land belonging to him in execution of the decree. During the attachment Amirnawaz Khan sold this land to respondent 1, K. B. Mian Musharaf Shah. The litigation over this question was eventually taken before the Privy Council in Privy Council Appeal No. 93 of 1932 reported as AIR 1934 P C 217.[1] In the course of their judgment their Lordships remarked as follows :

Their Lordships agree with the District Judge that so far as 250 kanals which were not included in the 1915 mortgage are concerned, the interest of respondent 1 who only came in after the prohibitory orders, is subordinated to that of the appellant.

On the basis of that order of the Privy Council the petitioner brought a suit for recovery of mesne profits of this 250 kanals of land against the two respondents. After many vicissitudes two Courts below have agreed in their decision on issue 1 which was framed in the suit and which is sufficient with the exception of one small point to which I shall refer later to dispose of the suit. Issue 1 reads as follows : Is the plaintiff

1. ('34) 21 AIR 1934 P C 217: 151 I C 221:15 Lah 836 : 61 I A 371 (PC), Mohammad Akbar Khan v. Munsharaf Shah.

entitled to the produce of 250 kanals of land? The finding of the Courts below in this connexion is virtually that the plaintiff has no cause of action in the present suit as the mere attachment of the land does not create any interest in that land in him so as to give him a right to sue for mesne profits. In support of that finding of the two Courts below learned counsel for the contesting respondent 1 relies on the following cases: A I R 1932 ALL 353[2] in which it was laid down that an attachment does not create an interest in the property attached but has the effect of invalidating alienations in conflict with the interest of the auction purchaser; A I R 1923 Lah 261[3] in which it was held that an attachment of property creates no charge on the property but merely prevents its private alienation; 36 Mad 383[4] in which it was laid down that an attachment gives certain rights in execution but the title remains with the owner. As against these the learned counsel for the petitioner himself relies upon the first ruling referred to above. He would, however, substitute the word "decree-holder" for "auction purchaser." That is obviously impossible for the position of an auction purchaser at a court sale is obviously different from that of decree-holder who has merely obtained a prohibitory order against the property.

Learned counsel for the petitioner relies in the second place on two cases reported as 30 Mad 413[5] and 84 I C 119.[6] The first case is the one which is most strong in his favour but the facts of the case are easily distinguishable. In that case crops had been attached and had been delivered into the custody of a person who subsequently made away with them. It was held that the decree-holder could maintain a suit against that person. In that case, however, it is to be noted that moveable property had been attached and had been removed from the custody of the Court. In the present case it was the land which was attached and land obviously cannot be removed from the custody of the Court. In the second case, namely 84 I C 119[6] the question was whether an attaching creditor had a right to bring an objection under O. 21, R. 90, Civil P. C. That is no authority for the proposition now put forward for any person has a right to make an objection under O. 21, R. 90 if his interests are affected by the sale. That is not the same thing as saying that a person who can bring an objection under that rule has acquired an interest in the property. The other two cases relied upon by learned counsel for petitioner, namely 2 I C 18[7] and 21 I C 330[8] do not support the contention which is put forward by him. It is clear that if the plaintiff were enforcing his claim under the attachment in execution then the rights of defendant 1 would be subordinated to him, but it appears to me that he cannot maintain a separate suit for mesne profits, for the very essence of a suit for mesne profits is that the defendant is in wrongful possession of the land and it is clear that in the present case the defendant is in lawful possession of the land, but that he holds it subject to such rights as the plaintiff can enforce in execution under his attachment. I, therefore, agree with the findings of the Courts below on this point.

The second point which is raised is that Amirnawaz Khan confessed judgment and that a decree should at any rate be passed against him. A perusal of the written statement put in by Amirnawaz Khan convinces me that he considered that the plaintiff had no cause of action against him and what he was really admitting was that the plaintiff could as far as he was concerned get a decree against defendant 1. In fact it is quite clear that no decree for mesne profits could be passed against Amirnawaz Khan who is not in possession of the property and is not alleged to be in possession. For these reasons I am of opinion that the suit of the plaintiff has rightly been dismissed and I dismiss this application with costs.

K.S./R.K. *Application dismissed.*

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2. ('32) 19 AIR 1932 All 353 : 137 I C 785 : 1932 A L J 285, Sita Ram v. Jado Rai.
3. ('23) 10 AIR 1923 Lah 261 : 69 I C 720 : 3 Lah 414, Ram Bhaj Datta v. Ram Das.
4. ('11) 36 Mad 383 : 13 I C 96 : 22 M L J 108 : (1911) 2 M W N 531, Ananta Razu Garu v. Narayanarazu Garu.
5. ('07) 30 Mad 413 : 17 M L J 334 : 2 M L T 365, Sankarlinga Reddy v. Kandasami Tevan.
6. ('24) 11 AIR 1924 Cal 786 : 84 I C 119 : 51 Cal 495 : 28 C W N 899, Dhirendra Nath v. Kamini Kumar.
7. ('09) 19 M L J 401 : 2 I C 18, Mandaleswara Katari v. Prayag Dosaji.
8. ('13) 15 Bom L R 848 : 21 I C 330, Subrao Mangesh Chandavarkar v. Mahadevi Manji Batta.

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ALMOND J. C. AND SOOFI J.

Sardar Gurdit Singh and another — Defendants — Appellants

v.

Siri Ram, Plaintiff and others, Defendants — Respondents.

First Appeal No. 34/5 of 1941, Decided on 29th May 1941, from decree and order of Sub-Judge, First Class, Peshawar, D/- 20th January 1941.

(a) Evidence Act (1872), Ss. 90 and 65—Copy admissible under S. 65 — Presumption under S. 90 can be drawn in respect of copy.

Where a copy is admissible under the provisions of S. 65, a presumption of correctness under the provisions of S. 90 can be drawn in respect of the copy as well: ('35) 22 A I R 1935 P C 132, *Rel. on*; ('27) 14 A I R 1927 Cal 229 and ('27) 14 A I R 1927 Cal 870, *Ref.* [P 94 C 1]

(b) Hindu law — Joint family property — Nucleus proved to exist — Whole property of joint family must be presumed to be joint—But no such presumption arises where nucleus is such that property claimed to be joint could not have been acquired with its help.

Where a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including all acquisitions by a member of the joint family and the onus lies in the first instance on the member who claims the property to be his separate property to prove that the acquisition thereof was not made out of the income from the joint family property. But where, income from the joint family property is not sufficient even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired: ('37) 24 A I R 1937 Mad 436 and ('37) 24 A I R 1937 Bom 446, *Rel. on.* [P 95 C 1]

(c) Hindu law — Joint family — Members jointly acquiring property without aid of joint family property — No proof of partnership — Property acquired must be presumed to be joint family property unless acquirers intended to hold it as co-owners.

In the absence of any proof of partnership, property jointly acquired by the members of a joint Hindu family without the aid of joint family property must be presumed to be joint family property, unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property: ('28) 15 A I R 1928 Lah 224 and ('37) 24 A I R 1937 Mad 29, *Rel. on.* [P 96 C 1]

(d) Hindu law — Joint family property—Application for loan by father—Loan application form signed by father containing statement of both ancestral as well as self-acquired property — Loan form is admissible to show whether father intended to treat two sets of properties as joint family property.

A loan application form signed by the father and containing a statement of both ancestral as well as self-acquired properties is admissible in evidence to show whether the father intended to keep the two sets of properties separate or he meant to treat them as joint family properties. [P 97 C 2]

(e) Hindu law—Joint family property—Member of joint family voluntarily throwing separate property into common stock — Separate property becomes joint family property — But clear intention to waive separate rights must be established — Intention cannot be inferred by mere fact of joint user of separate property by other members.

Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself. Separate property thrown into the common stock is subject to all the incidents of joint family property: ('23) 10 A I R 1923 P C 57, *Rel. on.* [P 99 C 1]

(f) Hindu law — Partition— Wife cannot demand partition—Partition between her husband and sons — Wife is entitled to share equal to that of son.

Under the Hindu law wife cannot herself demand a partition but if a partition does take place between her husband and her sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. Where a person institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants and the wife denies out and out the plaintiff's right to ask for the partition during the lifetime of his father on the ground of a special custom and the plea of special custom is subsequently given up the question of a pleading on the part of the wife to ask for her own share does not arise and the wife must be given a share if a partition is ordered. [P 101 C 1, 2]

(g) Hindu law — Partition — Joint family firm — One member taking certain property and abandoning his claim in joint family property without specification of share — Implied intention of rest of members to continue joint operates in continuance of joint family business — But specification of share in relinquishment deed operates to terminate joint family business.

Where one of the members of a joint Hindu family firm takes certain property and abandons his claim in the joint family firm, the absence of specification of share in the deed of relinquishment coupled with the implied intention on the part of the rest of the members of the joint family firm to continue as such operates in the continuance of the joint family business: ('25) 12 A I R 1925 P C 49, *Rel. on.* [P 100 C 1]

But the specification of his share in the deed of relinquishment by the member of the joint family firm operates to terminate the joint family business. [P 100 C 1, 2]

(h) Hindu law — Joint family firm — Dissolution — Previous accounts of business cannot be gone into at time of dissolution.

The previous accounts of a joint family business cannot be gone into at the time of the dissolution

of the joint family firm. Consequently the income of a member from his professional skill prior to the dissolution whether it acquired the nature of joint family property or not cannot be accounted for. [P 101 C 1]

R. B. Badri Das, L. Charanjit Lal and Sheikh Mohd. Shafi ; and L. Charanjit Lal — for Appellants (Sardar Gurdit Singh and Mt. Tulsan Devi, respectively).

S. B Raja Singh and R. B. Diwan Chand—for Respondents, Siri Ram and Dr. Gurbakhsh Singh, respectively.
Respondent 3 in person.

Soofi J.—This judgment shall dispose of the joint civil appeal preferred by defendants 1 and 4 as well as the separate cross-objections preferred by the plaintiff and defendant 2 against the preliminary decree passed by Mirza Fazal Rahman, Sub-Judge, First Class, Peshawar, in a suit for possession by partition of 1/4th share of the joint Hindu family property and for the rendition of accounts since 31-7-1930. Two alternative reliefs, as will appear from the issues, were also sought, but we are not concerned with them at the present stage. The relationship between the parties shall be clear from the following pedigree table :

L. NARAIN DAS
|
L. Ram Dass = Mt. Bhoji
died before 1879
|
L. Ajit Singh | L. Ganda Mal | L. Nihal Chand | L. Hansraj Singh died 1900
|
L. Nath Sahai

S. Gurdit Singh = Mt. Tulsan Devi (defendant 4) — defendant 1 | Sadhu Singh alias Diwan Singh (separated on 18-8-1915)

Surjan Singh B. 1895 (separated 31-7-1930)	Gursaran Singh B. winter 1897-98 (separated on 10-5-1923)	Dr. Gurbakhsh B. 1900 defendant 2	Siri Ram B. 1910 plaintiff	Hukam Chand B. 1916 defendant 3.

According to the plaintiff the joint Hindu family had continued to exist since the time of L. Hansraj Singh who was separate from his brothers from 1879. At the time of L. Hansraj Singh's death there was a nucleus of the joint Hindu family property, which consisted of six shops (Nos. 120 to 125) and two houses (705 and 695). Some more property was purchased from time to time and improvements were effected on the entire property. In 1913 a joint Hindu family business was started at Karachi, which was styled as Saigal Bros. As the business developed, branches were opened at Peshawar, Nowshera and Bannu. The Saigal Medical Hall started by defendant 2 at Nowshera was also a joint Hindu family concern. Gursaran Singh was given some property and cash and was turned out of the family business on 10-5-1923, but the joint Hindu family firm continued to exist. On 31-7-1930 with the separation of Surjan Singh from the firm, a disruption took place. Since then the plaintiff's position is that of a cosharer, and he is in constructive possession of the family property.

Defendants 1 and 2 were the only defendants who put in written statements. Defendant 2 on the whole supported the plaintiff's claim, but he controverted the claim in respect of the Saigal Medical Hall, Nowshera. According to him, it was his personal property. Defendant 1 was the chief contesting defendant. He inter alia pleaded that L. Hansraj Singh died in debt. The two houses had been burnt, and only one of them had been partly reconstructed. He paid off the father's debt. He purchased property in 1902 and 1910 with his own funds. He with his own money started the business, Saigal Brothers at Karachi in 1913, while he was in service there. He associated Surjan Singh with him in the business. He bought out the share of his brother Sadhu Singh in the ancestral property by paying him Rs. 1500 in 1915. Thus the ancestral property also became the self-acquired property. He as a father maintained his sons, gave them schooling and gave them training in business with a view to set them up in life. He did not make them his partners in business, nor was the business a joint Hindu family business. It was all his personal concern. He added that in case it be held that business set up by him was a joint Hindu family business, it came to an end in 1923 with the separation of Gursaran Singh from the family. It was a common

ground between the parties that a custom existed amongst the Hindus in Peshawar, by which the sons cannot ask for partition of joint Hindu family property during the lifetime of the father : *vide* A I R 1936 Pesh 111.[1] Defendant 1 relied upon this custom, while the plaintiff wanted a declaration that this custom was against the principle of justice, equity and good conscience, and was hence invalid. The learned trial Court in its judgment has given a full summary of the elaborate pleadings of the parties. We do not propose to repeat it, for, we feel that in view of the observations made above, it will be possible to understand the issues framed by the trial Court which we quote below :

(1) Is the plaintiff in possession of any portion of the property in dispute ? O. P. P. (2) Is the value for the purposes of jurisdiction correct, and the plaint is properly valued ? O. P. P. (3) Whether the property in possession of defendant 1 before 10-5-23 was not the joint Hindu family property of the parties, but was on the other hand the self-acquired property of defendant 1 ? O. P. D. 1. (4) Whether the property acquired after 10-5-1923 is to be considered as joint Hindu family property ? O. P. P. (5) Whether the plaintiff is a cosharer in the property in dispute ? If so since when ? O. P. P. (6) Whether the plaintiff is a partner in the business known as Saigal Brothers, Peshawar and Bannu, and Medical Hall Nowshera and is entitled to the rendition of accounts ? O. P. P. (7) If the plaintiff is found to be a member of joint Hindu family, is he entitled to claim partition in the lifetime of his father ? O. P. P. (8) Whether the plaintiff is entitled to claim the declaration as prayed for in para. 24 (2) (i) of the plaint ? O. P. P. (Para. 24 (2) (i) reads as follows : "Declaration of right to the effect that the custom according to which a son has in no way any right to have property partitioned in the lifetime of his father, being unreasonable and against equity, justice and good conscience, is not binding, and that the plaintiff is entitled to one-fourth share partitioned during the lifetime of his father.") (9) Whether the plaintiff is not entitled to joint possession? O. P. D. 1. (10) Whether the plaintiff is entitled to Rs. 800 on account of maintenance from 1-10-1935 to 30-5-1936 ? O. P. P. (11) Is the plaintiff entitled to sue for accounts and discovery as a coparcener ? O. P. P. (12) Is the plaintiff entitled to the injunction prayed for ? O. P. P. (13) Is the transfer dated 23-9-1935 made by defendant 1 in favour of defendant 4 void and ineffective as against the plaintiff ? O. P. P. (14) Whether defendant 1 made any will on 18-11-1935 and is it invalid ? O. P. P. (15) Whether the property mentioned in para. 12 (c) of the plaint was purchased benami in the name of defendant 4, and in fact it belongs to joint Hindu family ? O. P. P. (16) To what relief is the plaintiff entitled and against whom ? O. P. P.

By his respective orders dated 11-1-1941 and 13-1-1941 the learned Sub-Judge decided issues 1 and 2 against the plaintiff. The plaintiff made good the deficiency in court-fee on 15-1-1941. All the other issues were decided in the judgment delivered on 20-1-1941. Issues 3 and 4 were discussed together at great length. It was held that there was a nucleus of the joint Hindu family property at the death of L. Hans Raj Singh ; that the properties acquired in 1902 (*vide* sale deed EX. D-37 for Rs. 500) and in 1910 (*vide* sale deed, EX. D-39 for a sum of Rs. 1900) were in the nature of accretions to the nucleus, because there had been the blending of the personal income with joint Hindu family income ; that the properties acquired in 1921 (*vide* Ex. D-41), 1922 (*vide* Ex. D-42) and 1927 (*vide* Ex. D-43) and the properties at Nowshera were acquired with the funds of joint Hindu family business known as Saigal Bros., and hence all the properties were joint Hindu family properties. It was further held that the family and the family business remained intact when Gursaran Singh was separated on 10-5-1923, but there was disruption on the separation of Surjan Singh on 31-7-1930. After that date, the position of the members who still remained joint was that of cosharers and not that of coparceners. Therefore, the properties acquired by defendant 1 under the sale deeds Ex. D-44 (for Rs. 3000) and Ex. D-45 (for Rs. 18,000) on 3-11-1932 and 5-2-1935 respectively were his self-acquired properties. Though a sum of Rs. 3663 is debited to the books of the firm in respect of Ex. D-44, but there is no evidence that any funds were taken out of the firm in respect of Ex. D-45. Issue 5 was incidentally discussed while dealing with issues 3 and 4. It was held that on the separation of Surjan Singh on 31-7-1930 there was the end of coparcenary and since then the parties to the present suit remained associated in business as tenants in common and not as joint tenants. On issue 6, it was held that all concerns known as Saigal Bros., and the commercial side (as distinct from professional side) of Saigal Medical Hall Nowshera were joint Hindu family concerns, and on the disruption of joint Hindu family in 1930, a tenant in common was entitled to the rendition of accounts from the co-tenants.

On issues 7 and 8, it was held that in case the disruption did not take place in 1930, the plaintiff, in accordance with the recognized custom of Peshawar (*vide* A I R 1936 Pesh 111[1]) cannot sue for partition of joint Hindu family property during the lifetime of his father (defendant 1). On issues 9 and 10, it was held that had the family remained

1. ('36) 23 AIR 1936 Pesh 111 : 163 I C 52, Chela Ram v. Ganga Bishan.

joint, the plaintiff would have been entitled to joint possession and maintenance, but not now, as it has been held that the disruption took place in 1930. Similarly, on issues 11 and 12, it was held that the plaintiff as a coparcener could not have sued for the rendition of accounts or for an injunction. On issue 13, it was held that the gift of 20 kothis out of 30 in the serai by defendant 1 in favour of defendant 4 under the registered gift deed dated 19-9-1935 was valid to the extent of defendant 1's share, i. e., 1/4th only. As regards issue 14, it was held that as a cosharer the will dated 18-11-1935 was valid to the extent of the testator's share, i. e., 1/4th, but it would have been invalid had the testator, i. e., defendant 1, been a coparcener. As regards issue 15, it was held that the sale deed dated 5-2-1935 in respect of two shops and balakhanas on them and two kothis by Karam Chand Duggal in favour of defendant 4 for a sum of Rs. 9000 was a genuine sale and not a benami sale. The property thus purchased had become the personal property of Mt. Tulsan Devi (defendant 4). Issue 16 relates to the relief. In view of the findings on issues 3, 4, 5, 6, 13, 14 and 15, the learned Sub-Judge made the following order :

In the result therefore I grant the plaintiff a preliminary decree : (a) Declaring that the plaintiff and defendants 1, 2 and 3 are each entitled to 1/4th share in the property mentioned in the schedule attached to the plaint except items G H. Under the gift deed dated 19-9-1935, defendant 1's 1/4th share in the 20 kothis out of the property mentioned as item C now belongs to defendant 4. (b) For rendition of accounts of the income of the immovable property mentioned in the above schedule except items G and H from 31-7-1930 till the delivery of separate possession, and also of the income of the business known as the Saigal Brothers at Peshawar and Bannu and the Saigal Medical Hall at Nowshera from 31-7-1930 to 30-5-1936 when the plaintiff gave the other partners a notice of dissolution. Defendant 2 will be entitled to the gains of the business of the Saigal Medical Hall which have resulted directly from his professional knowledge.

Defendants 1 and 4 have preferred a joint appeal from the preliminary decree praying for the dismissal of the suit. The grounds of appeal which are 22 in number cover the following points only : (a) The property and the business are the result of personal labour of defendant 1. There was no family nucleus or at any rate the nucleus was not such that with its help the property and business which are claimed to be joint could have been built up. The trial Court had wrongly understood A I R 1933 Pesh 85[2] as laying down the proposition that the father of a joint Hindu family cannot acquire property to the exclusion of others. (b) The joint Hindu family and the joint Hindu family property and business, if it did exist at all, came to an end with the separation of Gursaran Singh on 10-5-1923. The properties acquired in 1902, 1910 and after 1923 cannot be regarded to be the joint Hindu family properties. The gift and the will are therefore valid. (c) The plaintiff is not entitled to call for accounts from 1930 onwards.

The cross-objections by the plaintiff are to the following effect : *(a)* The properties purchased by defendant 1 on 3-11-1932 and 5-2-1935 in his own name were purchased from the joint funds, and hence they are the property of all the cosharers. *(b)* The property purchased by defendant 4 on 5-2-1935 was in fact purchased by defendant 1 out of the joint funds. Hence this property also becomes the property of all the cosharers. (c) Defendant 1 is liable to render accounts for these properties as well.

The cross-objections by defendant 2 are to the following effect : The trial Court was wrong in holding that Saigal Medical Hall was financed by Saigal Brothers, and that there was a purely commercial side also of this concern. This property cannot be regarded as the joint Hindu family business. Before we deal with the points that need determination at this stage, we may note that the parties virtually admit : (1) That they are governed by the ordinary Hindu law of the Mitakshara School and not by the special Peshawar custom recognized in A I R 1936 Pesh 111[1] restraining the partition of joint Hindu family during the lifetime of the father and, (2) that the partition, if at all, took place on 31-7-1930 or earlier and not on the date of the notice of dissolution, (i. e., 30-5-1936).

The points for determination, therefore, are as follows : (I) Whether there was sufficient nucleus of the ancestral property, with the help of which the property and the business could have been built up? (II) Whether the business of joint Hindu family has been the result of the joint labours of the members of joint Hindu family, and thus it has acquired the nature of joint Hindu family business, and whether it has been treated as such by the parties and in particular by defendant 1. (III) Whether there has been the blending of the self-acquired property with joint Hindu family property in such a way that it has merged into joint

2. ('33) 20 A I R 1933 Pesh 85 : 147 I C 1037, Partapsingh v. Harkishansingh.

Hindu family property? (IV) In case point II is found in the affirmative, then on which of the two dates, viz., 10-5-1923 or 31-7-1930, should it be considered, that the disruption of joint Hindu family took place? (V) Whether the properties purchased by defendant 1 on 3-11-1932 under D-44 and 5-2-1935 under D-45 and the property purchased by defendant 4 on 5-2-1935 be deemed to be joint Hindu family properties, or the joint properties of a dissolved joint Hindu family firm? (VI) To what extent are the gift dated 19-9-1935 and the will dated 18-11-1935 by defendant 1 in favour of defendant 4 valid? (VII) Whether the commercial side of Saigal Medical Hall can be regarded as joint Hindu family business?

Our decisions on these points are as follows: *(I)* The question of nucleus was discussed at great length by the trial Court in its judgment. It has also been greatly stressed by either party in the arguments addressed to us. We agree with the learned trial Judge that there was a nucleus of ancestral property at the time of the death of L. Hans Raj Singh, but we are not convinced that it was such that with its help the properties worth Rs. 500 and Rs. 1900 could have been acquired in 1902 and 1910 respectively. L. Hans Raj Singh, though born in affluent circumstances, died a poor man. Wazir Mohd., D. W. 6, is the moharrir of the Sub-Registrar's office. He has proved the copies of sale deeds and mortgage deeds, Ex. D-21 to Ex. D-26. Those documents show that at an early date L. Hans Raj Singh felt the necessity of alienating his property for maintaining himself. There is no evidence that he built any property or started any business. By Ex. D-21, L. Hans Raj Singh, his brother Ganda Mal and his mother Mt. Bhoji sold 38 shops to Kanhaya Lal and Moti Lal for a sum of Rs. 5218-12-0 on 21-5-1879. L. Hans Raj Singh's share in this sale was one-fourth. Ex. D-22 relates to the sale of a site in Mandi Ram Dass by L. Hans Raj Singh and his brother Ganda Mal to Nathu Sahai for a sum of Rs. 220 on 18-6-1881. In this sale, L. Hans Raj Singh's share was one-half. Ex. D-23 dated 18-6-1881 relates to the sale of two sites by L. Hans Raj Singh and Ganda Mal to Nihal Chand for Rs. 180. Ex. D-24 dated 18-8-1891 relates to the mortgage of four shops by L. Hans Raj Singh in favour of Kanhaya Lal for a sum of Rs. 500. Ex. D-25 dated 17-8-1892 relates to the mortgage of two shops by L. Hans Raj Singh in favour of Diwan Chand for a sum of Rs. 700. Ex. D-26 dated 18-9-1896 relates to the sale of two shops by Lala Hans Raj Singh in favour of Duni Chand for a sum of Rs. 800.

The learned counsel for the appellant has laid a great deal of stress upon the document, Ex. D-1/A. This purports to be a copy of an application dated 5th July 1894 addressed by Lala Hans Raj Singh to the Deputy Commissioner praying for appointment as Naib Mohafiz Daftar. This copy is in the handwriting of Lala Hans Raj Singh himself, and is identified to be such by Sardar Gurdit Singh, defendant 1. It has come from the proper custody, i. e., from the custody of Sardar Gurdit Singh. In order to prove the handwriting of Lala Hans Raj Singh, an old colleague of his named Mohd. Ishaq, was produced as D. W. 5. This man has lost his eyesight. He is aged 95, and is unable to read anything. He stated that Lala Hans Raj Singh was his colleague when he used to be in the record room of the Deputy Commissioner's Office. He added that Lala Hans Raj Singh was copyist getting about Rs. 15 p. m. The importance of Ex. D-1/A lies in the fact that it depicts the financial position of Lala Hans Raj Singh. In this application he noted that he had been recruited in the record room staff about 25 years previously at Rs. 10 p. m. He was then transferred to the copying branch, when the work there increased and there was the necessity of having some additional hands. There he earned Rs. 20 p. m., but since lately the work had greatly diminished and the monthly income had dwindled down from Rs. 20 to Rs. 10 or less p. m. He added that during the Peshawar fire the whole of his moveable property and the two houses were burnt down to ashes. He had fallen into debt to the extent of Rs. 1000, and yet he had a family to support. His prayer was that since he had been an original employee of the record room staff, he might be appointed a Naib Mohafiz Daftar. At the foot of this application there is a copy in the handwriting of Lala Hans Raj Singh of the endorsing note of the record keeper. He recommended the application. So far as this application goes, it does not appear to have brought about the desired result, for we find on the record a document Ex. D-2 dated 15-3-1899 which purports to be the appointment order of Lala Hans Raj Singh as Muharrir Atlaf with Rs. 15 p. m., as his pay.

The learned counsel for the appellant wants us to draw the presumption under the provisions of S. 90, Evidence Act, about

the correctness and the genuineness of the document, EX. D.1/A, as it has come from the proper custody, and it has been proved to be in the handwriting of Lala Hans Raj Singh. The original is not forthcoming, because the old records in the Deputy Commissioner's office have been destroyed. The learned counsel has cited A I R 1935 P C 132[3] in support of the proposition that where a copy is admissible under the provisions of S. 65, Evidence Act, a presumption of correctness under the provisions of S. 90 of the Act can be drawn in respect of the copy as well. As regards this, the learned counsel for the plaintiff-respondent has argued that the Court is not bound to raise a presumption of genuineness and correctness of a document merely because it happens to be an old one. The Court may call upon the party to prove the document. In support of this proposition, he has referred us to A I R 1927 Cal 229[4] and A I R 1927 Cal 870.[5] There can be no doubt about the correctness of the proposition put forward by the learned counsel for the appellant, but we have to see in what manner does it apply to the facts of the present case. Here the document has been produced by Sardar Gurdit Singh from his own custody, and he being the head of the family, would naturally be the custodian of the family documents after the death of his father Lala Hans Raj Singh. Sardar Gurdit Singh identifies the handwriting of his father, and there is no reason why it should be doubted. Sardar Gurdit Singh did his best to prove the document by independent evidence, but unfortunately the attempt failed, because Mohd. Ishaq, who was conversant with the handwriting of Lala Hans Raj Singh has lost his eyesight on account of old age. Any way the document is corroborated by the statement of Mohd. Ishaq to this extent that Lala Hans Raj Singh was a copyist and that his monthly income was about Rs. 15. This document is corroborated in a way by the document EX. D-2, because the latter document shows that Lala Hans Raj Singh was promoted to the post of Muharrir Atlaf and that his pay was raised to Rs. 15 p. m.

The original of EX. D-1/A is not available. It contains a copy of the application as well as of the record keeper's report. We are not prepared to believe that the document is a forged one. We extend to it the presumption of correctness under the provisions of S. 90, Evidence Act, in view of the rule in A I R 1935 P C 132.[3] The further fact about Lala Hans Raj Singh is established by the statements of Sardar Gurdit Singh and Mt. Tulsan Devi. Lala Hans Raj Singh fell ill, retired from service and went to pass his last days at Amritsar, the holy place according to the religion professed by him. Mt. Tulsan Devi went to look after him, when his condition became worse. While he was there he was supported by Sardar Gurdit Singh, who was at that time in service at Chitral. The learned counsel has further argued that Lala Hans Raj Singh on his death left a debt of Rs. 1000, bearing an interest of Rs. 7 p. m. This amount was due to one Murli Mal, and was discharged by Sardar Gurdit Singh himself. There is the statement of Sardar Gurdit Singh on the file on this point. The creditor Murli Mal is dead and no receipt is forthcoming. The learned counsel for the plaintiff-appellant controverts this debt, and insists that a receipt for the repayment should have been forthcoming. Sardar Gurdit Singh's explanation on this point is that the loan was due on a bahi account, and that the entry of payment was made in the bahi. None of the heirs or successors of Lala Murli Mal is alive, hence the bahi entry can neither be produced nor proved. We see no reason to disbelieve the statement of Sardar Gurdit Singh on the point.

The property left by Lala Hans Raj Singh could not have been of any great value in the year 1900, because as late as the year 1915 it was not considered to be worth more than Rs. 3000. Sadhu Singh, brother of Sardar Gurdit Singh, instituted a suit for the partition of the coparcenary property. It was compromised on 18-8-1915. Sadhu Singh relinquished his interest in the coparcenary property on receiving a sum of Rs. 1500. The assertion of Sardar Gurdit Singh in the written statement to the effect that Lala Hans Raj Singh on his death left a house, a vacant site for a house and six shops only appears to be correct. Thus we see that there was some ancestral nucleus left by the joint Hindu family. The next question is whether a presumption as to its being coparcenary property can be drawn in respect of the property acquired after the death of Lala Hans Raj Singh. Section 233 of Mulla's Hindu Law, Edn. 9, 1940, deals with the presumptions. Paragraph 2 of sub-s. (2) appears

3. ('35) 22 A I R 1935 P C 132: 156 I C 864: 62 I A 180: 57 All 494 (P C), Basant Singh v. Brij Raj Saran Singh.
4. ('27) 14 A I R 1927 Cal 229: 98 I C 1021, Khetra Mohan Dass v. Bhairab Chandra Dass.
5. ('27) 14 A I R 1927 Cal 870: 104 I C 219: 55 Cal 210, Surendera Nath v. Sambu Nath.

to govern the facts of the present case, and is as follows:

> Where a nucleus of joint family property is proved or admitted, a presumption arises that the whole of the property of the joint family is joint including all acquisitions by a member of the joint family. But no such presumption would arise if the nucleus is such that with its help the property claimed to be joint could not have been acquired. In order to give rise to the presumption the nucleus must be such that with its help the property claimed to be joint could have been acquired.

This paragraph is based upon I L R (1937) Bom 708=39 Bom L R 846=171 I C 623.[6] In support of this proposition, we have been referred to A I R 1937 Mad 436[7] which is a direct authority on the point. The rule laid down there was as follows:

> The law is that where there is a nucleus of joint family property, the onus will no doubt lie on the father in the first instance to prove that the acquisition of the properties which he claims to be his separate property was not made out of the income from the joint family property. But where, it is clear that income from the joint family property is not sufficient even for the maintenance of the family, there is no basis for any presumption that the acquisitions must have been made from out of the income of the joint property.

The shops could not have brought more than Rs. 9 or Rs. 10 p. m. as rent in the year 1906, as is clear from the statement of Sardar Gurdit Singh himself, and is supported by some piece of circumstantial evidence. In the mortgage deed of 1892 (Ex. D-25), it is written that in case the two shops become deserted or untenanted, the mortgagor would be liable to pay Rs. 3-8-0 p. m. to the mortgagee. The amount of mortgage was Rs. 700. From this it can be deduced that a shop would fetch Re. 1-12-0 p. m. The statement of Gursaran Singh, P. W., and the account produced by him to which considerable importance has been attached by the learned counsel for the plaintiff-respondent shows that in the years 1914 and 1915 the property fetched Rs. 35 to 40 p.m. The learned counsel argues that this income was sufficient for the maintenance of the family, and hence it must be presumed that there was a sufficient nucleus. But the learned counsel for the appellants submits that by the year 1914-1915 some more property had been acquired, i.e., in the years 1902 and 1910, and a business known as Saigal Bros., had already been started at Karachi. In order to ascertain whether there was sufficient nucleus or not, we ought to see the state of affairs of the family at the time of the death of Lala Hans Raj Singh in the year 1900. The income at that time was surely not more than Rs. 9 or Rs. 10 p. m., which was not even sufficient for the maintenance of the family.

The fact that Sardar Gurdit Singh acquired the properties in the years 1902 and 1910 from his personal earnings is supported by the statement of Sardar Gurdit Singh himself, and also from certain documents. Sardar Gurdit Singh was a teacher in C.M.S. High School, Peshawar, from 1893 to 1895, and during that period he got Rs. 25 p. m. from the school and earned Rs. 20 p. m. by private tuition. On 27-6-1895 he was appointed temporary clerk in the Supply and Transport Department for three years. Then he became Victualling Agent on 13-11-1899, a temporary clerk on 13-9-1900 and again Victualling Agent on 26-11-1900. On 22-8-1901 Sardar Gurdit Singh was appointed a first class agent in connexion with the manoeuvres. A year later he was appointed a second class store-keeper, and then again Victualling Agent of the second class. On 8-11-1902 he was appointed Victualling Agent at the rate of Rs. 50 p. m. From 1903 to 1908 Sardar Gurdit Singh was a clerk in the local workshop at Rawalpindi. Up till this time, when in service, Sardar Gurdit Singh's monthly pay used to be from Rs. 25 to Rs. 50 p. m. When he was paid by commissions, his income no doubt was not on any definite basis.

In 1908 Sardar Gurdit Singh was appointed as assistant manager at Ghora Gali at Rs. 75 p. m. In the following year he accepted appointment with Hari Chand Kapur & Sons in charge of coffee shop attached to a regiment at Rs. 75 p. m. In 1910 he was given the further benefit of charging commission on certain articles sold in addition to his pay. In 1912 Sardar Gurdit Singh accepted service with Katrik-Building Co. at Karachi at Rs. 100 p. m. plus Rs. 3 per diem as travelling allowance. In the following year he accepted service with Messrs. Muller and Phipps at Rs. 150 p. m., and continued to work in that firm till 1923. The oral statement of Sardar Gurdit Singh is supported in material particulars by the certificates and appointment orders Exs. D-3 to D-20 and Ex. D-87. Thus Sardar Gurdit Singh had sufficient income from as early a period as 1893, which was far in excess of the income from the family nucleus. He purchased properties in 1902 and 1910 from his personal income, and that also added to this income. The fact that the properties acquired in 1902 and 1910 and the business started in 1913

6. ('37) 24 AIR 1937 Bom 446: 171 I C 623: I L R (1937) Bom 708 : 39 Bom L R 846, Babubhai Girdharlal v. Ujamlal Hargovandas.
7. ('37) 24 AIR 1937 Mad 436 : 169 I C 325 : (1937) 1 M L J 364, Sandanam Pillai v. Somasundaram Chettiar.

were not considered to be the accretions to the family nucleus is supported from the fact that Sadhu Singh relinquished his rights in the family property by accepting a sum of Rs. 1500 only in the year 1915. By that time the business alone was worth more than Rs. 5000. We consequently hold that the property acquired by Sardar Gurdit Singh and the business started by him in the year 1913 cannot be regarded as acquisitions to the joint family property because nucleus was not such that with its help the additional property could have been acquired or the business could have been started. Now we come to point No. II. Para. 228 of Mulla's Hindu Law deals with the property acquired in business by persons constituting a joint Hindu family by their joint labour. Paragraph 2 of sub-s. (3) reads as follows:

> In the absence of any proof of partnership, property jointly acquired by the members of a joint Hindu family without the aid of joint family property is, as stated above, to be presumed to be joint. But is it also to be presumed to be joint family property? It was at one time held by the High Court of Bombay that property jointly acquired without the aid of joint family property was not joint family property and that the male issue of the joint acquirers did not acquire an interest in it by birth, unless it was thrown into the common stock. In later cases however it has been held that such property must be presumed to be joint family property, and this has been followed in Lahore. In Madras it has been held that property so acquired must be presumed to be joint family property, unless the acquirers intended to hold the property as co-owners between themselves in which case it would be their joint property.

The law thus enunciated is supported by AIR 1928 Lah 224[8] and AIR 1937 Mad 29.[9] We have to examine from the facts of this case whether the business Saigal Bros. did become a joint family concern in view of the joint labours of the father and the sons. The evidence, it may be remembered, is a bit conflicting. It is only natural that it should be so. The family had no business traditions. Lala Hans Raj Singh joined service in 1870, and till as late as 1923 he was in service with one master or another. Thus there could not be any clear expression of the intention on the part of Sardar Gurdit Singh or the other members of his family in respect of the business conducted by them as to whether it was to be treated as the exclusive business of Sardar Gurdit Singh, or the joint business of Sardar Gurdit Singh and one or more of his sons, or as joint Hindu family business.

Surjan Singh was brought up at Peshawar. In 1913 when he finished the school at the age of 18, his mother found him to be good for nothing. He was playing marbles. She wrote a complaint to her husband at Karachi. Sardar Gurdit Singh sent for Surjan Singh, and gave him some preliminary training, and then started a business of commission agents under the style Saigal Bros. Sardar Gurdit Singh says that he thought that this name would be auspicious in view of the fact that Ralli Bros. and Volkart Bros. were doing good business. He however intended that it should remain his exclusive business. Surjan Singh was merely an employee. In order to create interest in Surjan Singh in the work he was allowed to draw for his personal use commissions from a Japanese Company M. B. K. On two occasions, i. e., 1st March 1921 and April 1921 Surjan Singh was paid Rs. 30 p. m. in lieu of his services. In the Tribune of 1-1-1922 an advertisement was issued on behalf of Sardar Gurdit Singh, which is Ex. D-62 on the file. In this, Sardar Gurdit Singh made it clear that he was the sole owner of business Saigal Bros., and that his son Surjan Singh was his employee, and if anybody had dealings with Surjan Singh in the capacity of a proprietor, he would do so at his own risk. In Ex. D-68 dated 15-5-1925 and in Ex. D-67 dated 2-5-1926 Sardar Gurdit Singh entered into agreements with Shankar Dass, sub-agent, Kohat, and with the Burma Oil Co., respectively on behalf of Saigal Bros. Surjan Singh signed as an attesting witness. The contention of the learned counsel for the appellants is that had Surjan Singh been one of the partners in the joint family firm, there is no reason why he should have signed the agreement as a witness. The signature on his part as the attesting witness amounts to an admission that he was not a partner in the firm.

Similarly there is a document dated 1-11-1927, Ex. D-70, which is an agreement of cash credit account with the Peoples Bank of Northern India. It is signed by Sardar Gurdit Singh as the proprietor of Saigal Bros., while Surjan Singh is a marginal witness. This document is supported by Ex. D-71 which is a pronote. The pronote, as was natural, could not be attested by a marginal witness. It was signed by Sardar Gurdit Singh alone as proprietor of Saigal Bros. Exhibit D-59 dated 9-10-1930 is a letter by the Punjab National Bank, Peshawar, to

8. ('28) 15 A I R 1928 Lah 224 : 109 I C 779 : 9 Lah 470 : 29 P L R 635, Sanwal Das v. Kuremal.
9. ('37) 24 AIR 1937 Mad 29 : 168 I C 408, Krishna Murthi v. P. Seetamma.

Saigal Bros., in which they are informed that their cash and credit account had been raised from Rs. 5000 to Rs. 10,000. Exhibit D-60, dated 14-11-1921, is a letter by the Punjab National Bank, Peshawar, to Messrs. Saigal Bros., Peshawar, informing them that in future both cash credit and current accounts would be operated by Sardar Gurdit Singh Saigal as a proprietor of the firm, as instructed by the firm. In the daybook of the firm Saigal Bros., Karachi of the years 1921-22 Sardar Gurdit Singh signed a certificate to the following effect :

I, Gurdit Singh Saigal, son of Lala Hans Raj Singh Saigal, proprietor of the firm known as Saigal Bros., state and certify that I have this day carefully examined and inspected the account books of Karachi of the aforesaid firm and found them to be absolutely correct. Gurdit Singh Saigal Karachi. 31-12-1922.

There is a note in the vernacular underneath this certificate which rendered into English reads as follows: If any accounts have been missed, the same to be entered in my name : Gurdit Singh Saigal; 31-12 22. The learned counsel argues that Sardar Gurdit Singh Saigal as late as 31-12-1922 treated the business as his own personal business. But as against this there are indications that the business was a joint one. Exhibit P-Y dated 29-3-1916 is a copy of a loan application form, in the handwriting of Sardar Gurdit Singh signed as Sardar Gurdit Singh Saigal and Sons, Commission Agents and Merchants. It is addressed to the Punjab National Bank, Karachi, and in this is the usual statement of the immovable property which consisted of six shops Nos. 120 to 125, one serai containing 12 godowns and a plot of land and three houses Nos. 705, 695 and 696 situated in Mohalla Jogan Shah, Peshawar City, worth Rs. 39,000. This document is of particular importance because the ancestral property as well as the self-acquired property was shown to be the immovable property of Sardar Gurdit Singh Saigal and Sons. A similar document is Ex. P-X dated 16-6-1919. It is the copy of a loan application, in the handwriting of Sardar Gurdit Singh addressed to the Punjab National Bank, Peshawar. In this Sardar Gurdit Singh signed as Gurdit Singh of Saigal Bros. of Peshawar. The property shown in the usual list incorporated in the loan form consisted of six shops, one serai, two houses and one plot of land. This property, though not of the same magnitude as the property shown in Ex. P-Y was in fact more than the ancestral property. The learned counsel for the appellants attacks the admissibility of these documents into evidence. He contends that there is nothing to show that these documents were actually submitted to the respective branches of the Punjab National Bank, and that any action was taken on them. We do not see any force in this argument, because these documents have been produced not with a view to show that the firm had any dealings with the Punjab National Bank, or was indebted to the bank, and if so which particular persons are liable. These documents have been produced simply with a view to show that Sardar Gurdit Singh treated the entire property as the property of Saigal Bros., or of Gurdit Singh and sons. He did not intend to keep the two sets of properties separate, but he meant to treat them and use them as joint family properties. For that purpose these documents are admissible.

In the year 1918 a kerosene oil agency was taken from Alam Ji Mohd. Ji of Rawalpindi. It continued for about 3 years. Gursaran Singh was in charge of the business at Peshawar and operated the accounts on behalf of Saigal Bros. The accounts with the Karachi Bank were operated upon both by Sardar Gurdit Singh and Surjan Singh. In 1921 Saigal Bros. started sugar business at Peshawar. This was also under the charge of Gursaran Singh, and he operated the accounts on behalf of Saigal Bros. Ex. P-Z, dated 2-11-1928 is a declaration made by Surjan Singh on behalf of Saigal Bros. at the office of the Registrar of Firms, Karachi. The firm Saigal Bros., Karachi, was registered, and it was shown in the declaration that the proprietors were Gurdit Singh, Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand. The expenses of the registration were debited to Saigal Bros., account: *vide* the entry Ex. D-92 in the cash book and Ex. D-93 in the ledger both dated 4-11-1928. In the ledger the account was shown under the head 'Posts and Telegraphs.' Siri Ram worked at Bannu branch from 24-3-1930 to 19-3-1932. He operated on the accounts in the banks on behalf of Saigal Bros. In the ledger of 1923-24 of Saigal Bros., Karachi, at p. 2 there is an entry in the handwriting of Sardar Gurdit Singh himself which reads as follows : "Saigal Bros. (Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand proprietors)." On p. 1 of the daybook of 1929 of Saigal Bros., Karachi, there is an entry in the vernacular in the handwriting of Sardar Gurdit Singh, which rendered into English reads as

follows: "Proprietors Gurdit Singh, Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand." In the daybook of Saigal Bros., Karachi, of the years 1929-30 there is an entry at page 1 in the handwriting of Sardar Gurdit Singh, which rendered into English reads as follows :

The account of the firm Saigal Bros., Karachi Branch. Proprietors Sardar Gurdit Singh, Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand.

In the daybook of Messrs. Saigal Bros., Peshawar, Nowshera, Bannu and Karachi commencing with 1-4-1930 there is an entry in the vernacular in the handwriting of Sardar Gurdit Singh which rendered into English reads as follows: "Proprietors Gurdit Singh Saigal, Azizan (dear ones or sons) Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand." Similarly, in the ledger of the years 1929-30 of Saigal Bros., Peshawar at p. 2 there is an entry in the handwriting of Sardar Gurdit Singh which reads as follows : "Proprietors Gurdit Singh, Surjan Singh, Gurbakhshsingh, Siri Ram and Hukam Chand." In the books of account of the firm all the expenses on the family are shown in the khata of Sardar Gurdit Singh. Similarly, the income of the firm is also shown in his account. There is a head of account known as building khata, which was obviously run in the name of the firm. All the properties acquired, repaired or reconstructed were accounted for in that khata.

It appears that Sardar Gurdit Singh, while commencing the business in 1913, had no idea as to what would be the relationship of the business with the family. Sometimes he intended that it should run in his own name, and sometimes he intended that it should run as a joint family concern. The fact that all the family expenses were debited to his khata would not indicate anything. He was after all the karta of the family. The certificate dated 31-12-1922 signed by Sardar Gurdit Singh on the daybook of Karachi firm would no doubt indicate that Sardar Gurdit Singh Saigal was the proprietor of Messrs. Saigal Bros. but it appears that this certificate was signed while Sardar Gurdit Singh was annoyed with his son Gursaran Singh, who had started playing with the funds of the firm at Peshawar, which had culminated in the advertisement Ex. D.62 in the Tribune dated 1-1-22. It appears that Sardar Gurdit Singh was nervous about the business. He thought that in case it be considered as the family business, Gursaran Singh would come forward to ask for its partition. The entry in the ledger of 1923-24 of Karachi firm regarding the names of the proprietors also appears to have been made under the same impulse. It is worthy of note that Sardar Gurdit Singh did not sign his name as one of the proprietors of the firm. He carefully omitted the name of Gursaran Singh from amongst the proprietors. The idea appears to have been that Gursaran Singh, who was then in disfavour, might not come round and ask for the partition of the Karachi business claiming it to be the joint family business. Sardar Gurdit Singh omitted his own name with a view to give the impression that it was a joint business between the four brothers namely Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand, and that it was not a joint family concern.

After the separation of Gursaran Singh from the family on 10-5-1923, the fear that Gursaran Singh might ask for the partition no longer existed, and that is the reason why the entries regarding the proprietors in the later books of account, contain the name of Sardar Gurdit Singh side by side with the names of the four favoured sons. It may be remembered that Surjan Singh was associating with the firm for a very long period since the commencement of the business in 1913. Gursaran Singh came into the business about the year 1918, and he went out of it in 1923. Siri Ram appears to have come into the business about the year 1930. Gurbakhsh Singh came into the business about the year 1926 after he had finished his medical studies. Hukam Chand apparently did not come into the business at all, for he was the youngest of all the brothers and was born in 1916. The entries in the books of account regarding the proprietors of the firm constantly included the names of Gurbakhsh Singh and Hukam Chand as well. Gurbakhsh Singh was surely not in all business in the beginning of the year 1923, and Hukam Chand was not in the business at any time. From this it becomes clear that the intention of Sardar Gurdit Singh and his sons who were actively associating with him was that it should be run as a joint family concern. The business which was started with the joint labours of Sardar Gurdit Singh and some of his sons was run for the benefit of the joint Hindu family, and hence it assumed the nature of joint Hindu family business.

Now we come to the third point, i.e., regarding the blending of the self-acquired property with the joint Hindu family pro-

perty. The joint Hindu family property consisted of ancestral nucleus, and also the property, acquired by the joint labour of Sardar Gurdit Singh and some of his sons for the benefit of the entire family. The self-acquired property consisted of the properties acquired in 1902 and 1910. The books of account show that there was a complete blending of the incomes of all the properties. The expenses incurred on the purchase, repairs and the reconstructions of the properties also came from the joint funds of the firm. A separate head known as building khata was started in the firm's accounts, and the funds spent upon the properties were debited to that head. Lala Atma Ram, D. W. 7, is the Record Keeper of the Municipal Committee, Peshawar. He deposes that 16 applications were made by Sardar Gurdit Singh to the Municipal Committee, Peshawar, from 30-11-1909 to 4-9-1934 for effecting repairs to the various houses or shops and for reconstructing some from time to time. Besides other applications, there were 3 regarding the construction of houses. One was dated 20-7-1912 for the construction of a two-storeyed house. Another one was dated 19-8-1920 for the construction of a house and the third was dated 17-2-1922 for the construction of a three-storeyed house. The allegation on the part of the defendants-applicants is that all these properties were altered or reconstructed at the expense of Sardar Gurdit Singh, but the learned counsel for the plaintiff-respondent has pointed out that the funds did not come from the pocket of Sardar Gurdit Singh, but from the building khata of the joint family firm. Section 227 of Mulla's Hindu Law deals with properties thrown into common stock. Para. (1) reads as follows :

> Property which was originally the separate or self-acquired property of a member of a joint family may become joint family property, if it has been voluntarily thrown by him into the common stock with the intention of abandoning all separate claims upon it. A clear intention to waive his separate rights must be established, and it will not be inferred from the mere fact of his allowing the other members of the family to use it conjointly with himself. Separate property thrown into the common stock is subject to all the incidents of joint family property.

This statement of law is supported by the view taken by their Lordships of the Privy Council in A I R 1923 P C 57,[10] and has perfect application to the facts of the present case. There was a complete blending of the ancestral property, the property acquired by the fund of the joint family and the self-acquired property purchased in the years 1902 and 1910 by Sardar Gurdit Singh. The incomes from the properties were spent for joint family purposes. In 1914 and 1915, as Gursaran Singh states, the income from the property was about Rs. 40 p. m. and that it was spent on family expenses, though at that time no property had yet been acquired from the funds of the firm. No separate heads of account for the different properties were opened. The blending appears to have been complete about the year 1920 when the first house was constructed after the joint firm had come into existence in 1913.

Now we come to point IV. The plaintiff issued the notice of dissolution on 30.5.1936 after there had been an estrangement between him and Sardar Gurdit Singh and after the latter had made a gift of some of the property in favour of his wife. But a few days later when the plaintiff instituted the suit, his legal advisers had probably studied the effect of the relinquishment deed Ex. P.3 by Surjan Singh, at the time of his separation, and hence the plaintiff insisted that the partition had taken place from the date of Surjan Singh's separation on 31-7-1930. The appellants' present contention that the joint family firm if it did exist at all came to an end on 10-5-1923 on the separation of Gursaran Singh and not on a later date appears to have been due to Sardar Gurdit Singh's anxiety to enjoy exclusive ownership of the property acquired after that date. We have noticed above the entries in the handwriting of Sardar Gurdit Singh in the books of account of the years 1923-24, 1929 and 1930, which show that the firm was in existence. In the entry of the year 1923-24 the name of Sardar Gurdit Singh was missing, but that, as has already been discussed above, was because of a special reason. In the books of the years 1929 and 1930 the name of Sardar Gurdit Singh exists side by side with the names of Surjan Singh, Gurbakhsh Singh, Siri Ram and Hukam Chand as the partners of the firm. The distinguishing feature between the two relinquishment deeds is that in Ex. P-1 executed by Gursaran Singh there was no specification of the shares. He simply noted therein that he had taken one ancestral shop out of the six, one house in Mohallah Mir Hasham Khan out of the property purchased on 21-12-1921, *vide* Ex. D-41, and mortgagee rights of 1/3rd share in two houses, which had been acquired from Ganga

10. ('23) 10 AIR 1923 P C 57 : 73 I C 252 : 50 Cal 439 : 50 I A 173 (PC), Rajani Kanta Pal v. Jaga Mohan Pal.

Ram on 13.5.1922, *vide* EX. D.42, plus Rs. 5000. The non-specification of the share in EX. P-1, coupled with the implied intention on the part of Sardar Gurdit Singh and other members of the joint family firm to continue as such operated in the continuance of the joint family business: *vide* the rule in 48 Mad 254.[11] In the relinquishment deed, EX. P.3, there was a specification of share. The property given to Surjan Singh consisted of one shop out of the six ancestral shops, the house No. 666, one shop out of four in Bazar Ram Dass purchased on 22.3.1927, *vide* EX. D.43, one shop No. 85/2 out of the two shops built on the vacant site of bungalow No. 85 at Nowshera and the goodwill of the business Saigal Bros., Nowshera, and Rs. 1000 per annum as the share of the profits of the Bannu Branch of the firm so long as it continued and Rs. 16,000 in cash in lieu of the 1/5th share of the entire business.

The argument on behalf of the appellants is that the separation was in the nature of a gift and not a partition. Surjan Singh executed the relinquishment deed after he had received the property by way of gift. The separation had already been effected, and hence the execution of a deed by him at that time did not amount to separation, what to say of partition. At the best, the learned counsel argues, it was a unilateral transaction and not an agreement. We are not convinced with these arguments, because the document, as of necessity, was to be registered. Sardar Gurdit Singh was avoiding the registration of the document. If it was a fact that the document just recited what had already taken place, then where was the necessity of registration and why should Sardar Gurdit Singh have attempted to avoid the registration of the document? The document clearly specifies that the relinquishment was in lieu of the 1/5th share. Surjan Singh, being one of the five coparceners of the joint Hindu family property and business, believed his share to be 1/5th, and executed a relinquishment deed in respect of that share. Since the separation of Surjan Singh attempts have been made to wind up the business at Karachi, Bannu and Peshawar. The business, no doubt, continues at Nowshera, but that is exceptional. Doctor Gurbakhsh Singh is a medical practitioner, and he must carry on the commercial side of the Saigal Medical Hall side by side with his professional work. The firm Saigal Brothers, Nowshera, is no longer a family business, because the goodwill of that firm had been taken up by Surjan Singh in 1930. We therefore come to the conclusion that the joint family business terminated on 31-7-1930.

As regards point V, we come to the conclusion that the properties acquired after 31-7-1930 are the personal properties of the members of the dissolved joint family firm. Since that day their status has been not of joint tenants, but of tenants in common. They are however liable to account for the funds, if any, taken out of the family chest for effecting such purchases. As noticed above, a sum of Rs. 3663 was taken out of the common chest for purchasing the property: *vide* the sale deed EX. D-44 dated 3-11-1932. Sardar Gurdit Singh, who is the vendee, is accountable for that sum. This sum should be taken from him and brought into the hotchpot. There is no evidence that any money was taken out of the joint family funds for purchasing the property in 1935. Exhibit D-45 dated 5-2-1935 relates to the purchase by Sardar Gurdit Singh, while a deed of the same date relates to the purchase of some property by Mt. Tulsan Devi through Sardar Gurdit Singh. No funds were taken out of the common chest for the purchase of this property. The mere fact that Sardar Gurdit Singh officiated for Mt. Tulsan Devi at the time of the registration of the deed would not indicate that the money was supplied by Sardar Gurdit Singh. Anyhow this fact is not of any material value because no funds out of the common chest had been taken out by either of these two deeds. Mt. Tulsan Devi, as has been admitted by Gursaran Singh and Doctor Gurbakhsh Singh, had her own funds. Gursaran Singh further admitted that on one occasion she made a gift of Rs. 1000 to him, and made a loan of another sum of Rs. 1000, which he repaid. In the books of account of Saigal Brothers, Mt. Tulsan Devi was the creditor to the extent of Rs. 2000. She was a creditor of the vendor of the property as well.

As regards point VI, we agree with the learned trial Judge that the gift is valid to the extent of Sardar Gurdit Singh's share only, out of the tenancy in common. Had there been a coparcenary, the gift would have been invalid. The will need not be taken into consideration, because it is to take effect after the death of Sardar Gurdit Singh, and shall be effectual only in respect of the property of the testator available at that time.

11. ('25) 12 A I R 1925 P C 49 : 87 I C 333 : 48 Mad 254 : 52 I A 83 (P C), Palana Ammal v. Muthu Venkatachala Moniagar.

Point VII relates to the commercial side of Saigal Medical Hall. This business is distinct from the professional work done by Sardar Gurdit Singh. It was started with the funds of Saigal Brothers, Peshawar, which admittedly was a joint family concern. No doubt the lease deed of bungalow No. 85 was then in the name of Dr. Gurbakhsh Singh, but that does not necessarily indicate that the property thus taken on lease became the personal property of Dr. Gurbakhsh Singh. At that time the Dr. was a member of the joint Hindu family. Whatever was acquired by him with the funds of the joint Hindu family, was acquired for the benefit of the family. At the site of bungalow No. 85, two shops were built, and one of them, i. e., No. 85/2 was given to Surjan Singh at the time of his separation in 1930. Had this property been considered to be the personal property of Dr. Gurbakhsh Singh at that time, there is no reason why he should have acquiesced in its being given away to Surjan Singh. Only a passing reference need be made to the professional side of Sardar Gurbakhsh Singh's business. In accordance with Hindu Gains of Learning Act, 1930, he is entitled to the earnings made by his professional skill, notwithstanding the fact that he acquired the professional skill by the aid of family funds. The rule is given in S. 231A of Mulla's Hindu Law. It is also an established principle of law that the previous accounts of the joint family business cannot be gone into at the time of the dissolution. Thus the income from the professional skill prior to the year 1930 whether it acquired the nature of joint family property or not cannot be accounted for. While summing up the case, we have yet to determine the shares of the various persons interested in the property in suit. Section 315 of Mulla's Hindu Law reads as follows :

> A wife cannot herself demand a partition, but if a partition does take place between her husband and her sons, she is entitled to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband. Where a person institutes a suit for the partition of joint family property impleading his mother and other members of the family as defendants and a preliminary decree is passed, mother does not become owner of the share allotted to her until the preliminary decree is carried out and there is a division by metes and bounds.

It has been argued on behalf of the plaintiff that Mt. Tulsan Devi did not claim a share in the property in suit, hence she would not be entitled to any share in it. This argument does not appeal to us, because Mt. Tulsan Devi denied out and out the plaintiff's right to ask for the partition during the lifetime of his father. Stand was taken on the special custom of Peshawar, but it has since been given up. Mt. Tulsan Devi, not being a coparcener, cannot ask for partition, but if a partition is ordered, she must be given a share according to Hindu law. The suit, as we have seen above, in the first instance was fought on the question of custom and the question of a pleading on the part of Mt. Tulsan Devi to ask for her own share did not arise. Thus, we hold that the plaintiff, Sardar Gurdit Singh, Dr. Gurbakhsh Singh, Hukam Chand and Mt. Tulsan Devi are entitled to equal shares in the joint family property as it stood on 31-7-1930. To sum up the case, we have agreed with the learned trial Judge that there was a nucleus of joint family property, but we have disagreed with him that there was sufficient nucleus for the building up of the properties and business. We have agreed with the learned trial Judge that the business was a joint family business but on a different ground. According to him it was the joint family business, because there had been the nucleus of the ancestral property, but we have held that it became a joint business not from its inception, but later on because of the intention mainly on the part of Sardar Gurdit Singh that it should be known as a family business. It was the result of the joint labours of Sardar Gurdit Singh and some of his sons. The trial Judge has held that there was no self-acquired property at all. We have held that the properties acquired by Sardar Gurdit Singh in 1902 and 1910 were his self-acquired properties, but they too became joint family properties because of the doctrine of blending. We have upheld the decision of the learned trial Judge that the disruption of the joint Hindu family took place on 31-7-1930 on the separation of Surjan Singh.

We have also upheld the decision of the learned trial Judge as regards the properties shown as G and H in the schedule. G related to the properties purchased by Sardar Gurdit Singh on 3-11-1932 and 5-2-1935 : *vide* the sale deeds, Exs. D-44 and D-45. The property H relates to the one acquired by Mt. Tulsan Devi under sale deed dated 5-2-1935. These properties have been held to be the self-acquired properties of Sardar Gurdit Singh and Mt. Tulsan Devi respectively. Sardar Gurdit Singh is accountable for the sum of Rs. 3663 taken out by him out of the common chest for the purchase

of the property mentioned in EX. P-43. We have also upheld the decision of the trial Court that the gift by Sardar Gurdit Singh in favour of Mt. Tulsan Devi is valid to the extent of his own share, and that the will shall not take effect till after the death of Sardar Gurdit Singh. We have also upheld the decision of the learned trial Judge as regards the commercial side of Saigal Medical Hall business being the joint family business. We have disagreed with the learned trial Judge as regards the number of persons who are entitled to shares on partition. We have held that besides the four coparceners, who are the father and the three sons, Mt. Tulsan Devi is also entitled to a share. In view of these findings we alter portion (a) of the preliminary decree passed by the learned Sub-Judge. On amendment it shall read as follows : "(a) declaring that the plaintiff and defendants 1 to 4 are each entitled to 1/5th share in the property mentioned in the schedule attached to the plaint except items G and H. Under the gift deed dated 19-9-1935 defendant 1's 1/5th share in the 20 kothis out of the property mentioned as item "C" belongs to defendant 4." The appeal is thus accepted in part. The cross-objections of the plaintiff-respondent and of defendant 2 respondent are dismissed. In view of the fact that the appellants have succeeded in their appeal to a very small extent, and the respondents have not succeeded at all in the cross-objections, we leave the parties to bear their own costs in this Court. So far as the costs in the trial Court are concerned, the plaintiff shall be entitled to 4/5th of his costs from defendant 1 only.

Before we conclude we would like to say a few words about the dilatory procedure in the trial Court. The plaint was presented on 6-6-1936. The issues were framed on 15-7-1936. The case was at evidence stage in October 1936, but it took full 4 years (from 13-10-36 to 12-10-1940) to complete the evidence. Out of the witnesses examined in the case the statements of only three were lengthy. The statements were recorded in bits as the following analysis will show :

Name of witness.	No. of hearings.	Period covered.
Siri Ram plaintiff.	7	13-10-36 to 3-5-38.
Surjan Singh son of defendant No. 1.	5	6-7-37 to 7-8-37.
S. Gurdit Singh defendant 1	15	23-6-38 to 12-10-40.

There were as many as 111 hearings in the case, besides the three which were noted on the vernacular order sheet only. Almost all the hearings do not appear to have lasted more than an hour each. As a necessary adjunct to this lax procedure, a good deal of unnecessary material has come on the record. Before we conclude our remarks about the procedure in the trial Court, we would like to record our appreciation of the deep sense of duty displayed by Mirza Fazal Rahman who as a temporary officiating Senior Sub-Judge wound up the evidence and on the eve of his reversion he transferred the case to his own Court as Sub-Judge first class. He has succeeded in turning out a thorough, lucid and on the whole a sound judgment. Orders pronounced.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Peshawar 102

SOOFI J.

Sher Singh Sukha Singh and another Convicts — Petitioners

v.

Emperor.

Criminal Revn. No. 209 of 1941, Decided on 18th July 1941, for revision of order of Sess. Judge, Peshawar, D/- 17th May 1941.

Punjab Excise Act (1 of 1914), S. 58—N. W. F. P. Government Notification that rules in Punjab Excise Manual shall apply to N. W. F. P. until separate rules framed—Rules are not ultra vires.

There was a notification of the N. W. F. P. Government that the rules in the Punjab Excise Manual shall apply to N. W. F. Province until separate rules were framed by that Government. Accused who was convicted for violation of one of such rules contended that the rule was ultra vires as it had not been framed by the N. W. F. P. Government as required by S. 58 :

Held that in view of the Notification the rule was not ultra vires. [P 103 C 2]

Abdul Qayum and Beant Singh — for Petitioners.

S. B. Raja Singh, Advocate-General — for the Crown.

Order. — This revision arises out of a case of the transport of 26 tolas of charas, an excisable article, by Kirpal Singh, a recognized servant of Jiwan Singh, the licensed dealer of charas of Cherat from Cherat to Peshawar so that its sale may be effected by Sher Singh, a licensed dealer of Peshawar. Assistant Sub-Inspector Sharbat Khan had received information about this transport. He therefore travelled by the same lorry which carried Kirpal Singh. When Kirpal Singh was delivering a sack to Ishar Singh the Assistant Sub-Inspector took possession of the sack and from it recovered a bag

containing the said quantity of charas. The learned trial Magistrate convicted Kirpal Singh, Ishar Singh and Jiwan Singh under S. 61, Excise Act. Sher Singh and Jiwan Singh appealed from that order. The learned Sessions Judge upheld their conviction and the sentences. The sentence awarded to Sher Singh was one of fine of Rs. 250 or in default of the payment of fine six months R. I. The sentence of Jiwan Singh was of fine of Rs. 100 or six months R. I. in default. Both of them have come on revision. It has been argued that the order of the Revenue Commissioner prohibiting the transport of charas was ultra vires, hence for the breach of it they were not liable under S. 61, Excise Act.

The learned counsel for the petitioners has argued that under S. 58, Punjab Excise Act, the rules restricting the transport of an excisable article can be framed by a Local Government. These powers cannot be delegated to the Revenue Commissioner under the provisions of S. 13 of the Act. Section 59 alone deals with the powers of the Revenue Commissioner, and there is no provision therein regarding the framing of rules restricting the transport of excisable articles. The learned counsel further argues that even if the Local Government has made any orders, those cannot take effect unless they are published in a notification in the official Gazette: *vide* the N. W. F. P. General Clauses Act, S. 4, sub-ss (26) and (36). The learned Advocate General has replied that there was a notification by the Provincial Government adopting the rules framed by the Punjab Government as they were published in Punjab Excise Manual, vol. 1, 1925 Edition. The Notification was published in the N. W. F. Province Government Gazette. The Notification was drafted on 21st May 1934. I have sent for the Gazette, and have traced the Notification. It is No. 6325-Excise dated 21st May 1934 published in N. W. F. Province Gazette dated 8th December 1939 in part 1 at p. 547. It reads as follows :

In exercise of the powers conferred by S. 58 (1), Punjab Excise Act, 1 of 1914, as extended to the North West Frontier Province by Chief Commissioner's notification No. 120 Exc., dated 8/9th February 1915, the Government of the North-West Frontier Province, (Ministry of Transferred Departments) are pleased to direct that such ruling contained in the Punjab Excise Manual, Vol. 1 (1925 edition) as are not supported by relevant notification issued by this Government, shall apply to the North-West Frontier Province until such time as separate rules are framed by this Government. Any addenda or corrigenda which may be issued in respect of these rules by the Punjab Government shall automatically become applicable to this Province.

J. G. Acheson,
Secretary to Government,
North-West Frontier Province,
Revenue Department.

Abdul Qaium
Minister for Transferred Departments,
North-West Frontier Province.

In view of this notification the very pertinent objection raised by the learned counsel for the petitioners that the rules were ultra vires and the conviction based on the breach of those rules was bad does not hold good. The sentences awarded in the case are by no means excessive. The revision petition therefore fails and is dismissed. Order pronounced.

K.S./R.K. *Petition dismissed.*

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* (28) A. I. R. 1941 Peshawar 103

ALMOND J. C.

Sundar Singh Hira Nand —
Judgment-debtor — Appellant

v.

Khilanda Ram and others —
Decree-holders — Respondents.

Appeal No. 27/5 of 1941, Decided on 26th June 1941, against order of Sub-Judge, First Class, Dera Ismail Khan, D/- 15th January 1941.

* Limitation Act (1908), Art. 182 (5) — Execution application neither signed nor verified but Court acting upon it — It must be deemed to be application in accordance with law.

An application is required under the provisions of O. 21, R. 11, Civil P. C., to contain certain particulars and to be signed and verified. It is the duty of the Court when it is presented to check the application to see that the necessary particulars are given under O. 21, R. 17 and the Court is then empowered either to reject the application or require its immediate amendment or its amendment within a fixed time. If the Court takes none of these actions but acts also upon the application the Court must be deemed to hold the application to be in accordance with law : *Case law referred.*

[P 104 C 2]

Malik Khuda Bakhsh — for Appellant.

L. Raushan Lal — for Respondents.

Judgment. — This is an appeal by the judgment-debtor against the order of the Sub-Judge, first class, D. I. Khan dated 15th January 1941 holding the decree-holder's application to be within time. The application prior to this was made on 11th July 1938 and on 12th July 1938 an order was made that notice should be served on the judgment debtor and it was served upon him on 21st July 1938. The application was then consigned on 22nd July 1938. That application was

neither signed nor verified by the decree-holders or by anyone on their behalf. It was presented by a pleader duly appointed by them. The question is whether the failure to verify and sign an application renders it an application which is not in accordance with law within the meaning of Art. 182, Limitation Act. Learned counsel who has appeared on behalf of the appellant concedes that there are many rulings against him but he asks me to interpret the section by itself without any reference to the rulings of other High Courts which are not binding upon me and he himself has also referred to A I R 1938 Lah 515,[1] A I R 1937 Mad 239,[2] A I R 1940 Mad 215[3] and A I R 1929 Bom 196.[4]

In the first of these cases it was held that the application was not in accordance with law as against one of the judgment-debtors because his name was not entered in the application. In the second case it was held that the application was a nullity because it was presented by a pleader who had no authority to act. In A I R 1940 Mad 215[3] the application was returned to the decree-holder for amendment and was never re-presented by him. In the Bombay case the application was actually held to be in accordance with law. Learned counsel for the decree-holders in the executing Court relied on 34 I C 955[5] and A I R 1935 Nag 131[6] both of which are direct authorities in his favour. He has also before me cited 98 I C 166,[7] a judgment of the Calcutta High Court in which it was laid down that an application is in accordance with law if it is such that the Court can act upon it. He has also cited 31 Mad 68[8] in which it was held that small irregularities in an application should not be allowed to make the application invalid and lastly he has also referred to A I R 1938 Mad 323[9] in which it was laid down that the provisions of Art. 182 should not be construed too technically so as to give shelter to a judgment-debtor who has not paid his debt.

It appears to me that apart from the two direct authorities which have been relied upon by the lower Court the decision given by him is correct. An application is required under the provisions of O. 21, R. 11 to contain certain particulars and to be signed and verified. It is the duty of the Court when it is presented to check the application to see that the necessary particulars are given under O. 21, R. 17 and the Court is then empowered either to reject the application or require its immediate amendment or its amendment within a fixed time. It appears to me that if the Court takes none of these actions but acts upon the application, the Court must be deemed to hold the application to be in accordance with law; for these reasons I dismiss this appeal with costs. Pleader's fee Rs. 50.

K.S./R.K. *Appeal dismissed.*

1. ('38) 25 AIR 1938 Lah 515 : 179 I C 146 : 40 P L R 857, Pir Taj-ud-din v. Khambatta.
2. ('37) 24 AIR 1937 Mad 239 : 165 I C 659 : ILR (1937) Mad 320 : 71 M L J 604, Nandamani Anangabhima v. Modono Mohono Deo.
3. ('40) 27 AIR 1940 Mad 215 :189 I C 822:(1939) 2 M L J 864, G. R. Naidu v. Venkataswami Naidu.
4. ('29) 16 AIR 1929 Bom 196 : 117 I C 526 : 31 Bom L R 355, Hassan Saheb v. Ramchandra Appayya.
5. ('16) 3 AIR 1916 Lah 316 : 34 I C 955 : 65 P L R 1916, Baldeo Sahai v. Kanhaya Lal.
6. ('35) 22 AIR 1935 Nag 131 : 156 I C 114 : 31 N L R 333, Hanumanlala Kalar v. Sheonarayan Sonar.
7. ('26) 13 AIR 1926 Cal 1077 : 98 I C 166 : 53 Cal 664 : 45 C L J 86 : 30 C W N 918, Pitambar Jana v. Damodar Guchait.
8. ('08) 31 Mad 68 : 17 M L J 596 : 3 M L T 254, Ramayyan v. Kadir Bacha Sahib.
9. ('38) 25 AIR 1938 Mad 323 : 178 I C 749 : (1938) 1 MLJ 135, Annapurnamma v. Venkamma.

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THE
ALL INDIA REPORTER
1941
Rangoon High Court

A. I. R. 1941 Rangoon 1

ROBERTS C. J.

S. K. Roy Chowdhury—Applicant

v.

The King.

Criminal Revn. No. 340-B of 1940, Decided on 20th August 1940, for quashing of proceedings of Western Sub-divisional Magistrate (1), Rangoon.

(a) Defence of Burma Act (1940), S. 18 — Price control order seeking to fix maximum price at which particular dealer may sell certain commodity held not order fixing maximum price within meaning of Ordinance dated 4th September 1939 — Order could not be validated under Section 18.

A price control order provided as follows: "Except as provided in the annexed schedule and in subsequent amendments thereto, no wholesale or retail dealer in medicines, medical drugs, medical preparations and medical supplies shall sell such articles within the limits of the City of Rangoon at prices more than 12½ per cent. i. e. 2 annas in the rupee above the net wholesale or retail prices respectively charged by him on 1st September 1939":

Held that all that it had been sought to fix was the maximum price at which a particular dealer may sell the commodity. The Controller of Prices had no authority to do this under the Ordinance dated 4th September 1939 and hence the order could not be said to be validated under S. 18, Defence of Burma Act, 1940. [P 2 C 1; P 3 C 1]

(b) General Clauses Act (Burma) (1898), S. 24 —Ordinance is not enactment.

An Ordinance is not an enactment particularly an Ordinance which has expired. [P 4 C 1]

(c) Criminal trial — Practice—Accused must be told what is the law which he is said to have infringed.

When a person is charged with a criminal offence he must be told with particularity not only the act he is alleged to have committed which is said to constitute it but also what is the law which he is said to have infringed. [P 5 C 1]

C. K. Ray — for Applicant.

U Chan Tun Aung, Government Advocate — for the King.

Order. — The Court is asked to quash in revision certain criminal proceedings pending against the applicant in the Court of the Western Subdivisional Magistrate, Rangoon. The applicant was brought before the Magistrate on a charge under R. 81 (2) (b) of the Defence of Burma Rules made by the Governor under S. 2, Defence of Burma Act, 1940. The particulars given on the charge sheet were as follows:

Rule 81 (b) (4) Defence of Burma. The accused sold a tube of ethyl chloride for the sum of Rs. 2 instead of Re. 1-8-0 and also refused to give a voucher.

There is no such rule as R. 81 (b) (4); however this error is not material since it is clear that he was charged under R. 81 (2) (b) of the Rules made under the Act, the operative words of which are that the Governor may by order provide for controlling the prices at which articles or things of any description whatsoever may be sold; and sub-s. (4) provides a penalty for contravention of the order so made. Rule 130 (1) however provides that

no Court or Tribunal shall take cognizance of any alleged contravention of these rules except on a report in writing of the facts constituting such contravention made by a public servant.

Mr. Ray on behalf of the applicant said that he asked what were the facts which were alleged to constitute the offence but he was told that the evidence for the prosecution could be heard first. We have not before us any report in writing of the facts constituting a contravention of any order and made by a public servant. Such a report is an indispensable preliminary to cognizance being taken by the Court of an alleged contravention of the rules. Under S. 190, Criminal P. C., a Magistrate empowered to do so may take cognizance of any offence on receiving a complaint of facts which constitute the offence: but inasmuch as the rules impose upon the public more stringent obligations than are comprised within the Penal Code or within the statute

law normally in force, R. 130 has added a special condition precedent to criminal proceedings. The power to make rules under the Defence of Burma Act is vested in his Excellency the Governor : S. 2 (1). And he may by order direct that any such power may be exercised or discharged by any authority : S. 2 (4). On 7th March 1940, by Notification No. 34 in the Burma Gazette the Governor made the Control of Prices Order, 1940, which said: "In this Order the Controller of Prices means in Rangoon an officer appointed in that behalf by the Governor". Later in the Notification it appears that the Controller (if appointed) may fix the maximum price at which a commodity may be said in Rangoon, but no power is given to him to control prices other than by fixing a maximum price for a commodity.

It is however contended that under S. 18 of the Act a 'Price Control Order' made by one F. B. Arnold as the Controller of Prices at Rangoon on 2nd March 1940, five days before the Control of Prices Order, 1940, was notified by His Excellency the Governor, is a valid order under the Act. This order is headed "Price Control Order" "Medicines, Medical Drugs, etc., IV." and begins :

> Under the authority of Defence of Burma R. 81 I hereby order, with effect from 4th March 1940, that (1) except as provided in the annexed schedule and in subsequent amendments thereto, no wholesale or retail dealer in medicines, medical drugs, medicial preparations and medical supplies shall sell such articles within the limits of the city of Rangoon at prices more than 12½ per cent. i, e., 2 annas in the rupee above the net wholesale or retail prices respectively charged by him on 1st September 1939.

Then follow two other paragraphs which could have been validly issued at an earlier date under an ordinance dated 4th September 1939, and the subsequent rules added thereto by Notification in the Burma Gazette, and with which I do not propose to deal. There is an intimation that the maximum penalty for contravention of the order is three years' imprisonment. And there is appended a schedule of exceptions to the general provisions of the order just referred to in detail which fixes "maximum prices" of certain articles and commodities of which ethyl chloride is not one. Now first, is this a valid order under S. 18 of the Act ? Section 18 says :

> The Defence of Burma Ordinance, 1939, is hereby repealed; and notwithstanding such repeal anything done and any action taken in exercise of any power conferred by or under the said ordinance shall be deemed to have been done or taken in exercise of powers conferred by or under this Act as if this Act had commenced on the 4th day of September 1939.

Quite plainly the saving clauses are in the past tense. The Act is to come into force at once, and it is conceded that it came into force on 29th February 1940. On 2nd March 1940, the position was that the ordinance had already been repealed, though anything done under it prior to 29th February 1940, was deemed to have been done in exercise of the powers conferred by the new Act as if it had been in operation since the date of the ordinance which was promulgated on 4th September 1939, under S. 42, Government of Burma Act, 1935. The rules made in the ordinance have effect as if enacted in the body of the ordinance (S. 2) and R. 77A (1) (a) says :

> Where in the opinion of the competent authority it is necessary to control the price of any commodity the competent authority may by general or special order in writing fix the maximum price at which such commodity may be sold in the area or areas specified in such order.

Rule 92 states that the competent authority is named in appendix II ; and in Rangoon the competent authority to fix maximum prices was the controller of prices under the ordinance who was Mr. F. B. Arnold. The price at which an article may be sold is normally what the trader chooses to ask for it. But here were rules which made it a criminal offence for a person to sell articles specified in an order made under R. 77A at a price above the maximum. All that the Controller of Prices could do under these rules, and upto 29th February 1940 so far as price is concerned, was to fix a maximum price. He has not, in my judgment, fixed a maximum price for ethyl chloride. Maximum prices are expressly fixed in the schedule to the price control order, from which mention of ethyl chloride was omitted; but the so-called maximum price, apart from the schedule, is stated to be "two annas in the rupee above the net wholesale or retail prices respectively charged by him on 1st September 1939." No doubt this controls the price at which an individual may sell an article if he sold such an article on the date named. But through looseness of wording it does not even control the price of any article not sold on that date, much less does it fix it. It is clear that if a person set up in business as a dealer of drugs and medicines in October 1939, there are no maximum prices beyond which he might not sell his commodities under this order other than those named in the schedule. Again, if, although already in business on 1st septem-

ber 1939, he did not on that day sell the article in respect of which the charge is brought, though he may have had it in stock and may have been ready to offer it for sale at a fixed price, no one can say that the price was "charged" by him on that date to any customer.

Supposing it were possible to hold that a trader offered an article for sale at such and such a price on the date named, even though there were no purchasers and he never "charged" the price to anybody, and that the meaning is sufficiently clear, yet even then the controller has not fixed "a maximum price at which such commodity may be sold" within the meaning of R. 77A. It is common knowledge that articles to be obtained cheaply in one shop are more expensive in another. This difference in price is not put an end to by the order at all. Under the paragraph as it stands one dealer may only charge Rs. 9 for an article for which another dealer may charge Rs. 10. When one inquires what is the maximum price at which the commodity may be sold it is plain that none has been fixed; all that it has been sought to fix is the maximum price at which a particular dealer may sell the commodity. The Controller of Prices had no authority to do this under the ordinance. It must also be observed that if there is an officer who is controller of prices under the more recent Control of Prices Order 1940, made under the Act, he would have no authority to do it either. Doubtless it may have been difficult to fix maximum prices in respect of a number of unusual commodities, but what was sought to be done outside the schedule was to control prices and not to fix a maximum price.

But there is a further difficulty. On and after 29th February 1940, there was no such person as the Controller of Prices. Rule 81 issued under the new Act had superseded the ordinance which had been repealed. What he had validly done under the ordinance was still valid, but he could not do anything more. What he purported to do on 2nd March 1940 was of no legal effect; for it could not be "in exercise of any power conferred by or under" an ordinance, which had ceased to exist. It is true that the ordinance would not normally have expired till 4th March 1940, but the Act of 29th February which came into force at once, repealed it by the use of the words "is hereby repealed." It is suggested that what the Controller of Prices did must be deemed to have been done in the exercise of powers conferred by or under the Act of 1940 as if it had commenced on the 4th day of September 1939. But this argument appears to me to be unsound. It is only an action taken in exercise of any power "conferred by or under the ordinance" which shall be deemed to have been done in the exercise of the powers conferred by or under the new Act. The controller's action was not taken in exercise of a power under the ordinance and could not have been taken under it, first because it went beyond fixing a maximum price and sought to control the varying prices at which certain individuals might sell, and secondly because the ordinance was no longer of any effect. If this be the right view, then the order if valid at all was under the Act. It is expressed to be under R. 81 of the Act. Rule 81 taken together with His Excellency's power to direct that the powers thereunder may be discharged or exercised by any authority is of course the foundation for the control of prices order, 1940. This order no doubt contemplates the appointment of a Controller of Prices, but at the date of its issue there was no one holding this office. It is conceded that Mr. F. B. Arnold has not been re-appointed as Controller by any order or notification subsequent to the control of prices order which was notified on 7th March 1940; and even if he had been, nothing done by him prior to his appointment could be validated without an express provision to that effect. Moreover, the Controller of Prices (if any were appointed under the Order) could not control prices any more than he could have done under the old Ordinance; he could only fix the maximum price at which a commodity may be sold. A further argument was brought forward under S. 24, General Clauses Act (Burma), 1898. This provides, omitting immaterial words:

> Where any enactment is repealed and re-enacted by any Act, then unless it is otherwise expressly provided, any notification, order or rule made or issued under the repealed Act shall, so far as it is not inconsistent with the provisions re-enacted, continue in force, and be deemed to have been made or issued under the provisions so re-enacted unless and until it is superseded by any notification, order or rule made or issued under the provisions so re-enacted.

The contention is that the ordinance was an enactment, and that it was repealed and re-enacted by the Act of 1940, and that its rules continued in force so far as they were not inconsistent with the new Act, and must be deemed to have been made or issued under the new Act. This contention does not get rid of the fact that no rule could

continue in force under the new Act unless it was a rule made or issued under the repealed enactment. But it raises two new points. The first of these is whether the ordinance can now be said to be a repealed enactment, and the second is whether the old provisions which would have continued in force have been superseded by a notification order or rule made or issued under the provisions so re-enacted. Section 42, Government of Burma Act, 1935, describes an ordinance made under its provisions as being promulgated and not as being enacted. A Governor's Act is in S. 43 described as being enacted. An ordinance promulgated under S. 42 "shall have the same force and effect as an Act of the Legislature," but it is not enacted. It only operates for a specified time which cannot extend over six months, or twelve months if the period is extended by subsequent ordinance. But by virtue of the Government of Burma (Adaptation of Laws Order), 1937, there is a new sub-s. (2) to S. 1, General Clauses Act, which says:

> As from the separation of Burma and India the provisions of this Act relating to Acts shall, except as otherwise expressly provided, extend to all Acts, regulations and ordinances forming part of the law of Burma whenever and by whatever authorities they were passed or made, other than Acts of Parliament, and the General Clauses Act, 1897, shall cease to form part of the law of Burma.

Supposing an ordinance is an enactment, it seems to me difficult to say that an ordinance which has expired is an enactment which is repealed. This particular ordinance was in fact repealed by S. 18 of the Act of 1940; does the fact that it was repealed keep its provisions in force when if it had not been repealed but had expired they would no longer have been in force? I think it may be so, but I feel considerable hesitation about it. But then the second part of the argument must be that the old provisions of the Ordinance have not been superseded by any notification, order or rule made under the new Act. It is for this reason, it is contended, that they are kept alive. Rule 81 of the rules under the new Act appears to me to supersede the old R. 77A of the Ordinance. Unless and until His Excellency the Governor has by some new order under S. 2 (4) of the Act directed that his powers (which are under R. 81 (2) (b) to control prices and not merely to fix a maximum price) are to be exercised and discharged by some other authority, R. 81 puts an end to the activities of the former controller of prices. There was therefore nothing which could be done by Mr. Arnold on 2nd March after the new Defence of Burma Rules had been published on 29th February in supersession of R. 77A of the old Ordinance.

The applicant could not be charged with contravention of an order made on 2nd March in pursuance of the rules which were not published till 7th March and he was not even charged with a contravention of the order made under the ordinance, upon the footing that it had been kept alive under S. 18 of the new Act, although it is a breach of such an order which forms the gravamen of the complaint. He was expressly charged under R. 81 of the new Act. He has not been told what are the controlled prices for the sale of ethyl chloride under the new Act; nobody has ever fixed them. He has not even been told what was the maximum price under the old Ordinance, and nobody has ever fixed that either. He has only been told that he ought to have charged Re. 1-8-0 for a "tube" of it whatever that may mean. The charge does not specify the amount of the stuff for which it is alleged he must not charge more than Re. 1-8-0; it does not suggest that the order has been contravened by him because Rs. 2 is more than two annas in the rupee in excess of the net price charged by him on 1st September 1939 for the same quantity.

Summarizing the situation, the Price Control Order issued on 2nd March 1940, did not fix a maximum price for the sale of ethyl chloride; so far as that commodity is concerned, it would have been an invalid order under the Ordinance even if the Ordinance had remained in operation. Secondly, the order was made after the Ordinance had been repealed, and was bad upon that ground also, not only as regards ethyl chloride, but as regards the maximum prices fixed for other commodities. On 2nd March 1940 there was no such person as the Controller of Prices under the Ordinance. He was *functus officio*. Thirdly, the applicant has been charged not under the Ordinance at all, but under the Act. He is said to have been charged with a contravention of R. 81, but it is now sought to say that he was guilty of an offence under the Control of Prices Order, 1940 and although this was not expressly mentioned, I suppose, under para. 6. So as to found a charge under this head it must at least be shown that there was a Controller of Prices under the Control of Prices Order (not under the Ordinance) on 2nd March 1940 and that he fixed a maximum price for ethyl chloride under that order. But that order had not been issued on 2nd

March 1940: it was not issued till 7th March. Fourthly, no complaint has been made to a Magistrate of any facts which constitute an offence under S. 190 (1) (a), Criminal P. C. It is not, prima facie, an offence to sell a tube of ethyl chloride for the sum of Rs. 2 instead of Re. 1-8-0. It is added that he 'refused to give a voucher', but there is an omission to say when, or to whom. Fifthly, the provisions of R. 130 made under the Act of 1940 appear to have been entirely ignored. And after listening to prolonged argument on both sides I have been quite unable to elicit any facts which are alleged to constitute a contravention of R. 81 of the Defence of Burma Rules.

The proceedings have been very slipshod. This is apparent from the reference to the non-existent R. 81 (b) (4), to the allusion to "a tube" of ethyl chloride without specifying the amount sold, to the failure to state how the supposed maximum price of Re.1-8-0 was arrived at, and to the complete absence of any information showing when or to whom the accused refused to give a voucher. When a person is charged with a criminal offence he must be told with particularity not only the act he is alleged to have committed which is said to constitute it but also what is the law which he is said to have infringed. We appear to have no power to award costs to the applicant. We much regret this, for he might have been less out of pocket if he had submitted to a fine which would probably have been a relatively small one, rather than take up the case in revision on behalf of the public. In saying this I do not omit to notice that in the first information report it is stated that the applicant said he knew he was charging more than the permitted price. But, whatever he may have thought, no maximum price had been fixed by a competent authority for this commodity. We also think that although in such a case the police have authority to effect an arrest without a warrant it was a most unfortunate course to arrest him in a case of this kind. Since writing this judgment I have had sent to me in chambers what purports to be a true copy of a letter from the Secretary of the Department of Commerce and Industry to the Accountant-General, dated 14th November 1939 conveying the sanction of His Excellency the Governor to the temporary appointment of Mr. F. B. Arnold as Controller of Prices with effect from 4th October 1939. But the hearing of this application has been completed. I must pay no attention to this letter. In any event it is plain that its earlier production could not have affected the result. These proceedings must be quashed.

D.S./R.K. *Proceedings quashed.*—

** A. I. R. 1941 Rangoon 5

SHARPE J.

U Lun — Plaintiff

v.

U Chit Hlaing and another —

Defendants.

Civil Regular No. 103 of 1940, Decided on 23rd August 1940.

** *(a) Government of Burma Act (1935), S. 27 (3) — Speaker has no power to declare whether seat has become vacant or not.*

One must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration. In order, therefore, to appreciate the position of the speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Government of Burma Act. The speaker in Burma has no powers to declare whether a seat has become vacant or not. [P 11 C 2; P 12 C 2]

* *(b) Government of Burma Act (1935), Ss. 27 (1) and 32 (2)—Speaker in declaring that certain member's seat was vacant is not protected either by S. 27 (1) or by S. 32 (2).*

Section 27 (1) is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. The speaker's declaration that certain member's seat was vacant, although the declaration was made by words spoken in the chamber does not come within the purview of the sub-section. In making such declaration the speaker is doing more than merely giving a ruling on a point of order. He is therefore not protected either by S. 27 (1) or by S. 32 (2). [P 13 C 1, 2]

(c) Government of Burma Act (1935), S. 41— Ordinance under S. 41 providing that ordinance would cease to operate at expiration of six weeks from re-assembly of Legislature—Re-assembly of Legislature at 11 a. m. on 15th February — Ordinance ceases to operate at midnight on 28th/29th March.

An ordinance under S. 41 provided that the ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature if there be no resolution disapproving it passed by the House of Representatives. The Legislature re-assembled at 11 a. m. on 15th February:

Held that the ordinance ceased to operate at midnight on 28th/29th March as the law takes no notice of the fractions of a day: *Case law referred.* [P 14 C 1]

* *(d) Government of Burma Act (1935), S. 25 (1) (a) — Member appointed second Lieutenant in Army holds office of profit even if he has received no remuneration and his appointment is subject to His Majesty's approval.*

A person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers holds an office of profit under the Crown in Burma even if he has in fact received no remuneration or has not joined any particular unit of the Army in Burma

or his appointment is subject to His Majesty's approval. [P 14 C 2; P 15 C 2]

(e) Government of Burma Act (1935), S. 5 (3) — Correct reading of S. 5 (3), stated.

The correct reading of S. 5 (3) is that if any question arises whether any matter (a) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (b) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment then the decision of the Governor in his discretion is final. [P 19 C 1]

(f) Government of Burma Act (1935), S. 5 (3) — S. 5 (3) applies only as between Governor and Ministers regarding administrative matters.

Section 5 (3) only applies as between the Governor and the Ministers in regard to administrative matters. S. 5 (3) has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of Part 4 ("Legislative") of the Government of Burma Act. [P 19 C 2]

** *(g) Government of Burma Act (1935), S. 42 — High Court has power to enquire whether ordinance promulgated under S. 42 is or is not within powers of Governor — Ordinance providing that members of House of Representatives should not be disqualified for being members of House if they held commission in His Majesty's forces is beyond legislative powers of Governor.*

High Court is not precluded from enquiring whether an ordinance promulgated by the Governor under S. 42 is or is not within his powers. Subsection (4) of S. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under S. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature would not have been valid. An ordinance providing that members of the House of the Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces is not a matter of defence, but is concerned with something which is a matter entirely for the Ministers. Accordingly the Governor has no power to promulgate such ordinance when the Legislature is then in session. [P 18 C 2; P 19 C 1, 2]

(h) Government of Burma Act (1935), S. 42— Ordinance is promulgated on date when it is published in Gazette.

Promulgation of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. Promulgation of a new law takes place through the medium of the Official Gazette. It is wrong for the notifications which appear in the Burma Gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; they should say "The Governor hereby promulgates the following ordinance." An ordinance therefore is promulgated on the date on which it is published in the Gazette. [P 20 C 1, 2]

(i) Government of Burma Act (1935), Ss. 25 (1) (a) and 42—Ordinance providing that member whose seat has become vacant under Government of Burma Act shall nevertheless be restored to his former seat is beyond powers of Governor and is void.

The only meaning which can be assigned to S. 25 (1) (a) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. An ordinance the effect of which is to provide that a member whose seat has become vacant under the Government of Burma Act shall nevertheless be restored to his former seat, which is then vacant is beyond the powers of the Governor and is void. [P 20 C 2; P 21 C 1]

E Hay, U E Maung and U Maung Maung — for Plaintiff.

Kyaw Din and P. K. Basu — for Defendants Nos. 1 and 2, respectively.

Judgment. — In this and the other case which was heard at the same time extremely important questions of law arise and for that reason very full arguments were addressed to me by the learned advocates for the respective parties and I am very much obliged to them for their assistance. Among the matters into which I have had to enquire are the extent of the powers of the Speaker of the House of Representatives in Burma and whether, and to what extent, he is subject to the jurisdiction of this Court, and the extent of the legislative powers both of the Governor (by way of Ordinances) and of the Burma Legislature. With such important questions falling for my decision, it is a matter of regret to me that I have had since the hearing was concluded but a few days for the preparation of this judgment, and even on almost all those days I have been fully occupied disposing of important cases under the Tenancy Act and the Tenancy Ordinance. To-day is Friday, and on Monday not only does the long vacation of this Court commence but the Legislature reassembles. Therefore it was most desirable that I should deliver these two judgments to-day. With a little more time at my disposal I would have been able to condense considerably what I am about to say. No evidence has been called before me by any party, as the facts are not in dispute. They are either admitted or ascertainable from agreed documents. I will set out the facts at once. I shall do so somewhat fully, as there is no oral evidence on the record. On 18th September 1939, at a time when the Legislature was not in session the Governor of Burma promulgated, under S. 41, Government of Burma Act, an Ordinance called the Burma Legislature (Removal of Disqualifications) Ordinance, 1939 (to which I shall hereafter refer as "the first Ordinance"), S. 2 of which provided that a person should not be disqualified nor should be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legis-

lature by reason only that as a member of any of His Majesty's Forces he was holding or had held any office of profit under the Crown. At the time of the promulgation of this, the first Ordinance, the plaintiff, U Lun, was the member of the House of Representatives of the Burma Legislature for the constituency of Insein North, having been chosen, at the General Election in November 1936, in accordance with the provisions in that behalf contained in Schedule 3 to the Government of Burma Act, 1935. Neither then nor subsequently was he subject to any disqualification rendering his seat in the House of Representatives vacant, save that he was, in March last, appointed a Second Lieutenant in the Army in Burma Reserve of Officers, as I shall presently mention, if indeed that was a disqualification. Whether or not the holding of such appointment did disqualify the plaintiff is one of the important questions which fall to be decided in the present case.

By sub-s. (2) (a) of S. 41, Government of Burma Act, the first Ordinance ceased to operate at the expiration of six weeks from the first reassembly of the Legislature after its promulgation, or, if a resolution disapproving it was passed by the House of Representatives and agreed to by the Senate, then upon the resolution being agreed to by the Senate. The first reassembly of the Legislature after the promulgation of the first Ordinance was at 11 a. m. on 15th February 1940, the first Ordinance was duly laid before the Legislature, but no resolution disapproving it was passed by the House of Representatives. In the Burma Gazette for 16th March 1940[a] it was notified, under date 13th March, that the plaintiff together with his fellow member of the House of Representatives, U Ba Maung, the plaintiff in the other case, and together with some nineteen other persons, were subject to His Majesty's approval, appointed to be Second Lieutenants in the Army in Burma Reserve of Officers, with effect, in the case of the plaintiff and U Ba Maung from 11th March. Neither the plaintiff, U Lun, nor his fellow Member U Ba Maung, has ever proceeded to join any unit of the Army in Burma, for training or otherwise, nor has either of them drawn any pay or allowances. All the other 19 persons whose appointments as Second Lieutenants were notified in the Burma Gazette of 13th April joined a unit at Maymyo or elsewhere, and it is agreed that the reason for U Lun and U Ba Maung not doing so was that they might be left free to discharge their duties and responsibilities as members of the House of Representatives, and in fact they continued to do so. At about 12 noon on 29th March, during the course of the sitting of the House of Representatives, defendant 2 who was the Karen member for Thaton West and also the Deputy Speaker of the House, rose in his place in the Chamber and addressed defendent 1, who was and is the Speaker of the House of Representatives, in the following terms :

Mr. Speaker, may I draw your attention that the Burma Legislature (Removal of Disqualifications) Ordinance, 1939, ceased to operate on 28th March 1940, and now we have two officers of the Army in Burma Reserve of Officers sitting in this House. If you refer to S. 25, Government of Burma Act, Sir, a person shall be disqualified for being chosen as, and for being, a member of either Chamber, if he holds any office of profit under the Crown in Burma. I understand that these two officers will be called for training for which they will be remunerated very soon as they have been appointed Second Lieutenants.

The Speaker enquired who the two members were, and defendant 2 gave the names of the plaintiff and of U Ba Maung, the member for Myitkyina, and added :

"Sir, if they are disqualified under S. 25, are they under S. 24 (a) entitled to sit in this House and vote ? I am just drawing your attention to this matter."

The Speaker thereupon said that he thought that the question raised was a constitutional one and a very serious one too and suggested that the matter be considered after four o'clock. The Premier agreed, and added that he thought "the Advocate-General also should be present." The Speaker observed that, if a member is disqualified under S. 25, then under S. 26, he is liable to a fine of Rs. 500 in respect of each day he sits or votes, and he (the Speaker) added :

Therefore, I say it is very essential that this question should be decided promptly and we shall take it up after four o'clock to-day..

Both the plaintiff and the other member named were present in the Chamber when defendant 2 so raised this point. When four o'clock came the Speaker addressed the Chamber in this way :

Now we come to the point raised by U Hla Pe this morning whereupon the Premier said :

"Sir, I have already supplied you with a copy of the Ordinance about which you may kindly inform the members."

to which the Speaker rejoined :

I will read the Ordinance by His Excellency the Governor that has just been delivered to me. It reads thus :

a. Burma Gazette, Part I, p. 311: Defence Department Notification No. 185.

and he read out a type-written document headed the Burma Legislature (Removal of Disqualifications) Ordinance (Ordinance No. 5 of 1940). This ordinance (to which I shall hereafter refer as "the second ordinance,") was expressed to be made under S. 42, Government of Burma Act. The terms of S. 2 of the second Ordinance were identical with those of S. 2 of the first ordinance. Having read out the document, the Speaker returned it to the Premier and then asked defendant 2 what he had got to say, whereupon the latter addressed him as follows :

Sir, this Ordinance has just been promulgated, but when I drew your attention this morning there was no Ordinance in existence. The Ordinance first promulgated under S. 41, Government of Burma Act, ceased to operate on 28th March. That is why I raised this point, Sir.

The Speaker then said :

What has the Government got to say?

to which the Premier replied :

The Ordinance is quite clear, Sir. It operates with effect from 28th March. We cannot go beyond the action which has been taken by His Excellency. We are precluded from doing so and it is outside our jurisdiction.

The Speaker then addressed the house at considerable length upon the matter and thereby initiated a discussion in which about a dozen members (including three or four Ministers) participated, several of them at even greater length than the Speaker, until, apparently by chance, there appeared the Advocate-General who suggested that he would like a little time to consider the matter. This was on a Friday afternoon and the Advocate-General asked if he could have time till Monday, the 1st April. In the end this was agreed to.

The only other matters in connexion with this long discussion in the Chamber that afternoon (the 29th March) which it is material to mention here are these : At one stage of the discussion defendant 2 interposed and called attention to a certain passage in Byrne's Law Dictionary under the heading "office of profit under the Crown." His interjection only occupies two or three lines in the official report and except for that one interjection on 29th March defendant 2 took no part whatsoever in the discussion either that day or on 1st April. The other material matter to be mentioned in connexion with 29th March is that almost at the end of that day the plaintiff, U Lun, said this :

As a member charged as having been disqualified, I think, I need give an explanation in this House,

to which the Speaker replied :

No, the time has not yet come for your statement. Only when you are leaving this House you can make a statement, because according to the rule a Minister who resigns will be permitted to make a statement only when he tenders his resignation.

That attempt to intervene in his own defence is the only time upon which the plaintiff took any part in the discussion in the Chamber on this matter, except for a parting shot, as I may call it, which he made at the very close of the sitting on the 29th, when he remarked : "One thousand five hundred rupees to buy a vote." The plaintiff never again attempted to speak in his own defence.

On 30th March the second Ordinance was published in a Burma Gazette, Extraordinary, of that date. When the matter was resumed in the Chamber on 1st April the proceedings were opened by a lengthy and no doubt carefully prepared speech, or, rather, legal address by the Advocate-General. When he had concluded, a number of other members spoke on this question, again about a dozen of them, and one of the Counsellors to the Governor also spoke. Several of the members spoke at great length, and some of those (including at least one Minister) who spoke on 1st April had already spoken on 29th March, while one member who had spoken in English on the first day spoke in Burmese on the second. The discussion in the Chamber was again a prolonged one.

It is to be noted that at no time whatever when the question of the plaintiff's position as a member was under consideration—that is to say, at no time either on 29th March, 1st April, or 2nd April—was any motion or resolution ever before the House. It was not for or against any resolution that all these members were speaking, and it is said by the learned advocate on behalf of the Speaker that all that was happening for these two days of lengthy discussion was the putting by defendant 2 of a point of order ; and that the subsequent ruling given by the Speaker was upon that point of order. It is not unimportant, perhaps, to say this about the various speeches which were made on 29th March and 1st April : there was certainly no agreement amongst the various members as to whether it was the Speaker or the House who was to be urged to accept this or that particular view of the law which was being presented by the respective members. It is, I think, fair to say that although the various members who spoke knew quite well what they were talking about, yet few of them had any clear idea as to whether it was the Speaker or the House who was to do some-

thing about the matter. Even the Speaker himself, if one reads the observations which he interposed from time to time during the two days' discussion, thought that the matter was one for the House to decide (*see*, for example, his remarks at the bottom of page 1536, and especially his remarks at the bottom of p. 1564 of Vol. VII of the Official Report of the Proceedings of the House), yet in the end he decided it himself. When the many speeches had come to a close upon 1st April the Speaker said that, as this was an important matter, he would like to consider it very carefully that evening and would give his ruling the following morning.

An interesting thing happened on 1st April, after the Speaker had said that he would postpone his decision. First of all the House considered three or four Bills which have nothing to do with this case, and then there came before the House the Burma Legislature (Removal of Disqualifications) Bill, 1940, as passed by the Senate. The Minister for Judicial Affairs moved that that Bill be taken into consideration. This was the Bill which was destined to receive the Governor's assent four days later and to become thereby the Burma Legislature (Removal of Disqualifications) Act—Burma Act 12 of 1940. Section 2 of that Act is in precisely the same terms as the two sections 2 of the two Ordinances which I have already mentoined. The Burma Legislature (Removal of Disqualifications) Bill, 1940 (as passed by the Senate) was duly passed by the House of Representatives on 1st April, but not until after a lengthy debate in which there took part both the plaintiff, U Lun, himself and also, and, I think, at greater length than any other member, the Speaker, who addressed the Chamber not only in English for some time but also at length in Burmese, until Mr. Robertson, the representative of the Burma Chamber of Commerce, felt constrained to intervene in what he called the "rather embarrassing and difficult position" in which he found himself, with the object, not only of interrupting what had undoubtedly become a speech and a lengthy one — by the Speaker, but also of calling the Speaker's attention to the fact that by addressing the House in Burmese he (the Speaker)—as the Speaker himself was afterwards the first to admit—was not following the rules of the House which it was for him to enforce. Before, however, the House of Representatives passed the Burma Legislature (Removal of Disqualifications) Bill, 1940 (as passed by the Senate) on 1st April, a division was taken and amongst those who then voted were the plaintiff, U Lun, and also U Ba Maung, the two persons whose position as members was then under consideration by the Speaker. By their own votes they supported the attempt to maintain their own positions as members, and that at a time when the Speaker had their position as members under consideration.

The following morning, namely, 2nd April, the Speaker proceeded to give what he called his "ruling on the matter that was discussed yesterday." He commenced by referring to the matter as a point of order. He dealt at moderate length with the legal points raised, and towards the end of his ruling he said this:

> In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions.
>
> Under S. 26, Government of Burma Act, they have become liable to pay a penalty of Rs. 500 per day of their sitting in this House from 28th March and I request the Government to take necessary action for such recovery from the said gentlemen.
>
> It has been contended by the Government that the Speaker should not act as a Court under S. 27 (3) and in my view the chair can give a ruling on a point of order raised in the House under R. 46 (2) without fear or favour.

This is the "ruling" of which the plaintiff now complains. It is agreed by all parties that the plaintiff and also his fellow member U Ba Maung were both present in the Chamber as well in the afternoon as in the morning of 29th March, and again on both 1st and 2nd April, although from a passage in the Speaker's address on 29th March it appears that they were absent for a part of the afternoon on that day. On 5th April the Governor gave his assent to the Burma Legislature (Removal of Disqualifications) Bill, 1940, to which I have already referred. In the Burma Gazette (Extraordinary) of 6th April the fact of the Governor's assent to that bill was published for general information, and it was also therein notified that the Governor had withdrawn the second Ordinance, as he had power to do under S. 42 (3) (b), Government of Burma Act. No proceedings have been taken against the plaintiff under S. 26 of the Act. On 24th of April the present suit was filed. By his plaint the plaintiff asks, first, as against both the defendants' for a declaration that he is (that is to say, that he was, at the time of the institution of the suit) a member of the House of Representatives and that his seat in the said House had not become vacant, and he also seeks, as against the Speaker only, both a declaration that

the latter had no power to determine the matters disposed of by him in his "ruling" of 2nd April 1940 and that the Speaker's declarations and findings are of no force or validity, and also an injunction restraining the Speaker from taking any steps pursuant to his declaration that the seat of the plaintiff had become vacant and from in any way interfering with the exercise by the plaintiff of his rights, duties or privileges as a member of the House of Representatives. The contentions of the plaintiff, on the one hand and of the Speaker, on the other, can be stated quite shortly. I will deal later with the case in regard to defendant 2. The plaintiff says that he is, and at all material times has been, a member of the House of Representatives, that his seat has never become vacant; and, further, that in any event, whether his seat did become vacant or not, the Speaker had no power to decide whether it was vacant or not, and it was not for him (the Speaker) to declare it vacant. To this the Speaker replies, in the first place,

that he is not subject to the jurisdiction of this Hon'ble Court or any other Court in respect of acts done by him in exercise of the powers vested in him as the Speaker of the House of Representatives under the law.

That is para. 11 *(sic)* of his written statement. This plea must, I think, be read in connexion both with what he states in para 2 of his written statement, namely, that he,

apart from performing his duty as the Speaker of the House of Representatives to regulate the procedure or the conduct of business or maintaining order in the Legislature by enforcing the rule that only a member shall sit and vote in the House, has neither denied nor is interested in denying the plaintiff's status

and also with what he states in para. 10 *(sic)* which is

that he by virtue of his office as the Speaker of the House of Representatives properly constituted under the law is the sole authority to give a ruling on the point raised 'by his co-defendant' and his ruling is final and conclusive and cannot in any way be questioned in any Court of law.

Finally he says—in para. 12 *(sic)*—that in any event the plaintiff was not, at the time the ruling was given, a member of the House of Representatives, as no Act of the Legislature or Ordinance could legally make him a member once he had ceased to be one. Incidentally the Speaker admits, by para. 1 of his written statement, that the plaintiff was a member at the date of the plaint. This is obviously an error in drafting, and the case has been fought on the basis that the two defendants had denied and not admitted such allegation. The words of para. 11 *(sic)* of his written statement are expressly designed to afford the Speaker the immunity given him by S. 32 (2), Government of Burma Act. It is clear that, if all that the Speaker did on 1st April was to exercise the powers vested in him for regulating procedure and the conduct of business and for maintaining order, then he is not subject to the jurisdiction of this Court in respect of the matter now complained of by the plaintiff. The first question really is, on this part of the case whether the Speaker was not doing more than merely giving a ruling on a point of order. In my judgment he was doing more and a great deal more. It must be borne in mind that for two days he had been hearing arguments on the one side and on the other and the Advocate-General had given a carefully prepared address on the legal position. Reported decisions of various Indian High Courts had been cited to him, and; when all this had been done and after taking time to consider his decision, he delivered from the Speaker's chair a speech which was quite the equivalent of a judgment of a Court of law. I do not say that this speech of the Speaker (to borrow the words of Stephen J., in (1884) 12 Q B D 271[1] at p. 285, when referring to the resolution of the House of Commons which gave rise to that case) is the judgment of a Court but it has much in common with such a judgment. The Speaker had concluded his speech in these terms :

In these circumstances I hold that the seats of U Lun and U Ba Maung have become vacant by their own actions.

I think that it would not be wrong to say that the Speaker sought to attract to himself something very little, if at all, removed from the status of a Court; and that is something directly opposed to the clear terms of S. 27 (3), Government of Burma Act. The fact that the Speaker concluded his speech by expressly stating that he was not acting as a Court but was only giving a ruling on a point of order does not to my mind in any way alter the true effect of the facts, which to my mind clearly show that, whether or not the Speaker was acting as a Court in this matter, he was certainly doing something more than merely regulating procedure or maintaining order. After all, in the extract from his written statement which I have just read, the Speaker is now definitely claiming to be the sole authority for

1. (1884) 12 Q B D 271 : 53 L J Q B 209 : 53 L T 620 : 32 W R 552, Bradlaugh v. Gossett.

deciding the question raised by defendant 2, which was whether the plaintiff's seat was vacant or not. I think it quite impossible to accept the contention put forward on behalf of the Speaker, that he was merely dealing with a point of order. He was in my judgment claiming to have the right to declare whether any particular seat was vacant or not. I will now consider what the powers of the Speaker of the House of Representatives are and whether the right to declare when a seat in the House has or has not become vacant is one of them or not.

More than once during the course of his address to me Mr. Kyaw Din, on behalf of the Speaker, emphasised the fact that of course he was not contending in this case that the Speaker of the House of Representatives here in Burma has powers which are equal to those of the Speaker of the House of Commons in England. But it appears to me that in this particular matter the Speaker is claiming a great deal more than the Speaker of the House of Commons in England now claims, and something, indeed, to which no claim has been made by Mr. Speaker in England for at any rate some hundreds of years. It is important to distinguish between the Speaker of the House of Commons in England and the House of Commons itself. One of the privileges of the House of Commons in England is the right to provide for the proper constitution of the body of which it consists, by the issue of writs when vacancies occur during the existence of a Parliament. It is to be noted however that what I have just mentioned is the privilege of the House of Commons and not that of the Speaker. When a vacancy occurs in the House of Commons from any cause which legally vacates a seat, a warrant is issued by the Speaker, but it is only issued by him in pursuance of an order of the House. In order to get over the difficulty which otherwise would have arisen when a vacancy occurred during a recess, when the immediate authority of the House of Commons would not have been available, it was necessary to pass the Recess Elections Act, 1784. Without the statutory power given to him by that Act even the Speaker of the House of Commons in England had no power to issue a writ for the purpose of filling a vacancy. In the present case there was never any order of the House of Representatives. As I have already stated, no resolution or motion was at any time before the House. The Speaker does not suggest for one moment that he has taken the sense of the House on the matter at all. He listened to the arguments on the one side and on the other, as a Judge might do. In the end he delivered his decision, or whatever you like to call it. It was his own, personal decision at which he, after due reflection, thought fit to arrive. It is in no sense the decision of the House of Representatives; it is solely the decision of the Speaker. Let me at this point read one short passage from the judgment of the Privy Council (delivered by Sir James Colville) in (1866) 4 Moo P C (N S) 203[2] at p. 218, which, it seems to me, should be borne in mind in the present connexion:

> The privileges of the House of Commons . . . . . belong to it by virtue of the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It cannot therefore be inferred from the possession of certain powers by the House of Commons, by virtue of that ancient usage and prescription, that the like powers belong to legislative assemblies of comparatively recent creation in the dependencies of the Crown.

In other words, one must look at the particular statute which brings into being the Legislature whose powers and privileges are under consideration: see also (1890) 24 Q B D 557[3] per Pollock B at p. 559 and (1898) A C 769,[4] per Lord Hobhouse at bottom of p. 775. In order therefore to appreciate the position of the Speaker in Burma and to ascertain his powers and privileges, it is necessary to turn to the Government of Burma Act. The Speaker here is entirely the creature of that Statute; he is brought into being by S. 21 of that Act. A reading of that and the next succeeding section of the Act shows to my mind that the Speaker is what in ordinary parlance would be called a "Chairman." S. 29 of the Act provides for the making of rules, both by the House of Representatives and also by the Governor, for regulating, subject to the provisions of the Act, the procedure and the conduct of its business by the House of Representatives, and the Speaker is the particular individual charged with supervising the due conduct of the proceedings of the House of Representatives, for maintaining order therein, and for conducting and seeing that the business of the House is conducted in accordance with those rules. He is also, by Chap. 16 of the Rules of Procedure, made the medium of communication from the House to the Governor

2. (1866) L R 1 P C 328 : 4 Moo P C (N S) 203 : 36 L J P C 33 : 15 W R 366, Doyle v. Falconer.
3. (1890) 24 Q B D 557 : 62 L T 768 : 38 W R 507, Attorney-General v. Theobald.
4. (1898) 1898 A C 769 : 67 L J P 144 : 79 L T 42 : 14 T L R 488, Harding v. Commissioners of Stamps for Queensland.

to one of the mediums of communication from the Governor and the House. The Speaker of the House of Commons in England also has functions similar to the foregoing, but he has however in addition, other functions which are not bestowed upon the Speaker here. That there are strict limitations placed upon the powers of the Speaker of the House of Representatives is apparent from S. 27(3), Government of Burma Act, which provides, as I have already indicated, that notwithstanding the right of freedom of speech in the Legislature and the other privileges accorded to members by the earlier provisions of that section, nothing in the Act shall be construed as conferring, or empowering the Legislature to confer, on any officer of either Chamber (which, so far as this case is concerned, means the Speaker) the status of a Court, or any punitive or disciplinary powers other than the power to remove or exclude persons infringing the rules or standing orders, or otherwise behaving in a disorderly manner. A further instance of a limitation on the Speaker's powers is to be found in R. 42 of the Rules of Procedure for the House of Representatives, which provides that even if a question arises in the House whether a motion, amendment or question is or is not such as to require the prior sanction of the Governor, the Speaker cannot decide it, although he is presiding over the Chamber. I also call attention to the fact that it is not the Speaker, nor even the House, who can take proceedings under S. 26. I will at this point deal with a case upon which much reliance was placed by Mr. Kyaw Din, namely, 51 Cal 279,[5] a decision of Page J. as he then was, which on appeal was upheld by Sanderson C. J. and Richardson J. The point of that decision can really, I think, be summed up in a single passage to be found in the judgment of Page J. at the very top of p. 287:

> . . . where a question within the jurisdiction of a public officer entrusted with judicial powers has been bona fide entertained and decided by such officer, the Court will not interfere with his decision merely upon the ground that his decision was erroneous either with respect to facts or in point of law.

With that statement of the law I, with respect, entirely agree. The whole question in the present case is whether the Speaker was entrusted with the powers which he claims. If he seeks to rely upon the above decision of Page J., he must admit that the powers which he exercised were judicial powers, but S. 27(3), Government of Burma Act, denies him such powers. If he says, as in view of S. 27(3) of the Act, he must do that he was not exercising judicial powers, then the above decision has no application to the facts of the present case.

In my judgment it is quite clear that the Speaker in Burma has no powers beyond those which are conferred upon him by or under the Government of Burma Act. Can it be found anywhere in that Act that the Speaker is given the power to declare whether a seat has become vacant or not? I cannot find such a power anywhere in that Act. I invited Mr. Kyaw Din to point it out to me, and he had to admit that he could not do so. He argued however that there was a gap in this regard in the constitution of Burma as it now stands. He said that no provision has been made either by the Government of Burma Act or by His Majesty in Council for determining who shall have the right to declare when a seat becomes vacant (the special case provided for by S.24(3) has no application to the present suit) and that there is neither an Act of the Burma Legislature nor any rules made by the Governor under Cl. 15 of Sch. 3 to the Act dealing with this matter. And so Mr. Kyaw Din argued that, there being, so he says, this gap the Speaker is impliedly made the person or authority who is given the power to declare whether a seat in the House of Representatives is vacant or not. I am not prepared to accept that argument. Such powers as are conferred by the Act upon the Speaker in Burma are so few, and are limited in so many ways, that I cannot hold that he has any such implied power as that for which Mr. Kyaw Din contends. In my judgment he has only such powers as are expressly conferred upon him by or under the Government of Burma Act. The power to declare whether a seat is vacant or not is admittedly not expressly conferred upon the Speaker by or under the Act. It is, in my view, unnecessary for me to decide whether there is or is not this gap in the constitution of which Mr. Kyaw Din speaks. It is enough for me to hold, and I do hold, that at any rate the Speaker has no such power of declaring a vacancy as he undoubtedly claims to have.

It is, I think, worth while looking to see what powers the Imperial Parliament conferred upon the Legislatures in other parts of the Empire, in regard to the declaration of vacancies in their Lower House. In the case of Canada it thought fit to confer upon

5. ('24) 11 A I R 1924 Cal 761 : 79 I C 1042 : 51 Cal 279 : 39 C L J 58, Manindra Chandra v. Provas Chandra.

the House of Commons in that Dominion such privileges and powers as might from time to time be defined by Act of the Parliament of Canada, provided that they did not exceed those then enjoyed by the House of Commons in England: *see* S.18, British North America Act, 1867. So that it was open to the Canadian Parliament to give the Canadian House of Commons (not, be it noted, its Speaker) the right to declare when a vacancy arose. In Australia (and it is interesting to note that the "disqualification sections" of the Act dealing with Burma are very similar indeed in their wording to those of the Act dealing with Australia) the right of determining any question respecting the qualification of a member of the House of Representatives or respecting a vacancy therein, was (until the Parliament should otherwise provide) expressly given to the House (again not to the Speaker) in which the question might arise: *see* S. 47, Commonwealth of Australia Constitution Act, 1900. There is nothing in the Government of Burma Act which comes anywhere near the above-mentioned provisions of the Imperial Statutes which brought into being those two Dominions. It is abundantly clear to me that the Speaker, the defendant in the present suit, is not invested with those powers to which he so plainly lays claim in para. 10 (*sic*) of his written statement.

One final point on this part of the case. The Speaker claims that he is not subject to the jurisdiction of any Court in regard to this matter, for the further reason that he is protected by S. 27 (1), Government of Burma Act. Mr. Kyaw Din raised this point in the course of his argument: it is not pleaded by the Speaker, although it is pleaded by his co-defendant. The point can be disposed of very briefly. The sub-section which I have just mentioned renders all members of the Burma Legislature immune from any proceedings in any Court in respect of anything said by them in the Legislature. In my judgment this sub-section is designed to prevent members being sued for slander or prosecuted for defamation, and perhaps also, from being prosecuted for sedition, in respect of a speech made in the House. I do not think that the Speaker's declaration that the plaintiff's seat was vacant, although the declaration was made by words spoken in the Chamber, comes within the purview of the sub-section. It must also be noted that S. 27 (1) opens with the words "subject to the provisions of this Act . . ." Section 27 (3), I have already pointed out, expressly declares that the Speaker is not to have "the status of a Court." So that if the Speaker purports within the Chamber, to act as a Court, he will not, in my view, be protected by the provisions of S. 27 (1) in regard to what he then says.

In the result, on this part of the case, I have come to the conclusion that the Speaker, on 1st April last, did a great deal more than merely rule upon a point of order arising under the rules of procedure of the House, that he wrongly, and in excess of his legal powers, assumed the right to declare whether a seat was vacant or not, and that in respect of that wrongful assumption of a power which was not vested in him he is amenable to the jurisdiction of this Court, and is not protected either by S. 32 (2), Government of Burma Act, or otherwise. I now turn to the second main part of the case, which involves a decision as to whether the plaintiff was, either on 1st April, when the Speaker gave his decision, or on 24th April, when the present suit was instituted, still a member of the House of Representatives.

The first question on this part of the case is whether the plaintiff was holding an office of profit under Crown in Burma at the time when the first Ordinance ceased to operate. There is even a contest between the parties as to when that was. The first Ordinance was promulgated under S. 41, Government of Burma Act. By sub-s. (2) (a) of that section the first Ordinance ceased to operate "at the expiration of six weeks from the reassembly of the Legislature," there having been no resolution disapproving it passed by the House of Representatives. The plaintiff contends that, as the Legislature reassembled on 15th February, the Ordinance ceased to operate at midnight on 28th/29th March, which is six weeks from midnight on 15th/16th February, while the Speaker contends that the Ordinance either ceased to operate at midnight on 27th/28th March or, at latest, at 11 A. M. on 28th March, the latter being six weeks from the precise moment at which the Legislature reassembled. Although it would be necessary to decide this matter if I were now dealing with a case under S. 26, Government of Burma Act—for in such a case it would be necessary to ascertain the exact number of days on which the plaintiff sat or voted when disqualified, if he ever was disqualified—yet to my mind and on the view which I take of the case it is immaterial for the purpose of the present suit to decide this point, because (1) the matter now in dispute was never raised in the

Chamber until about noon on 29th March, so that there was in any event a gap between the time when the first Ordinance ceased to operate and the raising of the present question; (2) the second Ordinance is expressed to have come into force with effect from 28th March, which means midnight on 27th/28th March, and so, if it is valid, then it covers even the widest gap suggested by the defendants in this case; and (3) if Act 12 of 1940 is valid, that also covers any possible gap, as the Act is expressed to come into force on the date on which the first Ordinance ceased to operate. But, as my conclusion on the point can be stated quite briefly and as the point was fully argued before me I will give my decision upon it. Had it been necessary for me to decide this question, I should have held that the first Ordinance ceased to operate at midnight on 28th/29th March. This appears to me to follow from the judgment of Sir John Romilly M. R., in (1859) 28 Beav 93[6] at p. 94 and from such a case as in (1904) 1 K B 1.[7] It also follows if one applies the test, suggested by Lord Tenterden C. J. in (1829) 9 B & C 134[8] at p. 144, of reducing the time to one day—a test which was more than once adopted by Parke B: *see* (1838) 3 M & W 473[9] and (1890) 6 M & W 49[10] and which was adopted again in 1891, in fact twice in that year, once by Wills J. in (1892) 1 Q B 61[11] at p. 163 and again by Day J. in (1891) 1 Q B 402[12] at p. 405. The well-known maxim that the law takes no notice of the fractions of a day—and, except where there are conflicting rights between subject and subject for the determination of which it is necessary to ascertain the actual priority, such is the universal rule—is to my mind enough to dispose of the Speaker's alternative contention that the period of six weeks must be calculated from the actual hour namely, 11·0 A.M. at which the Legislature reassembled on 15th February: 46 MAD 685[13] and (1879) 4 Q B D 230[14] and see per Lust J. at p. 232, both also support this view.

It is said against the plaintiff that as he was appointed a Second Lieutenant in the Army in Burma Reserve of Officers with effect from 11th March, he was from and after that date holding an office of profit under the Crown in Burma. Two things are said on his behalf: (1) that his appointment was made "subject to His Majesty's approval" and that His Majesty had not at any material time given his approval; and (2) that he (the plaintiff) has never been called upon to join any unit of the Army in Burma for training and has accordingly never drawn any pay or allowance. The whole position surrounding an "office of profit under the Crown" is as regards those holding commissions in His Majesty's Forces, an extremely difficult one. In England "the incapacity, if any, arises under S. 24, Succession to the Crown Act, 1707," to quote the words of the Attorney-General when bringing in a bill on 2nd September last, on the eve of the present war; while on the following day in the House of the Lords the Lord Chancellor, moving the second reading of that bill referred to the "difficulty often in the minds of quite a number of lawyers" on this question.

The fact that the plaintiff before me has not in fact received any remuneration does not to my mind assist him, for the stewardship of the Chiltern Hundreds in England in fact now brings no profit to the steward, yet for very many years appointments to that office have been made for the express purpose of enabling members who wish to retire from membership of the House of Commons to accept an office of profit from the Crown so that their seats can be legally vacated. Nor in my opinion does the plaintiff obtain assistance from the fact that he has not yet joined any particular unit of the Army in Burma. His position, I think, is analogous to that of a person in England who holds a commission in the territorial force or reserve of officers. But let me first of all take the old Militia, the law relating to which was consolidated in the Militia Act, 1882. That Act provided for the calling up for a short annual training, and also for the embodiment (in case of imminent national danger or of great emergency) and for the disembodiment of the Militia. S. 38 of that Act expressly provided that the acceptance of a commission as a militia officer should

6. (1859) 28 Beav 93 : 28 L J Ch 886 : 5 Jur (N S) 696, Williams v. Nash.

7. (1904) 1 K B 1 : 72 L J K B 931 : 89 L T 428 : 52 W R 21 : 68 J P 41 : 20 T L R 7, Goldsmith's Co. v. The West Metropolitan, Ry. Co.

8. (1829) 9 B & C 134 : 4 M & Ry 130: 7 L J (O S) M C 84, Pellew v. East Wonford.

9. (1838) 3 M & W 473 : 6 D P C 549 : 7 L J Ex 140, Webb v. Fairminer.

10. (1840) 6 M & W 49 : 8 D P C 212 : 9 L J M C 29: 4 Jur 125, Young v. Higgon.

11. (1892) 1 Q B 161: 61 L J M C 63: 65 L T 677: 40 W R 63: 56 J P 262, Radcliffe v. Bartholomew.

12. (1891) 1 Q B 402: 60 L J Q B 47 : 63 L T 807: 55 J P 168, South Staffordshire Tramways Co. v. Sickness and Accident Assurance Association.

13. ('24) 11 A I R 1924 Mad 257 : 76 I C 721 : 46 Mad 685: 45 M L J 557 (S B), In re Court Fees.

14. (1879) 4 Q B D 230 : 48 L J M C 95 : 40 L T 459: 27 W R 552, Tomlinson v. Bullock.

not vacate the seat of any member returned to serve in Parliament. If the mere acceptance of a commission in the militia, without being called up for training or without being embodied, did not amount to accepting an office of profit under the Crown, why was it necessary to include in the Militia Act, 1882, a section such as S. 38?

The territorial force in England was brought into being by the Territorial and Reserve Forces Act, 1907. That Act also provided both for an annual training and for the embodiment of the force (if the army reserve was called out on permanent service) and for its subsequent disembodiment. Yet it was thought necessary to insert in that Act a provision — S. 23 (1) — that the acceptance of a commission as an officer of the territorial force should not vacate the seat of any member returned to serve in Parliament. If the contention of the plaintiff in the present suit were a sound one, it is strange that S. 23 (1) of this Act of 1907 should have been inserted to protect a person who merely accepted a commission, apart altogether from attending the annual training or being embodied. But perhaps the nearest thing to the Army in Burma Reserve of Officers is the Reserve of Officers in England. Here again it was thought desirable to provide in S. 36, Territorial and Reserve Forces Act, 1907, that the acceptance of a commission even only as an officer in the reserve of officers should not vacate the seat of any member returned to serve in Parliament. Why was that section incorporated? Both at the beginning of the last War (in November 1914) and again on the outbreak of the present War (in September last) an Act was passed to avoid the possibility of the seat of any member of the House of Commons in England being vacated by reason of his acceptance of a commission as an officer in his Majesty's Forces.

The only statutory provision which I can find which throws a favourable light upon the plaintiff's contention is the concluding sentence of S. 44, Commonwealth of Australia Act, 1900, which provided that a member of the Commonwealth House of Representatives should not be disqualified by the receipt of pay, half pay or a pension as an officer or member of the Queen's navy or army, or by the receipt of pay as an officer or member of the naval or military forces of the Commonwealth, if his services were not wholly employed by the Commonwealth. At that time the Imperial Parliament apparently thought the receipt of pay was the test. It is to be noted however that this section is not only dealing with persons of commissioned rank but with all members of the forces. In view of all these enactments (other than the one dealing with Australia), and in view also of the fact that acceptance of the Stewardship of the Chiltern Hundreds vacates the seat of a member of the House of Commons notwithstanding the fact that the incumbent derives no actual profit from the office, I think it would be impossible for me to say that a person who is appointed a Second Lieutenant in the Army in Burma Reserve of Officers does not hold an office of profit under the Crown in Burma.

There is just one other point which was raised on behalf of the plaintiff in connexion with this matter with which I must deal. It is said that the fact that the plaintiff's appointment was made "subject to His Majesty's approval" is sufficient to preserve the plaintiff's position as a member of the House of Representatives. It has been argued on his behalf that until His Majesty approves of his appointment the plaintiff cannot be said "to hold the office." I cannot accede to that argument. Take the case of all those other persons whose appointments as Second Lieutenants were announced in the Burma Gazette at the same time as the plaintiff's and who then proceeded to join a unit, either at Maymyo or elsewhere, without waiting for His Majesty to approve their appointments. Can it be said that they had no standing as Second Lieutenants, that they had none of the powers which ordinarily vest in Second Lieutenants, and that any man under their command or to whom it was necessary for them to issue orders could disobey them with impunity, on the ground that His Majesty had not approved their appointments? To me that seems an impossible proposition.

In all the circumstances which I have just been mentioning I feel constrained to hold that at the time the first Ordinance ceased to operate, be that at midnight on 27th/28th March, or twenty-four hours later, or at some time between the two, the plaintiff was holding an office of profit under the Crown in Burma. S. 25 (1) (a), Government of Burma Act, disqualifies for being a member of the House of Representatives inter alia a person who holds an office of profit under the Crown in Burma, other than an office declared by Act of the Legislature not to disqualify its holder. There was, when the first Ordinance ceased to operate, no Act of the Legislature in opera-

tion whereby a Second Lieutenant in the Army in Burma Reserve of Officers was declared not to be disqualified for being a member of the House of Representatives. S. 24 (2) (a) enacts that, if a member becomes subject, inter alia, to any of the disqualifications mentioned in S. 25 (1), his seat shall thereupon become vacant. Therefore it is clear that the plaintiff's seat became vacant the moment the first Ordinance ceased to operate. The next question therefore is whether the second Ordinance restored the plaintiff to membership of the House. This question involves a consideration of four separate legal points : (1) Is this Court entitled to go into the question whether the Governor had power to promulgate the second Ordinance; (2) had the Governor in fact power to promulgate an Ordinance on this matter under S. 42, Government of Burma Act; (3) when was the second Ordinance promulgated and (4) if it was only promulgated on 30th March and if the Governor had such power as I have just mentioned, had he power to make the second Ordinance take effect retrospectively ?

The Burma Legislature is created by S. 17, Government of Burma Act, and consists of His Majesty (represented by the Governor), the Senate, and the House of Representatives. The extent of the legislative powers of the Burma Legislature are to be found in Ss. 33 and 34 of that Act. But in Burma the power of legislation is not confined to the Legislature which is set up by S. 17. The Governor himself, in addition to being, as His Majesty's representative, a part of the Legislature which is set up by S. 17, has also legislative powers of his own, which are set forth in Ss. 40 to 43, Government of Burma Act. In the first place the Governor has certain legislative powers of his own in regard to what I will call "the special areas" —those areas, such as the Shan States, the Chin Hills District and the Somra tract, which are specified in Sch. 2 to the Government of Burma Act—but I need not examine this particular legislative power of the Governor because the question of these special areas does not arise in this case. In regard to the remainder of the territories in Burma which are vested in His Majesty, the Governor is given legislative powers of his own, which are quite distinct from the legislative powers given to the Burma Legislature. The Governor is given, under Ss. 41 and 42, Government of Burma Act, the power to promulgate Ordinances, and under S. 43 the power to enact what are called "Governor's Acts." These two powers are quite distinct. I need not consider the latter of them—an example of which is the Defence of Burma Act, 1940, which was considered by a Bench of this Court earlier this week in Cri. Revision No. 340B of 1940[15] as no question about it arises in this case, but the Governor's powers in regard to promulgating Ordinances require a somewhat careful examination.

The Ordinances which the Governor is given power to promulgate fall into two distinct classes, the one under S. 41 and the other under S. 42. In order to appreciate the Governor's legislative powers as conferred by these two sections it is necessary to understand his position in the constitution of Burma, so far as the executive is concerned as the extent of his legislative powers under part 4 of the Act is closely linked with his executive and administrative powers under part 2. The constitution of Burma is to be found in the Government of Burma Act, 1935, as amended two or three months ago by the India and Burma (Emergency Powers) Act, 1940. The recent amendments to the principal Act, which are designed to meet present war time conditions, do not, however, affect this case.

By S. 2 (1), Government of Burma Act, all rights, authority and jurisdiction theretofore belonging to His Majesty which appertain to Burma are exercisable by His Majesty except in so far as may be otherwise provided by or under that Act, or as may be otherwise directed by His Majesty. By S. 3 (1) of the Act the Governor of Burma is appointed by His Majesty by a Commission under the Royal Sign Manual and has all such powers and duties as are conferred or imposed on him by or under that Act, and such other powers of His Majesty as His Majesty may be pleased to assign to him. The executive functions of the Governor of Burma fall into two main classes : those which he is, by or under the Government of Burma Act, required to exercise in his discretion (which may be conveniently called his "discretionary functions") and his remaining functions under the Act, which I will call his "non-discretionary functions". The discretionary functions of the Governor are, in the main, specified in S. 7 (1), Government of Burma Act. I say "in the main" because other discretionary functions are specified in other sections of the Act, as, for example, in S. 6 (5), which provides that the functions of the

15. *Reported in* ('41) 28 A I R 1941 Rang 1, S. K. Roy Chowdhury v. The King.

Governor with respect to the choosing and summoning and the dismissal of ministers shall be exercised by him in his discretion. The discretionary functions specified in S. 7 (1) are defence, ecclesiastical affairs, the affairs of what I have called above "the special areas", the control of monetary policy, currency and coinage, and with respect to external affairs. Section 7 (2) of the Act provides that, to assist the Governor in the exercise of these discretionary functions, he may appoint not more than three counsellors.

Now as regards the non-discretionary functions of the Governor: S. 5 (1) of the Act provides that there shall be a council of not more than ten ministers to aid and advise the Governor in the exercise of his non-discretionary functions. Section 9 (1) of the Act enables His Majesty, on the recommendations of the Secretary of State and in pursuance of an address presented to His Majesty by both Houses of Parliament, to issue instructions to the Governor. Pursuant to an address so presented to him, His Majesty has in fact issued instructions to the Governor, which are incorporated in what is known as the instrument of instructions, Cl. 8 of which specially enjoins the Governor to be guided by the advice of his Ministers in relation to his non-discretionary functions. The result is that, in exercising his discretionary functions, the Governor can, if he so decides, do everything himself—he need not appoint any Counsellors, and, even if he does, he need not follow his or their advice—but in exercising his non-discretionary functions the Governor must not only choose and summon a Council of Ministers but must be guided by their advice. As the Governor's functions with regard to defence, ecclesiastical affairs, monetary policy and the other matters mentioned in S. 7 (1) are his discretionary functions, it follows that these subjects are outside the sphere of the Council of Ministers. I have indicated the two main divisions of the Governor's executive authority, but S. 8, Government of Burma Act, remains to be considered. That section gives the Governor certain special responsibilities, and if, and in so far as, any special responsibility of the Governor is involved S. 8 (2) requires him, in the exercise of his functions, to exercise his individual judgment as to the action to be taken. The principal matters which are thus made the special responsibilities of the Governor—or perhaps I should say "some of the matters", for the Governor's special responsibility is equal as regards them all—are the prevention of any grave menace to the peace or tranquillity of Burma, the safeguarding of the financial stability and credit of the Government of Burma, the safeguarding of the legitimate interests of minorities, and restrictions on discrimination. In regard to these matters the Governor is given special responsibilities, and in regard to the exercise of his functions, so far as the special responsibilities are involved, he must exercise his individual judgment. There are certain other matters about which the Governor is required to exercise his individual judgment (*see*, for example, Ss. 12 and 13 of the Act), but I need not detail these other matters in this judgment.

The great importance of these special responsibilities not only emerges from S. 8 (1) of the Act but is also specially emphasised by the proviso to S. 5 (1) which says that nothing in that sub-section, namely sub-s. 5 (1) of S. 5 (which is the sub-section which brings into being the Council of Ministers) shall be construed as preventing the Governor from exercising his individual judgment in any case where he is by or under the Act required so to do. The paramount importance of the Governor's special responsibilities is recognized by His Majesty in Cl. 8 of the Instrument of Instructions, which expressly lays it down that the Governor shall not be guided by the advice of his Ministers—in other words he must over-ride their advice—if in his opinion so to be guided would be inconsistent with the fulfilment of any of his special responsibilities, in which case, so the Instrument of Instructions directs, the Governor shall, notwithstanding his Ministers' advice, act in such manner as to his individual judgment seems requisite for the due discharge of his special responsibilities. Again, although, in so far as the Governor is by or under the Government of Burma Act required to act in his discretion or exercise his individual judgment, he is under the general control of, and is required to comply with such particular directions, if any, as may from time to time be given to him by the Secretary of State, yet, by S. 10 (2) the Secretary of State is required, before giving any directions to the Governor, to satisfy himself that nothing in such directions requires the Governor to act in any manner inconsistent with any instrument of Instructions; and, as the Instrument of Instructions as I have already pointed out, ... preserves the Governor's special responsibilities, so equally, the superinten-

dence of the Secretary of State over the Governor cannot encroach upon these special responsibilities which have been imposed upon him by the Imperial Parliament. This consideration of the Governor's executive functions is necessary for an appreciation of the true meaning and effect of Ss. 41 and 42 to which I referred earlier in this judgment and to which I will now return.

Section 41, Government of Burma Act, gives the Governor power to promulgate ordinances only when the Legislature is not in session. At any time when the Legislature is not in session the Governor may, if satisfied that circumstances exist which render it necessary for him to take immediate action, promulgate such ordinances as the circumstances appear to him to require. There is no limitation regarding the subjects or matters about which the Governor may promulgate ordinances under S. 41, that is to say, when the Legislature is not in session. Now I turn to S. 42. That section gives the Governor power to promulgate ordinances at any time, that is to say, at any time whether the Legislature is or is not then in session, but the Governor's power to promulgate ordinances under S. 42, that is to say, when the Legislature is in session, is limited. He only has such power when he is satisfied that circumstances exist which render it necessary for him to take immediate action for the purpose of enabling him satisfactorily to discharge his functions in so far as he is by or under the Government of Burma Act required in the exercise thereof to act in his discretion or to exercise his individual judgment. It is then, and then only, that he may promulgate such ordinances as in his opinion the circumstances of the case require. So that his power is limited, when the Legislature is in session, to promulgating ordinances, to put it in another way, either (a) in respect of matters outside the sphere of the Ministers, or (b) in respect of matters within that sphere but as ragards which the Governor's special responsibilities require him to override their advice, or (c) in respect of the other matters about which he is required by the Act to exercise his individual judgment. Sub-s. (5) of S. 42 provides that the functions of the Governor under S. 42 are to be exercised by him in his discretion.

Now in this particular case the Governor promulgated the second ordinance under S. 42. As the Legislature was then in session he had no power to promulgate an ordinance under S. 41. The question therefore is whether (a) the subject-matter of the second ordinance was concerned with one of the discretionary functions of the Governor, or with one of his special responsibilities, or with one of the other matters about which he is required to exercise his individual judgment; or (b) whether, on the other hand, it was concerned with a matter which was one entirely for the Ministers. It is said on behalf of the plaintiff that the second ordinance was concerned with a matter of defence, which is the first of the discretionary functions of the Governor which are mentioned in S. 7 (1), Government of Burma Act. That is the only ground put forward by the plaintiff for saying that the second ordinance was within the legislative powers of the Governor, and it appears to me that that was the only ground which could be advanced in this particular case. If the subject-matter of the second ordinance was a matter of defence, then the Governor had power to promulgate it.

Now what did the second ordinance provide? It provided that members of the House of Representatives should not be disqualified for being members of the House if they held commissions in His Majesty's forces. Can it be said that that was a matter of defence? I do not think that it can. Even if there had been no second ordinance, Members of the House of Representatives would have been perfectly free to join His Majesty's forces and to be granted commissions therein. It may be that, if a member were granted a commission, he would thereupon lose his seat in the House of Representatives, but there is no legal bar which prevents him from joining His Majesty's force. He would perhaps be penalised for, but would not be prevented from, being granted a commission, if "penalised" is the right word to use; the penalty would merely be the loss of his seat. His Majesty is not prevented from utilizing his services in the defence of Burma, although his constituents lose the benefit of being represented by him in the Legislature. The latter may be an unfortunate matter for the electors, but I do not think that it is a matter of defence. The electors can choose someone else. It is not, and, indeed, could not be, suggested that this matter was one concerning which the Governor had a special responsibility under S. 8, Government of Burma Act. The result, therefore, is that the subject-matter of the second ordinance was in my judgment concerned with something which was a matter entirely for the Ministers. Accordingly, in my opinion, the Governor had no power

to promulgate the second ordinance, as the Legislature was then in session.

But it is said on behalf of the plaintiff that it is not for this Court to say whether the second ordinance is valid or not—that this Court cannot go into that question—on the ground that if the Governor says in an ordinance that he makes it under S. 42 — as is in fact stated in the second ordiance—that concludes the matter; if the Governor says he makes it under S. 42, that means that he has decided that its subject-matter properly brings it under S. 42, and this Court cannot enquire whether its subject-matter does or does not come within the purview of S. 42. It is contended on behalf of the plaintiff that the position is governed by S. 5 (3), Government of Burma Act. That sub-section says that the decision of the Governor in his discretion shall be final if any question arises whether any matter is or is not a matter in respect of which the Governor is by or under that Act required to act in his discretion or to exercise his individual judgment. For the Speaker it has been suggested that this sub-s. (3) means that if any question arises whether any matter is (a) one about which the Governor is required to act in his discretion or (b) is one about which he is required to exercise his individual judgment, then the decision of the Governor in his discretion is final.

I do not think that that reading of the sub-section is right. I think that the correct reading is this. If any question arises whether any matter (a) is a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment, or (b) is not a matter as respects which the Governor is by or under the Act required to act in his discretion or to exercise his individual judgment — then the decision of the Governor in his discretion is final. But whether that reading of mine is right or wrong, it appears to me that S. 5 (3) only applies in regard to questions arising as between the Governor and his Ministers. Suppose the Governor says to his Ministers that in his opinion a particular matter about which it is necessary to take executive action (and which is admittedly not one of the Governor's special responsibilities) comes within the purview of his discretionary functions, and suppose the Ministers say that it is a non-discretionary function, and that accordingly the Governor must follow their advice. In such a case the decision of the Governor in his discretion would settle the question. That would be a case within S. 5 (3) of the Act. My interpretation of the Act is that that sub-section only applies as between the Governor and the Ministers in regard to administrative matters. For observe: In the first place it is a sub-section of the section (S. 5) which creates the Council of Ministers; next, S. 5 is a group of sections with the sub-heading "administration"; thirdly, that sub-heading itself comes under the main heading "the executive," which constitutes PART II of the Act. Section 5 (3) is quite distinct from, and in my opinion has nothing whatever to do with the Governor's legislative powers which are specified in a sub-part ("Legislative powers of Governor") of PART IV ("Legislative") of the Government of Burma Act. In my judgment this Court is not precluded from enquiring whether an ordinance promulgated by the Governor under S. 42 is or is not within his powers. Sub-section (4) of S. 42 makes it clear that the Court can go into the question whether any provision of an ordinance promulgated under S. 42 is or is not void, on the ground that such provision, if it had been enacted in an Act of the Legislature, would not have been valid. So that, in the absence of any restraining provision in PART IV of the Act, I do not feel any difficulty about examining the provisions of an ordinance promulgated under S. 42 with a view to seeing whether or not it comes within the limited terms of S. 42 (1). In this connexion the following words of Lord Selbourne, when delivering the judgment of the Judicial Committe of the Privy Council in 5 I A 178[16] at pages 193 and 194, afford support for the view which I have taken of this matter :

> The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers .... The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question, and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted.

The Burma Legislature has, according to my construction of the Government of Burma Act, been given the exclusive right, while the Legislature is in session, to legislate on certain matters, and the subject-matter of the second ordinance is one of them. It is not, in my opinion, possible to say that this Court is exceeding its powers

16. ('79) 4 Cal 172 : 5 I A 178 : 3 C L R 197 : 3 Sar 834 (P C), Emperor v. Burah.

when it enquired into the question whether the subject-matter of a certain piece of legislation is one which lies within the exclusive legislative power of the Burma Legislature or whether it is one within the legislative powers of the Governor. I hold that this Court has jurisdiction to go into that question, and, having gone into that question, I have come to the conclusion, for the reasons which I have already given, that the second ordinance was beyond the legislative powers of the Governor and so was void and of no effect. But the matter does not rest there, for, a further point is raised in connexion with the second ordinance, namely, that (even if I cannot go into the question whether the Government had power to promulgate it, or if I can go into that question and decide that he did have such power) yet, by reason of S. 42 (4), Government of Burma Act, the second ordinance is void so far as, and because, it contains a provision which would not have been valid (for the reason that it infringed the terms of S. 33 or S. 34 of the Act) if it had been enacted in an Act of the Legislature — because, in other words, it had retrospective effect.

There is however, a preliminary point on this question which I must first decide. If the second ordinance was promulgated on 29th March, then it would be possible to say, on the authority in (1879) 4 Q B D 230,[14] —and see also 46 MAD 685[13]—that the second ordinance was not invalid as having retrospective effect merely because it was promulgated after the first ordinance ceased to operate. But it is only possible to say that if the second ordinance was promulgated on 29th March; if it was promulgated after 29th March it would mean that it purported to have retrospective effect, and on that ground and to that extent its validity might be assailed. In my judgment the second ordinance was not promulgated on 29th March, but on 30th March. "Promulgation" of an ordinance without doubt connotes the fact of making the public aware of the existence of the new law. In this country, as in India and elsewhere, promulgation of a new law takes place through the medium of the official gazette. It is in my judgment wrong for the notifications which appear in the Burma gazette when an ordinance is first published therein to say, as they do: "The Governor has promulgated the following ordinance"; to my mind they should say "The Governor hereby promulgates the following ordinance." In the case of the second ordinance it was not published in the Burma Gazette till 30th March, and I hold that that was the day on which it was promulgated. I am not prepared to accept the suggestion that it was promulgated on 29th March when the Speaker read out to the House of Representatives the terms of a typed copy document handed to him by the Premier. I think that the official print of the second ordinance published by the Government Press (which is the equivalent in this country of a King's Printer's copy of an Act of Parliament in England) is quite right in stating, as it does, that it was promulgated on 30th March. As I hold that that was the date on which the second ordinance was promulgated it must now be considered whether (even if the Governor had power to promulgate an ordinance under S. 42 on this subject), the second ordinance is not invalid so far as it purports to have retrospective effect. This point, with which I am now about to deal, was in my opinion, if I may say so, particularly well argued by Mr. Basu. The material words of the second ordinance are to be found in S. 2, which reads thus:

> A person shall not be disqualified nor shall be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legislature by reason only that as a member of any of His Majesty's forces he holds or has held any office of profit under the Crown.

The grounds for this further objection to the second ordinance can, I think, be stated quite shortly. Section 24 (2) (a), Government of Burma Act, says in clear terms that if a member becomes subject to any disqualification mentioned in S. 25 (1) his seat shall thereupon become vacant. Section 25 (1) (a) says that a person shall be disqualified for being a member if he holds any office of profit under the Crown in Burma other than an office declared by Act of the Legislature not to disqualify its holder. The use of the past participle of the verb "declare" is important. Reading the two sub-sections together it is clear to me that the result is that, if the particular office of profit of which a member becomes the holder, has not already been declared not to disqualify its holder, then the seat thereupon becomes vacant. To my mind nothing could be clearer. A vacant seat can only be filled in accordance with the provisions of S. 17 (3) of the Act. Section 34 (b) (ii) of the Act expressly deprives the Legislature of power, except in so far as expressly permitted by the Act, to make any law amending any provisions of the Act. An Act of the Legislature, the effect of which is to provide that

a member whose seat has become vacant under the Government of Burma Act shall nevertheless be restored to his former seat, which is then vacant—such an Act to my mind amends the provision of the Government of Burma Act, and as I cannot find any express provision in that Act permitting the Burma Legislature so to amend the Government of Burma Act, it is beyond the powers of the Burma Legislature to enact such an Act. Having regard to the terms of S. 24 (2) the only meaning which I can assign to S. 25 (1) (a) is that if an office of profit is not to disqualify its holder it must have been so declared before the time comes when the seat would, but for such a declaration by the Burma Legislature, have become vacant. Now S. 42 (4) limits the legislative powers of the Governor under S. 42 to the same extent as S. 34 (b) limits the legislative powers of the Burma Legislature. If the Burma Legislature could not have made a law in the terms of the second ordinance containing such terms, then the Governor could not promulgate an ordinance, and in this respect it matters not whether the ordinance is promulgated under S. 41 or under S. 42, for S. 41 (3) is in the same terms as S. 42 (4).

I must therefore hold that on any view of the matter, at any rate the provision of the second ordinance which purported to restore the plaintiff to the seat which he occupied, up till the time when the first ordinance ceased to operate, is void. I now come to the Burma Legislature (Removal of Disqualifications) Act—Act 12 of 1940. It is said on behalf of the speaker that I need not consider that Act, because it only received the Governor's assent after the speaker had given his decision. But the plaintiff is claiming, inter alia, a declaration that he was at the time he instituted this suit, which is after Act 12 of 1940 came into force, a member of the House of Representatives. If Act 12 of 1940 restored him to his original position as a member, then I shall have to consider whether or not to grant him the declaration for which he asks. Therefore in my view I must necessarily deal with Act 12 of 1940. The terms of S. 2 of that Act are identical with the terms of S. 2 of the second ordinance. For reasons similar to those which I have just given for holding that the second ordinance was invalid, under S. 42 (4), Government of Burma Act —for similar reasons which I need not restate, I hold that, in so far as Act 12 of 1940 purported to restore the plaintiff to the seat which had already become vacant, it infringed the provisions of S. 34 (b) and at any rate to that extent was invalid. It is unnecessary for me to decide, and I do not decide, whether it is possible to say that the words "nor shall be deemed ever to have been disqualified" in S. 2 of Act 12 of 1940 can be passed over so that the Act is valid as regards all its other provisions. On this point argument can, I think, be adduced on both sides.

The result is that in my judgment neither the second ordinance or Act 12 of 1940 restored the plaintiff to his membership of the House of Representatives. I hold that his seat became vacant when the first ordinance ceased to operate and has been vacant ever since. He cannot, therefore, possibly have a declaration that he was a member when he instituted this suit, namely on 25th April last. As that is the only relief which he seeks as against defendant 2, I need say nothing about those points which were raised by Mr. Basu on behalf of defendant 2 which were additional to those raised on behalf of the speaker and which were peculiar to the case of defendant 2. The suit against defendant 2 fails and as against him it is dismissed with costs. Bearing in mind the fact that the two cases were heard together, but also bearing in mind the importance of this case and the amount of work which has obviously had to be done by the advocates, I fix an advocate's fee, for defendant 2, of twenty gold mohurs for the first day, twelve gold mohurs each for the second, third, fourth, fifth and seventh days, eight gold mohurs for the sixth day (which was not a full one) and three gold mohurs for to-day. I have not quite finished with the case against the Speaker, for the plaintiff also seeks as against him (a) a declaration that he (the Speaker) had no power to determine the matters disposed of by him in his "ruling," as it is called, of 2nd April, and that his findings are of no force or validity, and (b) an injunction to restrain the speaker from inter alia, interfering with the exercise by the plaintiff of his rights, duties or privileges as a member of the House of Representatives. This last-mentioned relief, the injunction, cannot possibly be granted as I hold that the plaintiff is no longer a member of the House of Representatives. With regard to the claim for the declaration which I have just mentioned it is true that I have held that the Speaker had not power to determine this matter and that his "ruling" is of no effect,

but apart altogether from the question whether S.42, Specific Relief Act, entitles me to grant the plaintiff this declaration in such terms as he seeks, about which I am not at all sure, I would not be prepared in the present case to exercise my discretion and grant the plaintiff such a declaration — for it is undoubtedly a matter of discretion under S. 42 — even if I had the power to do so, for the simple reason that, as I have held that the plaintiff's seat did become vacant, it follows that I think that the speaker's decision was a correct one as regards the plaintiff although he had no power to give that decision which is accordingly of no force or validity.

In these circumstances it would to my mind be of no use to the plaintiff for me to grant him such a declaration, and I would not be prepared to exercise my discretion and do so. As, for the reasons given, I am not prepared to grant the plaintiff any of the reliefs which he seeks from defendant 1, the suit must also be dismissed as against that defendant as well as against defendant 2. Mr. Kyaw Din has informed me, at the Bar, that the Government has been, and is, responsible for conducting the case on behalf of the Speaker and that he (Mr. Kyaw Din) is retained by the Government to act on behalf of the Speaker—and, incidentally, that the Advocate-General would himself have appeared before me to argue the case, had it not been that he felt that he might find himself in an embarrassing position having regard to the fact that he, the Advocate-General, had spoken fully on the subject in the House of Representatives — and Mr. Kyaw Din also informed me that he was instructed not to ask on behalf of the speaker for cost against the plaintiff in the event of the suit being dismissed. There will accordingly be no order for costs in favour of defendant 1.

I have every sympathy with the plaintiff. The whole trouble has been brought about by the Government's omission, for a reason not disclosed to me — and indeed it was not necessary that it should be—to see that the Burma Legislature (Removal of Disqualifications) Ordinance, 1940, as passed by the Senate, was not passed through its remaining stages before the first ordinance ceased to operate. I cannot, however, allow my sympathy for the plaintiff to affect in any way my judgment on the legal issues which have fallen for my decision. The suit is dismissed.

D.S./R.K. *Suit dismissed.*

*** A. I. R. 1941 Rangoon 22**

BAGULEY J.

U Po Hlaing and another — Applicants

v.

Daw Ngwe — Respondent.

Civil Revn. No. 378 of 1938, Decided on 28th February 1939, from order of Dist. Court, Yamethin at Pyinmana, D/- 25th October 1938.

(a) Civil P. C. (1908), S. 115 — Ignoring or failing to grasp essentials of reported ruling of High Court is material irregularity.

The ignoring of a reported ruling of the High Court, or complete failure to grasp its essentials, must be taken as material irregularities. [P 23 C 2]

(b) Arbitration — Dispute about inheritance referred to arbitration by some heirs only—Award cannot be set aside so far as they are concerned.

The mere fact that all the heirs did not join in the reference to arbitration of a dispute about inheritance is no ground for upsetting the award so far as those people who made the reference are concerned: A I R 1925 P C 216, *Rel. on.* [P 24 C 1]

* *(c) Arbitration — Reference to number of arbitrators — Evidence recorded by some — Award sent to absentee arbitrator and he getting acquainted with evidence—Award is not invalidated.*

It is true that when arbitrators are appointed they are supposed to act together, but it is not absolutely essential that all the arbitrators should be present when all the evidence is recorded provided all the arbitrators are made acquainted with the evidence that has been recorded before they come to their decision. There is nothing illegal or contrary to the principles of natural justice in this. [P 24 C 1]

Hence where reference is made to a number of arbitrators and some of them record evidence and then the award is sent to the absentee arbitrator who gets himself acquainted with the evidence the award is not invalidated. [P 24 C 2]

Basu — for Applicants.

Guha — for Respondent.

Order.—This application arises out of an application to file an award under para. 20 of Sch. 2, Civil P. C. The facts of the case are that one Daw Thaung died leaving a son, three daughters and three grand-children by another son Po Saing who predeceased her. It would appear that there were certain admitted immovable properties left by Ma Thaung and these were partitioned among the heirs. After this had been done U Po Hlaing, the surviving son, and Maung Phye (a) Maung Thu Daw, one of the grand-children who seems to have been representing his brother and sister throughout, claimed that Ma Thaung had left some jewellery and cash in addition to the landed property which had been divided up. Daw Ngwe said that Ma Thaung had left nothing more. Her two sisters agreed with her, and executed a deed in

which they waived all claims to any further property against Daw Ngwe in whose hands it would seem the gold and cash, if it existed, must be. Then U Po Hlaing, Maung Phye and Daw Ngwe referred the question of the *atwin* property to arbitration, and four arbitrators were appointed. The deed of reference is simple. The parties agreed to obey what the arbitrators decided on the matters in dispute about inheritance. One of the arbitrators, U Tha Hlaing, was sick at the time; so the other three recorded statements of witnesses in his absence. They then wrote an award which is in the form of a judgment giving a gist of the evidence recorded at the hearing. I have checked the award with the witnesses' statements, and the award does set out the salient points of the evidence, and in fact I have seen worse judgments written by Courts. This was taken to the other arbitrator who read through it, thereby making himself acquainted with the evidence, and he signed it as he regarded it as reasonable. This is the award which the plaintiffs seek to have filed. Ma Ngwe objects. The written statement seems to have been drawn up not with regard to the facts of the case but with regard to sch. 2, Civil P. C. Every possible objection that can be raised has been raised, and the Judge of the trial Court framed seven issues. He first deals with issue 4, whether the arbitration was revoked and, if so, could a valid award be passed. This is a question of fact and he answers it in the negative. He next deals with issue 5, whether three out of five heirs could make a valid reference. He quotes no authority but says that it is not incompetent for the remaining heirs to refer the matter to arbitration. He then deals with issue 6, whether failure of one of the arbitrators to participate in the proceedings invalidates the award. After quoting 12 RANG 128[1] and 7 RANG 715[2] he comes to the conclusion that the arbitrators in the present case had violated the fundamental principles of arbitration by proceeding in the absence of the fourth arbitrator. He therefore dismissed the suit.

An appeal was filed and the learned District Judge deals with the question of whether failure of one of the arbitrators to participate in the proceedings invalidates the award. The learned District Judge refers to (1897-01) 2 U B R 14[3] and 1 Rang 15,[4] and agrees with the view taken by the trial Court that the arbitrators had violated the fundamental principles of arbitration and are guilty of misconduct. He then goes on to say that the case would in any event have to be dismissed because all the heirs had not joined in the reference to arbitration; so on that ground also the case must fail. The plaintiffs come to this Court in revision. This is a revision matter, but it has been held more than once that the ignoring of a reported ruling of this High Court, or complete failure to grasp its essentials, must be taken as material irregularities, and it seems to me that in this case both the lower Courts have done this. With regard to all the heirs not having joined in the reference to arbitration, there is a very well known case which, I should think, every Court in Burma knew, namely what is known as *the Kirkwood case* which has produced more than one ruling from the Privy Council already. The present case I refer to is 5 Rang 186.[5] This was a dispute with regard to the division of two estates which began with a reference to arbitration. A reference to page 191 shows that the submission to arbitration was executed by certain adults and by certain unauthorized guardians of some minor heirs, and it was not disputed that the persons who purported to act for the minors had no authority to do so. The actual reference therefore was by some only of the heirs. Nevertheless their Lordships did not say immediately that the reference to arbitration must have been bad. On p. 201 is the passage :

> There remains, however, the important question whether the award of 10th June 1910, having been set aside as regards the two minors, ... it should in addition be set aside in its entirety.

After dealing with the facts, on p. 203 it will be seen that the trial Court found that the award was void with regard to all the parties and must be set aside in its entirety, but on appeal the Chief Court took a wholly different view. In the next page occurs the passage :

> The major parties to the reference in the award acted with their eyes open and with full knowledge of what they were doing. . . . . there is no ground for holding that they should be relieved of the result of their considered action and their binding agreement to refer.

And their Lordships of the Privy Council dismissed the appeal against that order. It

1. ('34) 21 A I R 1934 Rang 24 : 149 I C 1083 : 12 Rang 128, Bagaya Sayadaw v. U Paduma.
2. ('30) 17 A I R 1930 Rang 186 : 121 I C 801 : 7 Rang 715, Ma Sin v. Ma Pu.
3. ('97-01) 2 UBR 14, Ma Mi Tu v. Maung Naing.
4. ('23) 10 A I R 1923 Rang 187 : 74 I C 6 : 1 Rang 15, U Gunawa v. U Pyinnyadipa.
5. ('25) 12 A I R 1925 P C 216 : 89 I C 773 : 5 Rang 186 : 52 I A 265 (P C), Kirkwood v. Maung Sin.

seems therefore manifest that the mere fact that all the heirs did not join in the reference is no ground for upsetting the award so far as those people who made the reference are concerned. Next with regard to the award itself, I am fully aware that when arbitrators are appointed they are supposed to act together, but I do not think that it is absolutely essential that all the arbitrators should be present when all the evidence is recorded provided all the arbitrators are made acquainted with the evidence that has been recorded before they come to their decision. There is nothing illegal or contrary to the principles of natural justice in this and it is often expressly provided for, as in the case of an election petition with which I had to deal recently in which the rules lay down that one of the Commissioners may be sent out to record evidence by himself if all the Commissioners are unable to make the necessary journey. But it must be shown that all the arbitrators are made acquainted with that evidence, and for that reason I have had to check the record of the evidence with the resume of it which appears in the award, and although it has not been proved that the absent arbitrator read the evidence in full, it is proved that he read through the award which contains a digest of it. It is argued that the arbitrators never met together for discussions. This seems to me to be true, but they all took the same view of the evidence.

The rulings which are quoted in the judgment are not really to the point. In 7 RANG 715[2] only three of the four arbitrators signed the award and they never met together for discussion. One of the arbitrators objected to the award and if they all had a discussion together he might have been able to persuade his colleagues to come round to his view. But I cannot understand how four men who all think alike must be required to discuss matters, for they will presumably only confirm each other's opinion. 12 RANG 128[1] referred to quite a different state of affairs. Five arbitrators were appointed by the Court and were ordered to sit together. Four of them acted in the absence of the fifth. Obviously it was misconduct for them to ignore the direct orders of the Court which appointed them. My attention has been drawn to a Single Judge ruling of the Madras High Court, 12 MAD 113.[6] This is a ruling of a Single Judge. It is under S. 531 (a) of the old Civil P. C., and decides apparently on the basis of some unreported second appeal of the Madras High Court. I am unable to hold it as a binding authority.

The lower Courts seem to me to have taken rulings on totally different facts and applied them to this case. This is more than a mere error of law. After considering the law applicable a failure to grasp the real point in issue is, in my opinion, a material irregularity, and for that reason this Court can interfere in revision. I hold that this award, if good in other respects, will bind the people who signed the reference to arbitration. I also hold that this is a good award of all the arbitrators in view of the fact that they were all made acquainted with the material parts of the evidence and all came to the same conclusion. I set aside the order of the lower Appellate Court confirming the order of the trial Court which dismissed the suit. I am however not able to pass final orders because the trial Court did not deal with the other issues in its judgment at all. I therefore set aside the decree of the lower Appellate Court and send the case back to the trial Court for disposal on the other issues. All costs hitherto to be costs in the case as ultimately decided.

D.S./R.K. *Decree set aside.*

6. ('89) 12 Mad 113, Thammiraju v. Bapiraju.

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ROBERTS C. J. AND BLAGDEN J.

Thaivanai Achi — Appellant

v.

O. R. M. P. R. M. Ramanathan Chettyar and others — Respondents.

Civil Misc. Appeal No. 80 of 1939, Decided on 26th March 1940, against order of Dist. Court, Tharrawaddy, D/- 6th December 1939.

(a) Burma Insolvency Act (1920), Ss. 4 and 75 — Decision under S. 4 is appealable under Section 75.

The words "any such person aggrieved" in S. 75 (2) mean any person aggrieved having regard to the wording of S. 75 (1) and the words "such decision" in S. 75 (2) clearly refer to such decision as is specified in Sch. 1 and Sch. 1 in its turn names a decision under S. 4 as decision which is appealable within the meaning of the section. Consequently an appeal from a decision under S. 4 is competent under S. 75. [P 25 C 1]

(b) Civill P. C. (1908), O. 1, R. 8 — Representee made party to suit — Suit dismissed — Matter becomes res judicata.

Once a representee has been made a party to the suit under O. 1, R. 8 it cannot be dismissed without his being heard, if it is dismissed the matter will become res judicata. [P 25 C 2]

(c) Civil P. C. (1908), O. 1, R. 8 — Representative suit under O. 1, R. 8 dismissed at

instance of representor — Dismissal is not res judicata against representee not made party to suit.

Where a representor in a suit under O. 1, R. 8 chooses for reasons of his own without the knowledge and concurrence of the representee who was not made a party to the suit to abandon his suit and the suit is dismissed at his instance the representee who was not made a party to the suit can bring another suit in respect of the same subject-matter. The doctrine of res judicata has no application. Although the representance is bound by a final decision, it is only by the result of litigation that he becomes bound, "the decision" means a decision by a Judge who is trying the case and not a decision by one of the parties to pursue the matter no further : (1908) 2 Ch D 652; 21 All 505 (P C); (1865) 18 C B (N S) 255, *Rel. on;* 13 M I A 160 (P C) and 12 Cal 563, *Disting.;* AIR 1933 P C 183, *Expl.* [P 25 C 2; P 26 C 1]

V. S. Venkatram — for Appellant.

P. K. Basu — for Respondent 1.

Roberts C. J. — This is an appeal from an order of the learned District Judge of Tharrawaddy who had before him a petition under S. 4, Burma Insolvency Act, and the first point which was raised before us was that no appeal lay in respect of an order so made. In my opinion that contention is ill founded. Under S. 75, sub-s. (2), Burma Insolvency Act,

> any such person aggrieved by any such decision or order of a District Court as is specified in Sch. 1, come to or made otherwise than in appeal from an order made by a subordinate Court may appeal to the High Court.

The words "such decision" clearly refer to such decision as is specified in Sch. 1 and Sch. 1 in its turn names a decision under S. 4 as decision which is appealable within the meaning of the section. The words "any such person aggrieved" appear to mean any person aggrieved having regard to the wording of S. 75, sub-s. (1) which says :

> The debtor, any creditor, the receiver or any other person aggrieved by a decision come to ..... may appeal to the District Court.

But this is a case which falls within the ambit of sub-s. (2), because it is a decision such as is specified in Sch. 1 made otherwise than in an appeal from an order made by a subordinate Court.

The main question which we have to decide relates to the position of a person who is a member of a class in respect of whom a representative suit has been brought within the meaning of O. 1, R. 8. By leave of the Court a person may represent the whole of such a class and notice of the institution of the suit must then be given to every member of it. Such members of the class who may be termed representees are not parties to the suit unless they apply to be made parties which they are at liberty to do under sub-r. (2) of R. 8 which reads :

> Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-r. (1) may apply to the Court to be made a party to such suit.

And it is conceded by Mr. Basu that once a person has been made a party to the suit —and it cannot be dismissed without his being heard — if it is dismissed the matter will become res judicata. But in this instance a suit was brought by one S. P. L. Subbiah Chettiar on behalf of respondent 1 among others; respondent 1 was served with a notice of the suit, but was not made a party thereto; and the question now is the suit having been dissmissed at the instance of the representor plaintiff who brought it whether respondent 1 can bring another suit in respect of the same subject-matter. In (1908) 2 Ch D 652[1] at page 659, Lord Cozens-Hardy, then Master of the Rolls, said :

> This is a representative action in which a judicial decision on any question of construction or other matter arising in the action will bind all the members of the class represented by the plaintiff. Rules of Court provide for this: But if the plaintiff cannot compromise without the sanction of the Court (O. 16, R. 9A), still less can he voluntarily give away any of the rights to which the persons whom he represents are admittedly entitled. He cannot elect on their behalf to take less than they are admittedly entitled to. Each individual member of the class has a separate right to elect, when the facts are known.

It appears to me that these remarks are applicable to the present case. The plaintiff in the representative action chose, for reasons of his own, without the knowledge and concurrence of respondent 1, to abandon his suit. At that stage he was voluntarily giving away some of the rights of the persons whom he was representing, if they are not to be allowed to file suits to enforce those rights. We have had our attention drawn to the case in 26 I A 175,[2] and it is noteworthy that in the speech of Lord Macnaghten he quoted with approval some observations of Willes J. In (1865) 18 C B (N S) 255[3] at p. 270, who said :

> The conditions of the exclusion of jurisdiction on the ground of res judicata are that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided.

In the present case the course of litigation was commenced, the conclusion of which would have been binding on respon-

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1. (1908) 2 Ch D 652:78 L J Ch 97: 99 L T 706:16 Manson 36, In re Calgary and Medicine Hat Land Co. Ltd.
2. ('99) 21 All 505 : 26 I A 175 : 7 Sar 538 (PC), Parsotam Gir v. Narbada Gir.
3. (1865) 18 C B (N S) 255 : 11 Jur (N S) 177 : 12 L T 143 : 13 W R 469, Langmead v. Maple.

dent 1; but the persons ceased to litigate the matter. Though it appears about to be controverted, it was not controverted, still less was it finally decided; and no conclusion was reached. Adopting therefore the standard which the learned Judge has laid down, and which has received the approval of their Lordships, I cannot find reason for saying that the doctrine of res judicata applies here. Again, in *Robert Watson and Co.* v. *Collector of Zillah Rajshahye*,[4] which was cited by Mr. Venkatram, who argued his case with great ability, the representor had litigated, whereas in the present case he abandoned litigation at some intermediate stage. And again, the dictum of Tottenham J., in *Kartick Chandra Pal* v. *Sridhar Mandal*,[5] that since the plaintiff failed to adduce evidence which it was incumbent upon them to do and the suit was dismissed it must be held to have been dismissed upon the merits, was cited. But I am of opinion that the learned Judge meant such a dismissal to apply as against a party to the suit and not a mere potential party such as respondent 1 was in the matter we are now reviewing.

Although the representance is bound by a final decision, it is only by the result of litigation that he becomes bound, and in my opinion, "the decision" means a decision by a Judge who is trying the case and not a decision by one of the parties to pursue the matter no further. Another case to which we were referred was that of *Kumaravelu Chettiar* v. *Ramaswami Ayyar*.[6] There it was decided that the decision in a former suit only operated as res judicata under certain condition. The present is a case in which there has been no decision in a former suit. Accordingly, for all these reasons, I am of opinion that the order of the learned Judge was right, although I am constrained to add that he does not give very many reasons for arriving at the conclusion which he reached, and this appeal must be dismissed with costs, advocate's fee seventeen gold mohurs.

Blagden J. — I entirely agree, although I (perhaps unnecessarily) should like to make it clear that by the reference in my Lord's and my judgment to the plaintiff in the first suit having given up the right of respondent 1 to this appeal we do not mean that he gave up the right to avoid the transfer which it is now sought to avoid; the question remains open whether he ever had that right. All that is meant is that he gave up the right to have that question judicially decided in the first suit.

G.N./R.K. *Appeal dismissed.*

4. ('67-69) 13 M I A 160 : 3 Beng L R 48 : 12 W R 43 : 2 Suther 269 : 2 Sar 500 (P C).
5. ('86) 12 Cal 563.
6. ('33) 20 A I R 1933 P C 183 : 143 I C 665 : 60 I A 278=56 Mad 657 (P C).

A. I. R. 1941 Rangoon 26

ROBERTS C. J. AND BLAGDEN J.

K. A. Ramaswamy Naidu — Appellant

v.

A. Y. Lazarus — Respondent.

Civil Misc. Appeal No. 4 of 1940, Decided on 2nd April 1940, from order of High Court in Insolvency Case No. 92 of 1937.

Presidency Towns Insolvency Act (1909) (Rangoon), Ss. 39 (1) (b) and 60 (2) — Order under S. 39 (1) (b) — Judge can add to it order under Section 60 (2).

Where a Court has suspended the discharge for a specified time, under S. 39 (1) (b) he can add to the order under S. 39 (1) (b) an appropriation order under S. 60 (2) : (1908) 98 L T 55, *Rel. on.*

[P 26 C 2 ; P 27 C 1]

Bhattacharya — for Appellant.

Dangali — for Respondent.

Roberts C. J. — This appeal must be allowed. With all respect, I feel that the learned Judge perhaps did not have put before him the provisions of S. 60, sub-s. (2), Rangoon Insolvency Act, and that the position in regard to S. 39 of the Act, was therefore rendered not quite clear. In the case before Braund J., that learned Judge did not desire to refuse the discharge, but to take one of the other two courses open to him under S. 39. And what S. 39 enacts, so far as the two kinds of suspensions are concerned, in this; either that the suspension must be for a specified time, or, if the time is left vague, the suspension may be for a period which will elapse when four annas in the rupee has been paid to the creditors. The learned Judge, in plain terms, suspended the discharge for a specified time, under S. 39 (1) (b) of the Act, and, to put the matter in common place language, the insolvent then knew, when he left the Court, that he would get his discharge within thirty months. There was therefore no vagueness in the order. At the same time, the learned Judge, acting under S. 60 (2) of the same Act, having found that the insolvent was in receipt of a salary, to which the Act applied, made an order of payment of a part of it to the official assignee. This is known as an appropriation order, and the amount ordered to be paid was Rs. 35 a month. And the learned Judge was quite within his rights

in adding to the order under S. 39 (1) (b) an appropriation order under S. 60 (2). The learned Judge took quite a different course from that which he had taken some years before in 13 RANG 355.[1] In that case the Court, on appeal, found it necessary to allow an appeal from this learned Judge, who had then said:

> . . . . . I take the view that this insolvent can and should pay twelve annas in the rupee. . . . . I shall accordingly suspend his discharge until twelve annas in the rupee is paid.

The effect of that order would be that the insolvent leaving the Court might not know when he could pay twelve annas in the rupee and it would not be an order under S. 39 (1) (b) suspending the discharge for a specified time at all, but suspending his discharge until a specified payment, exceeding four annas in the rupee, had been made, and therefore as the Court of appeal pointed out, was beyond his power. Mr. Dangali has urged upon us that the effect of the order passed by the learned Judge in the present case will be the same as that passed in 13 Rang 355,[1] because the insolvent will not get his discharge until in fact the creditors, under the appropriation order, have received more than four annas in the rupee. But the whole point of the difference is this: that in the present case the insolvent knows that he is going to receive his discharge within a specified time. The order has been made under S. 39 (1) (b), and the mere fact that the creditors are going to receive some part of their dues ought to be a matter of satisfaction rather than regret. We have had the case in (1908) 98 L T 55[2] cited to us, and there Phillimore J. said:

> There is no jurisdiction to suspend an order of discharge till two conditions have been satisfied, one of time and one of payment. There is, however, power to suspend for either, and to suspend for time and to attach conditions as to portion of the debtor's future earnings.

That is exactly what has been done here. It was a suspension for a specified time, conditions having been attached, under the provisions of S. 60 (2), Rangoon Insolvency Act, as to a portion of the debtor's future earnings, in the sense that an appropriation order under that section has been made. The object of the statute is not that insolvents should not pay a sum exceeding four annas in the rupee, but that if they do so there should be a reasonable certainty in their minds as to the date on which they will get their discharge. That certainty exists here and, for those reasons, this appeal must be allowed with costs, advocate's fee in this Court, three gold mohurs.

Blagden J. — An order suspending an insolvent's discharge for a definite time, an order suspending an insolvent's discharge until the insolvent pays four annas in the rupee, and an order of discharge conditional on judgment being entered, are each in the nature of a punishment. That is what S. 39 (1) (b), Rangoon Insolvency Act, is for. But punishment of insolvents and protection of the public against them are not the only objects of the Insolvency Act; another object is to try to secure some measure of payment to the creditors of the particular insolvent, and that is what S. 60 of the Act is for. In my opinion, the fallacy of Mr. Dangali's argument, which was both ingenious and ingenuous, is that it confuses punishment on the one hand and an attempt to secure payment on the other. A man is not punished because he is made to pay some portion of his just debts; his punishment is in so far as his discharge is suspended or refused. Here the Court imposed a particular punishment; that is not made any the worse, or made illegal, because the Court also did something else, namely, set aside a portion of the debtor's future pay for the benefit of the creditors. In these circumstances I entirely agree with what my Lord has said.

D.S./R.K. *Appeal allowed.*

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* A. I. R. 1941 Rangoon 27

SHARPE J.

U Ba Maung — Plaintiff

v.

U Chit Hlaing and another Defendants.

Civil Regular No. 104 of 1940, Decided on 23rd August 1940.

*(a) *Government of Burma Act (1935), S. 25 (1) (a) — Member resigning his appointment in Army as Second Lieutenant—He ceases to hold any office of profit even if his resignation is still subject to His Majesty's approval.*

Where a member has resigned his appointment in the Army as Second Lieutenant he is not holding any office of profit under the Crown and is therefore never disqualified for being a member of the House of Representatives even if His Majesty has not yet approved of his being given permission to resign his appointment. [P 28 C 2]

(b) Government of Burma Act (1935), S. 27 (3) — Speaker has no power to declare whether member's seat has become vacant or not.

The Speaker is subject to the jurisdiction of the High Court and he has no power to declare whether

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1. ('35) 22 A I R 1935 Rang 200 : 156 I C 982 : 13 Rang 355, Bola Ram v. Sohan Singh.
2. (1908) 98 L T 55 : 15 Manson 342 : 52 S J 192, In re Walmsley; Ex parte Bankrupt.

a member's seat has become vacant or not: A I R 1941 Rang 5, *Foll.* [P 29 C 1]

(c) Practice — Subsequent events — Incomplete cause of action cannot be completed by anything arising after action.

Nothing arising after action is brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit: A I R 1938 Rang 134, *Rel. on.* [P 29 C 2]

E. Hay, U E Maung and U Maung Maung — for Plaintiff.

Kyaw Din and P. K. Basu — for Defendants 1 and 2, respectively.

Judgment. — The facts of this case are similar to those in *U Lun* v. *U Chit Hlaing*.[1] There are however one or two slight differences, one of which is all-important. At all material times the plaintiff, U Ba Maung, was the member for Myitkyina, having been chosen at a bye-election in December 1938. He was present in the chamber when the point was first raised by defendant 2, and he, too was also present there during the discussion both on 29th March and 1st April, and also when the speaker gave his decision on 2nd April. Unlike U Lun, however the plaintiff in this suit did not speak in the chamber at any time on any of those three days, either in an attempt to defend his own position as a member or otherwise. The other difference, and the all-important one, between the facts of this case and those of *U Lun's case*[1] is that in the Burma Gazette for 13th April 1940[a] it was notified, under date 6th April, that the plaintiff in this suit, U Ba Maung, had been permitted, subject to His Majesty's approval, to resign his appointment as a Second Lieutenant in the Army in Burma Reserve of Officers, with effect from 26th March. The fact that the plaintiff had resigned his appointment on 26th March was mentioned to the speaker by the Advocate-General in the course of the latter's address on 1st April. But no mention whatever of this fact was made by the speaker in the course of giving his decision on 2nd April. The plaintiff, U Ba Maung, filed this suit on the same day that U Lun filed his. The plaints in the two suits are identical, except that the plaint in this suit includes the additional averment (in Para. 5) that the plaintiff resigned his appointment on 26th March. The two written statements in this suit are in precisely the same terms as the two written statements in *U Lun's suit*;[1] there is no additional plea in either of the written statements in this suit to meet the additional allegation in the plaint which I have just mentioned.

In my judgment the fact that this plaintiff resigned his appointment on 26th March disposes of the case. As he had resigned on that date, he was not holding any office of profit under the Crown in Burma when the first ordinance ceased to operate, and it is not suggested that he was doing so at any later date. The plaintiff in this suit was therefore never disqualified for being a member of the House of Representatives and so his seat never became vacant. Some slight argument, if I may so describe it, was addressed to me by Mr. Kyaw Din to the effect that, as the plaintiff's resignation was only permitted subject to His Majesty's approval, and as His Majesty has not yet given his approval thereto, the plaintiff's resignation is as yet of no effect. It is enough for me to say that if it was right to say in *U Lun's case*[1] that the fact that His Majesty had not yet approved his appointment as a Second Lieutenant did not prevent the appointment from being effective so far as disqualification for membership of the House of Representatives was concerned, then it is equally right to say that the fact that His Majesty has not yet approved of the present plaintiff being given permission to resign his appointment does not prevent his resignation being effective for the present purpose.

It has been said on behalf of the speaker that he was right not to rely upon the mere statement made in the chamber by the Advocate-General that the plaintiff had resigned his appointment on 26th March, and that the plaintiff ought to have substantiated in some way or another the fact of his resignation, as no notification of his resignation appeared in the Burma Gazette until 13th April, which was after the speaker announced his decision. It is not to be overlooked in this connexion that U Lun, the plaintiff in the other suit, tried to speak in his own defence, and was not allowed to do so when he wanted to. I think that, as regards this plaintiff at any rate, the speaker, having been put on notice of the position, might well have addressed some enquiry either to the plaintiff, or to the defence department, or to both, with a view to ascertaining whether what the Advocate-General had stated was correct or not; or he might have waited a short while to see if any notification on the subject appeared in the Burma Gazette, as in fact

1. *Reported in* ('41) 28 A I R 1941 Rang 5.
a. Burma Gazette, Part 1, page 435 : Defence Department Notification No. 253.

it did less than a fortnight after his decision. But the speaker did none of these things, and proceeded to give his decision, in which he did not make any reference at all to even the possibility of this plaintiff having resigned. Nor did he, after the notification had appeared in the Burma Gazette, make any statement in the chamber reviewing his decision. Incidentally, his omission to do that confirms me in my view that the speaker did in fact purport to be "the declaring authority" in this matter, for if the speaker had been legally invested with the power to declare a seat to have become vacant, he could not, as it seems to me, go back on that declaration.

In these circumstances the plaintiff was in my opinion fully justified in instituting this suit on 24th April last, at any rate as against the speaker. On that date the plaintiff was entitled to the legal character of a member of the House of Representatives of the Burma Legislature, and the speaker had denied his title to that character. For the reasons given in my judgment in *U Lun's case*[1] I am of opinion not only that the speaker is subject to the jurisdiction of this Court but also that he had no power to declare that the plaintiff's seat had become vacant. It is not suggested on behalf of the speaker that the plaintiff is able to seek any further relief than a bare declaration, except the injunction for which he also asks, and so I think that this is a proper case in which to grant relief to the plaintiff under S. 42, Specific Relief Act, 1877. The plaintiff will be granted as against defendant 1 a declaration that he (the plaintiff) was on 25th April 1940 a member of the House of Representatives of the Burma Legislature. I do not propose to grant the plaintiff a further declaration, as he asks me to do, to the effect that defendant 1 had no power to determine the matters disposed of by him in his "ruling" of 2nd April 1940 and that defendant 1's declarations and findings are of no force or validity. The plaintiff obtains all that really matters to him by being granted the declaration which I do propose to make, while I am not at all sure that the further declaration which he seeks is one which I can properly grant under S. 42, Specific Relief Act. I should be slow to grant the injunction which is asked for, because I feel sure myself that the speaker will not act contrary to the decision of this Court, but (of course subject, if he so desires, to testing the correctness of my judgment on appeal) will loyally abide by it. In fact, at the very end of the hearing of this case Mr. E Maung, on behalf of the plaintiff, said—these are the exact words :

> We have to assume that as speaker of the House of Representatives he (that is, the speaker) would show respect to the decision of this Court. We are not justified in thinking that he would flout the decision of this Court.

In these circumstances I shall not therefore grant the plaintiff an injunction. Defendant 1 must pay the plaintiff's costs. Bearing in mind the fact that the two cases were heard together, but also bearing in mind the importance of this case and the amount of preparatory work which has obviously had to be done by the advocates, I fix an advocate's fee of twenty gold mohurs for the first day, eight gold mohurs each for the second, third, fourth, fifth and seventh days of the hearing, five gold mohurs for the sixth day (which was not a full one), and two gold mohurs for to-day.

I must now deal with the position of defendant 2. Mr. E Maung, on behalf of the plaintiff, impressed it upon me, when he first opened his case, that his client was only suing defendant 2 in his capacity of a private member of the House, and not in his capacity of deputy speaker. Mr. E Maung has very frankly and properly conceded that, merely by raising this matter in the chamber in the way in which he did, defendant 2 cannot be said to have denied the plaintiff's title to his character of a member of the House of Representatives. Mr. E Maung however relies upon para. 4 of defendant 2's written statement, the terms of which are that defendant 2 "states that from the date of gazette notification plaintiff held an office of profit under the Crown." That is the only thing upon which the plaintiff relies as showing that defendant 2 has denied the plaintiff's status as a member. Even if I thought that that did in fact amount to such a denial as is contemplated by S. 42, Specific Relief Act, it would not assist the plaintiff on this point, for, as I pointed out in 1938 R L R 6[2] at p. 18 :

> Nothing arising after action brought can either create a new, or complete a then incomplete, cause of action entitling the plaintiff to any relief in that same then existing suit.

Defendant 2's statement was, naturally, filed after the suit was instituted, and so the plaintiff cannot rely upon anything in the written statement to complete his admittedly otherwise incomplete cause of action. On this ground alone the suit as

2. ('38) 25 A I R 1938 Rang 134 : 177 I C 63 : 1938 R L R 6, Smith v. Heptonstall.

against defendant 2 must be dismissed with costs, the advocate's fee to be similar to that which I have fixed as between defendant 1 and the plaintiff, and I need not go into the other defences raised by defendant 2.

D.S./R.K. *Order accordingly.*

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* A. I. R. 1941 Rangoon 30

BA U J.

Maung Thet — Applicant

v.

Maung Chit Kywe — Opposite Party.

Criminal Misc. Appln. No. 1 of 1940, Decided on 20th June 1940, for transfer of case from Township Magistrate, Madaya.

* *Criminal P.C. (1898), Ss. 190 (c), 191 and 351 — During trial of certain person another person who was present in Court detained and made co-accused — S. 351 applies — S. 191 is no bar to jurisdiction of Magistrate to try such person.*

Section 190 appears in a chapter dealing with conditions requisite for initiation of proceedings, whereas S. 351 appears in a chapter dealing with matters arising out of proceedings already initiated. After a Magistrate has taken cognizance of an offence in one of the three methods mentioned in S. 190, he gets the seisin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. Where proceedings have been instituted against certain person and during the trial of such person Magistrate detains another person and makes him co-accused, S. 351 applies to such a case and not S. 190 (c). Section 191 is no bar to the jurisdiction of Magistrate to try such person: AIR 1923 Rang 31 (F B) and (1897-01) 1 U B R Cr 56, *Rel. on.* [P 31 C 1]

K. C. Sanyal — for Applicant.

U Ni, Government Advocate — for the Crown.

Order.—This is an application for transfer of Criminal Regular Trial No. 78 of 1939 from the Court of the Township Magistrate, Madaya, to some other Court in Mandalay for trial. It arises in this way. On the report made by one Maung Chit Kywe of the loss of his boat the police arrested one Ma Ya and sent her up for trial on a charge of theft under S. 379, Penal Code. The applicant and one Maung Bo were two of the witnesses for the prosecution but they were not examined though they were present in Court. After the examination of some other prosecution witnesses the applicant and Maung Bo were detained and made co-accused; whereupon the applicant applied for adjournment of the case on the ground that he wanted to move the District Magistrate of Mandalay for transfer. The adjournment was granted and the applicant moved the District Magistrate for transfer but his application was dismissed. He therefore comes up to this Court on the following grounds: (i) That the Magistrate has no jurisdiction to try the case against the applicant and Maung Bo as he took cognizance of the offence against them under S. 190 (c), Criminal P. C.; (ii) that the Magistrate and the informant Chit Kywe are friends and that Chit Kywe has been seen going to the Magistrate's chamber during the hearing of the case.

So far as the second ground is concerned, there is, in my opinion, not only no substance in it but it appears to be a false allegation. When the applicant applied to the District Magistrate for transfer, he did so not on this ground but on the ground of want of jurisdiction on the part of the Magistrate. The applicant can therefore succeed only if he can show that the Magistrate took cognizance of the offence against him and Maung Bo under S. 190 (c), Criminal P. C. If the Magistrate took cognizance of the offence under S. 190 (c), he would, of course, have no jurisdiction to try the case in view of what S. 191, Criminal P. C., says. The Magistrate in his order by which he made the applicant and Maung Bo co-accused said that he did it in exercise of the power conferred by S. 351, Criminal P. C. The whole question that therefore arises is whether in circumstances such as these S. 190 (c) or S. 351 of the Code applies. This question was considered by a Full Bench of the late Chief Court of Lower Burma in 11 L B R 398[1] at pages 405 and 406 and Sir Sydney Robinson answered it, after quoting S. 190, as follows:

It is to be noted that the section provides that cognizance may be taken of any offence and that no reference is made to the offender. Indeed, the identity of the offender is in no way involved, for a complaint may be presented with a view to action being taken against some person or persons unknown. When therefore proceedings are initiated on a complaint, or on a police report, the Magistrate can legally take cognizance of the offence and the requirements of S. 190 of the Code are complete.

In the present case, the trial was commenced and action was taken against Chan Tha. The addition of a new accused does not, in my opinion, necessitate fresh proceedings in initiation. The evidence, it is true, must be recorded de novo, but that is merely in order that the witnesses, whose evidence has already been recorded, may be used against the new accused. The Magistrate having taking congnizance of the offence it is right and proper that he should bring to justice all those persons, whether originally mentioned or not, who, the evidence shows, were guilty of that offence. It has been held that in such cases, the Magistrate should be regarded as taking cognizance under the same clause of S. 190 as he did against the original accused; and if it were necessary to apply S. 190 at

1. ('23) 10 AIR 1923 Rang 31 : 78 I C 55 : 24 Cr L J 519 : 11 L B R 398 (F B), Nga Chan Tha v. Emperor.

all, I would hold that that is the correct view to take for the reasons that I have given above. But, in my opinion, S. 351 applies to such cases, and is intended to apply to them. The offence being one and the same, and the Magistrate, having cognizance of that offence, acting under S. 190 (b), has full seisin of the offence. He takes action on the evidence given for the prosecution to establish the offence, and there is apparently no need therefore to refer back to S. 190 at all. However this may be, if there is such necessity, there is ample authority to support the view that in this case the Magistrate was acting under S. 190 (b). I am unable to agree that there is no indication in the language of S. 351 to support the view that S. 190 applies to the initiation of proceedings and that S. 351 applies to proceedings that have already been initiated. The section distinctly refers to cases in which a trial has already been begun, and the section, as now drafted, refers to enquiries and also trials. With the exception of one case, there is no reported case that I can find that takes a different view.

The same view was held by Herbert Thirkell White J. C. (as he then was) in (1897-01) 1 U B R Cr 56.[2] I respectfully agree with these views. Looking at the positions which Ss. 190 and 351 respectively occupy in the Code, the intention of the Legislature becomes quite apparent. Section 190 appears in a chapter dealing with conditions requisite for initiation of proceedings, whereas S. 351 appears in a chapter dealing with matters arising out of proceedings already initiated. After a Magistrate has taken cognizance of an offence in one of the three methods mentioned in S. 190, he gets the seisin of the whole case and his jurisdiction to bring everybody concerned in the commission of the offence to justice is in no way restricted. Section 351, therefore provides that

(1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under chap. 18 or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

When a Magistrate detains a person under S. 351 and tries him, S. 191 is not a bar to his jurisdiction. That is exactly what the Magistrate did in this case, and the application must for these reasons be dismissed. It is accordingly dismissed.

D.S./R.K. *Application dismissed.*

2. ('97-01) 1 U B R Cr 56, Nga Paing v. Queen-Empress.

A. I. R. 1941 Rangoon 31

BA U AND SPARGO JJ.

Maung Ba Ku — Applicant

v.

The King.

Criminal Misc. Appln. No. 71 of 1938, Decided on 9th February 1939, for transfer of case.

(a) Kachin Hill Tribes Regulation (1 of 1895), (Rangoon), Ss. 8 and 9 — Regulation applies only to persons who are members of hill tribe — Application by person, not member of hill tribe, but residing in hill tracts, for transfer of case, lies to High Court and not to Commissioner of Division appointed under S. 9 — High Court has jurisdiction to deal with such application — Case is governed by Modification 11 in Schedule to Burma (Frontier Districts) Regulation, 1 of 1925.

The Kachin Hill Tribes Regulation applies only to persons who are members of a hill tribe and not to persons who, though they happen to be residing in the Kachin Hill Tracts, are not members of a hill tribe. Ss. 8 and 9 of the Regulation, therefore, only apply when the accused is a member of a hill tribe. As regards persons who are not members of a hill tribe but who are residing in the Kachin Hill Tracts, the Burma (Frontier Districts) Regulation, 1 of 1925 applies and under S. 3 of the Regulation, it is enacted that the Criminal Procedure Code shall be in force in the territories to which the Regulation applies with such modifications as are set forth in the schedule.

An application by an accused, who is residing in the Kachin Hill Tracts, but who is not a member of a hill tribe, for transfer of a case from the Court of Sessions Judge to some other Court outside the district or to some other Court of competent jurisdiction other than the Sessions Judge of Kachin Hill Tracts is governed by Modification No. 11 in the schedule and such application lies to the High Court and not to the Commissioner of the Division as the High Court appointed under S. 9 of the Kachin Hill Tribes Regulation and the High Court has jurisdiction to deal with such application : Cri. Appeal No. 176 of 1938, *Reversed.*

[P 32 C 1, 2]

(b) Burma (Frontier Districts) Regulation (1 of 1925), Schedule, Modification No. 11, proviso 3 — Scope — Proviso does not deprive High Court of power to transfer cases under S. 526, Criminal P. C.

Proviso 3 to Modification No. 11 in the Schedule to Burma (Frontier Districts) Regulation No. 1 of 1925 does not take away the power of High Court to transfer cases under S. 526, Criminal P. C.

[P 32 C 2]

K. C. Sanyal — for Applicant.

U Tun Byu, Government Advocate — for the Crown.

Spargo J. — The question that arises for decision in this case is whether the Kachin Hill Tribes Regulation (Regulation No. 1 of 1895) applies to persons who are residing in the Kachin Hill Tracts but who are not members of a hill tribe. The applicant, one Maung Ba Ku, is accused of committing

criminal misappropriation and breach of trust, the offence being said to have been committed in Sinlumkaba. He has made an application to transfer the case from the Court of the Sessions Judge of the Kachin Hill Tracts, Bhamo, to some other Court outside the District of Bhamo, or to some other Court of competent jurisdiction other than that of the Sessions Judge of the Kachin Hill Tracts. The question has arisen whether an application for transfer of such a case as this should be made to this Court or to the Commissioner of the Division as the High Court appointed under S. 9 of the Regulation. In Criminal Appeal No. 176 of 1938, Mackney J., held that :

> So far as the jurisdiction of the Courts is concerned Ss. 8 and 9 of the Regulation apply, and in deciding which Courts have jurisdiction it is immaterial whether the person concerned was a member of a hill tribe or not. What is relevant is the locality in which the offence took place.

Doubts have arisen whether this decision was correct. I am, with the greatest respect, of opinion that the Regulation applies only to persons who are members of a hill tribe and not to persons who, though they happen to be residing in the Kachin Hill Tracts, are not members of a hill tribe. Reference to the preamble which reads :

> Whereas it is expedient to declare the law applicable to the hill tribes in the Kachin Hill Tracts of Upper Burma . . . .

shows what the intention of the Regulation was. It was clearly to declare the law applicable to hill tribes. Section 1 (3) enacts that :

> It (the Regulation) shall extend to such hill tracts and shall apply to such hill tribes as the Governor . . . . may, from time to time direct.

It is clear, therefore, that the Regulation purports to declare the law applicable to members of hill tribes in the Kachin Hill Tracts. Certain sections of the Regulation are made applicable in special circumstances to other persons by S. 1 (3), but the general scope of the Regulation is as I have stated above. Sections 8 and 9, therefore, only apply when the accused is a member of a hill tribe. The question then arises : What law regulating criminal procedure is applicable to persons residing in the Kachin Hill Tracts who are not members of a hill tribe? The answer to this clearly is that the Burma (Frontier Districts) Regulation 1 of 1925 applies. By S. 3 of this Regulation it is enacted that the Criminal Procedure Code shall be in force in the territories to which the Regulation applies, with such modifications as are set forth in the schedule. The relevant modification is numbered 11 in the schedule. It was suggested that proviso 8 to this modification had the effect of ousting the jurisdiction that the High Court would otherwise have had to transfer cases in the frontier districts. It was suggested that the power granted to the High Court by this proviso to reverse or vary any order made by a Court of Session under S. 526, replaced the ordinary power possessed by the High Court to transfer cases under S. 526, Criminal P. C. I find it very difficult to believe that this is the effect intended by the proviso in question. If that effect were intended it would have been very easy to make that clear. And there is a reasonable interpretation of the proviso namely that it confers upon the High Court in those parts a power which is unusual in the Code, a power to reverse or vary an order made by a Court of concurrent jurisdiction. Or it may be that the effect is to remove doubts on the question whether the High Court has power in the frontier districts to reverse or vary an order made by a Court of Session under S. 526 of the Code. But that it takes away the power from the High Court to transfer cases under S. 526 of the Code I do not believe. I therefore believe that this Court has jurisdiction to deal with this application for transfer.

It was suggested that since the Deputy Commissioner Bhamo had taken cognizance of the case as Sessions Judge, Kachin Hill Tracts, the application for transfer should be dealt with on the footing that the Kachin Hill Tribes Regulation appplied. In that case the application for transfer would have to be made to the Commissioner of the Division as the High Court appointed under S. 9 of the Regulation. In my opinion this could not be done because it is only by the decision of this case that it has been decided that the Kachin Hill Tribes Regulation does not apply and once that has been decided this Court at once has jurisdiction to order a transfer. As to the merits of the application, the officer who took cognizance of the offence has now been transferred and I see no reason to suppose that a fair and impartial trial cannot be had if the case is tried by his successor, or that it is expedient for the ends of justice that the case should be transferred as desired. I would therefore dismiss the application.

Ba U J. — I agree.

R.M./R.K. *Application dismissed.*

A. I. R. 1941 Rangoon 33

ROBERTS C. J. AND BLAGDEN J.

Cyril by agent Ma Thein May — Appellant

v.

Miss I. D'Attaides — Respondent.

Civil First Appeal No. 135 of 1939, Decided on 3rd April 1940, against decree of Dist. Court, Bassein, D/- 25th July 1939.

(a) Burma Laws Act (13 of 1898), S. 13 — Applicability—S. 13 does not apply to Burmese or Indian Christian—Burmese adoptive father dying Christian intestate — Adopted child is not heir within meaning of S. 37, Succession Act.

Section 13 of the Burma Laws Act does not apply to Indian or Burmese Christians. An adopted child is not an heir entitled within the meaning of Section 37 of the Succession Act, on an intestacy, to inherit the estate of his deceased adoptive parent, such parent dying a Chrisitan. No acceptance can be given to the view that a deceased person, even though a Christian, had by his acts made such an indication as the law would respect to the effect that his succession is not to be governed by the Succession Act. S. 37, Succession Act, does not include illegitimate children nor is there any rule in English law or among Christians that a person dying without a will confers any rights of succession upon children whom he may have had living with him in his household and treated in the kind of way which would suggest in a Burmese Buddhist household either an apathita or possibly even a kittima adoption: AIR 1934 Rang 72 and AIR 1922 P C 14, *Rel. on.* [P 33 C 2 ; P 34 C 1]

(b) Buddhist Law (Burmese) — Adoption — Burman Christian — Custom among Burman Christians giving some share to adopted child in inheritance is based on moral obligation — Court is not concerned with it.

The custom whereby Burman Christians take into their household children as though they were Burman Buddhists, and after their death their relatives accord to those children some share (without making a dispute about it) in the inheritance arises out of moral obligations only and the Court has nothing to do with it. [P 34 C 1, 2]

(c) Succession Act (1925), Ss. 237 and 238 — Lost will — Person relying on, must prove that there was will and also its terms — Codicil dependent on will — It cannot be admitted to probate unless terms of will proved.

A person relying on a lost will, must not only show that there was a will, but also show what were its terms; and it will be quite impossible to admit to probate a document as a codicil when the terms of the codicil will be incapable of being carried out without independent knowledge of what was in the alleged will: P & D 72, *Ref.* [P 35 C 2]

San Po Lwin — for Appellant.

Trutwein — for Respondent.

Roberts C. J.—This is an appeal by one Cyril through Ma Thein May, his next friend, objecting to the grant of letters of administration to Miss Irene D'Attaides in respect of the estate of the late Mr. D. D'Attaides, who died at Bassein on 9th November 1938. Miss Irene D'Attaides is a niece of the deceased and the learned District Judge granted her letters of administration notwithstanding the objections of the appellant. The case is, in my opinion, not one of great difficulty; but there was a very large quantity of irrelevant matter introduced into the case. The learned District Judge recorded all the information he could get on disputed matters, deferring to decide questions of admissibility to a later date; he did not frame issues, and the effect of that has been that there is a mass of irrelevant matter intermingled with the relevant and it is that fact which has made the case, which at first sight could have been regarded as a simple one, into a difficult one. Cyril, the appellant, in his objection, said that he was an adopted son. Secondly, he said that there was a will made by the deceased, Mr. D'Attaides, in his favour, that it had been lost, and that an exhibit document, known as EX. C. 1., which indicated some of his last wishes, should be regarded as a codicil and should be admitted, independently of the will, to probate.

It is perhaps convenient to take the claim in respect of adoption first. The appellant is a Roman Catholic. His father, apparently was a Buddhist and his mother a Roman Catholic; but the evidence as to who his real father is is by no means conclusive, and he must be taken to be and, what is much more important, the old Mr. D'Attaides was, quite clearly a member of the Christian faith, and, accordingly, the rules of Burmese Buddhist law have no application at all to this case. Section 13, Burma Laws Act, does not apply to Indian or Burmese Christians and it is quite clear from the decision in *Ma Khin Than* v. *Ma Ahma*[1] that an adopted child is not an heir entitled, on an intestacy, to inherit the estate of his deceased adoptive parent such parent dying a Christian. We have been referred to Roman law and the doctrine of *patria potestas*, but these are not relevant to the appellant's case, and it is clear from the judgment in *Kamawati* v. *Digbijai Singh*[2] and the passage cited with approval by my learned predecessor in giving his judgment in the *Rangoon case*[1] to which I have just referred, that no acceptance can be given to the view that a deceased person, even though a Christian, had by his acts made such an indication as the law would respect, to the

1. ('34) 21 A I R 1934 Rang 72 : 149 I C 1148 : 12 Rang 184.
2. ('22) 9 A I R 1922 P C 14 : 64 I C 559 : 48 I A 381 : 43 All 525 (P C).

effect that his succession is not to be governed by the Succession Act.

It was pressed upon us in argument by the learned counsel for the appellant that in S. 37, Succession Act, which deals with the death of a person intestate who leaves surviving him a child or children, we ought to include adopted children. There is no authority for this view. It is clear that illegitimate children are never included, and it is a fact, as has been explained in many English decided cases, that there is no rule in English law or among Christians that a person dying without a will confers any rights of succession upon children whom he may have had living with him in his household and treated in the kind of way which would suggest in a Burmese Buddhist household either an apathita or possibly even a kittima adoption. It is, of course, quite clear that Mr. D'Attaides treated the appellant in such a way that no one would have been surprised if Mr. D'Attaides had made him his heir. Sir San C Po, in his evidence, said that the whole attitude of the deceased towards Cyril was that of a father towards his son. There are, however, one or two circumstances from which the contrary intention might be inferred. When application was made for Cyril to be admitted as a pupil in the de la Sale Institute, his name was put down as "Cyril Po Yin," Po Yin being the name of a person who, the mother said was the father of her child Cyril. We have been shown in the course of the case that certain linen was marked with the intials "C. D. A.," but we consider it unnecessary to go into this question, or express any opinion as to the genuineness of this piece of evidence, or whether it really was the case that Mr. D'Attaides had caused the linen to be marked in this way or not, since the appellant, in the present state of the law, cannot possibly base his claim upon an intestacy and adoption, but must rest his claim, if any, upon the existence of a will.

Having said that, it is necessary, I think, again to stress the view that a very large amount of evidence was taken which would have been relevant in a case in which the question of kittima adoption was in dispute. The learned District Judge said, no doubt rightly, that it is the custom for Burman Christians to take into their household children as though they were Burman Buddhists, and after their death for their relatives to accord to those children some share (without making a dispute about it) in the inheritence. These are customs arising out of moral obligations only and the Court has nothing to do with them. Was there then a will executed by the late Mr. D'Attaides? None has been produced; and Miss D'Attaides, to whom letters of administration were granted, says that despite search for a period of eight months after the gentleman's death, no will could be found. But Tun Shwe, his chauffeur, who was 12th witness for the defendant, said that he got from Cyril some envelopes after Mr. D'Attaides' death and took them to Mr. Trutwein and it is conjectured that in these four envelopes various testamentary papers were found. The most important document is EX. C-1, which is undoubtedly in Mr. D'Attaides' handwriting, and it is described by him as "to be taken as part of my last will and testament and acted upon." If, however, there was a will, it is a clear indication that the document was not to be taken in supersession of it. In this document are given elaborate directions in relation to various properties. Some of the directions do not seem to be capable of being carried out in their entirety. It is doubtful what the phrase "surplus moneys" may mean. It is quite clear that Mr. D'Attaides desired to provide for the education of various persons, including Cyril. He said in para. 12 :

> A sum of rupees five hundred is to be paid to Archibald Thomas of the Retreat if he attains his 21st birthday. If Archibald wishes to pursue a higher course of education and shew promise of doing well then I charge my executor to contribute in part or in whole the costs of such education.

And, dealing with Cyril himself, he says:

> The children, Cyril and Marie, will be given the education they prove themselves worthy of. I would prefer that Cyril should work up Donald's Ranch and carry on a paying business.

There were therefore matters which were to be left to the discretion and judgment of the executor whom he appointed, as he said, in his last will and testament. Who the executor or executors may be, will, I fear, never be known. No evidence has been shown to exist, which would enable the Court to arrive at a conclusion in that regard. So far as the actual execution of the will goes, there is a good deal of evidence to show that the testator thought at some time that he had made a will. San Tun E who is put forward as an attesting witness said :

> I had to sign my name on some important documents once or twice while working under Mr. D'Attaides . . . . In 1935, when Mr. D'Attaides was very ill, he asked me and Ba Thaw to sign on a piece of paper which he called his last will. He said 'I have written this will for the people in my

house'. At that time the people in his house were Cyril and Ma Thein Me.

But, then, there is no evidence that this will was ever duly executed. San Tun E does not even say that he saw the testator sign it; he does not say that he himself witnessed it, or that Ba Thaw witnessed it; and the evidence of the execution of any will by the testator is entirely wanting. Mr. Trutwein said in the course of his evidence that he had been talking to Mr. D'Attaides for a long time about making his will. Apparently, this part of the evidence is directed to a period about 1934 or 1935; and it is said that, this conversation having taken place, it is obvious that at the time Mr. D'Attaides had not made a will, or else he would have said so to Mr. Trutwein. But, whether he had executed a document, which he thought was a will, or had in fact executed a document which would be admitted to probate, will for ever remain a matter of doubt. Ma Thein Me said in her evidence :

In 1935 he (Mr. D'Attaides) made a will. He told me if I die take this to Mr. Trutwein. He will do what is necessary as you don't understand anything.

Well now, the question of the existence of a will depends not upon one easy conclusion of fact, but upon the result of two considerations. First, was there in existence a document which purported to be a will ? Of that there is some evidence. Secondly, was the document, which was in existence and which Mr. D'Attaides believed to be a will, a valid will ? Of that there is no evidence at all. Our attention has been drawn by Mr. Trutwein to the provisions of S. 63, Succession Act; and it is clear from that that the execution of wills is one, as every lawyer knows, which is attended with some solemnity. The testator shall sign or affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. Secondly, the signature or mark of the person signing (testator or other) shall be so placed that it was intended thereby to give effect to the will of the testator. Then the will must be attested by two or more witnesses, each of them must have seen the testator sign or affix his mark, or see the other person sign; and each witness shall sign the will in the presence of the testator. There is no kind of evidence that the will was duly executed in this manner, and we are therefore driven to the secondary conclusion that EX. C-1 if of any legal effect at all would have to be regarded as a codicil independent of the will. In connexion with that matter we obtain some guidance from the case in *In the Goods of Grigge*,[3] where it was held that a Court could admit to probate a codicil which was intended to be independent of a will where the will was proved to have been in existence and proved to have been lost. But this is not the case here because, as I have pointed out, we are not even certain that there ever was a will. If there was a will, it is not by any means established that such will was lost, and it may very well have been revoked. I regret that the learned Judge found it necessary to record the evidence of Father Brun, since it appears to me that what Mr. D'Attaides said to him about revoking a will is not evidence, and we do not know whether the will was lost or revoked if there ever was a will.

Then the next thing is that the codicil must have been independent of the will, but it is quite plain that EX. C-1 is dependent on the will and itself expressed in its opening words, "To be taken as part of my last will and testament and acted upon." It refers to executors of whose identity we are quite unaware. A person relying on a lost will must not only show that there was a will but also show what were its terms; and it will be quite impossible to admit to probate a document as a codicil when the terms of the codicil will be incapable of being carried out without independent knowledge of what was in the alleged will.

The evidence in this case no doubt shows a strong moral claim which might be urged by Cyril against the legal representatives of Mr. D'Attaides. Mr. D'Attaides, during his lifetime, made himself absolutely responsible for this boy, treating him in a very indulgent fashion, and so brought him up that he might reasonably expect never to be a pauper or to be worried about money matters. Now he is thrown upon the world and Miss D'Attaides says that his conduct, especially since Mr. D'Attaide's death has been far from good ; and I bear in mind the statements made in EX. F and in other documents, which tend to show that he may have been a very difficult person to deal with. This Court is no Court of morals and we can make no directions as to what we think will be the proper way of treating the claim; but we may perhaps express the hope that in so far as it is obvious that Mr. D'Attaides wished that something substantial should be done for the boy, his waywardness now will not be allowed to prejudice his whole career. We understand that the respondent

3. P & D 72.

is not pressing for a personal order for costs beyond the order of the costs of the appeal to the extent of the security provided and the appeal will consequently be dismissed on those terms.

Blagden J. — I agree.

G.N./R.K. *Appeal dismissed.*

*** A. I. R. 1941 Rangoon 36**

ROBERTS C. J. AND MOSELY J.

U. C. Mitra — *Plaintiff* — Appellant

v.

Mohamed Ismail and another — *Defendants* — Respondents.

Letters Patent Appeal No. 4 of 1940, Decided on 24th July 1940, from decree of High Court in S. A. No. 174 of 1939, D/- 12th January 1940.

• *Provincial Small Cause Courts Act (1887), S. 15 and Sch. 2—'House'—Meaning explained—Appollo Cinema Hall held not house — Suit to recover rent for it is suit to recover rent other than house rent — Second appeal lies.*

In order to determine whether a building is a house the test to be applied is the character of the building and the purposes to which it is or can be adapted; not the name by which it is called. It must be plain that though every house is a building by no means every building can rightly be described as a house. A building designed exclusively for public worship and not for residence does not become a house merely because some people call it a house of prayer. 'Adapted' must mean adapted without structural alteration, and it must mean adapted for normal residential purposes; the mere fact that a building could be used to shelter refugees from a fire or earthquake in a pressing emergency does not make it a house within the meaning of the clause. [P 36 C 2; P 37 C 1]

Appollo Cinema Hall held not a house within the meaning of S. 15, Provincial Small Cause Courts Act, and hence a suit to recover rent of it is a suit for recovery of rent other than house rent. There is therefore a right of second appeal. [P 37 C 1, 2]

J. R. Chowdhury—for Appellant.

R. K. Roy—for Respondents.

Roberts C. J. — The plaintiff-appellant as the receiver of the Appollo Cinema Hall, Yenangyaung, brought this suit against the defendant-respondents for rent of the property which had been demised to them. He was successful in the Township Court, but on appeal to the District Court the decree was reversed. He therefore appealed to the High Court, but the respondents contend that there is no right of second appeal. By S. 102, Civil P. C.,

no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed Rs. 500.

By S. 15, Small Cause Courts Act, 1887, read with sch. 2 to the Act, a Court of Small Causes shall not take cognizance of a suit for the recovery of rent other than house rent. The amount or value of the subject-matter of the original suit is Rs. 400 only. There is, therefore, no right of second appeal unless this is a suit for the recovery of rent other than house rent. It follows that the short question for us is whether the Appollo Cinema Hall is a "house" within the meaning of the Small Couse Courts Act. The learned Judge in second appeal has held that it is and that therefore no right of second appeal exists. Now there is no definition of the word "house" in the Provincial Small Cause Courts Act. For the purposes of the Court-fees Act, there is a definition which includes buildings of every description; for the purposes of the Penal Code house trespass includes criminal trespass "in any building, tent or vessel used as a human dwelling or any building used as a place of worship"; and for the purposes of the Public Health Act, 1875, (in England) the word "house" includes schools, factories and other buildings in which more than twenty persons are employed at one time. It was necessary to insert these definitions. Except for the purposes of the Penal Code, a sampan which is used as a human dwelling is not a house. Buildings of every description are not necessarily houses, except for the purposes of the Court-fees Act. And in England, for the purposes of the Public Health Act, the question whether a factory is a house depends on the number of persons employed therein. We have to consider the significance of the word "house" in a statute where no definition has been given at all; that is to say, we are thrown back on the significance which has been given to the word by decided cases in this country; and, where authority is lacking here, by decided cases in England where the connotation of the English word has been discussed.

According to good authority a house is a structure of a permanent character, structurally severed from other tenements, that is used, or may be used, for the habitation of man. Stroud's Judicial Dictionary : It need not actually be used as a dwelling : *see* (1844) 14 L J C P 70[1] where a building was held to be a 'house' though used as a warehouse and sale-room because it had been 'calculated for a dwelling house, divided into apartments, and with little trouble might be lived in again.' The test to be applied is the

1. (1844) 14 L J C P 70 : 7 Man & G 122 : 8 Scott (N R) 949 : 1 Luttw Reg Cas 230 : Barr & Arm 380 : 9 Jar 258, Daniel v. Coulsting.

character of the building and the purposes to which it is or can be adapted; not the name by which it is called. It must be plain that though every house is a building by no means every building can rightly be described as a house. It is of course true that we use the terms greenhouse, cowhouse, or electrical powerhouse, but this is by way .of analogy merely, and a building designed exclusively for public worship and not for residence does not become a house merely because some people call it a house of prayer. Such buildings would only become houses for the purposes of a particular statute if there was a statutory definition expressly including them. It has been held in (1907-'09) 2 U B R (P S C C) 5[2] that a suit for recovery of rent for the occupation of a stall in a market in this country was a suit for recovery of house rent within the meaning of cl. 8 of sch. II to the Provincial Small Cause Courts Act. Shops and stalls in the markets are houses within the meaning of this clause. As was pointed out in that case, they are capable of being used as a residence by the people of the country. I agree that the decision in 49 ALL 134[3] was right, but because a shop must be considered a house in a country where it is capable of being used as a residence it by no means follows that every building is a house for the purposes of this Act. And the fact that the word "house" has expressly been given an extended definition for the purposes of other statutes in this country or elsewhere seems to be entirely beside the point in dealing with this Act.

The Apollo Cinema Hall is not, so far as I am aware, adapted for residential purposes, nor could it be adapted as such. Adapted must mean adapted without structural alteration, for the interior of almost any building of sufficient size could be structurally altered so as to make it ultimately fit for residence. And it must mean adapted for normal residential purposes; the mere fact that a building could be used to shelter refugees from a fire or earthquake in a pressing emergency does not make it a house within the meaning of the clause. Some stress was laid on the fact that there was furniture on the premises; that is a wide term and may cover all the equipment of a cinema hall including apparatus of various kinds and possibly rows of armchairs clamped to the floor, or benches. There was no evidence of the existence of domestic furniture which would suggest that the hall was or could be used as a residence. Its purpose is not residential, it is a building to which the public resort from time to time for purposes of entertainment. The fact that the lease describes itself as a lease of a house and machinery and refers to the demised premises as a Talkie House cannot alter the facts. The word "house" has a much more restricted significance than "building", but it seems to me, with respect, that the learned Judge in second appeal has treated the matter as though the Act dealt with the recovery of rent other than rent of a building. This appeal must be allowed and the case must go back to the learned Judge in second appeal with the direction that the suit is a suit for the recovery of rent other than house rent. There is therefore a right of second appeal and that appeal remains to be determined by him on its merits. The respondents must pay the costs of this appeal, advocate's fee in this Court three gold mohurs.

Mosely J. — I agree.

D.S./R.K. *Appeal allowed.*

2. ('07-09) 2 U B R (P S C C) 5, Nga Kan v. Mi Mya.
3. ('27) 14 AIR 1927 All 194 : 98 I C 848 : 49 All 134 : 25 A L J 131, Ahmadi Begam v. Girraj Kishore.

A. I. R. 1941 Rangoon 37

ROBERTS C. J. AND BLAGDEN J.

Eusoof Karwa and others — Appellants

v.

Mrs. Niemeyer and others—Respondents.

First Appeal No. 29 of 1939, Decided on 28th March 1940, from judgment of High Court, *Reported in A I R 1937 Rang 413.*

(a) Pleadings — Amendment — Party desiring amendment should submit proposed amendment in explicit form before leave is granted.

It is usual and generally most desirable that a party desiring to amend his pleadings should submit his proposed amendment in explicit form before the leave sought is granted, that is, he should formulate and state in writing the exact amendment for which he asks : (1908) 2 K B 696, *Rel. on.* [P 39 C 1]

(b) Civil P. C. (1908), S. 52 — Action by executor or administrator as such failing — He is personally liable for costs unless defendant is proved guilty of misconduct inducing action — But if executor or administrator is sued upon testator's liability he is protected under S. 52.

In ordinary cases, that is unless the defendant has been guilty of some misconduct inducing the action, an executor or administrator who sues as such and fails is personally liable for the costs of the action. Although if he is sued upon a liability of his testator he has the protection of S. 52, Civil P. C., but if he seeks to assert a claim the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts the defendant

at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity : (1879) 4 A C 733, *Rel. on.* [P 39 C 2]

(c) Pleadings — Amendment — Original claim based on renewal given to plaintiff of earlier pro-note executed in favour of deceased—Plaintiff amending claim and suing on earlier pro-note as deceased's executrix — Amendment held did not alter suit.

The fundamental character of a suit is not altered where the plaintiff first bases his claim on a renewal given to him of a pro-note executed in favour of the deceased and subsequently amends the pleadings and sues on the original pro-note as executor of the deceased : AIR 1922 P C 249, *Disting.* [P 39 C 2]

(d) Contract Act (1872), S. 62—Suit by mortgagee on subsequent mortgage executed in lieu of prior one — Mortgagee cannot set up prior mortgage—But pro-note in lieu of mortgage does not extinguish mortgage — Pro-note serves merely as evidence of original loan.

Although a mortgagee in a suit on a subsequent mortgage executed in lieu of a prior mortgage cannot set up the prior mortgage yet a fresh promissory note only provides evidence of the original loan and does not extinguish the mortgage : A I R 1937 Rang 154, *Rel. on.* [P 39 C 2; P 40 C 1]

(e) Limitation Act (1908), S. 21—Mahomedan brother and sister executing mortgage— Payment by one cannot save limitation against other — Brother cannot be deemed to be sister's agent.

A payment by one of co-mortgagors, Mahomedan brother and sister cannot save limitation against the other. Nor can the brother be deemed to be the sister's agent for making payments to creditor in absence of proof of authority : A I R 1936 All 820 (FB) and AIR 1939 All 230, *Rel. on; Case law referred.* [P 41 C 1]

(f) Civil P. C. (1908), S. 52 — Legal representative—Claim against deceased's estate — Personal representative is entitled to require strict proof of any claim against estate not within his personal knowledge—He is entitled to avail himself of any technical defence.

A personal representative is fully justified in requiring strict proof of any claim against the estate not within his personal knowledge, and entitled — may be bound if others than he are interested in the estate — to avail himself of any technical defence which he may be advised is open to him. [P 42 C 1]

(g) Civil P. C. (1908), O. 6, R. 17—Cause of action — Party having complete cause of action alleging it imperfectly—Party may be helped by amendment—But premature suit is incurable.

If a party at the moment he commences a suit has but an inchoate cause of action nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable : (1911) 2 K B 1031; 15 All 399; A I R 1919 Pat 507 and AIR 1938 Rang 134, *Rel. on.* [P 42 C 2]

C. K. Ray — for Appellants.

Clark and Hormasji — for Respondent 1.

Roberts C. J. — The two points urged before us in this appeal are, first that the suit ought not to have gone to trial upon the pleadings as amended, but that leave for the amendments should have been refused; and secondly, that upon the pleadings as amended the suit is barred by limitation. It appears that the plaintiff-respondent originally filed a suit for a preliminary mortgage decree based upon a promissory note for Rs. 8000 given by Ismail Eusoof Jeewa Karwa and his sister Khatiza Bibi (whose heirs and legal representatives were the defendants) to Messrs. Balthazar & Son Ltd., on 6th september 1932. By way of security for this note there was a mortgage by deposit of title deeds and these had been delivered to the plaintiff and the promissory note endorsed to her for valuable consideration. There was an early amendment of the plaint averring that Messrs. Balthazar & Son Ltd., were the agents of the plaintiff; this was no doubt to avoid the objection that the mortgage debt could not be transferred by mere indorsement of the promissory note. It was pleaded that for better security Messrs. Balthazar & Son Ltd., had executed a duly registered assignment of the debt. However, this assignment was made on 18th November 1936, after the date of filing the suit, and could not complete an incomplete cause of action, nor entitle the plaintiff to any further relief in the existing suit : *see* 1938 R L R 6.[1] The cause of action in the plaint and amended plaint is stated to have arisen on 6th September 1932. The case proceeded to trial before Braund J., who held that one of the stamps on the promissory note had not been cancelled and that as the mortgage debt was due upon the note and upon it alone the plaintiff could not succeed. He refused leave to amend the plaint by the averment of some obligation anterior to the note. The opportunity was given to the plaintiff's advocate of withdrawing the suit with leave to bring a fresh suit under Order 23, but this was declined. By reason of S. 35, Stamp Act, this promissory note is inadmissible in evidence for any purpose whatever. Upon appeal a Bench of this Court held that the plaintiff should have been allowed to amend the plaint on the following lines: The first paragraph would have to be amended so as to omit reference to the promissory note, and to set out the existing liability, if any, which the two deceased persons owed to the plaintiff. Paragraph 3 would have to have omitted from it all references to the transfer alleged to have been made subsequent to the date on which the suit was filed and the amount due might require to be altered.

The plaintiff then filed an amended plaint

1. ('38) 25 AIR 1938 Rang 134 : 177 I C 63 : 1938 R L R 6, Smith v. Mrs. Heptonstall.

on 23rd April 1938, in which she described herself for the first time as the sole executrix of the will of George Henry Smith deceased, late of Rangoon. She set up the plea that George Henry Smith lent Ismail Eusoof Jeewa Karwa and his sister Khatiza Bibi Rs. 8,000 on 4th December 1922, and that they gave a promissory note to Messrs. Balthazar & Son on that date, before Messrs. Balthazar & Son had become a limited liability company, and that there was a mortgage by deposit of title deeds with Messrs. Balthazar & Son on the same date. It was pleaded that the cause of action arose on 4th December 1922 and limitation was saved by reason of payment of interest as such. Objection was taken to these amendments as falling outside the scope of the leave given to amend. Shaw J. allowed the amended plaint and in the course of his order referred to the Appellate Court's decision and said :

> The Court however not having the proposed amendment before it could not visualize all the consequential amendments that would have to be made. To insist therefore that the plaint should only be amended exactly as stated and no more might lead to an absurd position. Leave having been given to fall back on the original debt of liability, it must, I think, follow that everything that goes with it must also be allowed to be pleaded so that the defendants may know clearly what case they have to meet.

When the case went to trial the learned Judge on the original side pointed out that so far as he was concerned the interlocutory order of Shaw J. was final, but we are asked to say here that it ought not to have been made. The question before us is whether the plaintiff has gone beyond the leave to amend which was granted by the Bench. Mr. Ray says that the plaint as amended sets up an entirely new cause of action and that the subject-matter of the suit has been changed. The plaintiff is suing for the first time as executrix; and she is setting up a mortgage of 1922 by deposit of title deeds with a partnership firm, instead of a mortgage ten years later by deposit of title deeds with a limited liability company. Upon the authority in 48 Cal 832[2] it is urged that such an amendment was never contemplated by the Appellate Bench and ought not to be entertained. Now it is usual and generally most desirable that a party desiring to amend his pleadings should submit his proposed amendments in explicit form before the leave sought is granted; that is, in the words of Farwell L. J., in (1908) 2 K B 696[3] at p. 724 "to formulate and state in writing the exact amendments for which he asks". If he does so the trouble and expense of deciding later whether the amendment as made should be allowed to stand will be avoided. In this case the effect of the order of the Appellate Court, which of course is not open to criticism by us, has unfortunately been to pave the way to further controversy as to its scope.

It has been strongly contended by Mr. Ray that a suit by the plaintiff as executrix alters the whole character of the action. This seems to depend on the further contention that if she failed she would not be personally liable for the costs. But this latter contention is fallacious. In ordinary cases, that is unless the defendant has been guilty of some misconduct inducing the action, an executor or administrator who sues as such and fails is personally liable for the costs of the action : (1879) 4 A C 733.[4] It is true that if he is sued upon a liability of his testator he has the protection of S. 52, Civil P. C., but if he seeks to assert a claim, the fact that he possesses it by virtue of being sole executor and beneficiary of a deceased person puts the defendant at no disadvantage from which he would have been free if the claim had been brought otherwise than in a representative capacity. In the judgment of the Bench which gave leave to amend there was quoted with approval a rule laid down by the commentator of Mulla's Civil Procedure Code that :

> Where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant, he may not be allowed to amend the plaint so as to have it on a different legal relation.

The fundamental character of the suit is not altered here merely because the claim rests upon a promissory note given in 1922 to the testator and not upon the note in renewal thereof given to the plaintiff, who is his executrix in 1932. Mr. Joakim in his evidence said that the note was renewed in 1932 but that there was no fresh deposit of title deeds, and the learned Judge accepted this evidence. Doubtless, if there had been two mortgages, the plaintiff could not have leave to set up the earlier one in her amended plaint, but as has been held in 1937 R L R 303[5] a fresh promissory note

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2. ('22) 9 AIR 1922 P C 249 : 63 I C 914 : 48 Cal 832: 48 I A 214: 4 U B R 30 (P C,) Ma Shwe Mya v. Maung Mo Hnaung.

3. (1908) 2 K B 696: 77 L J K B 794: 99 L T 424: 24 T L R 675:52 S J 551, Hyams v. Stuart King.

4. (1879) 4 A C 733, Charles Boynton v. George H. Boynton.

5. ('37) 24 A I R 1937 Rang 154 : 171 I C 356 : 1937 R L R 303, Hirendra Nath Datta v. Noyes.

only provides evidence of the original loan and does not extinguish the prior mortgage. It has been urged upon us that in cross-examination Mr. Joakim assented to the suggestion that the recitals in the assignment of November 1936 represented the true state of affairs, and that in fact these recitals set out a fresh deposit of title deeds creating a new mortgage, but in view of his explicit denial in his examination-in-chief the explanation appears to me to lie in the fact that this part of the cross-examination was directed to the references to the promissory note; no further question was put to him on this point and I am satisfied from his evidence that there was only one mortgage.

The distinction between the present case and that in 48 Cal 832[2] is that the latter case proceeded to trial upon unamended pleadings. The respondent sued for specific performance of an oral agreement made in 1912 with the appellant whereby she promised to transfer three specified sites of oil wells allotted to her by Government and obtained by her in that year. This agreement was alleged in relation to an earlier contract in 1903, and when it was found that the agreement pleaded could not be established by the evidence the respondent sought to amend by alleging breach of the contract in 1903, but their Lordships held that the real controversy in question between the parties was the existence and character of an agreement made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint which could only have been delivered in respect of that subsequent bargain and the Court could not permit a new case to be made. But here an amendment does no injustice to the defendant-appellants and does not set up a new and distinct cause of action, nor does it change the subject-matter of the suit. In my judgment therefore there is no ground for saying that it has in effect gone beyond the real question in controversy between the parties or has exceeded the extent of the amendment proposed to be allowed by the Appellate Court's decision.

Upon the question of limitation it has been pointed out in 7 Rang 522[6] that it is impossible for a creditor to make a fresh starting point for limitation. If payment by a debtor is to satisfy the statute and it is not distinctly stated by him that the payment is one of interest as such there must be evidence from which payment as interest may be distinctly inferred: 24 Bom 493.[7] Now here the learned trial Judge held that a specific payment of Rs. 60 by way of interest as such had been shown to have been made on 30th December 1927. He had before him a number of book entries made by the creditors which showed that on later dates the sum of Rs. 60 was paid whenever that amount of interest fell due. Mr. Joakim had said the payments of interest were regular. In my judgment an inference could clearly be drawn that in all the circumstances payment of interest as such had been made on this date. But a more difficult question arises when we consider whether the payment of interest as such was made in such circumstances as to bind each of the joint contractors within the meaning of S. 21 (2), Limitation Act. A payment made by one of the joint executants of a promissory note does not in itself operate to bind the other or others; in order to do so there must be evidence from which it can be inferred that he was in effect acting as his or their agent. These co-mortgagors were brother and sister and it has been said that Khatiza Bibi was a purdanashin lady. Interest was reduced from 9 per cent. to 8 per cent. at the request of her brother Karwa, as appears from Mr. Joakim's evidence: this appears to have been some time after the payment to which I have referred. The inference has been drawn from the regularity of the payments of interest as such and from the circumstances of the case that they were made on behalf of both the joint contractors.

It would appear that the provisions of S. 21 (2), Limitation Act, were not dealt with in argument before the learned trial Judge. Mr. Clark contends that in the circumstances and from the relationship of brother and sister which subsisted between them a payment of interest may justify the inference that the person paying was impliedly authorized by the sister to act on her behalf. He cited 66 M L J 40[8] and 90 I C 774,[9] but in neither of these cases was the effect of S. 21 (2) considered. In 5 Luck 1[10] their Lordships found no difficulty in implying authority to pay interest: indeed there was an agreement between the person who paid

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6. ('29) 16 A I R 1929 Rang 339 : 120 I C 897 : 7 Rang 522, U Ba Gyi v. U Than Kyauk.

7. (1900) 24 Bom 493 : 2 Bom L R 378, Kariyappa v. Rachappa.

8. ('34) 21 A I R 1934 Mad 45 : 148 I C 126 : 66 M L J 40, Janaki Ammal v. Srinivasan.

9. ('26) 13 A I R 1926 Cal 150: 90 I C 774, Achola Sundari Debi v. Doman Sundari Debi.

10. ('29) 16 A I R 1929 P C 297 : 121 I C 193 : 57 I A 1 : 5 Luck 1 (PC), National Bank of Upper India, Ltd. v. Bansidhar.

the interest and the respondent that the former would discharge the debt of the respondent to the bank in respect of both principal and interest. The decision is thus inapplicable to the facts before us here. In 53 Mad 119[11] it was observed that in the case of several joint contractors the operation of S. 20 seems to be cut down or limited by S. 21 (2) of the Act, and that whatever the law was as to executors it was impossible to say of two joint contractors (which term had been held to include two mortgagors): *see* 55 I C 763[12]—that one contrator was bound by the payments of the other. In 59 Cal 1128[13] it was decided that when interest on a debt is paid by one of the executants of a simple money bond before the expiry of a period of limitation, a fresh period of limitation shall not be computed from the time of the payment against the other executants of the bond who did not make the payment. Again in I L R (1937) ALL 272[14] at p. 283 a Full Bench of the Allahabad High Court said :

> So far as S. 20 stood alone there was certainly room for the view that the payment of a joint debt by one of joint debtors may amount to a payment of the debt within the meaning of that section so as to save limitation as against all the debtors, but the Indian law is in this respect different from the old English law. We have a specific provision in S. 21, Limitation Act, which applies to both acknowledgments under S. 19 and to payment of interest and principal under S. 20. That section provides that 'nothing in the said sections renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them'. A Full Bench of the Madras High Court in 25 Mad 220[15] held that co-mortgagors come within the scope of the words 'joint contractors' and that this section is applicable to co-mortgagors as well.

And see also I L R (1939) ALL 258.[16] The decision by a Bench of this Court in First Appeal No. 53 of 1938[17] had not been delivered at the time of the judgment made by the learned trial Judge in the present case. That Bench followed the trend of authority to which I have referred and held that no agency on behalf of his wife could be implied from the mere fact that a Burmese Buddhist husband paid interest upon the debt due under a promissory note secured by a joint mortgage by deposit of title deeds. Section 21 (3) (b) deals with liabilities which have been incurred by, or on behalf of, a Hindu undivided family as such. But where the liability has been incurred by co-mortgagors, they are joint contractors. In 58 Mad 418[18] it was held that where the managing member of a joint Hindu family was a co-mortgagor with his brother, and made a payment to the mortgagee at a time when the mortgagee was pressing both brothers for payment, there was evidence of an implied agency.

In the present case I could not infer a payment of interest as such on the sister's behalf from the mere fact that interest was paid regularly by some one. But the regular payments of Rs. 60 per month are evidence from which it may be inferred that they were at least made on behalf of the brother who showed his concern at the rate of interest which was being paid. As regards the sister the conclusion might well be different, but as the only appellants are the heirs and legal representatives of Ismail Eusoof Karwa it is clear that the payment of interest on 30th December 1927 saved limitation as against him, and consequently this appeal must be dismissed. There is however a small point in respect of which the decree should be made clear. The amount claimed was Rs. 8368, being Rs. 8000 principal and Rs. 368 interest to the date of filing the suit. This was decreed together with further interest from the date of the institution of the suit until realization at the contract rate of 6 per cent. per annum; this further interest must be calculated on the principal sum of Rs. 8000 and not upon the amount claimed of Rs. 8368. The appellants must pay the costs of the appeal, advocate's fees in this Court forty gold mohurs; and we certify for two counsel.

Blagden J. — This case might well be described as a tragedy of errors and about its only satisfactory feature is the conspicuous ability with which it has been presented to us by learned counsel on both sides. The plaintiff commenced this suit on 6th July 1936 when she filed a plaint alleging—exe-

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11. ('29) 16 A I R 1929 Mad 881 : 121 I C 858 : 53 Mad 119 : 57 M L J 588, Thayammal v. Mutukumaraswami Chettiar.

12. ('20) 7 A I R 1920 Mad 418 : 55 I C 763, Muthu Chettiar v. Muhammad Hussain.

13. ('32) 19 A I R 1932 Cal 620 : 138 I C 740 : 59 Cal 1128 : 55 C L J 347 : 36 C W N 487, Jogeshchandra v. Monindra Narain.

14. ('36) 23 AIR 1936 All 820 : 166 I C 106 : I L R (1937) All 272 : 1936 A L J 1140 (FB), Mohamed Taqui Khan v. Raja Ram.

15. ('02) 25 Mad 220 (FB), Narayana Ayyar v. Venkataramana Ayyar.

16. ('39) 26 AIR 1939 All 230 : 181 I C 490 : I L R (1939) All 258 : 1939 A L J 66, Ram Kumar v. Hira Lal.

17. *Reported in* ('39) 26 AIR 1939 Rang 287 : 184 I C 622, U So Maung v. J. Thom.

18. ('35) 22 AIR 1935 Mad 101 : 154 I C 1053 : 58 Mad 418 : 68 M L J 470, Lakshmi Naidu v. Gunamma.

cution of a promissory note for Rs. 8000 with interest at 9 per cent. per annum and creation of a mortgage by deposit of title deeds to secure that sum in favour of Balthazar & Son Ltd., by one Khatiza Bibi and one Ismail Eusoof Jeewa Karwa (hereinafter together called "the mortgagors") on 6th September 1932, endorsement over to herself of the promissory note and delivery over of the title deeds. She further averred the death on 10th August 1934 and thereafter of both the mortgagors, certain reductions in the original rate of interest : and non-payment of Rs. 8000 principal and Rs. 368 interest ; and claimed Rs. 8368 with interest at 6 per cent. to judgment, sale of the mortgaged property in default of payment, and a receiver, against two groups of defendants the one consisting of Ebrahim Moosaji Mamoojee husband heir and legal personal representative of Khatiza Bibi, and the other of seven persons the heirs and legal representatives of Ismail Eusoof Jeewa Karwa. This story was duly verified as true by the plaintiff on 7th July 1936.

The first named defendant who (we must remember) represented the female mortgagor did not defend the suit and (or but) subsequently died, and by an order of 8th August 1938 his legal personal representatives were brought on the record. They also did not defend the suit. The remaining defendants who represented the male mortgagor did defend the suit. Hereinafter when I refer to "the defendants" I shall, unless the contrary appears mean, these, the effective, defendants. They filed written statements which did not deny that they were the legal representatives of the male mortgagor, and in other respects each took the form of a general traverse. They also took certain points of law with which I shall try to deal later. As some capital has been sought to be made of the lack of merits which this defence discloses, I will observe at once that a personal representative is in my view fully justified in requiring strict proof of any claim against the estate not within his personal knowledge, and entitled — may be be bound if others than he are interested in the estate—to avail himself of any technical defence which he may be advised is open to him.

Some time in the autumn of 1936 the plaintiff was apparently advised erroneously in view of the subsequent decision in 1937 R L R 303,[5] that her cause of action as set out in her plaint was imperfect and in an endeavour to put matters right a deed was executed on 18th November 1936 whereby Balthazar Son Ltd., assigned to the plaintiff the debt and security sued on. This deed was duly registered and on 19th November 1936 the plaint was amended by inserting an allegation of the deed: the amended plaint was again verified by the plaintiff. This step was not only unnecessary but also, of course, completely idle, because it is clear (I should imagine in the law of any country civilized enough to entertain law suits) that if a party at the moment he commences a suit has but an inchoate cause of action nothing he thereafter does can entitle him to any relief in that suit. His only course is to discontinue it and, if possible, start afresh. A party who, having a complete cause of action, alleges it imperfectly may be helped by amendment; but a premature suit is incurable: *see* in England (1911) 2 K B 1031,[19] in India 15 ALL 399,[20] and 4 PAT L J 387,[21] and in this country 1938 R L R 6[1]. It is fair to observe that at the date of the deed and of the first amendment the last cited case was not yet decided. However vain thing though it was, this deed had this importance, namely, that amongst its short and simple recitals was a recital of a mortgage of 6th September 1932. The suit came on for hearing before Braund J., and it transpired that a stamp on the promissory note relied on by the plaintiff as proof of debt was not properly deleted. Braund J. refused leave to amend by asserting the original obligation alleged by the plaintiff to be subsisting before 6th September 1932 but he offered the plaintiff leave to withdraw her suit and bring another. This was declined, and the learned Judge accordingly dismissed the suit on 1st June 1937.

The plaintiff appealed, and the case on appeal is reported in 1938 R L R 521[22]. The Court reversed Braund J.'s decision and granted the plaintiff leave to amend. Mr. Ray for the defendants has pressed upon us the decisions in 48 Cal 832[2], 3 Rang 483[23] and 7 Rang 140.[24] But material as these cases would be if we were considering whether to

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19. (1911) 2 K B 1031:81 L J K B 49:104 L T 419: 75 J P 229: 27 T L R 206, Clayton v. Le Roy.

20. ('93) 15 All 399:1893 A W N 170, Gulzar Singh v. Kalyan Chand.

21. ('19) 9 AIR 1919 Pat 507: 52 I C 231: 4 Pat L J 387, Gobind Ramanuj Das v. Debendrabala Dasi.

22. ('38) 25 AIR 1938 Rang 461: 180 I C 519: 1938 R L R 521, Niemeyer v. E. M. Mamooji.

23. ('26) 13 AIR 1926 Rang 49:92 I C 253: 3 Rang 483, Maung Ba Thein v. Ma Than Myit.

24. ('29) 16 AIR 1929 Rang 179 : 117 I C 577 : 7 Rang 140, Ma Thaing v. Maung Chit On.

allow an amendment or not, in the events which have happened both we and the defendants are bound by the decision in the present suit reported at 1938 R L R 521,[22] right or wrong. It would therefore be both presumptuous and superfluous for us to discuss the merits of that decision. What has, however, turned out to be a most unfortunate thing happened. The Court did not insist that learned counsel for the plaintiff should formulate in writing the amendment he desired to make before considering whether it would allow the amendment or not, nor did it declare generally that the plaintiff should be allowed to amend her plaint and remit the case to the Judge of first instance to consider what precise amendments he would in his discretion allow: instead it allowed an amendment "on the lines" set out at the foot of page 540 and the top of page 541 of the report. Now it is easy to be wise after the event and I am not going to criticize anybody concerned for what then and afterwards happened. But, like my Lord, I do think the subsequent history of the case well illustrates the desirability of adhering to the general rule of practice laid down by the English Court of Appeal in (1908) 2 K B 700[3] at pp. 717, 724.

Much of the time this case has necessarily occupied before us was spent in considering the question whether the amendment which the plaintiff did make came within the four walls of the permission she had received or not. What she did in reliance on that permission was to make about as drastic a series of amendments as it is possible to imagine. She completely jettisoned the mortgage of 6th September 1932; and abandoned all suggestions that there was any privity of contract between herself personally and the defendants or the mortgagor they represent. In place of these averments she, by her second amended plaint, filed on 23rd April 1938, asserted a loan by one George Henry Smith through the agency of Balthazar & Son, Ltd., to the original mortgagors of Rs. 8000 on or about 4th December 1922; a promissory note for that amount with interest at 9 per cent. per annum and a mortgage by deposit of title deeds of the property referred to in her original plaint, also on 4th December 1922. She further asserted a will made by George Henry Smith appointing her sole executrix, the death on 8th April 1926 of George Henry Smith, and a grant of probate to her, the plaintiff. The rest of the pleadings followed the lines of the original plaint except that the plaintiff (as, on her new case, was necessary) now averred due payment of interest as such up to 30th September 1935 and that such payment saved limitation. The relief prayed remained unaltered.

That the defendants carried in objections to these amendments is not surprising. By those objections it was contended that the amendments were not only out of time—nothing now turns on this—but also (and this is a substantial question for our decision) out of order. Shaw J. heard and disallowed those objections, and in due course the suit came before Dunkley J. for hearing on the amended pleadings. The defendants sought before him to go behind the decision of Shaw J. Whether Dunkley J. was entitled to take this course I will not discuss, for clearly he was not bound to and he did not. Equally clearly, however, he reserved to the defendants full liberty to question before us, if unsuccessful before him, the propriety of that learned Judge's decision as well as that of his own. In the result he found in favour of the plaintiff and from that decision the defendants now appeal. It thus comes about that this appeal though in form from Dunkley J., is in substance in part an appeal from that learned Judge and in part from Shaw J. Mr. Ray for the present appellants takes three points which I propose to deal with in the following order. He says (1) that the plaintiff's second amendment is not within the terms of the leave granted her and therefore irregular *i. e.*, that the order of Shaw J., was wrong; (2) that the alleged mortgage of 1932 destroyed by novation the mortgage of 1922 on which the plaintiff now relies and (3) that payment of interest as such by or on behalf of his clients or the deceased has not been proved and that the claim is therefore statute-barred. The suit must be dismissed if he is right on any one of these points.

I have traced the rather complicated history of the suit in some detail for the purpose of making intelligible the conclusions at which I have arrived on the first and second of these points, which I can now, I hope, state comparatively briefly. Had the second amendment been formulated in writing when leave to amend was asked, and had its effect been to deprive the defendants of any advantage which they would have enjoyed had the case thereby set up, been set up in the original plaint it would have been a strong ground for refusing leave to amend; had its effect been to set up a cause of action which since the filing of the

original plaint had become statute-barred leave would, we may be sure, have been refused. If therefore Mr. Ray could have shown as that the amendment had in fact either effect we could, I think, safely say that the amendment as made was not one which the Bench in 1938 intended to allow. Actually however it is one of the few satisfactory features of the case that it had neither effect. Both the original mortgagors who might have given evidence in their own favour, if alive, died not after the second amendment but before the suit was commenced at all; while the amendment, so far from being a device to evade the statute of limitations, made, as Mr. Clark said a present to the defendants of at least a highly arguable case under that enactment.

The real spear-head of Mr. Ray's attack on this particular front was wisely concentrated on the change of character in which the plaintiff sued. The Court, he said, gave the plaintiff leave "to set out the existing liability, if any, which the two deceased persons owed to the plaintiff" that is to say, to Mrs. Mary Niemeyer, in 1932; whereas what has been done is to set out the existing liability which the two deceased persons owed to the executrix of Captain Smith. It is true that the latter happened to occupy the same body as the former, but, he says, that is a mere accident, and the two are in law separate and distinct entities. For certain purposes the office of legal representative must be regarded as a distinct thing from its holder. Whether this is so for the present purposes we have to decide. The decision of Braund J., in 14 Rang 336[25] as well as the dicta in 60 Cal 801[26] at pp. 805-6 and I L R (1937) 1 Cal 99[27] at p. 101 are against this contention, and it might suffice to say that I respectfully and entirely agree with Braund J's., decision and am content to adopt his reasoning. But I ought to add that the case of a trustee in bankruptcy who institutes proceedings appears to me analogous to that of the representative of a deceased person who sues, and it is well settled that if the former is unsuccessful his adversary is entitled to look for his costs to his individual assailant and not to an insolvent estate the right of the former to an indemnity from such assets as there may be in the latter is plain, provided certain conditions are satisfied, but is no concern of the successful defendant. So in the present case if Mrs. Niemeyer personally was worth Rs. X it matters not to the defendants what the estate of Captain Smith, or what Mary Niemeyer's interest in that estate, may be worth. As neither can be less than nothing Rs. X to which the defendants, if successful, were entitled on the original pleadings remains undiminished.

Mr. Ray sought to distinguish 14 Rang 336[25] on the ground that the public trustee is a statutory person and executors are not, but I do not find this distinction convincing for though it is true that the individual who holds the office of executor is not chosen by statute his duties, subject to the will, are as much statutory duties as those of the public trustee. Both sides place reliance on S.52 (1), Civil P. C., but in my opinion it tells strongly in favour of the plaintiff. This section provides what is to happen :

> Where a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased. . . . .

If a decree against an executor as such were necessarily a decree for the payment of money out of the property of the deceased the words I have just quoted from "and the decree" down to and including "the deceased" would be quite unnecessary. The section therefore contemplates a decree against a party as the legal representative of a deceased person which is not limited in the way described but is enforceable without more ado against him personally, and such a decree is in my opinion the proper decree where the executor is plaintiff, while in the absence of misconduct on his part the other form of decree is applicable where, *e. g.*, the executor as such is defendant in an action by a creditor of the deceased. The first point in the appeal therefore, in my judgment, fails. As to the second point (novation) it is not disputed that if there was a complete mortgage in 1932 that is an end of the plaintiff's case as now pleaded, and whether there was is a pure question of fact. We must consider whether there was any evidence on which Dunkley J., could have found, as he did, that there was no such mortgage. If there was none we must, and if there was any we may, reverse his decision, though in the latter event it would need a very strong case to persuade us so to do.

I do not myself think that the possibility of there having been a mortgage in 1932 can

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25. ('36) 23 AIR 1936 Rang 514 : 166 I C 247 : 14 Rang 336, Mahant Singh v. U Aye.

26. ('33) 20 AIR 1933 Cal 668 : 149 I C 282 : 60 Cal 801, Mackintosh Burn, Limited v. Shivakali Kumar.

27. ('37) 24 AIR 1937 Cal 407 : 175 I C 895 : ILR (1937) 1 Cal 99, Zubaida Sultan v. Dawood Ismail.

lightly be cast on one side. True, there would have been no point in such a transaction, but the plaintiff might well have been as ill-advised in September 1932 as she was in November 1936. The plaintiff herself has stated in writing no less than five times that there was a mortgage in September 1932 while her witness Mr. Joakim flatly contradicted himself at the trial, saying in chief that there was no such mortgage and in cross-examination that the recitals in the deed of November 1936 were correct from which answer, if true, it follows that there was. Comment before us has been made on the fact that the learned counsel who cross-examined him did not follow up this answer with a specific and direct question as to the alleged 1932 mortgage. In the light of after events I am inclined to think it would have been better if this had been done, but I do not for a moment blame the learned counsel concerned for exercising his discretion in the way he did and, having got what he (I think very reasonably (understood to be the answer he desired, not seeking to paint the lily with further questions. After all, he was not dealing with an elderly maiden lady or an illiterate person but with an experienced and intelligent man of business, nor were the recitals to the deed of November 1936 by any means prolix or complicated.

Anyhow, that was the evidence about this matter. The existence of the 1932 mortgage had been six times asserted and only once denied, but of course you do not weigh evidence by counting assertions and denials. To my mind it is difficult to believe that if there had been a mortgage in 1932 the plaintiff's present advisers would not have been so instructed and that if they had been so instructed they would, when framing the second amendment, have gone back into the mists of antiquity for the purpose of founding their case on the 1922 mortgage. They could have pleaded and, as it turns out, proved their client's case by reliance on the promissory note of 1922 and the mortgage of 1932. If I had had to decide the point I should, I think, have shared what must have been Dunkley J.'s view, namely that Mr. Joikim's answer in cross-examination was a mistake due to his not appreciating where the answer led him; but it is sufficient to say that I am quite clear that we ought not to reverse the learned Judge's decision on this question of fact.

The third question—that of limitation—is at first view the most difficult in the case but the difficulties largely solve themselves if we bear in mind that we have before us the repesentatives of only one of the original mortgagors and are therefore not concerned with the rights of the representatives of the other who have let the suit go by default. I do not propose to indulge in any elaborate review of the authorities on this part of the case because as I find myself in complete agreement with what my Lord has said about them and in particular with his observations on 66 M L J 40[5] and 90 I C 774.[9] The law applicable is, I think, undisputed to this extent, namely (1) that the combined effect of Ss. 20, as now amended, and 21, Limitation Act, imposed on the plaintiff, who does not here allege any such written acknowledgment as the proviso to the former section contemplates, the burden of proving at least one payment of interest expressly as such by Ismail Eusoof Jeewa Karwa or some person duly authorized by him, between 23rd April 1926 (being 12 years before the second amended plaint was filed) and 1st January 1928 (when a written acknowledgment as well as a payment of interest became necessary to save limitation) and (2) that it is not enough for her merely to prove that payment was made either by or on behalf of Eusoof Jeewa Karwa or of his co-mortgagor without showing which or that a payment in gross by Eusoof Jeewa Karwa was lawfully appropriated to interest by or on behalf of the mortgagee.

Mr. Clark sets about the discharge of this burden by proving, by the evidence of Mr. Joakim supported by the books of his company, that a payment of an amount precisely equal to the interest then due was made by somebody on 30th December 1927 a few days after that payment fell due. He then proves by similar evidence a whole series of similar payments since that date, each of them round about a date when interest would be payable, down to 1935. It seems to me quite clear, and I do not think any of the authorities conflict with this view, that the learned Judge was on this uncontradicted evidence justified in inferring that the payment on 30th December 1927 was a payment of interest as such by somebody. Who then was that somebody? It is true that some kind person might from 1927 to 1935 have been benevolently but voluntarily paying the mortgagors' interest for them without their knowledge, and it is true that Messrs. Balthazars might have been paying it themselves by means of book entries for the purpose of defeating the statute. The former contingency appears to

me unlikely, and the latter fantastically so. Not only would they, as reputable people, not have dreamt of doing anything so dishonest, but also they would not have done anything so silly as by faking their books to make themselves accountable to their principals for money they had never in fact received. Section 114, Evidenct Act, in effect provides that the Court may use a little commonsense. It would, I think, be a conspicious failure to use any either to draw no inference from the fact of these payments at all or, in the absence of any evidence to suggest it, to infer that all these payments were, and in particular that the payment of 30th December 1937 was, made by some person other than one or more of those who would unnaturally be expected to make payments of interest, namely the mortgagors.

Is there then anything to justify the inference that the male mortgaor was that one, if it was only one ? Mr. Clark asks us to say that such an inference can be drawn from the fact that the mortgagors were brother and sister. To that proposition I cannot agree. A Buddhist husband is not as such his wife's agent, (First Appeal No. 53 of 1938[17]) and I can see no reason why a Mahomedan brother should as such be his sister's, even if, as here was in evidence the sister is a purdanashin lady. If he is an agent to pay interest, what, one may ask, are the limits of a brother's ostensible authority qua brother? If one imagines the chaos that might result wherever there was a large family, of whatever race if all the brothers each pledged all their sisters' credit and each sold all their sisters' property each to different persons one realizes without difficulty that this suggestion cannot be well founded, and Mr. Ray has cited ample authority against it. But Mr. Clark has a better card in his hand than that. In none of the cases to which Mr. Ray drew our attention on this point did it appear, as here it does, that one of several co-mortgagors applied for and obtained a reduction of the rate of interest, after which interest was paid at the reduced rate. This, it seems to me, points clearly to the conclusion that if the payments before his application were not made, at the time they were made, by the applicant, they were ratified by him: since the subsequent punctual payments of money at the reduced rate and of no more money raise the inference that there were then no arrears of interest and almost must have been made by the applicant, or with his knowledge and approval, since without information received from him nobody on behalf of the mortgagors could well have known of the reduction. That disposes of the appeal, and I agree with the order which my Lord the Chief Justice proposes and also with his observation as to what its effect as regards interest will be.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Rangoon 46

MOSELY J.

Ma Khin Yi —Applicant

v.

Edward Khin Maung — Respondent.

Criminal Revn. No. 128-B of 1939, Decided on 5th June 1939, from order in review of 6th Addl. Magistrate, Bassein, in Criminal Misc. No. 20 of 1938.

(a) Criminal P. C. (1898), S. 488—Mere compromise petition does not oust criminal Court's jurisdiction in all cases — Monthly maintenance order based on compromise can be enforced by criminal Court—Compromise relating not merely to monthly maintenance but embodying other consideration, terms or conditions—Criminal Court has no jurisdiction either to pass or enforce it.

It is impossible to say generally in all cases, merely because a compromise petition between the parties has been filed, that there is no longer a refusal or neglect by the husband to maintain his wife and that the jurisdiction of the Court is ousted by the application for compromise. The refusal or neglect in question is refusal made or neglect committed before the proceedings commenced, and not a refusal or neglect that arose after the initiation of the proceedings. An order for monthly maintenance alone based on an application of compromise is not illegal and can be enforced by a criminal Court. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a criminal Court, and a criminal Court has no jurisdiction either to pass or enforce it. [P 48 C 1, 2]

Both husband and wife parties to proceedings under S. 488 filed a joint petition for a consent order, which was headed "compromise petition." Orders were accordingly passed in terms of the petition, and it was directed that the husband keep his three children with the wife from the date of the application for maintenance ; that the wife educate, feed and clothe the children properly; and the husband pay the wife Rs. 20 a month from the date of the application and Rs. 25 a month from a date a year from that for the maintenance of the wife and children :

Held that the compromise and the order based thereon clearly contained terms and conditions which were not within the jurisdiction of the criminal Court to order or enforce : 42 P R 1888 p. 107, *Rel. on.* ; 42 P R 1888 p. 108*n*, *Expl. and Rel. on* ; 2 Weir 629, *Approved* ; A I R 1926 Lah 469 and 40 P R (Judicial) 79, *Not approved* ; 6 Mad 283, *Ref.* [P 47 C 1 P 48 C 2]

(b) Criminal P. C. (1898), S. 488—Maintenance order for wife and her three children — At

time of enforcing order two children living with husband — Order cannot be partially enforced— Remedy of wife is by way of fresh application for maintenance.

The order for maintenance prescribed a certain amount for the maintenance of the wife and her three children, but at the time of the application for enforcement of the order two of the children were with the husband :

Held that the order had become of no effect in that it could not be partially enforced by making an allotment for the wife and one child only and that the wife's remedy was to make a fresh application for maintenance: *A I R 1917 L B 84, Rel. on.*

[P 49 C 1]

Eunoose — for Applicant.

Twa Aung — for Respondent.

Order. — This is an application in revision against an order passed under S. 488, sub-s. (3), Criminal P. C., refusing to enforce a previous order for maintenance. Two grounds were given for this refusal, (1) that the order was passed on a compromise, and was only enforceable by civil proceedings, and (2) that the order for maintenance prescribed a certain amount for the maintenance of the applicant and her children, and that as two of the children were still with the respondent, the husband, the order could not be partially enforced by making an allotment for the applicant and one child only.

For the first contention 6 Mad 283[1] and 95 I C 315[2] were quoted. Earlier rulings which were mentioned before the Magistrate were evidently not available, and will be cited here. It is desirable to dispel the misconception that a criminal Court has no power to enforce an order of maintenance based upon any kind of petiton of compromise between the parties. In the present case both parties filed a joint petition for a consent order, which was headed "compromise petition." Orders were accordingly passed in terms of the petition, and it was directed that the respondent keep his three children with the petitioner from the date of the application for maintenance; that the petitioner educate, feed and clothe the children properly; and that the respondent pay the petitioner Rs. 20 a month from the date of the application and Rs. 25 a month from a date a year from that for the maintenance of his wife and children.

The first case quoted, 6 Mad 283,[1] merely laid down that an agreement by a husband to maintain his wife by giving her certain property and by delivering to her annually grain and money could not be enforced under the Criminal Code which empowered a Magistrate only to direct payment of the monthly maintenance. The earliest case in point is 42 P R 1888 Cr, p. 107.[3] In that case an order for maintenance was made in favour of the wife at the rate Rs. 5 a month. Subsequently she applied for realization of arrears of maintenance; the husband imputed misconduct, but eventually no enquiry was made, the parties coming to an agreement that for the future, if the wife resided in a house provided by the husband, she should get her maintenance of Rs. 5 a month, and if not, it should be stopped. Over a year later the wife applied for arrears of maintenance. It was held that at the first application for arrears the order of maintenance ought to have been cancelled. It was clear that the parties entered then into a new agreement which the Court recorded, and which was an agreement to live separately by mutual consent. That agreement had the effect of superseding the previous order, and neither the agreement nor the order could be enforced summarily under the Criminal Code. Another similar case was 42 P R 1888 Cr, p. 108*n*.[4] The only difference was that here the agreement was entered into in the original proceedings for maintenance, and the maintenance was awarded on condition that the wife should live with the husband. It was similarly held that as the parties had come to an amicable arrangement that the husband was to pay the wife a monthly sum on certain conditions, the Magistrate's duty was at an end, and the application should have been dismissed and the wife told that her remedy would be by a civil suit should her husband not fulfil his agreement. I would agree, with respect, with both these decisions, which are to the effect that where the parties have come to an agreement, not merely as to the amount of maintenance, but that the maintenance should only be paid on certain conditions, the agreement to pay maintenance and the conditions should not be recorded in an order by the Magistrate, but he should dismiss the application, whether it be for maintenance or for the enforcement thereof. In this second case, however, there is a remark by the learned Judge which, as I consider, gave rise to misconception. He said that S. 488, Criminal

1. ('83) 16 Mad 283 : 2 Weir 626, Viramma v. Narayya.
2. ('26) 13 A I R 1926 Lah 469 : 95 I C 315 : 27 Cr L J 779, Budhu Ram v. Khem Devi.
3. ('88) 42 P R 1888 Cr, p. 107, Mt. Rahim Bibi v. Khair Din.
4. ('88) 42 P R 1888 Cr, p. 108*n*, Mt. Najibulnissa v. Mustafa Khan.

P. C., only gives the Magistrate authority when the husband, having means, "neglects or refuses" to maintain his wife. All that was meant in the context, I think, by this remark was that the parties, having come to an amicable settlement on certain conditions andon these conditions the wife having waived the previous refusal to maintain her, the Magistrate could not pass an order for maintenance which could be enforced by the summary process of a criminal Court.

The principle involved, if I may say so with respect, was overlooked in *Rahim Ali* v. *Fateh Bibi*.[5] This was a case where the wife applied for maintenance, and during the pendency of the case the parties compromised, and the Court passed an order in the terms of the compromise that the husband should give his wife half his land and a house to reside in, or, in case of default, Rs. 9 a month. On a subsequent application for enforcement the Magistrate ordered that the woman should receive arrears of payment. The proceedings were forwarded in revision by the District Magistrate on the ground that in accordance with the principle laid down in 42 P R 1888 Cr, P 107[3] when a compromise had been arranged between the parties the enforcement of that compromise came within the jurisdiction of a civil and not of a criminal Court, because the husband no longer neglected or refused to maintain his wife. The order of the Court was a short one upholding the view taken by the District Magistrate, and gave no grounds for its decision.

It appears to me to be impossible to say generally in all cases, merely because a compromise petition between the parties has been filed, that there is no longer a refusal or neglect by the husband to maintain his wife and that the jurisdiction of the Court is ousted by the application for compromise. Such an application may merely mean that the parties have come to an agreement as to what is the proper amount of maintenance to be paid, and in such a case the mere fact that both parties have signed the petition to the Court is immaterial, except in so far as it obviates the necessity for the Court to take evidence from which to assess the amount of maintenance. If the argument were extended a little further, it would lead to the obviously untenable conclusion that a petition signed by the husband alone or an admission given by the husband in evidence would show that he no longer refuses to maintain his wife. It would be absurd to hold in such cases that the husband by so doing could force the wife to have recourse to a suit in a civil Court. The refusal or neglect in question is refusal made or neglect committed before the proceedings commenced, and not a refusal or neglect that arose after the initiation of the proceedings. I note that exactly the same view was taken in 2 Weir 629,[6] a Madras case. There the order for maintenance was passed in accordance with the terms of a joint application put in by the parties. It was contended that that order was illegal, being based on a compromise. It was held that the order, which was one directing payment monthly of a fixed sum of money, was one which in itself was in accordance with the Code, and was not rendered illegal because it was made on consent of parties which dispensed with the necessity of taking evidence. In 95 I C 315,[2] a judgment of the Lahore High Court, it was, however, held that any order for maintenance based on a compromise application is without jurisdiction and cannot be enforced by a criminal Court. The learned Judge purported to follow 42 P R 1888 Cr, P 107[3] and *Rahim Ali's case*.[5] In my opinion, 42 P R 1888 Cr P 107[3] is no authority for this proposition, and, as I have pointed out, in *Rahim Ali's case*[5] quite a different kind of compromise was entered into, and that case is no authority for the general proposition laid down in 95 I C 315.[2]

Both according to law, then, and common sense alike an order for monthly maintenance alone based on an application of compromise is not illegal. Where, however, the compromise not merely relates to the amount of monthly maintenance but embodies other consideration or terms or conditions, then the order based on the compromise goes beyond the scope allowed to a criminal Court, and a criminal Court has no jurisdiction either to pass or enforce it. In the present case the application for compromise and the order based thereon clearly contained terms and conditions which were not within the jurisdiction of the criminal Court to order or enforce.

As to the second ground on which the learned Magistrate based his order there is nothing to be said. The ruling quoted by him, 9 L B R 49,[7] is clear authority for the

5. ('05) 39 PR 1905 Cr: 109 P L R 1905: 2 Cr LJ 690.

6. ('02) 2 Weir 629, In re Rangammal.
7. ('17) 4 AIR 1917 L B 84: 37 I C 311: 18 Cr L J 103: 9 LBR 49, Thambuswamy Pillay v. Ma Lone.

proposition that the order had become of no effect, in that it could not be partially enforced, and that the applicant's remedy is to make a fresh application for maintenance. This application in revision will therefore be dismissed.

G.N./R.K. *Application dismissed.*

**** A. I. R. 1941 Rangoon 49**

ROBERTS C. J. AND DUNKLEY J.

U Lun — Appellant

v.

U Chit Hlaing — Respondent.

First Appeal No. 113 of 1940, Decided on 18th November 1940, against decree of Sharpe J., *Reported in A I R 1941 Rang 5.*

(a) Government of Burma Act (1935), Ss. 41 and 42—Ordinance has same force as Act.

An ordinance promulgated under either S. 41 or S. 42 of the Act has the same force and effect as an Act of the Legislature. [P 50 C 1]

(b) Civil P. C. (1908), O. 8, R. 5 — Contention that allegation needs no reply is no denial by necessary implication.

There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. [P 50 C 2]

**(c) Government of Burma Act (1935)— Promulgation — Publication in gazette is not necessary—Speaker reading in House of Representatives is sufficient promulgation:* A I R 1941 Rang 5, REVERSED.

Promulgation and publication in the official Gazette are not synonymous. There is a distinction between the two. Publication in the official Gazette is not *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. Reading of an ordinance by the speaker to the House of Representatives is sufficient promulgation : A I R 1941 Rang 5, *REVERSED.* [P 50 C 2; P 51 C 1]

(d) Government of Burma Act (1935), S. 41 (2) (a)—Expiry of ordinance.

An ordinance was promulgated under S. 41 of the Act. The Legislature re-assembled on 15th February 1940:

Held that the ordinance expired at the midnight which concluded on 28th March, as six weeks from 15th February 1940 expired on 28th March 1940: A I R 1941 Rang 5, *Affirmed.* [P 50 C 1]

(e) Government of Burma Act (1935), S. 42 —Ordinance issued by Governor — It is implied that Governor has formed his opinion and exercised his individual judgment.

The Governor's functions are capable of being exercised in any of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. Matters in the Government of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second and third group according to the opinion formed by the Governor as to the course which he should take. Where therefore an ordinance issued is expressed to be under the powers conferred by S. 42 it is implied that an opinion has been formed by the Governor and an individual judgment has been exercised by him. [P 51 C 2]

***(f) Government of Burma Act (1935), Ss. 41 and 42— Ordinance expressing purpose of enabling Governor satisfactorily to discharge functions—Governor is sole judge—Court cannot sit on judgment of necessity of action:* A I R 1941 Rang 5, REVERSED.

The Court will not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an ordinance. That is for the Governor to decide. The Court should not assume the burden of deciding for what purpose the action was necessary. Where in an ordinance the purpose is expressed to be that of enabling the Governor satisfactorily to discharge certain functions the Governor is the only judge of that: A I R 1931 P C 111, *Rel. on*; A I R 1932 Cal 738 (SB), *Ref.*; AIR 1941 Rang 5, *REVERSED.* [P 52 C 2]

(g) Government of Burma Act (1935), Ss. 25, 24—Speaker cannot declare whether seat has been vacant—Court has to determine it.

The question whether a seat of a member of the House of Representatives has become vacant or not is not a point of order at all for the Speaker, nor is it a matter for the House to determine. It is a point of law affecting the status of an individual and is for a Court to determine: A I R 1941 Rang 5, *Affirmed.* [P 53 C 1]

(h) Injunction—Grant of, when should be refused explained.

The granting of an injunction is a discretionary matter and if the defendant has given an assurance that he would refrain from any action to the prejudice of the plaintiff, the Court should be loth to consider that circumstances could make it desirable to grant an injunction in such a case. [P 53 C 1]

(i) Government of Burma Act (1935), S. 42 — Preamble setting out purpose of ordinance is not legally compulsory but is advisable. (Per Dunkley J.)

It is not legally necessary that an ordinance should have a Preamble setting out that the Governor is satisfied as required by the terms of S. 42 (1), and also the purpose within S. 42 (1), for which the ordinance is promulgated. Legally all that is necessary is that the Governor should declare that he promulgates the ordinance under the provisions of S. 42 of the Act; but the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an ordiance. [P 55 C 2]

U E Maung—for Appellant.

U Kyaw Din—for Respondent 1.

Roberts C. J. — This was an action brought by the appellant U Lun against U Chit Hlaing, Speaker of the House of Representatives, for a declaration that the plaintiff was a member of the House of Representatives and that his seat had not become vacant by reason of any disqualification and for an injunction to restrain the defendant from interfering with the exercise

of the plaintiff's rights and privileges in that behalf. The facts have been set out very fully by the learned trial Judge. The plaintiff had been duly elected a member of the House of Representatives representing Insein North at the General Election in November 1936, and in March 1940, he was appointed a Second Lieutenant in the Army in the Burma Reserve of Officers subject to the approval of His Majesty.

The holder of a commission in His Majesty's forces enjoys an office of profit under the Crown and by S. 25 (1) (a), Government of Burma Act he is disqualified for being chosen as, or for being, a member of either Chamber unless this office is declared by an Act of the Legislature not to disqualify its holder. His Excellency the Governor, in pursuance of his powers under S. 41, Government of Burma Act, promulgated an ordinance on 18th September 1939, which provided that a person should not be disqualified nor should be deemed ever to have been disqualified for being chosen as, and for being, a member of either Chamber of the Legislature by reason only that as a member of His Majesty's forces he was holding or had held any office of profit under the Crown. An ordinance promulgated under either S. 41 or S. 42 of the Act has the same force and effect as an Act of the Legislature, and consequently it protected the plaintiff from the disqualification which he would otherwise have suffered. But this particular ordinance would cease to operate at the expiration of six weeks from the re-assembly of the Legislature unless (which never happened) a resolution disapproving it were passed by the House of Representatives and agreed to by the Senate on some earlier date.

The Legislature re-assembled on 15th February 1940, and six weeks from that date brings us to 28th March 1940. I respectfully agree with the learned trial Judge for the reasons given by him that this Ordinance expired at the midnight which concluded the 28th March. On the 29th March, when the Legislature was in session, the Governor, in pursuance of his powers under S. 42 of the Act, promulgated a further Ordinance in similar terms. It was afterwards published in a Burma Gazette Extraordinary dated 30th March, but published in a truncated and inaccurate form. Its concluding words were: "The above Ordinance is promulgated under the powers conferred by S. 42, Government of Burma Act, 1935." By a surprising and unfortunate omission none of these concluding words were contained in the Official Gazette. During the afternoon of 29th March the original of this second Ordinance was delivered to the Speaker and read by him to the House of Representatives; an advance copy of it had been already supplied to him by the Premier. It never has been contended by any party to this suit that promulgation did not take place on 29th March. In para. 10 of the plaint it was expressly pleaded that 29th March was the date of promulgation. In the written statement of the respondent he was content to aver that this allegation needed no reply; and by O. 8, R. 5, Civil P. C., every allegation of fact not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. There is no denial by necessary implication of a fact alleged in a plaint when it is merely contended in the written statement that the allegation needs no reply. If the second Ordinance was a valid Ordinance and was promulgated on 29th March there never was a time when the appellant's seat became vacant by reason of any disqualification, and no question of its validity could be raised on the ground of its contravention of the provisions of sub-s. (4) of S. 42, which enacts that an ordinance passed under the section shall only be valid if and so far as an Act of the Legislature in similar terms would be valid.

The learned trial Judge has taken the view that promulgation was not effected until 30th March, although the Governor's signature to the document on 29th March states that it "is promulgated" and not that it will be. The original document was however never produced in Court before him, for the notification in the Gazette was admissible in evidence as to its contents though entirely misleading in its effect. I find myself unable to accept the suggestion that promulgation and publication in the Official Gazette are synonymous. If the Act used the word "publication" it might no doubt be said that the term connoted the fact of making the public in this way aware of the existence of the Ordinance, and that publication meant publication in the Official Gazette. But I have asked myself why the Act uses the word " promulgate " in preference to the more popular word "publish", and it seems to me that there is a distinction. What is promulgated is no doubt in practice published in the Official Gazette so as to ensure wider dissemination. But the promulgation of an Ordinance is an emergency measure;

it depends on the necessity for immediate action, as the Act states. The Governor is empowered to take this action at once and is not obliged to wait till the printers are ready, or to communicate with them, it may be from a great distance, before his action becomes effective. Some proclamation or making known by public declaration is no doubt necessary; no one can be said to promulgate what he keeps locked up in his breast: but publication in the Official Gazette does not appear to me to be *sine qua non* of promulgation, though it is a record that promulgation has taken place and a means of announcing the fact to the widest possible circle of individuals. The India and Burma Emergency Provisions Act, 1940, had not been published in Burma at the time of the judgment. In that Act the Governor is empowered to make certain provisions which under S. 157, Government of Burma Act, could be made by an Order in Council or which under the Act fell within the scope of rules issuable by the Secretary of State. This he can do "by notification in the Official Gazette of Burma". The new statute does not say that these provisions may be made and promulgated by the Governor, and lays down a procedure different from that contemplated in the case of promulgation of an ordinance under the Government of Burma Act.

Illustration (e) to S. 114, Evidence Act, says that the Court may presume that judicial and official acts have been regularly performed. We have seen the Governor's signed declaration on 29th March 1940, that the second Ordinance is promulgated, and indeed the fact appears to have been admitted on the pleadings; I cannot hold that no promulgation with due regard to form and procedure took place before 30th March. It is also unfortunate that the attention of the learned trial Judge was, as we are assured, not drawn to this point in the voluminous pleadings and that he was allowed to think that a type-written copy of the Ordinance was all that was delivered to the Speaker on 29th March.

Then was the second Ordinance a valid Ordinance ? In my view the answer to this question must be in the affirmative. The Ordinance did not attract the provisions of S. 42 (4) as being one which would be invalid if enacted by the Legislature. Such part of it as would appear to give retrospective effect to its provisions, namely the words "nor shall be deemed ever to have been disqualified", are clearly severable from the remainder, and the remainder freed the appellant from any disqualification since it came into operation immediately upon the expiry of the first Ordinance at the midnight concluding 28th March.

It is desirable to examine the scope of S. 42 which deals with the Governor's power to make ordinances when the Legislature is in session.

The Governor's functions appear to me, with great respect, to be capable of being exercised in any one of three different ways. Some are exercisable in his discretion which means that he need not ask for the aid or advice of his Ministers at all ; indeed it is not their duty to aid or advise him in respect of these matters ; a second group is exercisable, notwithstanding the advice of Ministers, in the exercise of his individual judgment; and a third group is exercisable under the guidance of his Ministers. The third group comprises all cases in which the Governor does not regard it as inconsistent with the fulfilment of any of the special responsibilities which are committed to him by the Act, or with the proper discharge of the functions which he is otherwise by or under the Act required to exercise in his individual judgment, to be guided by his Ministers' advice.

In performing any of the functions in the second or third group the Governor (acting under para. 8 of the Instrument of Instructions issued to him by His Majesty) forms his own opinion as to whether, having regard to its terms, he should be guided by his Ministers or not. Thus, matters in the Government of Burma Act which are said to fall within the individual judgment of the Governor may fall within the second or third group according to the opinion formed by the Governor as to the course which he should take.

Paragraph 8 of the Instrument of Instructions relates to all matters within the scope of the executive authority in Burma save the purely discretionary functions. They may become matters for the exercise of the individual judgment of the Governor simply because he has formed the opinion referred to in the paragraph. When an Ordinance is issued expressed to be under the powers conferred by S. 42 it is implied that such an opinion has been formed.

The learned Judge has examined with great care the question whether the subject-matter of the second Ordinance was concerned with one of the discretionary functions of the Governor, or with one of his special

responsibilities, or with one of the other matters about which he is required to exercise his individual judgment. But he has, I respectfully think, omitted to notice that within this last class there may fall a matter which he describes as "one entirely for the Ministers".

As I read the Act and the Instrument of Instructions, there are no matters which can be dismissed from consideration as "entirely for the Ministers": they act in the name of the Governor and their executive acts can become a matter for the individual judgment of the Governor if he forms the opinion that to be guided by them would be inconsistent (1) with the fulfilment of his special responsibilities under the Act, or (2) with the proper discharge of functions which he is otherwise by or under the Act required to exercise in his individual judgment. We do not precisely know which of these two opinions he has formed, but by the issue of the second Ordinance he has impliedly formed one or other of them, and has therefore exercised his individual judgment; unless, indeed, he has promulgated the Ordinance for the purpose of discharging functions which lie within his discretion.

We have been informed that the attention of the learned Judge was never drawn to S. 8 (1) (h) of the Act which makes it one of the Special Responsibilities of the Governor to secure that the due discharge of his functions, whether discretionary or in the exercise of his individual judgment under the Act (which of course includes the Instrument of Instructions), is not prejudiced or impeded by any course of action taken with respect to any other matter. I should have thought that to permit a Member of the House of Representatives to be penalised for his loyalty and readiness to serve in the armed forces of the Crown in time of war might well impede the course of action taken with respect to defence : that is, however, entirely by the way, and I must not be taken to hazard any guess as to the grounds upon which the Governor saw fit to promulgate the Ordinance in question; it seems to me irrelevant to inquire. It was, again, unfortunate that the attention of the learned trial Judge was not drawn to the important decision of the Privy Council in 12 Lah 280.[1]

There the Governor-General, acting under S. 72, Government of India Act, 1915, being satisfied that a state of emergency existed, promulgated an Ordinance expressed to be for the peace and good government of India. Its validity was challenged. Lord Dunedin said (at p. 283) :

> The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition—It connotes a state of matters calling for drastic action which is to be judged as such by some one. It is more than obvious that that some one must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.
>
> Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the Ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board—after a contentious and protracted enquiry — that no state of emergency existed, and that the Ordinance with all that followed on it was illegal.
>
> In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it.
>
> It was next said that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by S. 72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it.

And in 37 C W N 166[2] at p. 168 Rankin C. J said :

> As the validity of the Ordinance rests neither upon proof of an emergency nor upon the recital of an emergency but upon the judgment of the Governor-General that immediate action of this character was necessary, there is, in my judgment, no basis for the contention that the Ordinance was not valid and effective. In no event could the validity of the Ordinance be determined by evidence adduced before the Court as to whether a state of emergency did or did not exist.

The Court will thus not inquire whether circumstances in fact existed which rendered immediate action necessary before the promulgation of an Ordinance. That is for the Governor to decide. I cannot see that the Court should assume the burden of deciding for what purpose the action was necessary. In the Lahore case the purpose of the Ordinance was expressed to be for the peace and good government of British India, and the Governor-General was held to be the judge of that—here the purpose is

1. ('31) 18 A I R 1931 P C 111 : 131 I C 415 : 12 Lah 280 : 32 Cr L J 727 : 58 I A 169 (P C), Bhagat Singh v. Emperor.

2. ('32) 19 A I R 1932 Cal 738 : 140 I C 304 : 33 Cr L J 949 : 56 C L J 157 : 37 C W N 166 (SB), In re Amrita Bazar Patrika.

expressed to be that of enabling the Governor satisfactorily to discharge certain functions, and I regard myself as bound by the authority of the Privy Council decision to say that the Governor must be the judge of that. I think it unnecessary to go further and examine the provisions of S. 5 (3) of the Act.

In this view of the law the appeal must be allowed. Each of the Ordinances was valid and since the second followed the first with no intervening gap there is no ground for stating that the second Ordinance would have been invalid as an Act of the Legislature. The plaintiff-appellant is entitled to a declaration in the terms sought by him in his plaint; for the reasons given by the learned Judge the respondent had no power to determine the matters disposed of by him in what has been described as his ruling of 2nd April 1940. The question at issue was not a point of order at all for the Speaker, nor was it a matter for the House to determine. It was a point of law affecting the status of an individual and is for this Court to determine. With regard to the prayer for an injunction this has been most properly withdrawn upon the assurance that the Speaker will refrain from any action to the prejudice of the appellant's rights as declared in our judgment. In any event the granting of an injuncion is a discretionary matter and we should be loath to consider that circumstances could make it desirable to grant one in such a case. Before concluding the judgment I desire to express our appreciation of the assistance given to us by the learned Advocate-General whom we have heard as *amicus curiæ*, and to add one or two further observations.

U Kyaw Din who appeared to represent the respondent informs us that from the circumstances in which he was engaged, instructed and remunerated he thought he was appearing instead of the Advocate-General. He has gone into the circumstances at length and we think there was confusion of thought which arose not unnaturally but which was allowed to continue through inadvertence. He was entirely mistaken in his view, for the Advocate-General was in no way concerned, but the learned trial Judge was led to believe that the Government was represented before him when in fact that was not the case. It was a misfortune for the Judge, and it is apparent from what we have learned that, apart from being unintentionally misled on this matter, the crucial authorities on the law were never cited to him and he was also misinformed on several facts: it appears that he did not even see the original Ordinance and could never have known that it was incorrectly reproduced in the Official Gazette, the latter being receivable in evidence as a Government publication, and presumed to be accurate. On these two matters, namely, the date of promulgation, and the Privy Council decision to which I have referred, he was entirely without the data which have proved conclusive in the determination of this appeal. This appeal will accordingly be allowed; the judgment and decree of this Court on the original side, dismissing the plaintiffs' suit is set aside and instead thereof the plaintiff-appellant will be granted declarations as prayed for in the first and second prayers of his plaint. The respondent must pay the costs both here and in the Court below, advocate's fee in this Court forty gold mohurs.

Dunkley J.—I concur in the conclusions at which my Lord the Chief Justice has arrived. The points which were considered and decided by the learned trial Judge in his judgment may be briefly summarized as follows: (1) that this High Court has jurisdiction to determine the questions raised by and to give the reliefs claimed in the plaint; (2) that the plaintiff-appellant was holding an office of profit under the Crown on March 28th and 29th; (3) that Ordinance No. 7 of 1939 ceased to operate at midnight of 28th/29th March; (4) that Ordinance No. 5 of 1940 was not promulgated until 30th March; (5) that the Courts have jurisdiction to enquire whether an Ordinance purporting to be promulgated under S. 42, Government of Burma Act, was in fact promulgated under the conditions prescribed by sub-s. (1) of that section; (6) that Ordinance No. 5 of 1940 was ultra vires the Governor. As long ago as 1866 their Lordships of the Privy Council in 11 M I A 7[3] at p. 20 pointed out "the absolute necessity that the determinations in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made." This salutary rule is often forgotten, and, with the greatest respect, it was apparently overlooked by the learned trial Judge. Order 8, Rule 5, Civil P. C., enacts that

every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to

3. ('66) 11 M I A 7 : 6 W R 57 : 2 Sar 209 : 1 Suther 649 (PC), Eshen Chunder Singh v. Shama Churn Bhutto.

be not admitted in the pleading of the defendant, shall be taken to be admitted.

Paragraph 10 of the plaint states: "On 29th March 1940, His Excellency the Governor promulgated under S. 42 of the Act an Ordinance, being No. 5 of 1940 . . . ." Paragraph 5 of the written statement of the defendant-respondent reads: "Paragraphs . . . . 10 . . . . of the plaint need no reply." Hence the allegation in para. 10 of the plaint, that Ordinance No. 5 of 1940 was promulgated on 29th March, was not denied specifically or by necessary implication or stated to be not admitted in the written statement, and should therefore have been taken to be admitted. Moreover, the printed copies of the proceedings of the House of Representatives on 29th March and 1st and 2nd April were admitted as evidence by consent, and the defendant-respondent's "ruling" delivered on 2nd April (at p. 1729) contains the following sentence: "It is admitted that in the afternoon of 29th March . . . . His Excellency the Governor promulgated the new Ordinance under S. 42, Government of Burma Act." This is an unequivocal admission that Ordinance No. 5 of 1940 was promulgated on 29th March, and this question was not in dispute between the parties. Hence, with all due respect, it was not open to the learned Judge to come to the finding, at which he did arrive, that this Ordinance was not promulgated until 30th March. Order 8, Rule 2, Civil P. C., enacts that

> the defendant must raise by his pleading all matters which show the suit not to be maintainable, ... and all such grounds of defence as . . . . would raise issues of fact not arising out of the plaint, as, for instance, ... facts showing illegality.

The defendant-respondent did not, either during the prolonged discussion in the House of Representatives, or in his "ruling" of 2nd April, or in his written statement, suggest that Ordinance No. 5 of 1940 was not validly promulgated by the Governor under S. 42, Government of Burma Act. In fact, as I have already stated, he did not reply to para. 10 of the plaint, which set out the facts concerning the due promulgation of this Ordinance, and the defence that the Ordinance was ultra vires the Governor was raised only in the written statement of defendant 2 in the suit, against whom the appeal has been withdrawn. The decision of the learned Judge on the first three points was correct and was in favour of the plaintiff-appellant, and, so far as the present respondent is concerned, no other issue arose on the pleadings. However, I propose to make a few observations regarding each of the points decided by the learned trial Judge. There was no substance in the respondent's demurrer to jurisdiction. The Speaker derives his authority and powers from the Government of Burma Act, and in deciding a disputed question as to whether a duly elected and sitting member of the House of Representatives had since become disqualified under S. 25 (1) (a) of the Act by reason of having accepted an office of profit under the Crown he arrogated to himself the status of a Court, and furthermore in his "ruling" of 2nd April, which is nothing more nor less than a considered judgment, he purported to inflict a penalty of Rs. 500 per day on the appellant. These are things which the Speaker is expressly prohibited from doing by S. 27 (3) of the Act. He cannot assume the status of a Court and no punitive powers can be conferred on him. Yet he assumed authority to deprive the appellant of his salary as a member of the House of Representatives and to inflict a fine of Rs. 500 a day on him. As regards the argument that, in the absence of any provision of the Government of Burma Act declaring the authority which shall determine whether a seat is vacant or not, by implication the Speaker must be that authority, I do not understand, nor has it been explained to us, how any such implication arises. Possibly the Legislature could pass an Act, or the Governor could make a rule under cl. 15, Sch. 3 to the Government of Burma Act, determining the authority which shall declare when a seat becomes vacant and ousting the jurisdiction of the civil Courts in such a matter; but in view of S. 27 (3) neither the Legislature nor the Governor could confer this authority on the Speaker, and in the absence of any such Act or rule ousting the jurisdiction of the Courts such a matter is clearly a question of status to be determined by the Courts under S. 42, Specific Relief Act.

The correctness of the learned trial Judge's conclusion on the second point has not been challenged by the appellant. On the third point the respondent held in his "ruling" of 2nd April that Ordinance No. 7 of 1939 ceased to operate at midnight of 27th/28th March, a patently erroneous decision which his learned counsel has not attempted to support. The contention now is that, as the Legislature reassembled at 11 A. M. on 15th February, under S. 41 (2) (a), Government of Burma Act, this Ordinance ceased to operate at 11 A. M. on 28th March. But,

as the learned trial Judge has pointed out, the law takes no notice of the fractions of a day, and he has cited a line of cases in which this maxim has been applied, of which I need mention only (1879) 4 Q B D 230[4] at p. 232. Section 41 (2) (a) enacts that an Ordinance promulgated under that section shall cease to operate "at the expiration of six weeks from the reassembly of the Legislature," and if the expression "six weeks" is to be construed as equivalent to any 42 consecutive days, then Ordinance No. 7 of 1939 ceased to operate at midnight of 28th/29th March. That conclusion is sufficient for the disposal of this case. But it seems to me that it might have been urged with cogency that if Parliament had intended the period to be 42 days it would have said so in express terms, and that this construction does violence to the actual wording of the section; and, further, that just as, in law, a day begins at midnight and ends at midnight, so a week begins on Saturday/Sunday midnights and ends on the following Saturday/Sunday midnight. Then it would follow, on the analogy of the cases cited by the learned trial Judge, that when the expression "week" is used in a statute no notice can be taken of the fractions of a week. If this is the correct interpretation of S. 41 (2) (a) it follows that Ordinance No. 7 of 1939 ceased to operate only at midnight of 30th/31st March. Attractive as I find this line of thought to be, this view has not been raised before us in argument, and for the decision of this appeal it is unnecessary to consider it, and therefore I must reserve it for further consideration if and when the question arises again.

As regards the fourth point, it is most unfortunate that the learned trial Judge was left with the erroneous impression in his mind that what was read out to the members of the House of Representatives by the Speaker on 29th March was a typed copy of Ordinance No. 5 of 1940. The document which was read out by the Speaker has been shown to us by the learned Advocate-General, and it is now admitted on all hands that what was read was the original Ordinance, signed by the Governor and in part in the Governor's own handwriting. It is even more unfortunate that this Ordinance was inaccurately reproduced in the Gazette Extraordinary of 30th March. The public and the Courts are entitled, and in fact are required by law, to rely on the accuracy of statements appearing in the Burma Gazette, and the failure of the judicial department of the Government of Burma to publish in this Gazette the identical terms of the Ordinance as made and promulgated by the Governor is extremely surprising. In the course of the hearing of this appeal, we have had produced before us two notifications in the Gazette purporting to publish two different Ordinances of the Governor promulgated under S. 42, Government of Burma Act, and they are in essentially different forms. At the risk of being accused of going outside the matters falling for determination in this appeal, I venture to suggest that there ought to be a common form of Preamble for all such Ordinances, and that the preamble should set out that the Governor is satisfied as required by the terms of S. 42 (1) and also the purpose within S. 42 (1) for which the Ordinance is promulgated. In making this suggestion I have not overlooked the judgment of Rankin C. J., in 37 C W N 166[2] at p. 168, and I realize that it is not legally necessary that this should be done, and that legally all that is necessary is that the Governor should declare that he promulgates the Ordinance under the provisions of S. 42, Government of Burma Act; but I think that the adoption of this suggestion might make for the better understanding by the public of the reason and necessity for the issue of an Ordinance.

Now, under S. 42 (1), the Governor "promulgates" an Ordinance, and there is no special legal significance about the word "promulgate"; it is an ordinary English word, not in common use, which according to Murray's Dictionary means to publish or proclaim formally. That is the sense in which it is used in Ss. 41 and 42, Government of Burma Act. It does not connote publication in the Official Gazette; that is, as my Lord has pointed out, quite unnecessary, and indeed, if it were necessary, it would render the provision of S. 42 ineffectual for the purpose which they are obviously designed to meet. Publication in the Gazette is merely a convenient means of bringing the Ordinance to the notice of the public generally, but not a necessary means. As the learned trial Judge has pointed out, the Speaker is a medium of communication from the Governor to the House of Representatives. In that capacity, the Speaker read out the original Ordinance No. 5 of 1940 to the members of the House. How better could this Ordinance be "promulgated" than by reading it out formally to the body of persons most affected thereby? To my mind, it is

4. (1879) 4 Q B D 230 : 48 L J M C 95 : 40 L T 459 : 27 W R 552, Tomlinson v. Bullock.

clear that this Ordinance was promulgated, within the meaning of S. 42 (1), Government of Burma Act, when it was read out by the Speaker to the House of Representatives on 29th March. Therefore, in view of the provisions of S. 4 (2), General Clauses Act, it came into operation at midnight of 28th/29th March. Points 5 and 6 are covered by authority namely, the judgment of their Lordships of the Privy Council in 12 Lah 280[1] at p. 283, and it is highly regrettable that this case was not cited to the learned trial Judge. In view of this judgment of the Judicial Committee, it must, with all due respect, be held that the decisions of the learned Judge on these two points were wrong. I therefore agree that this appeal must be allowed, the judgment and decree of the original side of this Court reversed, and the plaintiff-appellant granted declarations in accordance with prayers (a) and (b) of the plaint. I agree with my Lord's order regarding the costs of the suit and the appeal.

R.K. *Appeal allowed.*

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MYA BU AND MOSELY JJ.

P. L. S. P. Subramanian Chettiar — Appellant

v.

L. N. Chettyar Firm and others — Respondents.

First Appeal No. 170 of 1939, Decided on 16th May 1940 from order of the Dist. Court, Maubin, D/- 22nd September 1939.

(a) Limitation Act (1908), S. 5 — S. 5 does not apply to application in execution.

Section 5 does not apply to applications in execution at all. [P 57 C 1]

(b) Limitation—Execution—Court which passed decree has jurisdiction to determine whether execution application is barred even if decree has been transmitted to another Court for execution.

The Court which passed the decree is not debarred from determining the question whether the execution of the decree is time-barred or not, although it has sent the decree to another Court for execution. Both, the Court which passed the decree and that to which the decree is sent for execution have jurisdiction to determine this question, and which is the more suitable of the two depends upon the question of convenience and priority. [P 58 C 1 ; P 59 C 2]

(c) Res judicata—Plea that execution application is time-barred even if not raised in transferee Court does not become res judicata in Court which passed decree.

Even if the plea that application for execution is time-barred is not raised in the Court to which decree is transmitted for execution the plea cannot be res judicata in the Court which passed the decree because the plea can be raised at any time in the transferee Court : 13 Cal 257, *Rel. on.* [P 58 C 1]

(d) Burma Courts Act (11 of 1922), S. 7 (c) —Words "original proceeding" — Meaning explained.

The words "original proceeding" are not used in contradistinction to "proceeding in appeal," and can only mean proceedings which initiate something, such as, for example, pauper application. These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. [P 58 C 2]

(e) Burma Courts Act (11 of 1922), as amended in 1932—Fact that Assistant District Judge has been constituted by amending Act of 1932 does not mean that District Court which passed decree is deprived of its jurisdiction to execute its decree not exceeding pecuniary limit of Assistant District Court's jurisdiction—District Court is proper Court to which application for execution is to be made.

Just because an Assistant District Court has been constituted by Burma Courts Amending Act, 1932, for the same local area after the passing of the decree with jurisdiction to hear and determine suits or original proceedings of certain value, the Court of a higher pecuniary jurisdiction i. e., the District Court which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the Assistant District Court's jurisdiction but is the proper Court which should execute the decree. [P 60 C 1]

E. Hay — for Appellant.

P. K. Basu — for Respondents.

Mosely J. — This is an appeal from an order in execution passed by the District Judge of Maubin. The facts of the case are as follows: A decree was passed in favour of respondent 1, L. N. Chettyar Firm, in the District Court, Maubin, in suit No. 2 of 1928 for some Rs. 8000 odd against the appellant P. L. S. P. Subrmaniam Chettiar and his partner, respondent 2, Karuppan Chettyar, who has not entered appearance in this appeal and is only a pro forma party. Execution of this decree was taken out in civil execution case No. 2 of 1929 and in civil execution case No. 18 of 1931 of the District Court of Maubin, which was closed on 5th December 1931, and again in a third execution proceedings No. 8 of 1934 of the Assistant District Court of Maubin. Assistant District Courts were not constituted by the Burma Courts Act, 11 of 1922, but were only established under a further Act to amend that Act, Burma Act 4 of 1932, which came into force in that year—1932. This execution proceeding was instituted on 9th November 1934, but was not proceeded with, and was closed on 21st January 1935. Then a fourth execution proceeding, the one with which the present appeal is concerned, execution case No. 5 of 1936, was instituted on 5th August 1936, for execution for a sum of Rs. 4800 odd. This was an application that the

decree be sent for execution to the subordinate Court of Sivaganga in the Madras Presidency. The decree was sent (as usual without notice to the judgment-debtors) with the necessary certificate on that date.

Execution was proceeded with in the Sivaganga Court, but nothing further was done in execution case No. 5 of 1936 of the District Court of Maubin until 21st October 1938, when the appellant applied that the decree be recalled and the certificate of non-satisfaction corrected by the showing of a sum of some Rs. 2000 as having already been satisfied by a payment in 1931. On 31st October this application was followed by a further application by the appellant pleading that execution of the decree was time-barred. Respondent 1, the decree-holder, then filed a written objection, and later, in April 1939, an application was made to condone the delay. The present order now under appeal was passed on this application and on the application by the judgment-debtors to say that the appeal was time-barred. The learned District Judge found in the first place that execution case No. 8 of 1934 had not been transferred to the Assistant District Court nor had it been presented to the proper Court as defined in Art. 182 read with Expln. 2 to that article. In the explanation it is said "proper Court" means the Court whose duty it is to execute the decree or order. The learned Judge, however, went on to quote S. 5, Limitation Act, and to say that the Court had power to condone delay if it was satisfied that the decree-holder had sufficient cause for not making his application within the period of limitation. Section 5, however, does not apply to applications in execution at all. The learned Judge proceeded to hold that the mistake was a bona fide one and that the delay should and could be condoned under S. 14 (2), Limitation Act, forgetting that S. 14 (2) could only operate to exclude from limitation the actual time during which this application in execution to the Assistant District Court was pending. Admittedly that period would not be sufficient to make the present application within time.

This appeal is on the ground that Ss. 5 and 14, Limitation Act, have no application and that the proceedings in execution in question are on the face of them time barred. A preliminary objection is made by the respondent that any objection on the score of limitation should have been made to the Sivaganga Court in which proceedings in execution were being conducted and not to the Maubin Court. This question was discussed, but not decided, in an appeal to a Bench of this Court, 5 Rang 775.[1] This was a case where a decree of the Chief Court of Lower Burma was sent for execution to the District Court of Ramnad in Madras and was returned with a certificate of non-satisfaction for the purpose of enabling the decree-holder to bring the legal representatives of the deceased defendant on the record. This was done and it was then ordered that the decree be resent to the Ramnad Court. In appeal it was contended that the decree and the application to bring the legal representatives on the record were both time-barred. The learned Judge on the original side of the High Court had taken the view that both questions were questions which should ordinarily be decided by the Chief Court, but that in the circumstances of the case they ought to be decided by the District Court of Ramnad as the whole of the previous proceedings in execution had been taken in that Court and all necessary materials for a decision were therefore available there.

It was contended in appeal that the appellant was entitled to have these questions decided by this Court. 54 I A 129,[2] a decision of their Lordships of the Privy Council was quoted, where it was expressly said that an order of transmission would be rightly made ex parte and as a ministerial act, and it followed by necessary implication that an order permitting execution against the legal representatives could also rightly be made ex parte. That case affirmed the decree of the Calcutta High Court in A I R 1925 Cal 213,[3] where the other question had arisen as to which was the proper Court to decide an objection on the part of the judgment-debtor that execution was time-barred. In that case Richardson J., had briefly said that under the scheme of the Code the Court transmitting a decree was not the Court to decide such an objection, and that such objection should be taken and determined by the Court to which the decree is transmitted. All that was said in 5 Rang 775[1] was that this Court could have rightly left both questions, in the circumstances of that case, to the Ramnad Court.

1. ('28) 15 AIR 1928 Rang 40 : 106 I C 857 : 5 Rang 775, Nachiamma Achi v. S. N. Subraminian Chetty.
2. ('27) 14 AIR 1927 P C 73 : 101 I C 24 : 54 Cal 500 : 54 I A 129 (P C), Banku Behary v. Narain-das Dutt.
3. ('25) 12 AIR 1925 Cal 213 : 78 I C 1001, Narain Dass Dutt v. Banku Behari.

Another ruling quoted, 37 Mad 231,[4] is to the effect that after a decree is sent for execution, the Court which passed the decree has no jurisdiction to entertain another application in execution unless concurrent execution had been ordered or the proceedings in the Court to which the decree was sent had been stayed. But the present application is not one to execute but that the decree be declared incapable of execution and, it may be remarked, execution has been stayed in the Sivaganga Court for the purpose of allowing this question of limitation to be decided by the District Court of Maubin. I myself can find nothing in the Act to show that it is intended that objections as to limitation which go to the root of execution can only be taken in the Court to which a decree is transmitted. No doubt that is often the most convenient course, and is usually the most convenient course when the executing Court lies in the same province as the Court which passed the decree and can easily obtain full materials and information. But the Court which passed the decree is the Court which has and retains control of the proceedings: *vide* O. 21, R. 28, which says that

> any order of the Court by which the decree was passed . . . in relation to the execution of such decree shall be binding upon the Court to which the decree was sent for execution.

Of course applications that the decree has been wholly satisfied in Burma after its transmission to Madras would naturally and normally be made to the Court in Burma which passed the decree, and there is, in my opinion, nothing in the Act or in the scope or intention of the Act to prevent similar applications in regard to matters concerning limitation which go to the root of execution. It is merely the question of convenience or of priority of application which determines the Court which shall decide such questions. If this preliminary objection had been well-founded and the District Court had had no power to decide the question of limitation, the District Court would have had no power to transmit the decree to the Sivaganga Court. Another objection that this plea of limitation is res judicata because it was not raised in the Sivaganga Court may be dismissed on the short ground that it would be raised at any time in the Sivaganga Court and cannot therefore be res judicata here: *see* a case decided on these lines, 13 Cal 257.[5] As to the main grounds of appeal we must first refer to the Burma Courts Act of 1922 and to the amending Act of 1932 by which the Assistant District Court was constituted. By S. 6 of Act 11 of 1922 it was enacted that the Local Government shall establish District Courts, Subdivisional Courts and Township Courts. Section 7 defined the original jurisdiction of those Courts, and sub-cl. (c) said that the District Court shall have jurisdiction to hear and determine any suit or original proceeding without restriction as regards the value.

It appears to me that the words "original proceeding" are not used in contradistinction to "proceeding in appeal," and can only mean proceedings which initiate something, such as, for example, pauper applications, (the same words are used with reference to the jurisdiction of sub-divisional and township Courts). These words at all events cannot refer to execution proceedings which are merely a continuation of the proceedings in the suit which gave rise to them. Section 24 is the first section of Ch. 4, which is headed "Provision for Pending and Past Proceedings," and S. 24, sub-s. (2) says that every proceeding pending in any other civil Court in Burma (i. e., other than the High Court, mentioned in S. 24 (1)) at the commencement of this Act shall be deemed to be transferred to the Court exercising the jurisdiction under this Act, which corresponds to the jurisdiction of the Court in which the proceeding was instituted, and the Court to which any such proceeding is transferred shall proceed to try, hear and determine the matter as if it had been instituted in such Court. Section 26 refers to execution of past decrees and orders, and says that all decrees and orders passed by the divisional Court shall be deemed to have been passed or made by the District Court which would have had jurisdiction if this Act had been in force at the time the decrees or orders were passed or made.

The Amending Act (Burma Act 4 of 1932), by sub-s. 2 (1) established a new grade of Court in Burma in addition to the already established Courts, namely the Assistant District Court, and by sub-s. (4) of that Act it was laid down that the Assistant District Court shall have jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rs. 15,000. It would appear clear on a plain reading of this last

4. ('14) 1 AIR 1914 Mad 435: 15 I C 738: 37 Mad 231: 23 M L J 236, Maharaja of Bobbili v. Narasaraju Peda.

5. ('86) 13 Cal 257, Srihari Mundul v. Murari Chowdhury.

provision, read with S. 24 (2) of the Act of 1922, that the Assistant District Court had only jurisdiction to try suits or original proceedings within its pecuniary jurisdiction which were instituted after Act 4 of 1932 came into force, or, it may be added, which were transferred to it under S. 24 of the Code by the District Court. Section 26 of Act 11 of 1922 was not amended so as to make it deemed that decrees of the District Court had been passed by the Assistant District Court. It cannot be said that the Court which passed the decree (S. 38 of the Code) had ceased to exist or to have jurisdiction to execute its decrees. If that were the case, of course, the Assistant District Court would be the Court to which applications in execution of the proceedings of the District Court within the pecuniary jurisdiction of the Assistant District Court would lie under the provisions of S. 37 (b) of the Code. But the District Court has not ceased to exist, and in practice District Courts have been executing decrees passed in suits of a value less than Rs. 15,000 passed prior to 1932 ever since then, and applications for execution of such decrees have not been filed in the Assistant District Courts. The proper procedure was pointed out by a circular of this Court in 1933. I do not see that S. 150 of the Code can help the respondents here. That section enacts :

> Save as otherwise provided, where the business of any Court is transferred to any other Court, (i. e., the business of any Court is, in whole or part, transferred to any other Court), the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

I do not wish to allude to cases which have been quoted where a Court had ceased to exist or had ceased to exercise territorial jurisdiction. This argument presupposes that the District Court had ceased to exist or had ceased to exercise jurisdiction in respect of decrees to the value of under Rs. 15,000 passed by it. I will only refer to one case cited by the respondents, 47 Cal 1100.[6] In that case a Munsif who was empowered to try suits up to Rs. 2000 had passed a preliminary decree but was then transferred, and the final decree in the case was passed by the subordinate Judge. Application for execution of the decree was subsequently made to a successor of the Munsif, who was also empowered to try suits up to Rs. 2000. It was said in the judgment in that case (p. 1103 ibid) that since the second Munsif's Court was vested with the powers to try suits up to Rs. 2000 in value the business in the subordinate Judge's Court so far as it related to suits up to the value of Rs. 2000 must be taken to have been transferred to the Munsif's Court, and that that Court therefore would have the same powers and would perform the same duties as those conferred and imposed by the Code upon the Court of the subordinate Judge from which the business was transferred. The decision purported to be one under the provisions of S. 150 of the Code, but I cannot see myself that that section had any application in that case. Section 150 starts "Save as otherwise provided," and it certainly could not have been said in that case, in the words of S. 37 that the Court of the subordinate Judge had ceased to exist. For these reasons I think that the trial Court was right in coming to its conclusion that execution case No. 8 of 1934 had not been instituted in the proper Court. This being so, it must be held that execution in the present case now under appeal is time barred. This appeal will be successful and there will be a finding to this effect. Respondent 1 is to pay the costs of this appeal ad valorem. The proceedings in execution will be recalled from the Court of Sivaganga.

Mya Bu J. — I agree with my learned brother. As regards the respondent's objection to the jurisdiction of the District Court of Maubin, the principle underlying the rule in O. 21, R. 28, and the decision in 13 CAL 257[5] make me incline to the view that the Court which passed the decree possesses jurisdiction to determine the question whether the execution of the decree is time-barred or not, although it has sent the decree to another Court for execution ; but for the purpose of this case, I am content to adopt the view that the authorities relied on in support of the contention do not lay down that the Court which passed the decree is deprived of jurisdiction to determine the question after it has sent the decree to another Court for execution, and I am in entire agreement with my learned brother that both, the Court which passed the decree and that to which the decree is sent for execution, have jurisdiction to determine this question, and which is the more suitable of the two depends upon the question of convenience and priority.

Coming to the main question for determination, namely, whether the application

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6. ('20) 7 A I R 1920 Cal 532 : 57 I C 879 : 47 Cal 1100 : 24 C W N 899, Aminuddin Mullick v. Atormoni Dasi.

for execution in civil execution No. 8 of 1934 of the Assistant District Court of Maubin was an application made to the proper Court, the arguments addressed in support of the affirmative view seem to have proceeded upon the supposition that by the creation of the Assistant District Court by the Burma Courts (Amendment) Act 1932, the jurisdiction of the District Court to execute its own decrees under S. 38, Civil P. C., was extinguished, where the amount does not exceed the pecuniary limit of the jurisdiction of the Assistant District Court. The authorities relied on by the learned advocate for the respondents (other than the one already quoted by my learned brother) are cases where the Court which had jurisdiction to pass the decree had ceased to exist and another Court had come into being to exercise that jurisdiction. The fallacy of the argument can, however, be illustrated by simple illustrations, such as, for example, in a suit for Rs. 20,000 filed in the District Court in which the District Court passes a decree for Rs. 500 only, it is still the District Court which has jurisdiction to execute the decree for Rs. 500, although the decretal amount happens to be within the jurisdiction of the township Court which, of course, will have jurisdiction to execute the decree only if it be transferred to it. This illustration, in my opinion, is sufficient to show that, just because an inferior Court has been constituted for the same local area after the passing of the decree with jurisdiction to hear and determine suits or original proceedings of a certain value, the Court of a higher pecuniary jurisdiction which passed the decree is not only not deprived of its jurisdiction to execute its decree which may not exceed the pecuniary limit of the new Court's jurisdiction but is the proper Court which should execute the decree. For these reasons I agree in the order proposed by my learned brother.

D.S./R.K. *Appeal allowed.*

A. I. R. 1941 Rangoon 60

MOSELY J.

K. N. R. M. Narayanan Chettyar — Applicant

v.

Ma Saw Hla and others — Respondents.

Civil Revn. No. 14 of 1940, Decided on 27th May 1940, from order of Sub-Divisional Court, Bassein, in Civil Exn. No. 57 of 1938.

Civil P. C. (1908), S. 151 — Property of judgment-debtor attached in execution — Suit by third person for declaration that decree was obtained by fraud and was inoperative against estate — Court cannot stay execution by invoking S. 151.

Where in execution of decree, the property of the judgment-debtor is attached and a third person who was not party to the proceedings brings a suit for declaration that the decree had been obtained by fraud and was inoperative against the estate, the Court cannot, by invoking S. 151, stay execution. It makes no difference that the plaintiff's suit is one for a declaration under the Specific Relief Act and not one under O. 21, R. 63 : A I R 1938 Rang 21, *Rel. on.* [P 61 C 1]

P. K. Basu — for Applicant.

Order. — This is an application for revision of an order of the sub-divisional Court, Bassein. It has been heard ex parte. The applicant K. N. R. M. Narayanan Chettyar obtained a decree against L. A. Kasi Chettyar and two others (respondents 2, 3 and 4 here who have not entered any appearance), as legal representatives of one Somasundram Chettyar, and took out execution in which some property was sold. Respondent 1 Ma Saw Hla made an application for removal of the attachment but later withdrew it. After that she filed a suit against the K. N. R. M. firm for a declaration that she was the sole legal representative of Somasundram Chettyar who was a Buddhist, she being his daughter, that the decree which had been obtained and obtained ex parte against L. A. Kasi Chettyar and two others had been obtained by fraud and collusion and was inoperative against Somasundram's estate and against her, and that in any case she is not bound by it. Ma Saw Hla did not sue for an injunction to restrain the sale of the rest of Somasundram's property in execution of the decree obtained by K. N. R. M. Narayanan Chettyar, but she applied to the Court to stay execution. Both suits having been filed in the subdivisional Court the learned Judge held that Ma Saw Hla was not bound to sue for an injunction but that it would put her to inconvenience in recovering the properties if they were sold as that would drive her to enforce her claims by fresh suits and might result in injury to the purchasers at the sales. He also mentioned a case as cited in Chitaley's Civil Procedure Code, where stay of execution was granted on the ground that the ex parte decree was obtained by fraud. That case is 75 I C 419,[1] and it was held there that, although no suit between the parties was pending within the meaning of O. 21, R. 29, yet as the defendant in the previous suit was about to file a suit for a declara-

1. ('23) 10 A I R 1923 Lah 514 : 75 I C 419, P. W. Fitzholmes v. Waryam Singh.

tion that the decree had been obtained by fraud, stay of execution might be ordered in other proceedings under the inherent powers of the Court. In that case, however, stay was ordered in favour of a party to the previous proceedings, whereas Ma Saw Hla here was not such a party. The trial Court here too purported to order stay of execution under its inherent powers under S. 151.

It was laid down as early as 1863 by the Calcutta High Court in Marsh Rep 478[2] that "the Court will not interfere to stay execution upon the application of a person, not a party to the suit, who claims immovable property liable to be taken under the decree," that is to say, if Ma Saw Hla had applied in the previous execution proceedings execution would not have been stayed. It was pointed out that the remedy was by an application under the section to which the corresponding provision now would be O. 21, Rr. 98 and 99. The matter is really concluded by the case in A I R 1938 Rang 21.[3] It was said there that O. 39, R. 1 has now been amended and the words "wrongfully sold in execution of a decree" have been deleted.

The result of the amendment prima facie, "(it is said)" is that the Court in which a suit under O. 21, R. 63, is pending does not enjoy the power of granting a temporary injunction to prevent the sale of the property under attachment in the execution case which led to the suit. The reason for the present rule is not far to seek. The claimant in a proceeding under O. 21, R. 58, who files a suit under O. 21, R. 63, is not the judgment-debtor against whom execution is taken, and the sale of the property attached in the execution cannot impair his right, title or interest in the property, for it is only the right, title and interest of the judgment-debtor which is conveyed to the purchaser at the sale. If his suit succeeds then the interests which are declared in his favour are to be deemed not to have been disposed by the sale.

If no temporary injunction can be given it is clear that execution cannot be stayed, for that would amount to exactly the same thing. As was said in the above case, S. 151 cannot be invoked, for, it is not necessary in the ends of justice, or to prevent the abuse of the process of the Court, to stay execution when the right, title and interest cannot be affected by the sale. It makes no difference that the plaintiff's suit is one for a declaration under the Specific Relief Act and not one under O. 21, R. 63. For these reasons, this application in revision will be successful and the order of the trial Court passed without jurisdiction staying the sale will be set aside with costs, advocate's fee two gold mohurs.

D.S./R.K. *Order set aside.*

2. Marsh Rep 478, Khiluck Chunder Ghose v. Prosunno Moyee Dassee.
3. ('38) 25 A I R 1938 Rang 21 : 174 I C 503, Mohamed Hajee Valli Mohamed v. Vednath Singh.

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* A. I. R. 1941 Rangoon 61

Special Bench

ROBERTS C. J., DUNKLEY AND BLAGDEN JJ.

Ma Htwa Yin and others — Applicants

v.

Maung Thet Hnin — Respondent.

Civil Ref. No. 7 of 1940, Decided on 26th November 1940, made by the Commissioner for Workmen's Compensation, Tavoy.

• *Workmen's Compensation Act (1923), S. 2 (n) — Licensee upon mine paid by piece work rates and without any control by mine authorities is not workman.*

A mere licensee upon the mine who is paid by piece work rates for the work which he did and over whom there is no control by the mine authorities is not a 'workman' within the meaning of the Act. [P 61 C 2]

J. R. Chowdhury — for Respondent.

Roberts C. J. — In this case the Commissioner for Workmen's Compensation for Tavoy has referred to us the question whether in law the deceased person was a "workman" within the meaning of the Workmen's Compensation Act. It is a matter to be concluded from the facts by the Commissioner whether an applicant, or a deceased person whose dependents are applicants, in a particular case was or was not a workman within the meaning of the Act, and properly this is not a question of law which should have been referred to us at all. It is however clear that the conclusions of fact have been drawn from the evidence which was adduced. The Commissioner has found as a fact that the deceased was a mere licensee upon the mine, that he was paid by piece work rates for the work which he did and that there was no control over him by the mine authorities. In those circumstances, the proper inference—and, indeed, the only inference—to be drawn is that he was not a "workman" within the meaning of the Act; and, although, in my opinion, strictly speaking, we are not to answer this question, we think it desirable to answer it in the negative and to say that in future the Commissioner should determine such questions himself.

Dunkley J.—I agree.

Blagden J.—I agree.

D.S./R.K. *Answered in negative.*

* A. I. R. 1941 Rangoon 62

MOSELY J.

The King

v.

U Datthana — Accused — Respondent.

Criminal Revn. No. 374-B of 1940, Decided on 23rd August 1940.

* *Penal Code (1860), S. 124-A — Sentence — Violent speech inciting people to rise in rebellion against Government and calculated to bring Government into contempt is grave offence specially in war time—Deterrent sentence is necessary.*

A speech which is a violent and dangerous incitement to the people to rise in rebellion against the Government established and also calculated to bring the Government into hatred and contempt is an offence of enormity at any time, but even more so when a nation is engaged in war against its external enemies. In such a case severe and deterrent sentences are necessary: A I R 1939 Rang 169, *Expl., and Disting.* [P 62 C 2 ; P 63 C 1]

Chan Htoon Aung — for the Crown.

Accused in person.

Order.—The respondent U Datthana, a Buddhist monk aged 44, was sentenced by the Second Additional Magistrate, Myingyan (a Special Power Magistrate), to two concurrent terms of six months' rigorous imprisonment on two charges under S. 124-A, Penal Code, for making speeches on two successive days, 19th and 20th February 1940, at Natogyi and Taungtha, in which he attempted to bring into hatred or contempt or excite disaffection towards the Government established by law in Burma.

Application has now been made by Government for enhancement of these sentences on the ground that, considering the grave character of the offence committed, they are entirely inadequate. I have heard the learned Government Advocate for the Crown and also the respondent. The respondent only contends that the sentences were a sufficient punishment. The first speech at Natogyi was delivered to an audience of about 200 people. Some members of the Thakin party spoke after the respondent. The respondent began by saying that it had not been arranged that he should speak. He said that he had been delivering speeches on politics at various places since 20th January. He would not speak on religious topics.

(Extracts of speeches are not reproduced as the language used in them is vile and virulent.) There is no doubt, as the learned Magistrate found, that the whole speech was correctly taken down by the short-hand reporter, as is testified by him and by the persons to whom it was read and who certified its correctness. This speech was from start to finish a violent and dangerous incitement to the Burmese people to rise in rebellion against the Government established. It was also calculated to bring the Government into hatred and contempt. An educated man who distorts and misrepresents the facts and who tries to incite an audience, many of whom are drawn from an ignorant, excitable and easily gullible class, is far more guilty in my opinion than his miserable dupes on whom heavy sentences of imprisonment are inflicted if they are led by such inflamatory speeches playing on their passions and prejudices to rise in actual revolt. In the second speech the respondent again prefaced his remarks by declining to speak on religious matters. (Extracts of speeches are not reproduced as the language used in them is vile and virulent.) This speech also was duly proved by the short-hand writer and the witnesses who attested it. As the Magistrate remarked, no speeches could conceivably be more seditious than these. It is incorrect, I think, to say, as the Magistrate said, that the key-note of the second speech was "I want to stay inside the jail with the convicts and rise in rebellion." The reference to the speaker's experiences in jail was merely an attempt to excite the sympathy of his audience. The key-note of the speech was the oppression of the people by the Government, the contemptible character of that Government, and the need for the people to rise in rebellion against it. Although the Magistrate considered these speeches to be of an extreme character and dangerously seditious, he yet imposed the entirely inadequate sentence of a total of six months' rigorous imprisonment. The Magistrate failed to consider not merely the nature of the speeches themselves but the highly critical times which existed when the speeches were delivered. Direct incitement to revolt against Government is an offence of enormity at any time, but even more so when a nation is engaged in war against its external enemies.

As a reason for such extraordinarily light sentences the Magistrate quoted 1939 R L R 239.[1] A sentence of four months' rigorous imprisonment only was imposed under S. 124-A on appeal to this Court. That was a totally different case and the Magistrate has entirely misconstrued what was laid down there if he thought that it had any application whatever to a case such as the

1. ('39) 26 AIR 1939 Rang 169 : 182 I C 361 : 1939 R L R 239 : 40 Cr L J 668, Lay Maung v. The King.

present one. 1939 R L R 239[1] was one of a speech delivered for the purpose of getting the oil-field labourers to unite in making a demand for their real or fancied rights and privileges from their employers, and also to have laws promulgated for amelioration of their conditions of work. That was the main object of that speech, but their was also the object of making the speaker's listeners feel discontented with their lot, a discontent which the speaker attributed to the unfair operations of the prevailing laws and to the alien character of the Government, which was favourable to capitalists and prejudicial to labourers. The speaker's comments in *Lay Maung's case*[1] expressed in part merely disapprobation of the measures or administrative action of Government with a view to obtain their alteration by lawful means. At the same time the speaker transgressed by adding these comments what amounted to an attempt, though in that case not a dangerous one, to excite hatred, contempt or disaffection towards Government. It would appear that in that case violent, inflammatory and contemptuous expressions were not used against the head of the Government and his principal ministers of Government such as were used in the present case. Much less in that case was there any overt attempt whatever to persuade the people to rise in active and open rebellion against Government.

Circumstances alter cases, and it may be that at the present juncture one might well feel inclined to impose a severer sentence in a case similar to that of *Lay Maung*[1] for the infinitely milder type of offence committed by him there. But for the offence committed in the present case there can be no doubt that severe and deterrent sentences are necessary. In revision it will be ordered that the sentence on the first charge under S. 124-A be enhanced to one of two years and six months' rigorous imprisonment. In view of this I do not think it necessary to pass a very severe sentence on the second charge, though the speech was equally virulent and violent. The sentence on the second charge will be enhanced to one of nine months' rigorous imprisonment, the sentences to run consecutively—a total of three years and three months' rigorous imprisonment in all, the prisoner to be recommended to be placed in the B class in which he is now.

D.S./R.K. *Sentence enhanced.*

A. I. R. 1941 Rangoon 63

ROBERTS C.J. AND BLAGDEN J.

Sein Dass — Appellant

v.

Lakhajee and another — Respondents.

Letters Patent Appeal No. 13 of 1939, Decided on 2nd May 1940, from decree of High Court, *Reported in A. I. R. 1940 Rang 97.*

(a) Appeal—Parties—Promissory note executed by A as agent of B in favour of C — Suit on promissory note by C against B and alternatively against A—Suit decreed against B but dismissed against A — Appeal against dismissal of suit against A becoming time-barred — Appeal by B against decree against him contending that A and not B was liable on pronote — B's appeal held incompetent in absence of A as necessary party— B held liable on pro-note.

A as agent of *B* executed a promissory note in favour of *C*. *C* brought a suit on the promissory note claiming relief alternatively against *A* and *B*. The trial Court decreed the suit as against *B* and dismissed it as against *A*. No appeal was filed against dismissal of suit as against *A* and the appeal consequently became time-barred. *B* appealed against decree against him and contended that *A* and not *B* was liable on the pronote. He however did not implead *A* as necessary party to the appeal :

Held that (1) when the right of appeal against the dismissal of *A* from the suit was time-barred, *A* was no longer an interested party. *A* was entitled to hold the decree in his favour; it was a substantive right of a very valuable kind of which he could not lightly be deprived ; [P 64 C 2]

(2) that the appeal of *B* was incompetent unless *A* was added by him as a necessary party; [P 64 C 2]

(3) that it was not necessary for *C* to have appealed against *A*'s dismissal from the suit. It was incumbent on *B*, if he desired to appeal against the judgment in *A*'s favour to do so : 13 Rang 189, *Ref.*; [P 64 C 2]

(4) that the order of the Court would be that the decree of the trial Court against *B* would be restored. [P 65 C 2]

(b) Civil P. C. (1908), O. 41, R. 33 — Leave to appeal to Letters Patent granted — Appellate Court has right to pass whatever decree which should have been passed by trial Court.

To assume that when leave to appeal to the Letters Patent is granted the appeal and the terms of the certificate are to be regarded as a reference only is an error and the appellate Court has the right and duty to pass whatever decree should have been passed by the trial Court in all the circumstances of the case, which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter. [P 65 C 1]

(c) Appeal — Letters Patent — Case certified to be fit for appeal to Letters Patent includes order for costs made or refused in that case.

When a 'case' is certified to be fit for appeal to the Letters Patent the word 'case' includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in the case. [P 66 C 1,2]

F. S. Doctor — for Appellant.

K. C. Sanyal and E. Hay — for Respondents 2 and 1, respectively.

Roberts C. J. — This is a letters patent appeal arising out of a suit on a promissory note for Rs. 1120 with interest at 2 per cent. per month, brought by the plaintiff-appellant against the two respondents as defendants. His plaint averred that the defendant, Lakhajee, executed a promissory note on 1st October 1932 as 'agent and for Ranglal' who was the proprietor of the Irrawaddy Rice Mill whilst Lakhajee was his manager. Alternatively, he claimed relief against Lakhajee. This relief would, of course, be in the nature of damages for breach of warranty of authority to act as Ranglal's agent if it were proved that Lakhajee was not acting as such; and the sum due as damages would be the amount due under the note. In the Sub-Divisional Court of Mogaung it was held that Ranglal was liable and though Lakhajee was not expressly dismissed from the suit he was dismissed by implication. The plaintiff therefore obtained a decree against Ranglal alone. The date of the judgment was 30th April 1938. Ranglal appealed to the District Court on 2nd June and Sein Dass was served with notice of the appeal on 25th June. The period of limitation running in Lakhajee's favour expired on 29th June.

In his grounds of appeal to the District Court Ranglal set out the contention that the lower Court had "erroneously come to the conclusion that the appellant is responsible for a debt contracted by one Lakhajee" and had "erroneously decided that the appellant ratified the acts of Lakhajee." It is clear therefore that his sole ground of appeal was that not he but Lakhajee was liable to the plaintiff. He did not join Lakhajee as a respondent as he ought to have done if he had desired to prove Lakhajee responsible for the debt. In (1907) A C 351[1] at p. 357 Lord Halsbury remarked that if a case cited to him as authority were supposed to decide that the principal and agent could be so divided in responsibility that like the schoolboys' game of "I did not take it: I have not got it," the united principal and agent might commit fraud with impunity, it would be quite new to our jurisprudence. It must frequently happen that a person who has contracted with some one upon the footing that the latter is an agent is in doubt whether to proceed against the principal or against the self-styled agent, and that it is reasonable to make each of them defendants in the alternative. When he obtains judgment against one and the other is dismissed from the suit, the unsuccessful defendant cannot, by omitting to join the successful defendant as a respondent in the appeal and then showing that the latter was really liable, deprive the plaintiff of his right to establish his claim. Ranglal did not appeal against the dismissal of Lakhajee from the suit.

When the right of appeal against the dismissal of Lakhajee from the suit was time barred, Lakhajee was no longer an interested party. I respectfully agree with the finding of the learned Judge in second appeal on this point and I need hardly add to his exhaustive researches into the authorities. It is enough to say that Lakhajee was entitled to hold the decree in his favour; it was, in the words employed by Sir John Wallis in 6 Rang 29[2] "a substantive right of a very valuable kind of which he should not lightly be deprived." What then was the position of Ranglal? Assume, he succeeded by showing that Lakhajee was really liable (and he did not attempt to succeed by any other means) there would be in existence two inconsistent decrees, one of the District Court and another of the Subdivisional Court, with respect to the subject-matter of the suit. Applying the principle in 9 Rang 624,[3] Ranglal's appeal ought not to have been allowed to proceed in the absence of Lakhajee as a necessary party.

In the events that have happened, the lower appellate Court set aside the decree against Ranglal and passed a decree against Lakhajee alone. The learned Judge in second appeal has, in my respectful opinion, rightly concluded that no decree should have been passed against Lakhajee as he was improperly joined as a respondent; but he has also agreed with the lower appellate Court that Ranglal was not liable on the promissory note and has dismissed the cross-objection of Sein Dass against Ranglal's appeal in respect of the costs in the District Court. The result of all this is that each of the respondents has escaped liability on the promissory note on which admittedly one of them was liable, and each of them is awarded costs against the person who plainly ought to be paid. The learned Judge

1. (1907) A C 351 : 77 L J P C 1, Pearson & Son Ltd. v. Lord Mayor, etc. of Dublin.

2. ('27) 14 A I R 1927 P C 252 : 107 I C 237 : 6 Rang 29 : 55 I A 7 (P C), Chockalingam Chetty v. Seethai Ache.

3. ('32) 19 A I R 1932 Rang 16 : 135 I C 645 : 9 Rang 624, Ma Thaw May v. Mohamed Eusoof.

incorporated into one judgment his decision on Lakhajee's appeal, special civil second appeal, No. 18 of 1939, and Ranglal's appeal against the order depriving him of his costs, civil second appeal No. 19 of 1939 and the cross-objection filed in the later. He then certified that the case was a fit one for a further appeal under Cl. 13 of the Letters Patent, because it raised the question whether Lakhajee could have been properly joined by the District Court as a respondent. It is now contended that our jurisdiction is limited to a consideration of this point alone but in view of the wide provisions of O. 41, R. 33, I am of opinion that we are not so fettered, but may make such further or other decree or order as the case may require.

We have had cited to us the case in 20 C W N 1303.[4] In that case the learned Chief Justice of the Patna High Court (Chamier C. J.) pointed out that though ordinarily a point is not to be taken in a letters patent appeal which had not been taken before the single Judge, there may be a case in which a point must be allowed to be taken in order to remedy what appears to be a serious failure of justice. It is perfectly clear that no learned Judge would ever grant a certificate of appeal against his judgment in such circumstances that the Court could only answer one specific question : to do that the Judge proceeds by referring a particular question; to assume that when leave is granted the appeal and the terms of the certificate are to be regarded as a reference only is, in my opinion, an error and the appellate Court has the right and duty to pass whatever decree should have been passed by the subordinate Court in all the circumstances of the case and that means in all the circumstances which gave rise to the litigation originally and to all the disputes between all the relevant parties in the matter. The nature of the decree which should have been passed in the plaintiff-appellant's suit against the two respondent-defendants is one which it is proper to determine in the circumstances and the conclusion at which we have arrived is that the appeal of Ranglal was incompetent unless Lakhajee was added by him as a necessary party. The whole of this question was reviewed by the learned Judge in second appeal and it cannot be said now that this Court is powerless to see that the appellant recovers the money which is due to him and in respect of which he brought a suit against each of the defendants in the alternative.

The failure on the part of Ranglal to join Lakhajee as a respondent has resulted in the latter's exoneration from liability to the plaintiff's claim and the alleged principal cannot offer a shield to one who has styled himself as his agent and then escape liability himself by proving that such self-styled agent was never his agent at all and was really all the time liable personally in damages for breach of warranty of authority, or, alternatively, upon the note. It has been contended that Sein Dass ought to have appealed against Lakhajee's dismissal from the suit. But Sein Dass had only asked for a decree against one or other of the defendants and having secured it against one had no need and indeed no right to pursue his claim against the other. It was incumbent on that other, if he desired to appeal against the judgment in Lakhajee's favour to do so : *see* 13 Rang 189.[5] The order of the Court will be that the decree of the Sub-divisional Court against Ranglal will be restored with costs here, advocate's fee in this Court thirty gold mohurs and in all the Courts below to be paid to the appellant. We have been obliged to increase the advocate's fee since his time as well as ours has been occupied in Court for many more hours than the comparatively simple character of the appeal demanded. The cross-objection of the appellant is allowed with costs in the Court below. The decree of the learned Judge in second appeal with regard to Lakhajee is affirmed; Sein Dass to pay his costs here and in all the Courts below, advocate's fee in this Court fifteen gold mohurs and Sein Dass to recover from Ranglal the amount of the costs which the former shall be obliged to pay to Lakhajee.

Blagden J.—I agree and desire only to add this. Mr. Sanyal contended, amongst other things, that even if his client was—as he denied—bound at his peril to make Lakhajee a party to his appeal to the District Court, if he wished there to contend that Lakhajee and not he was liable, the plaintiff was really to blame for Lakhajee's absence. Mr. Sanyal submitted that the plaintiff could have either (a) appealed against the order of the Sub-divisional Court in effect dismissing Lakhajee from the suit, or (b)

4. ('16) 3 AIR 1916 Pat 317 : 35 I C 888 : 1 P L J 485 : 20 C W N 1303, Devi Charan Lal v. Mehdi Hussain.

5. ('35) 13 Rang 189 : 159 I C 931, U Po Sein v. E. M. Bodi.

lodged his application to the District Court for Lakhajee to be added before that order had become unappealable, or (c) presented, if necessary, a petition under S. 5, Limitation Act. I do not agree that the first course was even open to him for the reasons given by my Lord. As to the second course (which in fact he, not unreasonably, did take within a not unreasonable time, though it was actually then too late) and the third course, it may well be that in fact here he could have taken one or other of them. But why should he have to act with feverish haste in order to preserve to himself the benefit of his original prudence in suing both defendants? Why should the time limited to him for taking the suggested steps be fixed not by any statute or rules of Court but by the whim of the unsuccessful defendant ? It is quite possible, if Mr. Sanyal is right, to imagine a case in which a combination of delay by the unsuccessful defendant, error by the trial Court and (say) illness of the successful plaintiff might put the Courts in the position of having to make two inconsistent decrees and deprive the plaintiff wholly of his rights.

It being admitted that A or B is liable to C, the lower Court having decreed that A is liable and B is not, and the latter part of the decree having become unappealable, the net result, if the appellate Court thought that B was liable, would be that C would have to pay costs to both of two persons one of whom was admittedly in his debt. This cannot be right. One and a sufficient answer to the cases cited to us on election by taking judgment against one of the persons liable in the alternative is, in my opinion, that in every one of those cases the judgment was effectual and subsisting. They do not decide that a judgment can at the option of an unsuccessful defendant be set aside on appeal in so far as it adversely affects the unsuccessful defendant and preserved in so far as it benefits a person who is admittedly liable, if he is not, and it would be absurd if such were the law. I have no doubt it is not, and therefore Lakhajee was in law a necessary party to Ranglal's appeal to the District Court, which should, in Lakhajee's absence, have been dismissed. With regard to the point that no appeal has been lodged against the decree in civil second appeal No. 19 of 1939 but only against the decree in special civil second appeal No. 18 of 1939, I do not think this has any substance. This appeal is an appeal in a 'case' certified to be fit for appeal, and the word 'case' is a very wide word. A case, in my opinion, includes an order for costs made or refused in that case, which is obviously ancillary to the substantive order made in the case. Neither the precise form of the certificate nor any failure by the appellant to file a document which he should have filed under O. 41, R. 1 (and I do not decide that there was any such failure) could, I think, deprive this Court of its statutory power under O. 41, R. 33 to pass or make such further or other decree as the case may require and I have no doubt that the present case before us does require the order which we are making.

D.S./R.K. *Order accordingly.*

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MYA BU AND MOSELY JJ.

Yin Win Lin and others — Appellants

v.

Ma Kyin Sein and others—Respondents.

First Appeal No. 67 of 1939, Decided on 1st May 1940, against decree of Dist. Court, Myingyan, D/- 28th February 1939.

Res judicata—Previous decisions as to existence of law or custom of persons domiciled in Burma are not binding as res judicata on Courts in Burma.

No number of previous decisions as to the existence of some law or custom of persons domiciled in Burma are binding on the Courts in Burma in the sense that they are res judicata; all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reagitated and an issue must formally be framed.

[P 68 C 2]

Hay and U Chan Htoon — for Appellants.

Dr. Ba Han — for Respondents.

Mya Bu J. — The suit out of which this appeal has arisen relates to a piece of immovable property which formed part of the estate of Yin Kyaung Yo, a Chinese Buddhist who died at Myingyan in August 1927. Yin Kyaung Yo had been married to Ma Kyin Sein, a Sino-Burmese lady, and lived with her at Myingyan, while he had a Chinese wife in China. On his death, Yin Kyaung Yo left him surviving Ma Kyin Sein as his widow but no issue whatever. He also had a brother Yin Kyaung Sint, who lived in Burma. Plaintiff-appellant 1 is the only surviving child of Yin Kyaung Sint by his first wife, while plaintiff-appellants 2 and 3 are the sons of Yin Kyaung Sint by his second wife. After the death of Yin Kyaung Yo in 1927 the property in suit fell into the hands of Ma Kyin Sein who subsequently sold it to defendants-respondents 2 and 3 by

a registered deed of sale in July 1935. The suit of the plaintiff-appellants is for a decree for possession of that property, or in the alternative for pre-emption of the sale.

When it was first instituted it was by plaintiff-appellant 1 alone alleging that he had been adopted by Yin Kyaung Yo as a son and that under the Chinese Customary law, by which the question of succession to the estate of Yin Kyaung Yo was governed, he was the sole heir to the exclusion of even the widow Ma Kyin Sein. The suit was filed on 9th May 1936. On 1st March 1937 judgment was delivered in First Appeal No. 93 of 1936[1] of this Court where it was held to the effect that on the death of a Chinese Buddhist domiciled in Burma and dying intestate a sole surviving son was entitled to succeed to the exclusion of the widow; that where the deceased left no son but an adopted son, the adopted son would have the same right as a natural son; and further that a son of the deceased's next younger brother must be adopted and that if such a nephew had not already been adopted by the deceased, he should be deemed to have been so adopted and was thus entitled to all the rights of an adopted son and consequently of a natural son. After the passing of that judgment plaintiff-appellant 1 had the plaint amended by bringing on the record his two younger half brothers, Yin Win Chi and Yin Win Yin, as plaintiffs, stating that in the event of the Court holding that the alleged adoption of Yin Win Lin by Yin Kyaung Yo was not established, plaintiffs 2 and 3, or any one of them, might be declared to be the heir of Yin Kynung Yo, and was thus entitled to the estate of Yin Kyaung Yo to the exclusion of the widow.

By their written statements, the defendants denied the alleged adoption of Yin Win Lin, and also denied that the Chinese Customary law governed the question of succession to the estate of Yin Kyaung Yo, or that under that law an adopted son is entitled to inherit the estate or that nephews, such as the plaintiffs, were to be deemed to have been adopted sons, or were entitled qua adoptee or potential adoptee or qua nephews to inherit the estate. The defendants further averred that Yin Kyaung Sint and plaintiff 1 Yin Win Lin, having taken part in the settlement under which Ma Kyin Sein received the property in suit, plaintiff 1 was estopped from denying Ma Kyin Sein's title to it. Upon the pleadings the following issues were inter alia framed :

4. Was the succession to the estate of the late Yin Kyaung Yo governed by Chinese Customary law or by Burmese Buddhist law ?

5. Was plaintiff 1 adopted by the late Yin Kyaung Yo with a view to inherit his estate ? If so, is he the sole heir to the estate of the late Yin Kyaung Yo ? Or in the alternative are the plaintiffs the heirs to the estate of Yin Kyaung Yo to the exclusion of defendant 1 ?

6. Was such settlement acted upon and acquiesced in by the plaintiff ? If so, are the plaintiffs estopped from questioning the sale of the suit properties by defendant 1 to defendants 2 and 3 ?

Certain witnesses were called to prove issues 4 and 5, the first two set out above, but when the Court delivered judgment no substantial reference was made to the evidence of witnesses on issue 4 and the learned District Judge, following the principles enunciated in the judgment of this Court in First Appeal No. 93 of 1936[1], held that Chinese Customary law was applicable. On the issue as to adoption the finding of the learned District Judge was that the adoption was not proved. He further observed :

> I do not think that all three plaintiffs, as nephews, can be heirs to the estate of the deceased Yin Kyaung Yo. According to the passage from Von Mollendorf, which has already been quoted, to the effect that if the younger brother has only one son he has to marry a second legal wife and give the first-born son of that marriage to his elder brother in adoption, plaintiff 2 Yin Win Chi, the eldest son of Yin Kyaung Sint's second marriage, is the person entitled to be adopted and succeed to the deceased Yin Kyaung Yoe's estate. But there is no estate of Yin Kyaung Yoe in existence as it has been divided up by a family arrangement in which Yin Kyaung Sint, the father of plaintiffs 2 and 3, participated and can be said to have acted and claimed a share in their interests

and held that not only Yin Win Lin but the two minors Yin Win Chi and Yin Win Yin are entitled to no relief whatsoever. The District Court delivered this judgment on 28th February 1939, and the plaintiffs filed this appeal on 26th May 1939.

The judgment of this Court in First Appeal No. 93 of 1936[1] was appealed against to the Judicial Committee of the Privy Council, 1939 R L R 548[2] at p. 568 and their Lordships of the Privy Council, in the judgment delivered by Sir George Rankin on 22nd June 1939, reversed the appellate decree of this Court. In the course of the judgment it was observed :

> In the present case it is not in dispute that the propositus Khoo Boon Tin and his wife Tan Ma Thin were Chinese Buddhists and that unless the plaintiff can show that the law applicable in Burma to them in questions of succession is Chinese Cus-

1. *Reported in* ('37) 24 A I R 1937 Rang 354 : 172 I C 550, Khoo Soo Cheng v. Ta Ma Shwe Zin.

2. ('39) 26 AIR 1939 P C 228 : 182 I C 993 : 1939 R L R 548 (P C), Tan Ma Shwe Zin v. Koo Soo Chong.

tomary law his suit cannot succeed. Their Lordships are of opinion that the Burmese Buddhist law is the law applicable to them, and it is not contended that according to that law the plaintiff has any claim to be the heir of either.

Their Lordships are further of opinion that on the evidence adduced in the present case it is not proved that according to Chinese Customary law the plaintiff as nephew would be entitled although not in fact adopted to succeed as heir of Khoo Boon Tin in preference to the widow. No reliable expert witness was called to speak to this question, and though the book relied on by the Division Bench may have been admissible under S. 60, Evidence Act, the conclusion drawn from its contents is drawn precariously and from material both obscure and inadequate. The order of succession which is essential to the plaintiff's case is not established by the evidence either as matter of foreign law or as a custom and his suit must fail.

In these circumstances when this case is called on for hearing it is urged on behalf of the appellants that before this Court considers the evidence as to the alleged adoption and the case with reference to the other issues, they may be permitted to adduce further evidence specifically on the question as to whether the Chinese Customary law is applicable to the case or not and, if so, what that law is with reference to the rights of nephews or adopted sons or persons entitled to be adopted as against the widow of the deceased. Whether this prayer should be allowed or not depends on whether the judgment of their Lordships of the Privy Council regarded it as a concluded matter of law that to the estates of Chinese Buddhists domiciled in Burma the Burmese Buddhist law, and not the Chinese Customary law, is applicable, or whether the judgment of their Lordships still leaves room for evidence to be adduced upon this point as a question of fact. In view of the wording of S. 13 (1) itself of the Burma Laws Act (13 of 1898) we are of the opinion that all that their Lordships intended to lay down—and actually did lay down—was that prima facie inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist was governed by the Buddhist law of Burma, and that the burden of proving any special custom or usage opposed to the ordinary rules of the Burmese Buddhist law of inheritance was on the person asserting that variation. Their Lordships found that in that case there was insufficient evidence to prove any Customary Chinese law opposed to the ordinary rules of the Burmese Buddhist law of inheritance. In our opinion the head-note to the Rangoon Law Reports of that ruling of their Lordships at p. 548 of 1939 Rangoon Reports correctly represents the trend of that decision.

The learned advocate for the respondents in opposing this prayer submitted that the question as to whether the Chinese Customary law was applicable or not was expressly put in issue, and that the plaintiffs therefore had adequate opportunity of adducing such evidence that they might deem desirable, and do not deserve any further opportunity to be given for this purpose. It is true that an issue was expressly framed as is seen in issue 4 and in the second part of issue 5, but these issues had to be formally framed because there were allegations in the plaint and denials of those allegations in the written statement. It is, in our opinion, a correct statement of the law to say that no number of previous decisions as to the existence of some law or custom of persons domiciled in this country are binding on the Courts in this country in the sense that they are res judicata; all that can be said is that a long line of decisions is always taken judicial notice of by the Court, and to that extent the law is to be regarded as settled law; but if any party so chooses, the question can always be reagitated and an issue must formally be framed.

It had been held consistently in the Courts of this province since the case in 2 L B R 95,[3] a decision dating from 1903, with one or two exceptions, until the decision of their Lordships of the Privy Council in 1939 R L R 548,[2] that Chinese Customary law was the law applicable to such cases of inheritance or succession in Burma amongst members of the Chinese community domiciled in Burma. Those cases are as follows: 2 L B R 95,[3] 8 L B R 404,[4] 9 L B R 179,[5] 11 Bur L T 224,[6] 1 Rang 161,[7] 2 Rang 94,[8] 6 Rang 623,[9] 10 Rang 97,[10] 11 Rang 310,[11] A I R 1937 Rang 543[12] and A I R 1938 Rang 254.[13] In all these cases Chinese Customary law was applied.

3. ('03) 2 L B R 95, Fone Lane v. Ma Gyee.
4. ('16) 3 A I R 1916 L B 12 : 34 I C 99 : 8 L B R 404, Ma Pwa v. Yu Lwai.
5. ('19) 6 A I R 1919 L B 133 : 47 I C 148 : 9 L B R 179, Kyin Wet v. Ma Gyok.
6. ('19) 6 A I R 1919 L B 68 : 50 I C 543 : 11 Bur L T 224, Ma Shwe Thit v. Maung Kyin.
7. ('23) 10 A I R 1923 Rang 180 : 74 I C 933 : 1 Rang 161, Maung Po Maung v. Ma Pyit Ma.
8. ('24) 11 A I R 1924 Rang 219 : 80 I C 749 : 2 Rang 94, Ma Sein v. Ma Pan Nyun.
9. ('29) 16 A I R 1929 Rang 22 : 114 I C 513 : 6 Rang 623, Chan Pyu v. Saw Sin.
10. ('32) 19 AIR 1932 Rang 59 : 137 I C 211 : 10 Rang 97, Tan Ma Shwe Zin v. Tan Ma Ngwe Zin.
11. ('33) 20 AIR 1933 Rang 313 : 148 I C 492 : 11 Rang 310, Ma Sein Byu v. Khoo Soon Thye.
12. ('37) 24 AIR 1937 Rang 543 : 174 I C 390, Ah Pein v. M. C. Deva.
13. ('38) 25 AIR 1938 Rang 254 : 177 I C 501, Oon Chan Thwin v. Khoo Zun Nee.

The sole exceptions are 4 L B R 124,[14] where it was said that a Chinese Buddhist law, if any would apply and not Chinese Customary law; 7 Bur L T 246 : 8 L B R 222,[15] where it was said that justice, equity and good conscience should be the rule of decision; and the Full Bench case in 8 Rang 57[16] where the Succession Act was said to be the law applicable.

Considering the state of the law prevailing, or thought to be prevailing by the parties, at the time the parties adduced evidence in this case, it is not surprising that the evidence on both sides was scanty. There was evidence given by a considerable number of witnesses on behalf of the plaintiffs to say that Chinese Customary law applied. The knowledge of some of those witnesses of the Chinese Customary law was not very extensive and the number of instances which they could give where Chinese Customary law had in fact been applied was not very large. On the other hand the defence took the matter even more lightly. There was hardly any cross-examination and the evidence in rebuttal was negligible. Both parties then took issues 4 and 5 (except on the question as to the alleged adoption) lightly, and it would not be fair to either side, or a satisfactory way of determining this suit, if it had to be determined on that evidence and if the parties were not allowed a further opportunity of adducing evidence, now that the legal position has been so changed by the decision of their Lordships of the Privy Council which was only announced after the appeal in the present suit was filed. For these reasons, we consider that this is a fit case in which we should require further evidence on these two matters in issue, namely (1) whether the Chinese Customary law is the law applicable to this case, and (2) if so, what that Chinese Customary law is. The case is therefore sent back to the trial Court in order that the Court may give the parties further opportunity of adducing such evidence that they desire on these matters in issue. The Judge of the District Court will resubmit this evidence with his finding by 2nd November of this year. Costs of the present hearing to be costs in the cause.

D.S./R.K. *Case remanded.*

14. ('08) 4 L B R 124, Apana Charan v. Shwe Nu.
15. ('14) 1 AIR 1914 L B 144 : 24 I C 367 : 8 L B R 222 : 7 Bur L T 246, Ma Thein Shin v. Ah Sein.
16. ('30) 17 AIR 1930 Rang 81 : 124 I C 849 : 8 Rang 57 (F B), Phan Tiyok v. Lim Kyin Kauk.

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ROBERTS C. J. AND BLAGDEN J.

Ebrahim Mohamed Bodi—Appellant

v.

K. Ba Gyi — Respondent.

Civil Misc. Appeal No. 6 of 1940, Decided on 3rd May 1940, against order of High Court, in Insolvency Case No. 49 of 1938, D/- 2nd January 1940.

(a) Presidency Towns Insolvency Act (1909), S. 8 (2) (b)—Word "judgment" in Cl. 13, Letters Patent (Rangoon), explained — For purposes of appeals various proceedings in insolvency should be regarded as "suits" arising from one failure — "Judgment" therefore means decision which finally determines substantive rights of those concerned in any such suit—Decision whether witness should or should not be further examined under S. 36 of Act is judgment and therefore appealable—Refusal to exercise jurisdiction, however, is not "judgment."

The word "judgment" in Cl. 13, Letters Patent (Rangoon), means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. For the purposes of appeals the various proceedings in an insolvency should be regarded as a series of "suits" arising out of one failure, and a decision which finally determines the substantive rights of those concerned in any one such 'suit" must be regarded as a judgment within the meaning of Cl. 13, Letters Patent (Rangoon). Consequently, a decision which finally determines the question whether a witness should or should not be further examined under S. 36 of the Act is a judgment within the meaning of Cl. 13, Letters Patent (Rangoon), and is therefore appealable. A judgment properly so called, must be an exercise of jurisdiction, and therefore a refusal to exercise jurisdiction at all events if it be a lawful refusal, cannot be a "judgment" : A I R 1935 Rang 267, *Expl.*; A I R 1926 Rang 64 and A I R 1928 Rang 246, *Disting.* [P 72 C 2]

(b) Presidency Towns Insolvency Act (1909), S. 36—Considerations governing exercise of power under S. 36 stated — S. 36 confers only right to apply to summon witness — Grant of application is discretionary with Court — Examination under S. 36 is in theory by Court—As matter of practice applicant is allowed to examine witness summoned.

Section 36 confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined : (1935) 1 Ch 65, *Ref.* [P 73 C 1]

The only right which the section gives to the Official Assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all : (1883) 48 L T 832, *Disting.* [P 73 C 1]

(c) Presidency Towns Insolvency Act (1909), Ss. 36 and 8 (2) (b) — Discretion under S. 36 in refusing to summon witness or further examine

him cannot be lightly interfered with in appeal—Essentials to be proved before it can be interfered with stated—Right decision even if reached in wrong way will not be disturbed.

The discretion of the Court under S. 36 in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal. It is not enough for the appellant to show that the discretion was wrongly exercised, but he must show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. But a right decision even if reached in the wrong way will not be interfered with. [P 73 C 2]

(d) Presidency Towns Insolvency Act (1909), S. 36 — Scope of examination under S. 36 is not confined to questions arising out of matters stated in affidavit leading to summons : 7 Rang 675 = A I R 1930 Rang 32=121 I C 772, OVERRULED.

It is impossible to lay down any hard and fast rule limiting the scope of a private examination under S. 36 and though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading to the summons there is certainly no rule that only those matters themselves may be put to the witness: 7 Rang 675=A I R 1930 Rang 32=121 I C 772, *OVERRULED.* [P 73 C 2; P 74 C 1]

(e) Presidency Towns Insolvency Act (1909), S. 36—Scope.

Section 36 is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.": A I R 1929 Bom 230, *dissented from.* [P 74 C 1]

(f) Presidency Towns Insolvency Act (1909), S. 36—Examination under S. 36 should be ordered if it is likely to be of some use — Mere fact that litigation against witness may ensue is no ground for refusing to examine him : 7 Rang 675=A I R 1930 Rang 32=121 I C 772, OVERRULED.

The Court ought not to make an order for the examination of a witness under S. 36 unless there is ground for thinking that the order is likely to be of some use. Sub-ss. (4) and (5) of S. 36 make it quite clear that the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination : 7 Rang 675=A I R 1930 Rang 32=121 I C 772, *OVERRULED*; A I R 1933 Bom 309 and (1888) 20 Q B D 518, *Rel. on.* [P 74 C 2; P 75 C 1]

(g) Presidency Towns Insolvency Act (1909), S. 36—Witness legally represented at examination under S. 36 is not entitled to costs—Witness made respondent in appeal against order under S. 36 — No substantive relief asked against him—Nor decision of appeal affecting him—Witness is not entitled to costs.

A witness who is legally represented at an examination under S. 36 is not entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. A witness who is (rightly or wrongly) made a respondent to an appeal from an order under S. 36 and served as such but against whom no substantive relief is asked for and who would not have been out of pocket by reason of the appellate decision, had it gone against him, if he had not contested the appeal is not entitled to costs : (1888) 20 Q B D 518, *Ref.*; (1935) 1 Ch 65, *Disting.* [P 75 C 1]

B. K. Dadachanji — for Appellant.

U Kyaw Myint — for Respondent.

Blagden J. — The appellant in this case is, it appears, the sole unsecured creditor of one U Po Sein against whom he has a decree for some Rs. 30,000 odd. On this decree an interest of U Po Sein was, on 13th January 1938, attached. That attachment lasted till 25th April 1938, and therefore at the last moment, 3rd February 1938 at the latest, U Po Sein suffered an act of insolvency under S. 9 (e), Rangoon Insolvency Act, hereinafter called "the Act." Within three months of that date, to wit on 25th April 1938, the appellant presented an insolvency petition against U Po Sein founded on this act of insolvency. The proceedings under this petition were somewhat protracted and it was not until 15th June 1938 that U Po Sein was adjudicated insolvent. This however does not matter because by S. 51 of the Act the insolvency of U Po Sein must be deemed to have relation back to and to have commenced at midnight of 3rd/4th February 1938 at the latest. This moment of time is important. By S. 52 (2) (a) of the Act, the property divisible amongst his creditors (which by S. 17 of the Act vested in the Official Assignee) therefore included (at least) all such property as belonged to U Po Sein at midnight of 3rd/4th February 1938.

The respondent K. Ba Gyi comes into the matter in this way. According to the insolvent's schedule lodged on 23rd February 1939 he was on 15th June 1938 a secured creditor of U Po Sein for Rs. 5000 (the debt and security dating from 25th July 1932) and the security was thereby estimated to produce a surplus of Rs. 5000. This made two things obvious, namely (1) that if the insolvent's estimate of the value of the security was anything like correct — and such estimates are, of course, apt to be optimistic — he was never likely to prove in the insolvency at all (*see* the proviso to S. 17 of, and Sch. 2 to the Act) and (2) that if the appellant, the only unsecured creditor, wished this particular point really investigated it was vital for him to know whether this debt, this security and not least this date (25th July 1932) were or were not genuine, and, as hereinafter appears, he had reason to suspect that the debt had in fact been to a large extent repaid by midnight of 3rd/4th February 1938. The public examination of the insolvent was concluded on 4th July 1939 and on the 28th of that month the present

appellant applied to the Court for the private examination under S. 36 of the Act of the present respondent and of six other persons not material to the present appeal. In support of this application he filed an affidavit para. 15 of which reads as follows :

15. In the schedule one K. Ba Gyi is also shown as a secured creditor for the sum of Rs. 5000. In her affidavits in Civil First Appeal No. 106 of 1933 of this Hon'ble Court sworn on 11th December 1933, and also in Suit Civil Regular No. 29 of 1934 of this Hon'ble Court sworn on or about 29th April 1935 Ma Kyin Yone the insolvent's wife stated to the effect that Rs. 6000 was borrowed from K. Ba Gyi on an equitable mortgage, that out of this sum of Rs. 6000 Rs. 4000 had been paid up and only Rs. 2000 were due when she swore those affidavits.

Pursuant to this application the present respondent was on 20th December 1939 examined under S. 36 of the Act. According to his evidence, the transaction alleged by the insolvent to have taken place was, subject to an immaterial discrepancy as to its date, genuine. But it was not an isolated transaction, there having been repayments and renewals of the loan, not all recorded in any existing book of the witness. His deposition concluded as follows :

I begin new books of account on 15th June of each year. The debit entry in the account of U Po Sein is dated 19th May 1938. The book for 1937-38 was started on 15th June 1937. Up to 14th June 1937, I had another book which has been destroyed. This is a ledger. I know book-keeping. I carry forward the balance from the old to the new book in each account.

Q. On 18th May 1938 nothing was due to you?

A. No.

Q. This entry (Ex. B-1) shows that Rs. 5000 a fresh sum, was paid on 19th May 1938?

A. Yes. No fresh mortgage was registered. I always however had the title deeds in my hands for the overdraft account. Ex. B is the account.

From this it will be seen at once that the examination had, in a sense, "gone beyond" what was stated in para. 15 of the applicant's affidavit. But to serve any useful purpose a private examination must elicit something more than is stated in the evidence on which the order for the examination is made, since that evidence is filed merely to show the Court that there are grounds for enquiry and it would be a vain thing if the Court were restricted to ascertaining from the witness facts of which it was already aware. It is also very apparent that the applicant had elicited information far more valuable to him than, on the facts as he previously supposed them to be, he could in his most sanguine moments have expected. The insolvency had notionally commenced at a date long anterior to that on which (according to the respondent) he made his advance and, in consequence his security became ineffective as such. Unless therefore he could bring himself within S. 57 of the Act by proving affirmatively that he had no notice of the presentation of any insolvency petition his security appears, on his own showing, worthless in view of Ss. 17, 51 and 52 (2) (a) of the Act while S. 46 (2) of the Act leaves it extremely doubtful if he had, on the same version of the facts, even a provable debt. There might have been further matters which Mr. Dadachanji for the present appellant might have wished to put to the witness and which the Registrar if asked to do so might have properly allowed him to ask. But Mr. Dadachanji told us very frankly that he could not now remember whether or not he had in mind any specific question as being desirable at that stage, though he was anxious to continue a general examination of the witness. Certainly, it does not seem that the Registrar was asked to consider allowing any specific further question to be put, and in the absence of any such request, I think, that he might, if unfettered by authority, well have taken the view that the applicant had elicited from the witness all he could possibly hope for and that further questions were a waste of time. That however is not quite the course he took. The following is his note of what occurred at this stage in the proceedings :

Dadachanji for Bodi, creditor. Khoo for witness K. Ba Gyi. Examination under S. 36 begins. Mr. Khoo draws my attention to 7 Rang 675.[1] The affidavit in support of the application to examine the witness (para. 15) shows that the intention of the creditor Bodi was to show that Rs. 2000 and not Rs. 5000 was due to K. Ba Gyi. The examination before me this morning has gone beyond the scope of para. 15 and possibly beyond the limit of S. 36. The matter is submitted to the Judge for further orders, on 2nd January 1940.

On 2nd January 1940 the matter came before my brother Ba U and his order reads as follows :

The insolvency Registrar was perfectly justified in doing what he had done. If Mr. K. Ba Gyi wants to realize his share he must come before the Court and prove his case in the manner laid down by the Insolvency Act. If and when he does this he can be subjected to searching cross-examination with regard to the amount due to him. It is unnecessary to go into this now. It will only result in waste of time. The order of the Registrar is confirmed.

Thence the matter comes before us by way of appeal. U Kyaw Myint took the preliminary objection that no appeal lies.

1. ('30) 17 A I R 1930 Rang 32: 121 I C 772 : 7 Rang 675, In the matter of G. H. Ghanchee & Sons.

In support of this proposition he relies on S. 8 (2) (b) of the Act which allows an appeal from the insolvency Judge in cases not covered by S. 8 (2) (a) (and the present case, he rightly concedes, is not so covered)

in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

He then draws our attention to Cl. 13 of the Letters Patent and 13 Rang 457[2] and cases there cited which, so far as this High Court is concerned, settle that the word "judgment" in that clause means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. 3 Rang 605[3] shows that for "an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court" to be appealable it must be either (a) within O. 43, R. 1, Civil P. C., (which this order is clearly not) or (b) a judgment. The present order, he says, is not a judgment because it does not determine the rights of the parties to the insolvency. He rightly admits that this ingenious argument (carried to its logical conclusion) involves the startling proposition that no order made by the insolvency Judge as such is appealable at all, since no one order made in the course of a particular insolvency determines the rights of everybody concerned in that insolvency. It is curious, if this be so, that this Court should have heard hundreds of such appeals and (in, for example, the case last cited) declined to hear others, not on the ground that they were appeals from the insolvency Judge but on the ground that the particular order concerned was not a "judgment." Moreover, the Letters Patent were already in existence when, in 1926, the Presidency Towns Insolvency Act (now the Act) was applied to Rangoon. In so applying it, the Legislature can hardly have meant to emulate that freak of nature which torments the desert traveller with visions of non-existent oases by extending before the citizens of Rangoon by [S. 8 (2) of the Act] an alluring prospect of a right of appeal well knowing that Cl. 13, Letters Patent, made that right illusory.

It has, I think, to be remembered that neither this Court in 13 Rang 457[2] nor their Lordships of the Privy Council in the judgments there cited had in mind the peculiar nature of an insolvency. For the purposes of this point the various proceedings in an insolvency should, in my opinion, be regarded as a series of "suits" arising out of one failure, and in my opinion that is a "judgment" for this purpose which finally determines the substantive rights of those concerned in any one such "suit:" for example, an order of adjudication on a creditor's petition is a "judgment" although it happens almost at the outset of the insolvency, but an order adjourning the hearing of the petition is not a "judgment." In 3 Rang 605[3] a Bench of this Court held that an order refusing to issue a commission to examine a witness in Madras could not be appealed. But there the witness's evidence was desired not as an end in itself but for the purposes of a then pending petition for the annulment of the adjudication, so that the Court's refusal was in reality an interlocutory order in that petition. Here there was, immediately before the decision of Ba U, J., no material proceeding pending other than the examination of Mr. K. Ba Gyi. This may or may not lead to further proceedings, but, for the moment, his further examination was desired as an end in itself and the decision of Ba U, J., finally determined the question in dispute before him, namely, whether the witness should or should not be further examined. The distinction is perhaps fine, but I think it is real. There is less difficulty in distinguishing 6 Rang 363[4] for whereas, in the present case, the Court heard and determined a disputed question, there the Court in its discretion declined to entertain the question at all and left the appellant to his remedy if any by a regular suit. A "judgment," properly so called, must in my opinion be an exercise of jurisdiction, and therefore a refusal to exercise jurisdiction, at all events if it be a lawful refusal, cannot be a "judgment." This preliminary objection, therefore, in my opinion, fails. The substantial question remains whether we should now direct that Mr. K. Ba Gyi be further privately examined. Sub-sections (1) and (3) of S. 36 of the Act read thus:

36. (1) The Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order of adjudication has been made, summon before it in such manner as may be prescribed the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent, or supposed to be indebted to the insolvent, or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property;

2. ('35) 22 A I R 1935 Rang 267: 157 I C 1107: 13 Rang 457 (F B), Dayabhai Jivandas v. Murugappa Chettiar.

3. ('26) 13 A I R 1926 Rang 64 : 93 I C 211: 3 Rang 605, Abdul Gaffoor v. Official Assignee.

4. ('25) 15 AIR 1928 Rang 246 : 111 I C 896 : 6 Rang 368, Arjuna Iyer v. Official Assignee.

and the Court may require any such person to produce any documents in his custody or power relating to the insolvent, his dealings or property.

(3) The Court may examine any person so brought before it concerning the insolvent, his dealings or property, and such person may be represented by a legal practitioner.

These sub-sections are for all material purposes identical with sub-ss. (1) and (3) of S. 25, English Bankruptcy Act, 1914, except that the right of the witness to legal representation at the examination is, in this country, expressly conferred by statute, while in England it is only sanctioned by long-established practice. The section confers on the Court an extraordinary and inquisitorial, though certainly a necessary power, to be exercised in the interests of the due administration of the insolvent's estate without fear, but not without scrupulous regard to considerations of economy and of fairness to the person examined: *see* for example (1935) 1 Ch 65.[5] It is to be observed that the only right which the section gives to the official assignee or to any creditor who has proved is a right to apply to the Court to summon a witness. It is in the discretion of the Court whether or not it will do so at all, and, if it does do so, the examination of the witness is, in theory, an examination by the Court; it is only as a matter of practice that the person applying for the summons is permitted to attend and question the person summoned at all. In this connexion attention was called to (1883) 48 L T 832.[6] where in the course of the judgment it is said:

Where the statute has plainly said that the trustee has a right to examine persons as therein directed, I may not withhold from the Queen's subjects that right which the law has given them.

This was said in connexion with S. 96, Bankruptcy Act, 1869, which was in similar terms to S. 36 (1) of our Act. I must therefore observe that the statute has not, plainly or otherwise, said what is attributed to it, and has in fact said nothing of the kind. The observation cited was unnecessary to the perfectly proper decision in that case and formed part of an unconsidered judgment of Vice-Chancellor Bacon sitting as Chief Judge in bankruptcy. He was a Judge of wide learning and experience whose decisions are entitled to great respect: but, as the Court of appeal has not infrequently had occasion to observe, his unconsidered dicta are often characterized rather by the attractive vigour than by the accuracy of the language in which they are expressed. That the discretion of the Court in refusing to summon or further to examine a witness is not lightly to be interfered with on appeal is a proposition which Mr. Dadachanji, who appeared for the appellant, rightly accepts. He admits that it is not enough for him to show that the discretion was wrongly exercised, but that he must go further and show either that it was not exercised at all, or, if exercised, was exercised either unjudicially, or on a wrong principle of law, or on a wrong appreciation of the facts. That one or other of these things must be shown in order to sustain an appeal from the purported exercise by a lower Court of a discretionary power is too well settled to need authority; but we must not forget that there is such a thing as a right decision reached in the wrong way. To take the most glaring example one could imagine of a failure to exercise discretion judicially or indeed at all, let us suppose that a Judge having a discretion to make or not to make a particular order decided not to make it by the spin of a coin, substituting for his own judgment the arbitrament of chance. Even if this absurdity were shown to have occurred, still the Court of appeal would not, I apprehend, make a different order if it thought that, on the facts as they were when the case came before it, a right decision had, by a fortunate accident, been reached.

Mr. Dadachanji, if I follow aright his careful argument, says that there was here no exercise of discretion because there was applied a supposed hard and fast rule against "going beyond" the evidence on which the summons was issued. I have already tried to show how absurd the literal application of any such rule would be. What I think the learned Registrar had in mind was the correct principle that S. 36 should not be used for purposes of what is sometimes termed a "roving commission" or "fishing enquiry." Both terms are apt to create confusion because they are necessarily inexact, though the expression "fishing" has a fairly well-known meaning in relation to interrogatories, the scope of which is of course much narrower than that of a private examination in an insolvency. Suffice it for the moment to say that it is impossible to lay down any hard and fast rule limiting the scope of a private examination, and that though the Court may (not must) think it proper to confine it to questions arising out of the matters stated in the affidavit leading

5. (1935) 1 Ch 65 : 104 L J Ch 1 : 152 L T 58: 78 S J 550 : 50 T L R 492, In re Maundy Gregory.
6. (1883) 48 L T 832, Ex parte Eckersley.

to the summons there is certainly no rule that only those matters themselves may be put to the witness.

Alternatively, which is perhaps only another way of putting the same point, Mr. Dadachanji says that the discretion was exercised on what was really a wrong principle of law because the Court below conceived itself bound by 7 Rang 675[1] to allow no further questions. He says that this decision does not decide that the Court was so bound, and that in any event it is not binding on us and he asks us to overrule it. If that decision were merely to the effect that the machinery of S. 36 is not, save in exceptional circumstances, to be used by one party to an actually pending suit for the purpose of his examining his opponent I should entirely agree with it : *see* (1892) 1 Q B 646[7] and 10 Morrell 40.[8] To let one litigant see the other's brief is obviously wrong. But it is clear that the decision goes further. The Registrar there was of opinion that the Official Assignee intended to examine the witness in order to prepare for future litigation, and following certain observations of Davar J., in *Nurmahomed & Bros.* v. *Ismail Karim*,[9] (not officially reported), he apparently disallowed the examination on that ground. Das J. upheld his order, observing that

> Section 36 was not intended for the purpose of enabling the Official Assignee to cross-examine a claimant and get from him the proof of his case.

As I have tried to indicate, he did not by "claimant" mean merely claimant in actually pending litigation, and therefore with all respect, I think that both he and Davar J., were, if the latter is correctly reported, wrong. The section is not in terms restricted to the examination of persons who are thought to be indebted to or possessed of part of the debtor's estate but extends to "any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property." In England the corresponding section is constantly employed to examine, for example, persons claiming to be creditors with a view to considering a motion to expunge or reduce their proofs. I have had some experience of its operation in practice and not only does it not work injustice but the contrary is in my opinion the case. Moreover, if one looks at sub-ss. (4) and (5) it becomes quite clear that the mere fact that litigation against the witness may ensue cannot be a ground for refusing the examination. Suppose the witness admits that he owes the insolvent's estate Rs. 10 and has in his possession the insolvent's watch : the Court may under these sub-sections order him there and then to pay the money and to hand over the watch. But if he denies one or both of these things is the examination to be stopped on the witness's bare denial, or is it to proceed on the terms that if eventually it becomes clear that the witness's denials are false the Official Assignee is to do nothing about recovering the money and the watch ? That the answer to the former question is no is clear from (1888) 20 Q B D 518[10] and that the answer to the latter is also no is plain common sense. In my opinion we ought to disapprove 7 Rang 675[1] and I am fortified in this opinion by the fact that both this decision and the cases there cited have been doubted in 57 Bom 665[11] with which I respectfully and entirely agree.

Then it is said that Ba U J., acted on a misapprehension as to the facts in that he assumed that sooner or later Mr. K. Ba Gyi "must come before the Court and prove his case in the manner laid down by the Insolvency Act" when there will be a full opportunity for cross-examining him. This does seem to me, with great respect, a quite unfounded assumption, though I am not sure that it materially affects the result at which he arrived, as doubtless if Mr. K. Ba Gyi brought a regular suit for the purpose of bringing his security to sale he would have to make the Official Assignee a party. Mr. Dadachanji has therefore in my opinion made out two or possibly three, grounds on which we are entitled if we think fit to vary Ba U, J.'s order although his power to make that order was discretionary. It remains to be considered whether exercising our own unfettered discretion we should order a further examination or not. I am for myself much impressed by Ba U, J.'s observation "it will only result in waste of time" though as I have said I do not quite agree with the grounds on which he formed that opinion. Moreover the last paragraph of the head-note in 57 Bom 665[11] reads :

> The Court ought not to make an order for the examination of a witness under S. 36 of the Act

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7. (1892) 1 Q B 646 : 66 L T 30 : 40 W R 384 : 9 Morrell 90, In re Franks; Ex parte Gittins.

8. (1893) 10 Morrell 40 : 5 R 221 : 68 L T 233, In re Desportes.

9. *Reported in* ('29) 16 A I R 1929 Bom 230 : 118 I C 794 : 31 Bom L R 420.

10. (1888) 20 Q B D 518 : 59 L T 188 : 36 W R 388 : 5 Morrell 79, In re Scharrer; Ex parte Tilly.

11. ('33) 20 A I R 1933 Bom 309 : 145 I C 648 : 57 Bom 665 : 35 Bom L R 546, In re Goolbai Bomanji Petit.

unless there is ground for thinking that the order is likely to be of some use.

This strikes me as both sound law and sound sense even if the word "further" be inserted before the word "examination." Mr. Dadachanji's examination of the witness has already produced results of which he had (if I may take an expression from another section of the Act) "no reasonable or probable ground of expectation." I can imagine some specific questions which might possibly make his client's prospects even brighter, but as there may be litigation between the parties about the matter I will not indicate what questions I have in mind. It may well be that Mr. Dadachanji would prefer not to put those particular questions at this stage and if so that is certainly a wise, and more than likely a right decision from his client's point of view. What he does ask us to do is to give him general liberty to continue the witness's examination in the hope of further windfalls. Whether a continuance of the examination will produce any result beneficial to the estate is, of course, a matter of speculation, but for my part I think it very unlikely. On the whole I think that Mr. Dadachanji's client has now got adequate materials on which to decide whether or not to take proceedings against Mr. K. Ba Gyi, and that he should make his mind up about it now. The appeal should, therefore, in my opinion, be dismissed. With regard to costs, a witness who is legally represented at an examination under S. 36 is not, I think, entitled to costs of such representation. It is a measure of prudence which he takes at his own expense. The position of Mr. K. Ba Gyi as to the appeal is somewhat different because (rightly or wrongly) he was made respondent and served as such: *see* as to this (1888) 20 Q B D 518[10] to which I have already referred in another connection. But no substantive relief was asked for against him, and he would not have been out of pocket by reason of our decision, had it gone against him, if he had not contested the appeal and I therefore think we ought to dismiss the appeal without costs. In (1935) 1 Ch 65,[5] to which I have also referred, a witness was given costs of an appeal. But there he was himself the appellant, and the matter arose out of his refusal to answer a question. Unless he could justify that refusal (which he did) he would have been in contempt and liable to punishment. Possibly, Mr. Bodi may be advised to apply to the insolvency Judge for his costs out of the estate, to which the Official Assignee would have been entitled had this application and this appeal been properly made and preferred by him. We should therefore, I think, make an order for Mr. Bodi's costs to be taxed if he so desires, and, while expressing no opinion as to what should be done on that application, we should grant him liberty to make it.

Roberts C. J. — I agree with the conclusions expressed by my learned brother. The order appealed from was made in the exercise of a discretionary power: and having regard to the answers already given in the examination under the Rangoon Insolvency Act, I make no doubt but that the exercise of his discretion by the learned Judge in insolvency was not only one with which we ought not to interfere, but was in the circumstances a wise exercise of it. The examination of a person under this section is at least in theory, an examination by the Court; it is entirely a matter for the Court's discretion how far it should extend. The statutory power given to the Court does not entitle a creditor to demand this or that latitude in putting questions, but the decision in 7 Rang 675[1] cannot now be regarded as good law; and, as has been stated in 57 Bom 665[11] by the bench of the High Court in Bombay, one of the objects of the section is to enable the Official Assignee to discover whether he has grounds for embarking on litigation on behalf of the creditors or not. I have not acquired the experience of my learned brother with regard to the English law and practice in bankruptcy cases analogous to the case under appeal here. But I entertain no doubt that we ought not to interfere in the present matter, though it must be conceded that we have jurisdiction to do so, for the reasons which he has given. The appellant's learned advocate has not been able to suggest any specific question which he was debarred from putting, and no hardship has been occasioned to his client. Any attempt to convert the latitude given to the advocate of a creditor in these circumstances into a right to try and establish, by devious questioning and cross-examination of a speculative character, some accidental advantage ought to be discouraged. And it is for this reason that in my respectful judgment the learned Judge in insolvency exercised a wise discretion and the appeal against his order must be dismissed.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Rangoon 76

ROBERTS C. J. AND MOSELY J.

Deokali Pattah — Appellant

v.

Ramdevi and another — Respondents.

Letters Patent Appeal No. 5 of 1940, Decided on 1st July 1940, against decree of High Court, in S. A. No. 191 of 1939.

(a) Appeal—Letters Patent—Finding of fact impugned by High Court in Letters Patent or second appellate Court—It is not enough for High Court to say that it is not satisfied that matters of fact were proved—It must be satisfied that there was no sufficient evidence — High Court can in Letters Patent appeal adjudicate on soundness of conclusions derived from findings of fact — Finding of fact arrived at on evidence with propriety cannot be interfered with.

While considering a finding of fact of the lower appellate Court it is necessary for the High Court in Letters Patent appeal to distinguish between evidence which would be sufficient and evidence which the High Court itself might think satisfactory. It is not allowable for the High Court in second appeal or in Letters Patent appeal to say merely that it is not satisfied that matters of fact were proved, within the meaning of S. 3, Evidence Act; it should have to go further, in order to impugn the finding of fact of the first appellate Court and say that there was no sufficient evidence. The High Court can adjudicate on the soundness of conclusions which have been derived from findings of fact. On the other hand, if there is evidence upon which a finding of fact has been arrived at which could have been arrived at with propriety, the function of the High Court is at an end : A I R 1936 Rang 117 and 20 Cal 93 (P C), *Rel. on* ; A I R 1940 Rang 126, *Ref.* [P 76 C 2 ; P 77 C 1]

(b) Transfer of Property Act (1882), S. 53 — Sole creditor can maintain representative suit.

Even if the plaintiff is the only creditor he is entitled to maintain a representative suit on behalf of or for the benefit of all the creditors : A I R 1934 Rang 302, *Ref.* [P 77 C 2]

(c) Transfer of Property Act (1882), S. 53 — Transfer challenged as void under S. 53 — Material question is whether transfer on date on which it was made was intended to defeat or delay creditors and not whether creditors have been defeated since — Fact that all creditors have been paid off since transfer is immaterial.

Where a transfer is challenged as void under S. 53, what the Court has to consider is whether the action of the transferee on the date of the transfer was intended to defeat or delay the creditors and not whether the creditors have been defeated since. The fact that all creditors have been paid off since the date of the transfer is immaterial. [P 77 C 2]

(d) Civil P. C. (1908), S. 100 — Finding of fact — Lower appellate Court agreeing with trial Court is not bound to take every sentence of trial Court and say that it agrees with it — Lower appellate Court using words while agreeing with trial Court — Words "It is not unreasonable to presume" held not ambiguous and meant that lower appellate Court was satisfied with trial Court's finding.

There is no magic in any special formula of words nor is the first appellate Court bound to take every sentence of the trial Court's judgment and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. Where the lower appellate Court while agreeing with the trial Court's finding of fact uses in a part of its judgment the phrase "it is not unreasonable to presume" with reference to the lower Court's finding of fact the phrase cannot be said to be ambiguous for, it means no more than that it was satisfied that the trial Court was right in the conclusion at which it arrived, or at least that it was unwilling to disturb it. Such finding of fact is binding in second appeal : A I R 1931 Rang 29, *Disting.* [P 78 C 1]

P. N. Bhattacharyya — for Appellant.

Srinivasan — for Respondents.

Roberts C. J.—This is a Letters Patent appeal in respect of which a certificate has been given that the case is a fit one for appeal, and the question before us is whether the finding of the District Judge, Meiktila, that a gift by registered deed, dated 25th October 1933, by one Ganesh Prasad to his wife Ramdevi, of two houses, was voidable as being made with intent to defeat or delay his creditors, within the meaning of S. 53, T. P. Act. If it is a finding of fact it cannot be interfered with by reason of the existence of the rule which has been recently explained in 1940 R L R 180.[1] The District Judge's finding purported to be one of fact, and we have to decide whether there was any material, sufficient in law, from which the District Judge could arrive by inference or deduction at the conclusion at which he arrived.

It is, of course, necessary for us to distinguish between evidence which would be sufficient and evidence which we ourselves might think satisfactory. It is not allowable for the learned Judge in second appeal, or for us, to say merely that we are not satisfied that matters of fact were proved, within the meaning of S. 3, Evidence Act : we should have to go further, in order to impugn the finding of fact of the learned District Judge, and say that there was no sufficient evidence. And the question here is whether the learned Judge was right in saying that there was no sufficient evidence in law, i. e., no material at all, from which a deduction and inference could be made. If there was any evidence at all, it is plain that we cannot interfere. We can as pointed out by Mr. Srinivasan, referring to 19 I A 228[2] adjudicate on the soundness of

1. ('40) 27 A I R 1940 Rang 126: 189 I C 817: 1940 R L R 180, U Rai Gyaw Thoo and Co. Ltd. v. Ma Hla U Pru.
2. ('92) 20 Cal 93 : 19 I A 228 (P C), Ram Gopal v. Shameskhaton.

conclusions which have been derived from findings of fact. On the other hand, if there is evidence upon which a finding of fact has been arrived at which could have been arrived at with propriety, our function is at an end : *see* 14 Rang 81,[3] where the judgment of the Court ended with these words :

> In the present case both Courts have found that as a matter of fact the transfer of the land in question was fraudulent, and against this finding of fact no second appeal lies. The appeal is, therefore, dismissed with costs.

What, then, was the evidence upon which the learned District Judge purported to arrive at a finding of fact? First of all, it is said by the learned Judge in second appeal that there was evidence that Ganesh Prasad was not financially embarrassed. That evidence, however, was disbelieved in the trial Court. It is clear that the gift which he purported to make to his wife on 25th October 1933, was made four days after he got a notice of demand for Rs. 2500 from a creditor, Jagat Singh, and shortly after the gift to his wife had been made Jagat Singh was obliged to file a suit in order to get this money paid to him.

There is, moreover, evidence that the present appellant Deokali Pattah accepted the mortgage of some property of Ganesh Prasad in April 1934 to cover a debt of Rs. 2532, due to the former. It is said that there is evidence on the record to show that the mortgaged property covered the amount of the debt, but, in our opinion, this is by no means clear. There is no doubt that the appellant took what he could get then by way of security, the mortgage being by way of renewal of an old promissory note. It is stated in the judgment appealed against that it is inconceivable that the respondent would have accepted such a mortgage if he had not himself been satisfied at the time that his debt was sufficiently secure. But there is no contention that this was a mortgage which was taken by a person who was parting with his property in consequence of having obtained proper security ; on the contrary, he was a creditor who was trying to cover himself by every means in his power.

Not only did he take a mortgage on his property, but Ganesh Prasad also had a policy on his life which he mortgaged along with these lands, and it is in evidence and accepted that this was the subject of a prior assignment to his wife ; this was found by the learned Sub-divisional Judge and inferentially confirmed by the District Court. There were other creditors who obtained decrees within a short time afterwards. It is, to my mind, unnecessary to go into their claims in detail ; it is enough to say that, when an examination of the position comes to be made, there were grounds for saying that Ganesh Prasad was financially embarrassed both after as well as before the time he made the purported gift of the houses to his wife.

It has been urged on behalf of the respondent that the gift of the two houses was made not by Ganesh Prasad alone but Ganesh Prasad and Muniram. Muniram is dead and it appears that his only legal representative is Lal Chand, respondent 2, who would be his grandson (Muniram being the father of Ganesh Prasad): however that may be, I cannot think that this point is one of importance since, the learned Judge having held that the gift was voidable and of no effect, it is clear that both the lower Courts accepted the plaintiff's views that the gift was made in collusion with Muniram, and that Muniram's name was used for the purpose of making what was represented as a gift, whereas in fact it was merely device in order to defeat or delay the creditors. Then it is said that this ought to be a representative suit and that the plaintiff-appellant represents no one except himself. It is, I think, clear that the suit has been instituted on behalf, or for the benefit, of all the creditors. The case to which reference was made in this connexion is that in 12 Rang 666.[4] Even if the plaintiff were the only creditor, I do not see why he should not, in those circumstances, bring a suit of this kind, and I agree with the observations of the learned District Judge in this connexion. It is urged that all creditors have been paid off now and that therefore it is impossible to say that the transfer is void; but what we have to consider is the action of Ganesh Prasad on 25th October 1933, and not whether the creditors have been defeated since ; it is quite clear that many of them may have been delayed.

The last point that was taken was that the learned District Judge did not specifically say that there was fraud and there must be concurrent finding of facts so that the Sub-divisional Court and the District Court are agreed before the learned Judge

3. ('36) 23 A I R 1936 Rang 117 : 161 I C 887: 14 Rang 81, Asgar Ali v. C. V. R. M. Firm.

4. ('34) 21 A I R 1934 Rang 302 : 152 I C 555 : 12 Rang 666, Chidambaram Chettyar v. R. M. A. R. S. Firm.

in second appeal is bound. There is however, in my opinion, no magic in any special formula of words, nor is the District Judge bound to take every sentence of the learned Sub-divisional Judge and say in terms that he agrees with it as though he were a litigant dealing with all his opponent's pleadings. He uses in a part of his judgment the phrase "it is not unreasonable to presume," and it is said that it is ambiguous. In my opinion, it means no more than that he was satisfied that the Sub-divisional Judge was right in the conclusion at which he arrived, or at least that he was unwilling to disturb it. There I see a clear distinction between this case and the case in 8 Rang 425,[5] which is the only authority for the proposition that the High Court may intervene on a question of fact where the matter has been ambiguously dealt with and no satisfactory conclusion has been arrived at in the Court below. Bearing all these matters in mind, I am of opinion that the whole case is really summed up in the observations of the Bench in 14 Rang 81[3] to which I have referred in the earlier part of my judgment. And, therefore, this appeal must be allowed and the judgment and decree of the learned Judge in second appeal must be set aside and the judgment of the District Court must be confirmed and the decree of the Sub-divisional Court upheld with costs in all Courts, advocate's fee in this Court 10 gold mohurs.

Mosely J. — I agree.

G.N./R.K. *Appeal allowed.*

5. ('31) 18 A I R 1931 Rang 29 : 128 I C 366 : 8 Rang 425, Ma Hla Me v. Maung Hla Baw.

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MOSELY J.

Maung Shwe Thin — Appellant

v.

Maung Tha Ok — Respondent.

Second Appeal No. 42 of 1940, Decided on 4th June 1940, against decree of Assist. Dist. Court, Minbu, D/- 4-11-1939.

Upper Burma Land and Revenue Regulation (3 of 1889), S. 53 (2) (xii) — Default in payment of revenue by fishery lessee — Surety's land resumed without notice for payment of revenue and without attachment or sale — Surety's claim is not barred by S. 53 (2) (xii).

The words "connected with or arising out of the collection of revenue" must be construed reasonably. Their meaning cannot be extended so as to include any consequence, however indirect, or however unjustified by law, of action taken to collect revenue. The words "collection of revenue" mean collection by payment in the ordinary course, or recovery of arrears in the ways allowed by S. 41. [P 79 C 1]

Hence where on default by a fishery lessee in the payment of revenue his surety's land is resumed without serving any notice to pay the revenue and without attachment or sale of the land within the meaning of S. 41, the claim of the surety cannot be said to be connected with or arising out of collection of revenue. The claim is not therefore barred by S. 53 (2) (xii). [P 79 C 1]

G. N. Banerjee — for Appellant.

U E Maung (1) — for Respondent.

Judgment. — The plaintiff-respondent Maung Tha Ok was surety for the payment of fishery revenue on behalf of a fishery lessee in Upper Burma. That lessee failed to pay the revenue and Maung Tha Ok's land was sold. Maung Tha Ok claimed that it was bobabaing land, the defendant that it was State land. The trial Court did not come to any finding on the point. Under S. 27, Fisheries Act, arrears of fishery revenue may be recovered as if they were arrears of revenue, (not land revenue,) and the term "revenue" is defined in S. 37 (c) of the Regulation as including revenue payable on account of fisheries. The surety's land was resumed though notice to pay the revenue was never served on him. The land was taken over or resumed by Government and the defendant-appellant Maung Shwe Thin was allowed to take it on payment of the arrears of Rs. 70-8-0. There was however no attachment or sale of the land within the meaning of S. 41 which gives the processes by which arrears may be recovered. Resumption is only allowed by the rules in the case of arrears of land revenue itself, and only in the case of State land: *vide* R. 174 framed under S. 41 (1) (d): (R. 34 quoted by the Court of First Appeal has been cancelled).

The two lower Courts were of the opinion that a civil Court had jurisdiction and that the plaintiff's claim was bound to succeed. The case quoted by the lower appellate Court, 3 Rang 171,[1] is irrelevant. That concerns the jurisdiction of the civil Courts to entertain disputes between private persons as to the right to occupy land over which no land-holders rights have been acquired under the Lower Burma Land and Revenue Act. There are similar decisions in Upper Burma as to the effect of S. 53 (2) (ii) of the Regulation, (1914-16) 2 U B R 151[2] and (1917-20) 3 U B R 212.[3] The only contention raised in this appeal is that the suit was barred by

1. ('25) 12 A I R 1925 Rang 203 : 86 I C 531 : 3 Rang 171, Maung Po Cho v. Maung San Bwin.
2. ('18) 5 A I R 1918 U B 46: 39 I C 367: 2 U B R 151, Sonilal Sheoshanka v. Delawar.
3. ('20) 7 A I R 1920 U B 1: 59 I C 960: 3 U B R 212, Burma Oil Co. Ltd. v. Baijnath Singh.

the provisions of S. 53 (2) (xii) of the Regulation which says that a civil Court shall not exercise jurisdiction over

any claim connected with, or arising out of, the collection of revenue, or the enforcement of any process for the recovery of an arrear of revenue or any sum recoverable as such an arrear.

1939 R L R 275[4] is quoted in this connexion. That however was a case where there were properly instituted recovery-proceedings for the recovery of thathameda tax, and the claim was in respect of the property sold in connexion with the collection of revenue. The question in the present case is whether the plaintiff's claim is connected with, or arising out of, a collection of revenue, or the enforcement of any process for the recovery of an arrear of revenue. The words "connected with or arising out of the collection of revenue" must be construed reasonably. Their meaning cannot be extended so as to include any consequence however indirect, or however unjustified by law of action taken to collect revenue. I do not think it can be said that the plaintiff's claim in this suit was connected with or arose out of a collection of revenue merely because, when the revenue was not collected, the revenue authorities proceeded without jurisdiction to resume the land. In my opinion the words "collection of revenue" mean collection by payment in the ordinary course or recovery of arrears in the ways allowed by S. 41. No doubt, if the revenue authorities had proceeded to enforce any process (process is defined in S. 41) for the recovery of arrears of revenue the jurisdiction of a civil Court would be barred; but there was no attachment and sale here, and what was done was not done in enforcement of any process for the recovery of revenue as defined in the Act. To hold otherwise would mean that if the revenue authorities did anything they pleased with total absence of jurisdiction under the Act in order to collect revenue the jurisdiction of civil Courts would be barred. For these reasons I consider that the orders of the lower Courts were correct and this appeal is dismissed with costs, advocate's fee two gold mohurs.

D.S./R.K. *Appeal dismissed.*

4. ('39) 26 A I R 1939 Rang 160 : 181 I C 590 : 1939 R L R 275, Ko Cheik v. Secretary of State.

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ROBERTS C. J. AND MOSELY J.

Daw Shin and another — Appellants

v.

Arjandas and another — Respondents.

Letters Patent Appeal No. 7 of 1940, Decided on 29th July 1940, from decree of High Court, in S. A. No. 192 of 1939, D/- 29th February 1940.

Administration suit — Cosharers—Partition — Mortgage by one heir of his undivided share in entire joint estate during pendency of suit — On partition other heirs take property allotted to their share free from encumbrance irrespective of doctrine of lis pendens.

Where one of two or more cosharers mortgages his undivided share in some of or the entire properties held jointly, the mortgagee takes the security subject to the right of the other cosharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. Consequently, where in the course of an administration suit for partition one of the heirs mortgages his undivided share in the whole of the joint estate, the other heirs take the properties allotted to their share by the partition decree in the absence of fraud, free from the mortgage irrespective of the doctrine of lis pendens and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share : 27 Cal 77 ; 1 I A 106 (P C); 32 Cal 198 (P C) ; AIR 1928 P C 38 and AIR 1932 P C 235, *Rel. on.* [P 80 C 2]

P. K. Basu — for Appellants.

K. C. Sanyal — for Respondents.

Mosely J. — This letters patent appeal must be allowed. The facts are briefly that in the course of an administration suit one of the parties, a co-owner (Maung Aung Pe) mortgaged his undivided share of the properties. The mortgage deed specifies the various properties which comprised the estate. At that time Aung Pe presumably thought that he was entitled to a one-eighth share and mortgaged that. He was subsequently awarded a one-third share and again mortgaged the balance of that to the respondents. After this a final decree was passed on a compromise between Aung Pe and the only other co-heir, Ma Saw Kin, who was entitled to a share in the properties, for the third co-heir, U Tun Aung Gyaw, had admittedly by then taken out more than his share of the estate. At this partition the house and site now in question went to Ma Saw Kin with other properties while Aung Pe again received other properties still. After this Ma Saw Kin transferred the properties in suit, the house and site, to her children, who again transferred them to the present appellants, Daw Shin and Daw Tin. The respondents sued Aung Pe

and obtained a mortgage decree against him, and at the auction bought the property themselves. They then sued Daw Tin and Daw Shin in the suit now under appeal for possession of Aung Pe's one-third share in this house and site. The suit was dismissed in the trial Court and in appeal by the learned District Judge, it being held that the suit was not maintainable. In second appeal to this Court, however, it was said that Aung Pe had only mortgaged his one-third interest, and that that transaction did not affect Ma Saw Kin's interests. The registered mortgage by Aung Pe was constructive notice to Ma Saw Kin. The learned Judge held that what Ma Saw Kin received at partition was only a two-thirds share in this house and site, or that what she received was subject to the mortgage of Aung Pe's one-third share in it. It was said that the doctrine of lis pendens does not necessarily apply to administration suits, which are not suits for the recovery of specific immovable property, and that for the above-mentioned reasons it should not be applied here.

Authorities were not cited to the learned Judge in second appeal, which convincingly show that irrespective of the doctrine of lis pendens this suit was not maintainable. One of these authorities was cited in the trial Court, namely 27 Cal 77,[1] which itself followed one of the leading authorities cited to us, 1 I A 106.[2] It was laid down there that a mortgage of an undivided share in land may be enforced against lands which under a revenue partition have been allotted in lieu of such share, whether such lands be in the possession of the mortgagor or of one who has purchased his right, title and interest. But lands allotted in severalty by the revenue partition to the cosharers of the mortgagor are not subject to the mortgage. Another decision of their Lordships of the Privy Council is 32 I A 1[3] at p. 16 where it was said that when the estate of a deceased person is under administration of the Court, a purchaser from an heir buys subject to any disposition which has been or may be made of the deceased's estate in due course of administration. In that case the transaction in question was one dealing with one specific property only. In 55 Cal 532[4] their Lordships dealt with a case similar to the present one. The head-note reads as follows:

> In a suit to ascertain and administer the trusts under a deed a decree was made declaring one of the parties entitled to a one-sixth share in the surplus income, and that the trustees should have their costs out of the trust property. The beneficiary thereupon mortgaged his share. Under a later order in the suit part of the property was sold to realize the trustees' costs. *Held* that the mortgagee's rights were subject to the sale, and the mortgage was consequently not an encumbrance upon the title of the purchasers.

Perhaps the authority most on all fours with the present case is another decision of their Lordships of the Privy Council, 13 Lah 702.[5] The decision there was to the effect that where one of two or more cosharers mortgages his undivided share in some of the properties held jointly, the mortgagee takes the security subject to the right of the other cosharers to enforce a partition and thereby to convert what was an undivided share of the whole into a defined portion held in severalty. If the mortgage, therefore, is followed by a partition and the mortgaged properties are allotted to other cosharers, they take the allotted properties, in the absence of fraud, free from the mortgage, and the mortgagee can proceed only against the properties allotted to the mortgagor in substitution for his undivided share. That was a case of mortgage of an undivided share of some only of the properties held jointly. This case, like 1 I A 106[3] and 55 Cal 532[4] was a mortgage of an undivided share in all the properties. But that distinction makes, I conceive, no difference. It is clear then that the respondents could not enforce their mortgage against this property, which had been transferred by partition by Aung Pe, and this appeal must be allowed. In the result, the suit will be dismissed with costs throughout, costs of this appeal five gold mohurs.

Roberts C. J.—I agree and have nothing to add.

G.N./R.K. *Appeal allowed.*

1. (1900) 27 Cal 77 : 4 C W N 254, Jogendra Chunder Ghose v. Fulkumari Dassi.
2. ('73-74) 1 I A 106 : 21 W R 233 : 3 Sar 333 : 2 Suther 942 (P C), Byjnath Lall v. Ramoodeen Chowdry.
3. ('05) 32 Cal 198 : 32 I A 1 : 7 C L J 395 : 9 C W N 225 : 8 Sar 713 (PC), Chutterput Singh v. Maharaj Bahadoor.
4. ('28) 15 A I R 1928 P C 38 : 108 I C 342 : 55 Cal 532 : 55 I A 81 (P C), Puran Chand v. Monmotho Nath.
5. ('32) 19 A I R 1932 P C 235 : 139 I C 85 : 13 Lah 702 : 59 I A 405 (PC), Mohamed Afzal Khan v. Abdul Rahman.

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DUNKLEY AND BLAGDEN JJ.

Dr. Tha Mya — Appellant

v.

Ma Kin Pu and another — Respondents.

First Appeal No. 37 of 1940, Decided on 4th July 1940, against decree of Dist. Court, Insein, D/- 10th February 1940.

(a) Buddhist Law (Burmese)—Maintenance — Suit by wife for maintenance—Arrears of maintenance for period before suit cannot be granted.

In a suit by a Buddhist wife against husband for maintenance, Court has no jurisdiction to order payment of arrears of maintenance for the period before the suit commenced: A I R 1939 Rang 223, *Rel. on.* [P 82 C 1]

(b) Burma Laws Act (13 of 1898), S. 13 (3)—Phrase, "according to justice, equity and good conscience" — Meaning of.

The phrase "according to justice, equity and good conscience" generally speaking, means English law if applicable to the society and circumstances of Burma: 11 Bom 551 (P C), *Rel. on.* [P 82 C 2]

(c) Maintenance—Law in Burma—Child cannot sue its parents for maintenance.

In Burma a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where the circumstances are such that the wife is morally bound to support a child or children that fact may, and should, be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. [P 83 C 1]

(d) Maintenance — Cause of action — Suit by wife for maintenance—Fact that husband subsequent to such suit has taken second wife cannot form part of wife's cause of action.

Where a husband, subsequent to the wife's suit for maintenance, has taken a second wife, this cannot, whatever its legal effect, form part of the wife's cause of action in the suit as a premature suit is incurable by subsequent events: (1911) 2 K B 1031 and A I R 1938 Rang 134, *Ref.* [P 84 C 1]

(e) Buddhist Law (Burmese)—Maintenance — Difference between wife's right to maintenance under English law and under Buddhist law explained.

In Buddhist law the spouses are for no purpose one person but of their after-acquired property they are tenants in common. The wife's interest in that property is a vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent, since this may be affected in various ways. It depends, for example, on whether the after-acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality (unlike that implied by English law) collateral to the main contract of marriage. It is to the effect that the husband shall be the manager of the after-acquired property and shall apply it during the subsistence of the marriage (as to income) first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates. The Buddhist husband is therefore under a positive legal duty to maintain his wife, but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband. The latter when sued for maintenance has a good defence if he pleads and proves that before action brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root. But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not qua husband but qua manager, and no wrong done to him in the former capacity can benefit him in the latter. [P 84 C 1, 2]

(f) Buddhist Law (Burmese)—Marriage—Dissolution by desertion and a year's absence — Absence of communication must be proved.

It is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses. [P 84 C 2]

(g) Husband and Wife—Cruelty to wife—Onus of proof — Definite words or actions must be proved.

In order to prove cruelty, it should be possible to point to some definite words or actions as constituting it. A charge of matrimonial cruelty is a serious matter, nonetheless serious when it is made against a medical man, and it is for the party who makes such a charge to prove it if it is denied. If he or she fails to prove it, a Court of law is bound to presume that it is unfounded. Mere failure to control a daughter of 17, often no easy task, cannot either alone or in conjunction with anything else amount to cruelty to her step-mother. [P 85 C 2]

(h) Buddhist Law (Burmese)—Maintenance—Husband taking second wife — Amount of maintenance to which first wife is entitled is one-sixth of husband's income—Cost of maintaining children is first charge on husband's income.

In Buddhist Burmese law, the general rule is that wife is entitled by way of maintenance to an amount which is one-third of the income acquired by the exertions of her monogamous husband. But when the husband takes a second wife the amount of maintenance to which the first wife is entitled is reduced to one-sixth of his income and the cost of maintaining children is first charge on the income. [P 85 C 2; P 86 C 1]

U E Maung (1) — for Appellant.

N. K. Bhattacharyya — for Respondents.

Blagden J. — This is an appeal by the defendant in a suit for maintenance commenced in the District Court of Insein. There is also a cross-objection by each respondent-plaintiff. Respondent-plaintiff 1 on 27th April 1939 presented to that Court a petition for leave to sue in forma pauperis. Her then proposed plaint lodged with the petition prayed for Rs. 200 monthly from the date of the suit for maintenance of herself and Rs. 50 for the maintenance and support of her minor son. Pending a decision on the petition, respondent 1 filed a proposed amended plaint making the infant son a co-plaintiff suing by herself as next friend.

Leave was given to sue in forma pauperis on 7th July 1939 (on which date, accordingly, the proposed plaint became an effective plaint and the suit must be held to have commenced), and to amend the plaint on 3rd October 1939. Judgment was given on 10th February 1940 and an order passed in favour of the adult plaintiff for Rs. 100 a month and of the infant plaintiff for Rs. 40 a month as from 6th July 1939. The appellant contends (amongst other things) that both sums are excessive and the respondents that neither is adequate. The latter also take a minor point, viz., that the order should have been ante-dated to 27th April 1939. For the reasons already given this contention is erroneous there being no jurisdiction to order payment of arrears of maintenance for the period before suit commenced, 1939 R L R 527.[1]

The first point argued before us concerned the claim of the infant plaintiff which, it was contended by the appellant, is bad in law. This contention is, in my opinion, well founded. I cannot conceive any reasonable system of law which allows children, as such, to take civil proceedings to compel their parents to maintain them. The logical consequences of such a state of things are palpably absurd. If a child in infancy has a civil right to be maintained in idleness by those responsible for its existence, at what age does it lose that right? No such age has been fixed either by the common law or by statute, and therefore if the right ever exists it is never lost. The whole structure of civilized society depends on (amongst other things) people doing work, which is seldom in itself a pleasure. But in a free country the forces which impel people (other than convicts) to do work are economic and not legal. The existence of any such right would therefore mean that orphans, and only orphans, would have any incentive to do any work. Consequently, all that has to be done would have to be done by the eldest living generation in each family — generally speaking, by middle-aged people themselves made incompetent to do it not only by their age but also by a youth of enervating sloth during which they in their time had battened in blissful indolence on their unfortunate parents. If such had ever been the law, the civilized world would have plunged into chaos long before it in fact did. Nor is authority lacking to disprove the existence of any such right. A suit by a child against its father for maintenance is not mentioned in S. 13 (1), Burma Laws Act. Therefore the question (unlike that of a wife's maintenance, which is a part of the law of marriage) does not fall to be determined by Buddhist law but, by sub-s. (3) of that section and must be decided "according to justice, equity and good conscience". This, generally speaking, means English law if applicable to the society and circumstances of this country : 11 Bom 551[2] at p. 561.

Now, the English law on the point is perfectly clear. Parents or persons *in loco parentis* who let their infant children starve or who run away leaving them chargeable on the parish are liable to criminal prosecution. The Parish (now the Public Assistance Committee) which relieves the necessities of poor persons may in certain cases recover its expenses from their more affluent relatives (including parents) under what used to be called the Poor Law. But a direct action by a child as such for maintenance against its parent is not only unheard of but contrary to the dicta on the subject of Lawrence J. in 4 East 76[3] at p. 84 and of Cockburn C. J., in (1842-43) 3 Q B 559[4] the latter, it is true, formed part of a dissenting judgment but the point of difference between the learned Chief Justice and his brethren does not affect the present question. Neither of these dicta has ever been doubted, and they were recognized as good law by Salter J., in (1918) 2 K B 90.[5] Moreover, these three cases are cited in the Hailsham edition of Halsburys " Laws of England " Vol. 17, Title 'Infants—Children' para. 1393, in support of the proposition that

> except under the operation of the Poor Law there is no actual legal obligation on a father or mother to maintain a child, unless the neglect to do so would bring the case within the criminal law.

The title 'Infants and Children' has the high authority of Sir Boyd Meriman, now President of the Probate, Divorce and Admiralty Division of the High Court in England. Against the appellant's case, which both in principle and in authority is in my opinion overwhelming, reliance on behalf of the infant respondent is placed on a passage in U E Maung's work and a note in May Oung's leading cases, Edn. 2, p. 53. As to the former, the argument of counsel who relies on the published opinion of his adver-

1. ('39) 26 AIR 1939 Rang 223 : 182 I C 799 : 1939 R L R 527, Ma Saw Nwe v. U Aung Soe.

2. ('87) 11 Bom 551 (P C), Waghela Rajsanji v. Shekh Masludin.
3. 4 East 76, Cooper v. Martin.
4. (1842-43) 3 Q B 559, Bageley v. Forder.
5. (1918) 2 K B 90 : 87 L J K B 816 : 118 L T 817 : 82 J P 170 : 16 L G R 876 : 26 Cox C C 260, Coldingham Parish Council v. Smith.

sary is always piquant, but if U E Maung did mean to express an opinion inconsistent with his present case he is not irrevocably committed to it and would be the first to admit that the opinion he expressed may be erroneous. I do not think that Mr. Bhattacharya's ingenious attempt to "hoist him with his own petard" should succeed. As to the latter, the passage cited runs thus:

> Under Buddhist law, it is part of the law of marriage that a man must maintain and support his wife and children. Hence, a civil action to enforce this duty will lie.

No authority is cited for it, and it is not said who is the proper plaintiff. It is unthinkable that both the child and its mother should be entitled to bring the suggested suit. It must be one or the other. A passage a few lines lower down reads :

> Even for future maintenance it is doubtful whether a decree can be given against a man where the wife has sufficient means of her own, though it may be argued that she has every right to expect support from him, since his obligation to maintain her is an essential incident of marriage. But, as regards children, a suit for maintenance by the mother even if she herself be wealthy is reasonable, except where the couple have been divorced and the father has given them up to her.

Given that in the contemplated circumstances the mother can sue, it follows that the child cannot, and this passage is therefore against the infant respondent. In any event, as I have said, Buddhist law is inapplicable. Therefore, in my opinion, the true view of the law of this country is that a wife may sue her husband, but a child as such may not sue his parents, for maintenance. Where, as here, the circumstances are such that the wife is morally bound to support a child or children that fact may, and should, be taken into account in assessing the quantum of maintenance to be paid to the wife, but she and she alone has a cause of action. The appeal against the judgment in favour of the infant plaintiff must therefore be allowed and his suit dismissed. As to the appeal against the judgment in favour of the adult plaintiff, her plaint, as I have said became effective on 6th July 1939. It set out that the parties were Burmese Buddhists and intermarried on 21st July 1937 when the adult plaintiff was a spinster and the defendant a widower with four children and that there was issue of the marriage one son (the infant plaintiff) born on 27th April 1938 and since 26th June 1938 in the sole custody of the adult plaintiff. All these facts the defendant by his written statement admitted.

The plaint then, with a fine disregard for the rules of pleading, set out, at considerable length, the main evidence which the adult plaintiff proposed to adduce, before alleging (which it did with a remarkable lack of proper particulars) the material facts which the plaintiff hoped thereby to prove, namely, separation of the spouses, justification for it, and neglect to maintain. The matrimonial offences of the defendant relied on as justifying the adult plaintiff's living apart were cruelty and the taking by the defendant of a second wife without the adult plaintiff's consent. The plaint averred the means of the defendant to be in the adult plaintiff's estimate Rs. 1000 a month, made a wholly unnecessary submission as to what the adult plaintiff's legal rights were, and concluded with formal averments and a prayer which I have already mentioned. The main body of the pleading consisted of a precis of correspondence between the defendant and the plaintiff's father, the former demanding of the latter money by threatening in default of payment to return the adult plaintiff to him, and the latter stoutly refusing either to part with his money or to receive back his daughter. The defendant's lack of affection for the adult plaintiff, avowed in this correspondence, might have been some evidence corroborative of the adult plaintiff if and when she ultimately (as she did) gave evidence of cruelty. In no other way were these letters in the least material to the adult plaintiff's case and why they were all pleaded passes my comprehension. The defendant by his amended written statement filed on 12th October 1939 was almost equally discursive. He rightly demurred to the claim of the infant plaintiff and he admitted the allegations as to the religion and marriage of the parties, their previous status, the birth of their child, their de facto separation, and child's subsequent custody.

He admitted, subject to reference, the correspondence pleaded and averred that his letters therein contained were written with the plaintiff's prior approval. He denied the allegations of cruelty, and pleaded his intended evidence about this at considerable length. He also pleaded a divorce by consent on 26th June 1938 : alternatively, desertion without just cause by the adult plaintiff on that date, and a consequent divorce (he should have said dissolution of marriage) on 26th June 1939: and in the further alternative he alleged that these parties were at all material times living apart by mutual consent. He admits having taken a wife subsequently

to 26th June 1938, though it appeared before us that this event only took place after suit commenced. This may therefore be, and I think it is, a material factor in the defendant's favour on the question of amount. But as it took place after suit commenced it could not, whatever its legal effect, form part of the adult plaintiff's cause of action in this suit, since a premature suit is incurable by subsequent events: *see* (1911) 2 K B 1031[6] and 1938 R L R 6.[7] The defendant further pleads that he offered the adult plaintiff Rs. 20 a month as maintenance for the infant, that it was refused, and that it was adequate. He denies the allegations as to his income and (after following his wife's bad example by inserting a short treatise on the law applicable to the case) concludes with a general traverse. On these pleadings nine issues were framed and after a trial lasting some seven days judgment was delivered on 10th February 1940. As I have already dealt with the question on which I differ from the learned District Judge (that of liability to the infant plaintiff) and as I agree with him (in the result) on the main question (that of liability to the adult plaintiff) I do not think I need deal in detail with those issues or that judgment. As it seems to me, there is, on those facts which are not in dispute, a complete answer to the defendant's case on the main question.

This arises from the difference between the nature of a wife's right to maintenance under the English and under the Buddhist law. Both, I apprehend arise from a term implied by law in marriage. The English law implies a term that the husband shall choose the social standard to which the household shall aspire and shall during the subsistence of that marriage maintain his wife, regard being had to her own means of reaching it, at the standard he has selected, out of his own pocket. This implied term goes to the very root of marriage, considered as a contract. The effect of the Buddhist law is probably in nine cases out of ten much the same, but the principle on which it proceeds is radically different. In Buddhist law, the spouses are for no purpose one person but of their after-acquired property they are tenants in common. The wife's interest in that property is a vested interest in the sense that its existence is indefeasible, but as to its quantum it is highly contingent, since this may be affected in various ways. It depends, for example, on whether the after acquired property is acquired by pure good luck or by the exertions of the spouses jointly or by those of the husband alone and also on the number of subsequent wives the husband may take. The material term to be implied is in reality (unlike that implied by English law) collateral to the main contract of marriage. It is to the effect that the husband shall be the manager of the after-acquired property and shall apply it during the subsistence of the marriage (as to income) first in maintaining his wife or wives, his children, and himself, and secondly in adding to the common capital, for which he or his estate will be accountable to each wife or her estate when her marriage terminates. The Buddhist husband is therefore under a positive legal duty to maintain his wife, 1939 R L R 527,[1] but the nature of the implied term from which that duty arises makes it in one respect more onerous than the corresponding duty of an English husband.

The latter when sued for maintenance has a good defence if he pleads and proves that before action brought the wife deserted him without just cause, that being a breach of the contract of marriage going to its root. But no marital offence by the wife can take away during the subsistence of the marriage her proprietary rights which, though precarious as regards amount, vested indefeasibly at the moment she married. In other words, the Buddhist husband is sued not qua husband but qua manager, and no wrong done to him in the former capacity can benefit him in the latter. From this it follows that the only valid pleas here pleaded by the appellant are those directed to showing that before suit brought his marriage to the adult respondent had been determined either (a) by mutual consent or (b) by desertion and a year's absence. As to the former, his own evidence as to what took place on 26th June 1938 both as pleaded in para. 5 of his written statement and as deposed at page 100 reversed is inconsistent with any such consent. As to the latter, it is essential to dissolution by desertion and a year's absence that during that year there should be absolutely no communication between the spouses. Here it is common ground that there was such communication. Therefore, the marriage was at the date the suit was commenced, and indeed is still, subsisting. The appellant is therefore liable to pay maintenance to the adult respondent, and the

6. (1911) 2 K B 1031: 81 L J K B 49: 105 L T 430: 75 J P 521 : 27 T L R 479, Clayton v. Le Roy.
7. ('38) 25 A I R 1938 Rang 134: 177 I C 63: 1938 R L R 6, Smith v. Mrs. Heptonstall.

only remaining question is one of amount. But before dealing with that, one thing must be said, in fairness to the appellant. The adult respondent's case as regards cruelty consisted of three parts. Firstly, there was the pleaded correspondence of December 1937. It is obvious that she was contemporaneously aware of this correspondence. One would have thought, this being so that she would have written entreating her father to relent from the attitude that she would "get into trouble" if she came home, and to receive her back; that is, at least, if in December 1937 her husband's treatment of her amounted to cruelty. The probable explanation of the fact that she did not do so is that the defendant's version of the facts about this correspondence is true, and if it be true the adult plaintiff's evidence as a whole comes under grave suspicion. I do not understand why the learned Judge said "I do not think that any serious notice can be taken of the defendant's explanation." Secondly, the adult plaintiff gave a lot of rather nebulous evidence which induced the learned Judge to find that the defendant

> adopted such an offensive and bitter attitude towards the plaintiff that made it impossible for the plaintiff to continue to live with him and at the same time to enjoy peace of mind.

That there can be such a thing as mental cruelty no one will deny, but it should be possible to point to some definite words or actions as constituting it, and if there were such conduct by the defendant as to have the effect found by the learned Judge it must surely have been conduct capable of being described a little more precisely than as "an offensive and bitter attitude." How, I ask, could any man meet a charge so vaguely expressed? It does seem that the learned Judge has (without any clear evidence that the appellant took the side of his daughter, his mother, or his sister, or instigated them or any of them to be unpleasant to his wife) saddled the defendant with responsibility for the quarrels which undoubtedly did take place between these ladies and the adult respondent. Consequently, he has, I think, regarded those quarrels as being an ingredient in the defendant's alleged cruelty. This is, of course, quite wrong. I have little doubt that the real source of the trouble in this case was too many women in one house, especially as the adult plaintiff was quite young enough to be the defendant's eldest daughter's sister. But whatever the rights and wrongs of the resulting and almost inevitable squabbles, mere failure to control a daughter of 17—often no easy task—cannot either alone or in conjunction with anything else amount to cruelty to her step-mother. Thirdly, the adult respondent deposed to three acts of physical violence about which her evidence was almost wholly uncorroborated and which she never pleaded or, it seems, mentioned to a living soul before she entered the witness-box. The learned Judge did not accept her evidence as satisfactory proof of these assaults, and, for my part, I go a step further and say flatly that I do not believe it. But the learned Judge said this :

> It does not necessarily follow that the plaintiff's allegations are not true though they may be said not to have been proved.

In my opinion this was a most unjudicial and improper observation. A charge of matrimonial cruelty is a serious matter none the less serious when it is made against a medical man and it is for the party who makes such a charge to prove it if it is denied. If he or she fails to prove it, a Court of law is bound to presume that it is unfounded, and I cannot too strongly deprecate an observation from the Bench which casts an unpleasant innuendo at a party merely for failure to discharge a burden which does not rest on him. In my considered opinion, the issue of cruelty in this suit should have been answered in favour of the appellant, and I think it unfortunate that for the reasons already given it is not strictly necessary for us to decide this question. With regard to amount a wife in England is as a general rule allowed by way of maintenance the amount necessary to bring her own income up to one-third of the parties combined incomes. By a pure, but curious, coincidence one-third is the quantum of her interest in Burmese Buddhist law in property acquired by the exertions of a monogamous husband. In the present case, there is no property not so acquired, the only income out of which the adult respondent can be paid being the professional earnings of the appellant. The only evidence as to their amount is that of the appellant himself who says that he earns Rs. 740 a month in salary etc., plus a negligible sum in private practice. If it were shown that a particular couple either did in fact live well below their income, or should reasonably have done so, one would be inclined to give the wife less than one-third of such income, leaving a balance to accumulate as capital and to be accounted for at the determination

of the marriage. But in the circumstances of this case, if there were no other wife, I think it would be reasonable to give the respondent about one-third. By her cross-objection the adult respondent limits the amount she claims to Rs. 150. Apart from the appellant's having now taken another wife the claim to Rs. 150 would have been very moderate indeed since one-third of Rs. 740 is Rs. 246-10-8, and in English law the new wife would, I think, have been regarded as a mere encumbrancer subsequent to the adult respondent. But as, in Burmese Buddhist law, the appellant was within his rights in taking her to wife provided he maintains the adult respondent, her marriage to the appellant reduces the expectant share of the adult respondent from one-third to one-sixth and U E Maung contends that we should not give the wife any more than one-sixth of the income or she will in effect have overdrawn her capital account when her marriage is dissolved.

This argument however ignores the costs of maintaining the infant respondent. The costs of maintaining children must, I think, be a first charge on income in this sense that if a married couple do not acquire any accretions of capital but succeed in saving out of income, so that there is something to divide when their marriage is dissolved, that divisible surplus is the residue left not after starving but after feeding the issue of the marriage. Rs. 20 is, I think, rather too little to allow as the cost of maintaining the child and Rs. 40 too much. I would propose to split the difference and call it Rs. 30, and deduct this sum from the appellant's income which leaves Rs. 710. One-sixth of this is Rs. 118-5-4. I would then propose (as the adult plaintiff has the child to provide for) to add to this figure Rs. 30 which I first deducted which gives Rs. 148-5-4. As the child grows older he will cost more than he now does and, therefore, I should feel justified in giving the adult respondent the round sum claimed by her cross-objection, *viz.*, Rs. 150, though it is a little more than that to which I think she is mathematically entitled as matters now stand. Respondent 1 has succeeded on her cross-objection while the appellant has succeeded as against the infant respondent. Strictly speaking he has failed on the main point, but that which I suppose was an important object in his appeal—namely to rid himself of the stigma of cruelty—he has obtained. That charge in my view should never have been made.

The appeal against respondent 2 is therefore allowed and the suit of respondent 2 is dismissed. The appeal as against respondent 1 fails, and is dismissed. The cross-objection of respondent 2 is dismissed. The cross-objection of respondent 1 is allowed, and the appellant is ordered to pay maintenance to her at the rate of Rs. 150 per month from 6th July 1939, and the decree of the District Court will be varied accordingly. As regards costs, the decree of the District Court in regard to the costs of the suit, including the order that the defendant-appellant shall pay the court-fees which would have been paid if respondent 1 had not been permitted to sue in forma pauperis will stand. The parties will respectively bear their own costs of this appeal and the cross-objections, but respondent 1 is ordered to pay the court-fees on the cross-objections, both in regard to her own cross-objection and also to the cross-objection on behalf of the infant respondent, which would have been paid if the cross-objections had not been permitted to be filed in forma pauperis.

Dunkley J. — A claim by a wife for maintenance is clearly a question regarding marriage, and therefore when the parties are Buddhists the Buddhist law must form the rule of decision by reason of the provisions of S. 13 (1), Burma Laws Act, and it is for this reason that the suit of respondent 1 against the appellant for her maintenance is sustainable, as I have held in 1939 R L R 527.[1] But a claim by a child against its father for maintenance is not a question regarding either succession, inheritance, marriage, caste or any religious usage or institution, and therefore sub-s. (1) of S. 13, Burma Laws Act, has no application to such a suit; but in accordance with sub-s. (3), if there is no statutory law dealing with the matter, the decision must be according to justice, equity and good conscience. The only statutory provision dealing with the matter is S. 488, Criminal P. C., which provides for an order by a Magistrate after a summary enquiry and does not give a right of suit. As my learned brother has pointed out, the phrase "justice, equity and good conscience" means the English Common law, so far as it can be applicable in this country, and under the English Common law a child cannot bring an action against its parents for its maintenance, and on this ground the suit of respondent 2 was bound to fail. I agree with my learned brother that the charges of cruelty by respondent 1 against the appellant ought never to have been made and I am in entire agreement with his observa-

tions in regard thereto. I also agree that the rate of maintenance allowance to be granted to respondent 1 should be enhanced to Rs. 150 per mensem. I agree with his order as to the costs of the suit and this appeal.

D.S./R.K. *Order accordingly.*

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DUNKLEY AND BLAGDEN JJ.

Ma Kyin Sein and others — Appellants

v.

Maung Kyin Htaik — Respondent.

First Appeal No. 18 of 1940, Decided on 4th July 1940, against decree of Dist. Court, Pyapon, D/- 29th December 1939.

(a) Buddhist Law (Burmese) — Keittima adoption — Adoptive parent has same right as natural parent to give adopted child in adoption to another —Where adopted child is minor no consent of any person on his behalf is necessary to validate second adoption—Effects of second adoption are same as those of first (Obiter).

An adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another. The adoptive parents step into the shoes of the natural parents, and as natural parents can give away their child in adoption, adoptive parents also may give away their keittima child in adoption to another person who takes the child with the intention that the child shall inherit to him, and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And, just as the adoption from the natural parents has the effect of severing all the ties of the child with its natural family, so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. [P 88 C 1]

(b) Buddhist Law (Burmese)—Adoption—Monk cannot adopt.

A Buddhist monk cannot adopt since he is vowed to a life of celibacy and poverty, and has cut himself off from all worldly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person, bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is precluded by his personal law from having natural children cannot adopt : A I R 1929 Rang 173, *Rel. on.* [P 88 C 2]

(c) Buddhist Law (Burmese)—Adoption—Adoptive parent's unilateral act cannot terminate adoption.

The relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act (disclaimer) of the parent. An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children: A I R 1920 L B 55, *Rel. on.* [P 89 C 1]

(d) Buddhist Law (Burmese) — Succession — Adoptive parents indicating by acts desire to sever relation with their keittima child—Keittima child acquiescing in parents wishes, as expressed by acts, by living separately and not attempting to discharge filial duties—Keittima child forfeits right of inheritance.

If the adoptive parents show by their acts that they desire to sever the relationship with their keittima child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as keittima child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his right of inheritance : A I R 1917 P C 136, *Rel. on*; A I R 1928 P C 197, *Expl.; Case law referred.* [P 89 C 2]

(e) Precedent — Parties to suit by consent not canvassing particular legal question — Decision in suit is not binding on inferior Court as to answer to that question.

Where by consent parties to a suit do not canvass a particular legal question the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that question is. [P 94 C 2]

U E Maung (1) — for Appellants.

U Aye Maung (2) — for Respondent.

Dunkley J.—The suit out of which this appeal arises was a suit by the plaintiff-respondent for the administration of the estate of U Maung Maung, deceased, who died in the year 1933. The plaintiff-respondent set up that he is the keittima adopted son of U Maung Maung and his first wife, Ma Kyin Si, who died in or about the year 1907. The respondent alleges that he was adopted with a view to inherit by U Maung Maung and Ma Kyin Si when he was a few months old, and that Ma Kyin Si died when he was a little over one year old. U Maung Maung and Ma Kyin Si had a number of children born to them, but the only one who survived infancy was Ma An, (P. W. 3), who is the respondent's strongest supporter in his present claim. In or about the year 1909, U Maung Maung married as his second wife one Ma Khin, who died in 1938. The defendant-appellants are the surviving children of U Maung Maung and Ma Khin. Assuming that the respondent's claim to be still the keittima son of U Maung Maung is true, he might have claimed his share of his adoptive father's estate on the latter's re-marriage, and again on U Maung Maung's death, and it is extremely significant that he waited until after Ma Khin's death before putting forward his claim, and, although he had erroneously stated in para. 17 of his plaint that his cause of action arose on Ma Khin's death, in the prayer he has asked for the administration of the estate of U Maung Maung. This delay in making his claim is rendered even more important by the facts that on 22nd November 1920 (Ex. 5), Ma An was given Rs. 20,000 by U Maung

Maung, as her share of the joint property of her mother and U Maung Maung due to her on U Maung Maung's remarriage and that on 23rd January 1935, (EX. 6) she was given by Ma Khin a piece of land in full satisfaction of all claims which she might have in the estate of U Maung Maung then deceased. On neither of these occasions when his (alleged) adoptive sister claimed and obtained a share of her father's estate did the respondent make any claim.

The appellants, in their defence, denied the adoption of the respondent and in the alternative pleaded that the relationship between U Maung Maung and the respondent, if it ever existed, was brought to an end on 25th June 1910. i. e., when the respondent was only three or four years of age by U Maung Maung giving away the respondent in keittima adoption to a monk named U Zawana, (P. W. 2). The finding of the learned District Judge that the respondent was in or about the year 1906 adopted in the keittima form by U Maung Maung and Ma Kyin Si has not been strenuously contested before us. It could not very well be in view of the evidence of U An Za (P. W. 1), U Zawana (P. W. 2), and Ma An (P. W. 3), as to the actual adoption and the admission made by U Maung Maung in the presence of a number of prominent residents of Pyapon who have signed the document as witnesses in the deed of adoption (EX. 8), dated 22nd February 1921 in which he acknowledged that the respondent was the keittima son of himself and Ma Kyin Si. It is conceded by both sides that an adoptive parent has the same right as a natural parent in regard to giving his adopted child in adoption to another and I think that this proposition is probably correct, although I have not been able to find any authority for it. The adoptive parents step into the shoes of the natural parents, and it seems probable that as natural parents can give away their child in adoption, adoptive parents also may give away their keittima child in adoption to another person who takes the child with the intention that the child shall inherit to him and if the child is a minor no consent of any person on behalf of the child would be necessary to the validity of such a second adoption. And, just as the adoption from the natural parents has the effect of severing all the ties of the child with its natural family so such a second adoption would have the effect of bringing to an end the relationship between the child and his original adoptive parents. But it is unnecessary for us to come to a decision on this question for the purported second adoption of the respondent was invalid on another ground.

Now it is clear from the evidence that soon after his second marriage U Maung Maung desired to sever his relationship with the respondent and purported to do so by giving away the respondent in keittima adoption to the monk U Zawana on 25th June 1910. This purported adoption was evidenced by the document EX. 8 executed more than ten years later on 22nd February 1921. U Zawana who is now 83 years of age and whose mental powers are obviously failing tried to pretend in his evidence that he did not intend to take the respondent in adoption, but he is naturally highly interested to deny that there was a monetary consideration for his execution of this document and I agree with the learned District Judge that the evidence of U Tha Kin, (D. W. 1), an advocate of this Court who signed the document as a witness is to be preferred as to the circumstances under which U Zawana and U Maung Maung executed it. It was confirmation in writing of an adoption which had taken place more than ten years previously and it shows that U Maung Maung severed his connexion with the respondent when the latter was about four years old and remained of the same mind until his death. If a second adoption is possible that would end the case in favour of the appellants provided that the adoption of the respondent by U Zawana were a valid adoption; but, in my opinion, it was invalid for the reason that a Buddhist monk cannot validly adopt. It is perhaps not surprising that there is no reported decision on this point as it must be a very rare occurrence for a pongyi to desire to adopt a child, but in an unreported case, *Ma On Kyi* v. *Ma Thaung May*[1] a Bench of this Court held that a pongyi, being bound by the Vinaya, cannot adopt. With the greatest respect, this must be so. A Buddhist monk is vowed to a life of celibacy and poverty, and has cut himself off from all wordly ties. By reason of his vows he cannot have natural children and he can own no property. The notion that a person, bound by such vows, can adopt a child to take the place of natural children and inherit his non-existent estate is preposterous. Clearly a person who is precluded by his personal law from having natural children cannot adopt.

1. *Reported in* ('29) 16 AIR 1929 Rang 173 : 120 I C 663.

However, U E Maung for the appellant concedes that the relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act of the parent. An adoptive parent has no power to disinherit his adopted child (except perhaps by giving him away in adoption), any more than a natural parent has such power in respect of his natural and lawful children: 12 Bur L T 207.[2] But U E Maung contends that the relationship can be severed by the act or acts of the adoptive parent in which the adopted child, having reached the age of discretion, has by his conduct acquiesced. That a keittima child may forfeit his right of inheritance by his conduct is unquestioned. According to the Dhammathats he forfeited his right of inheritance by living separately from his adoptive parents (Manukye, Book X, Ss. 25 and 26), but the strictness of this rule has been modified by judicial decision : *see* (1872-92) L B R 8;[3] (1872-92) L B R 191;[4] (1892-96) 2 U B R 22;[5] (1892-96) 2 U B R 176;[6] (1897-01) 2 U B R 135.[7] This question was considered by their Lordships of the Privy Council in 1917 in the case in 44 I A 251.[8] In the course of their judgment their Lordships observed at p. 255 :

> A keittima child may, according to the authorities, forfeit his right of inheritance by separating from his adoptive parents. These authorities, however draw a distinction between the cases where there are other children with whom the keittima seeks to compete and share and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation. This points to the true principle upon which the rule of forfeiture rests. It is a matter of intention. If the keittima child goes to live separately from his adoptive parents, it may be that he has shaken off the tie, that he has provided for himself, has discontinued the further performance of duty towards his adoptive parents, and has given up with his duty his claims upon their estate; and it is more easy to presume this when the parents have other children who can perform the duties and receive the estate. The fact that the child goes to live apart is some evidence of an intention to break the bond. The distance may be so great as to render it impracticable for the child to continue to discharge his duties to his adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken.

Hence, it is clear that if the adoptive parents show by their acts that they desire to sever the relationship with their keittima child, and if the conduct of the child shows that he acquiesces in their wishes, as expressed by their acts, by living separately from them and not attempting to discharge filial duties, and by not asserting his rights as keittima child, even when it is in his own interests to do so, the presumption arises that he intends to break off the tie with his adoptive parents, and under such circumstances he forfeits his rights of inheritance.

When the respondent was adopted, U Maung Maung and Ma Kyin Si were living at Eyagyi village, which is about two miles from Naukpyando village, where the pongyi U Zawana lives. Ma Kyin Si's mother, Daw Soon, also lived at Naukpyando. After his second marriage U Maung Maung moved to Pyapon, where he lived up to the time of his death. Naukpyando is about one hour's journey by boat from Pyapon. The respondent has stated in his evidence that after the death of Ma Kyin Si he lived with U Maung Maung and his second wife Ma Khin at Pyapon until he was eight years old, and then he was sent to U Zawana's monastery at Naukpyando, where he lived until he was 18 years old, first as a scholar and later as a novice; that after he left the monastery he lived with Daw Soon at Naukpyando until she died in 1928 ; that he was married at that time and he and his wife were living with Ma Soon ; that he continued to live at Naukpyando until 1938, when he moved to Pyapon; that his occupation since he left the monastery has been and still is that of a carpenter. The respondent cannot have any real recollection of his early life with U Maung Maung, and on this point I prefer the evidence of Ma An, who is 11 years older than the respondent. She is strongly prejudiced in favour of the respondent; she has admitted that in her evidence. She has stated that after the death of Ma Kyin Si she and the respondent were taken by Daw Soon to live with her. They lived with Daw Soon for about a year, and then U Maung Maung took them both to live with him and his second wife at Pyapon. A year later, that is, when the respondent was between 3 and 4 years old, the respondent was sent to U Zawana's monastery at Nyaukpyando. The

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2. ('20) 7 AIR 1920 LB 55 : 55 IC 258 : 12 BurLT 207, San Paw v. Ma Yin.
3. ('72-92) 1872-92 L B R 8, Nga Min Gyaw v. Me Pi.
4. ('72-92) 1872-92 L B R 191, Maung Po Sein v. Maung In Dun.
5. ('92-96) 2 U B R 22, Maung Aing v. Ma Kin.
6. ('92-96) 2 U B R 176, Ma Gyan v. Maung Kywin.
7. ('97-01) 2 U B R 135, Maung Shew Thwe v. Ma Saing.
8. ('17) 4 AIR 1917 P C 136 : 42 I C 863 : 45 Cal 1 : 44 I A 251 : 11 Bur L T 28, (P C), Maung Thwe v. Maung Tun Pe.

statement of Ma An on this point corresponds with the date mentioned in the document Ex. 8 as the date on which the original purported adoption of the respondent by U Zawana took place.

Consequently it is clear that from about the time when the respondent was 3 or 4 years old U Maung Maung considered that he had put an end to all ties between himself and the respondent, and never subsequently looked upon the respondent as his son. He did not maintain the boy; he did not "shinbyu" him. Daw Soon fed him and performed the "shinbyu" ceremony. U Zawana has stated that U Maung Maung on his visits to the monastery used to give some sweetmeats to the respondent, but it is clear that U Maung Maung and his family respected U Zawana, and that U Maung Maung's visits to the monastery were for the purpose of seeing U Zawana, and not to see the respondent, and it is very slight evidence of any relationship between them that a wealthy Burmese gentleman should give cakes or pocket money to a school-boy on his visits to the monastery. U Maung Maung's treatment of Ma An was in marked contrast. She continued to live with U Maung Maung and Ma Khin until she was 21 years old, when she married and set up a separate establishment with her husband.

The respondent did not attempt to perform filial duties towards U Maung Maung. He has stated in evidence that he used to pay visits to U Maung Maung at Pyapon, but he admits that he never slept in U Maung Maung's house and that the number of such visits was only ten in twenty years. U An Za and U Zawana have both stated that the respondent used to visit U Maung Maung, but they are very old and their memories are not good, and as they live at Naukpyando I cannot understand how they could know personally whether the respondent used to visit U Maung Maung or not. On the other hand, the appellants have called a number of the leading citizens of Pyapon as witnesses, some of these witnesses having been close neighbours of U Maung Maung, and they have stated that they had never heard of the existence of an adopted son of U Maung Maung and had never seen the respondent in U Maung Maung's house. They are persons who would have been likely to have known if the respondent had visited U Maung Maung at all frequently. Further Ma An who is the strongest witness for the respondent, has stated that whenever the respondent visited Pyapon he used to stay in her house, and as far as she is aware he never went to her father's house.

It has been urged upon us that these facts do not show any intention on the part of the respondent to sever the tie of adoption, because he had been repudiated by U Maung Maung and was therefore prevented from discharging his filial duties, which he was always ready and willing to discharge; but there are other facts which in my opinion, show conclusively that the respondent, after he had come of age, acquiesced in U Maung Maung's severance of the relationship between them, and did not consider himself to be the keittima son of U Maung Maung. U Maung Maung was a Sino-Burman. According to the custom of persons of this class, he was buried with Chinese ceremonies, and in these ceremonies the son of the deceased takes a very prominent part. Also all the near relatives of the deceased wear black clothes for a considerable time after his death. U Maung Maung died in 1933, when the respondent was 27 years of age. I am prepared to accept the evidence that the respondent attended the funeral, although his presence was so inconspicuous that U An Za did not notice him. He attended on two days as a follower of U Zawana, and did not stay at the funeral house. He was merely an ordinary guest at the funeral. He did not wear mourning clothes, although the appellants and their mother Ma Khin and Ma An did so. He took no part whatever in the funeral ceremonies. Clearly therefore he did not consider himself to be a son of U Maung Maung. In November 1920, Ma An was given Rs. 20,000 by U Maung Maung as her share of the joint estate of U Maung Maung and Ma Kyin Si. The respondent admits that he knew about this transaction. He was 14 years old at the time, and he had U Zawana and Ma Soon to advise him. Yet he made no claim for himself. In January 1935, after the death of U Maung Maung, Ma An made a further claim against her father's estate and was given a piece of land, valued at Rs. 1500, by Ma Khin. The respondent admits that he knew about this transaction at the time. He was 29 years old at that time, but he made no claim for himself. Baw Soon died in 1928, and at the time of her death she owned a holding of paddy land and a house and garden. Ma An applied to the revenue authorities to have these properties assessed to revenue in her name on the ground that she was the sole heir of Daw Soon. The respon-

dent objected, alleging that he was a joint heir with Ma An. U Maung Maung was examined by a revenue officer, and stated that the respondent was not his adopted son, and consequently Ma An's application was successful. The respondent did not proceed further with his objection, and did not prosecute his claim before the civil Courts. Ma An's statement in evidence in regard to this matter is extremely illuminating. She said:

> At the time of his filing the objection he and I were temporarily on bad terms with each other. We are now on speaking terms with each other. We have been so far about seven years (i. e. since 1932). About seven years ago he expressed his regret to me for having filed the objection and said that he had made a mistake.

Yet she is now strenuously supporting the respondents's claim, because she has, as she admits, quarrelled with the appellants. A sister of U Maung Maung, named Daw Gyi, died in 1938, and according to Chinese Customary Law (which at that time was held to be applicable to Sino-Burmans) her nephews were her heirs. One nephew brought a suit in the Township Court of Pyapon for the administration of her estate, and he joined her other nephews as defendants in the suit. If the respondent were the keittima son of U Maung Maung, he was also a nephew of the deceased and entitled to share equally with the other nephews in the estate. Yet he was not made a party to the suit, and although the respondent admits that he knew that Daw Gyi's nephews had inherited her estate he has never claimed a share therein.

All these facts raise the irresistible inference that the respondent acquiesced in and agreed to the act of U Maung Maung in severing the tie of adoption and repudiating the respondent as his son, and for many years before U Maung Maung's death did not consider himself to be U Maung Maung's adopted son. Hence the presumption arises that the respondent had intentionally severed the relationship with his adoptive father, and had thereby forfeited his right of inheritance. This appeal must therefore be allowed, the judgment and decree of the District Court of Pyapon set aside, and the suit of the plaintiff-respondent dismissed with costs in both Courts, advocate's fee to be calculated ad valorem on the amount of the claim, *viz.*, Rs. 35,325. As the plaintiff-respondent was permitted to sue in forma pauperis, it is now ordered that he shall pay the court-fees on his plaint which he would have had to pay if he had not been permitted to sue as a pauper, and the District Court of Pyapon is directed to send a copy of the decree in this appeal to the Collector of the Pyapon District.

Blagden J. — This appeal raises interesting questions of mixed law and fact. The plaintiff claims to administer the estate of U Maung Maung, deceased, as the keittima child of U Maung Maung and his first wife Ma Kyin Si. His adoption was in controversy in the Court below. The plaintiff adduced evidence to show that he was received into U Maung Maung's household as an infant of about six months; that a meal was given to pongyis to celebrate his adoption on the occasion of his first bath; and that an inscription on the tombstone of Ma Kyin Si referred to him as her son. Our attention was not called to any evidence that the person who caused this inscription to be made was dead, but I see that U Zawana (P. W. 2) was able to testify to this and thereby make the inscription evidence under S. 32 (6), Evidence Act. On the other hand a witness was adduced by the defendants who deposed to a conversation with U Maung Maung in 1908 in which he referred to the then infant plaintiff as being in his house, so to speak, "on approval" and expressed doubts as to how long he (the deceased) could tolerate his presence. This, if true, was quite inconsistent with keittima adoption at the date of the conversation. But the witness was dealing with an event more than thirty years old. Whatever the truth about this conversation (it may for example well be that the words were uttered in jest but, as so often happens with jests, were not so understood) a subsequent event, namely the execution of the document called EX. 8, makes it clear beyond reasonable doubt that at some time in or about 1907 the plaintiff was adopted as the keittima child of U Maung Maung. U E Maung, who appeared for the appellants, did not very strongly contend to the contrary, and therein he showed his usual wise discretion. The area of the dispute before us has also been greatly narrowed as learned counsel on both sides agree that if at the date of the death of U Maung Maung the plaintiff was still his keittima son, the plaintiff is in the events that have happened entitled to three-eighths (or one half of three quarters) of the payin property and 1/16th (or one half of one-eighth) of the lettetpwa property of U Maung Maung, the other halves being represented by the share of which Ma Ant

(his surviving daughter by his first marriage) elected to take possession on the death in 1933 of U Maung Maung in lieu of waiting for that of Ma Khin, his second wife.

Given that the plaintiff was adopted by U Maung Maung, the question remains whether the relationship of father and son by adoption survived till 1933. During the life of Ma Kyin Si, the deceased had his home at Eyagyi. Ma Kyin Si died shortly after the plaintiff's adoption and the two children, Ma Ant and the plaintiff, were apparently left for about a year in the care of her mother Daw Soon at Naukpyandoe. Then the deceased married Ma Khin and at or about the same time went to live at Pyapon, distant according to Ma Ant (P. W. 3) about one hour's journey by boat from Naukpyandoe. But a year or more later the two children ceased to be treated alike. When (according to the plaintiff) he was about five, or (according to his own witness Ma Ant) when he was three, he was sent back to live with his adoptive maternal grandmother Daw Soon. From the day forward he saw very little of the deceased or the deceased of him. From then till he was about 22 he continuously resided either in the house of Daw Soon or at a kyaung (also at Naukpyandoe) presided over by U Zawana (P. W. 2), where at first he daily attended as a kyaungtha, eating and sleeping at Daw Soon's house and where he later, until he was about 18, resided as a koyin, Daw Soon supplying his food. A shinbyu ceremony was performed for him not by U Maung Maung but by Daw Soon, although at about the same time a similar ceremony was performed for a number of other youths by U Maung Maung. During these years almost his only inter-course with U Maung Maung took place when, not more often than monthly, (the plaintiff himself says only about once a year) U Maung Maung visited the kyaung when he used apparently to give the boy pocket money and minor comestibles. With the greatest respect to my learned brother's views, I should have thought that this by itself was rather strong evidence of intention to continue adoptive paternity, though I agree it is quite insufficient to outweigh the other available evidence about this matter.

On 22nd February 1921 there came into existence the most important document in this case, EX. 8. It recites first the keittima adoption of the plaintiff by U Maung Maung and Ma Kyin, then an outright verbal gift of the plaintiff by way of keittima adoption to U Zawana 10 years before. It then confirms the latter gift and concludes with what is in effect a covenant for quiet enjoyment in favour of U Zawana. Whatever the legal effect of this document, it certainly does make it quite clear that the original adoption relied on by the plaintiff in fact took place. On the other hand, if the plaintiff had been given in adoption to U Zawana (if in law that were possible) there is an end of the plaintiff's case since one cannot have more than one father at any one time. We have to consider whether, either in 1911, or at all events as from 22nd February 1921, U Zawana in fact purported to adopt the plaintiff as his keittima child, and if so could he in law do so effectually? As against him the recital is strong though not irrebuttable evidence that he at all events purported to adopt the plaintiff and I think it some evidence against the plaintiff though by reason only of S. 32 (5), Evidence Act, and in all the circumstances I do not myself think it very strong evidence as the plaintiff was no party to the instrument. U Zawana strenuously denied that he ever adopted the plaintiff. He is not the first, or likely to be the last, person (even amongst those habitually dealing with worldly affairs) who has signed a document with a false recital, and as the learned District Judge seems to have been clearly of opinion that there was never even a purported adoption by him I should not myself have been prepared to come to a different conclusion on the facts.

As however my learned brother takes a different view about this I may be—indeed probably am—wrong. Even if I am, *Ma On Kyi* v. *Ma Thaung May*[1] (unreported) is an authority binding on us to show that anyhow a pongyi is in law incapable of making a valid adoption. It would certainly be paradoxical, if a person legally incapable of procreating children or possessing property could do by a legal fiction what he could not do through the usual channels and acquire children to inherit, but to inherit (presumably) nothing. The question whether there was a valid adoption by U Zawana being thus answered one way or another in the negative, it follows that if the plaintiff had been the natural son of U Maung Maung nothing that happened down to the latter's death would have terminated that relationship or, to be more accurate, its legal consequences. In the case of natural parenthood those legal consequences cease (1) on the adoption of the

child, (2) on divorce of the parents as between the child and that, if either, parent with whom filial relations are not maintained, and (3) on the child's becoming a "dogson". That the legal consequences of adoptive parenthood also cease on the happening of any of these three events is not in dispute. But none of them here happened. U E Maung contends that adoptive, unlike natural, parenthood can be terminated by mutual consent, and that such consent can be evinced by conduct and need not be expressed. Certainly there seems to be nothing unreasonable in a purely artificial relationship being terminable by purely artificial means.

On the facts, there can be no doubt at all that at latest on 22nd February 1921 U Maung Maung intended, so far as in him lay, irrevocably and completely to put an end to the artificial tie which once or then bound him to the plaintiff. He gave expression to that intention by an instrument which on the face of it recorded an adoption. This, as I have said, is not in my opinion shown to have in fact occurred and in law could not have done so; none the less he gave emphatic expression to his desire, and the instrument though ineffective as an assignment may still, as U E Maung contends, be effective as a disclaimer. U E Maung, rightly in my opinion, conceded that a disclaimer alone is not enough: parents, adoptive or natural, cannot in law get rid of their obligations to their children by a mere unilateral act; children are not chattels which can be abandoned at the owner's whim: *see* as to this 12 Bur L T 207.[2] U E Maung, therefore, further contends that the plaintiff's conduct, though it never approached that active impiety which would render him a dogson plainly indicates that he assented to the termination of his relationship with U Maung Maung.

It is unnecessary to consider what he did or did not do as a young child: I do not think that can affect the question. But looking only at what took place from February 1921 onwards, I think his conduct taken as a whole was quite inconsistent with his still regarding U Maung Maung as his father. He seems to have behaved towards him with increasing casualness culminating in complete neglect. It may well be that if he had sought greater intimacy he would have been rebuffed, but if he wanted to keep alive his relationship with U Maung Maung I think that at least he should have tendered performance of those obligations which that relationship imposed on him.

That which happened when he ceased to be a koyin is particularly important. He was, it seems, about 18 years of age. I ask myself where a youth of that age leaving an educational or similar establishment would naturally go, and the answer is "home—possibly not at once but fairly soon." Where did the plaintiff go? Admittedly to the house of Daw Soon; and he did not go there merely for such a farewell visit as any young man might well pay to an old lady for whose kindness in the past he had every reason to be grateful, but he stayed there for about four years. Taking his evidence as to his relations during this time with U Maung Maung at the highest, he paid to the latter such visits as a young man or boy might be prompted by great affection (or great expectations) to pay to a relative more remote than a parent, but his whole procedure during this period was inconsistent with his regarding U Mg. Maung's house as his home. True, there is no direct evidence that U Maung Maung's wish to sever parental and filial relations with him was ever brought to his knowledge. But the circumstantial evidence that neither regarded the other as father or as son during this period is overwhelming. It may also be true that had he returned, his relations with the defendants (his adoptive step-sisters) would have been intolerable. But, if so I do not see why he should be allowed to have it both ways so as to refuse to share the paternal home because he disliked his adoptive father's real daughters and at the same time to claim his share of their natural inheritance in opposition to them. If, therefore, a keittima adoption can in law be terminated in the manner suggested, this adoption was in my opinion so terminated. We must consider if it can be.

A passage in the Laws of Manoo, Vol. VI, p. 171, and a dhamma quoted in S. 201 of Vol. I of U Gaung's Digest show that from very early times adoption differed in law from procreation, being subject to possible restraints from which procreation was free. Still more significant is the passage in Vol. VIII of the Laws of Manoo, pp. 234-6 as showing that subject to certain conditions some adoptions were voidable at the instance of the natural parents. Though the tendency of modern decisions is to identify keittima with natural children, it is, I think, true that in those decisions the

Court has been considering not how a keittima adoption can be terminated but what a keittima adoption involves, assuming it to be subsisting at the material time.

(1872-92) L B R 8[3] and (1872-92) L B R 191,[4] though not binding on us and of dubious authority in view of 1937 R L R 426[9] which I shall mention later, at all events indicate that by living apart from his adoptive parents (even after his own marriage) a keittima child may (not must) lose his rights of inheritance, and they are based on explicit passages in the Dhammathats there cited, which, read literally, go even further than the decisions themselves. For example:

> If the adopted child be not living with the parents, and their own children are, he shall have no right to share: Manu Dhammathat, Vol. X, para. 25.
>
> If the child, being a notoriously adopted child, shall not live with the parents who adopted him but . . . . shall marry and live separately, he shall have no share in the property of the parents who adopted him : *Ibid*, para. 26.

It is true that these requirements must receive a reasonable construction regard being had to the changed conditions of modern times (1892-96) 2 U B R 176[6] and indeed it may be said that in view of (1892-96) 2 U B R 22,[5] they are no longer part of our law at all. But they are relevant to the present problem as showing that keittima children were never for all purposes in an identical position with natural children. It must be observed that in (1892-96) 2 U B R 176[6] it was said (at p. 181):

> The real issue for determination . . . is whether the surrounding circumstances proved to exist establish an intentional severance of the family tie or not,

a sentence which pre-supposes that the artificial family tie can be intentionally severed. At the very least these early authorities show that long ago it was considered that right of a kettima child to inherit might be lost where that of a natural child would not be. Other authorities to the same effect are (1892-96) 2 U B R 22,[5] (1897-01) 2 U B R 135[7] and (1893-1900) L B R 520.[10] Though in the last cited case the relaxation in modern times of the strict requirement of joint living, especially where there are no natural children, was pointed out, the possibility of loss of inheritance by a keittima child living apart was again clearly recognized as it was by their Lordships of the Privy Council in 44 I A 251.[8] Again, a Full Bench of this Court in 4 Rang 184[11] was of opinion that a keittima adopted son could not claim from his adoptive mother on the death of the adoptive father the auratha sons's quarter share of the parents' joint estate, which again indicates that the keittima child is not for every purpose in a position identical with an own child. This also appears from 11 L B R 124[12] where it was held that a keittima child who enters and then leaves the priesthood is not ipso facto re-adopted, though in similar circumstances the legal consequences of the natural relationship of parent and child would again come automatically into force.

At first view the decision of the Judicial Committee in 6 Rang 520[13] appears to be in the respondent's favour. But on a close examination one finds that that case actually decided nothing which affects the present question. The fourth issue settled in the District Court was (see p. 520): "Has Maung Shwe Ba lost his right to inherit on account of conduct inimical to Ma Ka ?" In other words, " Is the plaintiff a dogson?" Had the wording of the issue stopped at the word "inherit" light would doubtless have been thrown on the question we have to decide. But that the parties chose to confine the dispute to the particular question of "dogson or not dogson" is made abundantly clear by the agreed interpretation of the fourth issue set out at the top of p. 522. Where by consent parties to a suit do not canvass a particular legal question the decision in that suit cannot be an authority binding on an inferior Court as to what the answer to that question is, nor do I find any dicta in their Lordships' judgment which affect it.

There have in the last five years been four decisions in this Court which impinge on the case before us. Dealing with these in chronological order, in 14 Rang 557[14] the mode of effecting a keittima adoption was considered and the publicly expressed intention that the child shall inherit was laid down to be the essential factor. How, if at all, that expression of intention could be

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9. ('37) 24 AIR 1937 Rang 455 : 173 I C 238 : 1937 R L R 426, Ko Po Kyai v. Ma Thein Kha.
10. ('93-1900) 1893-1900 L B R 520, Ma E v. Maung Shwe Kaing.
11. ('26) 13 A I R 1926 Rang 148 : 98 I C 621 : 4 Rang 184 (FB), Maung Po An v. Ma Dwe.
12. ('21) 8 A I R 1921 L B 87 : 66 I C 573 : 11 L B R 124, Ma Nyun Sein v. Maung Chan Mya.
13. ('28) 15 A I R 1928 P C 197 : 110 I C 306 : 6 Rang 520 (PC), Maung Ba Po v. Maung Shwe Ba.
14. ('36) 23 A I R 1936 Rang 344 : 164 I C 272 : 14 Rang 557, Ma Than Nyun v. Daw Shwe Thit.

revoked was not in issue and therefore the case is really no authority on the point we have to decide.

In 1937 R L R 426,[9] to which I have already alluded, the opinion was expressed that the old requirement of cohabitation is no longer essential to a keittima child's inheriting. That dictum, if I may respectfully say so, seems clearly right in view of the decisions already reviewed. There is however much more here than mere failure to live in the adoptive parents' house. There is on the parent's side the clearest possible repudiation of the relationship of father and son; and there is on the plaintiff's side, as I have said, the deliberate choice of a house which was not the deceased's as his home. There is residence there by the plaintiff for four years, two of them before he married, which is quite inexplicable except on the hypothesis that he so regarded the house of Daw Sooh. There are then visits to the deceased, at first very infrequent and later ceasing altogether; the very minor part played by the plaintiff at the funeral of U Maung Maung; and his passive attitude to the rights of inheritance asserted by Ma Ant and another in opposition to him. I have no doubt at all that under the old law he would have lost his rights to inherit, and I see nothing in 1937 R L R 426[9] which in the circumstances of the present case shows that the contrary is true to-day.

That actual residence with the adoptive parents was not essential was also held by Braund J. in 1938 R L R 323.[15] No doubt, at any rate in modern times, merely sending the child away to receive education, whether secular or religious, would not sever the tie. But as I have said, much more than that took place here and in my opinion we should not be doing anything inconsistent with Braund J.'s decision if we were to hold that in this case the tie was severed on some date prior to the death of U Maung Maung. Finally there is the Full Bench decision in 1939 R L R 341.[16] The question referred there was:

What right of inheritance has the child adopted in the keittima form according to Burmese Buddhist law in the estate of the father of his adoptive father, where the latter having acquired the status of an auratha son has died before the death of the grandfather?

Consequently the decision which answered that question presupposed a valid adoption and an adoption subsisting at the date of the death of the adoptive father's father. The statement that "keittima adoption creates the relationship of parent and child" must therefore be read as referring to a subsisting keittima adoption. The question how, if at all, that fictitious relationship of parent and child can be terminated was never discussed. There is therefore in law nothing to preclude us from deciding what as I have indicated, we should in my opinion decide on the facts, namely that though the plaintiff was at one time the keittima adopted son of U Maung Maung he lost his right to inherit at some time before the death of the latter. It is unnecessary to decide at precisely what date he did so. The appeal should therefore in my opinion be allowed and the suit dismissed with the consequences as to costs indicated by my learned brother.

G.N./R.K. *Appeal allowed.*

15. ('37) 24 A I R 1937 Rang 170 : 169 I C 617 : 1938 R L R 323, U Ba Thaung v. Daw U.
16. ('39) 26 A I R 1939 Rang 197 : 182 I C 268 : 1939 R L R 341 (F B), Maung Thein v. U Tha Byaw.

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BA U J.

R. M. P. L. S. Chettiar Firm — Plaintiff

v.

Koormiah and another — Defendants.

Suit No. 52 of 1940, Decided on 5th June 1940.

Court-fees Act (1870), S. 17—S. 17 is not controlled by S. 67A, T. P. Act—Suit embracing two or more mortgages—Court-fee should be paid on each mortgage and not on aggregate amount of claim.

What S. 17 means is that in a suit which embraces two or more distinct causes of action court-fee should be paid on each cause of action. Each mortgage constitutes a distinct cause of action. Consequently, in a suit which embraces two or more mortgages court-fee shall be paid on each mortgage and not on the aggregate amount of the claim. Section 67A, T. P. Act, does not control S. 17, Court-fees Act: A I R 1935 Mad 262 and 63 Cal 720, *Rel. on.* [P 96 C 1, 2]

V. S. Venkatram — for Plaintiff.

U Tun Byu, Govt. Advocate — for the Crown.

Order.—In this suit the plaintiff sues for recovery of two sums of money, Rs. 1310-2-6 and Rs. 1139-3-6, secured by two separate mortgages but he has paid court-fees on the aggregate amount of Rs. 2449-6-0. The question that therefore arises now is how court-fee is to be assessed in a suit which embraces two or more mortgages. In his order of reference, the Taxing Master says that, having regard to the provisions of S. 17, Court-fees Act, court-fee should in his opinion be as-

sessed on each mortgage. Section 17, Court-fees Act, provides that:

> Where a suit embraces two or more distinct subjects, the plaint or memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act.

The words "distinct subjects," as used in this section, have been interpreted as meaning distinct causes of action, 2 ALL 676,[1] 8 Cal 593,[2] 5 L B R 94[3] and 4 Pat L J 195.[4] What S. 17 therefore means is that in a suit which embraces two or more distinct causes of action court-fee shall be paid on each cause of action. There is no dispute that each mortgage constitutes a distinct cause of action. Consequently, in a suit which embraces two or more mortgages court-fee shall be paid on each mortgage. Learned counsel for the plaintiff submits that this would be the logical view to take if S. 67A, T. P. Act, were not to come into play. According to him, what S. 17, Court-fees Act, contemplates is a suit which embraces two or more causes of action in respect of which a plaintiff can file separate suits, if he chooses to, but if he does not choose to he can unite them in one suit. He contends that it does not contemplate a suit which embraces two or more causes of action in respect of which a plaintiff cannot file separate suits. He says that under S. 67A, T. P. Act, a mortgagee who holds two or more mortgages executed by the same mortgagor must enforce all of them in the same suit and so S. 17, Court-fees Act, does not apply to a mortgage suit which embraces two or more mortgages: in other words, his contention is that S. 17, Court-fees Act, must be read subject to S. 67A, T. P. Act. I cannot accept this contention. In (1898) A C 748[5] at p. 754, their Lordships of the Privy Council observed:

> The general maxim is '*generalia specialibus non derogant.*' When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

When a subsequent general enactment cannot override or interfere with a special Act, I do not know how one special Act can override, or interfere with, the provisions of another special Act if there is no special provision made to that effect. The Court-fees Act is an Act which deals with the method of collecting a tax; while the Transfer of Property Act deals with the transmission of property between living persons. They are thus two distinct Codes. Therefore, in my opinion, S. 67A, T. P. Act, does not control S. 17, Court-fees Act. This is also the view held by Venkatasubba Rao J. in A I R 1935 Mad 262[6] where the learned Judge says:

> Nor is the view contended for by the petitioner correct. What is argued is that as under S. 67A, T. P. Act, a person is bound to include in the same suit different mortgages held by him, it follows from this, that the suit relates to one subject only and does not comprise as many subjects as there are mortgages. I am not prepared to accept this contention. The principle of consolidation applied by S. 67A, T. P. Act, has no bearing upon the interpretation of S. 17, Court-fees Act. The very basis of S. 67A is that there is more than one subject. The mortgages sued on may be different from one another in their terms and incidents; even the causes of action may have accrued on different dates. All that S. 67A enacts is, that the mortgagee is bound to sue on all the mortgages in respect of which the mortgage money has by the time of the suit become due.

This was quoted with approval by Mitter and Patterson JJ. of the Calcutta High Court in 63 Cal 720,[7] the headnote of which is in the following terms:

> The proper court-fee to be paid on a plaint in a suit to enforce several mortgage bonds, by which different properties are hypothecated, is not on the aggregate amount of the claim but the total of the fees payable separately on the sums claimed in respect of each of the bonds. Section 67A, T. P. Act, is not intended to affect in any way the provisions of S. 17, Court-fees Act.

For these reasons the order of the taxing master is correct and the plaintiff must pay court-fees on each of the mortgages sued upon in this suit.

D.S./R.K. *Order accordingly.*

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1. ('80) 2 All 676 (F B), Mul Chand v. Shib Charan Lal.
2. ('82) 8 Cal 593 : 10 C L R 359 (F B), Kishore Lal Roy v. Sharut Chunder.
3. ('07) 5 L B R 94 (F B), Perchiappa Chetty v. Po Kin.
4. ('22) 9 A I R 1922 Pat 359 : 50 I C 470 : 4 Pat L J 195, Nauratan Lal v. Stephenson.
5. (1898) 1898 A C 748 : 67 L J P C 115 : 79 L T 151, Barker v. Edger.
6. ('35) 22 A I R 1935 Mad 262 : 156 I C 435 : 68 M L J 316, Pollachi Town Bank Ltd. v. Krishna Ayyar.
7. ('35) 63 Cal 720 : 40 C W N 406, Radha Ranee Dassya v. Kshettra Mohan.

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Full Bench

ROBERTS C. J., MOSELY AND DUNKLEY JJ.

Ah Twe and another — Appellants

v.

Ma Mai Sein and others—Respondents.

Second Appeal No. 865 of 1939, Decided on 19th August 1940, from decree of Dist. Court, Insein, D/- 27th September 1939.

(a) Rangoon City Municipal Act (6 of 1922), S. 194—Before S. 194 can operate there must be tax claimable — Civil Court has jurisdiction to decide whether person is in arrears of municipal tax.

Before S. 194 comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court has jurisdiction to enquire whether a person is in arrear with payment of a municipal tax, for if he is not, the Land Revenue Acts have no application. [P 97 C 2]

(b) Lower Burma Land and Revenue Act (2 of 1876), Ss. 55 and 56—Civil Court has no jurisdiction to decide question as to arrears of land revenue or defaulter or both—It cannot entertain suit to set aside sale by township officer for arrears of land revenue.

With regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the revenue officer, and accordingly this question is one for him to determine. In view of Ss. 55 and 56, the civil Court has no jurisdiction to decide the question as to arrears of land revenue or defaulter or both and consequently it cannot entertain a suit to set aside a sale by a township officer for arrears of land revenue : AIR 1939 Rang 160, *Rel. on ;* AIR 1939 Rang 30 and AIR 1932 Rang 123 (FB), *Disting.* [P 97 C 2]

(c) Lower Burma Land and Revenue Act (2 of 1876), S. 56 — Government purchasing land at revenue sale and granting license to holder thereof —Suit to set aside sale—Government is necessary party—(Per Dunkley J.*)*

Where the Government purchases a land at a revenue sale and settles the holder of the land as a licensee, the Government is a necessary party to a suit to set aside the aforesaid sale and consequently S. 56 would apply : A I R 1915 L B 75, *Ref.* [P 99 C 1]

(d) Pleadings — Amendment — Suit to set aside revenue sale—Amendment of plaint that parts of Ss. 55 and 56, Burma Land and Revenue Act were ultra vires held could not be allowed in second appeal.

In a suit to set aside a sale held by a township officer in Lower Burma the plaintiff sought an amendment of his plaint at the stage of second appeal to the effect that parts of Ss. 55 and 56, Burma Land and Revenue Act, were ultra vires :

Held that the amendment could not be allowed at the stage of second appeal. [P 98 C 1]

U Sein Tun Aung — for Appellants.

S. T. Leong — for Respondents 1 to 11.

Roberts C. J. — The plaintiffs brought this suit to set aside a sale held by a Township Officer in Lower Burma for arrears of land revenue. The Sub-divisional Court thought that it had jurisdiction to entertain such a suit and it is contended, upon the authority in 1938 R L R 603[1] that such a conclusion was right. Section 194, Rangoon Municipal Act, provides that any arrears of tax or any fee or other money claimable by the Corporation thereunder may be recovered as if they were arrears of land revenue. Before this section comes into operation there must be arrears of tax or some fee or money claimable. There is no statute which says that the fulfilment or non-fulfilment of this condition precedent is to be decided by any person so that his decision is to be final and the jurisdiction of the Court is to be ousted. Accordingly the Court may enquire whether a person is in arrear with payment of a municipal tax, for, if he is not, the Land Revenue Acts have no application. But with regard to the assessment and collection of land revenue the (Lower) Burma Land and Revenue Act, 1876, specifically applies. It is not necessary to make any enquiry to see whether it does so or not. There is no preliminary question of whether arrears exist before the case is taken up by the revenue officer, and accordingly this question is one for him to determine. Section 56 provides (inter alia) that no civil Court shall exercise jurisdiction as to any matters, claims and questions mentioned in proviso 1 to section 55. When these are examined it will be seen that the jurisdiction of the civil Courts is ousted as to any questions of liability of any person under Ss. 37 and 38; questions as to whether any revenue, tax or rate is in arrear ; questions as to the legality of process in recovering sums in arrear ; and questions as to the validity of any sale under S. 45 or proclamation under section 47 of the Act.

In other words in land revenue cases revenue Courts deal with such matters to the exclusion of civil Courts ; in cases to which land revenue proceedings are made applicable for the recovery of arrears of moneys due, it must first be ascertained that arrears exist. Baguley J., pointed out in 1939 R L R 275[2] that S. 53 (2) (xii) of the Upper

1. ('39) 26 AIR 1939 Rang 30 : 180 I C 234 : 1938 R L R 603, Maung Thaung v. Abdul Gani.

2. ('39) 26 A I R 1939 Rang 160 : 181 I C 590 : 1939 R L R 275, Ko Cheik v. Secretary of State.

Burma Land and Revenue Regulation bars the jurisdiction of the civil Courts with regard to all claims in connexion with collection of revenue. The Act in Lower Burma is no less explicit. The appellant's counsel desires to show that the land revenue officer did not comply with various provisions of the Act in reaching his decisions; he says that there was no "defaulter" within the meaning of S. 44 and that there was no sum "in arrear"; but these are matters which we are expressly precluded by the terms of the Act from considering. Two lines of argument were pursued on behalf of the appellants. First it was urged that a suit to set aside a sale by a township officer for arrears of land revenue was maintainable in Bengal; the reason for this is that the Bengal Land Revenue Sales Act 1859 is quite different from the law in this country. If a plaintiff can show that he has suffered substantial injury when such a sale has taken place contrary to the provisions of that Act S. 33 of the Act expressly permits the civil Courts to intervene; but there is no such provision in the law in Burma. It follows that the long line of authorities sought to be invoked under the Bengal Act can be of no assistance in this country.

Secondly it was contended that we should assume that Ss. 55 and 56, Lower Burma Land and Revenue Act, which has been in operation for over sixty years deprives a party aggrieved of his rights to property. It is enough to say that it does not follow that because a person aggrieved cannot file a suit in the civil Courts to set aside a sale under the Act he has no other remedy; not only does he have the rights of appeal given him by the Act itself but he may be advised in certain cases of other remedies as well. It is suggested that we ought to permit an amendment of the pleadings at this stage in order to change the cause of action and to substitute for it a suit for a declaration that parts of Ss. 55 and 56 of the Act are ultra vires. That is not a proposition to which we can assent. Some attempt was made to employ arguments which were used in a recent case which came before this High Court by way of an application for a writ of certiorari. But the present proceedings stand on an entirely different footing. As I have pointed out they were brought in a Sub-divisional Court to set aside the acts of a revenue officer, and to determine questions which the Act says are not to be determined by the civil Courts. Accordingly this appeal must be dismissed with costs.

Mosely J.—I agree.

Dunkley J.—I agree with my Lord, the Chief Justice, that this second appeal must be dismissed with costs, as the jurisdiction of the civil Courts in regard to the subject-matter of the suit is ousted by the provisions of S. 56, Lower Burma Land and Revenue Act. The two Burma cases which have been cited by learned counsel for the appellants are clearly distinguishable. In 10 Rang 412,[3] the question was the recovery of an arrear of a tax imposed under the Rangoon Development Trust Act, 1920. The relevant provision of this Act is S. 86 (1), which enacts that :

> Any sum of money, or any tax, or fee due to or claimable by the Board (i. e. the Board of Trustees) may be recovered by the Board as if it was an arrear of land revenue.

In 1938 R L R 603,[1] the question was the recovery of an arrear of municipal taxes under the City of Rangoon Municipal Act, 1922, the relevant section of which is S. 194 (1), which enacts that :

> Any arrears of tax or any fee or other money claimable by the Corporation under this Act may be recovered as if they were arrears of land revenue.

Consequently, in both these cases the provisions of the Land and Revenue Act for the recovery of arrears of revenue do not come into play until there is an arrear of tax claimable from the person from whom the trustees of the Corporation of Rangoon as the case may be, are claiming it. As Page C. J., said in the former case,[3] (at p. 433), it is in such cases a condition precedent to the right of the authorities concerned to have recourse to the special procedure prescribed in the Land and Revenue Act that a sum has fallen due, and that it is due from the person from whom it is being claimed. These are, therefore, questions which can be decided by the civil Courts, and with respect to which the jurisdiction of the civil Courts has not been ousted. But in the case of an arrear of land revenue, the provisions of the Land and Revenue Act alone have to be considered, and the arrears fall to be recovered by the procedure laid down in that Act only; and under the Land and Revenue Act, the questions as to whether any revenue is in arrear, and by whom it is payable, are to be decided by the revenue Courts, and the jurisdiction of the civil Courts in such matters is ousted by the provisions of S. 56. I agree with my Lord that the law in regard to the jurisdiction of civil Courts in

3. ('32) 19 A I R 1932 Rang 123 : 139 I C 566 : 10 Rang 412 (F B), Trustees for the Development of the City of Rangoon v. G. S. Behara & Sons.

such a matter has been correctly laid down by Baguley J. in 1939 R L R 275.[2]

Reference has also been made to the line of cases of which 8 L B R 227[4] is the leading case, in which it was decided that the prohibition contained in S. 56, Land and Revenue Act, does not extend to disputes between private individuals regarding the right to occupy land. The answer to this point is that the Government of Burma was a necessary and proper party to this suit, and the suit could not succeed without joining Government as a party. The appellants seek to set aside a revenue sale at which Government was the purchaser, and the predecessor-in-interest of the respondents, Maung Po Ni, is a mere licensee of Government. Hence this suit, which was to set aside the revenue sale and to put the appellants into possession of the land, could not be decreed unless Government was made a party to the suit.

G.N./R.K. *Appeal dismissed.*

4. ('15) 2 AIR 1915 L B 75 : 30 I C 772 : 8 L B R 227 (F B), Maung Naw v. Ma Shwe Hmat.

A. I. R. 1941 Rangoon 99

MYA BU AND DUNKLEY JJ.

Ma Aye Tin — Plaintiff — Appellant

v.

Daw Thant—Defendant—Respondent.

First Appeal No. 8 of 1939, Decided on 23rd August 1940, against decree of Dist. Court, Henzada, D/- 9th January 1939.

(a) Evidence Act (1872), S. 92—Property purchased in names of A *and* B *jointly—Evidence by* A *showing that he paid whole consideration and that* B's *name was mentioned to enable him to present deed for registration is inadmissible.*

Where property is purchased in the joint names of *A* and *B*, evidence by *A* showing that he paid the whole consideration for the purchase and that *B's* name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the document for registration is clearly inadmissible under S. 92. [P 100 C 1]

(b) Buddhist Law (Burmese) — Wife's vested interest in payin property of her husband is not affected by rule in Manukye Book X, S. 28.

All property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property. The interest of the wife in the payin property of her husband is one-third and she cannot be deprived of such a vested interest in the property of her husband by the rule in Manukye Book X, S. 28 to which vested interest the law of inheritance can have no application. [P 101 C 1,2]

(c) Buddhist Law (Burmese) — Manukye Book X, S. 28—Scope of its operation explained.

The operation of S. 28 of Book X of the Manukye is not restricted to the vested interest of the deceased in the undivided family property only but is extended also to the property of the deceased generally which is in the possession of the parent. The rule applies whether the parent is natural or adoptive as adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists. [P 102 C 1,2]

U E Maung — for Appellant.

Dr. Ba Han — for Respondent.

Mya Bu J. — We first heard this appeal on 20th, 21st and 22nd June 1939, and at that hearing it was made clear to us that the only obstacle in the way of the appellant's complete success in the appeal was the decision in 10 Rang 124,[1] in which it was laid down that the provisions of the Manukye, Book X, S. 28, were still the law of Burma in regard to the division between the parents and daughter-in-law of the property of a son who has died childless. So far as the present case is concerned, the pertinent part of that section of the Manukye reads as follows (the section referring specifically to the case where the daughter has died and the son-in-law survives) :

Besides this he shall not recover any of his wife's property actually in the possession or keeping of her parents; they shall retain it.

As there was reason to doubt the correctness of the decision in 10 Rang 124,[1] we referred to a Full Bench for its opinion the following question :

As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, who is entitled to inherit such property under the Burmese Buddhist law ?

We have received the answer of the Full Bench* to this question, and it is that the parent is entitled to inherit such property. The conflict in this case is between the widow of one Maung Than Tun, namely Ma E Tin, who is the appellant and was the plaintiff in the District Court, and Maung Than Tun's adoptive mother, Daw Than, who is the respondent and was the defendant in the District Court. Most of the facts of the case have been set out in the order of reference, dated 24th August 1939, and it is unnecssary to repeat them. In fact, the only further questions of fact which remain for decision are (1) which of the properties mentioned in the schedules attached to the plaint belonged to Maung Than Tun, it being admitted by the appellant that they were all acquired by him prior to his marriage with her and (2) which of the properties

1. ('32) 19 A I R 1932 Rang 98 : 137 I C 431 : 10 Rang 124, Maung Ohn Khin v. U Nyo.

*[See A I R 1940 Rang 120 (FB) — Ed.]

mentioned in the schedules belonging to Maung Than Tun were in the possession of the respondent at the time of Maung Than Tun's death. The properties which the appellant claims to have constituted the estate of Maung Than Tun are set out in seven schedules attached to the plaint. Those mentioned in Schs. A and B are the properties in regard to which Maung Than Tun relinquished all his right, title and interest in favour of the respondent by the release deed, dated 11th February 1927, which we have already held to be void. Those properties were therefore the absolute property of Maung Than Tun at the time of his death. However, the evidence makes it clear that Maung Than Tun himself considered this deed of release to be binding upon him up to the time of his death and, in fact, he never attempted to challenge it. He allowed the respondent to exercise all the rights of ownership over these properties and, consequently, they must be held to have been in her possession at the time of his death.

Schedule C contains a number of items of jewellery, and the memorandum of appeal states unequivocally that the claim to these jewelleries is abandoned. Schedules D and E contain a number of items of immovable property which were purchased in the joint names of Maung Than Tun and the respondent. The presumption therefore arises that Maung Than Tun and the respondent were joint owners in equal shares of this property. This presumption has not been rebutted by the vague evidence called by the respondent to the effect that she paid the whole consideration for the purchase of each of these properties and that Maung Than Tun's name was mentioned in the deed as a joint purchaser merely in order that he should be able to present the documents for registration. Evidence of the latter category is clearly inadmissible under S. 92, Evidence Act, and even if the evidence to show that the respondent paid the whole of the purchase moneys to the different vendors be accepted, that raises no presumption in her favour, because she was the guardian appointed by the Court of Maung Than Tun, who was a minor when these properties were acquired, and received on his account a sum of Rs. 8000 which came to him on his natural father's death, and had for a number of years been in receipt of the income arising from lands which Maung Than Tun had inherited from his grandmother. No doubt, the respondent has an estate of her own, apart from the estate of Maung Than Tun, but she has admitted in evidence that the income of Maung Than Tun's estate has always been inextricably mixed by her with the income of her own estate, and consequently she had in her hands large funds belonging to Maung Than Tun's estate at the time when these properties were purchased; and therefore no inference arises, from the fact that she actually handed over the purchase moneys, that these moneys belonged to her only and not to Maung Than Tun.

Consequently, it has been established that Maung Than Tun owned a half share of the properties mentioned in schs. D and E. But as regards the possession of these properties it must be held that they were in the possession of the respondent. She has produced a large number of leases of these properties executed by tenants, and these leases were all executed in her name alone; and as against these the appellant has been able to produce only two leases executed in a single year in which the joint names of the respondent and Maung Than Tun are mentioned as lessors. It is common ground that the paddy received as the rents of the agricultural lands were all stored in a granary belonging to the respondent alone, and the evidence appears to be conclusive that the respondent alone negotiated the sale of this rental paddy. As regards the houses there is no evidence as to what happened to the rents of these, and, in fact, only one, which is the one which was jointly occupied by the respondent and Maung Than Tun and the appellant, is of any considerable value; but the evidence does show that the whole of the income arising from both Maung Than Tun's estate and the respondent's estate was received by the respondent and treated by her as if it were her own. Consequently, it must be held that the respondent was in possession of the properties mentioned in Schs. D and E. Schedule F consists only of one pair of bangles and a motor-cycle. The learned District Judge has dealt with these items in his judgment and there is no appeal against his decision.

Schedule G consists of two debts. It is said by the appellant that these debts were debts due to Maung Than Tun and the respondent jointly, but there is no evidence in support of her assertion. On the other hand, the two debtors, one of whom was examined as a witness for the appellant, have stated that they borrowed the money from the respondent only. Both the debts are oral loans and the money may have come from

the respondent's separate income, and in the absence of any evidence that Maung Than Tun's estate contributed towards these loans it must be held that it has not been proved that he had any interest in these debts. The same reasons apply also to a security deposit of Rs. 100 of which the respondent obtained the refund. Consequently, on the evidence, it would appear that Maung Than Tun's estate consisted of the whole of the properties mentioned in Schs. A and B and a half share of the properties mentioned in Schs. D and E, but that all these properties were in the possession of the respondent at the time of his death. Now, as we have said, on the reference to the Full Bench the learned Judges who composed it have held that the case in 10 Rang 124[1] lays down the law of Burma and that S. 28 of Book X of the Manukye is applicable in a proper case; but their decision is subject to a qualification in respect of any vested interest which the appellant may have obtained in her husband's property before his death. In the course of his judgment the learned Chief Justice said :

> But, of course, the question whether the property has been brought to the marriage and has been in the common enjoyment of the married couple, though still in the custody of the parent or parents, is all important.

In his judgment Mosely J., said :

> It has been held in 9 Rang 524[2] and again by their Lordships of the Privy Council in 10 Rang 261[3] that either spouse has a vested interest (to the extent of one-third) in the payin property brought by the other spouse to the marriage, that is to say, property which has passed into the common enjoyment though it may be in the custody or keeping of the parent. . . . I would agree that the law of inheritance contained in Manukye X, 28, cannot affect the wife's interest in such property.

And Mackney J. said :

> As my learned brother Mosely observes, the rule will not affect the vested interest of the son-in-law or daughter-in-law in the payin property brought to the marriage by the daughter and son: but property which is 'in the possession or keeping of the parents' can scarcely be deemed to be property brought to the marriage, unless it can be shown that the married couple actually enjoyed it as their own, the parents being as it were merely their agents for the management of the property.

Hence the learned Judges composing the Full Bench have held that the daughter-in-law could not be deprived by the rule in Manukye Book X, S. 28, of her vested interest in the payin property of her husband, to which vested interest the law of inheritance could have no application. The learned Judges have laid particular stress on the question of common enjoyment and have said that property cannot be said to be brought to the marriage unless it has passed into common enjoyment. With the greatest respect, these dicta would appear to be not in accordance with the judgment of their Lordships of the Privy Council in 10 Rang 261,[3] in which their Lordships observed (at page 268) :

> Married persons hold during the subsistence of the marriage an interest in all property belonging to either or both.

Their Lordships further observed (at page 280) :

> After all the ancient law has still a wide scope if admittedly all property acquired by either or both of the spouses before or during marriage passes into the common enjoyment and it is only dealt with by either according to his or her vested interest therein.

We consider ourselves bound to follow these statements of the law made by the Judicial Committee, which lay down as a principle that all property acquired by either or both the spouses before or during marriage passes into common enjoyment and both spouses have a vested interest in all such property; that is, "passing into common enjoyment" is a consequence of marriage and not a test of the vesting of property. Moreover, in the present case the property had passed into common enjoyment because the appellant and Maung Than Tun were during their married life maintained from the income of this property, and the respondent has stated in her evidence that this income was even insufficient to maintain the married couple. The interest of the wife in the payin property of her husband is one-third, and, in our opinion, the appellant had such a vested interest in the property of Maung Than Tun, which she acquired on her marriage with him, and which interest cannot be defeated by the fact that on his death his estate is inherited by some other person. On this ground the appellant is, in our opinion, entitled at least to a one-third share of the properties mentioned in Schs. A and B attached to the plaint and to a one-sixth share of the properties mentioned in Schs. D and E. A further question that has been raised on behalf of the appellant is whether S. 28 of Book X of the Manukye has any application at all in the present case. In support of the negative answer submitted by the learned counsel for the appellant the following passage in the judgment of Page C. J. in 12 Rang 409[4] has been relied on :

2. ('31) 18 AIR 1931 Rang 262 : 134 I C 1252 : 9 Rang 524 (S B), Chettyar Firm v. Maung Than Daing.
3. ('32) 19 AIR 1932 P C 152 : 137 I C 1 : 10 Rang 261 : 59 I A 216 (P C), U Pe v. U Maung Maung Kha.
4. ('34) 21 AIR 1934 Rang 318 : 152 I C 768 : 12 Rang 409, Ma Pwa Thin v. U Nyo.

The doctrine laid down in S. 28, in my opinion, ought not to be extended. In cases where it directly applies the law will be enforced, and the Court applied S. 28 in connexion with the claim to Po Aung's share. But unless the facts of any particular case bring it clearly within the terms of S. 28, in my opinion, the provisions of that section ought not to be extended by analogy or otherwise to other cases which are not brought within the ambit of the section.

The points of distinction between this case and the case in 10 Rang 124[1] which dealt with the same family were: (1) Po Aung had not taken from his mother his share in the estate of his deceased father and he and his wife lived with his mother until his death leaving no issue, whereas Maung Nyun had received a sum of money from his mother in full satisfaction of his claim in the estate of his deceased father and he and his wife lived separately from his mother, and (2) the claim put forward by Maung Ohn Khin was for Po Aung's alleged share in the estate of his deceased father which was until Po Aung's death in the possession of the mother, while Ma Pwa Thin's claim was for Maung Nyun's share in the estate of his sister who lived with the mother and died a spinster. Similar points of distinction do not exist between 10 Rang 124[1] and the present case. Another ground advanced by the learned counsel for the appellant is that the property in dispute in 10 Rang 124,[1] was the vested interest of Po Aung in undivided family property, whereas the property in dispute in the present case consists wholly of separate property belonging to the deceased. But the wording of S. 28 of Book X of the Manukye does not appear to restrict its operation to the vested interest of the deceased in the undivided family property only but appears to extend its operation to the property of the deceased generally which is in the possession of the parent. It has further been contended on behalf of the appellant that the respondent not being the natural mother of Maung Than Tun but only his adoptive mother, the provisions of S. 28 should not be extended so as to give the right under the section to the adoptive parents. Support is lent to this contention by the fact that under Ss. 25, 26 and 27 of Book X which lay down rules regarding the right of inheritance of a child "publicly and notoriously" adopted, that is, a keittima child, the position of an adopted child is inferior to that of a natural child and in 4 Rang 184[5] it was held that under the dhammathats the position of the keittima child was distinctly inferior in respect of inheritance to that of own children and accordingly that the right of the keittima child to equality with own children should not be extended to the orasa's right.

But 4 Rang 184[5] was a case in which the right of the keittima child, the only child of the family, to claim a quarter share from the widow on the death of the adoptive father constituted the principle point for consideration. Such right is not enjoyed under the dhammathats by an ordinary child though the child may be a natural child who does not possess the qualifications of an orasa child. The right is a preferential right even under the dhammathats extended to, and only to, a child who possesses certain qualifications and is therefore designated as an orasa child. As regards the general inferiority of the position of the keittima child in respect of inheritance to that of the own children recognized by the dhammathats, the Judge-made law for more than forty years has been that the keittima child stands exactly in the same position as a natural child and has taken firm root in the modern Burmese Buddhist law of inhertance. The fact that the preferential right of an orasa child is denied to the keittima child even under the prevailing system of law does not throw any doubt on the correctness of the proposition that for ordinary purposes of inheritance the keittima child stands in the same position as a natural child. Nor is this fact sufficient to show that the proposition which has never been doubted during the last forty years, that adoptive parents stand in the same position as the natural parents and have the same rights so long as the relationship constituted by adoption subsists, (1897-01) 2 U B R 109[6] cannot be consistently applied in favour of the adoptive parent in the matter of inheritance of the keittima child's estate, the right of the parent under S. 26, Book X of the Manukye being a right applicable to all parents and not only to parents with certain special qualifications.

In 1939 R L R 341[7] a Full Bench of this Court has pointed out that the keittima adoption creates not only heirship of the adoptee to the adoptor but also the relations of a parent and child and by virtue of

5. ('26) 13 AIR 1926 Rang 148:98 IC 621 : 4 Rang 184 (F B), Maung Po An v. Ma Dwe.

6. ('97-01) 2 U B R 109, Ma E Dok v. Maung Ngwe Hlaing.

7. ('39) 26 A I R 1939 Rang 197 : 182 I C 268 : 1939 R L R 341 (F B), Maung Thein v. U Thaw Byaw.

such relationship the adoptee acquires the rights of ordinary natural child of the adoptor in the estate of the adoptor's collaterals or ascendants. This shows that the relationship of the adoptive parent and the keittima child is as complete as that between an ordinary natural child and his parent in regard to rights of the keittima child or of the adoptive parent in the matter of inheritance. For these reasons we decline to uphold the contention that the provisions of S. 28 of Book X of the Manukye have no application at all in the present case. In the result the decree of the District Court will be set aside and there will be a decree in favour of the plaintiff-appellant for one-third share of the properties mentioned in Schs. A and B attached to the plaint and to a one-sixth share of the properties mentioned in Schs. D and E. The appellant's costs of this appeal and of the suit, including the court-fees payable on the plaint and on the memorandum of appeal, shall be paid out of the estate of Maung Than Tun.

D.S./R.K. *Decree set aside.*

A. I. R. 1941 Rangoon 103

DUNKLEY J.

Ma Kalema and another — Appellants

v.

Ma Kyaing and others — Respondents.

Special Second Appeal No. 87 of 1940, Decided on 18th June 1940, against decree of District Court, Pyapon, D/- 8th December 1939.

(a) Civil P. C. (1908), O. 32, R. 7 — Execution proceedings are continuance of suit—O. 32, R. 7 applies to agreements made during execution proceedings.

Execution proceedings are a continuance of the suit, and O. 32, R. 7, is applicable to an agreement or compromise made in the course of proceedings for the execution of the decree obtained in the suit. [P 104 C 1]

(b) Civil P. C. (1908), O. 32, R. 7 (2)—Minor seeking to avoid compromise voidable at his instance—Compromise must be declared void against all parties to compromise.

It is clear from the provisions of O. 32, R. 7 (2) that when a minor desires to avoid a compromise, which is voidable at his instance, the compromise is voidable against all parties and therefore must be declared to be void against all parties and not against some of them only : A I R 1916 P C 2 and A I R 1939 Cal 588, *Explained.* [P 104 C 2]

A. H. Paul — for Appellants.

U Tha Kin — for Respondents.

Judgment. — The suit out of which this second appeal arises was a suit by the plaintiffs-respondents against the defendants-appellants and one U Pan On for a declaration that a compromise effected between a person named U On Pe and U Pan On in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon was void. U Pan On is not a party to this present appeal. He has not appealed against the judgment and decree of the District Court of Pyapon on first appeal, which decreed the suit against him and the two appellants. The two appellants and respondents 2, 3 and 4 are the heirs of one U Tha Maung. Ma Kyaing, respondent 1, is the mother of the other respondents. In a suit for the administration of the estate of U Tha Maung, she acted as the next friend of the other three respondents who were all minors at that time. A decree was obtained in connexion with that administration suit against U Pan On for a sum of Rs. 6750, being the rent of a rice mill. The decree was obtained by the receiver of the estate, and after it had been obtained it was transferred by him to the appellants and respondents jointly. Ma Kyaing had no personal interest in this decree and she is not really a proper party to the present proceedings. After the decree had been transferred to them, the appellants and Ma Kyaing executed a power of attorney in favour of one U On Pe so that he could execute the decree on their behalf. U On Pe obtained a transfer of the decree to the Assistant District Court of Pyapon and applied in that Court for execution thereof. In November 1934, Ma Kyaing cancelled the power of attorney which she had given to U On Pe and, therefore, from that stage onwards he had no authority to act as the agent of the next friend of the other three respondents. However, in spite of Ma Kyaing having cancelled his power, U On Pe filed a fresh execution application in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon and in that application, which is signed by U On Pe and the appellant Maung Than only, U On Pe did not give any description of his status or state what was his right to execute the decree on behalf of the other decree-holders. Unfortunately, the learned Assistant District Judge held no enquiry whatever into this important point and did not question the status of U On Pe.

In first appeal the learned District Judge, in the course of a long and discursive judgment, which contains several unfortunate clerical errors, has discussed this question of U On Pe's status in Civil Execution Case No. 27 of 1935 of the Assistant District Court of Pyapon at great length, but it is quite

unnecessary, for the purpose of the point for decision in these proceedings, to come to any definite decision regarding the status of U On Pe in those execution proceedings, and it may be accepted that, so far as respondents 2, 3 and 4 were concerned, he was acting as their next friend. At the same time as the execution application was filed, U On Pe and U Pan On presented to the Court a joint petition for the compromise of the decree, and in this petition U On Pe described himself as the agent of the decree-holders. This compromise was recorded and in furtherance thereof a registered security bond was executed by U Pan On and certain sureties. This is the compromise which is called in question in the present proceedings. The orders of the Assistant District Court in regard to the matter are as follows:

24th September 1935. A joint application is filed by the parties praying that a settlement in terms of the said application be recorded in the case. A security bond is executed. Let it be registered. Put up registered bond on 26th September 1935.

26th September 1935. Bond duly registered. Case closed. Enter non-satisfaction.

Hence the learned Assistant District Judge recorded this compromise without any enquiry as to whether the compromise was for the benefit of the minor decree-holders or not, and in so doing contravened the provisions of O. 32, R. 7, Civil P. C. As I have said, the most favourable view of U On Pe's status, as representing the respondents in regard to this compromise, was that he acted as the next friend of the three respondents who were minors at the time; and R. 7 of O. 32 reads as follows :

(1) No next friend or guardian for the suit shall without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

Execution proceedings are a continuance of the suit, and O. 32, R. 7, is applicable to an agreement or compromise made in the course of proceedings for the execution of the decree obtained in the suit. The compromise now in question was recorded without the leave of the Court, and no such leave was expressly recorded in the proceedings. Hence there was a contravention of sub-r. (1) of R. 7, and consequently, under sub-r. (2) the compromise is voidable against all parties other than the minors. The learned advocate for the appellants admits that this compromise must be declared void so far as the respondents are concerned, by reason of sub-r. (2) of R. 7, but he argues that the appellants still support this compromise, and that, therefore it should not be set aside so far as they are concerned. He urges that sub-r. (2) of R. 7 has no application to the adult parties to such a compromise and he refers in support of his argument to the cases of 39 Mad 409[1] and 43 C W N 962.[2] But the proposition laid down in these cases is not the proposition for which learned counsel for the appellants contends; in fact, these cases lay down that it is only the minor who has the right to avoid such a compromise, and that the adult parties have no right to avoid it on the ground that the necessary leave of the Court has not been obtained. That proposition is undoubtedly correct, but, it is clear from the provisions of sub-r. (2) of R. 7 that when a minor desires to avoid a compromise, which is voidable at his instance, it is voidable against all parties, and therefore, the appellants cannot now be permitted to act on the compromise, which must be declared to be void against them. This is the decision at which the learned District Judge on first appeal arrived, though on somewhat different grounds. The result, therefore, is that this appeal fails and is dismissed with costs, advocate's fee five gold mohurs. The decree of the District Court also contains a clerical error, copied from the judgment.

G.N./R.K. *Appeal dismissed.*

1. ('16) 3 A I R 1916 P C 2 : 34 I C 213 : 39 Mad 409 : 43 I A 99 (P C), Jama Bai Saheb Mohitai Avergal v. Vasanta Rao Ananda Rao.
2. ('39) 26 A I R 1939 Cal 588 : 186 I C 72 : 43 C W N 962 : 70 C L J 115, Somorendra Nath v. Ashutosh Roy.

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ROBERTS C. J. AND BLAGDEN J.

Co-operative Town Bank, Henzada and another — Appellants

v.

U Kyaw Tha — Respondent.

Letters Patent Appeals Nos. 1 and 2 of 1940, Decided on 23rd May 1940, from decree of Mackney J., *reported in A I R 1940 Rang 157.*

Arbitration — Award by arbitrator appointed under Burma Co-operative Societies Act ignoring law of limitation — Suit to set aside such award is maintainable.

The Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of law would have done, when the parties have agreed on the one hand or when there is a statutory obligation placed upon them on the other, to

refer their disputes to a tribunal which is not a Court of law. But, on the other hand, that tribunal must come to a decision which is a quasi judicial decision or must make an award which has been arrived at after proper consideration of the case. An arbitrator is bound to give effect to all legal defences, including a defence under any statute of limitation. Hence, where an award made by an arbitrator appointed under the Burma Co-operative Societies Act has ignored the law of limitation, a suit to set aside the award is maintainable : A I R 1938 Rang. 392, *Expl.*

[P 105 C 2; P 106 C 1]

U Tun Aung — for Appellants.

R. Clark — for Respondent.

Roberts C. J. — These two connected appeals are brought by the appellants in order to prevent the respondent from filing a suit to set aside the award of an arbitrator and to claim relief under S. 39, Specific Relief Act. What the plaintiff has done in each of the suits is to aver in his plaint that there is an error of law manifest on the face of the record which vitiates an award; some particulars are given and it is said that, although the arbitrator was bound to comply with the law of limitation, he ignored the principles of law and allowed the claim basing his award on a manifestly erroneous legal proposition. And the question is whether this suit is maintainable. Lord Haldane in (1912) A C 673[1] said :

I am of opinion that the doctrine in (1858) 3 C B (NS) 189[2] to the effect that where an error of law appears on the face of the award the error can be reviewed, is a well-established part of the law of the land.

There has been some confusion in connexion with arbitrations which are conducted under the Co-operative Societies Act, and I must regret to learn that it has arisen owing to a misunderstanding of the scope of the decision, to which I was a party, in 1939 R L R 50.[3] That was a case in which a member of a co-operative society, being bound by the very terms of his membership and the statutes which deal with co-operative societies and their members to refer any dispute between him and the co-operative society which touched its business to the Registrar, was sued and it was held that a suit brought in the Courts was impliedly barred under S. 9, Civil P. C.; and all that that case is authority for is the simple proposition that where a statute expressly says that persons of a certain class must go to arbitration or must refer their disputes in a particular way and not come to the Courts, they are obliged to take that step and the Courts will not, when they do not take that step, entertain an action by them.

But although that step must be taken in the first instance, the case cited is no authority for the surprising proposition that when an award of an arbitrator has been made, or the decision of the Registrar has been arrived at, an error manifest upon the face of the award or decision leaves the party aggrieved with no remedy and ousts the jurisdiction of the Courts altogether. It has often been observed that Courts are always inclined where possible to support the validity of an award and will not lend themselves to a consideration of what a Court of law would have done, when the parties have agreed on the one hand, or when there is a statutory obligation placed upon them on the other, to refer their disputes to a tribunal which is not a Court of law. But, on the other hand, that tribunal must come to a decision which is a quasi judicial decision or must make an award which has been arrived at after proper consideration of the case. I ventured to give this morning as an illustration something which is far different from what is alleged in this case, namely, a case in which an arbitrator being lazy might declare that the issues of law and fact were so complicated that he was just as likely to fall into error as decide right, and thereupon might think he was justified in deciding the case upon the spin of a coin, which would be not his arbitrament but an arbitrament of chance. Other cases may be thought of in which parties may have a right to come to Court to set aside an award not so flagrant; one such would be, in my opinion, the delegation by an arbitrator to some other person never contemplated by the parties, of the duties which lay upon the arbitrator himself.

The question whether in this particular case the arbitrator was right or wrong does not arise at all; nor have we to decide now whether the law of limitation applied, or whether, if it did apply, the arbitrator refused entirely to consider it, or came to a wrong decision of law respecting it; nor have we to decide whether there was an error of law manifest on the face of the award, as the plaintiff pleads. All we have to decide is whether such a suit is maintainable; and if the plaintiff says that there is an error of

1. (1912) 1912 A C 673 : 81 L J K B 1132 : 107 L T 325 : 56 S J 734, British Westinghouse Electric & Manufacturing Co., Ltd. v. Underground Electric Railways Co. of London, Ltd.
2. (1858) 3 C B (N S) 189 : 27 L J C P 66 : 3 Jur (NS) 818 : 6 W R 181, Hodgkinson v. Fernie.
3. ('38) 25 A I R 1938 Rang 392 : 178 I C 674 : 1939 R L R 50 (F B), H. C. Dey v. Bengal Young Men's Co-operative Credit Society Ltd.

law, he is clearly entitled to go to the Courts and try to establish that proposition; whether there was such conduct on the part of the arbitrator as would justify the Court interfering is a matter for the Court before whom the suit is tried. I agree, with respect, with the decision of my learned brother Mackney and find but little to add to it. He has pointed out what are the limits within which the case in 1939 R L R 50[3] may be applied, and, by reference to the existing law on the subject, has shown that this is a case in which the aggrieved party is plainly entitled to challenge the award of the arbitrator. I desire to add very little as to the vexed question of how far an arbitrator should consider the law of limitation: the matter is one which is largely open. This seems clear from the observations in the speech of Viscount Cave L. C., in (1927) A C 610.[4] He said:

> I am far from wishing to throw doubt upon the view which has been commonly held, and which was affirmed by the decision of a Divisional Court in (1899) 68 L J Q B 252[5] that an arbitrator acting under an ordinary submission to arbitration is bound to give effect to all legal defences, including a defence under any statute of limitation. A decision against that view might seriously prejudice the practice of referring disputes to arbitration; and, while I am unwilling to pronounce a final opinion upon a question which does not really arise in this case, I certainly say nothing which is adverse to the view to which I have referred.

For these reasons, we think that the learned Judge's decision in second appeal was undoubtedly right and, accordingly, these appeals must be dismissed with costs, advocate's fee in each appeal six gold mohurs.

Blagden J. — I agree.

D.S./R.K. *Appeals dismissed.*

4. (1927) 1927 A C 610 : 96 L J K B 872 : 137 L T 419 : 71 S J 560 : 43 T L R 625 : 28 Ll L Rep 114 : 17 Asp M C 281, Board of Trade v. Cayzer Irvine & Co., Ltd.
5. (1899) 68 L J Q B 252 : 80 L T 116 : 15 T L R 154, In re Astley & Tyldesley Coal and Salt Co., and Tyldesley Coal Co.

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MYA BU AND MOSELY JJ.

Ma Pwa Shin—Plaintiff—Appellant

v.

Ma Gale and another — Defendants — Respondents.

First Appeal No. 34 of 1940, Decided on 29th May 1940, against decree of Asst. Dist. Court, Tharrawaddy, D/- 19th January 1940.

Buddhist Law (Burmese) — Succession — Husband and wife dying within short time of one another—Property inherited by one spouse during marriage from collaterals — Mode of succession, stated.

Where property is inherited, during marriage, from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as payin property, or as inherited lettetpwa in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party in case of death of both parties within a short time of one another. [P 108 C 1]

Chan Htoon — for Appellant.

U E Maung (1) — for Respondents.

Mosely J. — The plaintiff-appellant Ma Pwa Shin sued for a share in and administration of the estate of Maung Tun E and his wife Ma Hmin, who died within a short time of one another. Ma Bwa Shin is the sister of Ma Hmin. The defendants-respondents, Ma Gale and Maung Hla Maung, are the sister and the half brother of Maung Tun E. The estate claimed consists of the hnapazon or jointly acquired property of Maung Tun E and Ma Hmin and the share which Maung Tun E inherited just before his death in the estate of his first cousin once removed Daw Pwa Zon, with whom he and Ma Hmin lived. That share according to the pleadings (para. 6 of the plaint) was one-third of Daw Pwa Zon's estate. Daw Pwa Zon died on 1st May 1939, Ma Hmin on 4th May and Maung Tun E on 19th May of that year. The Assistant District Court allowed the claim in respect of one-half of the hnapazon property of Maung Tun E and Ma Hmin, but not in respect of the property inherited by Maung Tun E from Daw Pwa Zon. The provisions as to inheritance by collaterals of both sides where husband and wife die within a short time of one another are contained in a well known and disjointed part of the Manukye Dhammathat, Book X, para. 56. This section deals also with the ordinary case where one party dies more than a short time before the other. It says that if either spouse left no direct descendants and if their parents had predeceased them the relations who should inherit are the six relations of the husband or wife, that is the six kinds of uncles, father's elder and younger brother etc. It is clear that there are really eight kinds not six, and the deceased's father's younger sister and the mother's younger brother were held to be entitled to inherit in 3 Rang 271.[1] The section omits any reference to the brothers and sisters of the deceased, who are preferred to uncles and aunts,

1. ('25) 12 AIR 1925 Rang 235 : 88 I C 657 : 3 Rang 271, U Po Gyi v. U Pyo.

(Manukye, Book X, para. 19: *see* 8 Rang 480[2]). The relations of the wife are to take the property that came to her by descent from her parents *(miba ga pa thaw ossa yat)*, and the relations of the husband are to take what came to him by descent from his parents.

It would seem that this refers to cases where the husband and wife die within a short interval, as the section goes on to say that if one party dies (a considerable time) before the other the relations of the survivor only are to inherit. If the survivor sell any of the hereditary property *(ossa yo)* it is to be offered to the next of kin. This expression '*ossa yo*' appears to mean not all property inherited from the parents but entailed property, such as land held on hereditary tenure, (Manukye, Vol. VIII paras. 1 and 2) heirlooms, insignia and the like, (1892-96) 2 U B R 121[3] at pp. 124 and 136. If the couple die within a short interval

the relations of both are to inherit according to consanguinity, and also the property that accrued to the couple during marriage *(hnit pa dwin pwa thi ossa)*.

This last expression is translated by Richardson as "property acquired by the deceased couple during marriage," but is not the equivalent of the word "hnapazon" in its modern signification, that is property acquired by joint exertion as opposed to lettetpwa, another modern term, which includes property acquired by inheritance, (1893-1900) L B R 295.[4] In fact "*hna pa dwin pwa thi ossa*" seems to be the equivalent of the modern "lettetpwa." The corresponding text of other Dhammathats will be found in S. 308 of Vol. I of the Digest. For *miba ga pa thaw ossa* some Dhammathats give *meimma pa ossa* or *lin pa ossa*, property brought to the marriage by husband or wife, i. e. payin. For *hnit pa dwin pwa thi ossa* the Amwebon Dhammathat, which merely copies the portions of Manukye that deal with inheritance, gives *hnit pa son dwin pwa ossa*, which can only mean the same. In Manukye, Vol. XII, para. 3 at p. 345 a distinction is drawn between property brought to the marriage, payin, and property acquired during the coverture—Richardson translates "acquired mutually," *hnit pa son dwin ossa*. The section further defines property acquired during marriage, "*hnit pa son lettet pwa thi*", as of two kinds, property inherited from the parents during the coverture, (Richardson omits the words "during the coverture," *thin ne va dwin)*, and property acquired by the joint efforts and work of the couple, *(hnit u tha kyan si lok saung)*. The fact is that the Dhammathats do not specifically deal with property inherited from collaterals during coverture, but the distinction is throughout that between property inherited from the parents and property otherwise acquired by the couple.

Another section of Manukye, Volume X, para. 32, deals with the partition of the property of a couple dwelling apart from their parents who both die *(hnit pa son the)* without leaving issue. The early part of the section relates evidently, though it is not so stated, to cases where the couple die within a short interval of one another, for the last part of it lays down a different rule in the opposite case. The parents of each spouse are to take what he or she brought to the marriage (payin), while the property that accrued to the couple during the marriage, *(hnit pa son pyit pwa thi ossa)*, is to be divided equally amongst the parents of both spouses. This section in terms applies only to parents, but if the doctrine of common disaster is to apply at all the heirs who are to be preferred to parents, e. g., brothers and sisters, 9 Rang 217,[5] must also come under its provisions. The section goes on to lay down that where one spouse brought no property to the marriage (payin) the parents of that spouse were to take one share of the payin and the parents of the spouse who brought payin to the marriage two shares, (the parties being in the relationship of nissita and nissiya). The corresponding texts of other Dhammathats are given in Sec. 347 of the Digest. In Vol. XII, para. 3 of Manukye the same principle of division is applied to the payin property of virgin couples at divorce where one spouse only brought payin to the marriage, and also to lettetpwa by succession, (1902-03) 2 U B R (Buddhist Law, Divorce) 1,[6] (1906) U B R (Buddhist Law, Divorce) 19,[7] (1914) 2 U B R 127[8] and 11 L B R 52.[9]

The trial Court was of the opinion that the method of division laid by Manukye in

2. ('30) 17 AIR 1930 Rang 237 : 129 I C 524 : 8 Rang 480, U Po Tha Dun v. Maung Tin.
3. ('92-96) 2 U B R 121, Mi Lan v. Maung Shwe Daing.
4. ('93-1900) 1893-1900 L B R 295, Ma Ngwe Bwin v. Maung Lun Maung.
5. ('31) 18 A I R 1931 Rang 113 : 133 I C 234 : 9 Rang 217 (F B), Maung Kun v. Ma Chi.
6. ('02-03) 2 U B R (Buddhist Law, Divorce) 1, Kin Kin Gyi v. Mg. Kan Gyi.
7. ('06) 1906 U B R (Buddhist Law, Divorce) 19, Mi Myin v. Nga Twe.
8. ('14) 1 A I R 1914 U B 56 : 38 I C 405: 2U B R 127, Mi Saing v. Yan Gin.
9. ('21) 8 A I R 1921 L B 2 : 64 I C 806: 11 L B R 52, Ma Ngwe Hnit v. Maung Po Hmu.

the case of hereditary property ought to be extended by analogy to the case of property inherited from collaterals during coverture. But these special and exceptional rules of the customary law of inheritance should not be extended beyond the cases actually covered by them, 12 Rang 409,[10] at p. 414, except where it is necessary by implication to hold that heirs who exclude parents or uncles and aunts are entitled to the same rights as they. It would further seem that it is only property inherited from the parents which is to go solely to the relatives of the spouse who had it. It must be held then that where property is inherited during marriage from collaterals by one party only it should be treated not like property inherited from parents, nor as jointly acquired property, but on the same footing as payin property, or as inherited lettetpwa in cases of divorce by mutual consent, and should go to the extent of two-thirds to the relatives of the party who inherited it and to the extent of one-third to the relatives of the other party. The preliminary decree of the lower Court will therefore be altered to one declaring that the plaintiff-appellant is entitled to one-third of Maung Tun E's share in the property inherited by him from Ma Pwa Zon, that is to say to one-ninth of Ma Pwa Zon's estate, and the Commissioner will be directed to make the necessary inquiries and take accounts and report accordingly. The respondent must pay the costs of this appeal, advocate's fee ad valorem on the estimated value of the share in respect of which the appellant has been successful, namely Rs. 562.

Mya Bu J.—I agree.

D.S./R.K. *Decree modified.*

10. ('34) 21 A I R 1934 Rang 318: 152 I C 768: 12 Rang 409, Ma Pwa Thin v. U Nyo.

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MYA BU AND MOSELY JJ.

Chan Wan Hong Tong — Appellant

v.

A. K. A. C. T. V. Chettyar—Respondent.

First Appeal No. 99 of 1939, Decided on 4th April 1940.

(a) Transfer of Property Act (1882), S. 53— Suit under S. 53 impeaching mortgage or sale— Burden is on plaintiff to show that they are colourable by proving want of consideration.

Where a suit is brought under S. 53 impeaching a mortgage or sale the burden is on the plaintiff to show that the mortgage or sale were colourable transactions by proving inadequacy or absence of consideration and other circumstances suggesting that they were not meant to be acted upon : A I R 1927 P C 237 and A I R 1932 Mad 302, *Rel. on.* [P 109 C 2]

(b) Evidence Act (1872), S. 101 — Onus immaterial—Question is academic when all evidence is on record.

It is academic to argue the question of burden of proof at the stage when all the evidence is on record. [P 110 C 1]

(c) Evidence Act (1872), S. 114 — Party in possession of important documentary evidence withholding it from producing in Court — Presumption.

Even if the burden to prove something does not lie on a party the Court can draw an adverse inference if such party having important documentary evidence in his possession throwing light on the fact withholds it from the Court : A I R 1917 P C 6 ; A I R 1919 Mad 444 and A I R 1929 P C 95, *Rel. on.* [P 110 C 1]

Cowasjee — for Appellant.

Clark and P. K. Basu — for Respondent.

Mosely J. — In Suit No. 8 of 1934 of the District Court of Pyapon the A. K. A. C. T. V. Chettyar Firm sued Chan Wan Hong Tong, a Chinese merchant, under O. 21, R. 63, and under S. 53, T. P. Act, for a declaration that certain properties which Maung Sein Done alias Chan Cheing Tong, a Chinaman, purported to have first mortgaged and then sold to Chan Wan Hong Tong were liable to attachment and sale in satisfaction of the Chettyar firm's decree. In Civil Regular Suit No. 10 of 1935 of the same Court Chan Wan Hong Tong sued the Chettyar firm and Maung Sein Done, under S. 77, Registration Act, to have a sale deed registered. The suits were consolidated and tried together in the suit brought by Chan Wan Hong Tong, who is referred to in the judgment briefly as "the plaintiff." On the date fixed for hearing, Chan Wan Hong Tong's witnesses were ready, but not those for the Chettyar firm, and by consent Chan Wan Hong Tong produced his evidence on all the matters in issue in both suits, though it was for the Chettyar firm in their suit to prove that the transactions which they impugned were, as they alleged, sham or fraudulent or collusive. The attachments made by the Chettyar firm had previously been removed in Civil Miscellaneous No. 19 of 1934 of the District Court. The learned Judge found in the course of detailed and careful judgment that the transactions between Chan Wan Hong Tong and Maung Sein Done were not genuine but only colourable, benami and fraudulent, and that they were void against the creditors of Maung Sein Done. For this reason he refused to direct that the sale deed be registered, thinking it unnecessary to discuss other questions raised in the suit for registration of the sale deed. Civil Regular Suit No. 10 of 1935 was, therefore, dismissed.

Chan Wan Hong Tong has filed two separate appeals against this decree. We are here considering Civil First Appeal No. 99 of 1939, an appeal brought by Chan Wan Hong Tong against the decree in Civil Regular Suit No. 8 of 1934 declaring that the sale was a sham and fraudulent transaction. The properties in question, a house in Pyapon and a single holding measuring 289 odd acres in Pyapon township, were attached by the Chettyar firm on 29th November and 2nd December 1933 in Civil Execution Case No. 64 of 1933. One application for removal of the attachment (Civil Miscellaneous No. 58 of 1933) was dismissed as it was not filed by an authorized agent. The Judge's reasons are summed up at pp. 35 and 36 of his judgment. The consideration for the sale deed of 6th May 1932, said to be Rs. 66,255, is said to have been the principal and interest on the deed of mortgage for Rs. 50,000, a duly registered deed of 27th February 1930. The consideration for the mortgage is said to have been the amount due on Ex. W, promissory note for Rs. 50,000 at Re. 1-4-0 per cent. executed on 1st August 1928. Ex. W again is said to have been the consolidation of the amounts due on two promissory notes, Ex. B of 5th March 1927 for Rs. 30,000 in favour of Shaung Ah Wan Ma which is said to be the Burmese equivalent of Seong Wan, and Ex. C of 9th December 1927 for Rs. 20,000. These again are said to have been renewals of old promissory notes. Ex. C is said to have been a renewal of Ex. V, promissory note for Rs. 20,000 at Re. 1-4-0 per cent. of 12th December 1924. It is said that the promissory note of which Ex. B was a renewal is lost.

The main contention in this appeal is that the Judge wrongly put the burden of proof on Chan Wan Hong Tong, and that the evidence on the record did not show that the transaction was a fraudulent or colourable one. The learned Judge found that EX. V could not have been executed on the date which it bears. The Judge did not believe the evidence as to the execution of Exs. B and C promissory notes, nor the evidence as to their being the consideration for the mortgage deed. The Judge gave reasons for holding that the mortgage deed itself was a sham transaction, and that therefore there was no consideration for the sale. In my opinion, the Judge came to the only possible conclusion on the evidence. I shall therefore review the evidence on these transactions as briefly as possible, but dwell a little on the evidence as to possession after the sale on which less has been said. (After reviewing the evidence His Lordship proceeded.) It has been contended in argument that the Judge constantly referred to Chan Wan Hong Tong as "the plaintiff" throughout the course of his judgment, and it is suggested that the Judge wrongly cast the burden of proof on Chan Wan Hong Tong.

As regards the genuineness of the transactions in question there is nothing to support this line of argument. Chan Wan Hong Tong was referred to as "the plaintiff" merely because he started both cases. The Judge did not say in so many words on what side the burden of proof lay, but he clearly indicated his opinion that the evidence did not merely show that it was not proved that the transactions were genuine. The Judge came to the further conclusion that the evidence was sufficient to show that the transactions were not genuine. The Judge did not have the advantage of hearing the evidence, but I entirely agree with the conclusions which he drew. They were not conjectures founded on mere suspicion; they were reasoned conclusions arising from the evidence in the case. The burden of proof was, of course, initially on the Chettyar firm to show that these transactions were not genuine. It is true that the sale deed had not been properly registered. But when Chan Wan Hong Tong relied on S. 53A, T. P. Act, to cure that defect it was again for the Chettyar firm to show that the registered mortgage deed was not good consideration for the sale. It was for the Chettyar firm to show that the mortgage was only a colourable transaction by proving inadequacy or absence of consideration and other circumstances suggesting that the sale was not meant to be acted upon : *see* 5 Rang 852[1] at p. 855, a decision of their Lordships of the Privy Council. If the defendants put forward a substantial case it was then for the plaintiff to rebut it by proof of the genuine character of the sale. I agree with what was said in 55 Mad 748[2] as to the meaning of the above ruling.

In this case the substantive evidence for the defendants showed that Maung Sein Done was heavily embarrassed at the time of the mortgage sued upon, and that he was being pressed for repayment by respon-

1. ('27) 14 AIR 1927 P C 237 : 105 I C 788 : 5 Rang 852 (P C), V. E. A. R. M. Firm v. Maung Ba Kyin.
2. ('32) 19 AIR 1932 Mad 302 : 137 I C 879 : 55 Mad 748 : 62 M L J 236, Appathurai Chettyar v. Vellayan Chettyar.

dent 1 Chettyar, and it also showed that part of the plaintiff's evidence relied upon (Ex. v) was a fabrication. It showed that Ex. w could not have been the considera- for the mortgage deed. The rest of the evidence for the defence consisted of admissions elicited from the plaintiff and his witnesses in cross-examination. It is academic to argue the question of burden of proof at this stage when all the evidence is on record and the plaintiff's evidence itself has shown that the plaintiff's case was a false one.

Much argument has been adduced in an endeavour to say that no presumptions should be drawn from the gaps in the evidence for Chan Wan Hong Tong because the burden was not upon him, and that it was for the defence to show substantively that his case was false. On this I would like to quote some observations of their Lordships of the Privy Council in 40 Mad 402[3] at p. 408 viz.:

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough; they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition. The present is a good instance of this bad practice. It is proved in the case by the first witness that 'the mutt has regular fair day-books; they are not now before the Court; ledgers are also maintained in the mutt.' These ledgers and day-books were in the possession of the defendants or those of them who were heads of the institution, and they are not put in evidence.

This was followed in 42 Mad 629,[4] where the head-note reads:

Held, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business, it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not.

Then in A I R 1929 P C 95,[5] at p. 99 their Lordships made the following remarks:

In the change of attitude on the part of the defence and in its failure to produce documents presumably available and probably decisive one way or another if examined, the learned Judges saw a design on the part of the defendant to take advantage of the abstract doctrine of the burden of proof upon a plaintiff in ejectment.

Their Lordships, in agreement with the High Court, consider that the excuses made by the defendant for the non-production of these documents are unsatisfactory, and unreliable, and, like the learned Judges of the High Court, they consider that their non-production is due to the fear that, if produced, they would either establish the plaintiff's claim, or, in view of the defendant's admission as to the existence somewhere within the village of three jotes of the plaintiff of the area assigned would lead to a successful claim, albeit in another suit, which would be more serious for the defendant than that made in this suit. Their Lordships would refer to the views of the Board on this subject expressed by Lord Shaw when delivering the judgment of the Board in 40 Mad 402,[3] and would again endorse them. In their Lordships' judgment the learned Judges of the High Court were well warranted in finding further confirmation of the plaintiff's evidence in the defendant's reticence and inconsistency.

In the present case, Chan Wan Hong Tong failed to produce the accounts of his firm for 1924-32, to show any payments made by him on the promissory notes in question and any repayments towards them. The practice of Chinese firms of keeping and preserving books of account carefully is well known and has been recognized in a pronouncement in a recent case of their Lordships of the Privy Council on appeal from this Court. As their Lordships remarked in another case, (1927) A C 515,[6] at p 520:

Onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it and need not be further considered.

I have no doubt that the learned Judge of the trial Court came to the proper conclusion when he found that the transactions between Chan Wan Hong Tong's firm and Sein Done were merely sham and collusive. This appeal will be dismissed with costs.

Mya Bu J.—I concur.

D.S./R.K. *Appeal dismissed.*

3. ('17) 4 AIR 1917 P C 6 : 39 I C 659 : 40 Mad 402 : 44 I A 98 (P C), Murugesam Pillai v. M. D. Gnana Sambandha Pandara Sannadhi.
4. ('19) 6 A I R 1919 Mad 444 : 50 I C 775 : 42 Mad 629 : 36 M L J 568, Guruswami Nadar v. Gopalasami Odayar.
5. ('29) 16 A I R 1929 P C 95 : 114 I C 592 (P C), Rameshwar Singh v. Bajit Lal Pathak.
6. (1927) 1927 A C 515:96 L J P C 84:137 L T 1:71 S J 158 : 43 T L R 243, Robins v. National Trust Co. Ltd.

A. I. R. 1941 Rangoon 110

Special Bench

MYA BU, DUNKLEY AND SHAW JJ.

Ma Dun May — Petitioner

v.

Saw James — Respondent.

Civil Ref. No. 2 of 1940, Decided on 17th January 1941, reference made by District Judge, Bassein, in C. R. S. No. 1 of 1940.

(a) Divorce Act (1869), S. 10 — Petition must state distinctly facts upon which claim to have marriage dissolved is founded.

Evidence in divorce proceedings to prove the case of the petition must be confined to the pleas set out in the petition. Consequently it is essential, as laid down in S. 10 to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded.

[P 111 C 1]

(b) Divorce Act (1869), S. 14 — For exercise of discretion to excuse delay there must be some evidence explaining it.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery.

[P 111 C 2]

Mya Bu J.—The petitioner filed a petition, under the Burma Divorce Act on 14th February 1940, seeking a dissolution of her marriage with the respondent, upon the ground of adultery coupled with cruelty and desertion without reasonable excuse for over four years. The parties are Karen Christians who are domiciled in Burma. They were married on 19th March 1929 at Kanyinmyaung village, according to Christian rites, by the Baptist Pastor Thra Kya Aung who held a license to perform marriages. They lived in Bassein district for about seven years, after which the respondent left for Rangoon. In the petition it was stated that the respondent committed adultery with one Ma Sein Yin in January 1936, and had two children by her. Ma Sein Yin is now dead. The allegation was taken to mean that the alleged adultery commenced in January 1936 and continued until Ma Sein Yin's death. The evidence given was to the effect that the respondent and Ma Sein Yin lived together as husband and wife until about one year or two years ago when Ma Sein Yin died. The two children of the union are said to be alive. Evidence in divorce proceedings to prove the case of the petition must be confined to the pleas set out in the petition. Consequently it is essential, as laid down in S. 10, Burma Divorce Act, to insist that the petition for divorce shall state distinctly, as the nature of the case permits, the facts upon which the claim to have the marriage dissolved is founded.

Cruelty is alleged, with no particulars at all, by the mere statement that the respondent cruelly treated the petitioner. It was as well that the charge of cruelty was practically dropped. The only evidence of cruelty was the petitioner's statement that the respondent used to beat her when they were living together in her parent's house. The decree granted to the petitioner by the District Court was based upon adultery coupled with desertion without reasonable excuse for a period of two years and upwards. Although the adultery proved went beyond what was strictly necessary according to the petition, there was evidence which was sufficient to prove that the respondent committed adultery in January 1936 with Ma Sein Yin, taking the letter EX. A in conjunction with the other evidence. There was also evidence to prove desertion without reasonable excuse for a period of over two years. The Court, under S. 14 of the Act, had amongst other things to consider the delay in presenting the petition. That was done, but in coming to the conclusion that there had been unreasonable delay the learned District Judge stated that the petitioner was only an ignorant village woman and she was perhaps hoping that her husband might eventually return to her, especially after his mistress had died. It may have been apparent to the learned Judge that the petitioner was ignorant, but there is no evidence of that or that she was hoping for the return of her husband to her. The petitioner was not questioned to explain the delay in the presentation of her petition.

Before a Court can exercise the discretion to excuse the delay there should be some evidence explaining it, to make clear that there was no connivance or indifference to the adultery. There seems nothing in the evidence given in the case to indicate that the petitioner was hoping for her husband eventually to return to her. If Ma Sein Yin died about two years ago, as stated by the Pastor Thra Kya Aung, there was inordinate delay. But the petitioner mentioned that Ma Sein Yin died "last year" when she gave evidence on 13th May 1940. This matter requires clearing up. In the circumstances, the case must be remanded for additional evidence to be taken, under S. 17, Burma Divorce Act, on the question relating to the delay in the presentation of the petition. The case is remanded accordingly.

D.S./R.K. *Case remanded.*

A. I. R. 1941 Rangoon 111

MACKNEY J.

Maung Po Hlaing — Appellant

v.

Po Nyi and others — Respondents.

Special Second Appeal No. 147 of 1940, Decided on 9th July 1940.

(a) Buddhist Law (Burmese) — Partition — Suit for — Prayer ought to include entire estate in whosesoever hands it may be.

In the suit to partition an estate, the whole of that estate ought to be included in the prayer for partition in whosesoever hands it may be. [P 112 C 2]

(b) Co-owners—Defendant in exclusive possession for 25 years—Onus is on plaintiff to show that he is co-owner.

A plaintiff wishing to succeed on the ground that he is co-owner must establish that fact, where the defendant has beyond question been in exclusive and uninterrupted possession for a long period e. g., 25 years. [P 113 C 1]

(c) Buddhist Law (Burmese) — Co-owners — Property originally of parents — No proof that children hold it as co-owners—Co-ownership may however be presumed in absence of partition.

The fact that the property belonged originally to their parents does not in itself prove that the children hold it an co-owners, but co-ownership may be presumed from the fact that after the death of the parents there was no partition of the estate among the children. [P 113 C 1]

(d) Co-owners — Abandonment—Four brothers living together — One of them using property as his own — After a time rest of brothers going away and not taking interest in property for 25 years — Though fact of leaving house is not enough to show ouster, abandonment may be presumed under S. 114, Evidence Act.

Four brothers lived together and held property belonging to their parents as co-owners. One of them used the property as his own. After a time the rest of the brothers went away and took no interest in the property for a long period e. g., 25 years:

Held that abandonment on the part of the departing brothers of any claim that they might have had to the property might be presumed under S. 114, Evidence Act, which required rules of commonsense to be applied to the consideration of cases though the mere fact of leaving the house was not sufficient to show ouster of the departing brothers: 5 L B R 112, *Disting;* 29 Bom 300, *Rel. on.* [P 113 C 1]

J. H. Shukla — for Appellant.
N. Guha — for Respondents.

Judgment. — The appellant was defendant in a suit brought by his two brothers and the legal representatives of a third brother for partition of a small piece of property which was in his, the appellant's possession. The plaintiffs-respondents based their claim on the fact that the property had originally formed part of the estate of their parents. They alleged that after their parents' death the four brothers lived together in the same house for possibly five years and then, that is to say, nearly 25 years ago the three younger brothers left the house and the appellant, the eldest brother, remained with the house and the property in his sole keeping. Since that time, it is admitted that they have not enjoyed the profits of the property or taken any interest whatsoever in it. In 1937 the same three brothers brought a suit against the appellant for partition of other property belonging to the estate of their parents. The property now in question was not included, the reason given being that at the time it had passed out of the possession of Maung Po Hlaing into the possession of a person who had purchased it at an auction held by the revenue authorities in recovery of a loan taken by the defendant from the Government. What the circumstances of that loan were, does not appear, but there is nothing to show that anything but the interest of Maung Po Hlaing in the property had passed by such a sale. It is therefore a little difficult to understand why the plaintiffs should have omitted to sue for this particular piece of property, and the omission at least suggests that they were not very certain of their claim as regards this particular land. I may mention that that suit was dismissed in default of prosecution. It has been claimed that the present suit was barred by reason of the existence of the previous suit. It is true that when it is desired to partition an estate, the whole of that estate ought to be included in the prayer for partition in whosesoever hands it may be. However, it is not necessary to decide this point in the present appeal. The original Court found most issues in favour of the plaintiffs but, on the issue regarding the limitation, found for the defendant. The learned township Judge held that Art. 123, Limitation Act, applied and that the suit had become barred by limitation twelve years after the death of Aung Dun. Article 123 refers to suits for a distributive share of the property of an intestate. Accordingly the suit was dismissed. The plaintiffs then appealed to the District Court. The District Court differed from the Township Court on the finding of limitation and held that the right article to apply was Art. 144 and that as it appeared from the circumstances of the case that Maung Po Hlaing was in occupation or enjoyment as a cosharer the suit was not barred. Accordingly the appeal was allowed and the suit decreed.

The defendant now appeals to this Court. He relies mainly on the plea that the suit is barred by limitation. It is conceded that Art. 144, Limitation Act, applies. Now, it is true that if the plaintiffs wished to succeed on the ground that they are co-owners they must establish that fact, for the defendant has beyond question been in exclusive and

uninterrupted possession of this property (so far as the plaintiffs are concerned) for 25 years. The fact that the property belonged originally to their parents does not in itself prove that the children held it as co-owners. The plaintiffs however were able to show that at least for five years after the death of their parents they did hold the property as co-owners. I think it may be conceded that such may be presumed from the fact that after the death of the parents there was no partition of the estate but the four brothers continued to live together in the same house. Thereafter, however, the position altered. It is true that the mere fact of leaving the house where this eldest brother resided is not sufficient to show that thereupon they were ousted from this property, but in considering this matter we must always bear in mind that the Evidence Act requires rules of common sense to be applied to the consideration of cases. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events in the conduct of public and private business in their relation to the facts of the particular case.

Now, here we have a case where four brothers lived together for a short time and then three of them went away leaving their elder brother in possession of this piece of land out of other property belonging to their parents. From that time they have not taken the slightest interest in the land. Their brother has worked it and he was working it even whilst they were living with him. He has been in fact using it as if it were his very own. Surely from these facts we may presume that the three brothers have abandoned any claim that they might have had to the property and that the eldest brother was asserting his exclusive right to the land; otherwise how could such a situation have arisen? Surely at one time or another, earlier than after the lapse of 25 years, one at least of the younger brothers would have come forward to make a claim to this property. The fact that they did not do so indicates that they recognized Maung Po Hlaing's exclusive title. I have been referred to the case in 5 L B R 112[1] where it was ruled

> that so long as a co-owner who actually enjoys the profits of jointly owned property does not by some unequivocal act communicate to his co-owner, either directly or indirectly, that he no longer recognizes any right of the latter in the property, and asserts that he holds the property as his own to the exclusion of the other, the possession of one continues to be the possession of both, and the one in possession can acquire no right against the other by adverse possession.

In that case it would appear that there were five children who had agreed that they should enjoy the land in turn. The plaintiff was one of these children who had failed to enjoy the land in her turns since 1890, the first turn thereafter having occurred in 1895, the suit was brought in 1907 or 1908. It does not appear that the other co-heirs also had been ousted, so that there was a clear case of co-ownership still subsisting and clearly the fact that one co-owner had failed to take advantage of the arrangement made between the co-heirs did not necessarily indicate that she renounced her title to her share. The present case is entirely different where one brother has been allowed to remain in undisturbed possession for 25 years by all three other brothers. 29 Bom 300[2] proceeding on the authority of certain English decisions ruled that:

> Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenants-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed.

I am of the opinion, therefore, that the appellant successfully established his claim to be left in undisturbed possession of the property. This appeal is allowed with costs, advocate's fee three gold mohurs. The plaintiffs' suit is dismissed with costs in the Township Court and in the Assistant District Court.

G.N./R.K. *Appeal allowed.*

1. ('09) 5 L B R 112 : 4 I C 298, Ma Le v. Ma Hmyin.

2. ('05) 29 Bom 300 : 7 Bom L R 252, Gangadhar v. Parashram Bhalchandra.

A. I. R. 1941 Rangoon 113

MYA BU AND MOSELY JJ.

S. B. Dass — Appellant

v.

Ghanshamdas and others—Respondents.

First Appeal No. 117 of 1939, Decided on 13th May 1940, from order of Dist. Court, Akyab, in Civil Exn. Case No. 8 of 1938.

Civil P. C. (1908), Ss. 73 and 47—Order under S. 73 determining question of rateable distribution between rival decree-holders—Judgment-debtor not interested—Order does not fall under S. 47 and is not appealable.

An order under S. 73 determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 and is not appealable: A I R 1937 Rang 134, *Foll.* [P 114 C 1]

Doctor — for Appellant.

Hay — for Respondents.

Judgment. — Mr. Hay objects that no appeal lies: *vide* A I R 1937 Rang 134.[1] It was held there that an order under S. 73, Civil P. C., determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47, Civil P. C., and is not appealable. We are bound by that ruling. The facts here are indistinguishable. This appeal is dismissed with costs, advocate's fee two gold mohurs in respect of each respondent, six gold mohurs in all.

G.N./R.K. *Appeal dismissed.*

1. ('37) 24 A I R 1937 Rang 134 : 169 I C 644, Aga M. Sherazee v. R. M. P. M. Chettyar Firm.

A. I. R. 1941 Rangoon 114

DUNKLEY J.

The King

v.

Maung Po Thaing and others.

Criminal Revns. Nos. 640A, 642A, 643A, 644A, 645A and 646A of 1940, Decided on 14th November 1940, to review proceedings of Township and Additional Magistrate, Pyawbwe, in Criminal Summary Trial No. 113 and Criminal Regular Trial Nos. 50 to 53 and 74 of 1939.

(a) Criminal P. C. (1898), S. 435—Order calling for proceeding signed and issued by headquarters assistant for District Magistrate is void.

Under S. 435 the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person 'for' the District Magistrate, calling for a proceeding, is an order without authority. Hence the order issued by the headquarters assistant and signed by him for District Magistrate is void. [P 115 C 2; P 116 C 1]

(b) Criminal P. C. (1898), S. 439 — District Magistrate has no power to stay proceedings in criminal Court subordinate to him — Only High Court can do so.

There is no provision of the Criminal Procedure Code authorizing the District Magistrate to stay proceedings in a criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by S. 439 of the Code and S. 85 (1), Government of Burma Act. When a case is once made over for disposal to a subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. 32, Criminal P. C., i. e., Ss. 435, 436 and 437 : 30 Cal 449, *Rel. on.* [P 115 C 2; P 116 C 1]

(c) Burma Courts Manual, Para. 102 — Discretion of District Magistrate under para. 102 how to be exercised stated.

The instruction in the Burma Courts Manual, (Para. 102) which is based on the provisions of S. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. [P 116 C 1, 2]

U E Maung, Govt. Advocate — for the Crown.

Tan Po Aye — for Respondents.

Order.—This Court has been compelled to take up these six revision matters on its own motion by reason of an abuse of judicial procedure occasioned by the action of the Government of Burma in the department of forests. Eight cases under the Forest Act were instituted through the police by the Deputy Conservator of Forests of the Yamethin division. Two of these were sent to the Township Magistrate of Pyawbwe, who is a first class Magistrate, for trial, and the other six were sent for trial to the Additional Magistrate of Pyawbwe, who is a second class Magistrate. With two of these cases I am not now concerned, because in one the accused has been acquitted by the township Magistrate and in the other the accused has since died. The six with which I am now concerned are Criminal Regular Trial No. 113 of 1939 of the Township Magistrate of Pyawbwe and Nos. 50, 51, 52, 53 and 74 of 1939 of the Additional Magistrate of Pyawbwe. Criminal Regular Trial No. 113 of 1939 of the Township Magistrate of Pyawbwe was instituted on 30th May 1939. There is only a single diary entry in the case. It states that the accused and the prosecution witnesses were present on 30th May, but owing to want of time the case was adjourned for trial to 14th June. There is nothing else on this record and nothing further has been done in the case. Nos. 50, 51, 52 and 53 of the Additional Magistrate of Pyawbwe were instituted on 5th May 1939 and they had reached the stage of the defence. The same diary entry appears in each of these cases under the date 9th June 1939. It states that the accused was present but the defence witnesses were absent and that by order of the District Magistrate the case was to remain pending until further orders and was submitted to the District Magistrate for his perusal. No. 74 of 1939 of the Additional Magistrate was instituted on 3rd June 1939,

and was fixed for hearing on 9th June. On that date the accused and the prosecution witnesses were present, but as recorded in the diary the Magistrate did not proceed with the trial because he had been ordered by the District Magistrate to postpone the trial sine die and to submit the proceedings to the District Magistrate. All these six cases therefore still remain pending, although the last action which was taken in regard to any of them was at the beginning of June 1939. After a lapse of more than one year, the records were recovered by this Court from the Secretariat of the Ministry of Forests with considerable difficulty. It remains to be seen how the records of these pending criminal cases reached the Ministry of Forests.

On 3rd June 1939 the Deputy Conservator of Forests, Yamethin division, wrote to the District Magistrate of Yamethin District stating that he had been ordered by the Ministry of Forests to request the District Magistrate to stay further proceedings in the eight cases to which I have referred and further as the Ministry of Forests desired to see the proceedings he requested the District Magistrate to send the proceedings to him. On the reverse of this letter the District Magistrate recorded the following note :

H.J.C., call for the trial records of these cases and order the Magistrate concerned to stay the cases pending further orders.

This note is signed by the District Magistrate himself and by "H. J. C.", I presume, is meant the District Magistrate's head judicial clerk. How the head judicial clerk could call for proceedings or issue any order to a Magistrate, I am unable to understand. The order which was actually issued to the Magistrate is dated 7th June and was addressed to the Township Magistrate, Pyawbwe. It reads as follows :

Please stay the cases under the Forest Act pending further orders of the following accused of Gwezi village. The trial records of these cases may be submitted for my perusal. The cases are being tried by you and in the Court of the Additional Magistrate, Pyawbwe.

The order is signed "Po Lat H. Q. A., for District Magistrate, Yamethin." By some manner which has not been disclosed, this order was also communicated to the Additional Magistrate of Pyawbwe, although being addressed only to the Township Magistrate of Pyawbwe, it did not concern him, for orders to a Magistrate cannot be issued by proxy and the Additional Magistrate is not subordinate to the Township Magistrate. The cases were on 9th June 1939 submitted by these Magistrates to the District Magistrate and they were then forwarded to the Deputy Conservator of Forests, Yamethin division, on 13th June, the letter forwarding them also being signed by the "H. Q. A.," for the District Magistrate. It appears that the Deputy Conservator in his turn transmitted the records of these pending criminal trials to the Ministry of Forests and for over a year they have lain in the Secretariat of the Ministry without any action of any kind being taken. This Court obtained them from the Ministry on 20th July 1940. By "H. Q. A.", I understand is meant "Headquarters Assistant," that is to say, the Headquarters Assistant of Deputy Commissioner. As such, he exercises no magisterial powers whatever and he certainly has no authority to act on behalf of the District Magistrate. This matter appears to have been at its outset one more of the unfortunately all too frequent instances of the failure of an official, who functions both as Deputy Commissioner and District Magistrate, to differentiate between his duty as Deputy Commissioner and his duty as District Magistrate. Under S. 435, Criminal P. C., the District Magistrate undoubtedly has power to call for the records of proceedings before any Magistrate of the District, even when those proceedings are pending; but it is the District Magistrate who has that power, and an order signed by another person "for" the District Magistrate, calling for a proceeding, is an order without authority. Therefore the order issued by the Headquarters Assistant to the Township Magistrate of Pyawbwe on 7th June 1939, was a void order on which neither the Township Magistrate nor the Additional Magistrate ought to have taken any action. I have noticed that in many districts it is common for Headquarters Assistants to sign orders on behalf of District Magistrates; it must now be realized that they have no authority to do so and this illegal practice must cease forthwith in all districts.

However it was perhaps too much to expect that two subordinate Magistrates would ignore such an order, and, so far as the order requiring that the proceedings should be submitted to him was concerned, it was an order which the District Magistrate himself could have made. But that part of the order which directed the two Magistrates to stay their proceedings was an order entirely without jurisdiction and not within the competence of the District Magistrate. There is no provision of the

Code of Criminal Procedure authorising the District Magistrate to stay proceedings in a criminal Court subordinate to him, and it is only the High Court which has power to do so, that power being conferred by S. 439 of the Code and S. 85 (1), Government of Burma Act. When a case is once made over for disposal to a subordinate Magistrate, the District Magistrate is not competent to pass any order relating to it other than an order such as might be made by him under Chap. 32, Criminal P. C., i. e., Ss. 435, 436 and 437 : *see* 30 Cal 449.[1] Hence the order made by the Headquarters Assistant, purporting to act for the District Magistrate, directing that these cases should be stayed pending further orders, was not an order which the District Magistrate was competent to make. The Magistrates themselves were competent to adjourn the trials by orders in writing for any reasonable cause, under S. 344, Criminal P. C., and it may perhaps be considered that, in the case of a subordinate Magistrate, the fact that the District Magistrate has called for the record is a reasonable cause, although I think that a Magistrate of courage and independence would have proceeded with the trials, so far as he was able to do so, on the day on which the order of the District Magistrate was received before submitting the proceedings. The Township Magistrate, being a first class Magistrate, could also have stopped the proceedings in the trial before him under the provisions of S. 349, Criminal P. C., and if the District Magistrate had desired to stop these proceedings (although apparently all that he wished to do was to obey the order received from the Ministry of Forests through the Deputy Conservator of Forests) he might have accomplished this by transferring the trials to himself and then stopping the proceedings under the provisions of section 249.

I am aware that there is an instruction in the Burma Courts Manual (para. 102) which says that, in the event of a gazetted Government officer desiring to inspect any record of a subordinate Magistrate's Court, on his application to the District Magistrate the latter, after inspecting the record, shall decide, in the exercise of his discretion, whether it should be forwarded to such officer or not. This instruction, which is based on the provisions of S. 17 (1), Criminal P. C., no doubt applies to pending as well as to completed proceedings ; but the discretion which has to be exercised is the discretion of the District Magistrate, unfettered by influences and pressure which may weigh with the Deputy Commissioner, and it can very rarely be a proper exercise of such discretion to remove a pending proceeding from the Court of a Magistrate and forward it to an executive officer, and even in the rare cases when such a course might be justifiable it would be essential for the District Magistrate to take adequate steps to see that the record must be returned within a reasonable time so that the trial could proceed. In the present instance the District Magistrate never exercised his discretion at all, and it would seem that he never even inspected the records after they had been received from the Magistrates, but that they were forwarded as a matter of course by the Headquarters Assistant to the Deputy Conservator of Forests. This action was not in accordance with either the letter or the spirit of the instruction contained in the Courts Manual.

This matter was brought to the notice of this Court by the successor in office of the District Magistrate who originally directed his head judicial clerk to call for these records, and he has stated that frequent reminders and letters for the return of the records were sent to the Deputy Conservator of Forests, who, in reply, had stated that he was unable to obtain any answer to his requests to the Ministry of Forests for the return of the records. This statement, to my mind, discloses a serious state of affairs, and shows how very hazardous it is for a District Magistrate to remove the record of a pending trial from a subordinate Magistrate and forward it for perusal to an executive authority, and confirms what I have already stated, that it is only on the rarest occasion that it can be a proper exercise of the District Magistrate's discretion to do so. The action of the Ministry of Forests in calling for the records of these pending cases was an unwarranted interference with the course of justice, and their retention for over a year heightened the gravity of the matter. The respondents have been called upon to show cause why the trials should not proceed to a conclusion, but it would not, in my opinion, now be in accordance with the principles of natural justice to bring the respondents again before the criminal Courts to answer for these petty offences after such gross delay. I therefore suggest to the present District Magistrate that he should instruct the Public Prosecutor to apply

1. ('03) 30 Cal 449, Radhabullav Roy v. Benode Behari.

under the provisions of S. 494, Criminal P. C., to the Magistrate concerned for permission to withdraw from the prosecution of the respondents, or, if he prefers to adopt this course, transfer these pending cases to his own file and put an end to the proceedings under the provisions of S. 249 of the Code. The records of the trials will now be returned to the Magistrates concerned and a copy of this judgment will be forwarded to the District Magistrate of Yamethin for his information.

D.S./R.K. *Order accordingly.*

A. I. R. 1941 Rangoon 117

MYA BU AND MOSELY JJ.

U Min Sin — Appellant

v.

Ko Kye and another — Respondents.

First Appeal No. 29 of 1940, Decided on 29th May 1940, against decree of Dist. Court, Pyinmana, D/- 16th December 1939.

(a) Transfer of Property Act (1882), S. 107 — Rice mill leased for one month — If after expiry of lease unmilled paddy was left fixed monthly rent was payable for five years—Lease is for over one year.

Where the lease of a rice mill is executed for one month with a condition that if there was paddy left unmilled at the expiry of the lease a fixed monthly rent would be paid every month for five years, the lease is a lease for over one year and requires registration. [P 117 C 2]

(b) Registration Act (1908), S. 49 — Lessees admitting lease but pleading inadmissibility of lease-deed for want of registration — Court can go behind lease and determine validity.

Where the lessees admit the lease but plead that the lease deed is inadmissible in evidence for want of registration the Court is fully entitled to go behind the lease and determine its validity : A I R 1917 Mad 718, *Rel. on*; A I R 1919 Mad 469, *Ref.* [P 118 C 1]

(c) Lease — Lessees admitting lease — One of them pleading inadmissibility of lease deed — Lease found invalid—Lease is invalid against all lessees.

Where the lessees admit a lease but only one of them pleads that the lease deed is inadmissible for want of registration and the lease is found to be invalid it is invalid against all the lessees. [P 118 C 1]

(d) Admission — Liability — Defendant admitting execution of document relied on by plaintiff but pleading document to be ineffective — Defendant's pleading is no admission of liability.

An admission by the defendant that he had executed the document on which the plaintiff relies, accompanied by a pleading that the document is of no effect, is no admission at all of the defendant's liability. [P 118 C 1]

P. K. Basu — for Appellant.

E. Hay and K. N. Dangali — for Respondents 1 and 2, respectively.

Mosely J. — This appeal can be shortly disposed of. The plaintiff-appellant, U Min Sin, sued the two defendant-respondents, Ko Kye and his son E Maung, on, it was said, two agreements of lease of 21st December 1935 and 2nd January 1936. The first one was a lease of a rice mill for one month from 15th January 1936 to 15th February 1936 at Rs. 350 for the month. The second document recited that if there was paddy left unmilled on 15th February, Rs. 350 monthly rent would be paid every month for five years. The lease then was a lease for over one year and required registration: *vide* S. 107, T. P. Act. In a previous suit (No. 1 of 1937 of the Sub-divisional Court) the plaintiff obtained a decree against the defendants for nine months' rent, Rs. 1950. The present suit was filed in the District Court and was for Rs. 8750, rent for 25 months from 15th October 1936 to 14th November 1938.

The first defendant in his written statement admitted the allegations in para. 1 of the plaint, that is to say that he hired the mill on those two agreements. His defence was that he had given up the mill at an oral compromise relinquishing his claim to compensation against the plaintiff for not allowing night work. How defendant 1's advocate, an experienced advocate, Mr. S. Roy Chowdhury, came to overlook the fact that Ex. B was unregistered I am totally at a loss to conceive. However, this defect was remedied in the written statement of defendant 2 filed by a different advocate, U Hla Maung. This defendant merely said as regards these leases that he was assured that he would be under no liability and so signed them. In para. 8 he said that these leases or deeds of agreement were inadmissible in evidence. What he obviously meant by this is that he executed the leases but that they were bad leases for lack of registration and that the plaintiff could not sue on them. The diary of 15th March 1939 recites that the advocates for the parties were present, (I presume this means all the advocates were present), when issues were framed, but for some extraordinary reason the Judge failed to frame an issue as to whether the leases were valid or not. When it came to judgment, however, it appears that this point was raised in argument for the defendants, and it also appears from the heading of the judgment that Mr. Chowdhury was the only advocate who argued the case for the defendants, so the point must presumably have been raised by Mr. Chowdhury. The Judge decided, inter alia,

that the suit for rent did not lie on this unregistered lease, EX. B.

It is now argued before us that the lease or leases, having been admitted, need not have been proved. This might have been so had defendant 1 only been concerned and had the point not been taken up for him and had the leases not been proved, but the leases were actually sought to be proved on behalf of the plaintiff. The rulings cited in this connexion are (1897-01) 2 U B R 379,[1] 1 Rang 472[2] at p. 475 and 42 Mad 41.[3] Per contra, I note 35 I C 18,[4] where a Bench of the Madras High Court had previously held in the case of an unregistered lease that the Courts should not act on admissions made by parties in their pleadings when the documents whose execution or contents are thus admitted are not receivable in evidence and when the admissions are accompanied by denial of liability on the ground of such defect. This appears to me to go for granted, because an admission by a party that he had executed the document on which the plaintiff relies, accompanied by a pleading that that document is of no effect, is no admission at all of the defendant's liability. But it was also held (Per Sadasiva Aiyar J.):

If the legislative provision (here S. 49, Registration Act) declaring such a document to be inadmissible in evidence or ineffectual for certain purposes is based on reasons of public policy, a Court ought to go behind the admissions in the pleadings and refuse to act on the admitted facts in favour of either party.

This ruling is not cited in 42 Mad 41[3]: see also 49 I C 278.[5] In my opinion, the trial Court, which could and ought to have framed a formal issue as to the validity of the document was fully entitled to go into its validity in view of the pleadings and to come to the decision it did, which was obviously a correct decision. If the document is found to be invalid against one party it was rightly held to be invalid against both. As regards the contention of res judicata, it having apparently been held in the previous suit that EX. B was a valid lease, it is only necessary to point to the words of S. 11, Civil P. C. The Subdivisional Court was not competent to come to a finding in this suit subsequently filed in the District Court which was for subsequent rents of the value of Rs. 8750. The suit was one for rent, not for damages for use and occupation. This appeal will be dismissed with costs.

Mya Bu J.—I agree not only in the decisions of my learned brother but also in the expression of amazement at the failure of Mr. Roy Chowdhury to raise a question as to the validity of the lease sued upon in the written statement of his client, defendant 1.

G.N./R.K. *Appeal dismissed.*

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ROBERTS C. J. AND MOSELY J.

U Sin — Appellant

v.

Ma Ma Lay — Respondent.

First Appeal No. 61 of 1940, Decided on 19th August 1940, against decree of High Court, in C. R. S. No. 140 of 1938, D/- 24th April 1940.

(a) Civil P. C. (1908), O. 23, R. 1 — Leave to file fresh suit can be granted only on withdrawal of earlier suit and not on its dismissal.

A Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal: A I R 1925 P C 55, *Rel. on.* [P 119 C 2]

(b) Civil P. C. (1908), S. 11—Previous suit by wife for divorce—No alternative plea for declaration that she is not wife—Subsequent suit for such declaration is not barred by res judicata.

It cannot be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist. These matters are so dissimilar that their union not only might but must certainly lead to confusion. Hence the failure of a wife in earlier suit for divorce to raise alternative plea for declaration that her marriage has ceased to exist will not bar a subsequent suit for such declaration. [P 120 C 1]

(c) Civil P. C. (1908), O. 2, R. 2 — O. 2, R. 2 does not apply to joining of different causes of action in same action.

Order 2, R. 2 is not directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions: 41 I A 142 (PC), *Rel. on.* [P 120 C 2]

(d) Buddhist law (Burmese)—Marriage—Law of divorce explained.

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retain the hnapazon property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he only has one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage be-

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1. ('97-01) 2 U B R 379, Maung Kat v. Maung So.
2. ('24) 11 A I R 1924 Rang 57 : 82 I C 610 : 1 Rang 472, Maung Wala v. Maung Shwe Gun.
3. ('19) 6 A I R 1919 Mad 833 : 48 I C 158 : 42 Mad 41 : 35 M L J 555 (FB), Mallappa v. Matum Nagu Chetty.
4. ('17) 4 A I R 1917 Mad 718 : 35 I C 18 : 31 M L J 240, Kotamreddi Seetamma v. Krishnaswamy Row.
5. ('19) 6 A I R 1919 Mad 469 : 49 I C 278, Muniappa Chettiar v. Vellachamy Munnadi.

comes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him." Nor can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery.
[P 122 C 1]

U Ze Ya — for Appellant.
U Maung Maung for U E Maung —
for Respondent.

Roberts C. J. — This suit (Civil Regular No. 140 of 1938) was brought by the respondent against the appellant to whom she had been married, and was for a declaration that the status of husband and wife had ceased to exist between them on 20th January 1935, owing to the husband's alleged desertion three years prior to that date, followed by absence of communication between the parties, and the failure of the defendant to maintain the plaintiff; or alternatively that the marital tie was severed on 20th January 1932, on the wife's desertion one year before that date; the plaintiff also prayed for an order directing accounts to be taken of the property of the marriage and for possession of her lawful share. The respondent had filed an earlier suit (Civil Regular No. 51 of 1937) on the footing that she was at the date of filing it a married woman. In that suit she asked for a decree of divorce on the ground of cruelty, and the cruelty alleged was the bringing of a false charge of adultery against her by her husband, and turning her out of the house. The husband pleaded in his written statement that the plaintiff was no longer a married woman; he admitted that they had parted on 21st January 1931, and had lived separately ever since. If the separation amounted to desertion on the part of the wife the marital tie would be severed one year later; if it were desertion on the part of the husband it would be severed three years after he refused to take her back on 20th January 1932 and, it is contended on the part of the appellant, that if the separation was in consequence of the wife's adultery it would sever the marriage tie at once. At all events, the point taken by the defence in the first suit was that the plaintiff was not the defendant's wife at the time of bringing her action.

At the trial the wife sought leave to amend her pleading; she wanted to bring an action for a declaration that the marriage was no longer subsisting. Leave to do this was refused her, the learned Judge pointing out that she was seeking to substitute a new and entirely different cause of action against the defendant. The wife thereupon offered no evidence in support of her suit for divorce and it was dismissed because she did not choose to pursue it on the unamended plaint. It is not quite right to say, as we were asked to do, that it was dismissed on the footing that the marriage had already been dissolved. There was no finding to that effect; it was dismissed for want of prosecution. The learned Judge was asked to give leave to the plaintiff under O. 23 to file a fresh suit. He stated that if it was necessary for him to give leave (which he doubted) he would do so. It seems that no authorities on this point were cited to him, but a trial Judge cannot give leave to a plaintiff to file a fresh suit upon the dismissal of an earlier suit but only upon its withdrawal. The plaintiff here did not withdraw her suit, but it was dismissed. And having had it dismissed she could not bring a fresh suit on the same cause of action: 52 I A 100.[1] There was however nothing to prevent her bringing a suit against the same person on a different cause of action provided the provisions of S. 11, Civil P. C., were not infringed. Broadly stated, the rule in S. 11 is a simple one. When a matter has been directly and substantially in issue in one suit and has been heard and finally decided by the Court, the parties to that litigation cannot get the matter tried again in a subsequent suit but are bound by the final judgment. The parties to the litigation who are bound include their representatives in interest or persons claiming under them. Parties to former litigation are not, however, bound, when in a subsequent suit they are suing in a different capacity. And, in a subsequent suit, a decree can only be pleaded as res judicata when the Judge by whom it was made had jurisdiction to try and to decide the subsequent suit itself. These qualifications, however, do not apply to the appeal before us. I only mention them lest it should be thought that the broad statement of the rule is exhaustive.

If, therefore, the matter in dispute in the present suit was directly and substantially in issue in the former suit, and was heard and finally decided by the Court, the doctrine of res judicata would apply. The learned advocate for the appellant contends that it was directly and substantially in issue. He says that it falls under Expl. IV to S. 11 because it was matter which "might and ought to have been made ground of

1. ('25) 12 AIR 1925 P C 55 : 91 I C 280 : 47 All 158 : 27 O C 334 : 52 I A 100 (P C), Fateh Singh v. Jagannath Baksh Singh.

attack" in the former suit and must therefore be deemed to have been a matter directly and substantially in issue in that suit. In 2 Cal 152[2] a father had conveyed some land to his daughter as stridhan. After the daughter's death, her mother brought a suit to recover the property saying that the gift deed was a forgery; it was held that the deed was genuine and the suit was dismissed. The mother then brought a second suit claiming the land as her daughter's heiress and it was held that the second suit was barred. Kemp J. observed (at p. 173) that the mother had to make out a title to possession and the title she set up in the second suit was one which she could and should have set up in the first suit, as the father and daughter were already dead; she had not changed her cause of action. In 25 Bom 109[3] the plaintiffs had first sued the defendant as surviving members of a joint family; their suit was dismissed. They then brought a second suit claiming to be entitled as reversioners on the death of the widow of the former owner. Jenkins C. J. in considering Expln. IV to S. 11 said they ought to have made this second contention a ground of attack in the former suit and remarked (at page 193):

> Where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would become important; in this case the matters were the same.

These very words were evidently taken from the judgment of Lord Morris in 20 Cal 79[4] at p. 85. But how can it be said that a person petitioning the Court for a divorce as a husband or wife ought to add an alternative plea asking for a declaration that he or she is not a husband or wife at all, because the marriage has long ago ceased to exist? These matters appear to me to be so dissimilar that their union not only might but must certainly lead to confusion. The causes of action, which a married woman brings for divorce, and which a woman no longer married brings for a declaration that the marriage has long ago ceased to subsist, are surely inconsistent and ought not to be brought together. And again, not only are the causes of action incongruous but the date at which partition must be reckoned if the plaintiff were successful would be different. A reference to O. 2, R. 2, makes it clear that a plaintiff must include the whole of the claim which he is entitled to make in respect of his cause of action, and that he cannot afterwards sue for a relief in respect of the same cause of action which he has omitted to claim. The rule is not directed to the inclusion in one and the same action of different causes of action even though they arise from the same transactions: *see* 41 I A 142.[5] In that case the first action was on two promissory notes; so long as they were outstanding there could not be right of action by the plaintiff except upon them. This action having been dismissed on the ground that there had been material alterations in the notes plaintiff then claimed upon an award under which the promissory notes were given; it was held that it was impossible to say that this claim was the same cause of action as the claim upon the notes and ought to have been included in the prior action.

The conclusion at which I have arrived is that the present suit by the appellant was not barred by S. 11, Civil P. C., or by the provisions of O. 2, R. 2, and the matter now in dispute cannot be deemed to be res judicata. In the present suit, the appellant pleaded that the marriage was dissolved owing to the plaintiff's adultery, and the question arises whether a husband can at this stage raise any such plea—it is contended by the respondent that a husband can only aver and prove the adultery of his wife in an action brought by him for divorce on the ground of her adultery. It seems necessary to enquire what may happen under Burmese Buddhist law when a husband suspects that his wife is guilty of adultery. First, of course, he may disregard his suspicions; or, none the less entertaining the conviction that she is guilty, he may condone the offence. That aspect of the matter does not arise here. Secondly, he may ask in the Courts for a decree of divorce; that does not arise here either. Thirdly, he may succeed in getting a divorce by mutual consent; the wife, whilst not admitting her guilt, may agree to this; and I am disposed to think, though it is unnecessary for me to decide, that she might whilst either admitting or denying her guilt submit to her dismissal on the footing that her husband was to retain the hnapazon property in the circumstances of the case. But, fourthly, it is contended that the husband may put her

2. ('76) 2 Cal 152, Denobundhoo Chowdhry v. Kristomonee Dossee.
3. ('01) 25 Bom 109 : 2 Bom L R 872, Gudappa v. Tirkappa.
4. ('93) 20 Cal 79 : 19 I A 234 : 6 Sar 241 (P C), Kameswar Pershad v. Rajkumari Ruttan Koer.
5. ('13) 41 I A 142 : 26 I C 228 : (1914) A C 618 : 83 L J P C 131 (P C), Saminathan Chetty v. Palaniappa Chetty.

away. The following passage of Manugye ch. XII (43) has been cited :

> Concerning putting away a woman who does not conform to the habits of her class, but addicts herself to low habits, it is thus said : If a woman, without regard to the credit of her family takes a paramour, or without the knowledge of her husband steals, or conceals his property, it is not said the husband shall only cease connubial intercourse with her ; her habits are bad ; she has certainly no regard to the honour of her family. For this reason, let him take all the property, and have a right to put her away.

Shortly stated, this lays down that if the wife takes a paramour the husband may put her away and retain the hnapazon property. We have been urged that this is Buddhist law and there is no law which, in a matter of this kind, can abridge or alter it. I have the greatest sympathy with this contention, and if it were capable of application I should have no hesitation in applying it. But who is to decide whether the wife has taken a paramour or not? As I have remarked, her submission to being "put away" on this ground may conclude the matter. But in many cases she may not, and in the present case she does not at all, admit her guilt ; here there was no divorce by mutual consent on the footing of admitted adultery. I cannot think that the husband can be judge in his own cause in such a matter. One can imagine a husband who had no ground for suspicion at all but a desire to rid himself of his wife for some quite different reason, turning out his wife and invoking this provision of the law as though he had only to make a charge which everyone knew was groundless in order to justify his action ; or it is possible to think of a jealous husband who has had quite groundless fears as to his wife's fidelity "putting her away" under this provision ; is he, although she is quite guiltless, to be allowed to retain all the hnapazon property ? The appellant's advocate, with wisdom, has not pretended that a wife may be cast adrift in this way upon a baseless charge.

It would not suffice to try and interpret the provision in Manugye by saying that if the husband had reasonable grounds for believing the wife to be guilty he could put her away under this section. For one thing the laws of Menoo do not say that at all ; for another, it would be impossible to hold that a divorce took place on one day because the husband mistakenly and on reasonable grounds believed his wife to be guilty of misconduct, and that his discovery of his error amounted to a remarriage of the parties. Much might have happened in the meantime. This drives me to the conclusion that although the provision cited is good law it certainly does not mean that a husband who merely suspects his wife of adultery can put her away. He can only put her away without her consent if in the words of Manugye "she takes a paramour" ; nobody can ever know whether she has done so or not till it is proved in a Court of justice. Therefore, when I remarked at an early stage in this judgment that it was contended on the part of the appellant that if the separation was in consequence of the wife's adultery it would sever the marriage tie at once, I had in mind that it would be difficult to show in any particular case that the separation took place because the wife had in fact committed adultery unless proof were given in a Court of justice of this fact ; although it might be easy to show that separation took place because the husband thought, or said he thought, that his wife had committed adultery. This being, as I understand it, the law, we are obliged to consider the husband's position according to it. If he does not disregard his suspicions, or condone the offence, or obtain a divorce by mutual consent, he has to decide whether he will put his wife away or whether he will resort to the Courts to prove his wife's adultery and thus obtain a decree of divorce.

It is clear that if he puts his wife away in circumstances which do not, through lack of proof of the factum of adultery, entitle him to retain the hnapazon property the marriage nevertheless becomes dissolved by efflux of time owing to the separation. In such a case the desertion must be that of the husband and at the expiration of three years the marital bond is severed. At any time before the expiration of that period the husband may ask the Court for a decree of divorce, and will obtain it if he can prove adultery ; but if he does not choose to come to Court with such a prayer within three years his right to tender such proof is at an end, for he ceases to be a husband. He has then chosen not to bring his petition within the period of coverture, and it is plainly too late to do so afterwards. In 1938 R L R 229,[6] a Bench decision, Dunkley J. said (at p. 234) :

> In the present case, the husband not having brought an action for divorce against the appellant on account of her adultery, the marriage was brought to an end by the appellant's desertion and

6. ('38) 25 A I R 1938 Rang 168: 177 I C 492: 1938 R L R 229, Ma Dun Mai v. Maung San Tun.

not by her adultery, and therefore the rights of the appellant and her deceased husband's heirs to the joint property of the marriage must be decided in accordance with the law for the division of that property on the marriage becoming dissolved by desertion,

and at a later stage of his judgment he remarked :

In my opinion even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has been dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him.

We have been asked to direct that this decision may be considered by a Full Bench of not less than three Judges, but I respectfully agree with what the learned Judge there stated. A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and the dissolution of marriage may take place by mutual consent on the footing that the husband retain the hnapazon property. If he cannot do this and a separation ensues by reason of his own desertion, then he has three years in which to bring a suit for a decree of divorce, but if by reason of their differences his wife has deserted him, he only has one year. In the suit for a decree of divorce he may, if he can, prove the factum of adultery, but unless he does so the dissolution of marriage becomes effective at the expiration of one or other of these periods whichever may apply. He is no longer a husband and he cannot "prove the adultery in a suit for divorce brought by him." Nor, in my judgment, can he bring a suit for a declaration that the dissolution of the marriage tie was effected in circumstances that his former wife has been guilty of adultery. Accepting the authority cited as good law, the time has gone by for that. To hold otherwise would be to permit the disputed question of the wife's adultery to be examined into many years after the marriage had been dissolved and when the husband had omitted to seek to put an end to coverture by proving the truth of his suspicions in a Court of justice. And, if he cannot bring a suit of this kind, it seems to me to follow that he cannot raise a defence of this kind in a suit brought against him.

Some attempt has been made to show, as against the respondent, that one Maung Hla Tin was convicted of adultery with the appellant's wife in 1932. The respondent had no opportunity of showing that she had not committed adultery with him, and these proceedings are not relevant to any issue between the present parties. As, in the Court below, the admission was made on behalf of the wife that she would accept the view that her conduct amounted to her own desertion, the learned trial Judge was in my respectful opinion, right in considering that the marriage became dissolved on 21st January 1933. The learned trial Judge remitted the case to the Deputy Registrar for amendment of pleadings in order that issues might be framed on which a decision could be reached as to share to which the plaintiff was entitled. The appeal against his decisions in all these matters must be dismissed and the appellant must pay the costs, advocates' fee in this Court 25 gold mohurs.

Mosely J. — I agree. Manugye, Ch. XII, para. 43 at p. 358 has been quoted for the appellant. It is to be noted that para. 3 at p. 345 is much less uncompromising. It says that if the wife really has a paramour and admits that she has or goes with him, the husband may take possession of all the property. In my opinion (1892 96) 2 U B R 116[7] is still good law, and unaffected by the decision here or by 1938 R L R 229.[6] (1892-96) 2 U B R 116[7] was a case where the wife eloped when the husband was suffering from an illness from which he did not recover. The husband, of course, could not sue for divorce. It was therefore, following S. 276, of the Attathankepa and Manugye, Chap. XII, paras. 3 and 43 in a suit between the wife and an heir of the husband, that the wife had forfeited all interest in the husband's property by her misconduct.

D.S./R.K. *Appeal dismissed.*

7. ('92-96) 2 U B R 116, Maung Tok v. Ma Kin.

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MYA BU AND MOSELY JJ.

Mirza Mohamed Osman and others — Appellants

v.

S. R. M. C. T. J. Jambulingam Chettyar by agent Muthu Palaniappa Chettyar — Respondent.

First Appeal No. 12 of 1940, and Misc. Appeal No. 3 of 1940, Decided on 30th May 1940, from decree and order of Asst. Dist. Court, Insein, D/- 14th October 1939.

(a) Evidence Act (1872), S. 68 — One of attesting witnesses not speaking to attestation by other attesting witnesses — It must be proved that deed was properly attested by those other attesting witnesses.

No doubt only one attesting witness need be called if that attesting witness speaks to attestation by the attesting witnesses. But if he does not

do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses. [P 125 C 1, 2]

(b) Principal and Agent — Agent of firm advancing firm's money and obtaining mortgage in his favour — Fact that he uses firm's initials would not show that transaction was entered into by firm.

Where the money advanced was the firm's money, but the mortgage was in favour of the firm's agent, the mere fact that he used the firm's initials would not show that the transaction was entered into by the firm: A I R 1935 Rang 81 and AIR 1932 Rang 97, *Rel. on.* [P 125 C 2; P 126 C 1]

(c) Mortgage — Assignment.

Mortgage can only be assigned by a registered deed of assignment and not by a document which merely purported to recite a previous partition: A I R 1936 Rang 152, *Rel. on.* [P 126 C 1]

P. B. Sen — for Appellants.

P. K. Basu — for Respondent.

Mosely J. — It is clear that this appeal must succeed. The plaintiff respondent, S. R. M. C. T. J. Jambulingam Chettyar, sued defendant-appellant 1, M. M. Osman, defendant-appellant 6, S. A. Aziz, his agent, and defendants appellants 2, 3 4 and 5, who are the legal representatives of Mirza Akbar Ali, deceased, on a mortgage which, he said, was executed by Aziz as the agent of Osman and as surety, and by Mirza Akbar Ali. He sued for the principal, Rs. 5000, and Rs. 1000, out of nearly Rs. 4000 interest due, in all for Rs. 6000. The mortgage was executed on 18th March 1930. In the written statement of defendants 1 to 5 they said (para. 1): "These defendants do not admit the allegations of paras. 1 and 2 of the plaint" (where it was said that the plaintiff was the mortgagee and where the particulars of the mortgage were given), "and put the plaintiff to strict proof of the same" (that is to say of the mortgage of course). In para. 2 they said: "These defendants do not admit the allegations of para. 5 of the plaint" (para. 5 recites that the mortgage was originally one in favour of S. R. M. C. T. S. S. P. A. Firm, of which the plaintiff was then a partner, and that there was subsequently a dissolution of partnership by a registered deed and division of assets, of which the mortgage in suit fell to the share of the plaintiff by "devolution").

They contend that the plaintiff has no right to sue and recover upon the mortgage deed in suit even if the same is proved to have been duly executed and registered by the persons alleged to have so executed and registered the deed.

Issues were framed originally:

(1) As to whether the mortgage deed was executed in favour of Somasundaram Chettyar personally or in favour of S. R. M. C. T. S. S P. A. Firm as alleged in the plaint. (Somasundaram Chettyar was the agent of that firm at the time of the mortgage). (2) Whether there was a dissolution of S. R. M. C. T. S. S. P. A. Firm and whether the mortgage debt fell to the share of the plaintiff. (3) Whether the plaintiff can maintain the present suit to recover the amount due on the mortgage. (4) Whether the mortgage bond was executed by defendant 6 in his personal capacity as well as in the capacity of an agent of M. M. Osman, and also by Mirza Akbar Ali, deceased.

In the plaint Aziz was sued as surety. In the deed itself he is described in the body as agent and purported to have executed the deed firstly as agent of Osman and also in his own capacity. The plaintiff cited three witnesses. It is only necessary to refer to the third witness, Muturaman Servai, who was once the head clerk of the S. R. M. C. R. S. S. P. A. Firm. This witness was obviously cited to prove due execution of the deed, i. e., execution by the mortgagor and attestation. The deed purports to be signed by three witnesses, S. Dhar (a pleader), Ba Thaung and R. S. M. Muturaman (i. e., Muturaman Servai). Muturaman Servai in his evidence said as follows:

Mirza Akbar Ali, Aziz for himself and for Osman executed the mortgage deed, Ex. A. I attested it. Mr. Dhar attested it. One lawyer's clerk, who is now in Mr. Bose's office, also attested it.

But when the witness was cross-examined he said as follows:

The document was executed in the firm's premises, that is, in Mogul Street, I do not remember where Mr. Dhar signed the document. I did not see Mr. Dhar sign the document. I do not remember whether Mr. Dhar came to Mogul Street (i. e., from his own office). I don't remember if I had seen Ba Thaung signing the document. He might have signed the document in the firm's premises. He came to the firm. Somasundaram asked him to sign. Ba Thaung was present when the executants executed the mortgage deed. We went to the lawyer's office. I did not call Ba Thaung who was talking with Somasundaram. He then came along to the firm's premises. I cannot say if Ba Thaung saw the executants sign the mortgage document but he was present at that time. I gave the money to the executants. Then they signed it. In their presence I attested the deed.

It is quite clear from this evidence that if Muturaman Servai saw the executants sign the deed in the Mogul Street office and attested it there, Mr. Dhar could not have seen or received an aknowledgment of the signature of the deed there at that time, nor previously, nor subsequently, as he signed his name at the top of the list of attesting witnesses. As for Ba Thaung, who, Muturaman Servai says, was asked by Somasundaram to sign, this witness said that Ba

Thaung was a clerk to Mr. Bose. The clerk in question, Maung Ba Thaung, was called for the defence (D. W. 1), and he said that he had been a clerk to Mr. Bose since 1922 or 1924—the only clerk by that name there, but that the signature on the deed was not his. The veracity of this witness is not in dispute. He also said that he knew a former clerk of Mr. S. Dhar, who, he thought, was still alive, called Ba Thaung, and who was not working for Mr. Dhar now. No attempt was ever made by the plaintiff to find this Ba Thaung or to call him, and there is nothing to show that he could not be found. The plaintiff then closed his case, and the defendants' case was opened. The two defendants were examined, and it then appeared that they admitted execution of the mortgage (i. e., signing the mortgage), but did not admit that it was executed in Mogul Street or that it was a valid mortgage, or had been duly attested.

It appears from the diary of 15th September 1939 that the Judge found "that the main point in dispute was whether the power authorized Abdul Aziz to mortgage Osman's property?" The Judge, therefore, framed an additional issue (issue 6), whether the power given to Aziz by Osman authorized Aziz to mortgage Osman's property? The Judge said in the diary that he would allow both parties to adduce further evidence on the point. On the date fixed for further evidence, however, the plaintiff brought Mr. William Dhar, the son of Mr. S. Dhar, to give evidence, which was practically all on the question of attestation, and should have been ruled out. It is obvious from the evidence in the suit and from the pleadings that the question of valid execution was very much in dispute between the parties, though the first part of the issue framed, (issue 4) seems at first sight a little misleading as to whether it was disputed that the mortgage bond was executed at all and whether it did not merely mean that the capacity in which it was executed was disputed. However, it is clear from the last part of that issue which is as to whether the mortgage bond was executed by Mirza Akbar Ali, that what was to be and understood to be in issue was whether the mortgage bond was executed at all by Aziz, whether it was executed at all by Mirza Akbar Ali and whether it was duly executed. The defendants admitted, it is true, when it came to evidence, that it was executed by the mortgagors, but it is still obvious that the dispute as to execution was by then centred on the question of attestation, or due execution, and that no doubt is why the plaintiff's advocate cited Mr. William Dhar to give the evidence he did. Mr. Dhar (P. W. 4) said :

> (The signature of) S. Dhar on the document Ex. A is that of my father. My father is now very old. He has been bed-ridden on account of old age. He is blind. His power of hearing is not good. I know that my father prepared (i. e. wrote) the document, Ex. A, . . . He is about 90 . . . My father's clerk was Ba Thaung in 1930. I know his signature (Ba Thaung's). His signature is below my father's signature. Ba Thaung is no longer in our service. I do not know his present whereabouts.

The witness went on to say :

> It is not likely that my father would write 'S. A. Aziz, duly constituted attorney of Osman' without being satisfied (that he was so).

That is merely an opinion of the witness of course and the witness could not have been cited to give this opinion only. That is the only piece of evidence relevant to the point on which the Judge allowed the additional witness to give evidence. The rest of his evidence should not have been considered. In cross-examination the witness said that his father was in the habit of signing all documents which he wrote. The Judge found on these issues, firstly that the mortgage was in favour of S. R. M. C. T. S. S. P. A. Firm. He then found that the mortgage fell to the share of the plaintiff (a partner in that firm) at dissolution. On issue 4, the Judge found that the mortgage bond was executed by Mirza Akbar Ali and by Aziz both in his personal capacity and as agent of Osman. Later on, the Judge went back to issue 4. No doubt he had overlooked before that it also referred to the question whether the mortgage deed had been validly executed, though that point must have been argued before him and he found that it had been properly proved. He said that Servai had witnessed it, that Ba Thaug could not be found (this was not proved), and that Ba Thaung "must have seen it signed by the executants as he signed as an attesting witness." As for Mr. Dhar he said that Mr. Dhar might have seen it signed otherwise he would not have signed as an attesting witness. Section 59, T. P. Act, enacts that when the principal money secured by the mortgage is one hundred rupees or upwards it can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. The meaning of 'attestation' is given in S. 3 of the Act. The mode of proof of documents required by law to be attested is given in Ss. 68, 69, 70 and 71, Evidence Act. Section 68 is as follows :

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document not being a will which has been registered in accordance with the provisions of the Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied.

The meaning of this section has been interpreted in 11 Rang 26.[1] I would call attention to the remarks of Page C. J., in para. 2 of p. 31 and to the judgment of Mya Bu J. there at pp. 34 and 35. It has been argued before us that what S. 68 requires is that only one attesting witness need be called, and that it is not necessary to call other attesting witnesses or to prove that the deed was properly attested by them, if the deed on the face of it purported to have been attested by two witnesses. No doubt only one attesting witness need be called if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses. Now, the effect of Muturaman Servai's evidence was at most to show that he attested the deed, if indeed he did so, at the Mogul Street office, and did not merely go to Mr. Dhar's office to pay the money, as has been suggested. But Muturaman Servai's evidence itself showed that Mr. Dhar could not have been present at the same time, and that the Ba Thaung, who he said, attested the deed, did not in fact attest it. It was therefore incumbent upon the plaintiff to prove aliunde attestation by these other witnesses. The evidence of Mr. Dhar (junior) if it had been not ruled out would have merely gone to prove his father's handwriting.

No doubt there are cases where it is impossible to call any attesting witnesses and where all that can be proved is their handwriting, and in such cases it will be presumed, until the contrary is shown, that the persons who purported to have signed were in fact attesting witnesses. This is not such a case. The mere proof of Mr. Dhar's signature, under the circumstances, did not go to rebut the deduction that must be drawn from Muturaman Servai's evidence. There was then no other evidence aliunde admissible under S. 71, Evidence Act, to prove attestation. 54 ALL 1051,[2] a Full Bench decision, was cited by the respondent to prove his contention that all that the mortgagee need prove was that the mortgagor signed the document in the presence of an attesting witness because the execution and attestation of the deed were merely not admitted here, but were not specifically denied. I do not myself understand the principles on which this judgment proceeds. The argument is at pp. 1056 to 1058. The principle enunciated in this decision was dissented from in the decision of their Lordships of the Privy Council in the case in 43 C W N 669.[3] I need only quote two passages at page 674 of that judgment :

Their Lordships cannot accept that contention. It is clear that Lachman Singh in his written statement pleaded that he did not admit the execution of the mortgage deed, and it appears from the judgment of the subordinate Judge that at the trial the pleader who appeared for Lachman Singh 'hotly contended that the execution and due attestation of the mortgage bond in suit was not proved against his client.' In these circumstances, in their Lordships' opinion, it must be held that the execution of the mortgage deed by Mt. Jamna Kunwar was in fact specifically denied by Lachman Singh.

The present case is a stronger one, as the defendants in their written statement always asserted that the mortgage deed was not duly executed. As their Lordships said, that plea was in fact one of a specific denial. It is clear from this judgment that the evidence of one attesting witness would in such case only be good evidence if he proved that the mortgage was duly attested (i. e., attested by two witnesses). It must be held, then, that this mortgage was not duly attested and is not valid. It will more briefly dispose of the other two findings of the District Judge, both of which I think are clearly unwarranted. The mortgage deed itself is throughout in favour of S. R. M. C. T. S. S. P. A. Somasundaram Chettyar, his heirs, legal representatives and assigns. Para. 5 of the mortgage speaks of assuring the premises "unto the mortgagee as by him shall be reasonably required." It may be and in fact it is not now denied for the purposes of this appeal, that the money advanced was the firm's money, but the mortgage was in favour of the firm's agent. The mere fact that he used the firm's initials would not

1. ('33) 20 A I R 1933 Rang 6 : 141 I C 700 : 11 Rang 26, R. M. A. R. M. Chettyar Firm v. U Htaw.

2. ('32) 19 A I R 1932 All 527 : 139 I C 1 : 54 All 1051 : 1932 A L J 653 (F B), Lachman Singh v. Surendra Bahadur Singh.

3. ('39) 26 A I R 1939 P C 117 : 181 I C 216 : I L R (1939) Kar P C 222 : 43 C W N 669 (P C), Surendra Bahadur Singh v. Behari Singh.

show in this case that the transaction was entered into by the firm: *see* 13 Rang 87[4] and 10 Rang 257.[5]

As regards the question of assignment, too, it appears to me that the trial Court was clearly wrong. This mortgage, which was of immovable property, could only be assigned by a registered deed of assignment and not by the document in question which merely purported to recite a previous partition: *see* on this 14 Rang 494.[6] We are also dealing here with an appeal in Misc. Appeal No. 3 of 1940 against an order passed by the Judge on the same date as the preliminary mortgage decree in the suit by which he appointed the bailiff receiver of the mortgaged property. This order must be set aside without costs, now that the suit has been dismissed. Civil First Appeal No. 12 of 1940 will be successful and the decree of the trial Court set aside with costs in both Courts.

Mya Bu J. — I agree.

D.S./R.K. *Order accordingly.*

4. ('35) 22 A I R 1935 Rang 81 : 155 I C 935 : 13 Rang 87, K. S. A. V. Chettyar Firm v. Mahmoo.
5. ('32) 19 A I R 1932 Rang 97 : 139 I C 460 : 10 Rang 257, Perchiappa Chettyar v. Maniyandi Servai.
6. ('36) 23 A I R 1936 Rang 152 : 163 I C 645 : 14 Rang 494, Bank of Chettinad Ltd. v. Ma Ba Lo.

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BA U J.

U Kyaw Zan — Applicant

v.

U Tun Hla U and others—Respondents.

Court-fees Reference arising out of Civil Revn. No. 155 of 1940, Decided on 23-8-40.

(a) Court-fees Act (1870), Sch. 1, Art. 14—Meaning explained—Suit under S. 9, Specific Relief Act—Revision—Court-fee payable is same as paid on plaint.

Schedule 1, Art. 14 means that on an application for revision the same amount of court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. Therefore on an application for revision arising out of a suit instituted under S. 9, Specific Relief Act, the court-fee payable is the same as has been paid on the plaint : A I R 1922 Mad 211, *Ref.* [P 127 C 1]

(b) Interpretation of Statutes — Fiscal statute.

A fiscal statute should be construed strictly and where there is a doubt, the doubt should be resolved in favour of the subject. [P 127 C 1]

U Sein Tun Aung — for Applicant.

U Tun Byu (Govt. Advocate) — for the Crown.

Order.—The applicant in this case filed a suit under S. 9, Specific Relief Act, in the Sub-divisional Court of Kyauktaw, Akyab District, against the respondents for possession of a mill and its site. He paid court-fee on half the value of the mill and site which he valued at Rs. 4500. The suit was contested and it was eventually dismissed. The applicant has therefore brought the case up to this Court in revision and paid the same amount of court-fee on his application as he paid on his plaint. The Taxing Master takes objection to this and directs the applicant to pay court-fee according to Art. 14 of Sch. 1, Court-fees Act. I do not agree with the learned Taxing Master. Under Art. 14, Sch. 1, Court-fees Act, an application for revision must be stamped with a Rs. 2-stamp if the value of the subject-matter in dispute does not exceed Rs. 25 but where the value of the subject-matter in dispute exceeds Rs. 25 the court fee payable on an application for revision is the same as the court-fee payable on a memorandum of appeal. The question as to what court-fee is payable on a memorandum of appeal depends upon what the value of the subject-matter in dispute in appeal is. If the subject-matter in dispute in appeal is the same as the subject-matter in dispute in the suit, then the same fee must be paid on the memorandum of appeal as has been paid on the plaint. The fee payable on a plaint is to be calculated according to the scale as laid down in S. 7 read with Sch. 1, Art. 1, Court-fees Act. If the subject-matter in dispute in appeal is not the same as the subject-matter in the suit then the payment of the court-fee depends upon what the value of the subject-matter in dispute in appeal is. If the value of the subject-matter in dispute in appeal is less than the value of the subject-matter in the suit, then the court-fee payable on the memorandum of appeal will be less than the fee paid on the plaint: 45 Mad 246.[1]

Therefore, the decision of the question now involved in this case will depend on what the subject-matter in dispute in a suit under S. 9, Specific Relief Act, is. The subject-matter in such a suit is immovable property but the relief claimed is possession only. The question of title, if necessary, must be adjudicated upon in a separate suit. If such a suit is instituted as is sometimes done, it means that court-fee has to be paid twice in respect of the same subject-matter though not necessarily by the same party. It therefore appears to my mind that the Legislature has advisedly laid it down in Art. 2, Sch. 1, Court-fees Act, that the court-fee payable on a plaint in a suit under S. 9,

1. ('22) 9 A I R 1922 Mad 211 : 68 I C 444 : 45 Mad 246 : 41 M L J 587, In re Porkodi Achi.

Specific Relief Act, should be half the value of the subject matter in dispute. If an appeal were to lie from a decree or order passed in such a suit, the same amount of court fee would have to be paid on the memorandum of appeal as has been paid on the plaint for the subject-matter in dispute and the relief claimed both in the appeal and in the suit will be the same. In fact, that was what was in the mind of the Legislature when they passed the Court-fees Act (Act 7 of 1870), for Art. 2, Sch. 1, provided that the same amount of court-fee was payable both on the plaint and on the memorandum of appeal in a suit instituted under S. 9, Specific Relief Act. Only when it was discovered later that no appeal lay from a decree or order passed in a suit under S. 9, Specific Relief Act, the words "memorandum of appeal" were deleted from the said article by Act 20 of 1870.

Therefore, what in my opinion Art. 14, Sch. 1, Court-fees Act, really means is that on an application for revision the same amount of court-fee is payable as has been paid on the plaint in a case where the subject-matter in dispute is the same both in the suit and in revision. It would be against every principle of justice, equity and good conscience if more court-fee is to be paid on an application for revision than on a plaint in case where the subject-matter in dispute is the same both in revision and in the suit. Besides it is a well-known and well-settled principle of interpretation that a fiscal statute should be construed strictly and that where there is a doubt the doubt should be resolved in favour of the subject. Therefore I hold that on an application for revision arising out of a suit instituted under S. 9, Specific Relief Act, the court-fee payable is the same as has been paid on the plaint.

G.N./R.K. *Order accordingly.*

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ROBERTS C. J. AND BLAGDEN J.

M. Do Carmo Lobo — Appellant

v.

Official Assignee.

Civil Misc. Appeal No. 70 of 1939, Decided on 6th March 1940, against order of High Court, in Insolvency Case No. 66 of 1935, D/- 8th November 1939.

Presidency Towns Insolvency Act (1909), (Rangoon), S 39 (2), cls. (a), (d) and (e)—Case falling under cls. (a), (d) and (e) — Court's order should be one suspending discharge for specific time.

The object of the order of the discharge is to enable a person to recommence with a clean slate and it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Act, should, as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. Hence, in a case falling under S. 39 (2), cls. (a), (d) and (e) Court's order should be an order suspending the discharge for a specific time. [P 128 C 2]

Dr. M. A. Rauf — for Appellant.

Paget — for Official Assignee.

Roberts C. J. — This is an appeal against the order of the learned Judge in Insolvency in reference to Mr. Lobo, who became insolvent on 26th March 1935. He had been employed as the chief agent of the Vulcan Insurance Co., of Bombay for over eight years subsequent to 1925; and it appears that his method of doing business with them was to canvass for policies and, when he had obtained a promise to pay the premium, to issue them and to debit the company with the commission to which he would become entitled. This was a somewhat hazardous method of doing business, since it meant that he was in effect guaranteeing to the Vulcan Insurance Co., whose agent he was, that the policy-holders would ultimately pay the premiums which were due on their policies. And, once having issued the policy and debited the company with the commission, he became from time to time responsible, under each policy, for the amount of the premiums to the company. And over a period beginning about 1927 it appears that Mr. Lobo, in addition to his insurance business, had been spending a good deal of time in connection with racing matters, he says, in order to advertise his insurance connections. Those racing matters were on the whole fortunate and, according to him, he made a profit altogether in a few years of some Rs. 30,000 upon the turf, not by gambling, but having prizes and awards as a result of his successful racing. Some of the money he spent on stabling and accommodation in connection with that, but it appears that all his landed properties were mortgaged and on their sale the sums realized were insufficient to pay the unsecured creditors. But it does appear from all the information at our disposal that the ventures of Mr. Lobo on the turf did not in any way contribute to his insolvency. On the contrary, he prospered on the turf and owed less to the company at the time of giving up racing than at the time he started it.

It must be remembered that the nature of his business was fire, marine and accident

insurance, and not life insurance, and the view taken by the learned Judge in insolvency may have been due to some misconception on his part. What the learned Judge found was that the insolvent used the premiums paid by the policy-holders in some other venture, and it is evident from his order that he was under the impression that Mr. Lobo speculated with money which was not his own. It is not now contended on behalf of the official assignee, and it does not appear anywhere, that there is the slightest ground for any imputation of criminality against Mr. Lobo; what he did may have been hazardous, but there is no kind of evidence that it was in the least degree criminal. The learned Judge has found that the insolvent brought on, or contributed to his insolvency by rash or hazardous speculations or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs. This brings the case under S. 39 (2) (f), Rangoon Insolvency Act, and accordingly, acting under its provisions, the learned Judge suspended the discharge of the insolvent until he paid at the rate of four annas in the rupee. We are obliged to reach the conclusion, after very carefully examining the evidence, that it was owing to a misconception that the learned Judge brought this case at all within the ambit of S. 39 (2) (f). The official assignee's report does not in any part suggest that the insolvency was brought about by gambling or hazardous speculation, and merely states in its concluding words that the debts were contracted recklessly and without any reasonable prospect of repayment. The fifth creditor's objection to the insolvent's discharge did make an allegation under S. 39 (2) (f), and in the grounds of opposition by the Vulcan Insurance Company to the application of the insolvent for his discharge it is alleged that he has failed to account satisfactorily for the deficiency in his assets, which would bring the matter within S. 39 (2) (e).

Now, it seems clear that the insolvent made his application for discharge very soon after his public examination, and at his public examination he was asked a number of questions from which the learned Judge came to the conclusion that he had been speculatively engaged on the turf but which, we think, really go to show that he failed to account satisfactorily for the loss of his assets, and certainly there were grounds upon which it could also be said, under clause (d), that at the time of contracting his debts he had not shown that he had any reasonable or probable expectation that he would be able to repay them. These debts were not all contracted in one fell swoop; from time to time as policy-holders failed to meet their obligations the insolvent must have known that he was going into deeper and deeper water and at no time does he appear to have made any substantial effort to cut his loss, and he has not shown in his public examination what income he was in receipt of and how he spent it. We have been referred to a number of questions and answers, as the result of which it is impossible to say whether he paid income-tax on an income of Rs. 14,000 or whether that sum represents the income-tax he paid, or whether his later suggestion that Rs. 5000 a year was his income, is correct; and it is also very difficult to say what he did with such money as he possessed or how he got into the chaotic condition in which he finds himself.

Accordingly, in our opinion, this appeal must be allowed and the order of the learned Judge must be varied upon the basis that it should have been made under S. 39 (2), cls. (a), (d) and (e). The principle which we have to bear in mind is a straightforward one. Dr. Rauf referred to the dicta of the learned Judges in Bankruptcy Courts in England (which have always been followed in this Court) which are to the effect that the object of the order of the discharge is to enable a person to recommence with a clean slate, and that it is desirable that he should be given the opportunity of making a fresh start. But, on the other hand, it is undesirable that a man who has brought himself within the ambit of the Act, should as it were, walk through the Bankruptcy Court without some period during which his discharge shall be suspended. And, we think, in all the circumstances, that our order ought only to be an order suspending the discharge for a specific time, and we suspend the discharge of the insolvent for a period of six months.

Blagden J. — I agree.

D.S./R.K. *Order varied.*

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ROBERTS C. J. AND MOSELY J.

First Appeal No. 159 of 1939, Decided on 7th August 1940, against decree of High Court, in Civil Regular No. 446 of 1932, D/- 7th November 1939.

A. Chockalingam Chettyar — Appellant

v.

A. S. P. S. K. R. Karuppan Chettyar and another — Respondents.

(a) Hindu law—Debts—Joint family business debts — Subsequent partition — Members are jointly and severally liable unless there was novation of contract.

Where a joint Hindu family incurs trade debts and is subsequently dissolved (by a partition) the liability for the debts continues against the former coparceners severally unless there is a discharge either by payment or novation. The members who seek to escape liability by alleging a novation must show that the creditor has by his conduct released them from liability: *Case law reviewed.* [P 129 C 2]

(b) Limitation Act (1908), Art. 115 — Hindu joint family firm — Person having thavani account with firm — Subsequent partition — No evidence as to novation of contract — Some of coparceners refusing to pay — Suit on thavani account—Time runs from refusal and not from partition.

A had thavani account with a joint family firm consisting of *B* and his sons. There was a partition after which *B* died. There was no evidence as to novation of the original contract. The sons refused to pay *A* whereupon he brought a suit for the amount due under the account :

Held that limitation began to run from the date of refusal and not from the date of partition.

[P 133 C 1]

Clark and Horrocks — for Appellant.

Hay and Kalyanvalla — for Respondents.

Roberts C. J.—This action was brought by the appellant against three defendants the first of whom A. S. P. S. Subramoniam Chettyar is now dead. He was the father of A. S. P. S. K. R. Karuppan Chettyar who in his turn is the father of A. S. P. S. K. R. Avudiappa Chettyar. They were all sued as members of a joint undivided Hindu family carrying on business as bankers and money lenders under the firm name and style of A. S. P. S. at Rangoon. Defendant 1 admitted liability to the plaintiff but the suit against defendants 2 and 3 was dismissed. Hence this appeal. The plaintiff's moneys were held by the firm on two separate accounts. One was a thavanai account and the plaint averred that there was on 11th March 1931 a sum of Rupees 7873-15-0 to his credit therein whilst a further sum of Rs. 860-6-0 should be added as interest up to 10th July 1932. It may be remarked that it appears from EX. 2D (1) that there was over Rs. 5000 to the plaintiff's credit in this account at the end of 1925. The other was a nadappu account (which it is agreed is the same as a current account) and the principal sum at his credit therein on 28th March 1932 was Rs. 1868 whilst another Rs. 44-10-9 should be credited as interest up to 4th August 1932. The suit was thus valued at Rupees 10,646-15-9 with claims for further interest.

The written statement of the respondents pleaded that prior to 1926 the A. S. P. S. firm held in deposit moneys belonging to the plaintiff and subsequently the joint family was partitioned and the A. S. P. S. business was allotted to defendant 1 and the moneys belonging to the plaintiff were at the direction and with the consent, knowledge and acquiescence of the plaintiff continued to be kept in deposit with the A. S. P. S. firm of Rangoon which belonged absolutely to defendant 1. It is agreed, at all events for the purposes of this case, that the joint Hindu family was dissolved in 1926. The debts now sued upon are pre-partition debts with interest credited to the plaintiff. Prior to that date the respondents would be liable to the plaintiff for whatever sums stood to his credit in these two accounts and the sole question is whether their liability has been extinguished. It is conceded that it has not been discharged by payment and therefore the question arises whether it has been discharged by novation that is to say by the substitution of some other thing for that original obligation out of which the debt arose, in circumstances which show an *animus novandi* : *see* judgment of Bacon V. C. in (1873) 16 Eq 60[1] at p. 74. In Lindley on Partnership, Edn. 10 at p. 304 it is stated :

> When, therefore, a partner has retired, and a creditor of the firm continues to deal with the continuing partners and such other persons, if any, as may have become associated with them in partnership, it is of great importance to ascertain whether the creditor has or has not accepted the new firm as his debtors in lieu of the old firm. If he has the retired partner's liability will cease; whilst if he has not it will continue.

If a joint Hindu family incurs trade debts and is subsequently dissolved, the liability for the debts continues against the former coparceners severally unless there is a discharge either by payment or novation. Though a joint Hindu family is not a partnership, 14 Rang 122,[2] the obligations of its members in this respect are admitted. From

1. (1873) 16 Eq 60 : 42 L J Ch 559 : 28 L T 331 : 21 W R 507, Wilson v. Lloyd.
2. ('36) 23 A I R 1936 Rang 160 : 162 I C 184 : 14 Rang 122, Chidambaram Chettyar v. Mutaya Chettyar.

the decision cited it is plain that a member of the family who takes an active part in carrying on the business after he has attained majority makes himself personally liable for the obligations of the business contracted after he came of age. I would also refer to 51 Mad 361[3] where all the Judges were agreed that, in the case of a family debt, partition would not by itself operate to discharge a former coparcener. The learned trial Judge has said in his judgment:

> As regards the written statements of defendants 2 and 3 it was argued that no express novation was pleaded in it, but what was pleaded was that the plaintiff knew of the partition and from his subsequent conduct it must be inferred that he looked to the deceased defendant 1 alone for payment of his dues. The plea that the moneys of the plaintiff were continued to be kept in deposit with the A. S. P. S. firm at Rangoon at the direction of and with the consent, knowledge and acquiescence of the plaintiff is clear enough. Whether it amounts to a plea of novation or not is immaterial.

In my respectful opinion this was an error. The plea in itself would not confess and avoid the plaintiff's claim unless it did amount to a plea of novation; and might in earlier days under the old system of pleading have given rise to a successful joinder of demurrer. The effect in this country would be the same, namely that the plea in the written statement if sustained is no answer to the plaint. The difficulty which I have felt is that whilst the learned Judge had before him evidence sufficient to show a novation as regards the Nadappu account, if this question had been properly raised in the pleadings, he seems to have adopted a view which would enable the respondents to succeed as regards the Thavani account even though they failed to prove novation. More than consent, knowledge and acquiescence is necessary. Thus, where a customer of a bank knowing of the death of a partner continued to receive interest on the balance of her deposit and received from the bank a fresh deposit receipt, it was held that she could still prove in an administration action against the estate of the deceased partner for the amount remaining due to her on the fresh deposit receipt: (1893) 3 Ch 426.[4] In Lindley on Partnership it is stated (p. 307):

> A creditor who treats the continuing partners as his debtors does not necessarily abandon his right to resort to a retired partner for payment.

He must do more than this to discharge a retired partner. In (1894) 2 Ch 32[5] at p. 53, Lindley L. J. said:

> First as to novation. The question whether a creditor of two or more persons has released one of them and converted the others into his sole debtors by what is called novation is a question of intention, and an intention to look to them for payment, especially when requested to do so by their co-debtor is quite consistent with an intention to look to them as a mere matter of convenience without releasing him. To succeed on this ground what the plaintiff has to prove is conduct inconsistent with a continuance of his liability, from which conduct an agreement to release him may be inferred.

In the present appeal of course it is the respondents as debtors who must show that an intention to release them can be inferred from the conduct of the plaintiff. The learned Lord Justice continued:

> Considering that in the present case the old debt was always kept separate and distinct, that no new partner became liable for it, that no new security was ever obtained for it, and that there is really nothing like proof of any intention to release the plaintiff, as distinguished from an intention to obtain payment, if possible, from his co-debtors, I am of opinion that the plaintiff fails to establish that he has been discharged by any agreement, express or implied, by the bank to look to the new firm and to the new firm only, for the payment of the old debt.

It is clear that the learned trial Judge did not really consider whether defendant 2 had been discharged by conduct from which an agreement to release him might be inferred. He stressed the fact that the partition was a genuine one, and that the plaintiff knowing of it still chose to keep his moneys with A. S. P. S. at Rangoon; and concluded that this was "in a sense" novation. He has even considered at some length whether at the partition there was provision made for the payment of the debts due by A. S. P. S. Rangoon. But the question appears to me not to be whether those jointly liable to the plaintiff made a bona fide agreement that one of them alone should pay him all; it is rather whether the plaintiff by his conduct must be held to have discharged the old contract and released the respondents from liability. This is perhaps a convenient stage at which to examine the nature of a thavanai account. In 8 L B R 526[6] a Bench of the Chief Court of Lower Burma after taking evidence on the subject expressed themselves as follows:

> The evidence as to the terms of the thavanai contract between Chetties being meagre, we called for further evidence as to these terms from Chetties unconnected with the case. A number of represen-

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3. ('28) 15 A I R 1928 Mad 657 : 110 I C 141 : 51 Mad 861 : 54 M L J 726 (F B), Subramania Aiyar v. Sabapathy Aiyar.
4. (1893) 3 Ch 426 : 63 L J Ch 35 : 3 R 712 : 69 L T 753 : 42 W R 55, In re Head.
5. (1894) 2 Ch 32 : 63 L J Ch 337 : 7 R 127 : 70 L T 427, Rouse v. Bradford Banking Co.
6. ('17) 4 AIR 1917 L B 109: 36 I C 497: 8 L B R 526, Annamalai Chetty v. Lutchman Chetty.

tatives of different firms have been examined. The evidence leaves no doubt that the relationship between the parties to a thavanai transaction is that of lender and borrower, that the loan is made for a fixed and certain period of two months at a rate of interest which is fixed weekly by members of the Chetty community for transactions which may be entered into during the ensuing week, that the lender cannot demand repayment before the end of the two months for which he has lent the money, that if he does not demand it at such time and the borrower does not elect to repay it then the loan is taken to be extended for another full two months at the rate of interest fixed by the weekly meeting of the community for the then period, and so on until the money is repaid.

It has been argued for the plaintiffs that under such circumstances each renewal must be regarded as constituting a fresh loan, and that limitation only begins to run against the lender from the start of the last renewal, but the terms on which the loan is made are those adopted initially and they apply even when nothing is said or done on either side. We cannot accede to the argument that a new contract is made at the start of each thavanai period during which the borrower holds the money lent.

There has been no contention that these observations have ever been disapproved in Burma. The only other source from which information can be obtained as to the nature of thavanai accounts in Madras, 43 I C 972[7] was a judgment of a Bench of which Sir John Wallis was a member. The question had arisen whether the depositor could get his money back at any time on demand, or whether it was only repayable at the termination of the next period of two months after the demand was made. In the first instance the transaction would be one of money deposited under an agreement that it should be payable on demand and Art. 60 would apply in questions of limitation; in the second instance it would not be payable on demand and Art. 60 would not apply. What then is the underlying notion of a thavanai contract? The Bench in that case said:

> The idea is that the money should remain until demanded and the interest should be added at the expiration of each thavanai.

In 43 Mad 629[8] Wallis C. J. referred to this earlier observation and added:

> As I understand it this means that the understanding between the parties is that at the end of each thavanai period, the interest for that period instead of being payable in cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit.

For the purpose of calculating the next quantum of interest due there is of course a fresh deposit; but this does not imply to my mind that it is a fresh contract with the money lender or bank, and indeed so to hold would be to run straight in the teeth of the decision in 8 L B R 526[6] to which I have referred. The learned Chief Justice at Madras obviously referred to the intention expressed or to be implied from the original agreement; he does not suggest for a moment that during the continuance of a relationship of this kind one should shut one's eyes to the original intention of the parties and look back no further than the latest thavanai period; much less that one should assume a succession of contracts to operate for two months only each one of which is to be discharged by the last. When one looks to see if there is a substituted agreement or novation one must seek indicia clearly pointing to the new terms which bring the parties to a new agreement on the discharge of the old contract. There must be apparent an indication of mutual intention to abandon the old contract and to proceed upon a new and well defined footing. If the depositor merely allows his money to remain in the hands of the banker he does not thereby make a fresh contract. He offers nothing and accepts nothing new. He merely continues a contractual relationship the terms of which are to be ascertained by the original agreement; that relationship is for a minimum period of two months; it is extended not through any new agreement but by virtue of the original agreement if it is not determined at the expiration of any thavanai period.

The real question here therefore is whether after the partition in 1926 the plaintiff exonerated and discharged defendants 2 and 3, or whether, continuing to deal with defendant 1, he nevertheless held them to their continuing liability under the original thavanai agreement. It must first be observed that defendant 2 stated in evidence that everything went on after the separation (or partition) in 1926 so far as outsiders could see just as it did before (p. 114). It is agreed that no one can say that any step was taken by anyone upon which the contention that there was a new contract could be founded until 7th May 1929. On that date the plaintiff himself effected a partition and wrote to the agents of the defendants to say so. This communication was in regard to the nadappu account alone. In this partition defendant 1 was a party as a member of the panchayat to the award. The letters are Exs. 8 and 9. As a result of it the joint nadappu account was closed and fresh ac-

7. ('17) 4 AIR 1917 Mad 1 : 43 I C 972, Muthiah Chettiar v. Ramanathan Chettiar.
8. ('20) 7 AIR 1920 Mad 983 : 58 I C 639 : 43 Mad 629 : 38 M L J 437, Narayanan Chetty v. Supiah Chetty.

counts were opened for each. It has been urged that defendant 2 was not thereby discharged from liability. I think there was evidence for the learned Judge to hold as he did that in relation to this matter the plaintiff looked to defendant 1 alone. I have hesitated here because novation has not been pleaded; but, in my view, the learned trial Judge might have allowed an amendment having regard to the pleadings and to the contentions raised before him; the question argued before us was whether there was a novation or not. This appears to me to be the real question which the defendants meant to raise.

We were referred to an unofficial report of a Madras case which, however, is distinguishable in that no account was closed, whereas here the plaintiff directed the whole of the contractual relationship to proceed upon a new footing. But this matter relates to the Nadappu account only. As regards the Thavanai account the respondents must still show that something was done which was inconsistent with a continuation of their liability thereunder. Proof of a substituted agreement in relation to the nadappu account does not assist the Court in arriving at a decision as to whether the Thavanai account became the subject-matter of a novation. As regards the Thavanai account the respondents seek to rely upon a letter to the plaintiff (EX. A-7) written by or on behalf of defendant 1 now deceased. It says that he will not pay any increased rate of interest at the suggestion of the plaintiff and asks the latter to withdraw his money. The plaintiff did not choose to do so, but how his abandonment of the attempt to secure higher interest, or his neglect or refusal to comply with the proposal to withdraw the money made to him by Subramoniam could be held to discharge anyone else is more than I can see.

Mr. Hay says that in fact the plaintiff received some interest over and above the rate agreed in the original contract. In support of this he produces EX. 2-C (2) which was never put to the plaintiff in cross-examination. No inference adverse to him can be drawn from it. For all we know there may be an explanation that at this period, the spring of 1930, when it has often been proved in cases in this Court and as is common knowledge in this country, there was a serious slump, the thavanai rate of interest may have been increased by the association of Nattukottai Chettyars themselves who fix the rate of interest for each succeeding thavanai period. It is evidence of no more than this: that increased interest was received, whether by way of variation of the terms of the old contract or not, no one can tell. In this connexion however, it is well to refer to 1 Str 404[9] where two persons on dissolving a partnership agreed that the joint bonds should be paid by one of them and an obligee agreed with his obligor that he should pay increased interest it was held that he did not thereby discharge the retired partner. But no reliance could, in any event, be placed on a document purporting to be evidence of a novation unless the plaintiff had the opportunity of explaining its significance : *see* 39 Bom 441[10] at page 461.

The fact that plaintiff was fully aware of the partition between defendants 1 and 2 does not with respect appear to me to warrant the importance given to it by the learned trial Judge. Though novation was not pleaded, I am satisfied that if it had been pleaded it would have been impossible for them to show (as they attempted to show in this Court) that there was any sufficient evidence of a novation having taken place. On this issue the learned Judge appears to me to have misdirected himself. The vital question was whether the plaintiff assented to a new contract so far as the thavanai account was concerned which restricted the liability to defendant 1 alone; it is not enough to say that he stood by and did nothing, nor can any inference be drawn against him from the matters to which I have alluded. The cases cited to us in (1837) 6 L J Ex 129[11] and (1834) 5 B & Ad 925[12] depended on questions of fact. In the former case, the plaintiff opened an account with Alexander & Co. from which the defendant later retired, and a new partner was introduced : it was held that there was evidence not only of the plaintiff's knowledge of the persons comprising the firm but of the adoption of those persons as his debtors (per Parke, B.). In the latter it was left to the jury whether the plaintiff agreed to accept a surviving partner as his sole creditor or not.

I think there is nothing in the point of limitation which is the only matter remaining for consideration. It is urged that since

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9. 1 Str 404, Heath v. Percival.
10. ('15) 2 A I R 1915 P C 7: 29 I C 639 : 39 Bom 441 : 42 I A 135 (P C), Bal Gangadhar Tilak v. Shrinivas Pandit.
11. (1837) 6 L J Ex 129 : 2 M & W 484 : 1 M & H 63 : 7 Car & P 746 : 46 R R 666, Hart v. Alexander.
12. (1834) 5 B & Ad 925 : 3 N & M 167 : 3 L J K B 98 : 53 R R 187, Thompson v. Percival.

there was a partition in 1926 between defendants 1 and 2 the statute of limitation would run against the latter from the date, because Art. 115 would apply, the deposit not being payable on demand and the breach of contract dating from the partition. Mr. Hay sought to say that any deposit of interest which was made at the beginning of a fresh thavanai period would be a loan to the survivor only; but this presupposes the formation of a new contract between the depositor and defendant 2; for the reasons which I have given although the deposit was with defendant 2 it was not made by virtue of a new and separable contract with him, but was part of the performance of the original contract from the obligations of which the respondents had never been released. The fact that they chose to effect a partition of the joint family in no way releases them. The breach of contract arose in my judgment in June and July 1932 when the respondents declined to pay the sums lawfully due to the plaintiff, and the suit which was filed so far back as August 1932 was well within time. The subsequent delay is of course due to the death of Subramanian Chettyar which resulted in vicissitudes with which we have no concern.

I have thus reached the conclusion that this appeal should be dismissed with costs so far as the claim for Rs. 1912-10-9 upon the nadappu account is concerned; but that it should be allowed with costs so far as it relates to the claim for Rs. 8734-5-0 upon the Thavanai account. There will accordingly be a decree against defendants 2 and 3 for this last mentioned amount with further interest at the contract rate from 10th July 1932 to the date of decree. The award of special costs in the trial Court is confirmed with the addition that the appellants are allowed the costs of junior counsel. Each party obtains these special costs to the extent to which he has been successful. It is agreed that the difference between the sums awardable as special costs results in a balance of Rs. 2829 in the appellant's favour which respondents must pay to him by way of special costs. The respondent must pay to the appellant an advocate's fee of thirty gold mohurs awarded as special costs of this appeal in addition to the costs ad valorem for one advocate.

W.N./R.K. *Appeal partly allowed.*

A. I. R. 1941 Rangoon 133

MOSELY AND SHARPE JJ.

First Appeals Nos. 183 of 1935 and 43, 75 and 80 of 1939, Decided on 15th January 1940, against decree of Dist. Court, Pyapon, in C. R. Nos. 18, 17 and 26 of 1933.

U Tun Yin and others — Appellants

v.

U Ba Han and others — Respondents.

Buddhist law (Burmese)—Widow or widower is proper person to administer estate and is entitled to letters of administration.

It may be laid down as a general rule that the widow or widower is the proper person to administer the estate. The widow or widower usually has possession of whole of the estate at the time of death of the other spouse and is in most cases entitled to the whole or a large part of it. Though it cannot be laid down as an absolute rule that in no circumstances should letters of administration be granted to any other person, it would require very special reasons to justify such a grant : 4 L B R 293, *Rel. on.* [P 134 C 1]

E Maung (1) — for Appellants.

P. K. Basu and Ba Maung, and E Hay— for Respondents 1, and 2, 3, 4 respectively.

Sharpe J. — These four appeals, which have been heard together, represent the latest stage in the protracted and complicated litigation which has followed upon the death, on 27th June 1933, of a Burmese Buddhist woman named Daw Tok. These appeals arise out of three applications for the grant of administration of her estate, which has been valued by the various applicants at something between two and three and a half lakhs of rupees. The first application, in point of time, was that filed by Ba Han on 4th July 1933; he is admittedly a nephew of the deceased (being her sister's child), but his claim to be her keittima adopted son, upon which his whole case rests is contested by his two rival claimants. The second application was that of Tun Yin, filed on 17th July 1933; he claims to be the surviving husband of the deceased, a claim which is contested by applicant 3 (whom I am about to mention) but which is admitted by Ba Han, who, however alleges that Tun Yin is not a fit and proper person to administer the deceased's estate. The third application was filed on 6th November 1933 by Ma Hla Nyun, a niece of the deceased (being her brother's child); she alleges that she is the keittima adopted daughter of the deceased a claim which is contested both by Ba Han and Tun Yin. Ma Aye Myint and Maung Hla Maung, sister and brother, respectively, of Ma Hla Nyun have also been made parties to this litigation, but neither

of them has taken any active part in it. All three applications, which were filed in the District Court of Pyapon, were made under S. 218, Succession Act, which provides that such a grant as that now applied for may be made

> to any person who, according to the rules for the distribution of the estate applicable in the case of such deceased (the section deals with Buddhist inter alios and I have already mentioned that the deceased in the present case was a Buddhist) would be entitled to the whole or any part of such deceased's estate.

In 4 L B R 293,[1] a Bench of the late Chief Court of Lower Burma held that having regard to the main features of the Burmese Buddhist law respecting the ownership of property by married couples, and the devolution of such property on the death of one of them, it may be laid down as a general rule that the widow or widower is the proper person to administer the estate. It is unnecessary for me here to discuss the law in regard to the devolution of the estate of a Burmese Buddhist married couple upon the death of one of the spouses. It is enough for me to say that I respectfully agree with the general rule laid down in 4 L B R 293[1] and which I have stated above and I will content myself with quoting one sentence from the judgment of Irwin J., in that case:

> The widow or widower usually has possession of the whole of the estate at the time of the death of the other spouse, and is in most cases entitled to the whole or a large part of it. It would be rash to lay down an absolute rule that in no circumstances should letters of administration be granted to any other person, but I am strongly of opinion that it would require very special reasons to justify such a grant.

It will thus be seen that, if Tun Yin establishes his marriage to Daw Tok, he ought to have the grant unless there are "very special reasons' to the contrary; and if he does obtain the grant, questions concerning the status of Ba Han and/or Ma Hla Nyun need not be investigated. It is conceded that, if Tun Yin was Daw Tok's husband at the time of her death, he is entitled to what is by far the greater part of the estate, notwithstanding the fact, if it be the fact, that both Ba Han and Ma Hla Nyun were Daw Tok's Keittima adopted children. For these reasons I shall deal with Tun Yin's case first. Ba Han admits that Tun Yin was Daw Tok's husband, but Ma Hla Nyun does not. Two questions therefore arise: was Tun Yin Daw Tok's husband at the time of her death? If so, are there any "very special reasons" to justify us in refusing his application? In my judgment the burden of proving his marriage with the deceased lies upon Tun Yin, but the burden of proving facts upon which to base a finding of "very special reasons" for refusing him a grant lies upon the person alleging that Tun Yin ought not to have a grant, that is to say that the burden of proof on the second question (if it arises) is upon Ba Han. [After discussing certain evidence his Lordship concluded as follows.] On the first part of the case, I find that Tun Yin was Daw Tok's husband at the time of her death, and on the second part of the case I find no evidence to justify me in saying that there are "very special reasons" for rejecting Tun Yin's application. In my judgment, therefore Tun Yin's application for the grant of administration of his late wife's estate should be allowed, on payment of the requisite court-fees and on furnishing security to the satisfaction of the District Court within such time as may be allowed by it. I think therefore that Tun Yin's appeal (that is to say, Civil First Appeal No. 183 of 1935) must be allowed with costs both here and below. In regard to the costs in this Court, I think that there should be an advocate's fee of twelve gold mohurs for the first day of the hearing before us; and advocate's fee of ten gold mohurs for each of the following three further full days of the hearing before us namely 15th, 19th and 20th December; and an advocate's fee of five gold mohurs for each of the other two days of the hearing namely 14th and 21st December, when there were no afternoon sittings of the Court. All the costs (including the advocate's fee) to be paid by Ba Han and Ma Hla Nyun in the proportions of two-fifths by Ba Han and three-fifths by Ma Hla Nyun.

I must now say a word about the other three appeals before us. Applications for grant of administration are intended to be disposed of comparatively quickly, without deciding who is and who is not entitled to share in the estate of the deceased person, and so that the estate may be speedily wound up. Here a most lamentable state of affairs is disclosed. Tun Yin himself commenced giving evidence in September 1934 and continued doing so till July 1935, during which time he was the only witness under examination. It is now over six and a half years since Daw Tok died, and only now is her estate to be administered. Having decided Tun Yin's case in the way in which I have done, it is unnecessary for me to go into the question of status (with consequent right to inherit) in regard to Ba Han and Ma Hla

1. ('07) 4 L B R 293, Ne Win v. Ma Aung Gale.

Nyun, unless or until Tun Yin fails to pay the necessary fees or furnish security.

Mosely J.—I agree with the judgment of my learned brother. We are ordinarily reluctant to interfere with decisions of learned District Judges on simple questions of fact, considering the advantage that the District Court has in having witnesses before it and forming an estimation of their credibility and seeing their demeanour; but there is no doubt that in the present case the District Judge had no warrant whatever for his finding that "there can be no doubt that a fair quantity of jewellery was left in the possession of Tun Yin," and for the finding, on which the case rested, that Tun Yin had in his possession the emerald ring in particular. The whole matter boiled down to the evidence of Maung Ba Hla, and as my learned brother has shown, that evidence did not show that the emerald ring was returned to Daw Tok before her death.

D.S./B.K. *Order accordingly.*

** A. I. R. 1941 Rangoon 135

SHARPE AND BLAGDEN JJ.

Criminal Revn. No. 317-B of 1940, Decided on 18th September 1940.

Ma Tin Tin — Applicant

v.

Maung Aye — Respondent.

** (a) Criminal P. C. (1898), S. 488 (3)—Wife applying to enforce maintenance order by single application including arrears covering several months — Defaulter can be sentenced to more than one month's imprisonment.

When a wife applies to enforce a maintenance order and in a single application includes arrears which cover several months, the Magistrate has power to sentence the defaulter to more than one month's imprisonment. He may sentence the defaulter to one month's imprisonment for each full month's arrears of maintenance and to a further month for any broken period over and above that completed number of months' arrears which falls short of another complete month: A I R 1914 L B 163, *Dissent.*; 20 Mad 3; 25 Cal 291 and AIR 1938 All 386 (F B), *Rel. on.* [P 137 C 2]

(b) Criminal P. C. (1898), S. 439—High Court, though can enhance sentence which has been wholly served, is reluctant to do so.

It is true that High Court can enhance a sentence which has been wholly served but High Court should always be reluctant to enhance the sentences of persons who do not themselves institute the proceedings which bring their cases to notice of High Court and especially reluctant to enhance the sentences of such persons when they have almost completed the term for which they have been committed. [P 138 C 1]

(c) Interpretation of statutes — Reference to previous law — Language not leading to clear conclusion between two possible meanings — Consideration of what law was before Act was passed is useful *(Per Blagden J.)*

Where the language of an Act of Parliament leads one to no clear conclusion between two possible meanings, one is often helped by considering what the law was before the Act was passed. Frequently it was defective, and one can infer that the Legislature intended to remedy the defect and construe the Act accordingly. [P 139 C 2]

(d) Interpretation of statutes — Scheduled forms are dangerous guides *(Per Blagden J.)*

Scheduled forms are always dangerous guides to the meaning of a statute. [P 140 C 2]

(e) Criminal P. C. (1898), Ss. 488 (7), 439 — Costs of revision.

The High Court has under S. 488 (7) power to make such order as to costs as it considers just in applications for revision of orders under S. 488. [P 138 C 2]

Ba Maung — for Applicant.
Rafi — for Respondent.

ORDER OF REFERENCE

Ba U J. — This is an application for enhancement of the sentence of simple imprisonment passed on the respondent under S. 488 (3), Criminal P. C. The respondent was directed by the first Additional Magistrate of Rangoon in his Criminal Miscellaneous No. 171 of 1934 to pay Rs. 40 a month for the maintenance of the applicant who is his wife. He carried out the order more or less regularly up to June 1938 when he began to fall into arrears. The arrears continued up to April 1939, whereupon the applicant applied for recovery of the arrears by arrest and imprisonment of the respondent. The respondent appeared and pleaded inability to pay. He was thereupon sentenced to suffer one month's simple imprisonment. Now, the submission made on behalf of the applicant is that the maximum imprisonment that can be imposed under S. 488 (3), Criminal P. C., is one month for each month's arrear, or a portion of each month's arrear, and as in this case the arrears are for eleven months the Magistrate should have given the respondent eleven months' imprisonment. On the other hand, learned counsel for the respondent contends that where a claim for accumulated arrears of maintenance for several months is made in one proceeding and a single warrant is issued for the levy thereof the maximum imprisonment that can be imposed is one month only. The decisions on this point are not unanimous. The earliest decision given is 9 ALL 240[1] where a Full Bench of the Allahabad High Court said:

Where a claim for accumulated arrears of maintenance for several months arising under several breaches of an order for maintenance is dealt with in one proceeding and arrears levied under a single warrant, the Magistrate, acting under S. 488, Criminal P. C., has no power to pass a heavier sen-

1. ('87) 9 All 240 : 1887 A W N 54 (F B), Queen-Empress v. Narain.

tence in default than one month's imprisonment, as if the warrant only related to a single breach of the order.

This was dissented from by a Bench of the Madras High Court in 20 Mad 3[2] where the learned Judges said :

The imprisonment provided by S. 488, Criminal P. C., in default of payment of maintenance awarded is not limited to one month. The maximum imprisonment that can be imposed is one month for each month's arrear, and if there is a balance representing the arrears for a portion of a month, a further term of a month's imprisonment may be imposed for such arrear.

The same point subsequently arose for decision before a Bench of the Calcutta High Court in 25 Cal 291[3] where the learned Judges followed the decision of the Madras High Court in preference to that of the Allahabad High Court. All these three cases were considered by a Bench of the late Chief Court of Lower Burma in 7 L B R 351[4] and the learned Judges there held that the decision given by the Allahabad High Court was correct and refused to follow the decisions of the Madras and Calcutta High Courts. The latest decision on this point is given in I L R (1938) ALL 750[5] where a Full Bench of the Allahabad High Court reviewed all the case law and said that the decision given in 9 ALL 240[1] was incorrect and that the decision of the Calcutta and Madras High Courts was correct. In view of this conflict of decisions I am of opinion that this case should be dealt with by a Bench. Place this case before the senior vacation Judge for orders.

Judgment of the Division Bench

Sharpe J. — The respondent and the applicant are husband and wife respectively, and in 1934 an order was made under sub-s. (1) of S. 488, Criminal P. C., directing the respondent to pay the applicant a monthly allowance of Rs. 40 for her maintenance. The respondent was always a bad payer under this order and in May of last year he was 11 months in arrear, so, on 4th May 1939, the applicant applied to the First Additional Magistrate, Rangoon, to enforce the order to the extent of Rs. 446, Rs. 284 of which was arrears due in a previous case, since closed, which had been launched by the applicant with a view to obtaining the payment of what was due to her under the original maintenance order, Rs. 160 of which was four months' arrears from January to April 1939, and Rs. 2 for the costs of the application. It was not till 30th May of this year that the respondent was finally brought before the First Additional Magistrate. In the months which had intervened since the application was filed on 4th May last year something like a dozen warrants for the arrest of the respondent had had to be issued. It appears that he always managed to receive informal intimation from some apparently secret source that a warrant had been issued and he kept out of the way and avoided the execution of the warrant until it had expired and, as I say, altogether something like a dozen warrants had to be issued before he was finally brought before the Magistrate.

On 4th June this year the Magistrate committed the respondent to one month's simple imprisonment in respect of the eleven months' arrears which I have mentioned. Within a week of that order being made the present application was filed in this Court, which application is one to revise the order of one month's imprisonment with a view to the respondent being committed to eleven months' imprisonment, namely, one month for each month of the arrears outstanding. On 19th June the present application for revision was admitted, but the case did not come into the list for hearing until 16th July by which time the respondent had come out from jail having served the term on one month's simple imprisonment. The case came in the first instance before Ba U J., who on 23rd August made an order under which he reviewed certain conflicting decisions on the main point in this case and in which he expressed the opinion that the case should be dealt with by a Bench and so the matter has come before us. The point in the case turns upon the construction which is to be put upon sub-s. (3) of S. 488, Criminal P. C. The two points of view advanced before us are, on the one hand, that, if there is only a single application in respect of arrears under a maintenance order which arrears cover a period of several months, the defaulter can only be imprisoned for one month, while on the other hand it is urged that where the husband is in default for several months he may be imprisoned for as many months as his wife's maintenance allowance is in arrear notwithstanding the fact that only one application is made to enforce it.

Mr. Rafi on behalf of the husband-res-

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2. ('97) 20 Mad 3 : 2 Weir 638, Allapichai Ravuthar v. Mohidin Bibi.
3. ('98) 25 Cal 291, Bhiku Khan v. Zahuran.
4. ('14) 1 A I R 1914 L B 163 : 24 I C 170 : 15 Cr L J 434 : 7 L B R 351, Zaw Ta v. Emperor.
5. ('38) 25 A I R 1938 All 386 : 176 I C 397 : 39 Cr L J 720 : ILR (1938) All 750 : 1938 A L J 565 (F B), Emperor v. Beni.

pondent has rightly pointed out that early in sub-s. (3) there appear the words "for every breach of the order" and that those words cover all the succeeding words in the sub-section down to the commencement of the proviso. But it seems to me, reading the sub-section, that for every breach of the order the Magistrate may do two things: (1) he may issue a warrant for levying the amount due in the manner provided for levying fines and (2) he may sentence such person, for the whole or any part of each month's allowance remaining unpaid after execution of the warrant, to imprisonment for a term which may extend to one month. In other words, one of the two things which he may do is that for every breach of the order he may sentence the defaulter, for the whole or any part of each month's allowance remaining unpaid, to imprisonment which may extend to one month; so that, if the arrears amount to more than one month, for the whole or any part of each month's arrears the defaulter may be imprisoned for a term up to one month. But reading the sub-section in the way Mr. Rafi asks us to do, it appears to me to result in the word "each" not having assigned to it its ordinary or indeed, any meaning. Mr. Rafi really wants us to read the sub-section as saying "for the whole or any part of any monthly allowance," which words would, if they were there, correspond with the words in sub-s. (1) of S. 488, but the words are different in the two sub-sections and I am of opinion that its usual and ordinary meaning must be given to the word "each" and, if that is done, then, so it seems to me, it follows that the defaulter may be imprisoned for a term up to one month in respect of each month's default.

That is my reading of the sub-section without reference to the authorities which have been cited before us. I think that I need only say this about all but one of the authorities were cited before us: that the High Courts of Madras, Calcutta and Allahabad all now take a view contrary to that urged upon us by Mr. Rafi and that the interpretation which I have just suggested as the correct one is the one which those three High Courts have now adopted: *see* 20 Mad 3,[2] 25 Cal 291[3] and I L R (1938) ALL 750.[5] Formerly the Allahabad High Court took the same view as Mr. Rafi has urged upon us but that view was altered by the Allahabad High Court by the Full Bench decision of five Judges in 1938 case. We were also told by U Ba Maung on behalf of the wife-petitioner, that the Lahore High Court had recently taken the same view as is now taken by Madras, Calcutta and Allahabad, but we were not referred to any decision of that Court in an authorized report. The one case about which I will say something is the case in 7 L B R 351[4] which is a decision of a Bench of two Judges of the late Chief Court of Lower Burma in 1914. In my judgment from the decision which is not binding on us, we must, with all respect, dissent.

I will not make any observations about the judgment in that case delivered by Sir Henry Hartnoll who confessed that his own view was that the meaning of the words of this sub-section is not too clear, but it is about the judgment of Ormond J. that I desire to say something. After a careful analysis of the wording of the sub-section, Ormond J. states it as his conclusion at p. 355 that he reads the words in question as meaning "for the whole amount or any part of a month's allowance remaining unpaid on each occasion after the execution of a warrant." Those are the exact words of the sub-section with the substitution of "a" for "each" which with the greatest respect to Ormond J. is, in my judgment, the very thing which must be avoided. The word used is "each" and not "a" and we must give to "each" its ordinary and usual meaning and when that is done it appears to me that the proper construction of sub-s. (3) is that when a wife applies to enforce a maintenance order and in a single application includes arrears which cover several months then the Magistrate has power to sentence the defaulter to more than one month's imprisonment. He may, as I read the sub-section, sentence the defaulter to one month's imprisonment for each full month's arrears of maintenance and to a further month for any broken period over and above that completed number of months' arrears which falls short of another complete month. That is how I read the sub-section, and the question now is what is to be done in the present case?

It is said that it is impossible for us to know for certain whether the Magistrate who made the order which is the subject-matter of this application would have sentenced the respondent to more than one month even if he had thought that he had power to do so. It is true that it does not appear from the wording of his order which is a very short one, that he did wish to do that, but from the written statement of the

respondent which has been filed before us in this Court it appears that the question of the Magistrate's power to award more than one month's imprisonment in this connexion was very fully gone into before him and it is impossible to imagine that there would have been as elaborate an argument as there was before him on this question if he had been of the opinion that, in any event, whether or not he had this power he was not going to avail himself of it. I think this is very bad case and I have no doubt that the Magistrate would have sentenced this respondent to more than one month if he had been satisfied that he had the power to do so. In any event I am prepared to say that I myself think that in this particular case one month was wholly inadequate. That being my view of the sentence imposed and of the powers of the Magistrate the question still remains whether we should now enhance the sentence or not and if so, to what extent.

It is not suggested — and I do not think that as a matter of law it could be suggested — that this Court cannot enhance a sentence which has been wholly served. But this Court should, however, in my judgment, always be reluctant to enhance the sentences of persons who do not themselves institute the proceedings which bring their cases to the notice of this Court, and especially reluctant to enhance the sentences of such persons when they have almost completed the term for which they have been committed. Here the matter goes further. The respondent has been already out from jail for about 2½ months. It is not the fault of the applicant that this case has not been disposed of till that state of affairs has been brought about. The sentence being only one of one month it was impossible that this case could in the circumstances be disposed of before the man had served his month. I fully appreciate that this case is different from cases of a strictly criminal nature where the man is sentenced to a term of imprisonment and there is no escape for him from that imprisonment, while here, whatever the sentence may be, the man can escape the whole of it by paying up what is due, but, on the other hand, I must call attention to this additional fact, that on 16th July, that is about a fortnight after he came out from the term of imprisonment imposed upon him on 4th June the respondent was again committed to serve another month for several months' arrears accumulated since May of last year when the application giving rise to the present case was filed. From this second term of one month the respondent has already been released for about a month. In all these circumstances I am certainly not prepared to revise the Magistrate's order to the extent of sending the respondent back for a further ten months in respect of the arrears for the period of eleven months down to May 1939, or, indeed, for any further substantial period at all, although it is an extremely bad case. We have now decided the principle and in future this Magistrate and others will act upon it.

U Ba Maung has told us that what his client really wishes to achieve in this case is to establish the power of the Magistrate to award, on any future occasions that may arise, more than one month if there are then more than one month's arrears outstanding, and that his client, the applicant, will be content if the order of the Magistrate of 4th June is revised to the extent of some small, or nominal, additional term of imprisonment, and I think that that is the proper course for us to adopt. The Magistrate's order will be revised to the extent that in lieu of his order dated 4th June 1940 that the respondent shall be imprisoned for one month we order him to be imprisoned for one month and one day, so that he now has the nominal term of one day still to serve. The husband-respondent has strenuously opposed the present application in revision and has filed in this Court the lengthy written-statement, as he calls it, to which I have had occasion to refer. Sub-section (7) of S. 488 gives the Court power in dealing with applications under that section to make such order as to costs as may be just and I read these words as giving us power now to make such order as to costs as we consider just, for we are a Court dealing with an application under S. 488. I think that the respondent must pay the applicant her costs of this revision applicat[illegible] which, having regard to all the circumstances of the case, including the fact that her learned advocate has had to appear and argue the case on two occasions, once before Ba U J. and once before us, should include an advocate's fee of fifteen gold mohurs as well as the other usual costs, such as the stamp on the application and the stamp on the power.

Blagden J. — Section 488 (1) and (3), Criminal P. C., so far as is material read thus:

(1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself . . . . a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a

monthly allowance for the maintenance of the wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks, fit, and to pay the same to such person as the Magistrate from time to time directs.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made.

U Ba Maung for the petitioner invites us to construe the words "each month" in subs. (3) without regard to the earlier words of the sub-section which regulate the conditions precedent to any sentence of imprisonment, and as merely regulating the amount of imprisonment that may be given on any one occasion. That, I think, is the natural meaning of those words read without the earlier words of the sub-section. If a pile of (say) buns is displayed in a shop window under the lable "one anna each" that would not mean that the shopkeeper was only prepared to sell one bun at a time. A hungry, or greedy, customer could perfectly well purchase eleven buns, provided of course he had eleven annas. Mr. Rafi for the respondent contends that the phrase "each month's allowance remaining unpaid" is the same thing as "every breach of the order." Force is lent to this argument by the fact that sub-s. (1) contemplates an order bidding a man to pay a monthly allowance. There could not be more than one breach of such an order per month, and every such breach must result in a month's allowance remaining unpaid, in whole or in part. According to the respondent's contention, the sub-section operates as follows: The order is once broken by failure without sufficient cause to pay one month's allowance in full: thereupon one warrant is to issue: if that fails to remedy the breach, imprisonment for a period not exceeding one month may be imposed. This is a strict construction, but the sub-section is penal and should prima facie be strictly construed. If the applicant's contention is well founded "every breach of the order" includes "any breaches of the order." Subject to any question of limitation, a warrant can on this theory issue for any number of months of arrears, or at all events several concurrent warrants can issue, and, in so far as it does, or they do, not produce payment, any amount of imprisonment may be imposed provided only that the number of month's imprisonment does not exceed the number of months in respect of which payment in full has not been made. This construction is favoured by S. 12, Burma General Clauses Act, 1898, which provides that

> in all Acts unless there is anything repugnant in the subject or context . . . . words in the singular shall include the plural.

Taking into account (for the moment) only the considerations I have stated the point appears to me a very nice one. My Lord suggested to Mr. Rafi that the word "each" might be construed as "each and every," but on reflection I do not myself think that (even if that be right) the matter is concluded against Mr. Rafi. Certainly it is not if you construe the word "every" as meaning "each and every." Actually, I find that in (1860) 2 De G F & J 168[6] Lord Campbell said:

> Dr. Johnson tells us in his Dictionary that 'every' was formerly spelt 'EVERICH' that is 'ever-each' and that the true meaning is 'each one of all.'

The two words are for many purposes interchangeable, and if it be true that "each" and "every" are common derivatives of the same source, and, strictly, synonymous, that distinctly favours Mr. Rafi. In these circumstances I do not think the mere language of the Code leads me to any one very clear conclusion; either contention may well be right. Where the language of an Act of Parliament leads one to no clear conclusion between two possible meanings, one is often helped by considering what the law was before the Act was passed. Frequently it was defective, and one can infer that the Legislature intended to remedy the defect, and construe the Act accordingly. The present section became effective in 1898. Its predecessor, S. 488 of the 1882 Code, was in similar terms. Before that, S. 316 of the 1861 Code, ran thus:

> The Magistrate may, for every breach of the order, by warrant direct the amount due to be levied in the manner provided for levying fines or may order such person to be imprisoned with or without hard labour for any term not exceeding one month.

In 9 ALL 240[1] the 1882 section was construed in the sense for which Mr. Rafi contends. Edge C. J. and Straight J., held that there could be (firstly) but one warrant per month (secondly) only one month's imprisonment per warrant, and (thirdly) only one month's imprisonment per sentence, whatever the number of unsatisfied warrants. I confess that I do not understand

6. (1860) 2 De G F & J 168: 29 L J Ch 595: 6 Jur 789: 2 L T (N S) 708: 129 R R 46: 8 W R 644, Brown v. Jarvis.

Edge C. J.'s difficulty about ascertaining, if there were several months arrears followed by a part payment, which monthly sum had been paid: prima facie, the first money received goes to satisfy the earliest indebtedness. Nor, even granting that the first two propositions were correct, am I satisfied that the third follows: while the reasons of Oldfield J. for his opinion that one warrant could be issued for more than one month's arrears but still that imprisonment would be limited to one month, no matter how many months of arrears were in the warrant, are to me, with all due respect, incomprehensible. Apparently, the attention of the Court was not called to the change in wording made by the 1882 Act. It may well be that the decision, if made under the 1861 Act, would have been right. But, if so, it was certainly unjust that a man who had wilfully paid nothing for a year should be liable to no greater penalty than a man who had only done so for a month. So the then law, if such it was, was defective. In that state of things the Legislature introduced words capable of meaning that as many months' imprisonment as there were defaults could be imposed, and it seems to me that the Legislature meant to remedy the possible defect in the existing law, and that we ought so to construe the Act as to make that remedy effective. Certainly we should not be doing so if we were to hold that by accepting not over a month's free, if uncomfortable, board and lodging a man can rid himself of liability to maintain his wife for a year.

Our attention has been drawn to a strong line of authorities which seem to me to show that the true interpretation of the new section is substantially that contended for by the petitioner. The first (though there it was only inferential that such was the Court's opinion) is 8 Mad 70.[7] In 20 Mad 3[2] the question whether the learned Magistrate there was right in using one piece of paper instead of 11 when he issued his warrant to levy the arrears was left open. But on the more important question whether the learned Magistrate might have awarded more than one month's imprisonment this authority is directly in the petitioner's favour : 25 Cal 291[3] was not argued and the Court's observations on these questions were obiter. But for what they are worth—and I think they are worth a lot—they are in her favour on both points. So is the decision of a Special Bench of the Allahabad High Court in ILR (1938) ALL 750,[5] though I personally think, with great respect to that Court, that Mr. Rafi was quite right in his submission that the argument founded on the form of warrant of imprisonment under S. 488, (Sch. V, Form No. 40) is fallacious. Scheduled forms are always dangerous guides to the meaning of a statute, and this particular form is really no guide at all. It ends with the words "imprisonment in the said jail for the period of ." There is nothing to show that the blank must or even may be filled by inserting a period of one month or more, and on any view of the law the period might be one month or less. The only other post-1882 authority the other way to which our notice has been called is 7 L B R 351.[4] That is directly in favour of the respondent, but it is not binding on us and I agree we would dissent from it. The headnote reads :

> The maximum sentence which may be imposed on any one occasion under S. 488 (3), Criminal P. C., is one month.

The word "occasion" is absent from the sub-section, and is a gloss on it introduced by this decision. Hartnoll, Officiating C. J., appears to me with great respect to have mistakenly identified "each month's allowance remaining unpaid" with "each complaint of non-payment." That led him into what I humbly conceive to be a fallacy. It is I think quite true that the expression "each part of the engine is in order" is equivalent to saying "all parts of the engine are in order." But it does not follow that in a context where the word "each" is clearly used distributively it should not be so interpreted. Suppose a man agrees to buy my car at the price of one anna for each part, when we meet to discuss the number of parts we find the car in perfect running order. Surely the purchaser could not successfully contend that as every part was merged in the composite whole he was entitled to take the car on payment of one anna. Nor with equal respect, can I agree with Ormond J.'s opinion that the words "for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant" are equivalent to "for the whole amount, or any part of a month's allowance, remaining unpaid on each occasion." They are in my humble opinion two totally different things. The second version entirely fails to give effect to the words "each month's allowance" and substitutes, quite arbitrarily, the words "each occasion." In view of the other authorities cited to us, apart from anything else,

7. ('85) 8 Mad 70 : 2 Weir 689, Biyacha v. Mohidin Kutti.

I think we should dissent from this decision. There remains 10 Rang 176.[8] This case was cited to us as conclusive in the respondent's favour unless we were prepared to overrule the decision of our own Court expressed by Carr J. Personally I have not the least doubt that the decision of Carr J. was right, but the case before him is I think plainly distinguishable from that before us. It was sought before him not, as here, to enhance a punishment once lawfully imposed but to impose a second punishment for an offence for which the offender had already been punished. It so happens that in the case before us the respondent has served the term of imprisonment which the learned Magistrate imposed on him, so that the practical effect of what is here sought is just the same as that sought before Carr J. This, I think, ought to make us very chary of acceding to any appreciable extent to the petitioner's request. None the less, this Court has power to enhance a sentence in a proper case and I cannot believe that that power is lost where a sentence which ought to be enhanced has, before the Court can consider the question, already been served. If, for example, a sentence of one week were imposed for an aggravated dacoity for which till recently the minimum sentence was seven years I have no doubt this Court would enhance the sentence even though the week would necessarily be up before the order could be made. The respondent's conduct under the maintenance order has been most unsatisfactory and the petitioner apprehends—I think reasonably—that it is likely so to continue. What she really wants is to get—for future reference—an authoritative ruling on the legality of a cumulative sentence of imprisonment where more than one month's arrears are unsatisfied under a warrant or warrants. Having reached the conclusion that such a sentence is lawful, and thinking that the respondent before us ought to have been sentenced to more than one month's imprisonment, I agree that the ends of justice will be served if we enhance the sentence we are asked to revise by one day and make the order as to costs proposed by my Lord.

D.S./R.K. *Order accordingly.*

8. ('32) 19 AIR 1932 Rang 93 : 137 I C 673 : 33 Cr L J 554 : 10 Rang 176, Maung Kyi Pe v. Ma Htu In.

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ROBERTS C. J. AND DUNKLEY J.

Criminal Appeal No. 963 of 1940, Decided on 26th November 1940, from order of Sess. Judge, Bassein, in Sess. Trial No. 16 of 1940.

Nga Moe — Appellant

v.

The King.

Penal Code (1860), Ss. 324, 304 and 302— Accused inflicting injury on deceased's head not likely to entail serious consequences to person in normal health—Wound healing up in hospital—Deceased getting temperature and leaving hospital against medical advice—Deceased dying of formation of abscess on brain due to his debilitated condition — Injury only remotely connected with formation of abscess—No death would have resulted had deceased stayed in hospital according to medical advice — Offence held fell under S. 324 — Use of dangerous weapon in circumstances of case held no indication of intention to cause injury likely to cause death — Offence therefore did not amount even to culpable homicide.

The injury inflicted by the accused on deceased's head was not such as to entail any serious consequences to a person in normal health. The wound had healed up at the end of seven days in the hospital but the deceased had temperature and on this account was advised to remain in hospital until temperature had subsided. Contrary to medical advice the deceased left hospital. Subsequently as a result of the formation of an abscess on the brain the deceased died. But no death would have resulted if he had not insisted on leaving the hospital against medical advice. His death really ensued because of his weak physical condition due to his suffering from chronic malaria and because his powers of resistance to infection had been much lowered by that disease. No abscess would have formed on the brain if the deceased had been in normal state of health and he died from abscess and not from the injury which had only a remote connexion with the abscess. The immediate cause of the deceased's death was his debilitated condition for which the injury was in no way responsible: [P 144 C 1]

Held that the accused was guilty of causing simple hurt, with a weapon for cutting, punishable under S. 324.

Held further that though the use of a dangerous weapon was a matter to be taken into account in deciding questions of intention, still having regard to the medical evidence as to the wound itself, it was impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not therefore amount even to culpable homicide: A I R 1937 Rang 396 (F B), *Expl. and Disting.*; AIR 1936 Rang 442, *Disting.*; A I R 1935 Rang 418 and A I R 1935 Oudh 446, *Discussed.* [P 144 C 1, 2]

Lambert, Government Advocate—for the Crown.

Dunkley J. — The appellant, Nga Moe, has been convicted of two offences by the learned Sessions Judge of Bassein, namely: (1) under S. 452, Penal Code, of having committed house trespass, having made preparation for causing hurt, on 14th January

1940, and (2) under S. 302, Penal Code, of having committed murder by causing the death of one Oo Swi on the same date. He has been sentenced to two years' rigorous imprisonment for the first offence, and transportation for life for the second offence, the sentences to run concurrently.

The facts out of which these charges arose have been clearly established by the evidence led at the trial, and the appellant, although not admitting the offences, was not able to throw any doubt on the prosecution evidence. He called no evidence in his defence. On the evening of 14th January, the appellant and a companion went to the shop of Kyaung Ngan, who keeps a shop at Shankwin village, and demanded to speak to Kyaung Ngan. He was armed with a short dah, and his companion also had a longer dah. Kyaung Ngan spoke to them on the verandah of his shop, and the appellant, who was somewhat under the influence of liquor, tried to pull him down from the verandah, but Kyaung Ngan was able to push the appellant off the verandah. Then the appellant and his companion raised their dahs in a threatening manner, and so Kyaung Ngan entered his shop and closed the doors; thereupon the appellant and his companion cut at the doors with their dahs, and the appellant called out to Kyaung Ngan to open the doors. After a short interval the appellant and his companion went away. At that time the Township Magistrate happened to be staying in the village, and so it was decided that Oo Swi, who is the nephew and employee of Kyaung Ngan, should go and make a report to the Township Magistrate. Oo Swi and his wife left Kyaung Ngan's shop by the back door and went to the house where the Township Magistrate was staying. They found that the Magistrate had gone to bed; but some of his followers were seated in the house talking to the Headman's agent and another person who had come to pay land revenue. Oo Swi and his wife came on to the verandah of this house and began to report the occurrence at Kyaung Ngan's shop to the Headman's agent, and then the appellant also came on to the verandah and delivered blows with his short dah at Oo Swi. He struck two blows and then ran away. Oo Swi was not seriously injured. He was brought to the Bassein Hospital on the next day, and the medical witness states that he had three injuries, namely (1) an incised wound, one and a half inches long by a quarter inch broad, scalp deep, on the right side of the head one and half inches above the tip of the right ear, (2) a linear contusion one and a quarter inches long on the upper part of the right shoulder blade, and (3) a superficial incised wound, one and a half inches long and one-eighth inch deep, on the lower part of the left side of his back. All these injuries were simple injuries and only the first was deserving of any attention at all. Oo Swi was detained as an in-patient in the hospital and this injury was treated. It had healed up at the end of seven days, but Oo Swi had a temperature, and on this account the doctor advised him to remain in the hospital until the temperature had subsided. The doctor now deposes that on account of this temperature there was a suspicion that sepsis might be forming underneath this injury. However, Oo Swi stated that he suffered from chronic malaria and that his fever was due to malaria, and he insisted on leaving the hospital. He was brought back to the hospital by his relatives on 5th February. He was then partially paralyzed on the left side, and there was an abscess over the seat of the first injury, which, as I have said, was healed. An operation was performed on the same day; the abscess was lanced, and about eight ounces of pus were removed, but on 7th February Oo Swi became unconscious and died. The post-mortem examination revealed that, in addition to the abscess over the seat of the injury, there was another internal abscess on the top of the head between the two lobes of the brain, and death was due to this abscess on the brain which had been caused by sepsis.

According to the medical witness, the brain abscess had formed as a result of infection spreading into the brain through the blood stream after the formation of pus under the first injury. This injury had not cut the skull at all, and there was no direct communication between the external injury and the abscess on the brain, which was not near the injury. The doctor has stated that, had the deceased stayed in hospital as advised, even if the abscess on the injury had formed, it would have been a simple matter to have cured it and no abscess on the brain would have formed at all and the deceased would have recovered. The post-mortem examination revealed that the spleen of the deceased was greatly enlarged, his liver was congested and somewhat enlarged, his heart was hypertrophied and the valves of the heart were slightly thickened, and malarial parasites were found in the blood stream. The medical witness stated that the deceased

suffered from chronic malaria, and opined that this malaria lowered his power of resistance and helped the formation of pus when there was an open wound. In his evidence before the Court of Session the medical witness said :

> Death was not due directly to the enlarged spleen or to the heart, but these contributed indirectly because they lowered the vitality and power of resistance of the deceased.

Dealing first with the first charge of house trespass, having made preparation for causing hurt, this offence was clearly established on the facts. But as nothing whatever was alleged against the previous character of the appellant, the sentence passed was, in my opinion, somewhat severe. I would uphold the conviction on this charge, but reduce the sentence to one of rigorous imprisonment for one year.

Turning now to the second charge of murder, the learned Sessions Judge rightly laid down that in order to constitute the offence of culpable homicide it is necessary, first, that the death of the deceased should have been caused by the act of the accused, and, secondly, that the accused did this act with the intention of causing death, or of causing such bodily injury as is likely to cause death. The learned Sessions Judge then came to the conclusion that the appellant caused the death of the deceased, and in coming to this conclusion he referred to the case in 1937 R L R 384[1] and 14 Rang 643.[2] He quoted a passage from the judgment of Spargo J. in 1937 R L R 384,[1] to the effect that if death results from an injury voluntarily caused, the person who caused that injury is deemed to have caused the death. With all due respect, this passage, when read alone, is too broadly stated, and it must be construed in conjunction with the facts of the particular case, which showed that the injury inflicted was of itself likely to cause death. The proposition of law laid down by the full Bench in 1937 R L R 384[1] is stated in the judgment of my Lord the Chief Justice, and is that where an injury is intentionally inflicted the defence that no proper medical treatment was administered does not exonerate the person who inflicted the injury from guilt of culpable homicide if death ensues as a natural or likely consequence. In order that the accused may be held to have caused the death of the deceased, the injury inflicted must be a proximate cause of death, and not a remote cause connected with the death by a chain of intervening events. Thus, in a case not officially reported, in 38 Cr L J 103,[3] where the injury inflicted was itself likely to cause death, but death in fact ensued as a result of gangrene induced by tying up the injury with a dirty cloth, my Lord the Chief Justice and myself, sitting as a Bench, held that the accused was guilty of murder.

On the other hand, in another case not officially reported, in 37 Cr L J 205,[4] where the injury inflicted was slight and the immediate cause of death was the effect of the village remedies applied to the injury, I held that the accused was not guilty of culpable homicide. The Chief Court of Oudh has come to the same conclusion in 11 Luck 401,[5] the facts of which case were exactly the same as those in 37 Cr L J 205.[4] In this latter case I said that in order that a person should be guilty of culpable homicide, the death of the deceased must be connected with the act of violence or other primary cause, not merely by a chain of causes and effects, but by such direct influence as is calculated to produce the effect without the intervention of any considerable change of circumstances. The principle involved is stated in Hale's Pleas of the Crown, Vol. 1, p. 428 in the following terms:

> If the wound or hurt be not mortal and it shall be made clearly and certainly to appear that the death of the party was caused by ill-applications by himself or those about him of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound, not in itself, mortal, for want of proper applications or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder or manslaughter according to circumstances, for, though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound, being the cause of gangrene or fever, is the immediate cause of the death *causa causati*.

The injury inflicted by the appellant in the present case was not such an injury as would be likely to entail any serious consequences to a person in normal health, and even in the case of the deceased Oo Swi his death would not have resulted from the injury if he had not insisted on leaving the

1. ('37) 24 A I R 1937 Rang 396 : 171 I C 574 : 38 Cr L J 1097 : 1937 R L R 384 (FB), King v. Abor Ahmed.
2. ('36) 23 A I R 1936 Rang 442 : 165 I C 245 : 37 CrLJ 1119:14 Rang 643, Emperor v. Nga San Pai.
3. ('36) 23 A I R 1936 Rang 526 : 165 I C 911 : 38 Cr L J 103, Nga Paw v. Emperor.
4. ('35) 22 A I R 1935 Rang 418 : 159 I C 1032 : 37 Cr L J 205, Nga Ba Min v. Emperor.
5. ('35) 22 A I R 1935 Oudh 446 : 157 I C 667 : 36 Cr L J 1262 : 1935 O W N 940 : 11 Luck 401, Sobha v. Emperor.

hospital against medical advice. His death really ensued because of his weak physical condition due to his suffering from chronic malaria and because his powers of resistance to infection had been so much lowered by the effects of this disease. It seems clear that no abscess would have formed on the brain if the deceased had been in a normal state of health, and he died from the abscess on the brain, not from the injury, which had only a remote connexion with this abscess. The immediate cause of the death of the deceased was his debilitated condition, for which the injury was in no way responsible. Therefore it cannot be held that the act of the appellant caused the death of the deceased. The only case in which the infliction of an injury of this nature under similar circumstances could be held to amount to culpable homicide or murder is a case falling within cl. 2 of S. 300, Penal Code, namely if the act is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. If there had been evidence to show that the appellant was at the time aware of the state of the deceased's health and therefore knew that even a slight injury was likely to result in his death, his act might have been brought under this clause, but there is no such evidence. No doubt, in his examination in the committing Court the accused did make this statement :

> The injuries received by him were not serious. He had been ailing for 15 years. Then about a year ago he was struck on the head, and on this account he became ill and died ;

but this statement is not evidence that the appellant was aware of these facts before he struck the deceased, and in making this answer he was merely repeating, in familiar language, the medical evidence which had already been given. In my opinion, the appellant cannot be held to be guilty of culpable homicide, and his offence was the offence of causing simple hurt with a weapon for cutting, punishable under S. 324, Penal Code. I would therefore set aside the conviction and sentence of the appellant under S. 302, Penal Code, and, instead thereof convict him of an offence under S. 324, Penal Code, and sentence him to undergo rigorous imprisonment for a term of two years for this offence, the sentence to run consecutively with the sentence passed on the first charge.

Roberts C. J. — I entirely agree, but as this case comes to us on a reference I wish to add a few words. It really is plain commonsense that, if a man strikes another such a blow as will not in the ordinary course of events cause more than simple hurt, he is answerable for causing simple hurt and for no more. No doubt, the natural effect of some grave wounds, if not medically treated, is septic inflammation, and if death proceeds from this in the ordinary course the offender is prima facie guilty of murder; if death is merely the likely result of such an injury it is culpable homicide. But here the dangerous condition which supervened was an unlikely consequence of a blow comparatively trivial in character, although the weapon was a dangerous one. The fact that a dangerous weapon is used is often, and may be indeed generally, a matter to be taken into account in deciding questions of intention ; but circumstances alter cases, and, having regard to the medical evidence here as to the wound itself, it is impossible to say that there was an intention to cause such injury as was likely to cause death. The offence could not therefore amount even to culpable homicide. In 1937 R L R 384[1] at p. 391 I observed that :

> Where an injury is intentionally inflicted the defence that no proper medical treatment was forthcoming does not exonerate the person who caused the injury .... from guilt of culpable homicide if death ensues as a natural or likely consequence. Such a person is deemed to have caused the death.

The learned Sessions Judge has quoted the judgment of my learned brother Spargo who whilst in no way dissenting from the rest of the Court, used the shorter phrase

> where death results from an injury voluntarily caused, the person who causes that injury must be deemed to have caused the death, although, etc.

Spargo J. doubtless thought it unnecessary to overload this particular sentence by repeating the qualification which I had already expressly made, and which is derived from the Penal Code. The death of a person must be at least a likely consequence of the injury received before S. 299 can operate at all, much less before any consideration arises as to whether the offence of murder has been committed. In the case cited, the Full Bench was not dealing with a matter in which the likelihood of death from the injuries was ever in dispute. It turns out here, though there is no evidence that the appellant knew it at the time he struck the blow, that the deceased was in such bad health as to lower his power of resistance to a septic condition; and when, owing to his state of health, this supervened, he was unwilling to exercise common prudence or

to abide by the proper remedies and skilful treatment available to him. These circumstances, in my opinion, explain the cause of death, which was due to a number of factors of which the appellant's wrongful act was only one. The learned Sessions Judge found him guilty of murder, but he cannot be said to have caused the death of the deceased so as to be guilty even of the offence of culpable homicide; for, he did nothing which was likely to cause it, or which would have done so except in conjunction with other circumstances which no reasonable man could foresee.

Again, even in order to constitute the offence of voluntarily causing grevious hurt, S. 322, Penal Code, and the explanation thereto lay down that the offender must intend or know himself likely to cause grievous hurt. There was no such intention or likelihood proved here and the offence was thus one of simple hurt. I agree in the convictions and sentences proposed by my learned brother both in respect of this offence and of the other offence of house trespass having made preparation for causing hurt.

G.N./R.K. *Order accordingly.*

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* A. I. R. 1941 Rangoon 145

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND BLAGDEN JJ.

Commissioner of Income-tax

v.

Bombay Burma Trading Corporation, Ltd.

Civil Ref. No. 4 of 1940, Decided on 9th December 1940.

* (a) Income-tax Act (1922), S. 10 (2) (viii) (a) —Construction — Extent of employee's authority or his liberal payment cannot exclude him from S. 10 (2) (viii) (a).

The Act does not deal with employees of any particular class nor contemplates the exclusion of any class. Consequently, the fact that an employee has a large measure of control over the business of the company (such as where he acts as secretary, treasurer and manager of the company) or is liberally paid cannot exclude him from the provisions of S. 10 (2) (viii) (a). [P 146 C 2; P 149 C 1]

* (b) Income-tax Act (1922), S. 10 (2) (ix) — Assessee Company's Article of Association providing for certain deductions from gross proceeds of business — Figure thus arrived at termed "net profits" — *A* acting as secretary, treasurer and manager of company — *A's* remuneration to be half of "net profits" subject to maximum of 5 per cent. of gross proceeds — Term "net profits" as used in Company's Article held not same as used in S. 87C, Companies Act, nor equivalent to 'profits or gains' under S. 10 (2) (ix), Income-tax Act — Remuneration of *A* held fell under S. 10 (2) (ix)—Company's Article held not agreement between *A* and assessee to share profits.

Article 77 of the assessee Company's Articles of Association provided that certain deductions shall first be made from the gross proceeds of the business and a figure thereby arrived at (which figure was called for the purpose of this article "the net profits of the company"), and the remuneration of *A*, the secretary, treasurer and manager shall be half of such "net profits," but that this remuneration shall be subject to a maximum of 5 per cent. of the gross proceeds of the business. The Commissioner of Income tax was of the opinion that the remuneration to be paid to *A* was an actual half share of the final net profits of the company, the other half share being distributed between the General Reserve Fund and the shareholders. Thus, he came to the conclusion that there was an agreement to share the profits between the assessee and *A*:

Held that the term "net profits" as used in Art. 77 of the Articles of Association was not identical with "profits or gains" under S. 10, Income-tax Act, nor had the same meaning as assigned to it under S. 87C, Companies Act. The remuneration of *A* was an expenditure incurred by the assessee solely for the purpose of earning profits or gains within the meaning of S. 10 (2) (ix) and therefore the assessee was entitled to a deduction of the same. The mere mode of the calculation of the remuneration could not make its deduction unlawful: (1938) 2 K B 220 and A I R 1937 P C 189, *Rel. on*; A I R 1931 PC 165, *Expl.*; ILR (1937) 2 Cal 36, *Dissent.*; AIR 1938 Lah 530, *Disting.* [P 147 C 1; P 148 C 2]

Held further that the agreement could not be treated as one to share profits inasmuch as there were two profit funds to be ascertained for two different purposes and not a joint venture and one single profit fund for all purposes which characterise an agreement to share profits. [P 148 C 1]

Clark — for Assessee.

Tun Byu, Govt. Advocate — for the Crown.

Roberts C. J.—We have been asked the following questions by the Commissioner of Income-tax on a reference made to us under S. 66 (2), Burma Income-tax Act :

(a) Whether in the circumstances of the case and in view of the provisions of S. 10, Burma Income-tax Act, the assessee Corporation has been correctly assessed on the total amount of Rupees 23,65,645 received by it as profits and gains of the business carried on by it.

(b) Whether under S. 10 of the Act, the assessee Corporation is entitled to claim a deduction from the said profits and gains to the extent of rupees 8,48,235 paid by it to Messrs. Wallace & Co., of Bombay as their remuneration in terms of Art. 77 of the Articles of Association of the Corporation on the ground that the latter sum was nothing but expenditure incurred solely for the purpose of earning the said profits or gains or on any other ground.

The relevant facts are very fully set out in the reference. A company known as the Burma Trading Co., was formed in 1863 to carry on and develop the businesss in Burma of one William Wallace. The agreement between Mr. Wallace and the company recites that Messrs. Wallace & Co., of Bombay

should be the secretaries, treasurers and managers of the company and they and their successors have remained so to this day, the name of the company having been changed in the meantime to the Bombay Burma Trading Corporation Ltd. Article 77 of the Memorandum and Articles of Association was prior to July 1896 in the following terms :

> The remuneration of the secretaries, treasurers and managers for the time being shall be and consist of a commission of 5 per centum on the gross proceeds of the business of the company.

It now, however, reads as follows :

> The remuneration of the secretaries, treasurers and managers for the time being shall be a share of the net profits of the company during any official year, such net profits to be ascertained after deducting for depreciation, wear and tear of the moveable and immovable properties, leases, live stock and other assets of the company and after deducting also such sums as the directors may carry to the fire insurance fund, underwriting fund, fixed property fund and suspense account to meet contingent depreciations or losses, equal in amount to the aggregate of the sums applied in payment of dividends to the shareholders both ordinary and preferential and of the sum set aside to the general reserve fund in each year; provided always that the sum to be received by them as remuneration in any one year shall not exceed a sum calculated at 5 per cent. on the gross proceeds of the business of the company for that year. This clause shall apply to the year commencing 1st June 1896 and subsequent years.

The Commissioner is of the opinion that the remuneration to be paid to Wallace & Co., is an actual half share of the final net profits of the Corporation, the other half share being distributed between the general reserve fund and the shareholders. Thus, he has come to the conclusion that there is an agreement to share the profits. By S. 10, Income-tax Act, tax shall be payable by an assessee under the head "business" in respect of the profits or gains of any business carried on by him. But, in order to compute such profits or gains, allowance must be made for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. It is, as the Commissioner has observed at the conclusion of para. 6 of the reference, "on the real nature of the payment that the decision must rest in this case." In the account year ended 31st May 1937, after paying salaries and allowing for depreciation, costs of buildings and machinery and other expenditure in Burma, Siam and elsewhere, there remained profits amounting to the sum of Rs. 32,21,762. Half of this sum would exceed 16 lakhs of rupees and payment of such an amount to Messrs. Wallace & Co., would therefore offend against the proviso to Art. 77. In lieu thereof payment of 5 per cent. of the gross proceeds fell due as their remuneration and it is agreed that this sum was Rs. 11,43,766. That proportion of it which relates to the undertakings in Burma and within the scope of the present assessment is Rs. 8,48,235 omitting odd annas.

What is the real nature of the payment to Messrs. Wallace & Co.? Lord Maugham has pointed out in I L R (1937) Bom 591[1] at p. 600 that if a company having made an apparent net profit of £10,000 has to pay £1000 to directors or managers as the contractual recompense for their services during the year it is plain that the real net profit is only £9000. With due deference to the Commissioner of Income-tax this dictum does not represent "a point of view." It is a recent pronouncement of the law by the highest judicial authority in the Empire, the Judicial Committee of the Privy Council. Since therefore Lord Macmillan in 54 Mad 691[2] has observed some six years previously that "profits coming into existence attract tax at that point" it is clear that he meant at the point at which they are not merely apparent net profits but real net profits. This he explained shortly afterwards in (1932) 16 Tax Cas 293[3] by saying :

> I was dealing with a case in which the obligation was, first of all, to ascertain the profits in a prescribed manner, after providing for all outlays incurred in earning them, and then to divide them.

An outlay incurred in earning the profits of the assessees here, was the remuneration payable to Messrs. Wallace & Co. It is not disputed that the Corporation could not earn profits or gains without secretaries, treasurers or managers. The Commissioner thought that Messrs. Wallace & Co., had an unusually large measure of control and that they were outside the class of employees contemplated by S. 10 (2) (viii) (a), Income-tax Act. The Act does not deal with employees of any particular class nor contemplate the exclusion of any class, and the business of the Corporation does not become an agreement to share profits unless the expenditure incurred in remunerating them falls outside the scope of the later clause, S. 10 (2) (ix), as being either capital expenditure or not incur-

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1. ('37) 24 A I R 1937 P C 189 : 168 I C 769 : 31 S L R 549 : I L R (1937) Bom 591 (P C), Indian Radio & Cable Communications Co., Ltd. v. Commissioner of Income-tax, Bombay.
2. ('31) 18 AIR 1931 P C 165 : 132 I C 619 : 54 Mad 691 : 58 I A 239 (P C), Pondicherry Railway Co., Ltd. v. Commissioner of Income-tax, Madras.
3. (1932) 16 Tax Cas 293 : 146 L T 172, Union Gold Storage Co., Ltd. v. Adamson.

red for the purpose of earning profits or gains. The limitation of the remuneration to 5 per cent. of the gross proceeds is similar to an arrangement whereby remuneration is paid on the net profits. And since January 1937 the remuneration of a managing agent of a company must be based on a fixed percentage of the net annual profits of the company, in the absence of a special resolution of the company: *see* S. 87C of the Burma Companies Act. It is clear from this section that net profits means something quite different from what is expressed in Art. 77 here.

As in (1932) 16 Tax Cas 293[3] the question is not one of the distribution of profits, but is whether a deduction for the remuneration of Messrs. Wallace & Co., has to be made in ascertaining what the profits are. We have been referred to I L R (1937) 2 Cal 36.[4] There a Bench followed the earlier dictum of Lord Macmillan with some reluctance, whilst his explanation of it in (1932) 16 Tax Cas 293[3] does not appear to have been drawn to their attention at all; and apparently what Lord Maugham has said very recently was not before them. In the following year Sir Wilfred Green, M. R., said in (1938) 2 K B 220,[5] at page 234:

> Once you realize that as a matter of construction profits may be used in one sense for one purpose and in another sense for another purpose, I think you have the real solution of the difficulties that have arisen in this case.

It has been contended that this decision is based on the English law of income-tax. Be that as it may, the taxable profits or really net profits, can only be discovered when every outlay has been provided for including expenditure out of income which has been incurred solely for the purpose of earning the profits or gains. What the Master of the Rolls said shows that it is necessary to scrutinize with care the sense in which the word "profits" or even the phrase "net profits" is employed. A sum which is to be regarded as "net profits" for the purpose of ascertaining the remuneration of the agents of a firm is only "net profits" in the different sense of being taxable, when such remuneration can be classed as outside the scope of expenditure from income which is incurred solely for the purpose of earning profits. An illustration of this class of case is afforded by 6 I T R 243.[6]

It is unfortunate that Art. 77 uses the words "net profits" because when one looks at the clause which states how they are to be acsertained, one finds that the outlay incurred annually (for the purpose of earning the profits) in remunerating the managing agents is omitted. Various deductions are made from the gross profits and the residue is called net; but it is still not the real net profit or taxable profit. One further deduction has yet to be made, and before this is done, the sum arrived at is only the net sum to be halved for the purpose of the deduction. If it is more than 5 per cent. of the gross proceeds, the latter amount is, by virtue of the agreement, to constitute the remuneration of Messrs. Wallace & Co. Once this deduction has been made the real net profits come into existence and attract tax at that point.

In view of the remarks of Lord Macmillan in (1932) 16 Tax Cas 293[3] and of the later authority to which I have just referred which was not the subject of an appeal to the House of Lords, I must respectfully dissent from the decision in I L R (1937) 2 Cal 36.[4] 6 I T R 243[6] is as I have already remarked, clearly distinguishable from the present case since there were additional ginning charges for cotton which were not in the nature of an outlay made solely for the purpose of profits but were based upon profits to be ascertained after the normal charges had been paid; and thus constituted an arrangement whereby to this extent the cotton ginning company entered upon an enterprise in the nature of a joint adventure with the assessee. In my opinion the first question propounded to us should therefore be answered in the negative and the second in the affirmative. The Commissioner of Income-tax must pay the costs of this reference. Advocates fee, 20 gold mohurs. The deposit will be refunded.

Dunkley J.—I am of the same opinion. The case for the Crown is that the agreement between the assessees and Wallace & Co., is an agreement for the division of profits; but in my view, when it is conceded, as it is necessarily conceded, that the remuneration of Wallace & Co., under the original Art. 77 of the Articles of Association of the assessee company was not in the nature of a division of profits, the case for the Crown falls to

4. ('37) I L R (1937) 2 Cal 36 : 41 C W N 46, Nrishingha Chandra Nandi, *In the matter of*.
5. (1938) 2 K B 220 : 107 L J K B 472 : 21 Tax Cas 528 : 159 L T 365 : 82 S J 75 : (1938) 1 All E R 149, British Sugar Manufacturers, Ltd. v. Harris.
6. ('38) 25 A I R 1938 Lah 530 : 181 I C 462 : I L R (1938) Lah 426 : 40 P L R 228 : (1938) 6 I T R 243, Gopinath Vir Bhan v. Commissioner of Income-tax, Punjab.

the ground. The original Art. 77 provided that the remuneration of Wallace & Co., should be a commission of 5 per cent. on the gross proceeds of the business of the assessees. The new Art. 77 provides that certain deductions shall first be made from the gross proceeds of the business and a figure thereby arrived at (which figure is called for the purpose of this article "the net profits of the company"), and the remuneration of Wallace & Co., shall be half of such "net profits" but that this remuneration shall be subject to a maximum of 5 per cent. of the gross proceeds of the business. The character of the remuneration therefore remains unchanged, but the method of calculation has been altered so as to give an additional advantage to the assessees. The "net profits" calculated under Art. 77 are not the same as the taxable profits for the purpose of the Income-tax Act.

I am, with the greatest respect, content to adopt the language of the Master of the Rolls in (1938) 2 K B 220[5] at p. 235, and it seems to me clear beyond any reasonable doubt that the agreement between the assessees and Wallace & Co., is merely an agreement under which, before ascertaining the divisible profits of this company at all, Wallace & Co., are to receive upon a particular conventional basis a commission sum as remuneration for their services. In order that it can be held in any case that there is an agreement for division of profits, there must be some sort of joint venture and there must be one single profit fund for all purposes, not two profit funds to be ascertained for different purposes. The latter is clearly the case here. There is one profit fund which has to be ascertained for the purpose of calculating the remuneration of Wallace & Co., and another and quite distinct profit fund to be ascertained (after the remuneration of Wallace & Co., has been fixed) for the purpose of calculating the profits divisible among the share-holders and or allocated to the general reserve fund. First an account has to be taken in accordance with the provisions of Art. 77, in order to ascertain what is to be paid to Wallace & Co. When that sum has been ascertained, that account ceases to have any further usefulness. Then a second account has to be taken in order to ascertain the divisible profits, and in this second account the sum payable to Wallace & Co., must of necessity appear as an expenditure, or as the Commissioner of Income-tax prefers to call it, a "revenue charge."

In the order of reference (para. 6) it is admitted that the calculations must be made in the above way when Wallace & Co., are entitled to the maximum remuneration permissible under Art. 77, but the Commissioner appears to think that no such double calculations are necessary, and that there is only one single profit fund, when the remuneration of Wallace & Co., does not reach the maximum. How such a fortuitous circumstance can alter the whole character of the payment to Wallace & Co. I am unable to understand. It would seem that the Commissioner has fallen into error because he has failed to bear in mind the clear distinction between "net profits" as defined in Art. 77 and "profits or gains" upon which income-tax is payable under S. 10, Income-tax Act. Clearly, the remuneration of Wallace & Co., is an expenditure incurred by the assessees "solely for the purpose of earning such profits or gains" within cl. (ix) of S. 10 (2), Income-tax Act.

Blagden J.— I entirely agree, and will only add two observations of my own. The first is that income-tax is not assessable on that part of a subject's gross revenue which the subject chooses to term his "net profits." It is assessable on his "profits or gains" whatever they may be. The two things are not necessarily identical. Admittedly, in arriving at his "profits or gains" i.e., assessable income, the subject is entitled to deduct from his gross revenue, amongst other things, expenditure solely incurred for the purpose of earning profits, or gains, and no method of computing that expenditure can make its deduction unlawful. I also, think that this is made abundantly clear by the judgments of the English Court of Appeal —particularly, if I may say so, that of the Master of the Rolls —in (1938) 2 K B 220[5] at p. 235.

My only other observation is this : It is quite plain that the assessee Corporation remunerated Messrs. Wallace & Co., solely for the purpose of earning profits or gains. The firm of Wallace & Co., did not hold its peculiar position as part of the price exacted by William Wallace on his sale of his business to the Corporation in 1864. The predecessors of the present firm (i.e., those who then carried on business as Wallace & Co.) were not the vendors, nor can they have acquired that position as the nominees of the vendor since they already held that position before the sale. Given that such is the case, I think Mr. Clark is quite right in his submission that there is no

difference for this purpose between the position of a managing agent and that of a managing director. The extent of the authority, or the liberality of the remuneration, of either is in my view completely irrelevant to the present questions.

G.N./R.K. *Answer accordingly.*

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DUNKLEY AND BLAGDEN JJ.

Shwe Hla U and others
v.
The King.

Criminal Appeals Nos. 676 to 679 of 1940, Decided on 11th September 1940, from order of Subdivisional Special Power Magistrate, Buthidaung, in Criminal Regular Trial No. 37 of 1940.

(a) Penal Code (1860), S. 397 as amended by Burma Act, 4 of 1940—Amending Act, 4 of 1940 does not apply to offences committed before 16th March 1940—Accused committing offence before 16th March 1940 but convicted after that date—S. 397 as it existed before amendment applies: Criminal Appeal No. 551 of 1940, *OVERRULED.*

The provisions of Burma Act 4 of 1940 have no application to offences which were committed before 16th March 1940. Consequently, S. 397 as it existed prior to its amendment must be applied in a case where the accused committed the offence before 16th March 1940, but was convicted after that date, inasmuch as it is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a criminal Court. The trial, ending in a conviction, is merely the means whereby a Court of Criminal Justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. This is made clear by S. 5, General Clauses Act : Criminal Appeal No. 551 of 1940, *OVERRULED;* Criminal Appeal No. 441 of 1940, *Approved;* (1891) 60 L J Q B 206, *Rel. on.* [P 150 C 1]

(b) Interpretation of Statutes — Retrospective effect — Statute is not retrospective in absence of express provision.

No statute is retrospective unless the statute itself expressly states that it is to be so. [P 150 C 1]

U Ni, Government Advocate — for the Crown.

Dunkley J. — The four appellants were convicted by the Sub-divisional Magistrate of Buthidaung of the offence of robbery, under S. 392, Penal Code, and in the case of three of the appellants the learned Subdivisional Magistrate held that S. 397 of the Code was applicable and therefore the minimum sentence which could be passed on them was seven years' rigorous imprisonment. The remaining appellant was sentenced to two years' rigorous imprisonment. The robbery occurred on 17th February. On that date the informant Abdul Motaleb and his friend Abdul Hussein went out to buy a cow. Abdul Motaleb had a sum of Rs. 15 with him for this purpose. They went to Bookay village and enquired of several persons whether there was a cow for sale, but they were unable to purchase one. Abdul Motaleb showed his money to these persons and there is no doubt that he had a sum of Rs. 15 on his person at that time. When the two were returning home, on the way they were attacked by robbers and Abdul Motaleb's coat was torn off his body and taken away by the robbers but was subsequently found, and it was then discovered that the three five-rupee notes had been taken out of the pocket. Both Abdul Motaleb and Abdul Hussein made their report immediately to the headman, and there can be no doubt about the fact that Abdul Motaleb was robbed as they stated. In the report to the headman they said that they had recognized three of the robbers, namely, Shwe Hla U, Shwe Pru Aung and Shwe Tha Aung. Certain persons who came to their assistance said that they had seen the robbers running away and they also recognized these same appellants. Appellant 4 Kyaw Zan Hla was subsequently identified by Abdul Motaleb and Abdul Hussein at an identification parade. There was therefore ample evidence to support the convictions of these appellants. The appellants in their defence set up alibis, but the trial Magistrate has given full consideration to the defence evidence and has shown that all the appellants were unable to bring evidence to prove that they were in other places at the time when this robbery occurred. There can be no doubt that the appellants have been rightly convicted. The Magistrate held that the appellant Shwe Hla U was armed with a local made gun, that Shwe Pru Aung was armed with a dagger and that Kyaw Zan Hla was armed with a dah, and his findings in this respect are justified by the evidence.

These appeals have come before a Bench on a certificate of my brother Mackney. On 16th March 1940, Burma Act 4 of 1940 came into force, and by this Act the words "uses any deadly weapon" were deleted from S. 397, Penal Code. My brother Mackney has taken the view that this Act is applicable to all offences, whether committed before or after 16th March, the trial of which did not conclude until after 16th March, and that therefore S. 397 had no application in the present case. His view is that the punishment for an offence under the Penal Code is not incurred until conviction and a person

incurs no punishment who is not convicted. My brother Mosely took the opposite view in Criminal Appeal No. 441 of 1940 and, with the greatest respect, his reasoning cannot be assailed. The matter is concluded by the provisions of S. 5, General Clauses Act of 1898. Section 5 says this :

> Where any Act repeals any enactment hitherto made or hereafter to be made, then unless a different intention appears the repeal shall not . . . . . (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed.

In Criminal Appeal No. 551 of 1940, my brother Mackney, referring to Burma Act 4 of 1940, said this :

> There is nothing in this Act to suggest that the amendment shall not affect the law previously applying to offences already committed but not tried.

This observation is contrary to the fundamental principle of the interpretation of statutes, that no statute shall be deemed to have retrospective effect unless the statute itself expressly states that it is to be retrospective. The view which Mackney J. is now expressing appears to be that the punishment for an offence is not incurred until the offender is convicted at a trial; but that view is, in my opinion, contrary to the plain meaning of almost any section of the Penal Code. Opening the Penal Code at random, I happened to open it at S. 302, which says that whoever commits murder shall be punished with death or transportation for life and shall also be liable to fine. The same form of words will be found in any section of the Penal Code which imposes a punishment. It is by reason of the commission of the offence that the offender incurs the punishment and not by reason of his conviction by a criminal Court, and clearly that must be so, for it would be illogical to hold that an offender is liable to punishment only by reason of his conviction for the offence and not by reason of his commission of the offence. The trial, ending in a conviction, is merely the means whereby a Court of criminal justice ascertains that the accused is the person who has incurred the punishment by having committed the offence. In my opinion, the provisions of Burma Act 4 of 1940 have no application to offences which were committed before 16th March 1940. Consequently, the provisions of S. 397, as they existed prior to the amendment, are applicable to the appellants Shwe Hla U, Shwe Pru Aung and Kyaw Zan Hla. The appellants have been rightly convicted. The sentences passed upon Shwe Hla U, Shwe Pru Aung and Kyaw Zan Hla were legally necessary and the sentence passed on Shwe Tha Aung erred, if at all, on the side of leniency. These appeals are therefore dismissed.

Blagden J. — On the merits, or rather demerits, of this appeal I agree with my Lord's judgment and have nothing to add. As to the effect of the partial repeal of S. 397, Penal Code, as from midnight of 15th/16th March 1940 on the liability of those who at that moment were guilty but as yet unconvicted of offences under that section the judgment of my brother Mosely in *Maung Nge* v. *Regem* (Criminal Appeals 441/442 of 1940) seems to me clearly right. Section 5, Burma General Clauses Act, 1898, omitting words which are for this purpose immaterial provides as follows :

> When any Act repeals any enactment . . . . the repeal shall not . . . . affect any . . . . punishment incurred in respect of any offence committed against any enactment so repealed or . . . . any . . . . legal proceeding . . . . in respect of any such punishment . . . . . and . . . . . any such punishment may be imposed as if the repealing Act had not been passed.

In the view of Mackney J. as I follow it, a criminal as such has not incurred a punishment unless and until he is sentenced. By committing a crime he has only "incurred" risk of punishment. But if this be right the last 16 words which I have read are absolute nonsense. A particular punishment for a particular crime can only be "imposed" once, and if a punishment be not "incurred" till it is "imposed" and had been "imposed" before the repealing Act it would be idle to provide that the same punishment might be "imposed" again after the repealing Act. Therefore, as I see it, the Legislature has clearly distinguished between the 'incurring' and the 'imposing' of a punishment. The language of the section makes it plain that they are two different things taking place at two different times. Obviously, the incurring of the punishment must precede its imposition, and granted that a punishment is "imposed" when sentence is passed, the only preceding events which could possibly be said to constitute its "incurrence" are (a) the making of the charge ; or (b) the arrest of the accused or (c) the committing of the crime. A man does not incur a punishment merely by being arrested for or charged with a crime, for either event is quite consistent with his innocence. Moreover, if a punishment is "incurred" at the moment of arrest or charge before a repealing Act, though sentence is not passed till after it, what is the position if, between these two events, the

culprit escapes and is at large at the moment the repealing Act comes into force? The only possible conclusion is that a punishment is "incurred" when a crime then involving that punishment is committed. This conclusion is in my opinion favoured by considerations alike of common sense and of English grammar and I am not surprised to find that there is authority for it.

Section 38(2) of the English Interpretation Act, 1889 is in terms in all material respects identical with the section now under consideration. In (1891) 60 L J Q B 206,[1] the applicant had been adjudged bankrupt under the Bankruptcy Act, 1883 shortly before the coming into force of the Bankruptcy Act, 1890. The latter repealed the provisions of S. 28 of the 1883 Act, relating to a bankrupt's discharge and substituted other provisions less favourable to bankrupts. Cave J. held that the applicant's right to apply for his discharge was a right acquired at the moment he became bankrupt though it was not then immediately effective, and consequently, that the application fell to be decided under the repealed section 28 of the 1883 Act and not under the new S. 8 of the 1890 Act. If a right is "acquired" when it vests, even though it may never become exercisable, a punishment is in my opinion "incurred" when a person becomes legally liable to that punishment even though he may escape detection, escape arrest, or escape conviction. I, therefore, share the opinion of Mosely J. and of my Lord.

G.N./R.K. *Appeals dismissed.*

1. (1891) 60 L J Q B 206 : 63 L T 709 : 39 W R 271 : 8 Morrell 11, Ex parte Raison.

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* A. I. R. 1941 Rangoon 151

DUNKLEY AND SHARPE JJ.

U Aye — Plaintiff

v.

U Chit Hlaing — Defendant.

Civil Regular No. 289 of 1940, Decided on 8th February 1941.

* (a) Government of Burma Act (1935), S. 25 (1) (a) — Commission in Reserve of Officers is office of profit.

Commission in the Reserve of Officers is "an office of profit under the Crown" within S. 25 (1) (a): A I R 1941 Rang 49, *Rel. on.* [P 152 C 2]

(b) Government of Burma Act (1935), S. 153 (b) — Commission in Reserve of Officers is not whole-time office remunerated either by salary or fees.

A Commission in the Reserve of Officers is "an office which is not a whole-time office remunerated either by salary or by fees," within the provisions of S. 153 (b). [P 152 C 2]

* (c) Government of Burma Act (1935), Ss. 25 and 27 — Speaker cannot declare that seat of member has become vacant.

Section 27 (3), Government of Burma Act, expressly prohibits the speaker from deciding whether a member has, since his election, become disqualified for being a member under S. 25 (1) (a), with the result that his seat has become vacant under S. 24 (2) (a). The punishment of declaring his seat vacant cannot be inflicted on a member of the Legislature until a competent Court has found him to be disqualified under S. 25 (1) : A I R 1941 Rang 49, *Foll.* [P 153 C 2; P 154 C 1]

(d) Government of Burma Act (1935), Ss. 41 and 42—Ordinances under—Ordinance No. VII of 1939, Ordinance No. V of 1940 and Act No. XII of 1940, have no retrospective effect.

Ordinance No. VII of 1939, Ordinance No. V of 1940 and Act No. XII of 1940 cannot have any retrospective effect so as to protect a member from a disqualification which he had incurred prior to their coming into force : A I R 1941 Rang 49, *Foll.* [P 153 C 1; P 155 C 1]

(e) Government of Burma Act (1935), S. 153 —Meaning of S. 153, explained.

The true meaning of S. 153 is that in regard to being chosen as and thereby becoming members of the Legislature at the first elections, persons who would, but for S. 153, be disqualified under S. 25 (1) (a) by reason of their holding an office of profit under the Crown should not be disqualified if the office which they hold falls within cl. (b) of S. 153. Hence a person who at the time of the first elections, in November 1936, held an office of profit under the Crown, which was of the class mentioned in cl. (b) of S. 153, was by reason of the provisions of that section not disqualified for being elected as a member of the Legislature at those first elections or from subsequently sitting as a member of either chamber of the Legislature, as elected at those first elections, so long as he continued to hold that same office. [P 156 C 1, 2]

(f) Interpretation of statutes — State of law existing at time of coming into force of an Act can be considered.

It is not out of place, when construing the Act, to consider the state of the law existing at the time it came into force : (1880) 5 Q B D 217, *Rel. on.* [P 158 C 1]

U E Maung (1) — for Plaintiff.

U Kyaw Din — for Defendant.

Dunkley J.—This suit has been brought by U Aye, a Member of the House of Representatives, against U Chit Hlaing, who is the Speaker of the House, for a declaration that at all material times he has been and still is a Member of the House. This is regrettably the third suit of this nature which has been brought in this Court during the last year. The defendant has quite unnecessarily put the plaintiff to proof of all the facts set out in the plaint, but the facts relating to the plaintiff's appointment as a Commissioned Officer in the Reserve of Officers and his promotion in the cadre of the Reserve of Officers and the retention of his

commission have been proved by the plaintiff by producing the relevant notifications, which appeared in the London Gazette, the Gazette of India and the Burma Gazette, his commission, granted by His Majesty on 22nd April 1932, appointing him an officer of the forces of the Crown, and the relevant extract from the Army Orders. U Aye was first appointed a Lieutenant in the Army in India Reserve of Officers with seniority to rank from 12th April 1930, by Army Department Notification No. 146, dated 19th March 1932. This appointment was made, as usual, subject to His Majesty's approval, which was signified by the subsequent grant to him of a King's Commission. He was promoted Captain with effect from 12th April 1934, by Army Department Notification No. 292, dated 2nd June 1934. By Defence Department Notification No. 1325, dated 7th October 1939, of the Government of India, U Aye was permitted to relinquish his commission, subject to His Majesty's approval, with a view to his being granted a Commission in the Army in Burma Reserve of Officers, the resignation to take effect from 4th September 1939, and by Government of Burma (Defence Department) Notification No. 521, dated 10th November 1939, U Aye was, subject to His Majesty's approval, appointed an officer with the rank of Captain, with effect from 4th September 1939, in the Army in Burma Reserve of Officers.

The approval of His Majesty was signified in the London Gazette of 19th January 1940, and, by a notification appearing therein, U Aye was permitted to relinquish his Commission in the Army in India Reserve of Officers with a view to being granted a Commission in the Army in Burma Reserve of Officers, with effect from 4th September 1939, and was appointed to be a Captain in the Army in Burma Reserve of Officers with effect from the same date. U Aye was permitted to relinquish his commission in the Army in India for the express purpose of being appointed to a similar rank in the Army in Burma. It is not now contended that his appointment in the Army in Burma was a new appointment. It is conceded that what took place was a mere transfer of U Aye's services from the Army in India to the Army in Burma, and that U Aye consistently held the same King's Commission and the same appointment under that commission from 12th April 1930, until he was ultimately permitted to relinquish his commission on 27th August 1940. Clearly that must be so, for there was never any hiatus in U Aye's service and he was serving under the same commission throughout this period.

But, however, that may be, although the permission to relinquish his Commission in the Army in India Reserve of Officers was antedated to 4th September 1939, apparently so as to give U Aye a certain seniority in the Army in Burma Reserve of Officers, that relinquishment of his commission did not and could not take effect until it was officially permitted by the notification dated 7th October 1939. Until that date U Aye was still an Officer of the Army in India Reserve of Officers. I do not discuss the effect of the reservations in the notifications of the Government of India and the Government of Burma, that this commission was permitted to be relinquished and this appointment was made "subject to His Majesty's approval," because for the purpose of this case it is not necessary to do so. On 18th September 1939, U Aye was called up for duty and on the 19th assumed full-time duty as an Officer of His Majesty's Army in Burma. Up to 18th September 1939, U Aye had drawn no pay as an Army Officer, but he had held the same appointment in the Reserve of Officers without break from 12th April 1930, until that date, and continued to hold it until he was ultimately permitted to relinquish his commission.

It is conceded on behalf of the plaintiff that U Aye's Commission in the Reserve of Officers was "an office of profit under the Crown" within S. 25 (1) (a), Government of Burma Act. It would be useless to contend to the contrary in view of the judgment of my learned brother in Suit No. 103 of 1940,[1] which on this point was confirmed on appeal, in First Appeal No. 113 of 1940.[2] It is also conceded on behalf of the defendant that a Commission in the Reserve of Officers is "an office which is not a whole-time office remunerated either by salary or by fees," within the provisions of S. 153 (b), Government of Burma Act. These are the facts on which the decision of this suit must be based, and on the pleadings the following issues arise: (1) Was the plaintiff elected as Member of the House of Representatives at the General Election held in 1936? (2) Was the plaintiff, at the time of his said election, disqualified for being chosen

1. *Reported in* ('41) 28 AIR 1941 Rang 5 : 193 I C 91, U Lun v. U Chit Hlaing.
2. *Reported in* ('41) 28 AIR 1941 Rang 49 : 193 I C 114 : 1941 R L R 101, U Lun v. U Chit Hlaing.

as a Member of the House of Representatives, by reason of his holding an office of profit under the Crown in Burma? (3) Has the plaintiff at any (and if so, what) time since his said election become disqualified for being a Member of the House of Representatives, by reason of his holding an office of profit under the Crown in Burma? (4) Did Ordinance No. VII of 1939, or Ordinance No. V of 1940, or Act No. XII of 1940 have any retrospective effect so as to protect the plaintiff from any disqualification which he might otherwise have incurred? (5) Was the defendant acting in excess of his powers as Speaker of the House of Representatives in expressing the opinion that the plaintiff was no longer a Member of the House and asking the plaintiff to withdraw from the House? (6) Is the plaintiff entitled to a declaration as prayed?

I propose to deal first with issue 5. This necessitates a reference to the proceedings in the House of Representatives on 26th August and 2nd September 1940. The printed records of the proceedings of these two days have been put in evidence by consent. On 26th August, a member named U Hla Pe rose and made the following statement:

Sir, I regret that I have to rise again on this point, because as things stand our honourable and gallant Captain U Aye, who is a personal friend of mine, is a total stranger to this House.

The plaintiff at once asked whether U Hla Pe was raising a point of order and submitted, what is undoubtedly correct, that the question raised was not a point of order. So far as I can discover from the record of the proceedings, he received no ruling from the Chair on his submission, but it is clear from the subsequent proceedings that the defendant did, in fact, treat the matter raised by U Hla Pe as a point of order, which it was not. Many members spoke on 26th August and the matter was adjourned until 2nd September, when the plaintiff made a statement and there was further discussion. Fortunately, it is unnecessary for me to make detailed comment on the course of the proceedings in the House of Representatives, but the result was that on 2nd September the defendant delivered himself of the following statement:

He himself admits that he is not a Captain. But still he holds the rank of Captain and now he has resigned that post. Therefore he has disqualified himself by his own action. As pointed out by the Honourable Advocate-General and as pointed out by other authorities, I may have no authority to declare his seat vacant. Section 24 (2) says that if a Member of either Chamber becomes subject to any of the disqualifications, his seat shall thereupon become vacant. I do not declare so any more. But, in my opinion, Honourable U Aye is no longer a member of this house and he is asked to withdraw from this Chamber.

The plaintiff, with the perfect discipline of a late Officer of His Majesty's Army, then withdrew from the House. It was a mere quibble for the defendant to say in his statement, "I do not declare so any more." He, as Speaker, has no authority to order a member to withdraw from the Chamber save for gross disorderly conduct (Rule 48 (2) of the Rules of Procedure for the House of Representatives). In making this statement and requesting the plaintiff to withdraw, he both expressly and by implication, decided that the plaintiff was disqualified for being a Member of the House of Representatives, under S. 25 (1) (a), Government of Burma Act, and that his seat had become vacant under S. 24 (2). It is not for me to criticise the conduct of the defendant as Speaker of the House of Representatives, but I am bound to say—and I say it with the greatest regret—that in making this decision the defendant, unfortunately encouraged by some Members of the House, was guilty of a deliberate and flagrant disobedience of the law.

It is trite to say that the laws of this country are made by the British Parliament and the local Legislature, of which the House of Representatives forms an important part, and that it falls to this Court, as the highest judicial tribunal in the country, to interpret those laws, and that the laws, as made by the British Parliament and the local Legislature and interpreted by this Court (unless and until that interpretation is declared by a superior judicial authority to be wrong), form the law of the land, which every inhabitant is bound to obey so far as it affects him. The judgment of my learned brother in Suit No. 103 of 1940,[1] to which the defendant was a party, was delivered on 23rd August 1940. The defendant was aware of this judgment when the present matter was raised by U Hla Pe on 26th August, and copies of the judgment were in the hands of the defendant and all Members of the House of Representatives when further discussion took place on 2nd September. In that judgment, my learned brother held that S. 27 (3), Government of Burma Act, expressly prohibits the Speaker from deciding whether a member has, since his election, become disqualified for being a member under S. 25 (1) (a), with the result that his seat has become vacant under S. 24 (2) (a),

(and his decision on this point was subsequently confirmed in First Appeal No. 113 of 1940[2]). My learned brother's interpretation of the law was and still is binding on the defendant, who, nevertheless, once again decided the very matter which he knew that he was prohibited by law from deciding.

I notice that in the course of the proceedings in the House on 2nd September the defendant asked the learned Advocate-General the question. "If neither the Speaker nor the House has power to declare a seat vacant then who is to declare the seat vacant?", and in the course of his argument before us the learned counsel for the defendant repeated this question rhetorically and laid particular stress on the phrase, occurring in S. 24 (2), Government of Burma Act, "his seat shall thereupon become vacant." There is no special virtue in the word "thereupon." A person who commits a criminal offence thereupon becomes liable to the punishment prescribed for that offence, but the punishment cannot be inflicted until he has been found guilty of the offence by a competent Court: *See* 1941 R L R 58.[3] Similarly, the punishment of declaring his seat vacant cannot be inflicted on a member of the Legislature until a competent Court has found him to be disqualified under S. 25 (1), Government of Burma Act. We were further asked in argument, "What is the Speaker to do when a Member raises a matter of this kind (as U Hla Pe did)?" It is not the function of this Court to answer such a question until it arises in a specific case, but learned counsel for the defendant answered it himself in the course of his argument. He was referring to other disqualifications, under clauses (b), (c) and (e) of S. 25 (1), and he said this:

> If a Member produces in the House an order of a competent Court declaring any other member to be of unsound mind, or an order of the Insolvency Court adjudicating him insolvent, or the judgment of a criminal Court convicting and sentencing him to two years' imprisonment or more, surely the Speaker on the production of this order or judgment can declare that member's seat to be vacant and request him to leave the House.

Of course he can, because when a member has been declared to be disqualified for being a member by a competent Court, the declaration that his seat is vacant and his exclusion from the House is a mere point of order, which it is specifically within the province of the Speaker to decide, under S. 32 (2), Government of Burma Act, and the Rules of Procedure for the House of Representatives. Plainly, when U Hla Pe raised this matter, the defendant should have said to him, "The matter which you raise is not a point of order and neither the Speaker nor the House has authority to decide it." Thereupon, U Hla Pe, if so advised, might have taken the necessary steps to obtain a declaration of a competent Court that the plaintiff was disqualified for being a member under S. 25 (1) (a), and, armed with the decree of the Court, he could have raised the question of the exclusion of the plaintiff from the House and of a declaration that his seat was vacant on a point of order.

Rule 51 of the Rules of Procedure for the House of Representatives figured prominently in the discussion in the House of Representatives on 2nd September and it has been mentioned in the course of argument before us, and therefore it behoves me to make some reference to it, although this is essentially a domestic matter and does not concern the Courts. This rule says that a member, while speaking for the purpose of taking part in debate, moving a motion or asking a question, must not refer to any matter on which a judicial decision is pending. On 2nd September First Appeal No. 113 of 1940[2] was pending in this Court, and one of the principal points for decision in that appeal was whether the Speaker of the House of Representatives or the House of Representatives itself, has power to decide that a Member has incurred disqualification under S. 25 (1), Government of Burma Act and that his seat has, in consequence, become vacant under S. 24 (2). The same point was the main point for decision in the plaintiff's matter, as raised by U Hla Pe, and consequently the discussion in the House of Representatives on U Hla Pe's motion, or point of order, or whatever it might be, was in direct contravention of R. 51. This was pointed out by the learned Advocate-General and certain Members of the House during the discussion on 2nd September, but it seems that the defendant is, when so minded, just as ready to jettison the Rules of Procedure for the Chamber over which he presides, as he is to flout the judgment of this Court. Clearly, issue 5 must be answered in the affirmative.

I now turn to issue 4. Ordinance No. VII of 1939, Ordinance No. V of 1940 and Act XII of 1940, are in precisely similar terms. They are designed to remove in the case of a member of any of His Majesty's Forces the disqualification which such member would otherwise incur under S. 25 (1) (a), Govern-

3. ('41) 28 A I R 1941 Rang 149: 1941 R L R 58, Shwe Hla U v. The King.

ment of Burma Act. It has been decided in First Appeal No. 113 of 1940[2] that neither these Ordinances nor this Act can have any retrospective effect so as to protect a member from a disqualification which he had incurred prior to their coming into force. That decision of the Appellate Bench is binding on us, and consequently the answer to issue 4 must be in the negative. But it is necessary to observe that it was held by the Appellate Bench in the same appeal that these two Ordinances and Act 12 of 1940 follow one another in point of time without any break, and consequently they are effective to prevent the disqualification of any member of the Legislature by reason of his being a member of any of His Majesty's Forces from the date on which Ordinance VII of 1939 came into force, i. e., midnight of 17th/18th September. Referring to the statement of facts with which I began this judgment, the plaintiff was completely protected from the date on which he was called up for duty.

In proof of the fact that he was elected as a Member of the House of Representatives at the general elections held in 1936, the plaintiff has produced the Burma Gazette Extraordinary of 26th November 1936, in which it is stated that the plaintiff, U Aye, had been declared elected as a Member of the House of Representatives for the Insein South (General Rural) Constituency. A general election for the House of Representatives was held in November 1936, under the Government of Burma (Commencement and Transitory Provisions) Order of 1936, which was made by His Majesty in Council under S. 159, Government of Burma Act, and was dated 3rd July 1936. By clause 3 of this order, it was provided that certain provisions of the Government of Burma Act should come into force at once for the purpose of enabling the elections for the House of Representatives to take place at any time after the end of September 1936. These provisions were, so far as they are material to the present case, Part III of the Act, which includes Ss. 24 and 25, and S. 153 thereof. These elections, held in November 1936, were the first elections under the Government of Burma Act of persons to serve as members of the Legislature.

Finally, I propose to consider issues 2 and 3 together. At the time of his election the plaintiff was holding an office of profit under the Crown in Burma. He had held that office since April 1930, and he continued to hold it until August 1940. He was therefore prima facie disqualified, under S. 25 (1) (a), Government of Burma Act, for being chosen as and for being a Member of the House of Representatives. But under this clause of S. 25 the kind of office which carries with it this disqualification is an office of profit "other than an office declared by Act of the Legislature not to disqualify its holder." The office which the plaintiff held was declared by Ordinance VII of 1939 and the succeeding Ordinance V of 1940 and Act 12 of 1940 not to disqualify its holder. Ordinance VII of 1939 came into force at midnight of 17th/18th September 1939, and by virtue of S. 41 (2), Government of Burma Act, it had the same force and effect as an Act of the Legislature. Hence, it follows that if the plaintiff was not disqualified prior to midnight of 17th/18th September 1939 he was certainly not disqualified at any subsequent date or time.

Now, I have already held that from 12th April 1930, until 7th October 1939, at the earliest, the plaintiff held without intermission one and the same office of profit under the Crown. Therefore it is only necessary to consider whether the holding of this office prior to 18th September 1939, disqualified him. The plaintiff was elected at the first elections of persons to serve as members of the Legislature, and he has, since November 1936, continued to serve as a Member of the House of Representatives by reason of that election. So far as the first elections are concerned, the operation of S. 25 (1) (a), Government of Burma Act, is considerably restricted by the provisions of S. 153 of the Act. This section reads as follows :

> *153.* For the purposes of the first elections of persons to serve as members of the Legislature, no person shall be subject to any disqualification by reason only of the fact that he holds —
>
> (a) . . . .
>
> (b) an office which is not a whole-time office remunerated either by salary or by fees.

It is conceded on behalf of the defendant, and indeed it is quite obvious, that the office which the plaintiff held at the time of the first elections, and continued subsequently to hold, was an office falling under cl. (b) of this section. Therefore the plaintiff was not subject to any disqualification "for the purposes of the first elections of persons to serve as members of the Legislature." The construction which learned counsel for the defendant seeks to put on this provision is that it means merely that in spite of his holding this office the plaintiff could be nominated and could stand for election and could be chosen as a Member of the House of Representatives, but the provision con-

ferred no further immunity, and on his being chosen S. 25 (1) (a) would come into unrestricted play and he would be disqualified for being a member of the Legislature.

Apparently, the first suggestion was that a person in this position, who was chosen to be a member, would have after being chosen a sort of *locus pœnitentiæ* in which to decide whether he would give up his "office of profit" and serve as a member of the Legislature, or would retain his office and be disqualified for being a member; but when it was pointed out to learned counsel that, under S. 24 (2), if a member becomes subject to any of the disqualifications mentioned in S. 25 (1) his seat shall thereupon become vacant, he contended that the candidate in question must make his election before he was chosen, and unless he effectively resigned his office before the returning officer declared him to be elected he would be disqualified for being a member of the Legislature. In support of this argument he relied on the distinction between S. 153, which refers only to "elections of persons to serve," and S. 25 (1), which refers both to being chosen as a member and to being a member.

In my opinion, this construction reduces the provisions of S. 153 to a complete nullity, and fails to give any force at all to the word "any" in the phrase "no person shall be subject to any disqualification." The true meaning of S. 153 is that in regard to being chosen as and thereby becoming members of the Legislature at the first elections, persons who would, but for S. 153, be disqualified under S. 25 (1) (a) by reason of their holding an office of profit under the Crown should not be disqualified if the office which they hold falls within cl. (b) of S. 153. A valuable guide to the correct construction of S. 153 is the law in regard to this matter which was in force in Burma, under the Government of India Act, until 1st April 1937. Section 80B of that Act provided that an official should not be qualified for election as a member of a local legislative council, and if any non-official member of a local legislative council accepted any office in the service of the Crown in India, his seat on the council should become vacant; and the expressions "official" and "non-official" were defined in S. 134 (7) of the Act as follows :

> The expressions 'official' and 'non-official' where used in relation to any person, mean respectively a person who is or is not in the civil or military service of the Crown in India : provided that rules under this Act may provide for the holders of such offices as may be specified in the rules not being treated for the purposes of this Act, or any of them, as officials.

Rules, called "the Non-official (Definition) Rules," were framed under this proviso by the Governor-General in Council with the sanction of the Secretary of State in Council, and were published in Notification No. 614G, dated 9th September 1920, of the Government of India. Rule 2 of these rules laid down that the holder of any office in the civil or military service of the Crown should not be treated as an official for any of the purposes of the Government of India Act if the office was one which did not involve both of the incidents that the incumbent was a whole-time servant of Government and was remunerated either by salary or fees. Clause (b) of S. 153, Government of Burma Act, follows the wording of this rule, and consequently persons of the class mentioned in clause (b) were non-officials under the Government of India Act, and could be elected to and sit as members of the Legislative Councils. Section 25 (1) (a), Government of Burma Act, enacts that only such an office of profit shall disqualify its holder as is not declared by Act of the Legislature not to disqualify its holder, and, to my mind, it is clear that in enacting S. 153 Parliament intended that the state of things which existed in the Legislative Council, which has been replaced by the two Chambers of the present Legislature, should continue in the first Legislature elected under the new Act, so as to give an opportunity to the new Legislature to decide what part-time offices of profit were of such a kind that they ought not to disqualify their holders.

Hence, I am of opinion that a person who at the time of the first elections, in November 1936, held an office of profit under the Crown, which was of the class mentioned in cl. (b) of S. 153, was by reason of the provisions of that section not disqualified for being elected as a member of the Legislature at those first elections or from subsequently sitting as a member of either Chamber of the Legislature, as elected at those first elections, so long as he continued to hold that same office. Learned counsel for the plaintiff desires to give an even wider interpretation to the provisions of S. 153. He has contended that it saves from disqualification a person elected as a member of the Legislature at the first elections, who subsequently to those elections accepts an office of profit under the Crown which falls within the scope of cl. (b) of S. 153. But I am not pre-

pared to accept that contention, and it was quite unnecessary for learned counsel to go so far, as the plaintiff continuously held the same office of profit under the Crown from a time long before the first elections of November 1936, until he was protected by Ordinance No. VII of 1939. The answers to issues 2 and 3 must therefore be in the negative. Consequently, the plaintiff is entitled to the declaration which he seeks in this suit, and the suit is decreed with costs. Having regard to the complexity of the question of law involved in this case, and to the time occupied in proving matters of fact which might well have been admitted by the defendant in his pleading, we fix the advocate's fee at twenty gold mohurs with an additional fee of five gold mohurs for each of the appearances on 4th February and to-day.

Sharpe J.—The importance of this case and the conflict which, it seems, the Speaker of the House of Representatives unhappily seeks to create between himself and this Court, rather than any difficulty in the legal questions involved, lead me to think it fit to express my own judgment separately, although, after having had the benefit of reading the judgment which my Lord has just delivered, I feel that the subject is well-nigh exhausted. The case came before us, sitting as a Bench on the Original Side of this Court, by order of the Chief Justice acting on a report, which I made to him under Original Side Rule 4 of Chap. 1, that it appeared to me, after hearing the learned advocates on both sides, that this suit could be more advantageously heard by a Bench of two Judges than by a single Judge. By his written statement the defendant put the plaintiff to the proof of almost every fact alleged in the plaint; he even averred that he did not know whether the plaintiff was duly elected to the House of Representatives at the General Election of 1936. But at the hearing before us his learned advocate did not really contest the facts alleged by the plaintiff, and confined his argument to the two points which I shall presently mention.

Subject to certain necessary war-time modifications contained in the India and Burma Emergency Provisions Act, 1940 (which are immaterial for the purposes of the present case), the present constitution of Burma is to be found in the Government of Burma Act, 1935 (to which I will hereafter refer as "the Act"), and that constitution, as is well known, took effect from 1st April 1937, the day on which Burma was separated from India, of which it was theretofore a province. By that constitution Burma was given its own Legislature (Part III of the Act), one of the two Chambers of which is known as the House of Representatives [sub-s.(1) of S.7 of the Act]. Sub-sections (1) and (2) of S. 25 of the Act provide, inter alia, that a person shall in certain circumstance be disqualified for being chosen as, and for being, a member of either Chamber. One of the circumstances in which a person is disqualified is if he holds any office of profit under the Crown in Burma, other than an office declared by Act of the Legislature not to disqualify its holder.

Naturally it was impossible for the Legislature to declare by an Act what offices of profit under the Crown in Burma should not disqualify their holders for being chosen as, and for being, members of the two Chambers until the Legislature had been brought into being, and the Legislature could not be brought into being until the first elections of persons to serve as members of the Legislature had been held. It was necessary therefore that some special provision should be made to deal with the particular disqualification mentioned in sub-s. (1) (a) of s. 25 of the Act until such time as the Legislature could itself deal with it. In my judgment, s. 153 was inserted in the Act for the express purpose of permitting persons who were qualified to sit in the then existing Governor's Legislative Council to sit in either Chamber of the newly created Legislature, until the latter had had an opportunity of declaring by an Act under sub-s. (1) (a) of S. 25 of the Act, which (if any) offices of profit should not disqualify their holders from sitting in either of its Chambers.

Obviously, everything necessary in order to bring the new constitution into being on 1st April 1937 could not all be done on that day. For instance, if no steps could be taken until that day to call for nominations of candidates for the newly created House of Representatives, some considerable time would necessarily elapse before a duly constituted Legislature could be convened; yet the new constitution gave the Legislature of Burma the power (within certain limits) to make laws for Burma with effect from the date of its separation from India. In order to overcome such difficulties and to make the whole scheme work effectively as from "Separation day" a proviso was added to S. 159 of the Act which enabled His Majesty in Council to bring the Act into operation piecemeal, and one of the steps which His Majesty

in Council took, to that end, was to direct that the House of Representatives should be summoned to meet for their first session not later than 11th February 1937 [*see also*, sub-s. (3) of S. 18 of the Act], and that the first elections for the House of Representatives might take place at any time after the end of September 1936. [Clause 4 and sub-cl. (1) (a) of cl. 3 of the Government of Burma (Commencement and Transitory Provisions) Order, 1936.] It is not, I think, out of place, when construing the Act, to consider the state of the law existing at the time it came into force. As Lush J. said in (1880) 5 Q B D 217[4] at p. 240 :

> While we are to collect what the Legislature intended from what it has said, we must look not at one phrase or one section only but at the whole of the Act, and must read it by the light which the state of the law at the time . . . . throws upon it.

An examination of the position immediately prior to separation will, I think, make it abundantly clear that what I have called, above, the express purpose of S. 153 was in fact the object which the Imperial Legislature had in mind when it included that section in the Act. The following persons were amongst those who, at that time, were not disqualified for being members of the Governor's Legislative Council, namely (a) Non-official Members of the Governor's Executive Council ("Non-official" meaning a person who was not in the civil or military service of the Crown in India), (b) Ministers, and (c) Officials who were not whole-time Government servants remunerated either by salary or by fees. [This was the combined effect of sub-ss. (1) and (2) of S. 47 and of sub-s. (1) of S. 73, Government of India Act, 1915, and of sub-s. (1) of S. 4, sub-ss. (1) and (4) (d) of S. 7, S. 14, sub-s. (1) of S. 15, S. 44 and S. 46, Government of India Act, 1919 (which, by sub-s. (1) of S. 1 and S. 45 of and by Part I of Sch. 2, Government of India Act, 1919, are now known as sub-ss. (1) and (2) of S. 47, sub-s. (1) of S. 73, sub-s. (1) of S. 52, sub-ss. (1) and (4) (d) of S. 72A, S. 80B, sub-s. (1) of S. 52A, S. 129A and S. 134, respectively, of the Government of India Act); the Non-official (Definition) Rules; and the Government of India (Home Department) Notification No. 225 (Public), dated 7th October 1921.] It is precisely these same persons whose disqualification is, for the purposes of the first elections of persons to serve as members of the new Burma Legislature, expressly removed by S. 153 of the Act. In other words, these persons, who were not then disqualified for serving as members of the Governor's Legislative Council, were not to be disqualified for the purposes of the first elections under the new constitution. When once the new Legislature had been summoned after the first elections had been held, it would be open to it to declare, and it would have the opportunity of declaring, by an Act under sub-s. (1) (a) of S. 25 of the Act, which, if any, of these persons who were expressly exempted by S. 153 from the disqualification which would otherwise attach to them, should be similarly exempted from disqualification at subsequent elections of persons to serve as members of the Burma Legislature.

Now to turn to the facts of this present case: From a date some years prior to the passing of the Act the plaintiff held His Majesty's Commission as an officer in the Army in India Reserve of officers. Owing to the separation of Burma from India he resigned his commission in the Army in India Reserve of Officers and was granted, with effect from the date of such resignation, a Commission in the Army in Burma Reserve of Officers, and he was still holding that commission when, on 18th September 1939, he was, consequent upon the outbreak of the present war, called up for full-time duty. Prior to his being so called up his appointment had only been a part-time one. The learned advocate for the defendant has conceded that the plaintiff has continuously held the same appointment throughout, and he has also conceded that, by virtue of his commission in the Reserve of Officers, the plaintiff is within the ambit of cl. (b) of S. 153 of the Act. It is said, however, on behalf of the defendant, that S. 153 only covers the first nominations and the first elections of persons to serve as members of the new Legislature and that the "suspension" of the disqualification does not go beyond the actual moment of election. That is the first of the two points raised on behalf of the defendant.

I am, however, quite unable to entertain it. For reasons which have already appeared, I think that the "suspension" of these particular disqualifications continues after the actual moment of election, and right on until either the particular seat is vacated under S. 24, or the Chamber is dissolved by the Governor under sub-section (2) (c) of S. 18 or by effluxion of time under sub-s. (4) of S. 18 of the Act, whichever first happens. In my judgment the Imperial Legislature intended, by S. 153 of the Act that to begin

4. (1880) 5 Q B D 217, South-Eastern Railway Co. v. Railway Commissioners.

with, no new disqualifications should be imposed—it is not uninstructive to compare the other disqualifications in S. 25 of the Act with those obtaining in regard to the old Legislative Council under R. 5, Burma Electoral Rules, made under sub-s. (4) (d) of S. 72A, Government of India Act; there is hardly any difference between the two — and that anyone in the position of the plaintiff, who would, as the holder of a part-time office, have been qualified to sit in the old Legislative Council, should not be disqualified, not merely for being nominated and elected to, but also for being and serving as a member of the new Legislature provided he was elected at the first elections.

The second point taken on behalf of the defendant was this: that he has not "declared" the plaintiff's seat to be vacant. In both Suit No. 103 of 1940[1] and also in Civil Reg. Suit No. 104 of 1940,[5] I held that the defendant, as Speaker of the House of Representatives, has no power to declare whether any particular seat in that Chamber is vacant or not, and on appeal in First Appeal No. 113 of 1940[2] that decision of mine was upheld. I gave my decisions in those two cases on 23rd August last; three days later the question was raised in the House of Representatives as to whether the present plaintiff's seat had not become vacant. The matter was debated in the Chamber that day and again on 2nd September, upon which latter day — only ten days after the decision of this Court in the previous cases — the defendant concluded a very long debate by the following observations from the chair :

'. . . . . .in my opinion he' (that is, the present plaintiff) 'has been disqualified from being a member of this House . . . . . As pointed out by the Hon'ble Advocate-General and as pointed out by other authorities' (that is a reference, and, I venture to think, a not very courteous reference, to this Court) 'I may have no authority to declare his seat vacant. Section 24 (2) says that if a member of either Chamber becomes subject to any of the disqualifications, his seat shall thereupon become vacant. I do not declare so any more. But in my opinion, the Hon'ble U Aye is no longer a member of this House and he is asked to withdraw from this Chamber.'

The plaintiff thereupon withdrew. To my mind it is impossible to say that the defendant was then doing or saying anything different from what he had done in the cases of U Lun and U Ba Maung and which he had been told by this Court he had no power to do. There is absolutely no distinction between what the defendant did and said on the two occasions, and in my judgment what the defendant did on 2nd September in reference to the present plaintiff rendered him amenable to the jurisdiction of this Court in precisely the same way as his previous actions and words had done in the cases of U Lun and U Ba Maung. I agree with my Lord that the plaintiff should be granted a declaration that he was on 28th November 1940 (the date of the institution of the present suit) a member of the House of Representatives of the Burma Legislature and that he was not then disqualified for being a member thereof. The plaintiff must have his costs and I agree that the advocate's fee should be as proposed by my Lord.

D.S./R.K. *Suit decreed.*

5. *Reported in* ('41) 28 A I R 1941 Rang 27, U Ba Maung v. U Chit Hlaing.

A. I. R. 1941 Rangoon 159

ROBERTS C. J. AND DUNKLEY J.

U Zawtipala — Appellant

v.

U Thatdama — Respondent.

First Appeals Nos. 49 and 50 of 1940, Decided on 16th December 1940, against decrees of Dist. Court, Bassein, D/- 16th January 1940.

(a) Res judicata — Suit for possession by monk as representative of Sanghas of kyaungdaik dismissed — Subsequent suit as presiding monk is not res judicata.

Where a suit for possession by a monk as representative of the Sanghas of kyaungdaik is dismissed, a subsequent suit by him for possession in the capacity of presiding monk is not res judicata. [P 160 C 2]

(b) Buddhist Law (Burmese)—Ecclesiastical law — Election of presiding monk of Sanghika kyaungdaik — Majority of Sangh expressing its desire to elect certain monk as presiding monk —Election is valid.

Where the majority of the Sangha did desire that a monk should be elected presiding monk of Sanghika kyaungdaik and so expressed their will at the meeting, then it must be held that he was validly elected. [P 161 C 2]

(c) Buddhist Law (Burmese)—Ecclesiastical law — Death of owner of poggalika property — Effect.

On the death of owner of poggalika property the property becomes sanghika property : A I R 1937 Rang 76, *Rel. on.* [P 162 C 1]

(d) Buddhist Law (Burmese)—Ecclesiastical law—Deed by owner of poggalika property declaring property to be dwithantaka property of himself and other person requires registration.

A deed by the owner of poggalika property declaring the property to be dwitantaka property of himself and other person is the creation of an interest in immovable property and therefore it must be registered under the provisions of S. 17 (1) (b), Registration Act : A I R 1918 L B 11, *Rel. on.* [P 162 C 1]

U Hla Tun Pru — for Appellant.

U Ba Sein for U E Maung (1) — for Respondent.

Roberts C. J. — One U Pandaisa, who died on 16th October 1933, was the presiding monk of the Nigyawdagon Nyaungbintha kyaungdaik in Bassein town. The kyaungdaik contains eight buildings in all, and U Pandaisa exercised control as presiding monk over all these buildings. In association with this kyaungdaik there were a number of holdings of paddy land, which had been dedicated (by five different registered deeds) by certain pious persons for the use and enjoyment of the monks residing therein. During his lifetime U Pandaisa managed these paddy lands, leased them to tenants and received the rents and profits thereof. After his death, disputes arose between the two parties to these appeals regarding the right of control of the kyaungdaik and the paddy lands, and it appears that the appellant, U Zawtipala, has obtained possession of the paddy lands and that the respondent, U Thatdama, has obtained possession of the kyaungdaik, with the exception of one building which is occupied by a few followers of U Zawtipala. The suits out of which these two appeals arise, being Nos. 8 and 9 of 1939 of the District Court of Bassein, were cross-suits brought by U Zawtipala and U Thatdama against one another. Suit No. 8 of 1939 was a suit by the respondent, U Thatdama, against the appellant, U Zawtipala, for recovery of possession of the paddy lands already mentioned and the mesne profits thereof. U Thatdama sued in the capacity of presiding monk of the Nigyawdagon Nyaungbintha Kyaungdaik, or, in the alternative, a member of the Sangha "suing on behalf of the whole body of Sanghas in general," and the suit was brought as a representative suit, under the provisions of O. 1, R. 8, Civil Procedure Code.

There was a previous suit between them for the possession of these paddy lands, being No. 3 of 1937 of the Assistant District Court of Bassein, out of which First Appeal No. 14 of 1938[1] of this Court arose. That suit was a representative suit in which U Thatdama sued as the representative of the Sanghas of the Nyaungbintha Kyaungdaik. His suit was unsuccessful because it was held by this Court on appeal that neither he nor U Zawtipala was the presiding monk of the kyaundaik in succession to U Pandaisa and that a suit for possession of the paddy lands brought in a representative character as representative of the residents of the kyaungdaik alone was incompetent. It is now urged on behalf of the appellant that suit No. 8 of 1939 of the District Court of Bassein, out of which first appeal No. 49 of 1940 arises, was res judicata by reason of the decision in suit No. 3 of 1937 of the Assistant District Court of Bassein and First Appeal No. 14 of 1938[1] of this Court. So far as the suit in the District Court was brought as a representative suit and the respondent claimed to be entitled to a decree for possession of the paddy lands "suing on behalf of the whole body of Sanghas in general," clearly the claim is res judicata for this is a claim which might and ought to have been made in the prior suit; but, so far as his claim was based on the assertion that he is the presiding monk in succession to U Pandaisa of this kyaungdaik, no question of res judicata arises. In First Appeal No. 14 of 1938[1] it was held at that time the respondent was not the presiding monk, and judgment in that appeal was delivered on 28th July 1938. Now, in the present suit, the respondent claims to have been elected the presiding monk of the kyaungdaik at a public meeting held on 3rd October 1938, i. e., he alleges that he has now acquired the status which gives him the right of action, which status he lacked in the former suit.

Suit No. 9 of 1939 of the District Court, out of which first appeal No. 50 of 1940 arises, was a suit by the appellant against the respondent for a declaration of ownership of the kyaungdaik and the buildings therein and the paddy lands, and for possession of those of these properties of which the appellant was out of possession at the time when the suit was brought. The appellant claims to be the sole owner in his own right of all these properties. The two suits were heard together and the evidence was recorded in suit No. 8 of 1939. The pleadings in that suit were extremely verbose and contained many unnecessary and untenable allegations of fact and much recital of evidence. The plaint consisted of 24 paragraphs and the written statement contained 15 paragraphs. In that suit the learned District Judge framed no less than 16 issues, which really comprised 20 questions for decision. In suit No. 9 of 1939 the pleadings were somewhat shorter, and the issues framed were only eight in number and were all included in the issues framed in suit No. 8 of 1939. Yet the points on which the parties were at issue in both suits were few and defined, and became quite plain when the respondent had been examined. The learned

1. *Reported in* ('39) 26 A I R 1939 Rang 21 : 180 I C 210, U Zawtipala v. U Thatdama.

District Judge would have been well advised if at that stage he had re-settled the issues. As it is, his judgment is overburdened with discussions of evidence and arguments which were really unnecessary to the decision of the suits.

The respondent's case is that the nyaungbintha kyaungdaik is sanghika property and that the paddy lands are aramika sanghika, dedicated by various donors at different times to the kyaungdaik for the use and enjoyment of the monks residing therein. He claims to be entitled to possession of the paddy lands as presiding monk of the kyaungdaik in succession to U Pandaisa. The appellant's case is that the kyaungdaik and the paddy lands were the poggalika property of U Pandaisa, that by a dwithantaka deed, made on 14th May 1932, by U Pandaisa before his death, he became joint owner with U Pandaisa of all this property and, consequently, on the latter's death they all became his sole poggalika property. During the course of the hearing of these appeals, we framed four questions which we consider to be the only questions which it was necessary to answer for the decision of both suits. They are as follows: 1. Is the respondent entitled to maintain suit No. 8 of 1939 (a) as presiding monk of the kyaungdaik, or (b) as representative of the sangha? 2. Were the properties, sanghika properties, or were they the poggalika properties of U Pandaisa? 3. If the properties were poggalika, did the appellant become the joint owner thereof with U Pandaisa before the latter's death? 4. Did the appellant become the presiding monk of the kyaungdaik by reason of the memorandum executed by U Pandaisa on 14th May 1932, (Ex. 5 in suit No. 3 of 1937 of the Assistant District Court)?

As regards the first question, we have already pointed out that it is not now open to the respondent to sue as a representative of the sangha. His right of action as presiding monk of the kyaungdaik is based on the averment in para. 18 of the amended plaint, to the effect that he was elected as presiding monk of this kyaungdaik at a public meeting convened for the purpose at the kyaungdaik on 3rd October 1938. The evidence which he has called concerning this meeting shows that at least 500 pamphlets in Burmese, setting out the object of this meeting, namely the election of the respondent as presiding monk, were distributed in Bassein, inviting members of the sangha and members of the public to attend this meeting, and that at least 30 members of the sangha and 50 members of the public were present at the meeting. The presiding monk of the Tagaung monastery, U Thumana, presided at this meeting, and the respondent was elected as presiding monk of the Nyaungbintha Kyaungdaik without a dissentient voice. The appellant does not seek to say that this testimony is not true, but he sets up that the election was invalid by reason of its informality. It is said that sufficient public notice of the meeting was not given, that the opponents of the respondent were not invited to attend, that no proper chairman of the meeting was elected, that no resolutions were put to the meeting, and no objections were asked for. So far as the objection that the supporters of the appellant were not specially invited is concerned, they were resident in the kyaungdaik at the time and their assertion that they did not know of this meeting until after it had been held cannot be believed. Clearly, they must have known of the meeting and they could have been present if they had desired to do so. They designedly stayed away and, even if they had been present, they are so few in number that their votes could not have affected the result. The contention of the appellant in regard to this election is concluded against him by our judgments in 1940 R L R 97.[2] As we said in the course of our judgments

> . . . an impossible position would arise if the will of the majority should not prevail, for a single monk by merely absenting himself from the election could render it impossible for a new presiding monk of a sanghika kyaungdaik to be elected;

and further

> . . . the only question which it is necessary to ask is this : Has there been a real, valid and true election by the Sangha as such ? They may elect, as it seems to us, in any way they choose, and the only matter about which we must be satisfied is whether the election was a real election by the whole of the Sangha.

That is, if we are satisfied that the majority of the Sangha did desire that the respondent should be elected presiding monk and so expressed their will at this meeting, then it must be held that the respondent was validly elected. The meeting was no hole and corner business; it was publicly advertised throughout the town of Bassein and every person, either monk or layman, who was really interested in this election, had an opportunity to attend. It is idle for the appellant and his supporters to say that they did not attend because their attendance would not have been welcome to the other

2. ('39) 26 AIR 1939 Rang 385 : 185 I C 483 : 1940 R L R 97, U Thuseitta v. U Eindawuntha.

side; that is always the position in which an opposition minority finds itself. The desire of the Sanghas that the respondent should succeed U Pandaisa as presiding monk of the kyaungdaik was clearly and unequivocally expressed at this meeting, and therefore it must be held that he was validly elected. This disposes of the first question. As regards the second question, the learned District Judge has found that all the kyaungs within the kyaungdaik except one were aramika sanghika property and that all the paddy lands except one were also aramika sanghika. He has further held that the remaining kyaung and remaining piece of paddy land were the poggalika property of U Pandaisa. He has carefully considered the evidence and no sufficient reason for not accepting his findings has been adduced in argument on behalf of the appellant. It is unnecessary for us to consider this question in detail, because, even if all the properties were the poggalika property of U Pandaisa, it must be held that he made no valid transfer of any of these properties during his lifetime and, consequently, on his death all the properties became sanghika in view of the decision in 14 Rang 566.[3]

In regard to the third question, the case of the appellant is based on the memorandum dated 14th May 1932 to which we have already referred. This memorandum sets out that five kyaungdaiks and all the property connected therewith, belonging to U Pandaisa of Nyaungbintha kyaungdaik, are declared to be the dwithantaka properties of U Zawtipala. The memorandum is signed by U Pandaisa and U Zawtipala. The learned District Judge held that it was inadmissible in evidence and did not affect the properties by reason of the fact that it was not registered. It is urged on behalf of the appellant that a dwithantaka deed of this description does not require registration, but no authority for this astonishing proposition has been cited, and the case in 9 L B R 258[4] is directly opposed to this contention. Clearly, it is the creation of an interest in immovable property and therefore since it has been recorded in the form of a document, it must be registered under the provisions of S. 17 (1) (b), Registration Act. It is said on behalf of the appellant that the transaction was not a gift but the creation of a joint ownership, that by it U Pandaisa made U Zawtipala a joint owner with him of his property and, on the other hand, U Zawtipala made U Pandaisa a joint owner with him of his property; but that is not what the memorandum itself says. The memorandum is plainly a gift of immovable property by U Pandaisa to U Zawtipala and under the provisions of S. 123, T. P. Act, such a gift can only be made by registered instrument. Moreover, even if the contention of the appellant as to the construction of this memorandum could be accepted, the transaction would then amount to an exchange within S. 118, T. P. Act, and therefore as the property is worth more than Rs. 100 it could only be effected by registered instrument. Hence the third question must be answered in the negative.

As regards the fourth question, it was decided by a Bench of this Court in First Appeal No. 14 of 1938[1] that U Zawtipala was not the presiding monk of this kyaungdaik, and with that decision and the reasons given therefor we are, with the greatest respect, in complete agreement. There has been no change in U Zawtipala's position since the delivery of the judgment in that appeal, and consequently it must be held that U Zawtipala did not become the presiding monk of the kyaungdaik by reason of the memorandum of 14th May 1932 and has at no material time been, and is not now, the presiding monk. The result of the answers to these four questions therefore is that the appellant, U Zawtipala, has no interest whatever in the kyaungdaik or in the aramika sanghika properties connected with the kyaungdaik, but that the respondent, as the presiding monk of the kyaungdaik, is entitled to possession of the kyaungdaik and all the paddy lands connected therewith. These are the decisions at which the learned District Judge has arrived, and, consequently, his decrees in the two suits, granting the respondent a decree for possession and mesne profits of the paddy lands in suit No. 8 and dismissing the appellant's suit in suit No. 9 are correct. These appeals fail and are dismissed with costs.

D.S./R.K. *Appeals dismissed.*

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3. ('37) 24 A I R 1937 Rang 76 : 168 I C 967 : 14 Rang 566, U Zawtika v. U Kalyana.

4. ('18) 5 AIR 1918 L B 11 : 45 I C 926 : 9 L B R 258, U Zayanta v. U Naga.

* (28) A. I. R. 1941 Rangoon 163

MYA BU AND BA U JJ.

Daw Saw Khin — Appellant

v.

Ko Hpar — Respondent.

First Appeal No. 63 of 1940, Decided on 15th November 1940, from order of Assistant District Court, Bassein, D/- 14th March 1940.

* (a) Criminal P. C. (1898), S. 476 — Civil or revenue Court acting under S. 476 or S. 476A or S. 476B is not altered into criminal Court.

There is nothing in the words of Ss. 195, 476, 476A or S. 476B or in the combined effect of the operation of these sections to warrant the view that a civil or a revenue Court acting under S. 476 or S. 476A or S. 476B is thereby altered into a criminal Court for purposes connected with such proceeding : A I R 1931 Lah 761 (FB), *Expl., and not foll.; Case law referred.* [P 164 C 1]

(b) Decree—Binding — Executing Court cannot challenge validity of decree.

The executing Court cannot challenge the validity of the decree if the party affected thereby fails to take such proceedings : A I R 1931 Rang 252 (FB), *Rel. on.* [P 165 C 2]

K. C. Sanyal — for Appellant.

U E Maung (1) — for Respondent.

Mya Bu J. — The facts which have led to this appeal are as follows: In a suit filed by the appellant in the Assistant District Court of Bassein the respondent gave evidence for the defendant. After the suit had been disposed of the appellant applied to the Court under S. 476, Criminal P. C., for the institution of a prosecution against the respondent for an offence punishable under S. 193, Penal Code. After enquiry the Assistant District Court dismissed the application. The appellant appealed to this Court against the order dismissing the application under S. 476B, Criminal P. C. The respondent contested the appeal which was heard and determined by a Judge of this Court under the proviso to clause (a) of R. 24 in Chap. 2 of the Rules and Orders relating to the appellate side of this Court. The learned Judge dismissed the appeal with costs fixing two gold mohurs as the respondent's advocate's fee. The respondent sought to execute that order by the filing of an application for execution in the Assistant District Court and it is against the order of the Assistant District Court which has virtually allowed the application that this appeal has been filed. The appeal has been urged on the ground that the Assistant District Court being a civil Court is not empowered to execute an order of a criminal Court or an order passed in a criminal case and further that in any event the order passed by this Court granting the respondent costs in the appeal was made without jurisdiction. In support of these grounds, the learned advocate for the appellant contends that a proceeding under S. 476 or S. 476B, Criminal P. C., is a criminal proceeding and a civil Court acting under these sections is for all purposes connected with those proceedings to be deemed a criminal Court and therefore has no jurisdiction to make an order for costs in favour of or against a party to such proceeding.

None of the authorities relied on by the learned advocate for the appellant goes so far as to say that a civil Court acting under S. 476 or S. 476B, Criminal P. C., becomes for purposes connected with such proceeding a criminal Court, while the observation of Dalip Singh J., in his referring order to the effect that if the matter were res integra he would feel inclined to hold that proceedings under S. 476 would be civil or criminal or revenue proceedings according to the Court in which the proceedings took place, in the Full Bench case in 13 Lah 342[1] of the Lahore High Court, which is cited as an authority for the proposition that a proceeding in a civil Court under S. 476 or S 476B, Criminal P. C., is a criminal proceeding, is in consonance with the preponderating weight of authority on the point. But for the restrictions imposed upon the power of the criminal Courts by S. 195 and kindred provisions of the Criminal Procedure Code to take cognizance of certain offences, there is nothing to restrict the general right of any member of the public acquainted with the facts of the case to file in a criminal Court a complaint of an offence; a Judge, a Magistrate or a revenue officer is as competent as an ordinary member of the public to make a complaint. Section 195 places a bar to the prosecution for the offences mentioned therein unless such prosecution is initiated in the manner therein prescribed, that is to say, (a) for prosecution for certain offences of contempt of lawful authority of public servants by a complaint in writing of the public servant concerned or by some other public servant to whom he is subordinate, (b) for prosecution for certain offences against public justice by the complaint in writing of the Court in which or in relation to a proceeding in which the offence is committed or of some other Court to which such Court is subordinate and (c) for prosecution for certain offences relating to documents given in evidence by a complaint in

1. ('31) 18 AIR 1931 Lah 761 : 135 I C 594 : 33 Cr L J 178 : 13 Lah 342 : 33 P L R 568 (F B), Dhanpat Rai v. Balak Ram.

writing of the Court in which the document is produced or given in evidence or of some other Court to which such Court is subordinate.

Section 476 lays down the procedure to be adopted by a civil, revenue or criminal Court preparatory to the filing of the complaint in writing, which is sufficient to remove the bar that is placed by S. 195, subs. (1), cls. (b) and (c). Section 476B provides that any person on whose application any civil, revenue or criminal Court has refused to make a complaint under S. 476 or S. 476A or against whom such a complaint has been made may appeal to the Court to which such former Court is subordinate and the appellate Court may thereupon after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under S. 476. Section 195, sub-s. (3) describes the relationship of the subordinate Court and the superior Court within the meaning of S. 476B. Thus, while S. 195 places a bar to the general rights of the members of the public to initiate a prosecution in respect of the offences mentioned in S. 195, the function of Ss. 476 and 476B is to lay down the way in which as regards the offences mentioned in S. 195, sub-s. (1), cls. (b) and (c), that bar is to be removed and the ordinary right of a member of the public acquainted with the facts of the case restored to the Court concerned in which or in relation to a proceeding in which the offence has been committed. There is, in my opinion, nothing in the words of Ss. 195, 476, 476A or 476B, or in the combined effect of the operation of these sections to warrant the view that a civil or a revenue Court acting under S. 476 or S. 476A or S. 476B is thereby altered into a criminal Court for purposes connected with such proceeding.

In 25 C W N 661[2] it was held that proceedings for sanction under S. 195, Criminal Procedure Code, though taken in a civil Court, relate to a criminal matter and the Court has no power to direct payment of costs in such cases. For reasons that will follow, it is unnecessary for the purpose in hand to consider whether the proposition that a civil Court has no power to direct payment of costs in such cases is correct or not. But, inasmuch as it involves the theory that the proceeding taken in a civil Court with a view to the granting of sanction (*Note:* this was a case of 1920 before the amendment of the Criminal Procedure Code in 1923) to prosecute is a criminal proceeding, I consider, with the greatest respect, that it cannot be considered to be good law in the face of an overwhelming weight of authority in later cases to the contrary. In reviewing the later cases on the point our task is considerably lightened by the exhaustive survey of all the then available case law on the point by Dalip Singh J., in his order of reference already referred to above which the learned Judge summed up by saying that it was clear enough that the weight of authority was on the side of the Allahabad view for the High Courts of Calcutta, Madras, Rangoon and Patna had followed the Allahabad view and also the Court of the Judicial Commissioners, Nagpur. Cases of those High Courts alluded to by the learned Judge are 26 ALL 249;[3] 28 ALL 554;[4] 49 ALL 536.[5] The last case is useful also for the purpose of showing that the alterations in S. 476 introduced by the Criminal Procedure Code (Amendment) Act, 1923, did not affect the arguments or the decisions in 26 ALL 249,[3] 40 Cal 477,[6] 36 I C 483,[7] A I R 1921 Pat 94[8] and 1 Rang 372.[9]

The general effect of the pronouncements made in these cases adjusted to the existing language of Ss. 476, 476A and 476B and of S. 195 (1), clauses (b) and (c) is that where a civil or a revenue Court decides to institute or withhold a prosecution the appeal is to the civil or the revenue Court, as the case may be, and the revision, if any, therefrom to the High Court is also on the civil side under S. 115, Civil P. C., and not under S. 439, Criminal P. C. The main reason given by the Full Bench of the Lahore High Court in 13 Lah 342[1] for not following this strong body of judicial opinion was the long standing course of procedure to the contrary in the Punjab. In Burma we have not had such a course of procedure as in the Punjab where the ruling of a Full Bench of the

2. ('21) 8 A I R 1921 Cal 548 : 67 I C 730 : 25 C W N 661, Bholanath v. Purna Chandra.

3. ('04) 26 All 249 (F B), In the matter of Bhup Kunwar.

4. ('06) 28 All 554, Salig Ram v. Ramji Lal.

5. ('27) 14 A I R 1927 All 334: 100 I C 376 : 28 Cr L J 296 : 49 All 536: 25 A L J 569, Abdul Haq v. Sheo Ram.

6. ('13) 40 Cal 477: 19 I C 197: 14 Cr L J 197 : 17 C W N 647 : 17 C L J 245 (F B), Emperor v. Har Prasad Das.

7. ('17) 4 A I R 1917 Mad 971 : 36 I C 483 : 17 Cr L J 515 : 31 M L J 440 (F B), Emperor v. Karri Venkanna Patrudu.

8. ('21) 8 A I R 1921 Pat 94: 61 I C 643: 22 Cr L J 403: 6 Pat L J 178 : 2 P L T 609, Ruktu Singh v. Emperor.

9. ('24) 11 AIR 1924 Rang 54: 85 I C 362: 1 Rang 372: 26 Cr L J 523, Valab Das v. Maung Ba Than.

Chief Court of the Punjab in 5 P R 1908 Cr[10] to the effect that an application for revision in the Chief Court of an order passed on appeal granting or revoking a sanction granted under the provisions of S. 195, Criminal P. C., by a civil Court lay under S. 439, Criminal P. C., led the field. There is, therefore, no reason why we should not follow the view expressed by the High Courts of Allahabad, Calcutta, Madras, Rangoon and Patna in the cases cited above which, in my opinion, lay down the law correctly.

The rulings in 53 Cal 827[11] and 59 Cal 68[12] have also practically re-affirmed the view expressed in 40 Cal 477.[6] 54 Cal 355[13] does not assist either one side or the other because, while one of the learned Judges forming the Division Bench expressed the view that an appeal under S. 476B, Criminal P. C., must be dealt with as an ordinary appeal under the Criminal Procedure Code, the other learned Judge held that the appeal is triable as a miscellaneous civil appeal and is regulated by O. 41, Civil P. C. The practice in the Courts in Burma has been to treat a proceeding under S. 476, Criminal P. C., in a civil Court as a civil miscellaneous proceeding and an appeal under S. 476 from an order of a civil Court as a civil miscellaneous appeal and to deal with an application for revision of an order passed by a civil Court under S. 476B, Criminal P. C., under S. 115, Civil P. C. This practice, in my opinion, has been in due conformity with law. The corresponding practice on the criminal side to deal with appeals under S. 476B, Criminal P. C., and applications for revision of orders passed in such appeals arising out of an order passed by a criminal Court under S. 476, according to the provisions of the Criminal Procedure Code, is also correct. For these reasons the order which the respondent sought to execute cannot be regarded but as an order passed by a civil Court.

The question as to the competency of a civil Court to order payment of costs by one of the parties to an appeal to the other in an appeal which comes before it under S. 476B, Criminal P. C., does not arise in this case for the reason that, although a decree—the order in question in this case has the force of a decree—passed without inherent jurisdiction can be declared ab initio null and void if proceedings in that behalf are taken as provided by law, the executing Court cannot challenge the validity of the decree if the party affected thereby fails to take such proceedings : 9 Rang 480.[14] In the result this appeal fails and it is dismissed with costs; advocate's fee three gold mohurs.

Ba U J. — The point that arises in this appeal is whether the Civil Procedure Code or the Criminal Procedure Code applies to an appeal from an order passed by a civil Court under S. 476, Criminal P. C. The authorities on this point are not quite unanimous. So far as the High Courts of Calcutta, Allahabad and Patna are concerned, they agree that an order passed by a civil Court under S. 476, Criminal P. C., is revisable under S. 115, Civil P. C., and not under S. 439, Criminal P. C. : 40 Cal 477,[6] 26 ALL 249,[3] 49 ALL 536,[5] AIR 1935 ALL 696[15] and AIR 1921 Pat 94.[8] The same view was held by this Court in 1 Rang 372.[9] But the view of the Madras High Court is, with due respect, some what inconsistent. Although it agrees with the aforesaid High Courts that an order passed by a civil Court under S. 476, Criminal P. C., is revisable under S. 115, Civil P. C., yet it holds that an appeal from an order passed by a civil Court should not be dealt with in accordance with the provisions of the said Code but in accordance with those of the Code of Criminal Procedure : 57 Mad 177.[16] One would have thought that the logical effect of holding that an order passed by a civil Court under S. 476, Criminal P. C., was revisable only under S. 115, Civil P. C., and not under S. 439, Criminal P. C., would be to hold that the Civil Procedure Code also governed an appeal from such an order and not the Criminal Procedure Code. That is in effect what has been held by the Calcutta High Court in 53 Cal 827[11] and 59 Cal 68[12] where the learned Judges said :

> All applications under Ss. 476, 476A and 476B originating in civi Courts should be dealt with according to the provisions of the Civil Procedure Code.

No case has been cited at the Bar and I have not been able to find any where the Bombay High Court has dealt with the point in question one way or the other

10. ('08) 5 P R 1908 Cr : 7 Cr L J 281 : 7 P W R 1908 Cr: 108 P L R 1908 Cr (F B), Bishen Singh v. Amritsaria.
11. ('27) 14 AIR 1927 Cal 98 : 99 I C 124 : 53 Cal 827 : 28 Cr L J 92, Nasaruddin Khan v. Emperor.
12. ('31) 18 AIR 1931 Cal 604 : 134 I C 1063 : 59 Cal 68 : 33 Cr L J 38 : 35 C W N 775, Surendranath Maiti v. Sushilkumar Chakrabarty.
13. ('27) 14 A I R 1927 Cal 284 : 100 I C 351 : 54 Cal 355 : 31 C W N 281, Hamid Ali v. Madhu Sudan Das.
14. ('31) 18 A I R 1931 Rang 252 : 135 I C 65 : 9 Rang 480 (F B), S. A. Nathan v. S. R. Samson.
15. ('35) 22 A I R 1935 All 696 : 161 I C 322 : 58 All 85 : 1935 A L J 943, Shiva Prasad v. Pahlad Singh.
16. ('34) 21 A I R 1934 Mad 52: 147 I C 351: 57 Mad 177 : 35 Cr L J 392 : 65 M L J 873 (F B), Janardana Rao v. Lakshmi Narasamma.

definitely. The only High Court in India that has taken a view contrary to that of the other High Courts is the Lahore High Court. In 13 Lah 342[1] it is laid down that an order passed under S. 476, Criminal P. C., is open to revision under S. 439 of the same Code and not under S. 115, Civil P. C., whether the order is passed by a civil, criminal or revenue Court. With due respect I do not agree with this view. To my mind it is quite clear that an order passed by a civil Court under S. 476, Criminal P. C., cannot be revised under S. 439 of the said Code. A High Court can review the order of an inferior criminal Court only in revision under S. 439. A civil Court does not become a criminal Court by filing a complaint or refusing to file a complaint under S. 476, Criminal P. C., or dealing with an appeal therefrom. What Court is a criminal Court is explained in Chap. 2, Criminal P. C. If the revision of an order passed by a civil Court under S. 476, Criminal P. C., is necessary, it can be done only under S. 115, Civil P. C. It therefore, in my opinion, follows that if the Code of Civil Procedure applies in the case of revisions, the same Code must apply in the case of appeals.

It would, in my opinion, be greatly illogical and would at the same time be inconvenient in its consequences if it were to hold, as has been held in 57 Mad 177[16] that the Code of Civil Procedure should apply in the case of revisions and that the Code of Criminal Procedure in the case of appeals. Besides, no question of innocence or otherwise of anybody is decided under S. 476, Criminal P. C. What is done is that a Court enquires, if the materials before it are not sufficient, as to whether any offence of the nature set out in S. 195, Criminal P. C., has been committed and, if so, whether it would be in the interests of justice that a complaint should be made. The act of filing or non-filing of a complaint is a judicial act and as such is open to review by a higher Court. In reviewing such an act the higher Court should, in my opinion, follow the procedure that generally governs its proceedings. If it were to follow some other procedure the Legislature would have in my opinion said so clearly; but, instead, what the Legislature has provided is that an appeal from a civil Court shall lie to the principal Court having ordinary original civil jurisdiction to which appeals from the former Court ordinarily lie, and an appeal from a criminal Court to a criminal Court of higher jurisdiction to which appeals from the former ordinarily lie. This is, in my opinion, a clear indication that the Courts should be guided by their respective Codes of procedure in dealing with proceedings arising out of orders passed under S. 476, Criminal P. C. If so guided, a civil Court has, in my opinion, jurisdiction to pass all necessary and consequential orders. That is exactly what Mackney J. did in dealing with an appeal from an order passed by the Assistant District Court of Bassein under S. 476, Criminal P. C. For these reasons I would dismiss the appeal.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Rangoon 166

ROBERTS C. J. AND BLAGDEN J.

Tan Soon Li — Appellant

v.

Burma Oil Co., Ltd. — Respondent.

First Appeal No. 112 of 1939, Decided on 4th March 1940, against decree of Assist. Dist. Court, Insein, D/- 5th June 1939.

(a) Abandonment — Wax in company's refinery catching fire and flowing out into river — People collecting same—Company not asserting right of ownership over its wax which was freely bought and sold by general public — Company must be deemed to have abandoned its right of ownership over aforesaid wax and also estopped from claiming it—Fact that company issued press announcement after salvage was complete is immaterial.

The wax in the company's refinery suddenly caught fire and flowed out in a molten state into the adjoining rivers wherefrom it was collected by the general public and was freely bought and sold in the market. The company permitted the salvage which they themselves were unable or unwilling to undertake, to continue. No steps were taken by the company to inform the general public of any intention to assert ownership over the wax :

Held that the company must be deemed to have abandoned its right of ownership over the wax and the issue of a press announcement after the salvage was complete in assertion of its right by the company was immaterial : (1861) L & C 1 ; (1877) 13 Cox C C 384 ; (1912) 23 Cox C C 190 ; (1868-88) 1 Vent 295, *Rel. on.* [P 170 C 1, 2]

Held further that the company having stood by at a time when it knew perfectly well that the general public were trading in the wax and having permitted persons to believe that it had no further interest in it, the estoppel arose by reason of its inaction since there was no prosecution instituted as a warning, no notice in the press, no evidence of cautions given to the general public: A I R 1938 P C 52 and *English cases referred.* [P 170 C 2]

(b) Contract—Finder of goods—Suit against purchaser from, for return — Burden is on plaintiff to prove that goods are his.

Where a suit is brought against the purchaser from the finder of goods for return of the goods, it is for the plaintiff to prove that the goods are his

and not for the defendant to show that they were his: (1907) A C 73, *Ref.* [P 171 C 1]

Dr. Ba Maw — for Appellant.

E. C. V. Foucar — for Respondent.

Roberts C. J. — On Thursday 7th July 1938, a fire broke out at refinery of the respondent company at Syriam used by them in connexion with the manufacture of wax. Some 2500 tons of molten wax escaped into the Rangoon river and adjoining creeks, some into mid-stream and some on the river banks on which it was stranded with the ebb tide. At the time there was a strike among the labourers of the company. On Friday morning 8th July, Mr. Copeman, a Shipping Assistant of the company, received instructions to try and salve the wax, and took three launches, six sampans and a cargo boat in order to do so. He collected wax in mid-stream and he saw a number of persons not in the employment of the company who were also collecting wax. He did not stop them and explained in evidence that he had no authority to do so. The attempt at salvage by the company was only made on this one day. It was difficult to get the requisite labour and the destruction and debris caused by the fire was extensive. Great numbers of villagers went out to gather wax on their own account on 8th July and succeeding days: their operations took place along the bank for several miles, and hundreds of people went out in river craft of all descriptions and waded in mud along the creeks filling with wax any kind of container they could bring for the purpose. A one-ton lorry made a succession of trips between the Syriam jetty and the town laden with wax which was freely bought and sold in the streets. For weeks afterwards, there was a brisk trade in wax: no one was prevented from carrying it on. There was wax in almost every house in Syriam, and it was piled in heaps in the open and was offered for sale there and elsewhere, openly, and was taken away in boats and road vehicles of many kinds.

There is no sort of doubt that everyone who dealt in this wax knew that it was wax which was or had been the property of the company and had escaped into the river as a consequence of the fire and in spite of the efforts of the company to save it. Mr. Mallinson the officiating works manager of the company in his evidence said :

Some people returned the wax collected by them. I did not make any attempt to stop the villagers from collecting the wax. I assumed that they would return the wax to us on receipt of collection charges. There was no intention on the part of the company to abandon this wax. .... Some villagers returned the wax saying 'this is your wax'. They did not ask for money. We did not pay anything to them.

He added that other villagers came and said they had wax in their sampans and were offered Rs. 5 per sampan. He does not say it was explained to them that this was offered to them as compensation for their trouble and the expense incurred in preserving the goods for the company as owners. They refused the amounts and took away the wax.

They were not warned that the wax remained the property of the company. Nothing was done by the company to assert their rights of ownership in any of the wax not in their possession till 14th July when it was discovered that a firm named Messrs. Hoe Kee held a quantity of wax and a letter (Ex. E) was written to them to say that

this wax is our property and we have not relinquished our ownership of it. We are prepared to pay reasonable collection and delivery charges on quantities returned to us.

Other letters were written to various firms on later dates to the same effect. But as far as the general public were concerned nothing was done till the publication of a notice, Ex. 50, in various newspapers on 18th August. This notice runs as follows:

Notice is hereby given that the wax which as a result of the fire at Syriam Refinery on 7th July flowed in a molten state into the adjoining Pegu and Rangoon rivers, from where it has since been collected by unauthorized persons, still remains the property of the Burmah Oil Co., Ltd. Persons who do not take immediate steps to return the wax to the Burmah Oil Co., Ltd. are liable to be prosecuted for theft. The Burmah Oil Co., Ltd. requires the return of this wax to its Syriam Refinery or Dunneedaw Installation and upon application is prepared to send a lorry to collect it. Reasonable salvage and collecting charges will be paid on all quantities returned.

Before this notice, said Mr. Mallinson in his evidence,

the B. O. C. took no action to inform the public about their intention to recover the wax. It was not practicable to go and collect the wax from various villagers. The company waited till the wax got into the hands of the fewer number of people.

Mr. Murray who was in charge of the wax department said in evidence :

No notice of our intention to recover the wax was given to the public at large before the issue of notice Ex. L . . . . . I know that a certain amount of wax was being sold openly. Before the issue of the notice we thought it unnecessary to inform the public that we would give them the salvage charges.

Then he said they thought everyone knew that the wax belonged to the com-

pany, and then they learnt that traders were buying it :

So far as I know the Rangoon office did not take steps at that time to notify the salvers to bring back the wax to us on payment or to stop selling.

In the course of further cross-examination he stated :

I cannot explain why the Syriam office did not take action to intimate to the people not to buy and sell the wax. As regards the Rangoon office it did nothing beyond writing letters to a few persons after they had bought the wax till 17th August 1938. . . . . .The chief reason for issuing the notice was that we realized that quite a lot of people were still ignorant of our intention and we wanted to inform them about our intention not to abandon the wax.

One of the persons who bought a quantity of wax was the appellant. He purchased three boat loads on 4th August, 14th August and 20th August respectively. No one has contended that at the time of the last purchase he knew of the existence of EX. L or had any notice other than EX. L given to him by the company prior to an interview with the company's representative on 26th August and a letter written by them to him on the next day. He refused to return the wax and was prosecuted in a criminal Court although he answered their letter and set up a claim of right, stating that he had made careful inquiries at Syriam and neighbouring places whether he could buy the wax lawfully and was fully satisfied that the company had abandoned it as derelict. He contended that the conduct of the company in having waited till the bulk of the wax had passed into the hands of several merchants precluded them from asserting their title to it at so late a stage. At this trial Mr. E. W. Davies the manager of the Refinery Department gave evidence for the prosecution. He has since left this country and this evidence was admitted in the present case under S. 33, Evidence Act, and relied on by the company in their reply to the written statement of the appellant. He said :

The company took no steps whatever to prevent the villagers collecting the damaged wax. The buying and selling of the damaged wax was actually going on to a limited extent and without concealment. I think it was sold in the syriam jetty bazaar and various villages. No warning was given to the public till we issued the notice in the vernacular papers. We stood by like that on account of the strike, fire and other troubles and because it was not a practical proposition to recover the wax from hundreds of small holders. When we learnt that a large quantity of wax had got into the possession of a few Rangoon merchants we began to take action and we did so because we believed it was their intention to compete against the B.O.C. with the B. O. C.'s own property . . . . By 19th August local candle manufacturers were using this damaged wax for making candles and selling them. This was bound to affect our trade in candles to some extent. It was for this reason we made our press announcement to warn the public in general.

Mr. Lin Bin Hock called for the company said that for four or six days before he received the letter written to him on 14th July he purchased wax openly and nobody objected. He did not see the B. O. C. collecting wax. The criminal prosecution of the appellant having proved unsuccessful the company brought an action against the appellant for recovery of the wax or alternatively for its value and the learned Additional District Judge of Insein held they were entitled to recover it and granted a decree accordingly. This appeal has been brought against his judgment and decree.

Dr. Ba Maw for the appellant contended that the company abandoned the wax between 9th July and 13th July. Some of it was lost beyond recovery and no steps were taken to inform the general public of any intention to assert ownership over the wax which was being freely bought and sold in the neighbourhood of the refinery. The company could have taken the step which they took on 17th August much earlier if they had desired to do so and could have issued a notice to the public. When wax was brought to them and the finders merely gave it to the company it was accepted but other persons were allowed to remain in possession of wax when they expressed unwillingness to accept Rs. 5 a sampan. They were not told that this amount was offered as collection charges, nor were they warned that the company still claimed to be owners of the wax. They were permitted to sell it as though it was their own property. Though it is true that in individual cases unknown to the appellant the company wrote letters saying that the wax was still theirs it was not until the middle of August that the company ever endeavoured to assert the rights of an owner as against the general public and then only because they thought that traders on a large scale were entering into competition with them. If this had not taken place and the wax had remained in the hands of villagers in small amounts no action would have been taken.

The company permitted the salvage, which they themselves were unable or unwilling to undertake, to continue ; they took no steps to prevent trading in the wax. Then when all the work of salvage had been done and as the result of open buying and selling the wax had found its way into the

hands of a few merchants they decided it would be profitable to deny their abandonment of the wax. Now on 10th August the company caused a letter to be written to a firm which had openly purchased wax demanding its return "or unless you pay us Rs. 280 per ton you will be liable to immediate prosecution for theft." This was wax which the company knew had been shipped to Hongkong and other places. Mr. Mallinson, and Mr. Pringle of the Indo-Burma Petroleum Co., called by the plaintiffs, valued the damaged wax at Rs. 25 per ton.

It was on 4th August that appellant bought the first boat load of wax. He endeavoured to support his case by alleging in evidence that with two other Chinese, the vendor and broker, he went to the office of Mr. Roper, the General Manager of the company, on or about 2nd August and through an interpreter asked Mr. Roper whether the company wanted the wax back and that Mr. Roper said he did not. This story has been disbelieved and the evidence of the alleged interview is not now relied on. But Dr. Ba Maw urges that however untruthful his client may have been this does not and cannot affect the fact that the company had abandoned the wax long before his purchase of it, apart from the operation of any rule of estoppel. The first purchase by the appellant was 28 days after the fire: the wax was in a damaged state. No one had been interfered with or prosecuted for dealing with it. No notice had been issued to the public. There had been in fact an abandonment by the company but the company's officials changed their minds and wished they had not abandoned the wax when they discovered the competition which was bound to affect their trade.

Secondly, it is said there is the question of estoppel. The company intentionally permitted the public of which the appellant was a member to believe that the company had no further interest in the wax and to act upon that belief. Accordingly the company cannot now set up their title to it. In I L R (1938) Mad 360[1] it was pointed out that estoppel by representation depended upon the existence of a duty and the judgment of Blackburn J. in (1853) 2 H & C 175=159 E R 73[2] shows that there must be the neglect of some duty that is owing to the person led into that belief, or to the general public of whom the person is one, and not merely imprudence on the part of the person against whom the estoppel is sought to be founded. Baron Parke in (1848) 2 Ex 654[3] explained that :

> If whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant he should act upon it, and did act upon it as true the party making the representation would be precluded from contesting its truth: and conduct by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons on the faith of their being so authorized.

The illustration shows that "duty" is referred to in a wider sense than a mere duty the breach of which gives rise to a cause of action. In (1839) 10 A & E 90[4] Lord Denman said :

> A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving.

It is contended that the general public was induced to believe and did believe as a result of the action of the company in standing by that the wax was to be regarded as a substance in which they had no further interest and which belonged to the salvors. It was not necessary for every member of the public to inquire at the company's office, although the appellant during the course of this action at one time feared it might have been and pretended that he had done so. The company now contends that the position was that they were bound under S. 168, Contract Act, to pay the finders compensation, but their willingness to do so was concealed from the public at the time. During the months of July and early August at least this was not put forward as the position; there is no single instance given in evidence of even the smallest sum paid by them as compensation to finders before their letters beginning on 14th July intimated their willingness to pay such moneys to the particular recipients : the company was not troubling to get the wax back from those members of the general public who they now assert were finders of their property.

1. ('38) 25 A I R 1938 P C 52 : 172 I C 745 : I L R (1938) Mad 360 : 32 S L R 313 : 65 I A 75 (P C), Mercantile Bank of India, Ltd. v. Central Bank of India, Ltd.
2. (1853) 2 H & C 175: 159 E R 73, Swan v. North British Australasian Co.
3. (1848) 2 Ex 654 : 18 L J Ex 114 : 12 Jur 777, Freeman v. Cooke.
4. (1839) 10 A & E 90 : 2 P & D 296, Gregg v. Wells.

Except as affecting the question of costs it does not seem to me to matter that the appellant, after the criminal prosecution chose to try and strengthen his case in the civil action brought against him by giving an account of an alleged interview with Mr. Roper. What concerns us is the belief which existed in his mind as a member of the public at the time he bought the wax. There is no evidence that he knew of any of the letters such as EX. E written to individuals in July, and indeed it has never been contended that he had any such knowledge. The appellant's letter to the manager of the company (EX. N) written on 31st August sets out his position and is precisely the case which is urged before us in appeal. It is conceded that a finder of wax on the day after the fire had a duty to offer to return it to the company but that does not touch the point at issue here which is whether the company's conduct between the date of the fire and 4th August was such as to amount to an abandonment of any wax which had not been offered to them or had been refused by them; and was also such as to raise an estoppel from denying that a purchaser of it in the month of August was the true owner.

It is not necessary for us to decide whether they abandoned the wax which was the subject of the letter written to Messrs. Hoe Kee on 14th July, although Dr. Ba Maw has contended that all their wax was abandoned before this date. After such a fire and in all the circumstances of the case it might be difficult to say that the company had stood by and allowed Messrs. Hoe Kee to believe they were acquiring a good title in so short a space of time. But having had it brought to their knowledge in mid July that traders were acquiring wax in this way I am of opinion that they then certainly did abandon the wax which they could not trace. Their notice to the public published in the press on 18th August was a complete change of front induced by their fear of competition after abandonment. So far as estoppel is concerned, it may well be said they stood by as far as the general public was concerned despite the knowledge which their letters to Messrs. Hoe Kee on 14th July and to others show that they then possessed. They did not try to prevent sales but to intervene after sales had taken place. Mr. Murray has said that in some cases in which disputes arose a considerable time after the fire there were settlements out of Court and the company paid Rs. 25 per ton for salvage and delivery charges. The evidence of Mr. Mallinson and Mr. Pringle is that that Rs. 25 to Rs. 30 per ton was its full value to them and there is some ground for the contention that the company were really buying back the wax at that figure. It was very discoloured and dirty and contained a lot of water.

In my opinion, therefore, the company abandoned the wax in suit. Nothing was done by them until the discovery that it might be profitable to pounce upon the true owner. The criminal prosecution launched against him was preposterous. I also hold that the company is estopped from denying his title. The learned Additional District Judge has considered the matter as though the appellant were a finder of the wax directly after the fire and has referred to S. 403 (2), Penal Code. But the respondent company stood by at a time when its officials knew perfectly well that members of the general public were trading in the wax and permitted persons to believe that the company had no further interest in it. The estoppel arose by reason of their inaction. There was no prosecution instituted as a warning, no notice in the press, no evidence of cautions given to the general public. The judgment and decree of the learned Additional District Judge must be set aside. We are informed that the respondent company is no longer in possession of the wax and there must be an enquiry in the District Court as to the amount to be paid to the appellant for damages in lieu thereof, since we have no evidence which enables us to determine the proper sum to be awarded by reason of the appointment of a receiver in the suit.

With regard to the question of costs we have been most unfavourably impressed by the palpably false evidence given at the trial by the defendant concerning a fictitious interview with Mr. Roper. This was not even pleaded and the defendant said that he abstained from pleading it for the very purpose of causing surprise. Some of his evidence however was unchallenged and on his unchallenged evidence together with the evidence of the plaintiffs themselves we think he had a good defence. The order as to costs must be that each side pays its own costs in the Court below and the appellant must have his costs in the appeal, advocate's fee thirty gold mohurs and also the costs of the enquiry as to damages.

Blagden J. — The plaint in this case is dated 16th December 1938 and thereby the

plaintiff company prayed inter alia for a decree directing the return to them of "all wax in the possession of the defendant" irrespective of its origin. In this demand they have wisely not persisted and the dispute before us had centred round some 136 tons of wax which the defendant had bought from one Tan Cheng Hong during the previous August, which 136 tons of wax I shall hereinafter call "the wax in suit." There is no dispute that the wax in suit had once been the plaintiffs' wax, forming as it did part of a much larger quantity of wax which escaped from their premises in a molten state on 7th July 1938: whether it was still their wax we have to decide. There is no dispute that before commencing their suit the plaintiffs did that which was essential to perfect their cause of action (if any) by demanding the return of the wax in suit and receiving a refusal. The defendant may or may not have been within his rights in refusing to return the wax in suit, but in any event he was not a mere wrongdoer but a purchaser for value; and, of course, it is common ground that immediately before the presentation of the plaint he was in possession of the wax in suit. It is true that at a subsequent stage in the proceedings the plaintiffs applied for and obtained the appointment of a receiver, as a result of which the defendant lost possession. But this order was made to preserve the subject-matter of the dispute and not to re-judge it: and at the trial the defendant should have been deemed to be still in possession. That being so, it was for the plaintiffs to prove that the wax in suit was theirs and not for the defendant to show that it was his: *see* the judgment of the Privy Council in 1907 A C 78.[5] This I mention because if there were any serious doubt as to whose the wax in suit was on 16th December 1938 the defendant would have been entitled to the benefit of that doubt, an important point which seems to me to have been somewhat lost sight of in the judgment now under appeal.

Dr. Ba Maw on the appellant's behalf made to us three submissions. First and foremost he contended that on the facts proved or admitted in this case (which I need not recapitulate) the plaintiffs must in law be held to have abandoned the property they formerly had in the wax in suit. He said that abandonment took place on 8th July 1938 (when the plaintiffs ceased their own salvage operations) or at all events a matter of several weeks before, as far as we know, the defendant came on the scene at all. It is quite sufficient for his purpose if the abandonment was complete by 4th August when the defendant made his first purchase, and save for the purpose of testing the validity of his argument it is not necessary to consider the precise moment when, if at all, it took place.

Mr. Foucar submitted (1) that there is in law no such thing as abandonment of property and (2) that in any event the facts here do not point to abandonment. The first proposition is in my opinion far too wide. Authority is not lacking for the legal possibility of abandoning one's property. In (1861) L & C 1[6] Rolfe, B. and in (1877) 13 Cox C C 384[7] the C. C. C. R. in England unhesitatingly recognized that such a thing might take place though both were of opinion that on the facts before them it had not done so: *see also* (1912) 23 Cox C C 190[8] where the proper direction to a jury on a charge of theft where there is ground for supposing the property in question may have been abandoned is considered. In Archbold's Criminal Law, 28th Edn., p. 545 it is said on the authority of 2 East P. C. 606 and St. Dig. C. L. 2nd Edn., p. 253 "things of which the ownership has been abandoned are not capable of being stolen," while in Madras it seems to have been held on facts identical with those in (1877) 13 Cox C C 384[7] that abandonment was in fact complete: *see* 4 M. H. C. App. 30, cited in Ratanlal and Thakore's Law of Crimes, edn. 13, p. 928. I may add that in (1868-88) 1 Vent 295[9] Twisden J. asserts that a man loses such property as he has in a tame fox if it escapes and resumes its wild nature: To hold that he is in a better position if, for example, he deliberately turns the animal loose hoping never to see it again, and then changes his mind when one of his neighbours has shot it, would, I think, be repugnant to common sense.

The question whether in this case we can say, the question of abandonment or no abandonment being one of fact, that abandonment did take place before the defendant bought the wax in suit is much more

5. (1907) 1907 A C 78 : 76 L J P C 19 : 95 L T 890 : 23 T L R 232, Perry v. Clissold.

6. (1861) 1861 L & C 1 : 30 L J M C 77 : 7 Jur (N S) 172 : 3 L T 710 : 9 W R 276 : 8 Cox C C 416, Reg. v. Moore.

7. (1877) 13 Cox C C 384 : 36 L T 30, Reg. v. Edwards.

8. (1912) 23 Cox C C 190 : 107 L T 528 : 76 J P 384, Rex v. White.

9. (1868-88) 1 Vent 295, Mitchil v. Alestree.

difficult. We must and do make every allowance for the difficulties in which at the material time the plaintiffs were placed by the strike (though this seems to have been nearing its end), by the fire, and by the immense quantity of the wax which had escaped. We must bear in mind that the original escape of the wax took place in spite and not because of the actions of the plaintiffs for, it is much easier to infer that a man has abandoned that which he has deliberately thrown away than that of which he has lost possession by the act of God or of a third party. But as against this it must be remembered that the wax escaped into a river which like all rivers "wound somewhere safe to sea." If nothing was done by anybody about retrieving it most of it must within quite a short time have been irretrievably lost and, after the first day, the plaintiffs for their part did nothing about retrieving it. For myself I attach particular importance to the fact that the plaintiffs ceased their salvage operations after one day and very little to their motive in so doing which, after all, the general public cannot have known though it might or might not have guessed. Mr. Foucar rightly stressed to us the practical difficulties of doing at that stage more than they did, but most properly admitted that they could at least then have advertised, as they did five weeks later. Whether they owed anyone but themselves a duty to do so, I will not, for the moment, discuss; but I do not think that in all the circumstances it was the least that a person in their position who did not intend to abandon the wax would have done. In my judgment we are justified in saying and bound to say that on the evidence before him and in particular that of the plaintiffs' own witnesses the only conclusion at which the learned Judge could properly have arrived was that at some time between 8th and 14th July 1938 the plaintiffs had abandoned their property in the wax then unsalved; so that it became first the property of nobody, and then the property of the first person to reduce it into possession. As I have said it is for the plaintiffs to show title and therefore in the absence of evidence that the wax in suit had before the plaintiffs abandoned it been salved by some third party (i. e. was stolen wax) we must conclude that the wax in suit formed part of the abandoned wax, as it is overwhelmingly probable that it did. Putting it at the very lowest (and this is quite sufficient for Dr. Ba Maw's case) we should in my judgment hold that had he properly directed himself the learned Judge must have been left in reasonable doubt as to the plaintiffs' title and should therefore have dismissed the suit.

It may well be that at a quite early stage the plaintiffs began to repent them of their decision and sought, ultimately by taking drastic steps, to undo what they had done. But this seems to me to make no difference since from its very nature abandonment must be irrevocable. Dr. Ba Maw's second submission only becomes material if we are wrong in our views on his first. He contends that failing abandonment in fact the plaintiffs are estopped from denying abandonment. Mr. Foucar on the other hand says that they never represented to any one that they had abandoned any wax, or if they did that they owed no duty to the defendant and, in the absence of such a duty, cannot be estopped. In support of the latter proposition he relies on I L R (1938) Mad 360.[1]

He further contends that to rely on estoppel the person who seeks to do so must have been not only misled but misled despite his being a reasonable man, and as authority for this he cites Parke, B. in (1848) 2 Ex 654.[3] The defendant, he says, was not misled at all, or, if misled was unreasonable in reaching the conclusion he did. In my judgment there was, at least, a representation of abandonment. My reasons are the same as my own and my Lord's reasons for thinking there was in fact an abandonment, and I will not repeat them. The doctrine that there can be no estoppel where there is no duty owing by the party said to be estopped to the party misled, or to the general public of whom that person is one, probably originated in the judgment of Blackburn J. in (1853) 2 H & C 175[2] (qualifying the observations of Ashhurst J. in (1787-1794) 2 T R 63[10] and received the approbation of the House of Lords in (1926) A C 670[11] and of the Privy Council in I L R (1938) Mad 360.[1] Moreover Blackburn J. at p. 181 described the duty referred to as a "duty which the law casts" upon the party said to be estopped, which indicates that mere moral duty will not suffice.

What however is meant by "duty" in this connexion? It may mean only an obligation the mere breach of which will of

10. (1787-94) 2 T R 63 : 1 H Bl 357 : 6 East 21 : 1 R R 425, Lickbarrow v. Mason.
11. (1926) 1926 A C 670: 95 L J K B 913: 135 L T 548 : 32 Com Cas 8 : 70 S J 756 : 42 T L R 644, Jones & Co. Ltd. v. Waring and Gillow Ltd.

itself involve the defaulting party in a legal liability or it may also include an obligation which a party need only fulfil if he proposes to assert a particular right or to rely on a particular defence in subsequent proceedings. The illustration, given by Blackburn J. himself in his subsequent citation from the judgment of Parke, B. in (1848) 2 Ex 654 [3] of the outgoing partner who fails to notify the fact of his retirement shows clearly that he used the word "duty" in the wider sense. Such a person may indeed be made liable for the debts of the continuing partners: but, if the latter duly meet their obligations no one in the world has any right to complain that he kept his retirement a secret. Moreover, in the course of the argument in (1848) 2 Ex 654,[3] Parke B. says that in the majority of cases in which an estoppel exists

> the party must have induced the other so to alter his position that the former would be responsible to him in an action for it;

there can be no majority without a minority. It also seems clear that to found an estoppel there need be no duty, even in the wide sense I have tried to indicate, to make a representation. It is quite sufficient if there is a duty to speak the truth if speaking at all. A person who is minded to allow the public a short cut across his field is not bound to indicate by a sign-post the path which he is dedicating. But if he does put a sign-post he cannot, while it is up, maintain trespass against users of the path, and the reason is that the law casts on him a duty, in the sense indicated above, not to blow hot and cold. Here we have to deal with the much more difficult case of a passive and not an active misrepresentation. Mr. Foucar says that at the worst his clients were foolish and that a man or company is not bound to abstain from folly. As a general proposition that is true enough. But if a man's folly becomes the proximate cause of damage to his neighbours that is a very different story, and one daily illustrated in the use (or misuse) of internal combustion engines. Here, again, the fact that it was into a river that the wax escaped is of great importance. In this respect the present case resembles those English cases in which a man whose goods have been wrongfully seized in execution stands by knowing that a sale under the execution is intended rather than those in which he stands by knowing only of the seizure. He has been held to be estopped in the former but not in the latter circumstances: *see* McCardie J.'s judgment in (1923) 2 K B 117[12] at pp. 127 and 128.

It was here no fault of the plaintiffs that the wax escaped; but they must and according to Mr. Murray's own evidence, they did know before they advertised that the situation of the escaped wax was after 8th July 1938 such that reasonable doubt did in fact exist among the public as to whose it was and that other people were taking trouble and incurring expense in dealing with the wax and would thereby suffer damage if the plaintiffs later successfully claimed it. Many cases might be thought of in which the duty to warn a person that he is heading for danger is, at most, a moral duty. I do not think the present is one of them. In my judgment the omission to take reasonable steps to assert their title to the escaped wax when ceasing their pursuit thereof, which again, in my opinion, gave the public reasonable grounds for thinking they no longer claimed a title to it, was just such an omission as S. 115, Evidence Act, contemplates. This section has been said more than once to be a codification of the English law of estoppel and, in England, Courts of equity have long recognized the principle that a man cannot with impunity stand by having a charge or encumbrance on property and allow others to make advances on it on the faith of its being unencumbered. See for example (1737-84) Ambler 629,[13] and the very pertinent observations of Lord Granworth in (1866) L R 1 H L 129[14] at p. 140 and of Thesiger L. J. in (1878) 8 Ch D 286[15] at p. 314 both cited in the judgment of McCardie J., to which I have just referred. The former says:

> If a stranger begins to build on my land supposing it to be his own, and I perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own.

The latter says this:

> If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.

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12. (1923) 2 K B 117 : 92 L J K B 638 : 129 L T 317 : 67 S J 518, Jones Brothers Holloway Ltd. v. Woodhouse.
13. (1737-84) Ambler 629, Troughton v. Gitley.
14. (1866) L R 1 H L 129 : 12 Jur (N S) 506 : 14 W R 926 : 149 R R 543, Ramsden v. Dyson.
15. (1878) 8 Ch D 286 : 47 L J Ch 381 : 38 L T 370, De Bussche v. Alt.

Nor was this principle unknown in the English Common Law Courts. In (1859) 4 H & N 549[16] Pollock, C. B. says :

> If any person, by a course of conduct or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or licence, whether the party intends that he should do so or not, it has the effect that the party using that language or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct.

As to the question whether reasonableness is essential in the person relying on estoppel, in my opinion, that was here in fact nothing unreasonable in the belief, if it existed, that the wax in question had been abandoned. Mr. Foucar said it was unreasonable to suppose the Burmah Oil Company would give anything away. There is certainly this much to be said for his argument, viz., that when some villagers brought wax back to them and did not expressly ask for remuneration, they did not give them one anna for their trouble; while conversely, from others they demanded under a threat of prosecution Rs. 280 for what they now say was worth Rs. 25. Neither of these facts indicates magnanimity: but in fact in my judgment the wax had been abandoned and it cannot be unreasonable to believe what is true. We, at all events, having held the fact believed to be true, can hardly hold the belief in it to be unreasonable. Even if I am wrong in this, I do not consider that Mr. Foucar's contention as to reasonableness is right, when one is enquiring whether a party believed a representation or not it is undoubtedly most material to enquire whether it would have been reasonable for him to do so, the more extravagant the story the less likely he is to have believed it. Given, however, that he in fact believed, the requisite that the belief should be reasonable is conspicuously absent from the Evidence Act, S. 115. A passage in Baron Parke's considered judgment in (1848) 2 Ex 654[3] (which I have already referred) is relied on. Parke B. first says that it is essential to an estoppel at least that he (the party estopped) "means his representation to be acted upon, and that it is acted upon accordingly." He then, by way of qualification of what he has just said, uses the words on which Mr. Foucar specially relies

> and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth.

He then proceeds (making no further reference to the reasonableness or unreasonableness of the party misled)

> and conduct, by negligence or omission where there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the same effect.

Compare the similar words of Abinger C. B. in (1859) 4 H & N 549[16] already quoted. Neither of these passages, in so far as they mention the reasonableness of the belief induced, is, read in its context, a definition, but each is rather an illustration of circumstances in which an estoppel commonly arises. But if either was meant to be a definition, it is not the same definition as that in the Evidence Act, and we are administering the law of Burma and not that of England. Mr. Foucar rightly points out that the Privy Council has said that the section is an enactment of the English law. Whether that means that we must read into the section words that are not there in order to make it precisely tally with the language of individual English jurists however eminent, used long before the passing of the Act, I should be inclined to doubt. But as we hold that the belief, if in fact it existed, was here a reasonable belief we need not decide the point.

As to the existence of the belief in question, the case has been somewhat complicated by the defendant's conduct in seeking at what was obviously a very late stage to fortify an already excellent case which has stood him in good stead in the quite unjustifiable criminal proceedings that had been taken against him, by adding to it at the trial of this action, a story which is now admitted to be completely false. On this point, however, there is nothing that I can usefully add to my Lord's judgment. The worst of liars may, at times tell the truth and as my Lord has shown the essential part of the defendant's case was not really challenged. I respectfully agree that complete justice can be done to the plaintiffs if we make the order as to costs which my Lord has proposed. The only other point in the case (which now does not arise) concerns Ss. 168 and 169, Contract Act. As to this, I do not as at present advised see any reason why a finder of goods should not transfer to another such rights in those goods as he has. Mr. Foucar could advance no reason why the owner should be freed from any liability to pay compensation by such accidents as the death or bankruptcy

16. (1859) 4 H & N 549 : 28 L J Ex 262 : 7 W R 504, Cornish v. Abington.

of the finder and I see nothing contrary to public policy in a voluntary transfer of those rights, although clearly there can be no transfer of the property in the goods where S. 169 is not satisfied. In view, however, of our conclusions on the other points in the case we need not decide this one. Finally I should like to thank both the learned advocates for the assistance they have given to us, and in particular to myself as a new-comer to this Court.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 176

ROBERTS C. J. AND DUNKLEY J.

Nga Thein — Appellant

v.

The King.

Criminal Appeal No. 3 of 1941, Decided on 21st January 1941, from order of Sessions Judge, Tharawaddy, D/- 20th December 1940.

(a) Penal Code (1860), Ss. 300, 100—Deceased advancing to attack accused with da—Accused alarmed and on trying to ward off the attack, striking deceased with spear causing fatal wound —Accused held protected by right of private defence.

The deceased who had two das in his possession, threw one at the accused and advanced to attack with the other whereupon the accused becoming alarmed and finding that the only way in which it was possible to defend himself was to ward off, struck at him (deceased) with his spear and inflicted the wound which ultimately became fatal :

Held that the accused acted under the right of private defence of body: A I R 1937 Rang 83 (FB), *Rel. on.* [P 175 C 2]

(b) Criminal trial—Murder charge—Defence of private defence raised by accused at earliest possible moment—Duty of prosecution stated.

The prosecution in every case must show that a murder has been committed and when the accused sets up, at the earliest possible moment the defence that he was acting in accordance with the right of private defence, such defence must be examined and it must be shown by the prosecution before he can be convicted that there are no reasonable grounds on which such a defence could be believed to be true. [P 175 C 2]

(c) Criminal trial—Prosecution witness making contradictory statements in Sessions Court —If defence counsel fails to cross-examine him on such statements, Court should examine him.

Where a prosecution witness makes a statement in the Sessions Court contradictory to the one made in the committal Court and the pleader for the accused fails in his duty by not cross-examining the witness in regard to the previous contradictory statements which he had made in the committal Court, it becomes the bounden duty of the Sessions Judge to examine such witness further in regard to his previous statements and to bring those statements on to the record of the Sessions trial. [P 176 C 2]

(d) Criminal trial — Same person cannot be both a prosecution and defence witness.

The same person cannot under any provision of the Code of Criminal Procedure be both a witness for the prosecution and for the defence. If he is called for the prosecution and the defence desires to elicit any facts from him, then those facts must be elicited by questions asked in cross-examination at the proper time. [P 177 C 1]

O. Krishnasawmi — for Appellant.

U E Maung, Government Advocate — for the Crown.

Roberts C. J.—The appellant Nga Thein was convicted by the learned Sessions Judge of Tharrawaddy of the murder of one Mya Bu in a field near Zibin village in the Tharrawaddy District at about 7 A. M. on 26th August last. It appears that these men were companions who had been working in a fishery but had had some dispute or quarrel and were walking along the fields past the place where one of the witnesses, Maung San Tin, was ploughing. It is admitted that the accused speared the deceased, but he says that there was a fight before it and that the deceased had two das in his possession ; that he threw one at the appellant and advanced to attack with the other, whereupon the appellant, becoming alarmed and finding that the only way in which it was possible to defend himself was to ward off, struck at him with his hmein or spear and inflicted the wound which ultimately became fatal. If this defence is true or if there is some ground for thinking that there is some reasonable chance that it may be true, *see* 14 Rang 666,[1] the appellant's conviction ought to be quashed.

The eye witness of the occurrence made a statement in the Sessions Court to the effect that from the time he saw the deceased and the appellant up to the time of the attack he had his eyes on them : he only saw the attack and the appellant inflicting the wound into Mya Bu's neck from behind and he did not see or hear any quarrel.

It is with regret that I feel obliged to say that this case was most unsatisfactorily and perfunctorily tried. The witness San Tin should have been cross-examined with much more care and the duty fell upon the learned Sessions Judge, having regard to the provisions of S. 540, Criminal P. C., of seeing that justice was done by making further enquiry and in particular by referring to the statement made by this witness in the committal Court and seeing that it was put upon the

1. ('37) 24 A I R 1937 Rang 83 : 168 I C 193 : 38 Cr L J 524 : 14 Rang 666 (F B), Emperor v. U Damapala.

record. It was extremely important to see whether San Tin's evidence at the Sessions tallied with that given before the committing Magistrate. Before the committing Magistrate he said :

I was ploughing in the field. I saw Mya Bu coming ahead of the accused Maung Thein. Mya Bu was at that time holding two das in his hands. They went to the south side while I was ploughing with my face to the north side. I was not watching them all the time.

This statement of course is in direct contradiction to what he subsequently said. The witness added before the Magistrate "I saw Maung Thein thrusting with a hmein when Mya Bu turned back, but I did not know what Mya Bu did before that." We are therefore left with a state of affairs in which the eye-witness has at one time been felt obliged to say that he did not see, because he was not watching, all that transpired between these two men before the fatal blow was struck. We have then to enquire, the accused having set up that he comes under an exception to S. 300, Penal Code, in that he was acting in the right of private defence of his body, whether there can be any ground for accepting his story as possibly true. It is clear that the deceased had two das before the quarrel took place. One of these das was not found, and the fact only one da was found out of two which the deceased possessed corroborates to some extent the appellant's story. At about the time when the deceased was killed, he somehow got rid of the da which went some distance away from him, and it may well be that he did indeed throw it at the appellant and advanced upon him and in this way put the appellant in real fear. The learned Sessions Judge has actually said that the appellant gave vent to his fury by thrusting a harpoon into the neck of the deceased from behind taking advantage of his position and it was a cowardly attack. I have seen the pictures which have been prepared by the medical witness of the head and body of the deceased showing where the wounds were inflicted. They are all upon the front of the deceased. There is no ground whatever for saying that the deceased was approached and stabbed from behind. The doctor, whose evidence was of considerable importance, was examined in the most perfunctory manner. He merely read his statement in the lower Court and said that the deceased could have been speared from the back if he turned his face; all that that can mean is that if the deceased was walking ahead of the appellant and had turned completely round thus facing the appellant he might have received his injuries in that way. If that occurred it would of course be entirely wrong to suggest that there was a stab from the back. The doctor cross-examined says that the injuries could have been caused from the front or the side. No further questions were put to him, and we must accept as likely to be true the appellant's story that the injuries were caused as a result of the attack made upon him by the deceased with a da.

The prosecution in every case must show that a murder has been committed and when the accused sets up, as he did in this case, at the earliest possible moment the defence that he was acting in accordance with the right of private defence, such defence must be examined and it must be shown by the prosecution before he can be convicted that there are no reasonable grounds on which such a defence could be believed to be true. In this particular case the appellant went at once to the headman and set up the version to which he adheres now. I must record my feeling of great regret that this man should have been convicted and sentenced to death and been in a condemned cell since 20th December. His conviction is quashed, the sentence of death is set aside and he will be set at liberty unless other charges are pending against him.

Dunkley J. — I agree that the appellant must be acquitted on the ground that he acted within the right of private defence of his body. The trial before the Sessions Court was superficial in the extreme. In the committal Court the appellant had set up the defence which he subsequently set up at the trial. It was therefore known both to the pleader who defended him in the Sessions Court and to the learned Sessions Judge who had the committal proceedings before him at the time of the trial. When the pleader failed in his duty by not cross-examining the witness San Tin, in regard to the previous contradictory statements which he had made in the committal Court it became the bounden duty of the learned Sessions Judge to examine San Tin further in regard to his previous statements and to bring those statements on to the record of the Sessions trial.

Now, there are in this case three circumstances which bring the case of the appellant within the rule in 14 Rang 666[1] to which my Lord has just referred. They are, first that although the deceased had two das in his hands immediately before the fatal injury

was inflicted on him, yet although the headman arrived on the scene within a few moments of the injury having been inflicted he found only one da near the deceased's body and the other da has disappeared completely, and this fact does support the appellant's version that one da was thrown at him and therefore may quite well have been lost in the fields after it failed to find its mark. The second circumstance is that the appellant made no attempt to abscond, for he went straight to the headman's house and as the headman had already been called away to the scene of crime he waited in the headman's house until that official returned, and then told the headman exactly the same story as he set up in his defence in the Sessions Court. And, thirdly, the statement made by the witness San Tin that the fatal blow was inflicted from behind—a suggestion which had been accepted by the learned Judge—is on the medical evidence as to the position of the injuries, clearly wrong. The blow must have been delivered while the deceased and the appellant were either standing side by side or were facing one another.

Consequently, when these facts became apparent, it was clearly on the prosecution to show that the appellant could not have had any right of private defence of his body, and the prosecution has not shown anything of the kind. In fact the evidence is merely that of a single witness who is proved to be quite untrustworty. I therefore agree that the conviction and sentence of the appellant must be set aside and he must be acquitted. One further remark. I notice that in the committal Court the witness San Tin was first examined as a witness for the prosecution and subsequently at a later date examined as a witness for the defence. That is bad practice. The same person cannot under any provision of the Code of Criminal Procedure be both a witness for the prosecution and for the defence. If he is called for the prosecution and the defence desires to elicit any facts from him, then those facts must be elicited by questions asked in cross-examination at the proper time.

K.S./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Rangoon 177

ROBERTS C. J. AND DUNKLEY J.

Abdul Rahaman Nizami — *Appellant*

v.

Manikram Hanumanbux Bajaj — *Respondent.*

First Appeal No. 67 of 1940, Decided on 4th December 1940, against decree of High Court on original side, D/- 24th April 1940.

Specific Relief Act (1877), Ss. 21 and 12 — *A* selling article to *B* on hire-purchase contract — Article to remain *A's* property until payment of all instalments—*B* entitled to return article any time in good working order provided all instalments due were paid — If any instalments were not paid, *A* could take possession of article and recover instalments due along with costs of putting it in order—*B* instead of returning article requesting *A* to take it back—*A* asking for time and subsequently refusing to take article as not being in working order — *A's* suit for amount of instalments due up to date of suit and declaration as to *B's* liability for remaining instalments held one for specific performance which could not be enforced—*A's* letter asking for time to take back article held novation of agreement so far as *B's* obligation to return article was concerned.

A sold certain article to *B* in pursuance of a hire-purchase agreement between the parties. The article was to remain the property of *A* until the payment of all the instalments of the purchase price. *B* was entitled to return the article in good working order at any time provided all amounts due by way of instalments were paid. If any instalments were not paid, *A* could take possession of the article as well as recover the amount of instalments due, and the costs of putting it in order. The parties subsequently fell out and instead of returning the goods himself as per terms of the agreement *B* requested *A* to take back the article. *A* instead of ignoring the letter as being contrary to the terms of the agreement asked for time to take back the article and after getting it examined refused to take it as it was not found in good working order. *A* then sued *B* for the amount of all instalments due up to the date of the suit and for a declaration that *B* was liable to pay all remaining instalments as set out in the agreement:

Held that the suit was one for the specific performance of the contract for the sale of goods and since the failure of *B* to perform his obligations under the hire-purchase agreement for the sale of goods could be adequately compensated in money the contract could not be specifically enforced.

[P 179 C 1]

Held further that *A's* letter asking for time to take back the article amounted, so far as the obligation of *B* to return the goods was concerned, to a novation of the agreement. [P 178 C 2]

Dr. Rauf — for Appellant.

K. C. Sanyal — for Respondent.

Roberts C. J.—By a contract dated 8th October 1937 between the parties there was an agreement to sell by hire-purchase certain cinema apparatus for the price of rupees 24,000, payable as to Rs. 5000 on the date of

execution and as to the balance in equal monthly instalments. The seller was Mr. A. R. Nizami and the purchaser was the present respondent. Clause 3 of the agreement ran :

It is also agreed that as long as there remains any sum outstanding for the price of the articles sold the articles shall remain the property of A. R. Nizami.

Clause 4 :

That the said Mr. M. H. Bajaj may at any time return the articles sold provided that he does so in good working order and all amounts due by way of instalments have been paid.

Clause 5 :

That if any instalment is not paid on the 5th of each month the said A. R. Nizami will allow fifteen days grace and on the expiration of that period he will be entitled to take possession of the articles wherever they might be found and he may recover the full amount of the instalments due up to that date as well as the cost of putting the machinery in working order as if on demand and in such event the said Bajaj shall have no further right or claim in respect of the said articles.

I agree with the learned Judge of first instance in this matter, that these paragraphs must all be read together. It is quite clear that the cinema apparatus was Mr. Nizami's property and that Mr. Bajaj on his part agreed to put it into good working order before returning it. Mr. Nizami, if any instalments were not paid, might take possession of the articles as well as recover the amount of instalments due and the costs of putting them in order. The parties here fell out in June 1938. Mr. Bajaj decided by 8th June that it was impracticable for him to retain the apparatus and he wrote asking Mr. Nizami to arrange to take back the old materials according to the terms of the agreement. In reply Mr. Nizami said that he was making arrangements to have the equipment examined by his engineer and this would take a week; and Mr. Bajaj somewhat rashly seized the opportunity to suggest that Rs. 100 a day rent would be payable as from 9th June. This, of course, as Mr. Nizami described it, was a ridiculous proposal; but the present appellant added to his letter of 13th June this paragraph :

I am making necessary arrangements to have the whole equipment and fittings thoroughly examined by my engineer in order to satisfy myself that they are in good order. You cannot possibly expect me to take over such delicate and expensive instrument and apparatus without proper examination as to their condition.

It seems to me that he was then saying that he refused to take delivery under the terms of the contract from Mr. Bajaj of his apparatus, but sought Mr. Bajaj's acceptance of a new term of contract that he should be allowed to go and test the apparatus and not take it away until after it was tested. It is now suggested by Dr. Rauf that he is only obliged to take away the apparatus if at the conclusion of the test he found that it was in good working order and that the contract had been complied with. But he had been already informed by Mr. Bajaj of the latter's intention to return the apparatus and if he found that it was not in good working order it seems to me that he could only accept the articles in the condition in which they were and debit Mr. Bajaj with the cost of putting them in good working order and claim that amount by way of damages for breach of contract. As it was, there was a dispute as to whether the articles were in good working order or not and they have been left on the premises of Mr. Bajaj. The latter has tried to charge rent for them at the rate of Rs. 100 a day, whereas Dr. Rauf's more modest claim was that instalments should be paid under the contract. It is however clear that the contract was broken long ago, and this view has found acceptance, as I understand it from the letters written by the learned advocate himself to Mr. Bajaj's then legal adviser. The view which I take of the terms of the contract and the legal position between the parties is the same as that taken by the learned trial Judge, and in my opinion this appeal must be dismissed with costs, advocate's fee ten gold mohurs.

Dunkley J. — I agree. Under cl. (4) of the hire-purchase agreement it was the respondent's duty to return the goods to the appellant, but by his letter (Ex. B) of 8th June he requested the appellant to take back the goods. The appellant might safely have ignored this letter as not being a proper compliance with the terms of cl. (4) of the agreement, but he did not take up that attitude; on the contrary, in his letter of 18th June (Ex. F) he agreed to take over the goods from the respondent on Thursday the 23rd June. That was, so far as the obligation of the respondent to return the goods was concerned, a novation of the agreement. The appellant refused to take over the goods because when his experts had examined them on 23rd June it was discovered that the apparatus was not in good working order; and in consequence of this refusal the suit, out of which this appeal has arisen, arose.

Now, one has only to read the plaint to realize at once that the suit was not maintainable. The plaint set out that in accordance with the agreement between the parties

the respondent was to purchase these goods and to pay for them by certain instalments; that he had failed to pay the instalments as due; and therefore the plaintiff-appellant asked for a decree, first, for the amount of all instalments which had fallen due up to the date of suit, and, secondly, for a declaration that the defendant-respondent was liable to pay all the remaining instalments as set out in the agreement. Clearly therefore the suit was a suit for the specific performance of a contract for the sale of goods. Under S. 12, Specific Relief Act, specific performance of a contract may, in the discretion of the Court, be enforced when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief. Under S. 21, a contract for the non-performance of which compensation in money is an adequate relief cannot be specifically enforced. How it can be said that the failure of a person to perform his obligations under a hire-purchase agreement for the sale of goods cannot be adequately compensated in money passes my comprehension.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Rangoon 179

MACKNEY J.

Ma E Thwe — Plaintiff — Appellant

v.

U Tha Yin—Defendant — Respondent.

Special Second Appeal No. 162 of 1940, Decided on 9th August 1940, against decree of Dist. Court, Tharrawaddy in Civil Appeal No. 4 of 1940.

Minor—Contract of marriage between minor girl and person of full age — Breach of promise to marry — Minor cannot sue for damages — Father's consent to contract does not make it any more valid.

A minor girl entering into a contract of marriage with a person of full age cannot sue for compensation for breach of promise of marriage. The fact that her father consented to her making the contract does not make it any the more a valid contract, although it might make the marriage a valid marriage if it had taken place: ('39) 26 A I R 1939 Rang 86 and ('19) 6 A I R 1919 U B 24, *Rel. on*; 21 Bom 23, *Not Appr.* [P 180 C 1]

Sein Tun Aung — for Appellant.

W. Hock — for Respondent.

Judgment.—The plaintiff-appellant is a minor girl. She has sued the defendant-respondent U Tha Yin for compensation for breach of promise to marry. Her suit was allowed in the Township Court and a decree for Rs. 200 was granted. On appeal to the District Court, this decree was set aside and the plaintiff's suit was dismissed. The learned District Judge has pointed out that in 1938 R L R 667,[1] it was held that a minor was not competent to enter into a valid or binding contract to marry and the minor could not sue for damages for breach of promise of marriage. The plaintiff now appeals to this Court taking the ground that the minor appellant could sue for breach of promise to marry because the promise was made not only to herself but to her parents also. This is a strange form of argument and, in my opinion, it betokens great confusion of mind. No doubt, according to Burman Buddhist law to constitute a valid marriage with a person under the age of 20 that person's parents must have given their consent. But we must distinguish between what is necessary for a valid marriage and what is necessary for a contract. It is the minor who is suing for breach of contract presumably because the contract was made with her. I fail to see how she could sue for breach of a contract which was made with her father, nor do I understand how the father could be sued or could sue on a breach of contract to marry his daughter.

The learned counsel relied on 21 Bom 23[2] which was a case where the plaintiff who had been betrothed to the defendant's daughter sued for a declaration that unless the defendant was willing that the marriage should be performed before a certain date the contract for the marriage should no longer be binding on the plaintiff and that the betrothal was void, and for Rs. 25,000 damages for breach of the contract of betrothal and marriage. It was expressly pointed out in that case that the marriage of Hindu children is a contract made by the parents and the children themselves exercise no volition; if this were true of the marriage, it was equally true of betrothal and there could be no implied condition that fulfilment of the contract must depend upon the willingness of the girl at the time of marriage. In 3 U B R 106[3] this decision was commented upon, and it was observed :

> It would be difficult to imagine circumstances more widely opposed to the conditions of marriage between Burmese Buddhists.

The consent of the parties is essential to a marriage and consequently the appellants

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1. ('39) 26 AIR 1939 Rang 86 : 181 I C 755 : 1938 R L R 667, Ma Pwa Kywe v. Maung Hmat Gyi.
2. ('97) 21 Bom 23, Purshomtamdas Tribhovandas v. Purshomtamdas Mangaldas.
3. ('19) 6 A I R 1919 U B 24 : 49 I C 59 : 3 UBR 106, Maung Po Thaw v. Maung Tha Hlaing.

it was held could not be made liable for damages for breach of the promise given by them. If they could not be liable for damages for breach of promise, neither could they sue. In the present case they have not sued. It is the minor who has sued. It is obvious that her suit must fail. The fact that her father consented to her making the contract does not make it any the more a valid contract although it might have made the marriage a valid marriage if it had taken place. The learned counsel for the appellant asks that this case should not be decided here but be referred to a Bench for decision. It does not appear to me that there is any necessity for this course. The appeal is dismissed. In the circumstances of the case, however, I am not disposed to make any order as to costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Rangoon 180

SHARPE J.

The King

v.

Sridhar and others — Respondents.

Criminal Appeal No. 980 of 1939, Decided on 25th January 1940, from order of Sess. Judge, Hanthawaddy, D/- 31st August 1939.

Penal Code (1860), S. 225—Police officer while arresting not acting on his own initiative but merely carrying out verbal orders of superior officer—Arrest is not lawful within meaning of S. 225 — Written order under S. 56, Criminal P. C., is essential.

Where a police officer while arresting a person is not acting on his own initiative or independently, but is merely doing what his superior officer tells him to do, the arrest is not lawful within the meaning of S. 225, Penal Code. An order in writing must be delivered to him under S. 56, Criminal P. C.: ('36) 23 A I R 1936 Rang 119, *Appr., and Rel. on*; ('37) 24 AIR 1937 Bom 56; ('26) 13 A I R 1926 Pat 424 and ('18) 5 A I R 1918 Mad 514, *Disting.*

[P 181 C 1]

U Myint Thein, Government Advocate — for the Crown.

H Basu; Hla Tun Pru; D. M. Ray; U Twa Aung — for Respondents 2; 7, 15 and 16; 5, 6 and 8; and 9 and 10, respectively.

Respondents 12, 13 and 14 in person.

Judgment. — This is an appeal against an acquittal presented by direction of the Governor. The incident in question arose out of the strike at the Burma Oil Company's works at Syriam in January of last year. At 8.10 A. M. on the morning of 26th January 1939, a first information report was made at the police station at Thilawa alleging that a haystack had been burnt at Thilawa the night before at about 10-30 P.M. About 4.30 P. M. on 26th January, Mr. Tooke, the Subdivisional Police Officer at Syriam, gave orders by word of mouth to Maung Kyin Maung, a Sub-Inspector of Police, also stationed at Syriam to arrest one Forja Singh in connexion with the haystack burning. Maung Kyin Maung was within the police area under the control of Mr. Tooke but Thilawa was not in the sub-area embraced by the Sub-Inspector's activities. In accordance with this verbal order, Maung Kyin Maung proceeded to arrest Forja Singh —and he was the man that Mr. Tooke had so ordered him to arrest—in connexion with the burning of the haystack on the previous night. As a matter of fact, Mr. Tooke told Maung Kyin Maung that Forja Singh was to be arrested for an offence punishable under S. 436, which is mischief by fire with intent to destroy a house whereas in point of fact if Forja Singh was to be arrested for any offence at all in accordance with the first information report, it would be an offence punishable under S. 435, which is mischief by fire with intent to cause damage. However, that point is really immaterial because the offences under both those sections are both cognizable ones.

Maung Kyin Maung and other police officers went to a meeting of the strikers and he arrested Forja Singh. After he had done so, the police party, himself included, was attacked by a mob of about 200 people who attempted to rescue Forja Singh. The present respondents were some of those who comprised that mob and they were afterwards arrested and charged with an offence punishable under S. 225 which provides the punishment for any one who attempts to rescue another person from any custody in which that person is lawfully detained for an offence. The whole question before me is whether Forja Singh, arrested as he was by Maung Kyin Maung in the circumstances just mentioned, was lawfully detained within the meaning of that section. The learned Magistrate who tried the respondents convicted them all. He bound over two of them and the rest he sentenced to six months' rigorous imprisonment each.

On appeal the learned Sessions Judge held that Forja Singh was not lawfully detained and, following the decision of my brother Mosely in 13 Rang 754[1] he acquitted all the respondents and set aside the convictions and sentences. In my judgment, 13 Rang 754[1] disposes of this appeal. I see no

1. ('36) 23 A I R 1936 Rang 119 : 161 I C 459 : 37 Cr L J 462 : 13 Rang 754, Mohamed Ismail v. Emperor.

reason whatever for saying that it is not a correct decision. If I had had any reason to suppose that it was incorrect, I should have referred that question of law for the determination of a Bench, but I think that that decision is quite right and concludes this matter. The learned Government Advocate has brought to my notice three cases from which he argued that 13 Rang 754[1] was not rightly decided. The latest of those cases is a Bombay case in which a Bench of the Bombay High Court discussed Mosely J.'s decision. I refer to ILR (1937) Bom 127.[2] That case however is distinguishable from the present case. In the Bombay case the police constables were present when the complaint was made so that the police officers in question had personal knowledge of the making of the complaint. In 5 Pat 533,[3] it is to be observed that the police constable who was deputed by the Sub-Inspector went along with the complainant from whom the constable, acting independently, obtained credible information which entitled him to act under S. 54, Criminal P. C.

The third case is that of 40 Mad 1028.[4] That case is distinguishable because, as is pointed out by Ayling J. it was in evidence that the constable knew that the warrant in that case had in fact been issued. All those three cases are therefore distinguishable from the present case where there is not the slightest suggestion that Maung Kyin Maung acted in any way on his own initiative or that he had any information or suspicion apart from what his superior officer told him. To my mind the important part of Mosely J.'s judgment is those few words at p. 756 where he said, ". . . . . provided that the officer is acting on his own initiative or independently in the course of his duty." If he is doing that he may then act under S. 54, Criminal P. C., but if he is not acting on his own initiative or independently, then, if he is merely doing what his superior officer tells him to do, an order in writing must be delivered to him under S. 56. In my judgment there is no reason to dispute the correctness of Mosely J's decision which, in my opinion, entirely covers the present case. In those circumstances the respondents' appeals to the Sessions Judge were rightly allowed and they were properly acquitted.

The learned Government Advocate however has pointed out that there is a second ground to his memorandum of appeal to this Court and he asks me to convict the respondents of some other offence such, for instance, as rioting, if the materials on the record in my opinion justify it. It is enough on that point for me to say this: that the learned Sessions Judge was apparently never asked to do that. What the learned Sessions Judge did was to come to the conclusion that no offence punishable under S. 225 had been committed by the respondents. With that decision I am, as I have already said in entire agreement. I do not think it right for me now, in the circumstances of the present case and having regard both to the fact that the Sessions Judge was not asked to record a conviction under some other section and also to the fact that it is precisely one year to-night since the haystack was set on fire, to go into these cases in detail to see what if any other offence these respondents have committed. Furthermore, the learned Government Advocate informed me at the outset of the hearing of this appeal that he did not now ask for anything more than a nominal sentence; all he wanted was an expression of opinion about 13 Rang 754.[1] I am much obliged to the learned advocates on both sides for the full and clear argument which they have presented. This appeal must in my judgment be dismissed.

G.N./R.K. *Appeal dismissed.*

2. ('37) 24 A I R 1937 Bom 56 : 166 I C 632 : 38 Cr L J 267 : ILR (1937) Bom 127 : 38 Bom L R 971, Keshavlal Harilal v. Emperor.
3. ('26) 13 A I R 1926 Pat 424 : 98 I C 254 : 5 Pat 533:27 Cr L J 1310:8 P L T 237, Kishun Mandar v. Emperor.
4. ('18) 5 AIR 1918 Mad 514:40 I C 709 : 18 Cr L J 709 : 40 Mad 1028, In re Ratna Mudali.

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(28) A. I. R. 1941 Rangoon 181

MOSELY J.

The King

v.

Maung Tin Shwe — Respondent.

Criminal Revn. No. 1206-A of 1940, Decided on 10th January 1941, from order of Headquarters Magistrate of Pyinmana, D/- 6th August 1940.

(a) Railways Act (1890), S. 112 as amended by Burma Act 18 of 1939—Sentence of whipping in default of payment of fine imposed under S. 112 is illegal.

Act 18 of 1939 must be read as enacting only that a subtantive sentence of whipping may be imposed where the person convicted is unable to pay a fine. Hence a sentence of whipping in default of payment of a fine imposed under S. 112, is illegal. [P 183 C 1]

(b) Railways Act (1890), S. 112 as amended by Burma Act 18 of 1939—Effect of Act 18 of 1939 on S. 17 of Prevention of Crime (Young Offenders) Act stated.

Section 17, Prevention of Crime (Young Offenders) Act, must be taken as having been modified by Act 18 of 1939, and can no longer affect the punishment to be awarded for offences by juveniles under 16 against S. 112, Railways Act. [P 183 C 1]

E. W. Lambert, Government Advocate — for the Crown.

Order. — The respondent, Maung Tin Shwe, a boy of 13 was found guilty, under S. 112 (a), Railways Act (9 of 1890), of travelling without a ticket, and was sentenced by a first class Magistrate to pay a fine of Rs. 10 plus the fare of Re. 0-15-9 or in default to receive seven lashes under that section of the Railways Act as amended by Burma Act 18 of 1939. This Act, headed as "An Act to amend S. 112, Railways Act," reads as follows :

To S. 112, Railways Act, the following proviso shall be added, namely :

'Provided that if such person is under the age of 20 years and unable to pay fine, he may be punished with whipping of not more than ten strokes by way of school discipline.'

It is to be noted that the wording of the Act is "pay fine" and not "pay the fine imposed." It would seem that the article "a" in front of the word "fine" was omitted because it was omitted in the Railways Act, which reads that "if a person contravenes the section he shall be punished with fine in addition to the amount of the single fare." This case has been placed before me in revision as it has been suggested that Burma Act 18 of 1939 only allows a substantive sentence of whipping and not a sentence of whipping in default. It is also desired to consider the effect of this Act on S. 17 (1), Prevention of Crime (Young Offenders) Act, (Burma Act 3 of 1930). This reads :

"When any person under 16 is convicted of an offence punishable with fine only and is sentenced to fine, the Court may add a sentence of whipping in default of payment of fine unless action against his parent or guardian" (i. e., to recover the fine) "under sub-s. (3) of S. 22 is practicable."

The argument is that, by Burma Act, 18 of 1939, an offence against S. 112, Railways Act, is no longer an offence punishable with fine only. In the case of an offence against the Penal Code, or any special or local law, (Ss. 40, 41 and 42, Penal Code), which is punishable with fine only, it is competent for the Court to direct, by the sentence, that in default of payment of the fine the offender shall suffer imprisonment, (S. 33, Criminal P. C., and S. 65, Penal Code), which shall be simple imprisonment, and not exceed a certain scale, (S. 67, Penal Code). Sentences of imprisonment passed in default of payment of fine differ from substantive sentences of imprisonment in that they may not exceed a certain scale, (Ss. 65 and 67, Penal Code and S. 33, Criminal P. C.). Sentences of imprisonment passed by a Court of Session or a District or first class Magistrate in default of payment of fine are or are not appealable according to the amount of the fine imposed, (S. 413, Criminal P. C.). A sentence of whipping can only be passed by a first class Magistrate (S. 32, Criminal P. C.). This applies to substantive sentences for serious offences tried under the Young Offenders Act also (S. 16 (c)), and must apply, though not so expressly stated, to petty offences for which sentences of whipping are imposed in default of payment of fine, (S. 17 (1), see para. 775 (1), Burma Courts Manual). Sentences of whipping in default of payment of fine passed under S. 17 (1), Young Offenders Act, are appealable by virtue of the special right of appeal given by S. 13 of that Act. A sentence of whipping can, as has been said only be passed by a first class Magistrate for an offence under the Railways Act, (which is triable by any Magistrate). It follows that a sentence of whipping imposed in default of payment of fine for an offence against the Railways Act will or will not be appealable according to the amount of the fine imposed, though the intention of the Criminal Procedure Code as amended in 1923 was clearly to make all sentences of whipping appealable.

A convicted person may commit a default or fail to pay a fine by reason of inability or unwillingness. Act 18 of 1939 is not couched in the customary legal terminology. The language is vague and general. It is merely said that a person under the age of 20 who is unable to pay a fine may be punished with whipping. This inability to pay a fine may and ordinarily should be ascertained by the Magistrate before sentence is passed. In such a case a substantive sentence of whipping would naturally be imposed. It appears to me that the language used clearly provides for such a case. On the other hand, though it is hardly likely with this type of offence, this inability may only be discovered at a later stage. The Criminal Procedure Code provides for the suspension of execution of a substantive sentence of whipping, (which is always appealable)—*vide* S. 391, and for suspension of execution of a sentence of imprisonment in default of payment of fine, whether the sentence be appealable or not, (S. 388) but there is no provision in the Criminal Procedure Code for suspension of a sentence

of whipping in default of payment of fine because such a sentence is not contemplated by that Code. Nor is there any provision for suspension in Act 18 of 1939, so that the inability to pay the fine would only be ascertained after the sentence of whipping had been executed.

It appears to me therefore from the lack of provision for appeal and suspension of execution of sentence that Act 18 of 1939 must be read as enacting only that a substantive sentence of whipping may be imposed where the person convicted is unable to pay a fine. It follows then that S. 17, Prevention of Crime (Young Offenders) Act, must be taken as having been modified by Act 18 of 1939, and can no longer affect the punishment to be awarded for offences by juveniles under 16 against S. 112, Railways Act. In the present case the Magistrate ascertained immediately on passing the sentence that the accused was unable to pay a fine, and the punishment of whipping awarded in default was executed then and there. In spite of this, miscellaneous proceedings were opened to recover the fine, which appears to have been unnecessary. I hold that a sentence of whipping in default of payment of a fine imposed under S. 112, Railways Act, is illegal.

D.S./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 183

MYA BU AND MOSELY JJ.

U Maung Gyi — Appellant

v.

Maung Shwe Thee — Respondent.

First Appeals Nos. 101 and 102 of 1940, Decided on 28th November 1940, from order of Dist. Court, Yamethin, D/- 8th July 1940.

(a) Buddhist law (Burmese) — Adoption — Keittima — Act of shinbyuing does not necessarily show relationship of parent and child.

The act of shinbyuing does not necessarily show that this work of merit is performed specifically because of the relationship of parent and child, in the absence of evidence as to any declaration by the parents either in the invitation to friends or at the ceremony that the person shinbyued was their son or their keittima son. [P 184 C 1, 2]

(b) Buddhist law (Burmese) — Adoption — Repute — Evidence that adoptee was known in village as son of his adoptive parents is inadmissible — Evidence of repute must satisfy requirements of S. 32 (5) and (6) and S. 50, Evidence Act.

To establish an adoption by repute, evidence to the effect that the adoptee was known in the village as the son of his alleged adoptive parents is inadmissible as being hearsay. [P 184 C 2]

The evidence of repute which is allowed by the Evidence Act must satisfy the requirements of S. 32 (5) and (6) and S. 50 of the Act. Such evidence must be expressed by the conduct of the person expressing the opinion as to the relationship, who has special knowledge of the existence of the relationship. [P 184 C 2]

(c) Buddhist law (Burmese)—Keittima adoption—Fact that alleged adoptee was allowed to enjoy profits of his alleged adoptive parent's land and to maintain them out of those profits does not show relationship of parent and child between him and his alleged adoptive parents—Nor does performance of funeral rites by him of his alleged adoptive parent show him to be nearest heir.

The fact that the alleged adoptee was allowed to work the land of his alleged adoptive parents and enjoyed the profits out of which he maintained the old couple is quite insufficient to show that there was relationship of parent and child between his alleged adoptive parents and him. Nor does the performance of the funeral rites of the alleged adoptive parents by the alleged adoptee necessarily show that he is the nearest heir. [P 185 C 1]

U Aye Maung (2) — for Appellant.

U Ba Sein for U E Maung (1) — for Respondent.

Judgment.—These two appeals arise out of contested applications for letters of administration by the parties. The estate to which they claim letters of administration is that of U Hme who died in October 1939. His wife Daw Phaw predeceased him by about a year. The respondent's claim is based on the allegation that he was the keittima adopted son of U Hme and Daw Phaw, while the appellant claims to be the sole heir of U Hme as being his only surviving brother and nearest relation. The appellant's relationship to U Hme is undisputed, but the alleged adoption of the respondent is denied by the appellant. Maung Shwe Thee was the half brother of Daw Phaw who was the daughter of one Daw Pha by her first husband U Cho. After the death of U Cho, Daw Pha married U Htu and had two children of whom one was Maung Shwe Thee. One of the other children of U Cho and Daw Pha is U Po Maung, the first witness for the respondent.

The evidence tendered on behalf of Maung Shwe Thee to prove the original act of adoption comes forth from two witnesses, U Po Maung and U San Dun. U Po Maung is aged 66, while U San Dun, aged 67, was the headman of Su-dat village until about five years ago. Before him the headman of Su-dat village was U San Dun's father, and according to Maung Shwe Thee's case, as supported by these two witnesses, when Maung Shwe Thee, now 50 years old, was about 11 years of age, U Hme and Daw Phaw who were

childless asked U Htu and Daw Pha to let them have Maung Shwe Thee in keittima adoption. The request was made when the alleged adoptors were desiring to shinbyu Maung Shwe Thee. According to these two witnesses, U Hme and Daw Phaw in their presence and in the presence of some other witnesses asked U Htu and Daw Pha to give Maung Shwe Thee to them, when U Htu and Daw Pha told them that if it was merely for the purpose of shinbyuing Maung Shwe Thee they were not willing to let them have Maung Shwe Thee, but that if they were going to adopt him as a son with the right of inheritance they could take Maung Shwe Thee. Thereupon, U Hme and Daw Phaw declared that they were taking Maung Shwe Thee as a son with the right to inherit. This resulted in Maung Shwe Thee going to U Hme and Daw Phaw's house and living there. Thereafter, till about a year later, Maung Shwe Thee was shinbyued and went to a monastery where he lived as a koyin for about two years. After leaving the monkhood Maung Shwe Thee came back and resided in the house of U Hme and Daw Phaw for about five years till he was given in marriage. According to the evidence of these two witnesses, as well as other evidence called in that behalf, the marriage took place at the house of U Hme and Daw Phaw, after which Maung Shwe Thee and his wife continued to live in the house of U Hme and Daw Phaw. It is however admitted that some time after their marriage Maung Shwe Thee and his wife left the house of U Hme and Daw Phaw and went and lived in a house built on the land of U Htu and Daw Pha. After the death of U Htu and Daw Pha leaving some property, such property fell into the hands of Maung Shwe Thee who explains that he took over such property not on account of his right of inheriting the estate of U Htu and Daw Pha but on account of certain loans which he had advanced to the heirs of U Htu and Daw Pha upon such property.

U Po Maung is very closely related to Maung Shwe Thee, while U San Dun, who was the son of the headman at the time of the alleged adoption, is the only independent witness. Their evidence must be tested in the light of the surrounding circumstances and in the light of the subsequent conduct between the alleged adoptors and the adoptee. When so tested the evidence of these two witnesses loses much of its claim to credence. The act of shinbyuing Maung Shwe Thee by U Hme and Daw Phaw does not necessarily show that this work of merit was performed specifically because of the relationship of parent and child. The evidence is silent as to any declaration made either in the invitation to friends or at the ceremony that Maung Shwe Thee was their son or their keittima son. Maung Shwe Thee lived in the monastery as a koyin for about two years, and although it appears to be quite true that he came back to live in the house of U Hma and Daw Phaw for about five years before his marriage, there is no proof of any treatment meted out to him by U Hme and Daw Phaw or his conduct towards them to show that he was living in the house of U Hme and Daw Phaw not merely as a favoured relative.

Coming now to the marriage, the evidence is again silent that any particular declaration as to Maung Shwe Thee's status as the son of U Hme and Daw Phaw was made at the marriage. Then we have U Po Maung himself admitting that after Maung Shwe Thee and his wife had lived for about a year in the house of U Hme and Daw Phaw the old couple said that they had men to help them and so Maung Shwe Thee and his wife went and built a house in the compound of U Htu and Daw Pha. This is a very significant statement which savours of the suggestion that Maung Shwe Thee lived in the house of U Hme and Daw Phaw not upon the footing of a son but merely to suit the convenience of U Hme and Daw Phaw. From U Po Maung's evidence it can also be seen that Maung Shwe Thee was not the only person who had lived in the house of U Hme and Daw Phaw but U Po Maung himself had stayed in U Hme and Daw Phaw's house for about four years. Much inadmissible evidence has been recorded by the trial Court as evidence of repute. Such evidence is to the effect that Maung Shwe Thee was known in the village as the son of U Hme and Daw Phaw. Evidence of this kind is clearly inadmissible as being hearsay. The evidence of repute which is allowed by the Evidence Act must satisfy the requirements of S. 32 (5) and (6) and S. 50 of the Act. Such evidence must be expressed by the conduct of the person expressing the opinion as to the relationship, who has special knowledge of the existence of the relationship. While there is absence of evidence as to general treatment by the adoptive parents to the adoptee and the adoptee's conduct towards the adoptive parents, there is a significant admission by Maung Shwe

Thee to the effect that when he gave evidence in a case he stated that his father was U Htu.

A circumstance which has been proved to give support to the theory of the adoption is that about two years before U Hme's death some land was made over to Maung Shwe Thee by U Hme and Daw Phaw upon the understanding that Maung Shwe Thee was to have this land and maintain the old couple out of the profits that he made out of the land. This transaction was put forward as a gift by the old couple to Maung Shwe Thee; but it was not by means of a registered instrument or by mutation of names in the revenue registers. The fact that Maung Shwe Thee was allowed to work the land and enjoyed the profits out of which he maintained the old couple is quite insufficient to show that there was relationship of parent and child between his alleged adoptive parents and him. U Hme and Daw Phaw must have been an aged couple at the time and it is quite possible that they would not themselves work the land and wished to have a relative come forward to work the land and maintain them out of the profits. The probability is very much in favour of the case put forward by the headman Maung Min Daing, son of U San Dun, to the effect that Maung Shwe Thee worked this land on half shares of the produce. There is a little evidence of the admission on behalf of U Hme and Daw Phaw that Maung Shwe Thee was their keittima adopted son, but such admissions as are alleged in the evidence were said to be made casually and without occasion, and so lack credibility. As is often the case, there is also brought on the record evidence tending to show that Maung Shwe Thee helped in the conduct of the funeral rites of U Hme. Such funeral rites are generally performed by any near relative and they do not necessarily show that the person performing the rites is the nearest heir. The evidence on the whole is really too scanty and devoid of circumstance to prove the keittima adoption. Maung Shwe Thee's claim for letters of administration to the estate of U Hme fails. The order of the trial Court granting letters of administration to Maung Shwe Thee is accordingly set aside and instead it is directed that letters of administration to the estate of U Hme be granted to U Maung Gyi the admitted nearest relation on the usual terms. The respondent Maung Shwe Thee will pay the appellant's costs in both Courts; advocates fee here four gold mohurs for both cases.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 185

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE, JJ.

Commissioner of Income-tax, Burma — *Applicant*

v.

Hajee Abdul Ganny Ayoob Moulmein — *Respondent.*

Civil Ref. No. 4 of 1941, Decided on 10th April 1941, made by Commissioner of Income-tax, Burma.

(a) Income-tax Act (1922), Ss. 66 (2) and 6— Questions whether debt is bad, when it became bad and its extent are questions of fact to be decided by Income-tax authorities.

The questions whether a debt is bad, the point of time at which it became bad and its extent are questions of fact to be decided by the Income-tax authorities: ('32) 19 A I R 1932 P C 178, *Rel. on.* [P 186 C 2]

(b) Income-tax Act (1922), S. 6—Bad debts can be deducted—Deductible loss is one which was reasonable or necessary to incur in carrying on business or profession—Assessee, piece goods merchant, maintaining open and current account with bank solely in connexion with business—Bank becoming insolvent—Amount due to assessee from bank held became bad debt when Official Assignee declared final dividend—Portion of debt remaining outstanding after aforesaid declaration is bad debt.

Although the Act nowhere in terms authorises the deduction of bad debts of a business, such a deduction is necessarily allowable: ('32) 19 A I R 1932 P C 178, *Foll.* [P 186 C 2]

In order to permit of deduction the loss must be in the nature of a commercial or professional loss which means a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned. [P 186 C 2]

The assessee, a piece goods merchant solely in connexion with his business, maintained an open and current account with the Bank. The daily receipts of the business were paid into the account and payments for goods purchased for and on account of the business were made by cheques drawn on this account. The Bank was adjudicated insolvent, and at that time the assessee's account was in credit to the extent of Rs. 34,367:

Held that the amount due to the assessee from the Bank was a loss connected with and arising out of the business and was a bad debt which must be deducted in order to arrive at the true profits and gains of the business: 2 I T R 322, *Disting.* [P 186 C 2]

The debt became bad when in the insolvency of the Bank the Official Assignee declared a final dividend and the portion of the debt which was bad was the portion which remained outstanding after the final dividend had been declared. [P 186 C 2]

U Tun Byu, Government Advocate — for Applicant.

Dr. M. A. Rauf — for Respondent.

Dunkley J.—This reference arises out of the assessment to income-tax of the respondent for the year 1939-40. The business of the assessee is that of a piece goods merchant. For the purposes of this business he maintained a banking account with the S. A. R. M. Chettyar Firm, which carried on a banking business at Moulmein. The account was an open and current account, and was maintained solely in connexion with the business. The daily receipts of the business were paid into this account, and payments for goods purchased for and on account of the business were made by cheques drawn on this account. The relation between the assessee's business and the S. A. R. M. Firm was therefore that of creditor and debtor; the assessee in his business was a creditor of the S. A. R. M. Firm to the extent of his credit balance in his banking account at any time. In the year 1932 the S. A. R. M. Firm was adjudicated insolvent, and at that time the assessee's account was in credit to the extent of Rupees 34,367. He has since received dividends from the Official Assignee, and the unrealised amount now stands at Rs. 24,213-12-6. The assessee has claimed that this amount is now a bad debt and that he is entitled to deduct it in estimating the profits and gains of his business, assessable to income-tax in the year 1939-40. The Commissioner of Income-tax has, under the provisions of S. 66 (2), Burma Income-tax Act, referred to this Court for its opinion two questions of law said to arise out of this assessment. They are as follows :

1. Was the Assistant Commissioner legally justified in applying the principles of the ruling in 2 I T R 322,[1] concerning as they do the loss of a trader's cash or funds from entirely fortuitous circumstances, such as theft, dacoity, or robbery, to the loss of the assessee's funds through the failure of his bankers in the course of his business dealings with them as such?

2. Whether the sum of Rs. 24,213-12-6, representing a loss caused by the insolvency of the S. A. R. M. Chettyar Firm in 1932, is in law a proper deduction under the Burma Income-tax Act in computing the profits of the applicant firm for the year in question?

The first question is not a proper question to be propounded. It does not state a point of law, but states the argument on which the opinion of the income-tax authorities on a point of law is founded. The case cited in the question is a decision of a Bench of the Lahore High Court, which is not binding on us, and which, with all due respect, I should not be prepared to follow. However that may be, this case has no relevancy to the point at issue in the present case. The answer to the second question is concluded against the view of the income-tax authorities by the judgment of their Lordships of the Privy Council in 59 I A 290.[2] In the course of their judgment, their Lordships said at p. 296 :

> Although the Act nowhere in terms authorizes the deduction of bad debts of a business, such a deduction is necessarily allowable.

And further at p. 297 :

> Whether a debt is a bad debt, and, if so, at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the ipse dixit of anyone else.

To this might be added that the extent to which a debt is a bad debt must be similarly decided. I am quite unable to distinguish between the debt owing by the S. A. R. M. Firm to the assessee's business, and the debt owing by any customer of the business who has taken goods on credit from the business and owes for those goods. Both seem to me to be exactly on the same footing. If the customer failed to pay for his goods, and the amount due proved to be irrecoverable, the debt would undoubtedly be a bad debt deductible in estimating the profits and gains of the business. So also the loss sustained by the bankruptcy of the S. A. R. M. Firm is a loss connected with and arising out of the business, and is a bad debt which must be deducted in order to arrive at the true profits and gains of the business. The answer to the second question must therefore be in the affirmative. The point of time at which the debt due by the S. A. R. M. Firm has or will become a bad debt, and the portion of that debt which is or will be bad, are questions of fact to be determined by the Income-tax authorities; but in regard to these matters I think it right to suggest for the guidance of the Income-tax authorities that the debt will become bad when in the insolvency of the S. A. R. M. Firm the Official Assignee has declared a final dividend, and the portion of the debt which is bad will be that portion which remains outstanding after the final dividend has been declared. The assessee is entitled to his costs of this reference, advocate's fee ten gold mohurs, and also to a refund of his deposit paid under the provisions of S. 66 (2).

1. ('34) 2 I T R 322, L. N. Gadodia & Co. v. Commissioner of Income-tax, Punjab.

2. ('32) 19 A I R 1932 P C 178: 137 I C 772: 59 I A 290: 28 N L R 205 (P C), Commissioner of Income-tax, C. P. & Berar v. S. M. Chitnavis.

Roberts C. J.—I agree with the answers given to the questions propounded and also with the reasons given therefor in my learned brother's judgment.

Sharpe J.—In computing profits for the purpose of assessment to income-tax any loss connected with or arising out of the trade or profession of the assessee may be deducted. That is not to be expanded so as to mean that every loss incurred by an assessee is deductible. In order to permit of deduction the loss must be in the nature of a commercial or professional loss. I think that perhaps as good a way as any of defining a loss which may be deducted is to say that it must be a loss which it was either reasonable or necessary to incur in carrying on the particular trade or profession concerned. If any particular loss falls within that definition, it follows that it is connected with and arises out of the trade or profession of the assessee, that it is, in other words, a commercial loss. This definition which I have suggested, and which I think will provide a good working rule, will exclude such losses as are, for example, attributable to damages for personal injuries due to the negligence of the assessee's servants. Applying this definition to the facts of the present case, it appears to me that, as my learned brother has just said, this particular bad debt owing by the S. A. R. M. Firm to the assessee may be deducted by the latter for the purpose of computing the profits of his business for the purpose of assessment to income-tax. The assessee is undoubtedly in a substantial way of business and it seems to me impossible to say that it was neither reasonable nor necessary that he should have kept a current account with a banker for the purposes of his business; and, as we know, this particular account was maintained solely in connexion with the assessee's business. I agree with my brother Dunkley as to the answers which should be given to the questions referred and as to the order for costs which he has proposed.

G.N./R.K. *Answer accordingly.*

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(28) A. I. R. 1941 Rangoon 187

FULL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

Khem Raj — Plaintiff — Appellant

v.

Durgi — Defendant — Respondent.

Civil Ref. No. 3 of 1940, Decided on 10th April 1941, made by Mya Bu and Mackney JJ.

Suits Valuation Act (1887), Ss. 9 and 8—Suit for restitution of conjugal rights — Value for jurisdiction is not necessarily same as for court-fee — Plaintiff can put his own valuation for purposes of jurisdiction provided valuation is bona fide and not for effecting improper purpose — Jurisdiction of Court other than District Court, Sub-divisional Court or Assistant District Court extended by Government to suits or original proceedings without value—Court can entertain suit for restitution of conjugal rights provided plaintiff's valuation gives it jurisdiction.

Section 8 does not apply to a suit for restitution of conjugal rights. In such a suit therefore the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction are not necessarily the same. [P 188 C 1]

In a suit for restitution of conjugal rights the plaintiff is entitled for the purposes of jurisdiction to put any value he likes on the relief sought and thus determine the Court in which the suit is to be instituted, provided that the valuation is made bona fide and not in order to effect an improper purpose: 34 Bom 236, *Rel. on*; 2 L B R 140 (F B), *Not Appr.*; *Case law discussed.* [P 189 C 2]

A Court, other than the District Court, or the Sub-divisional Court or the Assistant District Court, the jurisdiction of which has been extended by Government to suits or original proceedings without restriction as regards the value, has jurisdiction to hear and determine a suit for restitution of conjugal rights provided the valuation placed upon the suit by the plaintiff in his plaint gives the Court jurisdiction. [P 187 C 2; P 189 C 2]

K. C. Sanyal — for Appellant.

N. Bose — for Respondent.

Roberts C. J.—The following two questions come before us by way of reference from a Bench of this High Court:

(1) Has the plaintiff in a suit for restitution of conjugal rights the right to put any value he likes on the relief sought, and thus determine the Court in which the suit is to be instituted, provided he does not do so arbitrarily or from improper motives? and (2) Has a Court, other than the District Court, or the Sub-divisional Court or the Assistant District Court the jurisdiction of which has been extended by Government to suits or original proceedings without restriction as regards the value, jurisdiction to hear and determine a suit for restitution of conjugal rights?

In my opinion it is necessary in order to reach a right conclusion to remember that calculation for court-fees is not necessarily the same thing as valuation for jurisdiction. The Court-fees Act in S. 7 states how valuation for court-fees shall be computed and in Sch. II, Art. 17 (vi) provides for a fixed fee in cases in which it is not possible to estimate at a money value the subject-matter of dispute and which are not otherwise provided for by the Act. As my learned brother Mya Bu J. has pointed out in his order of reference, it is settled law that a suit for restitution of conjugal rights is one in which the value of the subject-matter in dispute

cannot be estimated satisfactorily in terms of money; and consequently it is a suit which may be brought upon payment of the fixed fee of Rs. 10 mentioned in cl. (vi) of Art. 17. Section 9, Suits Valuation Act, says:

When the subject-matter of suits of any class, other than suits mentioned in the Court-fees Act, 1870, S. 7, paras. v and vi, and para. x, cl. (d), is such that in the opinion of the High Court it does not admit of being satisfactorily valued, the High Court may, with the previous sanction of the Governor, direct that suits of that class shall, for the purposes of the Court-fees Act, 1870, and of this Act and any other enactment for the time being in force, be treated as if their subject-matter were of such value as the High Court thinks fit to specify in this behalf.

A suit for restitution of conjugal rights does not fall within any of the paragraphs mentioned here, and as it does not admit of being satisfactorily valued the High Court might, with the previous sanction of the Governor, make rules determining the value of suits of that class. But no such rules have so far been made. Now S. 8, Suits Valuation Act, says:

Where in suits other than those referred to in the Court-fees Act, 1870, S. 7, paras. v, vi and ix, and para. x, cl. (d), court-fees are payable ad valorem under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same.

This section deals with certain suits in which court-fees are payable ad valorem; it has therefore no application to a suit for restitution of conjugal rights. In such a suit therefore the value as determinable for the computation of court-fees and the value for the purposes of jurisdiction are not necessarily the same. Indeed, under the Court-fees Act no "value" is fixed to such a suit, but the statute merely says that a fixed fee is payable. But for the purpose of framing his plaint, the plaintiff must, so far as the case admits, insert therein a statement of the value of the subject-matter of the suit for the purposes of jurisdiction. This determines the forum, since under S. 15, Civil P. C., every suit shall be instituted in the Court of the lowest grade competent to try it.

Now in 2 L B R 140[1] a Full Bench of the Chief Court of Lower Burma declared that in a suit for the custody of a child, (the value of which was equally not capable of being estimated in money) it could not be said that it was beyond the pecuniary jurisdiction of the Township Court. This decision, in effect, seeks to make a rule determining the value of such a suit; but this is not in conformity with the views expressed by the High Courts in Calcutta, Allahabad or Bombay. In 34 Cal 352[2] it was held by a Bench that a plaintiff is bound to value his suit, but that if from some improper motive he either undervalues it or overvalues it the Court must decide what should be considered to be the proper value. The judgment of the Bench continues:

In 13 Cal 232[3] and 18 Cal 378[4] it has been held that a suit for restitution of conjugal rights is incapable of valuation, but those cases turned on the construction of statutes which contemplate a strict money-value and not merely a valuation by a plaintiff for the purposes of ordinary jurisdiction. There may not be any pecuniary value of the subject-matter of a suit, a mere sentiment, a benefit, or a feeling outraged, may not possess a pecuniary value. A suit to recover damages for loss of reputation on a sentimental wrong is certainly incapable of valuation in one sense. A suit based on the ground of a wife's adultery is incapable of satisfactory valuation, but the plaintiff has still to value the relief he claims in our Courts.

Then in 37 Cal 860[5] another Bench pointed out that the case in 31 Cal 849[6] relied on in the order of reference in the present matter is, so far as it deals with the jurisdiction of the Munsif to entertain a suit for restitution of conjugal rights, obiter dictum. They added:

We see no reason to depart from what appears to have been the practice in this province for a number of years and which has been accepted as the practice in other provinces, and to hold that, for the purposes of jurisdiction a suit to set aside an adoption is incapable of valuation. The practice has always been that it is competent to the plaintiff to value the relief claimed in his suit, and that valuation has been taken to determine the forum of the Court to decide the suit.

As has been remarked in the order of reference, a Full Bench in Allahabad has declared that in a suit for restitution of conjugal rights the value of such a suit for the purposes of jurisdiction is what the plaintiff chooses to put upon it provided that the suit is not unwarrantably undervalued or overvalued from improper motives: 28 ALL 545.[7] Aikman J. said that the practice of allowing the plaintiff to put a value on the relief which he asks for and thus to determine the jurisdiction was not illegal and that no departure should be made from it. Subse-

1. ('03) 2 L B R 140 (F B), Ma Shwe Ge v. Maung Shwe Pan.

2. ('07) 34 Cal 352 : 5 C L J 400 : 11 C W N 458, Jan Mohamed Mandal v. Masher Bibi.
3. ('86) 13 Cal 232, Golam Rahman v. Fatima Bibi.
4. ('91) 18 Cal 378, Mowala Newaz v. Sajidunissa Bibi.
5. ('10) 37 Cal 860 : 6 I C 636 : 14 C W N 929, Prahlad Chandra Das v. Dwarka Nath.
6. ('04) 31 Cal 849 : 8 C W N 705, Aklemannessa Bibi v. Mohamed Hatem.
7. ('06) 28 All 545 : 3 A L J 266 : 1906 A W N 99 (F B), Zair Husain Khan v. Khurshed Jan.

quently in 33 ALL 767[8] where the valuation for the purposes of jurisdiction in a suit for restitution of conjugal rights was Rs. 1150, Tudball J. explained that this was an arbitrary valuation made by the plaintiff for the purpose of selecting the Court in which the suit would be brought; this did not alter the fixed fee payable under cl. (6) of Art. 17 in Sch. 2, Court-fees Act. The word 'arbitrary' is here employed in its strict sense : in this sense every valuation of a suit must be arbitrary except where the plaintiff claims current coin of the realm. In the order of reference a distinction is sought to be drawn between cases in which the valuation cannot be satisfactorily made and those in which it cannot be made at all. I cannot see the distinction; some suits are capable of being valued by a process of reasoning which is susceptible of being followed and checked, and others are not. In the latter case they will (unless special provision has been made for them) fall under cl. (6) of Art. 17 of Sch. 2, Court-fees Act, but there must still be an arbitrary or notional or speculative valuation placed upon them for the purpose of jurisdiction.

In some other decisions the word "arbitrary" has been used in a different sense which suggests deliberate unfairness for the purpose of gaining some advantage to which the plaintiff is not entitled. This is a more colloquial sense of the word. The trend of the decisions shows that the Courts will be vigilant to see that a plaintiff is not enabled to use his undoubted right to place a notional or speculative valuation upon his suit for the purposes of jurisdiction in order to effect an improper purpose; as for instance by undervaluation to restrict the rights of appeal which the defendant to the action might otherwise enjoy. In 8 Bom 31[9] West J. said :

> What prima facie determines the jurisdiction is the claim or subject-matter of the claim as estimated by the plaintiff. . . . . An exaggerated claim thus brought for the purposes of getting a trial in a different Court from the one intended by the Legislature, is substantially a fraud upon the law and must be rejected whether it arises from mere recklessness or from an artful design to get the adjudication of one Judge instead of that of another.

Then in 34 Bom 236[10] it was held that, in a suit for restitution of conjugal rights so far as the valuation of the claim for purposes of jurisdiction is concerned, the law leaves it to the plaintiff to put his own valuation on the plaint, and accepts it for this purpose unless it is vitiated by some improper motive such as a deliberate design to give the Court a jurisdiction which it does not possess. I would answer the questions propounded as follows :

(1) In a suit for restitution of conjugal rights the plaintiff may, for the purposes of jurisdiction put any value he likes on the relief sought and thus determine the Court in which the suit is to be instituted, provided that the valuation is made bona fide and not in order to effect an improper purpose :

I avoid the use of the word "arbitrary" because it has been employed by the various High Courts in different senses and is susceptible of misinterpretation.

(2) The answer is in the affirmative, provided the valuation placed upon the suit by the plaintiff in his plaint gives the Court jurisdiction.

Costs of this reference, advocate's fee ten gold mohurs, to be costs in the appeal.

Dunkley J. — I agree.

Sharpe J.—I agree. I think that it may perhaps be desirable that I should point out that R.1(1) of O. 7, Civil P. C., requires a plaintiff to state in his plaint the value of the subject-matter of the suit for the purposes of jurisdiction as well as for the purposes of court-fees, as far as the case admits. I have nothing else to add to what my Lord has said.

G.N./R.K. *Answer accordingly.*

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(28) A. I. R. 1941 Rangoon 189

SHAW J.

Maung Chan Sein — *Applicant*

v.

The King.

Criminal Revn. No. 531B of 1940, Decided on 10th December 1940, from order of Headquarters Special Power Magistrate, Insein, in Criminal Trial No. 104 of 1940.

Penal Code (1860), S. 408 — Broker working under or for firm is not necessarily servant of firm — Broker can be actual seller as well — Accused broker having bought paddy himself and paid purchase money in respect of it receiving some advance against said paddy certain sum from complainant firm and agreeing to deliver same to firm at fixed time and place — Accused held independent vendor to firm and since ownership in money advanced by firm passed to accused any condition attached to its use did not amount to trust — Undertaking by accused to use advance expressly to pay for

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8. ('11) 33 All 767 : 11 I C 186 : 8 A L J 889, Aisha v. Faiyaz Husain.
9. ('84) 8 Bom 31, Lakshman Bhatkar v. Babaji Bhatkar.
10. ('10) 34 Bom 236 : 4 I C 836 : 11 Bom L R 1352, Jasoda v. Chhotu Manu.

paddy bought by him did not make him trustee for money—Conviction of accused under S. 408 held could not be sustained.

To work as a broker under or for a firm is not necessarily to become their servant. A broker is well understood to be nothing but a middleman, a person who brings together a buyer and a seller. But a broker can be an actual seller as well. [P 190 C 2]

The accused being a broker and having bought a certain quantity of paddy which was lying at certain places, received as advance against the said paddy a certain sum of money from the complainant firm and agreed to deliver that paddy to the firm at a certain place by a certain date. The accused who merely represented that he had entered into contracts for the purchase of paddy and paid purchase money in respect of them in order to be able in turn to supply paddy to the firm, undertook to use the advance paid to him to complete those purchases and so be in a position to deliver the paddy to the firm :

Held that the accused was an independent vendor to the firm and since the ownership in the money advanced passed to the accused, any condition attached to its use did not amount to a trust, and the undertaking given by him to use that advance payment for the express purpose of payment for paddy bought by him, as represented by him, and for no other purpose did not make him a trustee of the money. The failure to carry out a promise or an undertaking to do something with it upon being paid a sum of money, might possibly lay the defaulter open to some other charge dependent upon what were the representations, but as the money had become his and was no longer the property of the payer of the money, there could be no trust in respect of how it should be used for the benefit of the payer of the money. Consequently the accused could not be convicted under S. 408 : 7 L B R 16 (FB), *Rel. on*; ('19) 6 A I R 1919 L B 60, *Disting.*
[P 191 C 2; P 192 C 1, 2]

Dr. Ba Han — for Applicant.
Foucar — for Company.

Order.—In the Court of the Head-quarters Magistrate, Insein, the applicant was convicted of having "committed criminal breach of trust in respect of Rs. 2600 which he had received from the complainant, agent of Messrs. Steel Brothers, for the express purpose of delivery of paddy said to have been bought already by him," to use the words of the finding. The charge was that he "being a servant in the employment of Messrs. Steel Brothers, and in such capacity entrusted with certain property, to wit money Rs. 2600, committed criminal breach of trust with respect to the said property" on or about 2nd February 1940. The offence was said to be one under S. 408, Penal Code. The only statements in the learned Magistrate's judgment which may be taken as amounting to a finding that the applicant was a servant of the company are the following :

The position of the accused Chan Sein is not an independent paddy dealer or casual supplier of paddy. He is a head broker of Messrs. Steel Brothers & Co. and his remuneration is the brokerage of Rs. 2 per 100 baskets of paddy bought.

As was stated by the learned Sessions Judge, on appeal, the questions put to the applicant were not as full as they might have been nor did the applicant appear to understand fully each question put to him. The result on appeal was that the finding of the Court below was altered and the learned Sessions Judge found that the applicant committed criminal breach of trust in respect of a sum of Rs. 1160 entrusted to him on the date set out in the charge for the purpose of buying 1000 baskets of paddy on that day and delivering to the company on the same day, which was according to him an offence punishable under S. 408, Penal Code. Again it was taken that the applicant was a servant of the company. The learned Sessions Judge stated :

He admitted that he was a sub-broker in the service of the company who are prosecuting him and that he was engaged by them in the first instance in the year 1938.

The admission of the applicant was in answer to the first question put by the Magistrate. That question was :

It is stated that from 1938 up to 1939-40 you were working as a broker under Steel Brothers Co. Is it true ?

The answer was "It is true." No question was put to the applicant as to his remuneration or other gain which he expected to get for what he was to do, nor indeed was he asked to state what was the exact nature of the business he was to perform for and on behalf of Steel Brothers. To work as a broker under or for a firm like Steel Brothers & Co. Ltd., is not necessarily to become their servant. A broker is well understood to be nothing but a middleman, a person who brings together a buyer and a seller. That is the ordinary acceptation of the term "broker." But a broker can be an actual seller as well. What exactly was the relationship between the applicant and Steel Brothers cannot be understood by a mere reference to the fact that he was given a brokerage of Rs. 2 per hundred baskets of paddy bought or that he worked as a broker for Steel Brothers since 1938. I am afraid that the case against the applicant was not clearly understood by assuming his service and overlooking the significance of the exact relationship between the applicant and Steel Brothers. The learned Sessions Judge's reason for convicting the applicant is to be gathered from the following :

There is ample evidence to show that on that particular date the appellant was given a sum of Rs. 1160 to go and collect 1000 baskets of paddy on the same day and to deliver to the company. The company's agent even sent his clerk to see

that the money was given to the owner of the paddy and the evidence goes to show that the appellant, for reasons of his own, managed to divest himself of the clerk's company and that he did not appear on that day or on any subsequent day to deliver either the paddy or the money to the company. In respect of this particular item of transaction therefore the appellant was clearly acting as the agent or servant of the company and the facts are almost identical with those maintaining in 10 L B R 81,[1] in which case it was held that there was criminal breach of trust.

To begin with, it is important to see what was the complaint laid against the applicant. It is to be found in EX. A, letter which was made the first information report and it runs :

Maung Chan Sein has worked as a broker to Steel Brothers & Co. Ltd., Thonze, since 1938, and has also continued his service as broker to us for the season 1939-40. On 2nd February 1940, I gave him Rs. 2600 as advance for 4900 baskets of paddy bought by him and to be delivered to Messrs. Steel Brothers & Co. Ltd., Okkan buying station on or before 12th February 1940. This sum of Rs. 2600 he did not account for, nor did he supply us with paddy on the said date. I waited for some time, but after enquiries, it was found that he had absconded with the money.

In respect of that complaint, there was produced a document bearing the date, 2nd February 1940. It is written both in English and in Burmese. The applicant put his signature to both parts. It is a receipt which runs as follows :

Received from Messrs. Steel Brothers & Co. Ltd., the sum of rupees two thousand six hundred only, being advance against four thousand nine hundred baskets Ngatsaing and Saingaung paddy already bought by me and lying at Thaikkone and Thabyegon and to be brought to Messrs. Steel Brothers & Co. Ltd.'s Okkan buying station on or before 12th February 1940. It is clearly understood by me that the whole of the above sum is paid to me for the express purpose of payment for paddy bought by me as represented above and for no other purpose.

The learned Sessions Judge's finding would seem to show that the document did not represent the true state of facts as to the amount paid on 2nd February 1940 or as to the quantity of paddy bought and to be delivered. The whole fact of the matter was that Maung Tun Pe, the complainant, was barely intelligible in his anxiety to prove that there was some sort of a trust created. His fear seems to have been that the payment might be treated as part of the price paid in advance towards paddy which was to be supplied by the applicant by way of sale—which indeed it was. The document (EX. B) must be interpreted according to its terms, to see whether it shows that the applicant was a servant of the company and as such entrusted with money to do a specific thing in a specified manner with it for the company. There is no other document to be read along with it, except EX. C. The oral evidence given, while it may be helpful to understand details of dealings, cannot be used to explain what is contained in the document itself. On matters about which the document is silent, of course the oral evidence must be referred to for finding out what was the position in relation to such matters. The applicant is described in the document as head broker where he signed it. It is stated in the document that he received from Steel Brothers & Co. Ltd., Rs. 2600 being advance against 4900 baskets of Ngatsaing and Saingaung paddy already bought by him and lying at Thaikkone and Thabyegon. So far the meaning seems clear namely that he, being a broker and having bought a certain quantity of paddy which was lying at certain places, received as advance against the said paddy a certain sum of money from Steel Brothers. Then the document goes on to show that paddy was to be brought to Steel Brother's Okkan buying station on or before 12th February 1940. This means that the applicant agreed to deliver that paddy to Steel Brothers at a certain place by a certain date. It is difficult to read into the document up to this point any kind of entrustment of the money. Reliance is however placed on the sentence which concludes the document. But I fail to appreciate how a trust is imposed by agreement or by implication in that sentence. It merely means that the applicant, who had represented that he had entered into contracts for the purchase of paddy in order to be able in turn to supply paddy to Steel Brothers, undertook to use the advance paid to him to complete those purchases and so be in a position to deliver the paddy to Steel Brothers.

Paddy is treated as bought when a contract is entered into, sometimes payment by way of earnest money being given, but delivery can only be had on payment of the price at the time of delivery, unless credit is allowed. Maung Tun Pe's evidence and EX. C go to show that the applicant made representations that he had made purchases of paddy and paid earnest money in respect of those purchases. When thereupon payment of the money was made to the applicant did it remain the property of Steel Brothers & Co. Ltd., or did the ownership in the money pass to the applicant ? That is the test to be applied. If ownership in

1. ('19) 6 A I R 1919 L B 60 : 51 I C 673 : 20 Cr L J 513 : 10 L B R 81, Pyo Gyi v. Emperor.

the money passed to the applicant then any condition attached to its use would not amount to a trust. To fail to carry out a promise or an undertaking to do something with it upon being paid a sum of money, may possibly lay the defaulter open to some other charge dependent upon what were the representations, but, as the money had become his and was no longer the property of the payer of the money, there can be no trust in respect of how it should be used for the benefit of the payer of the money. It is not the case of Steel Brothers that the transactions were made directly as between the original paddy owners as sellers and themselves as buyers, through the applicant acting merely as their broker. Exhibit C shows that the applicant himself purported to buy from the original paddy owners, through sub-brokers, at prices which might, but need not, correspond with the prices at which he in turn had offered to sell or supply paddy to Steel Brothers. Maung Tun Pe gave his requirements for Steel Brothers, he called them orders, to his brokers, called head brokers, at fixed prices. The applicant, like the head brokers, ran the risk of losing, in case of fluctuations in the market, if his sub-brokers or sellers failed to deliver according to contract. Therefore, there can be no doubt that the applicant went about and made purchases on his own account for the purpose of being able to carry out his obligation to supply to Steel Brothers. Having entered into contracts himself, he then offered to supply a certain quantity of paddy to Steel Brothers according to their requirements, and against that offer of supply he received an advance payment from Steel Brothers through their agent Maung Tun Pe. It seems to me that the undertaking given by him to use that advance payment for the express purpose of payment for paddy bought by him, as represented by him, and for no other purpose, does not make him a trustee of the money. This case is covered by the Full Bench ruling in 7 L B R 16.[2] It has been contended on behalf of the prosecution that the applicant was not an independent vendor to Steel Brothers but was only a buyer on behalf of Steel Brothers. If that were so, the complainant, Maung Tun Pe, should have been able to prove the transactions which Steel Brothers had entered into with the original paddy owners. What he said was:

> The number of baskets mentioned in Ex. B are the number of baskets which should be delivered to the company at the quoted prices by me. The delivery of paddy on these terms has no reference to the current market price of paddy then prevailing. The price quoted is the agreed price arrived at between the parties. I am not responsible for the fluctuation in the market price of paddy. The buying orders were given by me to the brokers to buy paddy at such and such price and if they agree the documents in the nature of Ex. B are usually executed. If they agree to the price they execute the form in Ex. B and were paid the money at the time of such execution. The money was paid after the paddy was bought and not otherwise.

It is impossible to read into all those statements the simple fact that the applicant was a mere buyer for Steel Brothers, whose duty was only to bring the sellers into contact with Steel Brothers as the buyers. Maung Tun Pe said that the document (EX. B) itself contains: "The advance of Rs. 2600 was paid for paddy 4900 baskets already bought by the accused." His own words belie what is now suggested on behalf of the prosecution. They are:

> I meant to say that the paddy 4900 baskets was already bought and not for paddy which he had not bought yet. I meant that this paddy 4900 baskets was already in his hands. The accused gave me the particulars where the paddy was stored up in Ex. C wherein all the details were shown. Exhibit C was delivered to me on 31st January 1940.

It is nowhere stated that the transactions were made as between the original owners or sellers and Steel Brothers. On the contrary, it was suggested by Maung Tun Pe, on hearsay evidence, that Ex. C was entirely bogus and there were no purchases made by the applicant. Therefore, whether the amount paid to the applicant on 2nd February 1940 was Rs. 2600 or only Rs. 1160, there was, in my opinion, no trust created in respect of the amount paid as advance. I can see no similarity between the facts of this case and those in 10 L B R 31,[1] upon which great reliance was placed by the learned advocate who appeared on behalf of the complainant. Why the advance was ever paid, to differentiate this case from that relied on for the prosecution, is brought out by the statement of Maung Tun Pe:

> If I had known that the statement made in Ex. C was false I would not have advanced any money but stopped all transactions then and there.

As EX. C showed purchases said to have been already made by the applicant, the money could not have been given to the applicant to purchase a specified amount of paddy at specified prices on behalf of Steel Brothers; nor does EX. B say anything bearing that interpretation. From the first re-examination of Maung Tun Pe also it will be seen that a broker like the applicant

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2. ('13) 7 L B R 16 : 19 I C 145 : 6 Bur L T 13 : 14 Cr L J 145 (F B), Hock Cheng & Co. v. Tha Ka Do.

actually has to buy paddy and on the strength of that to supply in turn to Steel Brothers, resulting sometimes in shortage and consequent loss to himself. The conviction of the applicant was founded upon a wrong interpretation of the material evidence and a mistake of law, and it cannot be sustained. I accordingly allow the application for revision and set aside the conviction and sentence. I direct that the applicant shall be released so far as this case is concerned.

G.N./R.K. *Revision allowed.*

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(28) A. I. R. 1941 Rangoon 193

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

T. E. Lecky Thompson — Applicant.

v.

Mrs. M. Z. Lecky Thompson and another — Respondents.

Civil Ref. No. 6 of 1940, Decided on 12th May 1941, made by Dist. Judge, Myingyan, for confirmation of decree for dissolution of marriage.

Divorce Act (1869), Ss. 12 and 14—Obligation to consider all aspects of case mentioned in Ss. 12 and 14 is not extinguished merely because case is undefended—*A's* wife occupying bedroom in Railway Rest room with *B* at Rangoon on night of 25th August—*A's* wife leaving her husband at Myingyan on various pretexts previously and staying at Rangoon — *A's* wife and *B* held committed adultery with each other on night of 25th August.

It is obligatory on a Court entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in Ss. 12 and 14 and that obligation is not extinguished by the mere fact that the case is an undefended one: ('39) 26 A I R 1939 Rang 189, *Foll.* [P 193 C 2; P 194 C 1]

A's wife and *B* occupied a bedroom in a Railway Rest room at Rangoon from about 11 P. M. on 25th August to about 7 A. M. on 26th August 1940. *A's* wife used to leave him at Myingyan on various pretexts and come and stay in Rangoon :

Held that *A's* wife and *B* committed adultery, each with the other while occupying the bedroom on the night of 25th August. [P 193 C 2]

Sharpe J. — This case comes before us under S. 17, Divorce Act, for confirmation of a decree for dissolution of marriage made by the District Judge, Myingyan, on 30th September last on the petition of a husband. The petition was presented to the District Court by the husband under S. 10 of the Act; in it he prayed that his marriage might be dissolved on the ground that his wife had, since the solemnization thereof, been guilty of adultery, the adultery alleged being said to have been committed by the wife with the co-respondent at the Railway Rest-rooms here in Rangoon on 26th August last.

The petition was undefended. The husband abundantly proved the adultery alleged by calling not only a friend of his who, at his (the husband's) request, "shadowed" the wife and co-respondent on the evening in question and who purposely booked and occupied the next bedroom at the station to that occupied by the guilty couple, but also the railway servant who, as Assistant Station-master at Rangoon on duty that evening let bedroom No. 9 at the Rangoon Railway Station Rest-rooms to the wife and the co-respondent at about 11 P. M. on the night in question, and also an employee of the Catering Contractors who, about midnight that night, supplied some soda-water to a lady and gentleman in bedroom No. 9. There can be no doubt that the wife and the co-respondent occupied this bed room No. 9 from about 11 P. M. on 25th August to about 7 A. M. on 26th August 1940 and having regard to the surrounding circumstances of the case — the wife used to leave her husband at Myingyan on various pretexts and come and stay in Rangoon — I have no doubt that, as the learned District Judge has found the wife and the co-respondent committed adultery, each with the other, while occupying this bed room on that night.

The District Judge was satisfied that the husband had not been conniving at that adultery and he further held that the petition was not presented or prosecuted in collusion with either the wife or the co-respondent. I can see no reason for thinking that the learned Judge was wrong in regard to either of those two matters, but S. 12 of the Act also required him to satisfy himself, so far as he reasonably could, that the husband had not been in any manner accessory to this adultery and that he had not condoned the same. The provisions of S. 12 must always be carefully observed by a Court exercising jurisdiction under the Divorce Act. Further, it does not appear that the learned District Judge ever considered in this case whether or not the husband had been guilty of such conduct as made the pronouncement by him of a decree not a matter of obligation under Part 1 of S. 14 but a matter of discretion under the proviso to that section. I referred to the importance of these matters in my judgment in 1939 R L R 1,[1] and the obligation of a Court which

1. ('39) 26 AIR 1939 Rang 189 : 183 I C 49 : 1939 R L R 1, Po Tun v. Ma Chit.

is entertaining a petition under the Divorce Act to consider all the aspects of the case which are mentioned in Ss. 12 and 14 of the Act is not extinguished by the mere fact that the case is an undefended one.

This Court has power, under S. 17 of the Act, to send back to the District Court a case such as the present one; but I think it unnecessary to do so in this particular case, as it appears to me that there is sufficient evidence on the record to enable us to come to a conclusion on the matters upon which the learned District Judge unfortunately omitted to record findings, as he should have done. I see no reason for supposing either that the husband in the present case had been in any manner accessory to the adultery which he alleged and proved, or that he had condoned the same; indeed the evidence satisfies me that he had done neither of those two things. Those are the findings at which I myself arrive in respect of the matters mentioned in S. 12 which the learned District Judge omitted to consider, although he was under a duty to do so. Turning now to S. 14, it is impossible to say that the husband in the present case was guilty of unreasonable delay in presenting or prosecuting this petition; on the contrary, he seems to have acted with great promptitude. As none of the other matters mentioned in the proviso to S. 14 have been suggested against the husband in the present case, the granting of a decree, therefore, becomes a matter of obligation on the part of the Court, under part 1 of S. 14, Divorce Act. Although the two children of this marriage are still only ten and six years of age respectively, no order was asked for by the husband in respect of their custody, and so the District Court was right not to make any such order. In my judgment we ought now to confirm the decree made by the learned District Judge.

Dunkley J. — I agree.

Roberts C. J. — I agree.

G.N./R.K. *Decree confirmed.*

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(28) A. I. R. 1941 Rangoon 194

ROBERTS C. J. AND DUNKLEY J.

Ma Hmwe Yai and another — *Appellants*

v.

Daw Win Tha — *Respondent.*

Letters Patent Appeal No. 8 of 1940, Decided on 17th December 1940, from decree of High Court, dated 19th March 1940.

Limitation Act (1908), S. 5 and Art. 156 — S. 5 should be read together with dictum that act of Court cannot injure suitor—Contrary to O. 41, R. 30, Civil P. C., first appellate Court passing judgment without notice to parties — Appellant is entitled to full statutory period for appeal from date of his knowledge of judgment.

The dictum that an act of the Court cannot injure any of the suitors should be read together with s. 5 and the expression "sufficient cause" used therein should not be construed in too narrow a sense. A litigant is entitled to expect that the infringement of the rules and orders of the Court by the Judge should not hamper him in his appeal. Consequently, where in contravention of the provisions of O. 41, R. 30, the first appellate Court delivers its judgment at some future date without notice to the parties, the appellant cannot be prejudiced by the irregularity and therefore under S. 5 must be granted the full period allowed by statute in which to file his second appeal from the date on which he comes to know of the judgment of the first appellate Court. It would be to put a new standard into the law of limitation to say that in such cases the appellant is only to be given such time as the superior Court might in the exercise of its judgment think reasonable. The standard of what is reasonable depends upon the period of limitation which the Legislature has sought to impose in the first case : (1871) L R 3 P C 465 and ('15) 2 A I R 1915 L B 108, *Rel. on.* [P 194 C 2; P 195 C 1, 2; P 196 C 1]

The word 'diligence' does not occur in S. 5 although it is frequently referred to in judgments on the meaning of that section. The question of diligence arises only in cases where there has been a delay beyond the period of limitation after the judgment from which the appeal is preferred, has been delivered in accordance with law. Under Section 5, all that the appellants have to do is to satisfy the Court that they had sufficient cause for not preferring the appeal within the period of limitation allowed. [P 196 C 1]

R. M. Sen — for Appellants.

P. K. Basu — for Respondent.

Roberts C. J. — In (1871) L R 3 P C 465[1] at page 475, Lord Cairns said :

Their Lordships are of opinion that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is the duty of the aggregate of those tribunals, if I may use the expression, to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court.

This dictum appears to me to be one which it is useful to read together with S. 5, Limitation Act, decided authorities on which show that the expression "sufficient cause" used therein is not to be construed in too narrow a sense. In the present ap-

1. (1871) L R 3 P C 465 : 40 L J P C 1 : 24 L T 111 : 19 W R 449 : 7 Moo P C (N S) 314, Rodger v. Comptoir D'Escompte de Paris.

peal the respondent brought a suit for possession and was refused a decree in the Township Court, but the Assistant District Judge allowed her appeal and granted her the decree sought for. Much to our regret, we notice that the Assistant District Judge who tried this case at Sandoway, returned to Akyab and delivered his judgment in Akyab some weeks later, on 29th July 1939, without observing the provisions of O. 41, R. 30 in which it is clearly stated that an appellate Court shall pronounce judgment in open Court either at once or at some future date of which notice shall be given to the parties or their pleaders. The consequence of this infringement of the rule was that in many senses the judgment was incomplete, although no doubt technically the time by which limitation must be computed runs from the date of its pronouncement at Akyab. It was incomplete because for example, a judgment thus delivered, which contained an injunction ordering one of the parties to refrain from doing a particular act for a period of two months, let us say, would be inchoate until the party sought to be restrained had notice of what the Court had said. And it was incomplete in this sense, that no one could suppose that between 29th July and 25th September upon which date the parties became aware that judgment had been given any step could be taken by way of prosecution of an appeal.

When the parties were informed in the Township Court of Taungup of what had happened two months later, it is said by Mr. Basu that the unsuccessful litigant knew that time had begun to run already, and that therefore the period within which he should prefer his appeal had been cut down by this amount; and that therefore if he seeks to obtain the benefit of S. 5, Limitation Act, he must show that he has sufficient cause for not preferring the appeal within the 'cut down' period and must satisfy the Court as to each day's delay. In my opinion, this is too narrow a view to take of S. 5, Limitation Act. It seems to me that a litigant is entitled to expect that the infringement of the rules and orders of the Court by the Judge should not hamper him in his appeal; and if he is allowed a reasonable time within which to bring that appeal, the best way of finding out what time is reasonable is to consult the article and to assume that 90 days will be a reasonable time. No doubt, if after the expiration of that period of 90 days, he seeks for a further period, he must then show that he has acted with due diligence; but I cannot think that it is right to make the position of a would-be appellant worse and to hasten the steps by which he seeks to obtain what he believes to be his rights because a mistake has been made of this character in the Court below. The case in 8 Bur L T 99[2] shows that if an appeal is barred entirely through the negligence of the Judge in not giving notice to the parties of his intention to deliver judgment, as required by the order applicable to an original suit, viz., O. 20, R. 1 the appellant cannot be held responsible and the appeal should be admitted.

Mr. Basu has wisely conceded that if in this case the appellant could show that only a week were left, there would be no difficulty in holding that S. 5 was applicable. It seems to me that it would be to put a new standard into the law of limitation to say that when a Court made a mistake of this character the appellant was only to be given such time as the superior Court might in the exercise of its judgment think reasonable. In my view the standard of what is reasonable depends upon the period of limitation which the Legislature has sought to impose in the first case. This appeal must therefore be allowed, and the case must go back to be heard by the learned Judge in second appeal upon its merits. The respondent must pay the costs of this appeal in any event; advocate's fee eight gold mohurs.

Dunkley J.—I am of the same opinion. As soon as it was conceded on behalf of the respondent—as, of course, it had to be conceded — that after the appellants had obtained knowledge of the judgment in first appeal, which had been passed against them in contravention of the provisions of O. 41, R. 30, Civil P. C., they must be granted some time in which to file their second appeal, then, in my opinion, the case for the respondent broke down. Mr. Basu contends, as the learned Judge on second appeal has held that the time which should be given is a time which is reasonable in all the circumstances of the case. How is it to be decided what is a reasonable time in any particular case? Surely it cannot depend on the opinion of a particular Judge, with possibly an incomplete knowledge of all the relevant circumstances, as to the period within which the second appeal could be filed if the appellants acted with due diligence. A "reasonable time" must be held by the Court to be

2. ('15) 2 AIR 1915 L B 108 : 27 I C 784 : 8 Bur L T 99, Ma Me Thin v. Maung San Lun.

the time which the Legislature has decided to be the reasonable time for the purpose of the Limitation Act. In such a case as this, no question as to whether the appellants have acted with diligence arises. "Diligence" is not a word which occurs in S. 5, Limitation Act, and although it is frequently referred to in judgments on the meaning of this section, the question of diligence arises only in cases where there has been a delay beyond the period of limitation after the judgment, from which the appeal is preferred, has been delivered in accordance with law. Under that section all that the appellants have to do is to satisfy the Court that they had sufficient cause for not preferring the appeal within the period of limitation allowed. On that point the dictum of Lord Cairns in (1871) L R 3 P C 465[1] at p. 475, to which my Lord the Chief Justice has referred, is, in my opinion, conclusive in favour of the appellants: *Actus curiæ neminem gravabit.* The appellants cannot be prejudiced by the irregularity committed by the learned Assistant District Judge, and if they are not to be prejudiced thereby they must be granted the period allowed by statute in which to file their second appeal from the date on which they came to know of the judgment of the Assistant District Court. Hence, in this case the appellants must be allowed 90 days from 25th September 1939 and up to this limit any delay beyond the strict statutory period of limitation allowed by Art. 156 must be excused under the provisions of S. 5, Limitation Act.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Rangoon 196

ROBERTS C. J. AND DUNKLEY J.

Kashavlal Ghellabhai & Co.— *Appellants*

v.

Chunilal and Harakchand & Co. and another — *Respondents.*

Civil First Appeal No. 92 of 1940, Decided on 23rd December 1940, against decree of High Court, in Civil Regular Suit No. 296 of 1939, D/- 18th Jnne 1940.

(a) Partnership Act (1932), S. 58—Registration of dissolved firm is not contemplated.

The registration of a firm which has been dissolved is not contemplated by the Partnership Act: ('40) 27 A I R 1940 Rang 294, *Foll.*

[P 196 C 2]

(b) Partnership Act (1932), S. 69 — Suit by one partner of unregistered firm to compel other partners to join in registration of partnership is barred under S. 69.

Even assuming that in every partnership agreement there is implied an obligation on the partners to register the firm, that obligation would arise out of the partnership agreement, i. e., out of a contract, and the right, flowing from that obligation, of a partner to compel his co-partners to effect registration would be "a right arising from a contract," and a suit to enforce such a right brought by one partner against the other partners of an unregistered firm is expressly barred by the provisions of S. 69 (1), Partnership Act.

[P 197 C 1, 2]

(c) Specific Relief Act (1877), S. 55—Mandatory injunction cannot be granted to compel partners to join in registration of partnership.

The jurisdiction to issue a mandatory injunction is a discretionary jurisdiction which can be exercised only in a case which falls strictly within the four corners of S. 55, Specific Relief Act. The obligation referred to in this section is, of course, a legal obligation not a mere moral duty. Under the Partnership Act registration of a firm is optional and not obligatory. There is no implied obligation in every partnership agreement that the partnership should be registered. Hence a mandatory injunction cannot be granted to compel partners of a firm to join in registration of the firm.

[P 197 C 2]

R. Clark and C. A. Soorma — for Appellants.
Dr. M. A. Raut — for Respondent 1.

Roberts C. J. — This was a suit brought by respondent 1 Chunilal and Harakchand & Co. for a mandatory injunction directing the appellants Kashavlal Ghellabhai & Co. and respondent 2, Nalabhdas Jagjivan, to join with them in registering the partnership between the plaintiff and defendants. The pleadings raised the issue whether such a partnership existed at all, for the defendants in their written statements pleaded that the partnership was deemed to have commenced from 9th February 1938 and was to continue so long as the guarantee brokers agreement with the said Messrs. Louis Dreyfus & Co. continued and remained in force; that Messrs. Louis Dreyfus & Co. put an end to the agreement with effect from 1st July 1939. In para. 1 of the plaintiffs' reply it was denied that the agreement was terminated on 1st July 1939 or at all. As was pointed out in 1940 R L R 552,[1] the registration of a firm which has been dissolved is not contemplated by the Partnership Act; and therefore if this suit were maintainable at all we should have to send the case back to the learned trial Judge to determine whether a partnership still existed or not; but for the reasons which I am about to give it appears to me that this suit was not maintainable. Section 69, Partnership Act, enacts that no suit to enforce a right arising from

1. ('40) 27 AIR 1940 Rang 294 : 192 I C 283 : 1940 R L R 552, Bilasroy v. Scindia Steam Navigation Co.

a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered. An exception is made of the right to sue for the dissolution of a firm or for accounts of a dissolved firm or any right or power to realize the property of a dissolved firm.

Section 55, Specific Relief Act, deals with mandatory injunctions which may be granted when it is necessary to compel the performance of certain acts to prevent the breach of an obligation. It is contended here that there is an implied obligation in every partnership agreement that the partnership should be registered; or at least that if any partner desires registration he should be at liberty to insist upon the other partners concurring in his wishes and joining him in effecting it. And the argument continues that since by S. 9 of the Act partners are bound to carry on the business of the firm to the greatest common advantage and to be just and faithful to each other, the refusal of one partner to effect joint registration is a breach of such an obligation as is contemplated by S. 55, Specific Relief Act. But the Partnership Act nowhere enjoins registration; it merely states how registration may be carried into effect and what the effect of non-registration will be. It clearly contemplates the existence of unregistered partnership firms, the partners of which may sue for dissolution. The suit which was filed here is within the terms of S. 69. Even if there were an implied obligation such as is contended, a suit to enforce it would be a suit arising from the contract of partnership itself, and would be barred by that section. But I cannot hold that any such obligation as to concur in effecting registration is implied in a contract of partnership. Again a mandatory injunction would only be granted where there was no other appropriate remedy; even where such an obligation was expressed in a partnership agreement it is clear from S. 69 (3) that a suit for dissolution is the proper and indeed the only available remedy. In (1843) 8 Beav 129[2] the plaintiff obtained an injunction against the defendant who had turned him out of a partnership entered into under a binding agreement still in force, and in 32 Mad 76,[3] the Court entertained a suit and enforced by injunction express terms of a partnership agreement; but this was before the Partnership Act of 1932 and S. 69 of that Act altered the whole position, and in view of its provisions the English case cited would be inapplicable in this country. The appeal must be allowed and the suit of the plaintiff-respondent 1 dismissed with costs in both Courts, advocates' fee in this Court fifteen gold mohurs. We certify for two counsel.

Dunkley J.—I am of the same opinion. The jurisdiction to issue a mandatory injunction is a discretionary jurisdiction which can be exercised only in a case which falls strictly within the four corners of S. 55, Specific Relief Act. The obligation referred to in this section is, of course, a legal obligation, not a mere moral duty. The learned trial Judge has rightly held that under the Partnership Act registration of a firm is optional and not obligatory. This is clear from the provisions of Ss. 58 and 69. That was an end of plaintiff-respondent 1's case. It is now urged that in every partnership agreement there must be implied an obligation on the partners to register the firm. I cannot accede to this contention, but even if it were so, then that obligation would arise out of the partnership agreement, i. e., out of a contract, and the right, flowing from that obligation, of a partner to compel his co-partners to effect registration would be "a right arising from a contract," and a suit to enforce such a right brought by one partner against the other partners of an unregistered firm is expressly barred by the provisions of S. 69 (1), Partnership Act.

D.S./R.K. *Appeal allowed.*

2. (1843) 8 Beav 129 : 68 R R 39, England v. Curling.
3. ('09) 32 Mad 76 : 1 I C 384 : 19 M L J 10 : 4 M L T 456, Venkata Reddi v. Narasayya.

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(28) A. I. R. 1941 Rangoon 197

MYA BU J.

Singer Sewing Machine Co.— Applicant

v.

Surath Singh — Respondent.

Civil Revn. No. 229 of 1940, Decided on 19th November 1940, from order of Small Cause Court, Rangoon, in Civil Misc. No. 294 of 1940.

Civil P. C. (1908), O. 21, R. 63B and R. 63C (1) (Rangoon) — Notice under R. 63B issued — Garnishee failing to appear — Order under R. 63C (1) must be taken to be final not only as to garnishee's liability to pay but also as to amount he is liable to pay.

Where the garnishee fails to appear in answer to the notice under R. 63B an order passed under R. 63C (1) must be taken to be final not only as regards the general question of the garnishee's liability to pay but also the question of the amount which he is liable to pay. Consequently after the Court has made an order under R. 63C (1) the gar-

nishee cannot be given an opportunity of proving that the amount of debt is less than the amount mentioned in the notice of attachment.

[P 198 C 2]

J. R. Chowdhury — for Applicant.
P. N. Bhattacharyya — for Respondent.

Order. — This is an application for revision under S. 25, Rangoon Small Cause Courts Act, against an order granting an application for review of judgment. By that order the learned third Judge of the Small Cause Court has virtually refused to hold an inquiry as to the amount of the money lying in the hand of the applicant (garnishee) to the credit of the respondent's judgment-debtor in execution of the decree against whom the respondent obtained an order of attachment which was issued under O. 21, R. 46, Civil P. C. The judgment-debtor being a clerk in the Singer Sewing Machine Company's Office in Rangoon the prohibitory order was directed against a certain sum of money which the company held as security deposit from the judgment-debtor. The prohibitory order stated that the decree-holder had obtained a decree against the judgment-debtor for Rs. 308-8-0, that the judgment-debtor was thereby prohibited and restrained from receiving from the company "a certain debt alleged now to be due from you to the said defendant, namely, the sum of Rs. 308-8-0 out of the sum being the amount of deposit payable to" the judgment-debtor and that the company are thereby prohibited and restrained from making payment of the said debt to any person whomsoever or otherwise than into Court. This prohibitory order was issued on 19th December 1938.

As matters stand, it must be held that the prohibitory order was duly served on the manager of the company, but no action was taken on behalf of the company in regard to the prohibitory order, with the result that the Court called upon the garnishee under O. 21, R. 63B to appear and show cause why he should not pay into Court the debt due from him to the judgment-debtor. This notice was issued on 19th January 1939. As there was no appearance by or on behalf of the company on the date fixed in that notice the Court on 14th February 1939 ordered the company to comply with the terms of the notice. Thereafter the decree-holder applied for execution against the garnishee for the recovery of the amount mentioned in the notice. The applicant company sought to have the order under O. 21, R. 63C set aside in some proceeding but was unsuccessful. Therefore in the execution which has been taken against the company it is alleged on behalf of the company that the amount of the security deposit in the hand of the company was far less than Rs. 308-8-0 and that in such circumstances it should be made to pay only as much as the actual amount of the security deposit. When this representation was made by or on behalf of the company the Court ordered that an inquiry be held to ascertain the actual amount lying in the hand of the company. This led to the respondent filing an application for review of that order and the Court granted that application.

The question for determination is whether after the Court had made an order under O. 21, R. 63C (1) the garnishee should be given an opportunity of proving that the amount of debt is less than the amount mentioned in the notice of attachment. There is no authority in case law upon the point, but I have no doubt in my mind that the garnishee is not entitled to raise this question after the Court has made an order under O. 21, R. 63C (1) while that order remains valid. Rule 63B is designed to give the garnishee ample opportunity of disputing his liability to pay the amount or disputing his liability to pay anything or of showing that the amount of the debt is less than that mentioned in the notice. Therefore when an order under R. 63C (1) is made it must be the final determination of the question as to the liability of the garnishee to pay the debt and as to the fact that the debt is not less than the amount mentioned in the notice of attachment. If the garnishee appeared in answer to the notice issued under R. 63B and disputed his liability the issues as to the quantum of the debt and as to the general question of liability would have been adjudicated upon. Therefore, if the garnishee failed to appear in answer to the notice under R. 63B and an order under R. 63C (1) followed it must be taken to be final not only as regards the general question of the garnishee's liability to pay but also the question of the amount which he is liable to pay. For these reasons the decision of the Court below refusing to hold an inquiry as to the amount of the debt and deciding to proceed with the execution against the applicant company for the sum of Rs. 308-8-0 is valid. The application for revision is therefore dismissed with costs; advocate's fee two gold mohurs.

G.N./R.K. *Application dismissed.*

(28) A. I. R. 1941 Rangoon 199

ROBERTS C. J. AND DUNKLEY J.

U Ba San — Appellant

v.

U Ya and others — Respondents.

Civil Misc. Appeal No. 45 of 1940, Decided on 17th February 1941, against order of High Court, D/- 11th July 1940.

(a) Burma Tenancy Act (10 of 1939), S. 25 — Application under S. 25 made after prescribed period does not cease to be application — Court must receive it and dismiss it as barred.

An application under S. 25 does not cease to be an application because it is presented to the Court after the time allowed by law. In such a case the Court must receive it and dismiss it on the ground that it is barred by time. [P 201 C 1, 2]

(b) Burma Tenancy Ordinance (1940), S. 6 (3) and S. 9 — Final order under S. 6 (3) passed — Right of appeal under S. 9 not exercised—High Court will not issue writ of certiorari.

Where a petitioner for a writ of certiorari has another certain and sufficient remedy open to him he is not entitled to the benefit of the extraordinary remedy by writ. Consequently where after the passing of the final order under S. 6 (3) the right of appeal provided by S. 9 is not exercised an application to the High Court for a writ of certiorari does not lie : ('40) 27 A I R 1940 Rang 84 (S B), *Rel. on.* [P 200 C 1]

(c) Jurisdiction — No consent or waiver can confer jurisdiction — Incompetent appeal is not rendered valid by being heard ex parte.

An incompetent appeal is not rendered valid by being heard ex parte because no consent or waiver can confer on the Court a jurisdiction which it does not possess: 11 Mad 26 (P C), *Rel. on.* [P 200 C 2]

(d) Letters Patent (Rangoon), Cl. 13—Application for writ of certiorari — Decision on, is judgment within meaning of cl. 13.

A decision of a single Judge of the High Court or of any Division Court making absolute or discharging a rule nisi on a petition for the issue of a prerogative writ of certiorari is a judgment within the meaning of cl. 13 of the Letters Patent of the Rangoon High Court : 35 Mad 1, *Rel. on*; ('35) 22 A I R 1935 Rang 267 (F B), *Expl.*; ('40) 27 A I R 1940 Rang 84 (S B), *Ref.* [P 201 C 1]

U Tun Byu, Government Advocate — for Appellant.

Roberts C. J. — The first three respondents in this appeal are the joint owners of lands situated in Kalagyun Kwin in the township of Thaton; and for the tenancy season 1939-40 the lands were leased by them to respondent 4, U Gaw Ya. Respondent 1, U Ya acting on his own behalf and on behalf of respondents 2 and 3 refused to renew the lease for the tenancy season 1940-41, and thereupon U Gaw Ya applied to the revenue officer for an order enabling him to continue to cultivate the lands for that year and to be recognized as tenant. The application was made under S. 25, Tenancy Act, 1939 on 26th April 1940; but that section says that the application shall not be entertained if presented more than fifteen days after the close of the tenancy year. It is common ground that the last day on which the revenue officer could entertain the application under the Act was 15th April 1940. But the Tenancy Act, 1939, does not stand alone. It must be read subject to the provisions of subsequent tenancy ordinances, the material one for the purposes of this appeal being the Tenancy Ordinance, 1940. By S. 6 (4) of that Ordinance

> a revenue officer shall treat an application made under S. 25 of the Act either before or after the commencement of this ordinance as if it were an application under this section,

and by S. 9 of the same Ordinance

> an appeal shall lie to the Deputy Commissioner from any final order passed by a revenue officer under sub-ss. (3) or (4) of S. 6 of this Ordinance.

Under the Act this application would have been made too late to be entertained by the revenue officer; but it is not the revenue officer's duty to entertain applications under the Act any longer. If he sees that the character of the application is such that it is made under S. 25 of the Act, the ordinance directs him to treat it as an application under S. 6 of the Ordinance. That is what the revenue officer did in this case. He treated it as an application under the ordinance, and U Ya, the landlord and petitioner, in his affidavit has also treated the matter as falling within the ordinance. If U Ya, the landlord, desired to appeal against the revenue officer's decision he could and should have appealed to the Deputy Commissioner under section 9. Once the revenue officer treated the matter as falling within the ordinance the Deputy Commissioner became the appellate tribunal. Of course, if it could be shown that the Deputy Commissioner on appeal had somehow violated the provisions of the Act the remedy of the aggrieved party might well be by way of an application to this Court for a writ of certiorari to bring up and quash such appellate proceedings.

The learned Judge took the view that the revenue officer "entertained this application although it was presented beyond the fixed date" and said he ought not to have done so. With great respect, I find it impossible to say that the revenue officer did do so. Before the ordinance came into operation the revenue officer would have had to see first whether an application under the Act

was in time, and if it was, he could have entertained it by taking the steps indicated in the sections which follow S. 25; but if it was too late he could not have entertained it at all. The Act says "the application shall not be entertained," but in the very act of describing it as "the application" it is careful not to say that it ceases to be an application. Similarly, a contract which is procedurally unenforceable does not cease to be a contract. A promise to pay a time-barred debt requires no further consideration to support it, for the debt still exists though without the promise to pay it, it cannot be recovered.

But, since the passing of the ordinance although "the application" could not be entertained under the Act, the ordinance itself directs what shall happen to it. The revenue officer is to treat it as an application under S. 6 of the ordinance. This he has done: if in any respect the landlord is aggrieved his remedy lies under S. 9 of the ordinance. Even if it is said that the revenue officer was wrong in treating the application as one under the ordinance, still he has done so, and the remedy of the landlord was to appeal to the Deputy Commissioner. But what the landlord has done is to petition this Court for a writ of certiorari to quash the proceedings of the revenue officer. He obtained an order nisi and the rule has now been made absolute and it is against this judgment that this appeal has been brought. It must be taken as settled law that if a petitioner for a writ of certiorari has another certain and sufficient remedy open to him he is not entitled to the benefit of the extraordinary remedy by writ per curiam: 1940 R L R 325[1] at pp. 334 and 344. And therefore directly it is seen that the revenue officer was acting or purporting to act under the ordinance and that his decision had not been appealed against in the manner provided therein, no rule nisi for a writ of certiorari can be made absolute. All applications under S. 25 of the Act are now treated under sub-s. (4) of S. 6 of the ordinance. The revenue officer does not have to see whether they are good or bad in the sense of whether they could have been entertained under the Act because it is no longer his duty to entertain them under the Act, but he has to treat them as though they were applications under the ordinance. I observe that in Civil Miscellaneous No. 342 a bench of the original side of this Court discharged a rule nisi for certiorari in a case in which the revenue officer treated as falling under the ordinance an application which in form was made under the Act, upon the ground that the real question was whether it was for a relief granted by the ordinance. In that case the Deputy Commissioner had heard and dismissed an appeal from the revenue officer's decision. The Bench refused in its discretion to issue a writ of certiorari holding that in substance the matter fell within the ordinance and the right of appeal had been exhausted.

But in the present case the landlord did not appeal at all to the Deputy Commissioner and the right of appeal has thus not been exhausted. Apart from any question of discretion, therefore, the Court cannot issue the writ. If the landlord wanted to say that the application was wrongly treated as one under the ordinance he must go to the Deputy Commissioner first before he can come to the Court; and this he has not done. But for the reasons I have given the application was rightly treated as under the ordinance by the revenue officer. One other matter must be considered. This appeal has been heard ex parte but if it were incompetent no consent or waiver could confer on the Court a jurisdiction which it did not possess: 11 Mad 26.[2] In 13 Rang 457,[3] a Full Bench of this Court examined the meaning of the word "judgment" in cl. 13, Letters Patent, since it is only from a "judgment" that appeal lies under that clause. And it was held that the word "judgment" meant and was a decree in a suit by which the rights of the parties at issue in the suit were determined. In 35 Mad 1[4] at page 11, Krishnaswami Aiyar J. cited Black on Judgments to the following effect:

> A decree is a determination or sentence of equity pronounced by a competent Court upon the controversies submitted for decision.

In this sense there has certainly been a decree, and there is no doubt that by the making of a rule absolute (or discharging a rule) for a writ of certiorari the rights of the parties are conclusively determined. In my view the words "decree in a suit" must not be construed too narrowly, so as to exclude an order making absolute or discharging such a rule from the scope of the term "judgment." At the time of the Ran-

1. ('40) 27 A I R 1940 Rang 84 : 188 I C 422 : 1940 R L R 325 (S B), In re Maung Pyu.

2. ('88) 11 Mad 26 : 14 I A 160 : 5 Sar 54 (P C), Minakshi Naidu v. Subramaniya Sastri.

3. ('35) 22 A I R 1935 Rang 267 : 157 I C 1007 : 13 Rang 457 (F B), Dayabhai Jivandas v. Murugappa Chettyar.

4. ('12) 35 Mad 1 : 8 I C 340 : 21 M L J 1, Tuljaram Row v. Allagappa Chettyar.

goon decision the question of whether this High Court had jurisdiction to issue a writ of certiorari had never been discussed, much less decided. The learned Chief Justice enquired (see p. 463 of the report) what would be the position in regard to applications which did not result in decrees, as for instance mandamus or certiorari, if the word "judgment" were synonymous with decree. After it had been suggested in argument that it might be a matter for the Legislature to confer a statutory right of appeal in respect of them, the judgment of the Full Bench did not deal with such applications at all. But since then in 1940 R L R 325[1] it has been held, also by a Full Bench of this Court, that an inherent power resides in the High Court of Judicature of Rangoon, independent of any statutory enactment, to issue a writ of certiorari.

As this power was not created by the Legislature the question of a statutory right of appeal has never arisen. The earlier Full Bench judgment therefore was dealing exclusively with civil causes or matters when it laid down that "all other decisions are orders and are not judgments under the Letters Patent or appealable as such." It was not then contemplated that this decision could apply to orders made in proceedings analogous to those in the Crown Practice of the King's Bench Division wherein the subject petitions for the issue of one of the prerogative writs, since no such petitions had ever been preferred to this High Court. We have not had the benefit of listening to any argument to the contrary, and I have come to the conclusion that we ought to exercise jurisdiction in this case. A decision of a single Judge of the High Court or of any Division Court making absolute or discharging a rule nisi on a petition for the issue of a prerogative writ is a judgment within the meaning of Cl. 13, Letters Patent of the Rangoon High Court. This appeal must therefore be allowed, and the writ must be quashed. As this appeal was heard "ex parte" there will be no order as to the costs of the appeal but, in lieu of the order of the learned Judge on the original side, regarding the costs of the hearing before him, it is ordered that the respondent U Ya shall pay to the appellant, U Ba San, the costs of the hearing of the original petition; advocate's fee ten gold mohurs.

Dunkley J.—I agree. An application is no less an application because it is presented to the Court after the time allowed by law. In such a case the Court must receive it and dismiss it on the ground that it is barred by time. The effect of the provisions of S. 6 of the ordinance was that the time for presenting an application, whether the application was, in form, one under S. 6 (1) of the ordinance, or was, in form, one under S. 25 of the Act, was extended to 15th May. An application presented before that date, but after the date of the ordinance, which was, in form, an application under S. 25 of the Act, fell to be treated under S. 6 (4) of the ordinance. However that may be, the revenue officer did, in fact, treat the application made by the tenant as an application under the ordinance and he passed an order under S. 6 (3) of the ordinance, and if the landlord considered that the revenue officer acted wrongly in passing an order under S. 6 (3) of the ordinance on this application then he (the landlord) had a right of appeal to the Deputy Commissioner against that order under S. 9 of the ordinance. He did not exercise that right of appeal. Therefore his petition to this Court for a writ of certiorari did not lie.

G.N./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Rangoon 201

MYA BU AND SHAW JJ.

Ma Than Sein and others — Applicants

v.

Ma Hla Yi — Respondent.

Civil Revn. No. 287 of 1940, Decided on 2nd January 1941, against order of Dist. Court, Pyapon, D/- 16th July 1940.

Civil P. C. (1908), S. 141—Application to be brought on record as legal representatives of deceased plaintiff and for passing final mortgage decree dismissed for default—S. 141 does not apply—Applicant need not apply under O. 9, R. 9 but can apply afresh for the same relief.

The proceedings spoken to in S. 141 include original matters in the nature of suits as proceedings in probates, guardianships and so forth, and do not include executions. The expression 'original matters' means matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connection therewith. [P 202 C 1, 2]

Hence where application to have the applicants brought on record as legal representatives of the deceased plaintiff and for passing a final mortgage decree is dismissed for default, S. 141 does not apply and the applicants need not apply under O. 9, R. 9. Fresh application to have the same reliefs can be filed : 17 All 106 (P C) and ('27) 14 A I R 1927 Cal 534, *Rel. on.* [P 202 C 2]

U Kyaw Din — for Applicants.

U Chan Htoon — for Respondent.

Mya Bu J. — This is an application for revision of an order dismissing the two applications filed by the applicants in the District Court of Pyapon on 7th May 1940. One was an application to have themselves brought on the record as legal representatives of the deceased plaintiffs U Ba Thein and Daw Saw May, their parents, the other being an application for the passing of a final mortgage decree in the suit. The suit was filed by U Ba Thein and Daw Saw May in February 1939. A preliminary mortgage decree was passed on 20th September 1939. Daw Saw May had then died, her death having taken place on 7th September 1939 which was after the hearing of the issues in the case and during the time when the judgment was reserved. After the preliminary decree had been passed U Ba Thein died on 22nd February 1940. The applicants filed an application to have themselves brought on the record as legal representatives of their deceased parents on 11th March 1940 and an application for a final decree on 2nd April 1940. Those applications were dismissed for default. After their dismissal, the applicants instead of applying to have the order of dismissal of those applications set aside, filed their applications of 7th May 1940. The learned District Judge being of opinion that the proper step for the applicants to take was to have the order of dismissal of the applications of 11th March and 2nd April set aside, held that the applications of 7th May 1940 were not in order and has therefore dismissed them. In 17 ALL 106[1] their Lordships of the Privy Council held that the proceedings spoken of in S. 647, Civil P. C. of 1882 (corresponding to S. 141, Civil P. C. of 1908) include original matters in the nature of suits as proceedings in probates, guardianships, and so forth, and do not include executions. In 54 Cal 405[2] a Bench of the Calcutta High Court placed the following construction on the pronouncement of the Privy Council referred to above, namely :

> Their Lordships' decision makes it perfectly plain that the section does not apply to applications for execution, but only to 'original matters in the nature of suits such as proceedings in probates, guardianships and so forth.' The expression 'so forth' must, in my opinion, be read as meaning proceedings ejusdem generis with the instances that precede it, and include such proceedings as in divorce, in insolvency, for succession certificate and the like and the expression 'original matters' in my opinion confirms that view as meaning matters which originate in themselves and not those which spring up from a suit or from some other proceedings or arise in connexion therewith.

For the purpose of the matter in hand, we are content to adopt this interpretation. We therefore consider that the learned District Judge was in error in holding that under S. 141, Civil P.C., the proper step for the applicants to take was to apply under O. 9, R. 9, Civil P. C., to have the order of dismissal of the applications of 11th March and 2nd April 1940 set aside. In our opinion, the applications of 7th May 1940 are in order. We, accordingly, set aside the order of dismissal of these applications and direct the District Judge to dispose of these applications on their merits. The respondents to pay the applicants' cost in both the Courts. Advocate's fee two gold mohurs in the District Court and three gold mohurs in this Court.

D.S./R.K. *Order set aside.*

1. ('95) 17 All 106 : 22 I A 44 : 6 Sar 526 (P C), Thakur Prasad v. Fakirullah.
2. ('27) 14 A I R 1927 Cal 534 : 103 I C 69 : 54 Cal 405 : 31 C W N 576, Sarat Chandra v. Bisweswar Mitra.

*** (28) A. I. R. 1941 Rangoon 202**

MOSELY J.

U Tin Maung and another — Applicants

v.

The King.

Criminal Revn. No. 561B of 1940, Decided on 7th January 1941, from order Headquarters Special Power Magistrate, Sandoway, in Criminal Regular Trial No. 89 of 1939.

(a) Criminal P. C. (1898), S. 247 — Scope — S. 247 contemplates that general procedure is to acquit—Still even in summons case Magistrate has discretion to adjourn hearing or proceed with case.

No doubt S. 247 contemplates that the general procedure will be to acquit, but the body of the section and the proviso clearly indicate that even in a summons case the Magistrate has a discretion in proper cases to adjourn the hearing or proceed with the case : ('23) 10 A I R 1923 Mad 439, *Ref.* [P 203 C 2]

(b) Succession Act (1925), S. 306—S. 306 does not apply to criminal prosecution.

Section 306 has no application to a criminal prosecution: ('22) 9 A I R 1922 Lah 227 and ('21) 8 A I R 1921 Mad 278, *Rel. on;* ('23) 10 A I R 1923 Mad 206 and 10 P R 1908, *Dissent.* [P 204 C 1]

* (c) Criminal P. C. (1898), Ss. 259 and 198—Complainant's death does not abate criminal proceeding — Magistrate under S. 259 has discretion either to discharge accused or continue with trial — Complainant police officer alleging defamation against him and police force in general—Death of complainant — Discretion by Magistrate in proceeding with trial held properly exercised—S. 198 held limited only Court's power of initial cognizance.

A complainant's death does not abate the criminal proceeding. The Magistrate in compoundable or non-cognizable offence under section 259 has a discretion either to discharge the accused or to continue with the trial on the death of the complainant: (1884) 12 Q B D 320; ('31) 18 A I R 1931 Mad 772 and ('15) 2 A I R 1915 Cal 263, *Rel. on; Case law discussed.* [P 203 C 2; P 204 C 1]

The complainant police-officer in a case under S. 500, Penal Code, alleged defamation against himself and the police force in general. On the death of the complainant:

***Held* that S. 259 applied and the only way in which the Magistrate could exercise his discretion under S. 259 was to continue with the trial and not to discharge accused. [P 206 C 1]**

***Held further* that S. 198 only limited the power of the Court to initial cognizance of the offence; once the Court had seisin of the case there was nothing to prevent the Court proceeding with it. [P 205 C 2]**

Soorma — for Applicants.

Lambert, Government Advocate—for the Crown.

Order. — This is an application in revision to quash a prosecution for defamation, an offence punishable under S. 500, Penal Code, on the ground that the complainant is dead and that the proceedings "have abated." The complainant was U Ba Aung, Deputy Superintendent of Police in charge of the police in Sandoway District. The two accused are the editor and publisher of a vernacular paper called "New Burma." The defamation complained of is in a letter to the editor, EX. A, purporting to be from Sandoway, published in the issue of 9th August 1939. It alleges corruption and inefficiency of the police force in the district, failure of the head of the police force to enquire into an allegation of corruption against a certain police officer, and also other imputations directed against the head of the police force. The prosecution was instituted on 28th November 1939, on a complaint made by U Ba Aung with the sanction of the Governor. Much of the prosecution evidence has been recorded. The case was greatly delayed by the illness, real or pretended, of accused 2. The death of the complainant was intimated to the Court on 31st August last.

It was once held by the Chief Court of the Punjab, and has been held, (though the latest decision is to the contrary effect), by the High Court of Madras, that a criminal case instituted on a private complaint abates on the death of the complainant. The only ruling at all bearing on the subject in this Court is 6 Rang 664[1] at p. 666 which is a case where the complainant was absent through illness, and not one of abatement owing to the complainant's death. The cases where it has been held that proceedings must necessarily stop on the death of the complainant have proceeded on two lines: (1) that the cause of action in certain cases is personal and ceases with the death of the person aggrieved, and (2) that the wording of Ss. 247 and 259, Criminal P. C., itself necessitates such a course. Section 247 refers to summons cases, i. e., cases involving offences punishable with not more than six months' rigorous imprisonment, while S. 259 deals with warrant cases in which offences punishable with more than six months' imprisonment are concerned. Section 247 reads as follows:

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance, and proceed with the case.

Section 259 is as follows:

When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognisable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

The offence of defamation is triable as a warrant case, and the section of the Criminal Procedure Code applicable is S. 259. Section 247 has been quoted because some of the authorities on the subject deal with summons cases, e. g., 44 M L J 119.[2] Section 247 evidently lays down the general principle that a person charged with a summons case offence is entitled to an acquittal if the complainant is absent without sufficient cause. But the body of the section and the proviso clearly indicate that even in a summons case the Magistrate has a discretion in proper cases to adjourn the hearing or proceed with the case. It is contemplated in S. 247 that the general procedure will be to acquit. But in S. 259 the converse is the case. Where a complainant is absent and the offence is compoundable or non-cognizable, the Magistrate may discharge the accused, or he may, as was

1. ('29) 16 AIR 1929 Rang 14 : 114 I C 681 : 30 Cr L J 345 : 6 Rang 664, U Mo Gaung v. U Po Sin.

2. ('23) 10 A I R 1923 Mad 439: 72 I C 885: 24 Cr L J 469: 44 M L J 119, Venkatarama Aiyar v. Sundaram Pillai.

pointed out in 6 Rang 664,[1] decide to proceed with the trial. The ruling quoted in support of the applicant's case is 7 Cr L J 290,[3] a ruling of the Chief Court of the Punjab dating as far back as 1908. That was also a prosecution for defamation where it was sought to quash the proceedings on the death of the complainant. There it was very briefly held by a Bench of that Court that the principle laid down in S. 89, Probate and Administration Act, (5 of 1881) containing the law on the subject of a cause of action surviving to a representative of a deceased plaintiff was applicable to the question under consideration in that case, having regard to the narrowness of the line between a prosecution and a suit for damages. Section 89, Probate and Administration Act, corresponds to S. 306, Succession Act (adapted from the Succession Act, Act 39 of 1925). The section reads :

All demands whatsoever and all rights to prosecute or defend any action or special proceeding existing in favour of or against a person at the time of his decease, survive to and against his executors or administrators; except causes of action for defamation, assault, as defined in the Penal Code, or other personal injuries not causing the death of the party; and except also cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory.

It is difficult to see how this section has any application to a criminal prosecution. It refers to "all demands whatsoever" and "all rights to prosecute or defend any action or special proceeding." "Demands" clearly means, demands of a civil nature. The words "rights to prosecute or defend any action or special proceeding" were substituted for the words, "rights to prosecute or defend any suit or other proceeding" in Act 5 of 1881. But the alteration does not appear to be material, for the word "action" clearly means action of a civil nature, as is shown by the expression which follows, causes of action for defamation." No doubt the reason why assault was specified as "assault as defined in the Penal Code" was because the definition of assault there extends to acts done which do not cause hurt, such as gestures. As was said in 2 Lah 27[4] at p. 31 where 7 Cr L J 290[3] and two other rulings of the Punjab Chief Court following it were formally dissented from:

If the section is extended to criminal proceedings it would give a cause of action against the executors or administrators of a deceased offender, because the section applies not only to rights existing in favour of a person but also to rights existing against a person at the time of his decease.

The same view was held by Ayling J. and Coutts-Trotter J. (as he then was) in 44 Mad 417[5] at p. 420 where Ayling J. said that the word "prosecute" implied no connexion with criminal proceedings but was used in the same sense as in Ss. 14 and 16, Limitation Act. Coutts-Trotter J. made some trenchant remarks which I will quote in extenso, as I expressed the same view at the hearing of this case, where 44 Mad 417[5] was not cited. He said :

I entirely agree, and I only add a few words of my own because there are two reported decisions of the Punjab Chief Court which countenance the view that S. 89, Probate and Administration Act, (5 of 1881) applies to criminal as well as to civil proceedings. Ayling J. has pointed out several considerations that appear to me completely to dispose of such a contention, but there is a further one which reduces it to a positive absurdity. By the section 'all rights to prosecute or defend any suit or other proceeding . . . . survive to and against his executors or administrators,' with certain defined exceptions. So that if the Punjab view is correct, an executor or administrator can be put in the dock to answer for the criminal acts of his testator. This of course cannot have been pointed out to the learned Judges; but it ought to have occurred to the reporters, who put these decisions in the volumes of reports, and who had ample leisure to consider what was involved in them. The present indiscriminate system of reporting everything throws an unnecessary burden on both Bench and Bar ; and these cases seem to me to afford a signal instance of the mischief.

Another thing, it may be added, which adds to the difficulty of lower Courts is the failure of commentaries on the Criminal Procedure Code to distinguish rulings which have been superseded or have been definitely shown to be bad law. It is surprising to note that 44 Mad 417[5] was not cited before another Bench of the Madras High Court only two years later, in 46 Mad 88,[6] where it was briefly said by Oldfield and Devadoss JJ. that to substitute the legal representative of the person directly affected instead of that person himself takes no account of a principle of general application, that criminal proceedings instituted by a private complainant abate on such person's death. The learned Judge (Oldfield J.) said that it was not necessary to give authority in support of that principle. It might, however, be pointed out, he said, that, when an

3. ('08) 10 P R 1908: 7 Cr L J 290: 112 P L R 1908: 8 P W R 1908, Ishar Das v. Emperor.
4. ('22) 9 A I R 1922 Lah 227: 59 I C 918: 22 Cr L J 166: 2 Lah 27: 59 P L R 1921, Hazara Singh v. Emperor.
5. ('21) 8 A I R 1921 Mad 278: 65 I C 549: 23 Cr L J 117: 44 Mad 417: 40 M L J 351, Muhammad Ibrahim Sahib v. Shaik Davood.
6. ('23) 10 A I R 1923 Mad 206 : 71 I C 49 : 24 Cr L J 2 : 46 Mad 88 : 44 M L J 66, Ghulam Mohideen Quraishi Sahib v. Ahamadulla Begum Sahiba.

exception was intended, as in the case of proceedings under S. 145, Criminal P. C., such exception was specified clearly.

As has been remarked in other cases of the Madras High Court and elsewhere, there is no such principle to be found in the Criminal Procedure Code, (nor is there any corresponding provision in the law in England where procedure is by indictment or information). All that is to be found is contained in Ss. 247 and 259. Section 145 is an exceptional case for the simple reason that it was enacted to put a stop to disputes as to property which are likely to cause a breach of the peace, and it is frequently necessary for that purpose to ensure that the legal representative of either party concerned in the dispute be made a party to the proceedings as, being interested in the property, he is likely to be concerned in a breach of the peace. In 51 Mad 339,[7] Devadoss J. held very briefly in a summons case, where the Magistrate had been informed of the death of the complainant and had adjourned the hearing of the case, that such a course was illegal. The learned Judge went on the wording of the section and said that as the complainant was dead he could not appear before the Magistrate, and, therefore, the clause entitling a Magistrate, if he thought it proper, to adjourn a case, could not apply to a case of a complainant who was dead. I am bound to say I cannot follow this as, if we are to go on a literal reading of the words of the section, the section does not say, "adjourn the hearing of the case to some other day for the presence of the complainant." That case did not cite any previous ruling of the Madras High Court, but only referred to 19 C W N 334.[8] That was a case proceeding on quite different considerations. There the only ground given by the Magistrate for allowing the deceased complainant's nephew to be substituted for him in a case of assault was that the accused had been guilty of a contempt of Court.

In 54 Mad 768[9] Jackson J. held briefly that there was no abatement of a criminal case on the death of a complainant. This was assumed without question as the law in 18 C W N 1211.[10] The same view was held by Sir Edward Chamier C. J., and Jwala Prasad J. in 18 Cr L J 151[11] in the Patna High Court, which was followed in a case of the Bombay High Court, 27 Cr L J 491.[12] The Allahabad High Court has taken the same view: *vide* 32 Cr L J 366.[13] In some of these cases the principle has been referred to that as a complaint may be made so it may be continued by any person. There is a special limitation on complaints of defamation, that the Court shall only take cognizance of such an offence on a complaint made by some person aggrieved by such offence (S. 198, Criminal P. C.). The limitation is less strict or precise than that imposed by S. 199 on a complaint of adultery or enticement of a married woman, which may be only made by the husband or person in charge of the woman. Section 198 only limits the power of the Court to initial cognizance of the offence: once the Court has seisin of the case there is nothing to prevent the Court proceeding with it. It should be noted here that it may, under certain circumstances, amount to defamation to impute anything to a deceased person (Explanation to S. 499, Penal Code).

It was well said in 2 Lah 27[4] that decisions where it has been thought desirable that an offence should abate on the death of the complainant involve the assumption that the complainant would have compounded the offence. This, it was said, appears to be an unwarrantable assumption, because when a person makes a complaint the presumption is that he desires that the person complained against should be punished for the offence which the complainant alleges he has committed. It is, it was said, a mistake to speak of an offence as a purely personal one. In Vol. 9 of Halsbury's Laws of England at p. 232 a crime is said to be

> an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment.

While a crime is often also an injury to a private person who has a remedy in a civil action, it is as an act or default con-

7. ('28) 15 A I R 1928 Mad 167 : 107 I C 512 : 29 Cr L J 257 : 51 Mad 339 : 54 M L J 714, Appala Naidu v. Emperor.
8. ('15) 2 A I R 1915 Cal 708 : 28 I C 658 : 16 Cr L J 322 : 19 C W N 334, Puran Chandra v. Dengar Chandra.
9. ('31) 18 A I R 1931 Mad 772 : 134 I C 990 : 33 Cr L J 14 : 54 Mad 768 : 61 M L J 125, In re Narayana Naick.
10. ('15) 2 A I R 1915 Cal 263 : 26 I C 174 : 15 Cr L J 726 : 18 C W N 1211, Madho Chowdhury v. Turab Mian.
11. ('16) 3 A I R 1916 Pat 152 : 37 I C 519 : 18 Cr L J 151 : 1 Pat L J 264 : 20 C W N 862, Jitan Dusadh v. Domoo Sahoo.
12. ('26) 13 A I R 1926 Bom 178 : 93 I C 891 : 28 Bom L R 288 : 27 Cr L J 491, In re Mahomed Azam.
13. ('30) 17 A I R 1930 All 795 : 129 I C 262 : 32 Cr L J 366 : 53 All 39 : 1931 A L J 3, Emperor v. Nazir Husain.

trary to the order, peace and well being of society that a crime is punishable by the State. The learned Judge might perhaps here have quoted a well-known decision, (1884) 12 Q B D 320[14] at p 322, where (1791) 4 T R 126[15] is cited and it is further said that the whole criminality of libels on private persons, as distinguished from the civil liability of those who publish them is in their tendency to disturb the public peace. In the present case the defamation alleged is against the complainant in his public capacity, and also, it may be added, against the police force in general. The Magistrate therefore could only have exercised the discretion which lay in him in the way he did by not discharging the accused but continuing with the trial. This application in revision will be dismissed.

G.N./R.K. *Application dismissed.*

14. (1884) 12 Q B D 320 : 53 L J Q B 362 : 50 L T 177 : 32 W R 861 : 15 Cox C C 415 : 48 J P 165, Reg v. Labourchere.
15. (1791) 4 T R 126 : 2 R R 343, Rex v. Topham.

(28) A. I. R. 1941 Rangoon 206

DUNKLEY AND BLAGDEN JJ.

The King

v.

Basu Meah.

Criminal Revn. No. 697B of 1940, Decided on 15th January 1941, from order of Sess. Judge, Arakan, in Criminal Revn. No. 574 of 1940.

Burma Habitual Offenders Restriction Act (2 of 1919 repealed by Burma Act 1 of 1936), Ss. 18 and 12 — Restriction order under S. 18 passed against offender in 1933 for three years — Offender so repeatedly violating order that period of three years not expiring on 19th May 1939—On 19th May 1939 offender again violating order and convicted under S. 18 — Act repealed in 1936 — Conviction held justified by reason of S. 5 (c) and (e), Burma General Clauses Act—Offender's right under S. 12 held survived repeal — Case held fit for exercise of powers under S. 12.

A restriction order was passed against the offender in 1933 for a period of three years, but he so repeatedly violated the restriction order that by S. 18 (2) the period of three years had not expired on 19th May 1939. In fact however the Habitual Offenders Restriction Act was wholly repealed by Burma Act 1 of 1936 as from midnight of 24/25th April 1936. The last mentioned Act contained no saving or explanatory clause. On 19th May 1939 the offender again absented himself without a pass, as a result of which on 5th August 1940 he was charged with an offence under S. 18 and convicted:

***Held* that the conviction was justified by reason of S. 5 (c) and (e), Burma General Clauses Act : Criminal Appeal No. 556 of 1936, *Rel. on* ; ('41) 28 A I R 1941 Rang 149, *Disting.* [P 207 C 2]**

***Held further* that inasmuch as the restriction being an 'obligation' survived the repeal so did the right of the restricted person to have the powers under S. 12 exercised and that the case was a fit one for the exercise of the powers under S. 12.**

[P 208 C 1]

E Maung (1), Govt. Advocate — for the Crown.

Blagden J. — This case comes before us on a reference made by the learned Sessions Judge (Arakan) in his Criminal Revision No. 574 of 1940, the learned Chief Justice having directed that it should be heard by a Bench. It appears that one Basu Meah was on 29th August 1933 convicted by the Third Additional Magistrate, Akyab, under S. 380, Penal Code, and sentenced to nine months rigorous imprisonment in addition to which an order was made under the then Habitual Offenders Restriction Act, 1919, that he should restrict himself to Maungdaw for three years after his release. This person then served his sentence of nine months, but thereafter he so repeatedly violated the restriction order that by S. 18 (2), Habitual Offenders Restriction Act (if it had remained unrepealed) the period of three years had not expired on 19th May 1939. In fact however the Habitual Offenders Restriction Act was wholly repealed by Burma Act 1 of 1936 as from midnight of 24th/25th April 1936. The last mentioned Act contained no saving or explanatory clause. On 19th May 1939 Basu Meah again absented himself from Maungdaw without a pass, as a result of which on 5th August 1940 he was charged by the Third Additional Magistrate, Maungdaw, with an offence under S. 18, Habitual Offenders Restriction Act. He pleaded guilty and was sentenced to two years' rigorous imprisonment. The learned Magistrate said nothing in his judgment about the effect of the repeal of the Habitual Offenders Restriction Act.

Basu Meah appealed to the learned Sessions Judge. The latter directed the taking of certain further evidence (which was done) and eventually on 6th November 1940 reduced the sentence to one of one year's rigorous imprisonment. He was, as he rightly said, on the appeal powerless to consider the propriety of the conviction and in any case thought that the judgment of my learned brother in Cr. A. No. 556 of 1936[1] showed conclusively that it was proper. Between 6th and 8th November 1940 he indulged in reflection, and the process, he says, "brought light." Thus illumined, he opened revision proceedings on the last mentioned date and on 22nd November 1940 made the order now under consideration, referring the case to

1. Cri. Appeal No. 556 of 1936, Nga Ba On v. King-Emperor.

this Court with a recommendation that the conviction be set aside and Basu Meah set at liberty. Obviously, the reflection was prompted by that on which at the outset of his observations he thought it right to comment. "It is startling" he says, "to find a man convicted in 1940 for contravening an Act which was repealed in 1936." I entirely agree, especially when, as here, the alleged contravention occurred in 1939. But the learned Sessions Judge had to find a channel between the Scylla of S. 5, General Clauses Act, and the Charybdis of my Lord's judgment in *Nga Ba On's case.*[1] I agree with him that there is a distinction between the facts here and those in the latter case, in that there the alleged contravention took place before the repeal. But, for reasons which I shall try to state in a moment, it appears to me a distinction without a difference.

The observations my Lord then thought it right to make, in so far as they touch the facts of the present case, may therefore be regarded as obiter dicta, though it might have been wise for a Sessions Judge to indulge in a little more reflection than he did before disagreeing with them. However, we must consider whether they were well or ill founded. Having avoided the clutches of Charybdis by dissent from my Lord's observations, the learned Sessions Judge to his own satisfaction, avoided those of Scylla by overlooking S. 5, cl. (e), General Clauses Act. Thus he satisfied himself of the existence of the channel, and thought that he could pilot Basu Meah to liberty. In all the circumstances I wish I could agree with him, and when I first read his judgment I thought I could, though not with all his reasoning. But the wish was father to the thought, and as is usual in such cases the child did no credit to its male parent.

It is idle to speculate on what the Legislature "probably intended" by the unqualified and unexplained repeal of a particular Act, since the effect of such a repeal is laid down in S. 5, General Clauses Act. Where no words of qualification or explanation appear in a repealing Act it is idle to pretend that "a contrary intention appears" so as to oust that section, unless the result of applying it would be to produce an absurdity. Though, as I agree, it is startling that a man should be convicted in 1940 for something he did in 1939 in violation of an Act repealed in 1936, it would be far more startling if an obligation created by the repealed Act remained in existence but the prescribed penalty for its breach did not. The latter would indeed be an absurdity: the former may be harsh, but it is not nonsensical. Further I cannot understand the learned Sessions Judge's reasoning when he describes it as "fundamental" that an Act repealed without qualification "is as if it had never been utterly null and utterly void" when in his very next sentence he mentions S. 5, General Clauses Act, which says expressly that such is not the case. The only trouble with S. 5 is that it contains so many words that one is apt not to see the wood for the trees to overlook the words which are material in any particular case by reason of the multitude of those which are not. In this case, omitting all words of the latter class, it reads:

> 5. Where any Act repeals any enactment hitherto or hereafter to be made, then, unless a different intention appears, the repeal shall not: (c) affect any ... obligation ... incurred under any enactment so repealed; or (e) affect any ... legal proceeding ... in respect of any such ... obligation ... as aforesaid; and any such ... legal proceeding ... may be instituted ... as if the repealing Act had not been passed.

The following propositions seem to me unquestionable: (1.) That the order to confine himself to Maungdaw imposed on Basu Meah an "obligation". (2.) That the prosecution as a result of which Basu Meah received his present sentence was "a legal proceeding". (3). That that "legal proceeding" was "in respect of" that "obligation". (4). That when a legal proceeding is instituted "as if the repealing Act had not been passed" it may be prosecuted to the conclusion which it would have reached under the repealed Act. If I may say so with respect, my Lord's observations in Criminal Appeal No. 556 of 1936[1] differed from those of the learned Sessions Judge in that they did not ignore cl. (e) of S. 5, General Clauses Act. I think that, though obiter, they were perfectly right and the conviction with which we are now concerned was legal. With regard to (1941) R L R 58[2] the words of S. 5 which there made the seven years' sentence the minimum that could have been passed were "punishment incurred" in cl. (d). Nothing at all turned on the words "obligation .... incurred" in cl. (c) or "legal proceeding .... in respect of any such ..... obligation" in cl. (e). One thing remains to be added. I am rather shocked by the same thing which shocked the learned Sessions Judge. The letter of the law — which we are bound to uphold—does seem to have been used in this case as an instrument of oppression. My Lord has drawn attention to

2. ('41) 28 A I R 1941 Rang 149 : 1941 R L R 58, Shwe Hla U v. The King.

S. 12 of the repealed Act, which provides the remedy, and it is obvious that if restriction be an "obligation" which survives the repeal so does the "right" of the restricted person to invite the District Magistrate to exercise his powers under that section. I respectfully agree in thinking that the present case is one in which they might well be exercised and I hope they will be. It would be satisfactory to be sure that the present will be the last of many terms of imprisonment which Basu Meah will have suffered in consequence of a trifling offence committed nearly eight years ago. But the conviction of the respondent Basu Meah was undoubtedly correct: therefore apart from our recommendation to the District Magistrate, we must decline to interfere. The records may be returned.

Dunkley J. — I am in entire agreement with my learned brother. When Criminal Appeal No. 556 of 1936[1] was heard before me it was realised that such a case as that of the respondent was bound to occur, and at the request of the learned Government Advocate who argued the appeal, as the matter was so closely connected with the case before me, I endeavoured to lay down the law for the guidance of subordinate Courts in dealing with such a case. It is regrettable that the learned Sessions Judge was led by inexperience to reject the advice on which he was entitled to rely. I agree with my learned brother that the continuance of the restriction order against the respondent is not in the interest of justice, and almost amounts to using the law as an instrument of persecution. I therefore strongly support his recommendation to the District Magistrate of Akyab that the latter should now exercise his powers under S. 12, Habitual Offenders' Restriction Act, (which remain in force by virtue of cl. (c) of S. 5, General Clauses Act) to cancel the order of restriction against the respondent, so that the respondent may be free of restriction when he has served his present sentence.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 208

ROBERTS C. J. AND DUNKLEY J.

Maung Man — Appellant

v.

Maung Sai Gyi — Respondent.

Letters Patent Appeal No. 9 of 1940, Decided on 29th January 1941, against decree of High Court, in Special Second Appeal No. 26 of 1940, D/- 8th May 1940.

(a) Riparian owner—Who is—Depression in Government land — Small part of land abutting on *A's* land—For many years *A* using water collected in and flowing from Government land to his land for irrigating his crops — Question of riparian ownership does not arise.

"Riparian owners" are those whose land abuts on, and is part of, the bank of a river or stream, whether tidal or non-tidal: (1877) 46 L J Ch 68, *Rel. on.* [P 208 C 2]

Where rain water collecting in a depression in a Government land small part of which abuts upon *A's* land flows to *A's* land and is used by *A* for many years for irrigating his crops, no question of riparian ownership can arise. [P 208 C 2; P 209 C 1]

(b) Easement — Easement depending on previous grant—Right can be claimed against person capable of imposing permanent burden upon property or of making any grant — Easement on Government land cannot be claimed against squatter on that land.

The user of land in such a way as to enjoy what is claimed as an easement depends on a previous grant, which can only be legally made by a party capable of imposing such a permanent burden upon the property. Consequently a squatter on a Government land not being capable of imposing a permanent burden upon the Government property, or of making any grant, an easement on that land can be claimed against the Government alone and not the squatter. Therefore the remedy for obstruction to the alleged easement on Government land by the squatter lies against the Government and not the squatter. [P 209 C 1]

Jaganathan for J. V. Kale — for Appellant.

U E Maung (1) — for Respondent.

Roberts C. J.—The learned Judge who granted a certificate in this Letters Patent appeal made it clear in so doing that the only question on which his decision might be reconsidered was whether the parties are in the position of riparian owners, and, in my view, it is quite clear that they are not. In (1877) 46 L J Ch 68[1] Lord Selborne explained the meaning of "riparian rights" and "riparian owners": "riparian owners" are those whose land abuts on, and is part of, the bank of a river or stream, whether tidal or non-tidal; and this was also laid down in "Cowel," where, in the Second Book of Institutes, it is said "riparian signifies water or river running between the banks, be it salt or fresh." In the present appeal the facts are that a depression exists in certain land, which is the property of Government, and a small part of which abuts upon the appellant's land. The respondent, Maung Sai Gyi, is a squatter. For many years past, the rain water which had collected in that latter holding had flowed on to the appellant's land, and he used it to irrigate his crops and, without it he found himself in great difficulty in relation to the cultivation of paddy. Maung Sai Gyi, the respondent, nevertheless, is alleged to have erected a bund which entirely cut off this supply, and,

1. (1877) 46 L J Ch 68: 1 A C 662: 35 L T 569: 25 W R 165, Lyon v. Fishmongers' Co.

not unnaturally, the appellant desired to take action against him. But Maung Sai Gyi, as has been said, is a squatter, and the appellant, before he could obtain any legal remedy, would have to establish the existence of a legal right; and as is pointed out in "Gale on Easements," Edn. 11, at p. 224, the user of land in such a way as to enjoy what is claimed as an easement depends on a previous grant, and such previous grant can only have been legally made by a party capable of imposing such a permanent burden upon the property. The squatter here, the respondent, was not capable of imposing a permanent burden upon the property, or of making any grant to the appellant which would give him a legal right. It follows that, if the appellant desired to show that he had obtained an easement by prescription to the use and enjoyment of the overflow of water from the stagnant pond, he could only do so in a claim against the Government. There is no question of riparian ownership at all. That, however, is not the only difficulty under which the appellant labours, and I am in complete agreement with the observations which fell from the learned Judge in second appeal when he says:

> As regards the plaintiff's supposed right of easement as having been acquired by prescription . . . . . , the right to the use of water . . . . . , can become absolute and indefeasible only if it has been peaceably and openly enjoyed as an easement and as of right without interruption for 60 years, inasmuch as the property over which the right is claimed belongs to Government.

See S. 26, sub-s. (2), Limitation Act. The position, therefore, is that the only remedy which the plaintiff could have would depend upon the existence of such a right as would enure to him if he had acquired an easement. He would not acquire that easement, in the circumstances, in a less period than 60 years, and he has not pretended that he has enjoyed this water for so long a period, and in any case, his suit against Maung Sai Gyi would not be capable of granting him the remedy which he seeks. This appeal must, therefore, be dismissed with costs, advocate's fee five gold mohurs.

Dunkley J. — I agree.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Rangoon 209

ROBERTS C. J. AND DUNKLEY J.

Shwe Pru — Appellant

v.

The King.

Criminal Appeal No. 11 of 1941, Decided on 14th February 1941, from order of Sess. Judge, Arakan, in Sessions Trial No. 42 of 1940.

1941 R/27 & 28

(a) Criminal trial — Duty of prosecution — Public Prosecutor should examine prosecution witnesses in proper order so as to bring out facts in their logical sequence.

The Public Prosecutor should be required, as far as possible, to examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witnesses, such as the medical witness, ought not to be examined at an early stage of the trial, when it is impossible to realize on what points their opinion is necessary. [P 210 C 1]

* (b) Criminal P. C. (1898), Ss. 154 and 162— Telephone message to police about commission of cognizable offence by eyewitness — Police station officer can record it and sign it himself as information — That report forms first information report—Subsequent statements to police are statements in course of investigation and inadmissible under S. 162.

A telephone message given to police about the commission of a cognizable offence can be recorded by the station writer as a first information report, and the station writer may sign it himself as the person giving the information, for a first information report may be merely hearsay and need not necessarily be given by a person who has firsthand knowledge of the facts. And subsequent statements made to police must be regarded as statements made to the police in the course of the investigation of this cognizable offence and therefore as inadmissible under S. 162. [P 211 C 2; P 212 C 1]

(c) Criminal trial — Police diaries — Statements or entries not made in course of investigation should be proved by calling officer who has recorded them to state orally particulars recorded and then to produce diary in corroboration thereof.

Such entries, or parts of entries in the police diary as are admissible in evidence, that is to say, which do not include statements made to the police during the course of an investigation, should ordinarily be proved by calling the station writer who recorded them to state orally the particulars recorded in each entry and then to produce the general diary in corroboration of his oral evidence. They differ in no respect from any other record in writing of a statement or event. [P 212 C 1]

(d) Criminal trial—Duty of prosecution—His duty is not to obtain conviction at all costs — All important witnesses should be examined.

A prosecuting officer should not think that it is his duty to obtain a conviction at all costs. It is his plain duty to call important witnesses and put in all the relevant evidence : 14 Rang 45, *Rel. on.* [P 212 C 1]

Mya Thein — for Appellant.

E Maung (1), Government Advocate — for the Crown.

Dunkley J.—The appellant Maung Shwe Pru has been convicted of the offence of murder under S. 302, Penal Code, and sentenced to death by the learned Sessions Judge of Arakan. The prosecution case was that he had committed this offence by causing the death of one Maung Tha Tun on the night of 11th May 1940, at Akyab town. The trial was unsatisfactory in a number of respects, but especially in regard to the failure

to examine the witnesses for the prosecution in their proper order. In a trial of this importance, the Public Prosecutor should be required, as far as possible, to examine his witnesses so as to bring out the facts in their logical sequence, and particularly the expert witnesses, such as the medical witness, ought not to be examined at an early stage of the trial, when it is impossible to realize on what points their opinion is necessary.

That Maung Tha Tun was killed on the night of 11th May by being stabbed in Mill Road, Akyab, is not open to doubt. He received a stab wound near the inner third of the right collar bone, running downwards medially and backwards. The injury cut the sternomastoid muscle, the jugular vein of the right side and the right pleura and apex of the right lung. The injury was, of course, sufficient to cause death in the ordinary course of nature. The medical witness deposed that the deceased might have lived after this injury for a few minutes or even for a few hours. He further stated—and this is a point of great importance—that the body of the deceased was brought to the Akyab hospital at 5 A. M. on the morning of 12th May and at that time from the condition of his body he had been dead for three or six hours. It is clear that Maung Tha Tun was stabbed during the course of a clash between two bands of young rowdies near the junction of Mill Road and Dontaikpyin Road. The residence of the deceased was at Ontabin quarter which is along the Dontaikpyin Road to the north of the town proper and about two miles or more from the main police station, where this occurrence was reported. On that night the deceased Tha Tun and the witnesses Pho Sein, Kaung San Rhi, Hla Aung and Sein Tun Pru went into Akyab Town, and after 11 P. M. they were returning towards their homes at Ontabin. When they approached the road junction they met another band of young men coming along Mill Road from the north. This band consisted of the appellant Shwe Pru, his brother Shwe Aung, Sein Aung (D. W. 11) and several other persons whom the deceased's companions say that they did not recognize; these persons are defence witnesses and their names are Sein Tun, Htwe Hla Aung and Aung Tha Gyaw.

According to the deceased's companions, when the two bands met Shwe Aung flashed his torch on Maung Tha Tun's face and asked "Is that Maung Tha Tun?" and when Maung Tha Tun replied in the affirmative the appellant Shwe Pru stabbed him with a dagger. There is evidence to show that on the previous night the appellant and the deceased had had a quarrel while gambling in the house of one Ah Thu in Ontabin, and it is suggested by the prosecution that this quarrel was the motive for the stabbing. According to his companions, when the deceased was stabbed he shouted out that he had been stabbed by Maung Shwe Pru. Pho Sein says that he also shouted out that Tha Tun had been stabbed by Shwe Pru. They all ran away either up the Dontaikpyin Road or into the compounds of the rice mills near by. Pho Sein says that he immediately recovered his courage and returned to the assistance of the deceased who collapsed on the road, and he says that the deceased again denounced the appellant and asked to be taken to the hospital before he relapsed into unconsciousness. The other companions of the deceased returned to the place shortly afterwards, but, instead of taking the deceased to the hospital, they carried or dragged him towards his own village, with several halts on the way, and they ultimately reached a pongyi kyaung near Ontabin. There they left him alone on the side of the road. According to them, the deceased was still alive at that time, but, as I shall presently show, it is quite plain that he had died long before they reached the pongyi-kyaung. One of them, Sein Tun Pru, says that he did stay near the deceased, but his evidence on this point is plainly false, as it is on many other points; for when the driver of the motor car, Maung Tha No (D. W. 9), who ought to have been called by the prosecution but had to be called by the defence, arrived on the scene with his car, having been called by Pho Sein and Kaung San Rhi, he found no one near the dead body.

Pho Sein and Kaung San Rhi went away to obtain a conveyance to take the deceased to the hospital. Hla Aung went away to obtain assistance, and I have no doubt that Sein Tun Pru accompanied him. Actually Pho Sein and Kaung San Rhi went and called Maung Tha No out of bed and asked him to bring his taxi and carry a man who had been stabbed to the hospital. Maung Tha No, somewhat unwillingly, got out his taxi and went with them, and found the body of Tha Tun, who was dead, on the side of the road outside the pongyi-kyaung. No one was near the body. The body was covered with blood, and as the man was al-

ready dead Maung Tha No declined to take the body in his car; so Pho Sein asked him to take them to the police station so that they could make a report. He did so, and Pho Sein and Kaung San Rhi arrived at the police station at 2-10 A. M.

Reverting now to what Hla Aung and Sein Tun Pru did, they went to a mill and from the mill Maung Hla Aung telephoned to the Akyab police station. His telephone message was received at 1-5 A. M. After Hla Aung had sent this telephone message, he and Sein Tun Pru returned to the place where the body was, and it must have been during their absence that Tha No arrived there with his taxi. Then Sein Tun Pru was left with the body while Hla Aung went and called an uncle of the deceased named Kra Tun. The latter was told by Hla Aung that the deceased had been stabbed by the appellant Shwe Pru. He went and looked at the body, and finding that Tha Tun was dead he departed and called the deceased's other relatives. After calling the relatives, he went back again, and then only after the lapse of some time Pho Sein and Kaung San Rhi arrived on the scene having come back from the police station. After their arrival a stretcher was made and the body was taken to the Akyab police station, and from the police station direct to the hospital, where, as I have said, it arrived at 5 A. M.

After the body had reached the hospital Pho Sein was called back to the police station, and then his statement was taken down, and this statement was introduced at the trial as if it were the first information report, which, of course, it was not. According to what is recorded on it, this statement was made at 4 A. M., but this time is either a deliberate or an accidental error, for plainly Pho Sein did not make the statement until some time after 5 o'clock. Hla Aung's original telephone message was recorded in the general diary of the Akyab police station. It is serial No. 136 and was recorded at 1-5 A. M. by station writer Maung Bu. It reads as follows:

> Telephone message received. Maung Hla Aung sent a telephone message from Kheoh rice-mill as follows: 'A man whom I can identify at sight has stabbed Maung Tha Tun, the villager of Ontabin village, with da and Maung Tha Tun received injury on the throat.' Accordingly the police station informs him (Maung Hla Aung) to bring the injured man to the police station and make a report.

The learned Sessions Judge has held that the report made by Pho Sein after 5 A. M., which was recorded by the police as a first information report, is the true first information report in this case and can be treated as such, and does not offend against the provisions of S. 162, Criminal P. C. This is an erroneous conclusion. Under S. 154, Criminal P. C., every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it. In 2 Pat 517[1] at page 523 the learned Chief Justice of the Patna High Court said this:

> It was argued before us in appeal that the written statement made to the Sub-Inspector by the appellant's wife on the evening on the 16th, ought not to have been admitted in evidence as a first information report. It was pointed out that information having been already given at the police-station earlier by the chaukidar, any statements afterwards taken by the police were taken in the course of an investigation and were inadmissible as evidence under S. 162, Criminal P. C. I have no doubt that the statement made at the police-station by the chaukidar was information relating to the commission of a cognizable offence within the meaning of S. 154 of the Code. It ought to have been taken down in the book kept for that purpose as provided in the Section and whether this was done or not in the particular circumstances of this case, I think all further statements taken from the witnesses were taken in the course of a police investigation and that the written statements so taken were inadmissible as evidence under S. 162 of the Code.

With these observations I am, with all due respect, in entire agreement. Clearly, some information of the commission of a cognizable offence was received at 1-5 A. M., by telephone from Maung Hla Aung. This telephone message might have been recorded by the station writer as a first information report, and the station writer might have signed it himself as the person giving the information, for a first information report may be merely hearsay and need not necessarily be given by a person who has firsthand knowledge of the facts. However, Hla Aung was requested to go to the police station and make a report so that it might be signed by him in conformity with the provisions of S. 154, Criminal P. C., and I do not suggest that the station writer was wrong in adopting this course. But the next event, so far as the police were concerned, was the arrival of Pho Sein in person at the police station at 2-10 A. M. He made a

1. ('23) 10 A I R 1923 Pat 550 : 73 I C 561 : 24 Cr L J 641 : 2 Pat 517 : 4 P L T 462, Gansa Oraon v. Emperor.

statement and this statement ought to have been taken down in accordance with the provisions of S. 154. All statements subsequently made to the police, including the subsequent statement of Pho Sein which has been treated as a first information report, must be regarded as statements made to the police in the course of the investigation of this cognizable offence and therefore as inadmissible under S. 162, Criminal P. C.

The learned Sessions Judge has made considerable difficulty over the proof of statements recorded in the general diary of the police station. Such entries, or parts of entries, in the diary as are admissible in evidence, that is to say, which do not include statements made to the police during the course of an investigation, should ordinarily be proved by calling the station writer who recorded them to state orally the particulars recorded in each entry and then to produce the general diary in corroboration of his oral evidence. They differ in no respect from any other record in writing of a statement or event. It is astonishing that at this trial this most important telephone message had to be proved by the defence and was not brought out by the prosecution. Even then the station writer was not called. The learned Public Prosecutor of Akyab seems to have a curious idea of his duties. He seems to think that he is a police prosecuting officer and that it is his duty to obtain a conviction at all costs. He might benefit by reading the judgments in 14 Rang 45.[2] It was his plain duty to have called the station writers concerned and to have put in evidence for the prosecution all the relevant entries contained in this general diary, and it was his duty to have called the taxi driver Maung Tha No for the prosecution.

Further entries in the general diary were actually put in by him after all the evidence, including that of the defence witnesses, had been recorded. These are EXS. E and G. Exhibit E shows that Pho Sein came to the police station at 2-10 A. M. and he told the station writer that he came to get a gharry to carry the injured person, Maung Tha Tun, and that the injured person had been stabbed by Maung Shwe Pru. He deliberately gave the impression that Maung Tha Tun was still alive, although he knew that Maung Tha Tun was dead. Even though there was reason for not treating the telephone message as an information, it is most astonishing that a statement of this kind, made by a person who alleged that a particular person had committed a serious cognizable offence, was not taken down as a first information report, and it is quite clear from this case that the police of Akyab town are extremely lax in the performance of their duties; and on this point I desire to make the further remark that, although the first information of this crime was received at 1-5 A. M. the investigating officer admits that active investigation was not commenced until after 10-41 A. M. This is a most reprehensible state of affairs. The conviction of the appellant must rest on the statements of Pho Sein, Kaung San Rhi, Hla Aung and Sein Tun Pru that they actually recognized the appellant and saw him stab the deceased. (His Lordship considered their evidence and held it to be quite incredible, and concluded.) In my opinion the conviction of the appellant cannot be sustained, and therefore this appeal is allowed, the conviction and sentence are set aside, and the appellant is acquitted, and the sentence of death is not confirmed.

ROBERTS C. J.—I agree.

K.S./R.K. *Conviction set aside.*

2. ('35) 14 Rang 45, Nga Aung Gyi v. Emperor.

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(28) A. I. R. 1941 Rangoon 212

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

Commissioner of Income-tax, Burma

v.

Lakshmi Insurance Co. Ltd., Rangoon.

Civil Ref. No. 3 of 1941, Decided on 11-6-1941, made by Commissioner of Income-tax, Burma.

(a) Income-tax Act (1922) (Burma), S. 3 and S. 59, rules under, R. 25 — Premiums are not necessarily annual payments — They do not represent annual profits or gains of company — Similarly, total number of claims in one year cannot be set off as deductions—Object of framing R. 25 stated (Per *Roberts C. J.*)

Life policies are contracts of variable endurance, and premiums are in many cases not annual payments. In no sense do they represent the annual profits and gains of the company which can only be arrived at by actuarial calculations. In the same way the total number of claims in one year cannot be set off as deductions, for the annual statement of premiums minus claims paid is not a criterion of profits. It is to meet this difficulty in ascertaining what are the income, profits and gains of the previous year (within the meaning of S. 3) that R. 25 exists : (1889) 2 Tax Cas 551, *Rel. on.* [P 214 C 1]

(b) Income-tax Act (1922) (Burma), S. 59 — Rules under, Rr. 25 and 35—Rr. 25 and 35 simply deal with computation of total income— They cannot override unequivocal direction in Act — Words "premium income" in R. 35 mean premium income of previous year—Burma branch of

non-resident Life Assurance Company—Assessment—Total income of whole business should be ascertained in accordance with R. 25—Total income of company for Burma assessment should be computed on proportion of Burma premium to world premium received in its previous year — For ascertaining proportion of premiums received in Burma to those received in respect of whole business recourse to R. 25 or R. 35 is not necessary (Per *Roberts C. J., and Dunkley J.; Sharpe J. dissenting.*)

Rules 25 and 35 simply provide a somewhat arbitrary though convenient method of ascertaining the total profits or gains in respect of life assurance business. They cannot exclude the operation of unequivocal direction in the Act. The principles underlying the Act must be carefully borne in mind in the interpretation of the rules. The premium income, referred to in R. 35 means the premium income of the previous year, on the income, profits and gains of which the tax is charged. The second part of R. 35 does not form an exception to the general principle that the assessment is based on the figures of the previous year. It is merely an empirical rule for ascertaining the total income, profits and gains of the company for the previous year. Consequently, in the case of the assessment of the Burma branch of a non-resident Life Assurance Company the total income of the company must be first ascertained in accordance with R. 25 and then the fraction of that total income which is taxable in Burma should be found out by applying the first sentence of R. 35. The taxable income of the company in Burma should be computed on the proportion of the Burma premium to world premium received in its previous year and not on the proportion of the said premiums received during the valuation period. For the purpose of ascertaining the proportion of premiums received in Burma to those received in respect of the whole business, recourse to R. 25 or R. 35 is not necessary since those rules deal only with computation of total income and the premiums can be ascertained directly : I L R (1937) 2 Cal 540, *Approved.* [P 213 C 2; P 214 C 2; P 215 C 1; P 216 C 1]

(Per *Sharpe J.*) — The words or expressions which obviously are by design omitted are one of the most important things to be attended to in order to discover the true construction of any particular clause. Where the rule-making authority uses the expression which conveys what is said to have been its intention less clearly than the other expression which might equally well have been used would have done, it is proper to conclude that it did not intend to convey that intention at all. Consequently, the omission of the words "previous year" from R. 35 indicates that the words "premium income" in R. 35 mean premium income in the period to which relate 'the total income, profits or gains' mentioned earlier in the same sentence of that rule" and do not mean "premium income in the previous year:" (1863) 2 H & C 431, *Rel. on;* I L R (1937) 2 Cal 540, *Dissenting judgment approved;* 6 I T R 321, *Ref.* [P 218 C 2; P 219 C 1]

(c) Income-tax Act (1922), Ss. 10 (2) (ix) and 3 —Life Assurance Company — Interim bonuses distributed can be deducted from total income only if they can be shown to fall under S. 10 (2) (ix) (Per *Special Bench.*)

The interim bonuses distributed by a Life Assurance Company can be deducted from the total income only if the assessee can show that they constitute expenditure incurred for earning the profits of the company within the meaning of Section 10 (2) (ix). [P 215 C 2]

(d) Income-tax Act (1922), S. 22 (1) Proviso —Life Assurance Company cannot be said to be immune from tax during its early years of existence (Per *Roberts C. J.*)

A Life Assurance Company cannot be said to be immune from tax during the early years of its existence in view of the proviso to S. 22 (1). [P 215 C 1]

(e) Interpretation of statutes — One of two alternative meanings prima facie to be preferred to other—Fact of former being unreasonable destroys prima facie case in favour of latter (Per *Sharpe J.*)

When once it is found that one of two possible alternative meanings is prima facie to be preferred to the other, then the question of the reasonableness of the former meaning appears to be material; the fact that the meaning is an unreasonable one may destroy the prima facie case in favour of the latter meaning. [P 219 C 1]

(f) Interpretation of statutes — Views of Government department administering statute —Whether can be looked into explained.

Usually the views of a Government department as to the meaning of a statute which is administered by them are not admissible as an aid to construction but when in any particular case it is impossible to suppose that the Legislature is ignorant of the manner in which its own statute is being administered by a department of the State and yet the Legislature re-enacts the same provisions, it may not be improper for the Courts to take notice of the fact that the new enactment is in precisely the same terms as the previous one : (1891) A C 531, *Rel. on.* [P 219 C 2]

U E Maung, Government Advocate— for the Commissioner of Income-tax.

E. C. V. Foucar—for Assessee.

Roberts C. J. — The following questions have been referred to us for determination under S. 66 (2), Burma Income-tax Act :

(1) In the circumstances of the case, should the income, profits or gains of the Lakshmi Insurance Co., Ltd., have been computed for Burma assessment for 1937-38 on the proportion of the Burma premium to the world premium received in its previous year 1936-37, or should it have been computed on the proportion of the said premia received during the valuation period, namely the quadrennium ended 30th April 1936 ?

(2) In the circumstances of the case, in the computation of income on the basis of the valuation surplus, was the income-tax officer right in adding back the interim bonus paid to policy-holders ?

By S. 3, Income-tax Act, where any Act of the Legislature enacts that income-tax shall be charged for any year . . . tax shall be charged for that year . . . in respect of all income, profits and gains of the previous year. The Lakshmi Insurance Co., Ltd. deals with life insurance and the first question relates to the method of computation of its taxable income for the Burma assessment of 1937-38. The head office is in Lahore

in the Punjab, but the company has a local agency in Rangoon. It is therefore necessary to find, first, what is the total income, profits and gains of the whole business both inside and outside of Burma; and secondly, what proportion of this total income falls to be taxed in respect of that part of the business which lies in Burma. Two questions arise for determination, the first dealing with the computation of total income, and the second not dealing with that at all but merely inquiring what fraction of the total income is represented by the Burma business. For the purpose of arriving at the total income of the whole business, a rule has been made, bearing in mind no doubt the decision in (1889) 2 Tax Cas 551.[1] In that case it was pointed out that life policies are contracts of variable endurance, and premiums are in many cases not annual payments. In no sense do they represent the annual profits and gains of the company which can only be arrived at by actuarial calculations. In the same way, the total number of claims in one year could not be set off as deductions, for the annual statement of premiums minus claims paid is not a criterion of profits. It is to meet this difficulty in ascertaining what are the income, profits and gains of the previous year (within the meaning of S. 3) that R. 25 exists. By the second part of another rule, namely R. 35, the provisions of R. 25 extend to non-resident life assurance companies. Rule 25 runs as follows :

In the case of Life Assurance Companies incorporated in British Burma whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation, provided that any deductions made from the gross income in arriving at the actuarial valuation which are not admissible for the purpose of income-tax assessment, and any Burma income-tax deducted from or paid on income derived from investments before such income is received, shall be added to the net profits disclosed by the valuation.

When the total income, profits and gains of the previous year have been ascertained (or perhaps it should be said, estimated in the only way in which they are capable of being fairly estimated) the next question is what fraction of this total income is taxable in Burma. In order to answer this question it is necessary to go no further than to apply the first sentence of R. 35 which runs as follows :

The total income of the Burma branches of non-resident insurance companies (life, marine, fire, accident, burglary, fidelity guarantee, etc.) in the absence of more reliable data may be deemed to be the proportion of the total income, profits or gains, of the companies, corresponding to the proportion which their Burma premium income bears to their total premium income.

That means that inquiry is to be made into the premiums paid both in the business as a whole and in that part of it which lies in Burma. For the Burma assessment 1937-38 the total income of the business for the previous year, that is to say the year ending 30th April 1937, must be ascertained by applying R. 25. But the premiums paid to the assessees both in respect of the total business and in respect of the Burma branch for the year ending 30th April 1937, are directly ascertainable without recourse to any such rule. Inquiry into the amount of premiums paid in the single year ending 30th April 1937, is not made for the purpose of ascertaining the total income of the whole business; it is made only for the purpose of ascertaining what proportion the business in Burma represents to the entire undertaking. There is nothing in R. 25 which says that the premiums paid in the previous year shall be ignored, or that, for the purpose of calculating the proportion which part of the undertaking bears to the whole, resort shall be had to an arbitrary method based upon the average annual premiums over a valuation period. Rule 25 exists as a means of calculating total income which cannot be calculated fairly in any other way; but the figures for the premiums paid in the previous year do not need to be ascertained by any artificial method, since they are ascertainable directly. The second part of R. 35 reads :

For the purpose of this rule, the total income, profits or gains of non-resident Life Assurance Companies whose profits are periodically ascertained by actuarial valuation shall be computed in the same manner as is prescribed in R. 25 for the computation of income, profits and gains of Life Assurance Companies incorporated in British Burma.

This is directed plainly to the ascertainment of the total income of non-resident life assurance companies, and not to the proportion of premiums received in Burma to those received in respect of the whole business. I am in respectful agreement with the observations of Costello, J. in I L R (1937) 2 Cal 540[2] at p. 566 that Rr. 25 and 35 should not be taken as having any further effect than that they provide a somewhat arbitrary though convenient method of ascer-

1. (1889) 2 Tax Cas 551, Scottish Union & National Insurance Co. v. Smiles.

2. ('37) I L R (1937) 2 Cal 540 : 41 C W N 905, In re North British and Mercantile Insurance Co.

taining the total profits or gains in respect of life assurance business. They cannot exclude the operation of unequivocal direction in the Act. The propriety or legal accuracy of the method adopted by the Commissioner in the Calcutta case was not before the Court. It is for him to ascertain the proportion which one part of a business bears to the whole, as well as to ascertain its total income; and he is not bound in ascertaining such proportion to have recourse to the rules which deal only with the computation of total income. If the contention of the assessees here were correct, S. 22 of the Act would be inoperative in respect of the earlier years of the income, gains and profits of a life assurance company. Mr. Foucar has felt obliged to say that such a company is immune from tax for the first four years of its existence. I cannot accede to this proposition. In such a case the return furnished must necessarily be incomplete, and the income-tax officer would no doubt extend the date for its delivery in accordance with the proviso to S. 22.

The principles underlying the Act must be carefully borne in mind in the interpretation of the rules. A special form of procedure for computing the income of life assurance companies incorporated in British Burma whose profits are periodically ascertained by actuarial valuation has been ordered in R. 25, and this is extended to non-resident life assurance companies in the second part of R. 35. No special form of procedure has been laid down for the computation of the actual premiums paid: none is necessary; and regard is had to the sums paid by way of premium solely in order to arrive at the proportion which a part of the business bears to the whole. The answer to the first question must therefore be that the income, profits or gains of the assessees should have been computed for the Burma assessment 1937-38 on the proportion of the Burma premium to the world premium received in its previous year 1936-37. Passing to the second question, the difficulty, if any, is concluded by the decision of the Judicial Committee of the Privy Council in 7 I T C 151.[3] The amounts distributed by way of interim bonus were plainly distributed out of, or in anticipation of, net profits in the year in which they were so distributed. In the order of reference the Commissioner has repeated the Actuary's report for the quadrennium ending 30th April 1936 which is as follows:

The surplus disclosed by the valuation on the basis mentioned above is	Rs. 9,69,762
To this is to be added the amount of the interim bonuses paid during the period of four years	37,140
... making a total, ...	10,06,902

This total represents the income, profits and gains for the period under review. It is not a question of whether the sum of Rs. 37,140 should be "added back" to the surplus disclosed by the valuation. The latter amount was imcomplete unless the amounts paid out by way of interim bonus were added thereto. No ground has been shown for regarding them as mere refunds of overpaid premiums; they represent part of the profits. If it is contended that they should be deducted from the total of Rupees 10,06,902 the assessee must show that they constitute expenditure incurred for earning the profits of the company within the meaning of S. 10 (2) (ix) of the Act. He could not do this, and has not attempted to do it. The second question propounded should have read, "Was the income-tax officer right in including sums paid to policy holders by way of interim bonus in the total divisible surplus for the quadrennium ending 30th April 1936?" The answer to that question must be in the affirmative. The assessee must pay the costs of this reference: advocate's fee, 20 gold mohurs.

Dunkley J. — I agree with the answers proposed by my Lord the Chief Justice to the questions propounded. As regards the first question, when it is borne in mind that the Income-tax Rules do not form a water-tight compartment, but form part of the Income-tax Act and have been framed under the provisions of S. 59 of the Act, and that, as Costello J. pointed out in I L R (1937) 2 Cal 540[2] at p. 565 where there is any contradiction or ambiguity between the provisions of the Act and the rules the provisions of the Act must prevail, the answer to the first question, to my mind, becomes simple. As a matter of fact, there is, in my opinion, no ambiguity between the provisions of Rr. 25 and 35 of the Rules and the provisions of the Act in regard to the matter before us.

Under S. 3, Income-tax Act, where any Act of the Legislature enacts that income-tax shall be charged for any year, the tax shall be charged for that year in accordance

3. ('34) 21 AIR 1934 P C 45 : 147 I C 899 : 15 Lah 224 : 61 I A 41 : 7 I T C 151 (P C), Bharat Insurance Co. v. Commissioner of Income-tax, Punjab.

with and subject to the provisions of the Act in respect of all income, profits and gains of the previous year. Under S. 22 (1), the principal officer of every company shall prepare and, on or before 15th June in each year, furnish to the Income-tax Officer a return of the total income of the company during the previous year. Under S. 59 (2) (a) (ii), rules may be made to prescribe the manner in which, and the procedure by which, the income, profits and gains shall be arrived at in the case of an insurance company, and under S. 59 (3) (a), where the income, profits and gains liable to tax cannot be definitely ascertained, the rules may prescribe methods by which an estimate of such income, profits and gains may be made. Rules 25 and 35 of the Income-tax Rules have been framed under these provisions of S. 59. What are the "income, profits and gains" referred to in S. 59? Clearly, they are the income, profits and gains which are liable to tax, that is, the income, profits and gains of the previous year. Hence it is plain that R. 25 merely prescribes the method by which the income, profits and gains of the previous year of a life assurance company shall be ascertained, and the second part of R. 35 merely lays down that the total income, profits and gains of a non-resident life assurance company shall be ascertained in the same manner. The result of the calculation prescribed by R. 25, or in the case of a non-resident company by part 2 of R. 35 read with R. 25, is, or must be taken to be, the income, profits and gains of the company for the previous year. It therefore follows that the premium income, referred to in part 1 of R. 35, means the premium income of the previous year, on the income, profits and gains of which the tax is charged. The opinion of the Commissioner of Income-tax on this point is correct, save that he is in error in thinking that part 2 of R. 35 forms an exception to the general principle that the assessment is based on the figures of the previous year. It is merely an empirical rule for ascertaining the total income, profits and gains of the company for the previous year. The second question could not have arisen but for an unfortunate error of the Income-tax Officer in making the assessment. The Income-tax Officer stated in his order that the surplus for the quadrennium in question according to the Actuary's valuation was Rs. 9,69,762. This is not correct. As the Commissioner of Income-tax has pointed out in his order of reference, the Actuary found the surplus to be Rs. 10,06,902. The question of "adding back" the interim bonus of Rs. 37,140 never arose; it had already been included by the Actuary in the surplus. What the assessees are now contending is not that this sum should not have been included in the surplus of the quadrennium, but that they have a right to deduct this sum in arriving at the true surplus for income-tax purposes. They can have this right only under the provisions of cl. (ix) of S. 10 (2) of the Act, and it has not been, and plainly cannot be, contended that the payment of this interim bonus out of accrued or anticipated profits was "expenditure incurred solely for the purpose of earning such profits or gains."

Sharpe J.—I have had the benefit of reading in advance both the judgments which have just been delivered, but unfortunately I find myself unable to agree with the other members of the Court in regard to the first of the two matters which arise out of the statement of the case referred to us. I must therefore state the reasons for my decision more fully than I would otherwise have done. Our decision upon the first point depends upon the meaning of the words "premium income" which appear in two places at the end of the first sentence of R. 35 of the Burma Income-tax Rules made under sub-ss. (1), (2) (a) (ii) and (3) of S. 59, Income-tax Act, by the Financial Commissioner, who, since the separation of Burma from India, has replaced the Central Board of Revenue as the rule-making authority under that Act. The question is: Does "premium income" in R. 35 mean "premium income in the previous year" or "premium income in the period to which relate 'the total income, profits or gains', mentioned earlier in the same sentence of that rule?" Rules 25 to 32 (both inclusive) and R. 35 of the Burma Income-tax Rules prescribe—to use the words of sub-s. (2) (a) (i) of S. 59, Income-tax Act—the manner in which and the procedure by which, the income, profits and gains shall be arrived at in the case of insurance companies. Those rules deal with four classes of insurance companies, namely (i) life assurance companies incorporated in Burma, to which I will hereafter refer as "resident life companies"; (ii) insurance companies incorporated in Burma and doing insurance business other than life assurance business (e. g. Marine, Fire, Accident, Burglary, Fidelity Guarantee, etc.), to which I will hereafter refer as "resident non-life companies"; (iii) non-resident life assurance companies having a Burma branch,

to which I will hereafter refer as "non-resident life companies": and (iv) non-resident insurance companies doing insurance business other than life assurance business and having a Burma branch, to which I will hereafter refer as "non-resident non-life companies." The assessee before us is a non-resident life company.

In the case of resident non-life companies no special or exceptional methods are required in order to compute their total income, profits or gains for the purpose of their being charged with income-tax. Their income, profits and gains can be ascertained year by year and so R. 28 provides that such companies shall be assessed "in accordance with the provisions of the Act"; in other words, upon their income, profits and gains of the previous year. Similar considerations apply to non-resident non-life companies: their income, profits and gains can also be ascertained year by year. The only further step necessary in their case, beyond what is done in the case of resident non-life companies is to ascertain what part or portion of their income, profits or gains is assignable to their Burma branch. It may be that in some cases the Burma portion is exactly ascertainable, but I imagine that more often than not it will not be exactly ascertainable. Part 1 of R. 35 therefore provides that, where there is an absence of reliable data from which to ascertain exactly the Burma portion, the Burma portion may be deemed to be that portion of the total income, profits and gains (both inside and outside Burma) which results from multiplying the total incomes, profits and gains by a fraction, of which the numerator is the Burma premium income and the denominator is the total premium income. It is agreed on all hands that in the case of non-resident non-life companies the Burma premium income and the total premium income upon which the calculation is to be based must both be that of the previous year. But, although that is agreed, there are two possible reasons why the premium income so taken is to be that of the previous year, and our decision on the first point before us depends upon which of these two reasons is the right one. Does "premium income" in R. 35 mean that in the case of non-resident non-life companies the premium income to be taken into account is that of the previous year because "premium income" in R. 35 means "premium income in the previous year" or because "premium income" in that rule means "premium income in the period to which relate 'the total income, profits or gains' mentioned earlier in the same sentence of that rule"? In my view it is for the latter reason, and the grounds on which I base that view I shall state in a moment.

I have dealt with non-life companies both resident and non-resident and I will now turn to life companies. The income, profits and gains of such a company, if it is a resident one, shall, if its profits are periodically ascertained by actuarial valuation, be the average net profits disclosed by the last preceding valuation that is provided by R. 25, and about that also there is no dispute. That does not, however, result in a new resident life company which sets up a business in Burma for the first time, being immune from income-tax until after the expiration of that period of years (not exceeding five — that is the limit set by S. 8, Life Assurance Companies Act, 1912, which is still the section governing the matter in this country, while in India S. 8 of the 1912 Act has been replaced by S. 18, Insurance Act, 1938) which it is prescribed, by the instrument constituting it or by its regulations or bye-laws, shall be covered by each investigation into its financial condition, including a valuation of its liabilities, by an actuary. But such a company will not in practice be called upon to pay income-tax during its early years (it should be noted that I use the word "during" and not the phrase "in respect of"), because its principal officer will be unable in the first years of the company's existence to prepare and furnish a return of the total income of the company during the previons year, as required by sub-s. (1) of S. 22, and that inability will arise from the fact that the "total income" a return of which he is required to furnish means, by sub-s. (15) of S. 2, the "total amount of income, profits and gains" of the company, and that amount will not be known until it is ascertained by the first periodical actuarial valuation. In practice the Income-tax Officer will, no doubt, exercise the discretion given to him by the proviso to sub-s. (1) of S. 22 by extending the date for the delivery of the return in such a case, so that no difficulty need arise over the return to be made by a resident life company in its early years. The furnishing of the return required by sub-s. (1) of S. 22 in respect of the first year of its existence will be postponed until after the first periodical valuation has been made by an actuary, but when the return is furnished later on the company will be assessed upon it to income-tax for the

first year of the company's existence. The company does not escape either making a return for its first year or paying income-tax on the income, profits and gains of its first year, but the making of the return, and also the payment of income-tax, for the first year are both postponed. If the Income-tax Officer exercises the power given to him by the proviso to sub-s. (1) of S. 22, as I imagine he always will in these cases, the principal officer of the company will not be in default as regards the making of the return of the company's income and therefore the Income-tax Officer will not be required to make an assessment to the best of his judgment under sub-s. (4) of S. 23, which it was suggested in the course of the argument before us was what the income-tax officer would be compelled to do if a life company could not make a return of its total income in its early years. This position of resident life companies may be thought to be an anomaly under the Income-tax Act, but if the results which I have just been indicating are correct in regard to resident life companies, as I think they are, I see no reason for suggesting that it must necessarily be wrong for a similar result to follow in the case of a non-resident life company.

I now come to the last of the four classes of insurance companies which I mentioned at the beginning of this judgment, namely non-resident life companies, and the assessee in the present case is such a company. Rule 35 provides that in their case also, as in the case of non-resident non-life companies, a certain arithmetical sum may be done in order to ascertain what part or portion of their income, profits or gains is assignable to their Burma branch; this sum may be done where there is an absence of more reliable data from which to ascertain the Burma portion of the total income, profits and gains. The sum which may be done is exactly the same sum as may be done in the case of non-resident non-life companies, and it is this: the total income, profits and gains are to be multiplied by a fraction of which the numerator is the Burma "premium income" and the denominator is the total "premium income." The question is whether "premium income" means "premium income in the previous year" or "premium income in the period to which relate the 'total income, profits or gains' mentioned earlier in the same sentence of R. 35. My Lord the Chief Justice prefers the former meaning because, he says, the premiums paid to the assessees both in respect of the total business and in respect of the Burma branch for the previous year are directly ascertainable without recourse to any such rule as R. 25 because, he repeats, they do not need to be ascertained by an artificial method, since they are ascertainable directly. The mere fact that the premium income, both, Burma and total of the previous year can be ascertained exactly, without recourse to any artificial method, is to my mind, and with great respect to my Lord, an insufficient reason for saying that those figures are the figures intended to be used in doing the necessary sum, and I say that because the average annual premium income, both Burma and total, for the previous four years can equally well be ascertained exactly and without recourse to any artificial method. In both cases the figures are capable of being ascertained exactly. The reason given by my learned brother Dunkley for agreeing with the interpretation which my Lord places upon the words "premium income" is that as the result of the calculation prescribed by part 2 of R. 35 read with R. 25 is, or must be taken to be, the income, profits and gains of the company for the previous year, it therefore follows that the premium income referred to in part 1 of R. 35 means the premium income of the previous year. With great respect to my learned brother I am unable to see that that necessarily follows, as he says it does. My own view is that when once it is decided to resort to the calculation prescribed by R. 25, the Burma portion of the resultant figure — in the case of a non-resident life company — must necessarily be ascertained by using as the numerator and denominator, respectively, of the fraction which is to be used for the purpose of multiplying the average net annual profits disclosed by the last preceding valuation figures which are to be taken from the period covered by the valuation and not from outside that period. It appears to me wholly unreasonable to say that the Burma portion of the average annual net profits should be ascertained by using figures which relate to a period wholly outside the period in respect of which those average annual net profits are calculated.

My principal reason for holding that "premium income" in part 1 of R. 35 does not mean "premium income" in the previous year" is that, if the rule making authority had intended that to be its meaning it could easily have said so. In R. 31 it did in fact use the phrase "premium income in

the previous year." If that phrase had been used in R. 35 it would undoubtedly have conveyed more clearly than do the words "premium income" by themselves that what was intended in R. 35 was "premium income in the previous year," if, indeed, that is what was intended. As the rule-making authority used the expression which conveys what is said to have been its intention less clearly than the other expression which might equally well have been used would have done, it appears to me to be proper to conclude that it did not intend to convey that intention at all. A proposition to this effect is stated in Craies' on Statute Law (4th Edn.) at the top of p. 90. "The words or expressions which obviously are by design omitted" are one of the most important things to be attended to in order to discover the true construction of any particular clause; *see* the judgment of Pollock C. B. in (1863) 2 H & C 431.[4] In my judgment the omission from R. 35 of words inserted in R. 31 can only lead to the conclusion that "premium income" in the former rule does not mean "premium income in the previous year," if there is any other meaning which can be given to those two words.

It appears to me that there is another meaning which can be given to those words and it is "premium income in the period to which relate 'the total income, profits or gains' mentioned earlier in the same sentence of R. 35." This alternative meaning is stated by the Commissioner of Income-tax himself to be a logical one. Furthermore, this alternative meaning appears to me to be a wholly reasonable one; as a matter of fact, to my mind, it is the more reasonable of the two. It is of course true to say that it is not competent to me as a Judge to modify the language of R. 35 in order to bring it into accordance with my own views as to what is right or reasonable, but I do think that it is proper for me to express my own view of the reasonableness of this alternative meaning when once it appears from other considerations that this meaning is the one more likely to have been intended. When once it has been found that one of two possible alternative meanings is prima facie to be preferred to the other, then the question of the reasonableness of the former meaning appears to me to be material; the fact that that meaning is an unreasonable one may destroy the prima facie case, as I call it, in favour of the latter meaning. Here, then, the position is this: if the intention had been that "premium income" should mean "premium income in the previous year," it could have been so stated; the latter phrase is used in another rule dealing with a similar subject-matter (namely, another class of assessee which also has a premium income) so that it would equally well have been used in R. 35 if that was intended to be the meaning of that rule; there is another possible meaning which can be given to the words; and that other meaning is a reasonable one. For these reasons I am of the opinion that "premium income" in R. 35 does not mean "premium income in the previous year," as the income-tax officer has decided that it does, but has that meaning for which the assessee has contended before us.

There is another aspect of this matter to which I desire to refer. It seems to me that a strong argument in favour of the present assessee might have been founded upon what is stated by the Commissioner for Income-tax in para. 4 of the case before us, and a further consideration of the matter since we reserved our judgment causes me to regret that such an argument was not developed before us. Usually, no doubt, the views of a Government Department as to the meaning of a statute which is administered by them are not admissible as an aid to construction, but it has been suggested by Lord Macnaghten in (1891) A C 531[5] at p. 591 that when, in any particular case it is impossible to suppose that the Legislature is ignorant of the manner in which its own Income-tax Act is being administered by a department of the State and yet the Legislature re-enacts the same provisions, it may not be improper for the Courts to take notice of the fact that the new enactment is in precisely the same terms as the previous one. In India the income-tax rules have always included the whole of the present Rule 25 and the first sentence of the present R. 35. Rule 25 and this particular sentence of R. 35 were left untouched when the rules were amended by (amongst other things) the addition of the second sentence to R. 35; and when in 1939 the Income-tax Act was thoroughly overhauled, if I may so describe the changes then introduced, "rules for the computation of the profits and gains of insurance business" were inserted in the

4. (1863) 2 H & C 431 : 33 L J Ex 93 : 10 Jur (NS) 262 : 9 L T (NS) 261 : 12 W R 257 : 133 R R 731, Attorney-General v. Sillem.

5. (1891) 1891 A C 531 : 61 L J Q B 265 : 65 L T 621 : 55 J P 805, Commissioners of Income-tax v. Pemsel.

Act itself (probably with a view to getting rid of any difficulty which may have been felt as a result of what was said in I L R (1937) 2 Cal 540[2] as to a possible conflict between the Act and the rules made by the Central Board of Revenue under the Act), and the first sentence of the new R. 8— and this is most important—is identical with the old Indian Rule 35.

The circumstances in which the 1939 Act was put on the Indian Statute book were these. The method adopted for applying R. 35 in India— certainly in the two Presidencies of Calcutta and Bombay and probably elsewhere for para. 4 of the case before us uses the words "the practice in India" — was the method for which the present assessee contends. (The Calcutta income-tax authorities had a splendid opportunity of testing its accuracy in 1937 : *see* the case in I L R (1937) 2 Cal 581[6] at p. 583 but did not choose to do so). So that when the Legislature in India was overhauling this branch of the law in 1939, it chose to enact the exact words which had always been administered by the income-tax authorities in India in the manner for which the assessee has contended before us. This would seem to me to be an argument in favour of saying that, if this question were to come before an Indian High Court, an additional ground for deciding in favour of the assessee could be made out in the way which I have just indicated. His Majesty's Privy Council is the *commune forum* of both India and Burma in these matters, sub-s. (2) of S. 66A of their respective Income-tax Acts being the same in both countries. The decisions of the Judicial Committee tend to render uniform throughout the Empire the rules relating to the construction of statutes so that it would not be likely to give an interpretation in an appeal from this country which would be different from the interpretation it would give in respect of precisely similar words in an appeal from India. All these considerations might well, I think, lead to the conclusion that unless and until the Burma Legislature uses words which clearly indicate that a method of computation is intended which is different from the one which has always been in actual use in India of which until recently Burma was a Province, the Courts here ought to hold that such is not intended. If this argument is sound, expediency and equity would, in my opinion, be in favour of our accepting as the correct interpretation of the words in question an interpretation which accords with what is admitted to be the practice in India, until the Privy Council decides the matter finally.

In conclusion I desire to say one word about the case in ILR (1937) 2 Cal 540[2] ante. On the two main questions in that case Costello J. agreed with Derbyshire C. J. although he confessed that he felt some doubt in the matter, while Panckridge J. dissented. The correctness of that majority decision was almost immediately doubted in Bombay by Beaumont C. J. in 6 I T R 321.[7] I myself prefer the dissenting judgment of Panckridge J. in the Calcutta case to that of the majority of the Court, and what that learned Judge says at page 569 of his judgment indicates, I think, that if he had been called upon to give a decision upon the question now before us, he would have done so in favour of the present assessees. In the result I unfortunately find myself unable to agree with the other two members of this Court upon the first matter arising for our decision. In my judgment in the circumstances of the present case the income, profits and gains of the Lakshmi Insurance Co. Ltd., should have been computed for Burma assessment for 1937-38 on the proportion of the Burma premium to the world premium received during the quadrennial valuation period ended 30th April 1936 and not during the previous year. On the second matter arising for our decision I find myself in entire agreement with the other members of the Court and I have nothing to add to what they have said on that matter.

G.N./R.K. *Reference answered.*

6. ('37) ILR (1937) 2 Cal 581 : 41 C W N 922, In re Phoenix Assurance Co. Ltd.

7. ('38) 6 I T R 321, In re Manufacturers' Life Insurance Company of Canada.

(28) A. I. R. 1941 Rangoon 220

ROBERTS C. J. AND DUNKLEY J.

Daw Pone — Appellant

v.

Ma Hnin May — Respondent.

First Appeal No. 110 of 1939, Decided on 1st February 1940, against decree of Dist. Court, Tharrawaddy, D/- 25th July 1939.

Specific Relief Act (1877), S. 42 — Applicability.

A suit for a declaration that the defendant is not keittima daughter of the plaintiff and her husband does not lie under S. 42. [P 221 C 1]

U E Maung (1) — for Appellant.

Respondent in person.

Roberts C. J.—This appeal arises out of a suit which was brought by Daw Pone against Ma Hnin May, under S. 42, Specific Relief Act, for a declaration that the defendant was not the keittima daughter of her and her late husband, U Chit Lun. Looking at S. 42, Specific Relief Act, it applies only in cases in which a person entitled to some legal character or to any right as to any property brings a suit against a person denying or interested to deny his title to such character or right, and the relief to be given thereunder is purely discretionary. Nobody has never denied that Daw Pone is entitled to any legal character or right as to property that I can see. But she is bringing a suit for a declaration to establish a negative case, for, some time or other, I suppose, the defendant has claimed to be her keittima daughter. The learned District Judge dismissed that suit, apparently upon the merits and taking the view that the defendant was the keittima daughter of the plaintiff: as to that we must be careful to express no opinion whatever. We have not gone into the merits, for, in our opinion, a suit of this character ought not to have been brought and the learned Judge would have been better advised to say that, in his discretion, it was not a case in which the plaintiff, even if successful, should obtain the relief claimed. That being so, so far as this Court is concerned, the question of the defendant's status remains entirely undecided. If at any time she desires to make a claim that she is the keittima daughter of Daw Pone, that is a matter for her and her legal advisers, and we desire to say nothing which may be put forward in defence of it. Ma Hnin May has been brought here to appear in answer to this appeal and we think she ought to have her costs, two gold mohurs, for her appearance; and the appeal is dismissed.

Dunkley J.—I agree.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Rangoon 221

SHARPE J.

Heather Ussher — Petitioner

v.

Thomas Ussher — Respondent.

Civil Regular No. 234 of 1940, Decided on 17th January 1941.

(a) Divorce—Grounds of—Court cannot dissolve marriage in absence of legal grounds—Fact that Court is satisfied that it will be better for both parties to dissolve marriage is not by itself sufficient.

The Court can only administer the law as it finds it and, in the absence of legal grounds for a divorce, it cannot dissolve a marriage merely because the Court itself thinks that it would be better for all concerned to do so : (1790) 161 E R 466 and (1897) A C 395, *Rel. on.* [P 223 C 2]

(b) Divorce—Cruelty—Husband striking wife on face while pregnant — No bodily injury or threatened abortion — Incident held did not amount to cruelty.

Where a husband struck his wife on her face while she was pregnant but there was no evidence of any bodily injury or threatened abortion :

Held that that incident was not sufficient to establish the fact that the husband had treated his wife with cruelty so as to dissolve her marriage with him. [P 223 C 2]

(c) Divorce — Cruelty — Certain incident alleged to be cruelty—Subsequent cohabitation —Cruelty is condoned.

Where subsequent to an incident which the wife alleges to be cruelty on the part of her husband she resumes cohabitation with her husband, the cruelty should be deemed to have been condoned by the wife and cannot be treated as a ground for dissolving the marriage. [P 223 C 2]

*** (d) Divorce — Cruelty — Letters written by husband to wife doubting paternity of child held did not constitute cruelty.**

The cruelty alleged by the wife on the part of her husband was that he had sent her several letters doubting the paternity of her child and that she was very much affected by the receipt of the letters :

Held that by sending those letters to his wife the husband could not be said to have been guilty of cruelty towards her entitling her to a dissolution of her marriage with him : (1897) A C 395, *Rel. on.* [P 224 C 2]

(e) Divorce — Costs.

A wife who has filed a petition for divorce may be awarded costs even though she is unsuccessful in her petition. [P 224 C 2]

Christopher — for Petitioner.

Order. — This is a petition for divorce by a wife, under the Indian and Colonial Divorce Jurisdiction Act, on the ground of the husband's cruelty. The facts appear to be these. Many years ago the respondent-husband came to Burma as a soldier, from England, where he is domiciled. The petitioner is an Anglo-Burman woman, and about April 1938 sexual intercourse took place between them. The parties were married on 14th June 1938, because it was found that the petitioner was going to have a child. The honeymoon took place in Kalaw and even during the honeymoon there was a quarrel between the parties. The petitioner says that her husband struck her on the face some two or three weeks after they were married, while they were at Kalaw, and told her that he doubted whether he was the father of the child that she was going to have and asked how he could know whether

he was or was not the father of the child. The petitioner says that she was confined to bed as a result of this blow from her husband and had to be attended by a Doctor Bhattacharjee. In a leading question, one of many leading questions which I was unable to prevent Mr. Christopher from putting, despite repeated warnings, the words "threatened abortion" were used, but I am not prepared to hold that there was a threat of the petitioner having a miscarriage. Doctor Bhattacharjee has not been called before me. However, it does seem that the petitioner stayed in Kalaw longer than was originally intended and after the husband had returned to his military duties in the second half of July 1938. Apparently, the petitioner stayed on for about three weeks or so after the husband left Kalaw and then she returned to Rangoon, where she at first stayed with her sister; finally she rejoined her husband at No. 20 Budd Road, Rangoon, where they cohabited again as husband and wife, seemingly during some leave which the husband was granted for a few days preparatory to his sailing for India whither he was transferred. According to the petitioner, the husband, at Budd Road, again expressed doubts as to the paternity of the child to which the petitioner was about to give birth. The husband left Rangoon on 10th September 1938 and the parties have never since met. They only lived together for two or three months and have now been apart for two or three years.

The petitioner says that she did not go to India with her husband because of her pregnancy. When he got to India the respondent almost immediately wrote and repeated what, he described as his "grave doubts" as to the paternity of the child. I refer to his letter of 11th November 1938. On 23rd January 1939 a girl was born to the petitioner, who wrote and sent photographs of the child and of herself to the respondent in India, and upon receipt of these photographs and the letter the husband's attitude towards the petitioner changed and in a letter of 4th March 1939 he addressed her as "My darling Heather" and asked for forgiveness for having doubted that he was the father of the child and said that there was everything in the appearance of the child as shown by the photographs to indicate that he was its father. At the time—early March, 1939—the husband was at a place called Bannu, in Waziristan, which was not a place where wives could accompany their husbands, but in July 1939 he was transferred to Poona. During the four months from March to July 1939, there was complete silence on the part of the husband, so far as correspondence with his wife went, but on 5th July he wrote a ten-page letter in which he once more expressed his doubts as to the paternity of the petitioner's child, but which letter he nevertheless concluded with an invitation to his wife to join him at Poona. The petitioner says that this letter considerably depressed her. On 21st July the husband wrote an even longer letter which was almost entirely given up to an expression of his doubts as to the paternity of the child, and on 8th November 1939, after another three months' silence, the husband sent his wife a type-written letter of two foolscap sheets with a copy of Regimental Orders in which it was stated that he (the husband) had decided that, for private reasons, he did not wish to live with his wife any more. Since that date the husband has been making his wife a regular allowance of Rs. 130 a month through the army authorities. It is admitted that he had been paying this monthly sum regularly ever since he left Rangoon.

Nothing apparently passed between the parties from November 1939 to June 1940, a period of over six months. On 7th June 1940 the little girl died and then the petitioner wrote and asked her husband to consider a reconciliation in view of the death of the child whom the wife described as having been the bone of contention between her husband and herself. The husband made no reply and the petitioner learnt shortly afterwards that the respondent was about to go overseas on active service with his unit. On 12th September 1940 the petitioner applied for, and obtained from me, leave to file her petition notwithstanding the fact that three years had not then passed since the date of the marriage. I thought it was a borderline case but I felt disposed to assist the petition subject to this, that, by virtue of sub-s. (1) of S. 1, Matrimonial Causes Act, 1937, it would always be open to the Judge who disposed of the main petition to prolong the time for applying to have made absolute any decree nisi which he might grant, if it appeared to him that such leave had been obtained by any misrepresentation or concealment of the nature of the case. Now the cruelty relied upon is the blow struck on the petitioner's face at Kalaw during the honeymoon and the continued expression by the respondent of his doubts —sometimes expressed to be his grave doubts

—as to whether he was the father of the petitioner's child, now deceased. It is quite clear, I think, that no happiness is to be expected to come from this marriage, but even if I am satisfied as to that state of affairs that is no ground upon which I can grant the petitioner the relief she asks. It is well to bear in mind such words as those of Sir William Scott in (1790) 161 E R 466= 1 Hag Con 35[1]:

> The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second virtue of course, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the first feelings, of an individual. The law has said that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons which the law approves, and it is my duty to see whether those reasons exist in the present case.

And a little further on, at page 38, the same learned Judge said:

> What merely wounds the mental feelings is in few cases to be admitted where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve.

In bearing these words in mind, as I have done while considering this case, I have not overlooked the fact that they were spoken 150 years ago and that there have since—especially recently—been great changes in the outlook of society upon the married state. But in (1897) A C 395,[2] a case in which the House of Lords was divided in opinion by five to four, Lord Herschell said, at the top of p. 461:

> I am conscious that the law must be moulded by adapting it on established principles to the changing conditions which social development involves . . . . Great as have been the social changes which have characterized the last century in this respect, there has been no alteration—no new development. I think it is impossible to do otherwise than proceed upon the old lines.

And so, I, too, must proceed upon the old lines, subject, however, to the statutory changes which have been made since (1897) A C 395.[2] I can only administer the law as I find it and, in the absence of legal grounds for a divorce, I cannot dissolve a marriage merely because I myself think that it would be better for all concerned for me to do so. With regard to the honeymoon incident in the present case, I have already said that I do not think that the incident assumed such serious proportions that there was even a "threatened abortion". The petitioner was then only 2 months advanced in pregnancy and there is no medical evidence at all adduced before me. No reason had been advanced for not calling Dr. Bhattacharjee, and, although I can understand that the petitioner, being on her honeymoon, would not have wished the Doctor to know—as she says he did not know—the reason for her consulting him, I am not prepared to hold, in the absence of any medical evidence, that the evidence which is before me concerning the honeymoon incident is sufficient to establish the fact that the husband has treated the petitioner with cruelty entitling me to dissolve her marriage with him.

But supposing I am wrong about that, there is this difficulty in the way of the petitioner, namely that the Kalaw honeymoon incident, whatever it amounted to, has been condoned by the wife. On her return from Kalaw the wife resumed cohabitation with her husband at Budd Road, here in Rangoon, apart, from the evidence on the point, it is so stated expressly in para. 7 of the plaint and I cannot do otherwise than hold that there was condonation of the Kalaw incident. The cruelty at Kalaw —if it did amount to cruelty—could of course be revived by subsequent cruelty, and about that point I shall have a word to say in a moment. Turning now to the other cruelty alleged, the letters written by the husband in which he expressed doubt as to the paternity of the petitioner's child, Mr. Christopher has referred me to a large number of cases, as was apparently done recently in England in "The Times," 24th July 1940, p. 8, col. 3[3] which was not cited to me but which I myself have come across since I reserved judgment in this case. In "The Times" 24th July 1940 p. 8 col. 3,[3] Mackinnon L. J., said that "there were innumerable passages in a great number of judgments going back to cases in the ecclesiastical Courts which dealt with what cruelty was." The learned Lord Justice characterized them as "those rather vague

1. (1790) 161 E R 466 : 1 Hag Con 35, Evans v. Evans.
2. (1897) 1897 A C 395, Russell v. Russell.
3. "The Times," 24th July 1940, p. 8, col. 3, Varenne v. Varenne.

descriptions of cruelty," and I venture respectfully to agree with his description of them. I therefore only propose to refer to one of the many cases which were cited to me, and that is (1897) A C 395[2] which I have already mentioned. The speech of Lord Shand, who was one of the majority in that case, contains a passage which I should like to quote. Countess Russell had falsely charged her husband with having committed an unnatural offence. She published the charge to the world and persisted in it after she did not believe in its truth. A majority of the House of Lords held that there was insufficient evidence of legal cruelty. In the course of his speech Lord Shand said, at almost the bottom of p. 464 :

If the appellant's argument be well founded, it would not be necessary to aver or to shew that any apprehension of danger to health existed. What is there to take the place of this ? Is it to be enough that great mental distress and pain will be suffered, or that the spouse complained of has acted so as to destroy all affection, and to create even a horror of future intercourse ? The present is a flagrant, probably an unprecedented case, where so foul and loathsome a charge has been made and persisted in without belief in its truth on the part of wife ; but many cases might be figured and must occur in which circumstances far short of this would in the opinion of many jurymen make future cohabitation intolerable. A husband or wife might never cease to introduce and press subjects of conversation which would necessarily cause extreme irritation and mental distress—might never cease to use reproaches for past moral misconduct with the same result—might constantly use language opprobrious and insulting or continuously make unfounded charges of moral misconduct or even criminal offences of a serious character, though much less grave than the respondent in this case made. In such cases, if it should be shown that injury to health results, or reasonable apprehension of such injury exists, the law will give a remedy, for that is a criterion to which an appeal can be made and which admits of application. Without such a criterion there must be the utmost uncertainty, for it must be left to the Judge or to the jury to form his or their own notion of what conduct will or will not make continued domestic life impossible, with the single qualification—itself admitting of great diversity of views that the conduct complained of must be of a grave weight, and serious character. These considerations seem to me fully to account for and to justify the observation of Lord Stowell in (1790) 1 Hag Con 35,[1] so often quoted, when he said with reference to the criterion of injury or apprehended injury to health : 'The Court has never been driven off this ground'.

Now it seems to me that bearing in mind these words of Lord Shand and having considered the husband's letters in the present case and having seen the petitioner herself in the witness-box and being, therefore, able to judge for myself up to a certain point to what extent she was likely to be affected by the receipt of the three letters of 11th November 1938 and 5th and 21st July 1940 and not forgetting the evidence of the petitioner and her mother as to the nervous state to which the former was said to be reduced by the receipt of these letters from her husband which made it necessary for her to resort to Buckfast Wine and Ovaltine and the like and the explanation given for her not consulting a doctor — in short, having carefully read and re-read all the evidence on this point and the letters and having taken into consideration all the circumstances of that part of the present case, I have come to the conclusion that by sending these letters to his wife the husband cannot be said to have been guilty of cruelty towards her entitling her to a dissolution of her marriage with him. This conclusion, I may add, appears to me to be fully supported by what Lord Hershell said in (1897) A C 395[2] in the last two sentences on p. 456. As Lord Shand said in the concluding paragraph of his speech in (1897) A C 395[2] at the top of page 467 :

If it should be thought desirable that a different rule or principle of law from that which has hitherto prevailed should in future receive effect the change must be brought about by legislation which in any view should either give some other criterion of cruelty than that which now exists or should make something short of cruelty — in the sense which the law has attached to that term in questions between husband and wife — a ground for granting a decree of divorce.

The Legislature has brought about no such change as would help the petitioner in this case; it has not even done so in Mr. Herbert's recent Act, as the Matrimonial Causes Act, 1937, is popularly called. As I have come to the conclusion that the husband has not been guilty of cruelty in sending his wife the letters which I have mentioned, there has been no matrimonial offence committed by him since the petitioner condoned the earlier offence of cruelty, if, indeed, the Kalaw incident amounted to legal cruelty. There is, therefore, nothing which can revive the Kalaw incident, even if that was an act of cruelty on the husband's part. In these circumstances the wife's petition for divorce in the present case must, in my judgment, fail and it is accordingly dismissed. I think this is a case in which the respondent husband should pay the petitioner's costs, although she was unsuccessful; advocate's fee eight gold mohurs.

K.S./R.K. *Petition dismissed.*

* (28) A. I. R. 1941 Rangoon 225

MYA BU AND MOSELY JJ.

Collector, Hanthawaddy — Appellant

v.

Sulaiman Adamjee — Respondent.

First Appeals Nos. 153 and 154 of 1939, Decided on 21st August 1940, against decree of District Court, Hanthawaddy, in C. M. No. 12 of 1939.

(a) Land Acquisition Act (1894), S. 23 (1) — Notification under S. 4 (1) for acquiring a certain area — Second notification for acquiring larger area — Second notification not superseding first—Market value for determining amount of compensation must be determined as from date of first notification.

Where the first notification is not cancelled or superseded and the second notification is wider than the first one, and embraces not only the land covered by the first notification but more land of the claimant in addition, the market value for determining the amount of compensation to be awarded for land acquired under the Act must be taken as from the date of the first notification and not from the date of the second notification : ('29) 16 AIR 1929 P C 126, *Rel. on.* [P 226 C 1]

(b) Works of Defence Act (1903), S. 23 — Second declaration under S. 3 formally cancelling first declaration—Date of second declaration must be taken into consideration for determining value of property whose use is restricted.

Where the first declaration issued under the Act is cancelled by the second declaration the date of second declaration is the date which must be taken into consideration as regards the market value of the property whose use is restricted. [P 226 C 2]

U Thein Maung, Advocate-General — for Appellant.

R. Clark — for Respondent.

Mosely J. — Civil First Appeal No. 153 of 1939 is an appeal by the Collector, Hanthawaddy District against an order passed by the District Judge, Hanthawaddy on a reference by the claimant Sulaiman Adamjee under S. 18, Land Acquisition Act. The claim was preferred on behalf of the Upper Burma Refineries Ltd., of which Mr. Adamjee is the managing director. Civil First Appeal No. 154 is an appeal by the Collector against an order passed by the same Judge under Section 18, Works of Defence Act (Act 7 of 1903). Out of the land in question 107.34 acres was acquired under the Land Acquisition Act. A long disused oil refinery stands on part of this land with its buildings in which there still remains a small portion of the machinery. A notification was issued on 10th May 1934 (Ex. C) under S. 4, Land Acquisition Act, in respect of about 80 acres of this land, required for military training. The refinery stands on part of this land. A subsequent notification, Ex. Q. 1, was issued on 22nd February 1939 under S. 4, Land Acquisition Act, in respect of 107.34 acres, including the 80 acres previously notified. On 13th April 1936 by a notification Ex. W under S. 3, Works of Defence Act, more of this land, the area of which was unspecified, was placed under restriction. This was replaced by another notification Ex. S-1 of 6th April 1939 and that was cancelled and replaced by notification Ex. T-1 of 29th June 1939. Two oil tanks stand on this land, which measures 142.83 acres. Another 39.15 acres of land in question has not been acquired nor has its use been restricted. The refinery land measures in all 289.32 acres. It has evidently suffered from erosion as it was 294.40 acres in 1934, (Ex. G plan), and was supposed to measure 330 acres when bought in 1922 : (*see* the schedule of Ex. U-1), and when sold in 1925 (Exs. 6 and 7). *See also* Ex. G. (After analysing the evidence in great detail his Lordship remarked.) The Judge calculated the value of the property acquired as it stood in 1934 and the value of the property whose use was restricted as it stood in 1936. Section 23 (1), Land Acquisition Act, lays down that in determining the amount of compensation to be awarded for land acquired under the Act, the Court shall take into consideration : The market value of the land at the date of the publication of the notification under S. 4, sub-s. (1). Section 3 of the Act defines "land" as including things attached to the earth or permanently fastened to anything attached to the earth, i. e., buildings and machinery on beds or foundations. The words "notification under S. 4, sub-s. (1)" were substituted for the words "declaration relating thereto under S. 6" by S. 7 of Act 38 of 1923. The corresponding section in the Works of Defence Act, 7 of 1903 is S. 23, which directs the Court in determining the amount of compensation to take into consideration, the actual decree in market value of the land owing to publication of the declaration relating thereto under S. 3. Land is defined in S. 2 in the same terms as in the Land Acquisition Act.

The first notification Ex. C dated 10th May 1934 under S. 4, Land Acquisition Act, was in respect of about 80 acres of land, which included the refinery. The second notification Ex. W of 22nd February 1939 was one made under the provisions of both Ss. 4 and 6 of the Act. It did not formally cancel the first notification. It was in respect of 107.34 acres of land, including the 80 acres originally notified. The first declaration under the Works of Defence Act was by Notification

No. 125, Ex. W, of 13th April 1936. It was formally cancelled by Notification No. 137 of 5th April 1939, Ex. S-1. On 6th April 1939 by Notification No. 138 (Ex. S-1) and on 29th June 1939 by Notification No. 229 (Ex. T-1) fresh and more extensive declarations were made with which we are now dealing. This question was considered by their Lordships of the Privy Council in 7 Rang 227.[1] This was a case where a second notification cancelled a previous one made five months earlier, and itself embraced only a portion of the land previously notified. The value of the land, which was within the original jurisdiction of this Court, in Rangoon Town had advanced very rapidly between the dates of the two notifications, May and October 1923. This Court held in that case that though the word "cancelled" was used to mean that the first notification was either superseded or modified, the first notification* was to be considered. It was held in appeal by their Lordships that this view could not be taken because it was absolutely in the teeth of the wording of the Act. The alteration in the Act effected by Act 38 of 1923 was evidently not brought to the notice of their Lordships but that is immaterial. The principle remains the same whether it is the market value of the land at the date of the publication of the declaration under S. 6 which is to be considered, or the market value of the land at the date of the publication of the notification under S. 4, sub-s. (1). Their Lordships went on to say that the only notification which gave right to take the land in question was the second notification, and therefore that date must be the date taken.

In the present case the first notification was not cancelled or superseded. What happened was that the second notification was wider than the first one, and embraced not only the land covered by it but more land of the claimant in addition. It cannot be said that Government had not the right to take the land under the first notification. It must be held therefore that as regards the proceedings under the Land Acquisition Act the market value must be taken as from 1934 and not as from 1939. I am glad to be able to take this view, as it would obviously be unfair to the claimant not only to keep him out of his money so long but to saddle him with liability for depreciation of his property for nearly five years by the mere formal process of issuing another notification regarding the same property. As regards the declaration issued under the Works of Defence Act there is no difficulty. Here the Judge was evidently wrong in taking the date of the first declaration of 1936. That was cancelled by the second declaration of April 1939, which is the date which must be taken into consideration as regards the market value of the oil-tanks. (After further reviewing the evidence, his Lordship concluded.) The result of these two appeals is that they must be allowed in toto, with ad valorem costs; the cross objections will be dismissed with ad valorem costs on Rs. 70,636. The Collector's awards will stand good. The judgments of the District Court will be set aside with costs to be calculated ad valorem on the aggregate of the amounts eventually claimed in the two references (Rs. 11,44,685 less Rs. 5,80,000 warved=Rs. 5,64,685). In respect of the amounts eventually waived in the District Court the claimant must pay an advocate's fee of Rs. 400. The extra amount awarded by the Judge, Rs. 2,87,523, was drawn by the respondent on furnishing security. It must be refunded with interest at the Court rate of 6 per cent. per annum from the date of the receipt of it by the respondent.

Mya Bu J.—The judgment of my learned brother in this case represents the conclusions at which we have jointly arrived. It is therefore unnecessary for me to discuss further either the principles on which the conclusions in this judgment have been based on the details of the valuation of the property made by my brother. I agree that the Collector's award was, if anything, overgenerous. The District Judge had no warrant for enhancing it at all, much less by the very large figure by which he had enhanced it. The judgment of the District Court omitted a great many important matters which went to support the case for Government. The District Court erred in relying on Mr. Friedlander's evidence. I agree that the claimant acquired this property when it was under notification to his knowledge merely to obtain the machinery cheap for use in his refinery in Upper Burma. Although this machinery was out of date, it was still useful to him for that special purpose. It seems to me quite clear that the claimant never had any intention of working the property at dry-tree point as a refinery, nor had he the means to do

1. ('29) 16 AIR 1929 P C 126 : 116 I C 599 : 56 I A 210 : 7 Rang 227 (P C), Ma Sin v. Collector of Rangoon.

* Practically remained good as far as the land in question notified under it was concerned. So the market value at the date of the publication of the first notification.

so, nor, if he had done so, could he have done so profitably in competition with the three old-standing big companies in Rangoon. It is abundantly clear that the claimant's intention (paraded in the correspondence) to establish an oil-storage depot at this property was mere pretence. The District Court took a very unfair view of the evidence of Mr. Hamilton, and was unduly favourable to that of Mr. Angus. I agree with my brother's reasons for preferring the evidence of Mr. Hamilton, which is in agreement with the facts of the case, with common sense and with probabilities. Mr. Wilkinson's evidence was ignored by the Judge.

If the land, buildings, plants, machinery and tanks were to be valued separately such a valuation could only be useful as a guide for the information of possible purchasers of the property. It was not, and could not be made into, a going concern. There is no proof of the market value of this property taken as a whole. There is no evidence whatever in the case from which it can be deduced what a willing purchaser would have given for this property as a whole as it stood in 1934 (and tanks in 1939). I am in entire accord with my learned brother when he says that the sales of other lands quoted to prove the value of this property are entirely irrelevant. The only matters which can be taken into consideration as regards the valuation of the land are the prices paid by Mr. Lim Chin Tsong, by the auction purchaser Mohan Lall Kalidas and by the claimant for this land, and the price paid by Rajah Reddiar for the adjoining land. As regards the buildings, they have not been shown to be likely to be of use to any intending purchaser, and the demolition value in 1934 only is to be considered. As regards the plant and machinery, I agree too that their value can only be a little more than that given by Mr. Hamilton, that is to say, about Rs. 8000 at most. As regards the tanks, so far from there being any reason to enhance the Collector's award, there was reason to believe that only the scrap value of the tanks should have been given. These appeals must be allowed in toto. I concur with the orders as to costs and interest.

K.S./R.K. *Appeals allowed.*

****(28) A. I. R. 1941 Rangoon 227**

FULL BENCH

ROBERTS C. J., MYA BU, MOSELY, BA U AND DUNKLEY JJ.

M. Nagoor Gani — Appellant

v.

A. K. A. C. T. A. L. C. Chettiar and others — Respondents.

Civil Misc. Appeal No. 62 of 1940, Decided on 24th July 1941, against order of High Court in Misc. Case No. 163 of 1940, D/- 12th August 1940.

**Letters Patent (Rangoon), Cl. 13 — 'Judgment' — Order making absolute a rule nisi for certiorari granted by a Judge is not judgment and hence not appealable : ('41) 28 A I R 1941 Rang 199, *OVERRULED.*

An order making absolute a rule nisi for certiorari granted by a Judge on the original side of the High Court is not a judgment and hence is not appealable : ('41) 28 A I R 1941 Rang 199, *OVERRULED* ; ('35) 22 A I R 1935 Rang 267 (F B), *Applied; Case law referred.* [P 227 C 2; P 229 C 1]

J. B. Sanyal — for Appellant.

R. Clark and P. K. Basu; and U Tun Byu, Government Advocate — for Respondents 1, 2 and 3, respectively.

Mosely J.—This is an appeal against an order making absolute a rule nisi for certiorari granted by a Judge on the original side of this Court. A preliminary objection has been taken by the respondents that an appeal does not lie, the order in question not being a judgment within the meaning of Cl. 13, Letters Patent. In our opinion, it is clear that the matter is concluded by the decision of a Full Bench of seven Judges of this Court in 13 Rang 457.[1] That was an appeal against an order on the original side transferring certain suits from Courts in the mofussil for trial at Rangoon. It was held there that the word "judgment" in Cl. 13, Letters Patent, means and is a decree in a suit by which the rights of the parties at issue in the suit are determined. It was further held that the term "suit" in the Letters Patent includes suits instituted by a plaint or by an originating summons in the manner prescribed by the rules of the Court. All other decisions, it was said, are "orders" and not "judgments" under the Letters Patent, or appealable as such.

Admittedly a petition for a writ of certiorari is not instituted by a plaint or by an originating summons. It follows that the decision on the petition must be an order, and as it is not an order made appealable under the Code by S. 104, or by the rules

1. ('35) 22 A I R 1935 Rang 267 : 157 I C 1107 : 13 Rang 457 (F B), Dayabhai Jiwandas v. Murugappa Chettiar.

framed under that section, O. 43, R. 1, or "by any law for the time being in force," no appeal can lie. It should be noted that it is only the "judgment" of one Judge of this Court which is appealable to a Bench of this Court under Cl. 13, Letters Patent, while in the case of appeals to the Privy Council, (Cl. 37) an appeal lies from a final judgment, decree or order. The decision in 13 Rang 457[1] relies on three (really two) decisions of their Lordships of the Privy Council. The first in order of time is 48 Cal 481[2] at p. 488, a decision of 1921. A passage from the judgment (that of Lord Sumner) is quoted in extenso at p. 478 of 13 Rang 457.[1] That was a case of an appeal under Cl. 15, Letters Patent of the Calcutta High Court, (which is identical with Cl. 13, Letters Patent of this Court), an appeal from an order under O. 41, R. 10. There Lord Sumner pointed out that the provisions of the Code were, (with exceptions which had not been considered), to apply to High Courts, and that therefore an appeal from the order of a Judge of the High Court is regulated by the provisions of the Code. Clause 15 (R. 13), Letters Patent, provides an appeal from a decree of the High Court. In other words, an appeal from a decree of a single Judge of this Court lies not under S. 96 of the Code but under Cl. 13, Letters Patent, and Lord Sumner understood the term "judgment" in the Letters Patent as meaning "decree."

Another case is 47 Bom 724,[3] a decision of 1923, on the meaning of "final judgment, decree or order" under Clause 39, Bombay Letters Patent (equals Cl. 37 of our Letters Patent). In this case Lord Atkinson quoted with approval the definition of "judgment" in (1884) 12 Q B D 342[4] at p. 345, quoted at p. 472 of 13 Rang 457[1] where Cotton L. J. said that a "judgment" is a decision "obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established." We do not think it is correct to say, as is said at p. 477 of 13 Rang 457,[1] that their Lordships in this case interpreted the word "judgment" as meaning "decree." In 30 C W N 459,[5] Sir John Edge, delivering the judgment of the Board in 1925, laid down that the term "judgment" in the Letters Patent of the High Court means, in civil cases, a decree and not a judgment in the ordinary sense. Obviously Sir John Edge, a former Chief Justice of the Allahabad High Court, and Lord Sumner meant to use the word "decree" in the sense that it is used in India. (The term "decree" is scarcely a term of modern legal parlance in England now except in regard to actions in the Divorce Court.) Decree is defined in S. 2, sub-s. (2) of the Code:

'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include

(a) any adjudication from which an appeal lies as appeal for an order, or

(b) any order of dismissal for default.

The definition of "suit" is to be got from S. 26 of the Code which says:

Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

For provision for originating summons see Rule 191 of the High Court Rules and Orders. It may be remarked that it is common ground that "judgment" as used in Cl. 13 is used in a different sense from its definition in S. 2, sub-s. (9) of the Code where it is said that it means "the statement given by the Judge of the grounds of a decree or order." There is of course no provision of law which specifically allows an appeal from an order on a rule for certiorari. An example of the Legislature allowing such an appeal is S. 48, Specific Relief Act, which grants a right of appeal from an order under S. 45 of that Act (which takes the place in India and Burma, of a writ of mandamus). We have heard learned counsel on the other side, Mr. J. B. Sanyal, for the appellant, and the Government Advocate. It is argued for the appellant that "decree" means "decree in an action," and that "action" includes an order on an application for a writ of certiorari.

The appellant relies on the cases quoted, 13 Rang 457,[1] (1884) 12 Q B D 342,[4] (1890) 25 Q B D 465[6] and (1885) 14 Q B D 627,[7] which

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2. ('21) 8 A I R 1921 P C 80 : 60 I C 274 : 48 Cal 481 : 48 I A 76 (P C), Sabitri Thakurain v. Savi.

3. ('23) 10 A I R 1923 P C 148 : 74 I C 469 : 47 Bom 724 : 50 I A 212 (P C), Tata Iron & Steel Co., Ltd. v. Chief Revenue Authority of Bombay.

4. (1884) 12 Q B D 342 : 53 L J Ch 662 : 50 L T 342 : 32 W R 469 : 1 Morrell 31, Ex parte Chinery.

5. ('25) 12 A I R 1925 P C 155 : 87 I C 313 : 30 C W N 459 (P C), Sevak Jeranchod Bhogilal v. Dakore Temple Committee.

6. (1890) 25 Q B D 465: 59 L J Q B 556: 63 L T 513: 38 W R 728, Onslow v. Commissioners of Inland Revenue.

7. (1885) 14 Q B D 627: 54 L J Q B 190: 52 L T 376: 33 W R 438: 2 Morrell 52, Ex parte Moore; In re Faithfull.

define "judgment" in terms of "action." It is pointed out that Cl. 13, Letters Patent of this Court is copied from the corresponding Cl. 15, Letters Patent of the Chartered Courts, which dates in its present form from 1862. It is further said that in the English Judicature Act of 1873, S. 100 provides that "suit" shall include "action," and "action" shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court, and shall not include a criminal proceeding by the Crown. Since the passing of the Judicature Act there have been two decisions of the English Courts where applications for prerogative writs of mandamus and certiorari have been held to be "actions" and appealable as such. These are (1917) 2 K B 215,[8] a decision of 1917, (mandamus), and (1878) 39 L T 453,[9] a decision of 1878, (certiorari). It would appear, however, that "action" did not include an order on an application for a rule until the passing of the Judicature Act in 1873, nor does it appear that there was any right of appeal before that date. The remedy of the party whose application for a rule was refused by one Judge lay in an application to another Judge of original jurisdiction. The English decisions as to the meaning of "action" appear to have been cited in 13 Rang 457[1] for their bearing on the distinction between "judgments" and "orders," and possibly for the elucidation in 47 Bom 724.[3] "Action" is of course a term not known to the terminology of legal procedure in India, where the terms are "suits" and as opposed to "suits" applications or other judicial proceedings. We do not see how English decisions subsequent to 1873, which depend on the definition of "action" in the Judicature Act, and give a statutory right of appeal to decisions from all proceedings which can since the passing of that Act be classified as "action," can affect the definition of the term "judgment" in the Letters Patent, whether the definition of that term is to be sought prior to 1862 or in 1922 when the Letters Patent of this Court were granted. In neither case could an application for a rule of certiorari be appealable.

It is sufficient to say that the term "judgment" in the Letters Patent, has been defined as meaning "decree" and a decree can only be passed in a suit. We may note here, incidentally, that 9 Cal 482[10] cited by the respondent is not in point. That was a case where their Lordships of the Privy Council entertained an appeal against an order of a Judge refusing to transmit an appeal for execution. This decision is irrelevant because the Code of Civil Procedure of 1877 in S. 2 defines decree as "a formal order of the Court in which the result of the suit or other judicial proceeding is embodied." In any case we are bound by the decision of a Full Bench of seven Judges in 13 Rang 457.[1] It follows therefore that the ex parte decision of the Bench of two Judges of this Court in Civil Misc. Appeal No. 45 of 1940[11] which laid down that an appeal does lie from a decision making absolute or discharging a rule nisi on a petition for a prerogative writ must be overruled. Our attention was drawn during the course of this appeal by the appellant to a judgment of this Court reported in 1940 R L R 702[12] at p. 708. That judgment dealt with an appeal from an order of a Judge of this Court passed under S. 8, Rangoon Insolvency Act. It was said there that the various proceedings in an insolvency should be regarded as a series of "suits," and that that was a "judgment" which finally determined the substantive rights of those concerned in any one such "suit." Orders under S. 8, Rangoon Insolvency Act, are clearly in view of the decision in 13 Rang 457[1] not judgments but orders appealable as such under S. 8, Rangoon Insolvency Act. This appeal must be dismissed with costs, advocates fee ten gold mohurs.

K.S./R.K. *Appeal dismissed.*

8. (1917) 2 K B 215: 86 L J K B 1161: 116 L T 641: 81 J P 221: 15 L G R 362, Rex. v. Westminster Assessment Committee.

9. (1878) 4 A C 30: 48 L J Q B 65: 39 L T 453: 27 W R 189, Walsball Overseers v. L. & N. W. Ry. Co.

10. ('83) 9 Cal 482: 10 I A 4: 12 C L R 511: 4 Sar 407 (P C), Hurrish Chunder Chowdhry v. Kali Sunderi Debi.

11. *Reported in* ('41) 28 A I R 1941 Rang 199, U Ba San v. U Ya.

12. ('41) 28 A I R 1941 Rang 69: 1940 R L R 702, Ebrahim Mohamed Bodi v. K. Ba Gyi.

(28) A. I. R. 1941 Rangoon 229

ROBERTS C. J. AND DUNKLEY J.

U Hla Pe — Defendant — Appellant

v.

Ma Hla Khin — Plaintiff — Respondent.

First Appeal No. 109 of 1940, Decided on 20th March 1941, against decree of High Court, D/- 1st August 1940.

(a) Buddhist law (Burmese) — Inheritance— No children of second marriage — Children of first marriage are entitled to sixth share not

only in hnapazon but also in lettetpwa property of their parents acquired by inheritance from their parents or relations.

In the absence of children of second marriage, the children of the first marriage are entitled to a one-sixth share not only in the hnapazon property of their parents acquired by their joint exertions but also in the lettetpwa property acquired during coverture by either of them by inheritance from their parents or relations : ('25) 12 A I R 1925 Rang 340 (F B), *Expl., and Rel. on*; ('25) 12 A I R 1925 Rang 329 (FB), *Ref.* [P 231 C 1]

(b) Buddhist law (Burmese)— Inheritance — Manukye — Clear provisions must be applied.

Where the provisions of the Manukye are clear they must be applied. [P 231 C 1]

U Chan Htoon — for Appellant.

Eunoose — for Respondent.

Dunkley J. — The defendant-appellant is the step-father of the plaintiff-respondent, and the latter, on her mother's death, brought a suit for the administration of the estate. There were no children of the marriage of the appellant and the respondent's mother. In her plaint the respondent set up that the property belonging to her mother and her step-father jointly consisted both of hnapazon property and inherited lettetpwa, that is, property which the appellant had inherited from his parents during the coverture. The appellant filed a written statement and in that written statement he said that some of the property was atetpa property which he had brought to the marriage. However when the case came to trial he did not choose to attend and support his written statement, and the case was heard ex parte against him.

The learned trial Judge, in his judgment, applied the ruling of the Full Bench in 3 Rang 549[1] and held that the respondent was entitled to a one-sixth share in the joint property of her mother and her step-father, and he passed a preliminary decree directing that the necessary enquiries should be held by the official referee on that basis. The defendant-appellant has now appealed against this preliminary decree, and on his behalf it is urged that the decision in 3 Rang 549[1] refers to the hnapazon property of the married couple only and has no reference to other kinds of lettetpwa. The judgment in that case is based on the provisions of Ss. 8 and 10 of Book X of the Manukye Dhamma-that and, relying entirely on those two sections, it was held that in the case of hnapazon property (which was the only kind of property in dispute in that particular case) the children of the first marriage were entitled to a sixth share when there were no children of the second marriage and to an eighth share when there were children of the second marriage. The first proposition is to be found in S. 8 of Book X, and the second proposition is to be found in S. 10 of Book X. Section 8 applies in terms to the facts of the present case, and it is, I think, desirable to set it out and show how clearly it covers the case before us. It runs as follows :

8th. Between the step-father and his step-sons : I will now lay down the law as regards the partition of property between the step-father and his step-son. If the step-son be living with his step-father, at the time of his mother's death, let her property be divided into four shares, and the husband have one. If during the time of her coverture with the second husband, she shall have inherited the property of her parents, let the husband have half of it, though she has no children by him, as the husband has a right to the wife's property; and let the step-son have the other half; and though the mother inherited her father's property during her coverture with the step-father, he has no right to the grandson's shares; let his step-son have it. Let them bear the debts in the same proportions; and of the property acquired during the coverture of his mother, let the step-son have one-sixth share. This Menoo, the lord hermit, hath said.

It is said on behalf of the appellant that this section contains no rule for the division of the property inherited during coverture by the step-father and that this inherited lettetpwa cannot be divided in accordance with the provisions of the last clause of the section. Then by analogy it is argued that the share of the child of the first marriage in such inherited lettetpwa must be one-ninth, and this fraction is calculated on the hypothesis that in the division of the joint property between a parent and his own children and his step-children on the death of his wife the rule is that, of the wife's interest in such property, the husband shall have two shares and the children of each family shall have one share per stirpes; it is argued that it is on this basis that the shares of one-sixth and one-eighth in the hnapazon property are obtained. But that is not so; for, on a reference to S. 10 of Vol. X, which refers to the case where there are children of both families, it is seen that the children of each of the two families do not inherit equal shares, but that the children of the second family get a double share in relation to the children of the first family. The section lays down that the property shall be divided into eight shares and that the surviving parent shall have five of such shares, the step-children shall have one share and his own children shall have two shares. Reasoning by analogy in this man-

1. ('25) 12 AIR 1925 Rang 340 : 90 I C 341 : 3 Rang 549 (FB), Ma Nyein E v. Maung Maung.

ner will frequently lead to false results, for the rules which are contained in the Dhammathats cannot be reduced to mathematical formulæ.

It has so frequently been held that where the provisions of the Manukye are clear they must be applied, that we have no option but to apply S. 8 of Book X in the present case since the provisions of that section are clear. The contention that there is no provision in this section for the inherited lettetpwa of the surviving parent is, in my opinion, a contention against the plain provisions of the section. There is a special provision in this section for the inherited lettetpwa of the deceased parent, but there is no special provision for the inherited lettetpwa of the surviving parent, and, consequently, it must be plain, as a matter of construction, that the inherited lettetpwa of the surviving parent is included in the general term "property acquired during the coverture of his mother." That such inherited property is joint property of the couple has been laid down in 3 Rang 322.[2] The words used in this phrase, both in the original Burmese and in the English translation, are sufficiently wide to include not only the hnapazon property acquired by the joint exertions of the couple but also property acquired during coverture by either of them by inheritance from their parents or relations; and the phrase is certainly not restricted to hnapazon property only. As I have said, the judgment of the Full Bench in 3 Rang 549[1] was restricted in terms to hnapazon property because that was the only kind of property concerned in the case before the Court, but the judgment is based on an interpretation of Ss. 8 and 10 of Book X of Manukye, and the reasoning contained in the judgment of Maung Ba J. is equally applicable to any other kind of jointly acquired property. Therefore the learned Judge was right in applying this ruling to the present case, and his decision that the plaintiff-respondent is entitled to a one-sixth share in the joint property, whether hnapazon or inherited property, of her mother and her step-father, is a correct decision.

It has been urged that we ought to say that the judgment of the learned Judge does not cover the atetpa property of the appellant, if there is any such property; but the appellant did not choose to appear and present his case in the trial Court, and we are not going outside the facts which were presented to that Court. The appellant has the right, if he so desires, to appear at the hearing of the reference before the official referee and contest the case at that stage, and it may be that the official referee will at the hearing of the reference, subject to the direction of the learned Judge, permit the appellant to show that some of the property was atetpa property, and to show, as a consequence, that the respondent is not entitled to a one-sixth share of that property. We say nothing in regard to that; it is a matter for the original Court to decide in the course of the reference proceedings. This appeal fails and is dismissed with costs, advocate's fee ten gold mohurs to be paid by the appellant to the respondent in any event.

Roberts C. J. — I agree.

G.N./R.K. *Appeal dismissed.*

2. ('25) 12 A I R 1925 Rang 329 : 94 I C 797 : 3 Rang 322 (F B), C. T. P. V. Chetty Firm v. Maung Tha Hlaing.

*** (28) A. I. R. 1941 Rangoon 231**

MYA BU J.

Lewai Khan — Plaintiff — Applicant

v.

Goolreze Khan — Defendant — Respondent.

Civil Revn. No. 326 of 1940, Decided on 6th February 1941, against decree of Asst. Dist. Court, Tharrawaddy, D/- 17th September 1940.

Contract Act (1872), S. 23 — Offence compoundable with or without Court's leave — Agreement between complainant or prosecutor and accused or person interested in his welfare to withdraw prosecution is not against public policy — *A* prosecuting *B* for compoundable offence—Agreement between *A* and *B's* brother *C*—*C* to pay Rs. 100 to *A* by handing over to *A* pronote executed in *C's* favour by *D* – *C* to have no further dealings with *D* who was good debtor to both *A* and *C* who were money-lenders — Agreement restraining *C* from dealing with *D* held separate from promise by *C* to pay Rs. 100 to *A*—Promise to pay Rs. 100 held valid contract.

In the case of a compoundable offence or of an offence which may be compounded with the leave of the Court, an agreement to withdraw prosecution between the complainant or the prosecutor on the one hand and the accused or another person closely interested in the welfare of the accused on the other, is not against public policy and is accordingly valid : ('31) 18 AIR 1931 All 128, *Not approved*; (1866) L R 1 H L 200 and ('30) 17 AIR 1930 P C 100, *Disting*. [P 233 C 1]

In the course of a prosecution of *B* by *A* for a compoundable offence *A* and *B's* brother *C* entered into an agreement whereby *A* was to withdraw the prosecution and *C* was to pay Rs. 100 to *A* by handing over to *A* a promissory note executed in *C's* favour by *D*. It was also agreed that *C* should have no further dealings with *D* who was a good debtor to both *A* and *C* who were money-lenders :

Held, that even if the agreement restraining *C* from further dealings with *D* was void as being in restraint of trade the promise to pay Rs. 100 being separate was a valid contract. [P 232 C 2]

Gregory — for Applicant.

B. C. Paul — for Respondent.

Order. — This case arises out of a suit filed by the plaintiff-applicant against the defendant-respondent for recovery of a sum of Rs. 160 alleged to be due as damages for breach of contract. The contract in question has been described to have come about in the following manner:

In 1939 the applicant brought a criminal charge against the respondent's brother in the 4th Additional Magistrate's Court at Tharrawaddy. According to the judgment of the appellate Court, the charge was one under S. 325, Penal Code. It appears that the mention of S. 326 in para. 2 of the plaint is incorrect, because it is common ground that the criminal case was subsequently compounded. If the offence in question was an offence punishable under S. 326, Penal Code, it would be non-compoundable, but if it was an offence punishable under S. 325 it would be compoundable with the leave of the Court. Since it is common ground that the case was compounded eventually, it must be taken to be in relation to an offence which is compoundable with the leave of the Court. During the pendency of the criminal case some friends of the prosecutor and the accused intervened and brought about an agreement among them whereby the applicant agreed to have the criminal case compounded on his being paid Rs. 100 by way of damages, apparently for the personal injuries alleged to have been caused to him by the respondent's brother, and the respondent undertook to make a payment of the amount, not in ready money, but in the following manner: The respondent in whose favour a man named Carapiet had executed a promissory note for Rs. 400 with certain rate of interest was to make over the promissory note to the applicant, who was to pay Rs. 300 therefor. The applicant was also to take a sum of Rs. 60 which was due on the promissory note. This is the plaintiff's case. The fact that an agreement, more or less in these terms was reached and that the applicant acting upon that agreement paid Rs. 300 to the respondent who made over not the promissory note for Rs. 400 but a promissory note for Rs. 300 only, was proved by the applicant, and the trial Court accepted the evidence adduced by the applicant. Upon that finding, the trial Court gave a decree to the applicant for Rs. 160. On appeal by the respondent, the appellate Court held that the agreement upon which the suit was based was void as being in restraint of trade. This ground of voidability is stated to be in the fact that it was one of the terms of the agreement relied on by the plaintiff that after taking over the promissory note in the manner set out above the respondent was to have no further dealings with Carapiet who apparently was a very good debtor to the applicant and the respondent who are both Kabuli money-lenders.

It has been urged on behalf of the applicant that even if the argument between the applicant and the respondent that the respondent was to have no further dealings with Carapiet, in restraint of trade, that agreement is separable from the promise to pay Rs. 100 in the manner set out above, and that therefore the promise to pay Rs. 100 in the manner set out above was a valid and enforceable contract. It appears to me that this argument is sound. But the validity of the agreement to pay Rs. 100 or any other sum in any manner whatever has been assailed by the learned advocate for the respondent on the ground that it is void as being against public policy. In support of his contention, the learned advocate for the respondent has placed before me a decision of Banerji J. in 53 ALL 130,[1] where it was laid down that

> an agreement, the object and consideration of which is the withdrawal of the prosecution of a third party, the promisor not being personally liable or personally interested in the matter, is void under s. 23, Contract Act,

and therefore where a bond was executed it was held that the bond was void. It is not known whether the offence involved in that case was compoundable or not, and, with all respect, from the report of the judgment it is not ascertainable whether the learned Judge would have come to a different decision if the promisor or obligor was the accused in the case. To my mind, if an agreement between an accused person and the complainant, for the latter to withdraw the prosecution or to compound the case upon certain promise made by the accused, be valid, there is no reason why an agreement between the complainant and one who is closely interested in the welfare of the accused should not be valid. The authorities cited in support of the proposi-

1. ('31) 18 A I R 1931 All 128: 133 I C 313: 53 All 130 : 1930 A L J 1592, Nabidad Khan v. Abdul Rahman.

tion laid down in 53 ALL 130[1] are (1866) L R 1 H L 200[2] and 57 Cal 1302,[3] a Privy Council case. In the House of Lords case the facts of the case disclosed to their Lordships that there was coercion or pressure brought to bear upon the father to enter into the agreement in order to avoid a prosecution of the son for forgery, and the agreement was made before the prosecution was actually launched. In the Privy Council case, where this sort of agreement was set up against public policy, one of the offences was a non-compoundable offence. These cases, therefore, are not authorities for the proposition that in a case of a compoundable offence, or of an offence which may be compounded with the leave of the Court, an agreement arrived at between the complainant or the prosecutor on the one hand and the accused or another person closely interested in the welfare of the accused on the other, is against public policy and accordingly void. When an offence is a compoundable one and the Legislature thinks fit to allow a composition of the offence without reserving the Court's control over the parties' decision, there does not seem to be any ground whatever for thinking that an agreement relating to such composition is against public policy, and where, as in this case, the offence is one which may be compounded with the leave of the Court, such agreement arrived at between such persons cannot be in a worse position, for the composition is to be sanctioned by the Court which is in a position to safeguard the interest of justice in the matter before it. Nothing transpires on the record to show that the facts and circumstances which led to the conclusion of the agreement between the applicant and the respondent may be regarded as amounting to coercion on the part of the applicant against the respondent. For these reasons, in my opinion, the agreement is valid and binding on the parties.

Now, as regards the relief sought, the statement of facts as to how the applicant is entitled to Rs. 60 is extremely vague. Upon what footing he claims to receive Rs. 60 is not clearly expressed in the plaint, nor is it clearly expressed in his evidence. It is said to be interest due on the promissory note that was to be made over to him, but if he was to be paid Rs. 100, on his agreeing to withdraw the prosecution or compound the case, it is not likely that he was to get Rs. 60 over and above that sum, merely because he had to take over an actionable claim against a debtor whom he as well as the other party recognized as a very good customer. For these reasons, in my opinion, the applicant is entitled to a decree for Rs. 100, but not more. The decree of the lower appellate Court is accordingly set aside, and there will be a decree for Rs. 100, (Rupees one hundred only) in favour of the applicant, and the balance of his claim is dismissed. Costs of the suit in the trial Court will be borne proportionately and there will be no order for costs either of the lower appellate Court or of this Court.

G.N./R.K. *Order accordingly.*

2. (1866) LR 1 HL 200, Henry Williams v. James Bayley.

3. ('30) 17 AIR 1930 P C 100: 123 I C 187: 57 Cal 1302: 57 I A 117 (PC), Kaminikumar v. Birendranath.

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(28) A. I. R. 1941 Rangoon 233

ROBERTS C. J. AND BLAGDEN J.

P. V. S. Sundram and another — *Applicants*

v.

Madan Gopal Bagla — *Respondent.*

Civil Misc. Appln. No. 70 of 1940, Decided on 24th February 1941, for review of the judgment of High Court, in L. P. A. No. 6 of 1940, D/- 26th June 1940.

Civil P. C. (1908), O. 47, R. 1 — Right of review must be exercised in strict conformity with O. 47, R. 1—Review cannot be granted on ground that some wrong decision on point of law has found its way into judgment.

The right of review must be exercised in strict conformity with O. 47, R. 1. Review cannot be allowed on the ground that some wrong decision on a point of law has found its way into the judgment and that if the Court had referred to certain provisions of law it would have come to a different conclusion: ('35) 22 A I R 1935 Rang 32, *Rel. on.* [P 234 C 1]

K. C. Sanyal — for Applicants.

Cowasjee — for Respondent.

Roberts C. J.—This is an application for a review by this Court of its judgment in Letters Patent Appeal No. 6 of 1940; and the applicant must show, in conformity with the provisions of O. 47, R. 1, Civil P. C., that there is some mistake or error apparent on the face of the record before he can obtain the review which he seeks. Our attention has been called to the judgment, and it is said that the following paragraph shows an error on the face of the record :

With great respect, it appears to me that the only question before the learned Judge, having regard to the fact that the respondents did not file a cross-appeal, was that of the applicability of Sec. 51, T. P. Act. Having held as he did in relation

to this matter, I think that the appeal should have been allowed.

The facts were that the present respondent, Bagla, filed a suit for the recovery of possession of certain land. The suit was dismissed in the Subdivisional Court, but his appeal to the District Court was allowed, the learned District Judge making, however, an order that he should pay to the present applicants the sum of Rs. 11,000 for certain improvements to the land consisting of a house and, I think, other buildings. Bagla appealed against that decision and his appeal was dismissed; but the learned Judge gave a certificate that the case was a fit one for further appeal having regard to the decision in 58 Cal 1235.[1] We had a careful argument addressed to us, though in the absence of anyone on behalf of the respondents, and we came to the conclusion that having regard to that decision the question of estoppel did not arise. The learned Judge had thought that the appellant was estopped from seeking the relief which he claimed unless the sum of Rs. 11,000 was paid. We ventured to disagree with that decision, and it may be that if we had had the assistance of Mr. Sanyal's able advocacy at that stage we should have come to a different conclusion. I do not know; but there is no right of appeal again. The only right which subsists once an appeal has been heard and determined is a right of review, and that right must be exercised in strict conformity with the order. It is said that we might have come to a different conclusion upon an argument founded upon O. 41, R. 22; but be that as it may, I am of opinion that this is not really an attempt to review a decision because of an error apparent on the face of the record, but is an attempt to obtain a review by means of saying that some wrong decision on a point of law has found its way into our judgment. In conformity with the principle laid down by my learned brother Dunkley in 13 Rang 220[2] I think we are precluded from entertaining the application for review in the present case. The application accordingly is dismissed, and the appellants must pay the costs of the respondent, advocate's fee five gold mohurs.

Blagden J.—I agree, I only wish to add this, namely to call attention to one paragraph in the judgment of Dunkley J., in the case just cited by my Lord. It begins on the foot of p. 223 and reads thus:

> The meaning of 'an error apparent on the face of the record' is, to my mind, an error which can be seen by a mere perusal of the record, without reference to any other matter, and it certainly cannot be held that, on a perusal of the record of a case, the fact that the Judge had failed to refer to an authority binding upon him would be apparent. In 3 Lah 127[3] their Lordships of the Privy Council laid down that the fact that a judgment proceeded upon an incorrect exposition of the law is no ground for review under O. 47, R. 1, Civil P. C. This must obviously be so, for otherwise every judgment of a Court could be called in question on the ground that the Court had wrongly laid down the law in its judgment, and there would be no finality to litigation.

I do not for a moment wish to say that we did make a mistake, but if we did, it certainly is not apparent on the mere face of the record when it has been necessary to draw our attention to one or two orders of the Code of Civil Procedure for the purpose of showing that there was a mistake. One could not tell that there has been a mistake, if there has been one, without referring to those orders. What I think is intended is something like an arithmetical error, or the use of wrong words, such as the word "plaintiff" for "defendant," or, say, a finding of fact inconsistent with the pleadings. I therefore agree with my Lord in the order proposed.

G.N./R.K. *Application dismissed.*

1. ('31) 18 A I R 1931 P C 79 : 131 I C 762 : 58 Cal 1235 : 58 I A 91 (PC), Ariff v. Jadunath Majumdar.
2. ('35) 22 A I R 1935 Rang 32 : 154 I C 590 : 13 Rang 220, Juli Meah v. Atar Din.
3. ('22) 9 A I R 1922 P C 112 : 72 I C 566 : 3 Lah 127 : 49 I A 144 (PC), Chhaju Ram v. Neki.

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(28) A. I. R. 1941 Rangoon 234

ROBERTS C. J. AND DUNKLEY J.

Ma Mo E and others — *Appellants*

v.

Ma Kun Hlaing and others

— *Respondents.*

Letters Patent Appeal No. 10 of 1940, Decided on 30th January 1941, from decree of High Court, in Special Second Appeal No. 1 of 1940, D/- 23rd May 1940.

(a) Mortgage — Mortgage though requiring registration not registered — Mortgagor cannot sue for redemption—He can however bring suit for possession based on title.

A mortgagor cannot sue for redemption if the mortgage requires registration and is not registered. He can, however, bring a suit for possession based on title: ('35) 22 A I R 1935 Rang 230 (FB), *Foll.* [P 235 C 1, 2]

(b) Evidence Act (1872), S. 115 — Representation must be of fact and not of law—There is no estoppel against statute.

In order that an estoppel can be raised under the provisions of S. 115 the representation must be a representation of fact and not of law; and also

there can be no estoppel against the provisions of a statute. [P 236 C 1]

Doctor — for Appellants.

Chan Htoon — for Respondents 3 and 4.

Dunkley J.—The suit out of which this Letters Patent appeal arises was brought in the Township Court of Salin by the appellants. Appellant 1 Ma Mo E is the widow of one Maung Khaing Min and the other appellants are their children. Appellants 2 to 5 were really unnecessary parties to the suit. The suit was brought for the recovery of possession of a holding of agricultural land which is in the possession of respondents 3 and 4, who are husband and wife and were defendants 3 and 4 in the original suit. The basis of the cause of action was the judgment of a Full Bench of this Court in 13 Rang 274.[1] The case set up in the plaint was that this land belonged to Ma Mo E and her husband Maung Khaing Min, having been inherited by Ma Mo E from her parents, and the suit was based on title. Some time during the year 1929 Ma Mo E and Maung Khaing Min purported to create a mortgage with possession of this land in favour of one Maung Po Kun for a loan of Rs. 250. It was a verbal transaction and, of course, was ineffective to create any interest over the land in favour of Po Kun. Respondent 1 Ma Kun Hlaing is the widow of Maung Po Kun who is dead. On 14th December 1928, Maung Po Kun mortgaged, or rather sub-mortgaged, this land with possession for a sum of Rs. 200 to defendant-respondent 2 Maung Law Pan by a registered deed, and, so far as Po Kun had any interest in this property, this was, of course, a valid mortgage of that interest. On 7th October 1929, Po Kun and respondent 2 Law Pan purported to sub-mortgage this land again to respondent 3 Maung Pike for a sum of Rs. 150 the mortgage being an usufructuary mortgage with possession. A document was executed but was not registered, and, consequently, this mortgage also was invalid to give respondents 3 and 4 any interest in this property.

Now Ma Mo E brought her suit, as I have said, for possession of the land basing the cause of action on her title. The suit was defended only by respondents 3 and 4. Their written statement set up two lines of defence only; first, they put into issue Ma Mo E's title, and secondly, they set up that Ma Mo E could not, even if she was the owner of the land, recover possession unless she could prove that there was a valid mortgage which she had a right to redeem. The second ground of defence was, of course, quite untenable, being contrary to 13 Rang 274[1] to which I have just referred. As regards the first ground of defence the trial Court held that Ma Mo E had not proved her title, and therefore the suit was dismissed. On first appeal to the Assistant District Court the learned Assistant District Judge held that it had been proved by Ma Mo E that she had received this land on partition of her parent's estate and that she was the owner thereof, and he decreed the suit. The question of fact regarding Ma Mo E's title to this land has again been agitated before us in this Letters Patent appeal, and on this question it is sufficient to say that Ma Mo E's evidence regarding her title has been supported by a number of witnesses, and even respondent 1 Ma Kun Hlaing, widow of Po Kun, admits that Po Kun obtained possession of this land from Ma Mo E, and the possession of respondents 3 and 4 was, of course, derived from Po Kun. There is no rebutting evidence, and Ma Mo E has established with the utmost clearness that this land is her land which she received as her share of her parent's estate.

On second appeal to this Court an entirely new ground was raised, and it was said that Ma Mo E was estopped from setting up her title, or, if not estopped from setting up her title, then estopped from alleging that Po Kun had no right to make a valid mortgage, which he had done, of this land to Law Pan. The facts necessary to establish this alleged estoppel were never pleaded by respondents 3 and 4, but, nevertheless, the learned Judge on second appeal accepted this argument on the basis of a single statement which was made by Ma Mo E in her evidence in the trial Court, and on this ground reversed the judgment and decree of the Assistant District Court and dismissed the suit of the plaintiffs-appellants. The statement on which this theory of estoppel was founded is the following appearing in Ma Mo E's evidence :

> We told him that we could not redeem it as yet and we agreed that the land would be mortgaged to Ko Law Pan.

When the whole of Ma Mo E's evidence is read it appears that she and her husband had mortgaged, or purported to mortgage, this land with possession to Po Kun for a sum of Rs. 250, but soon after the loan had been received Po Kun came to them and demanded the return of his money; Ma Mo E and her husband were not

1. ('35) 22 A I R 1935 Rang 230 : 157 I C 565 : 13 Rang 274 (FB), Ma Kyi v. Mg. Thon.

in a position to redeem at the time, and therefore they said that Po Kun might mortgage the land if he wanted his money back, and as Po Kun stated that he had arranged to mortgage the land to Law Pan they told him that they agreed to his taking this course. It is quite clear from the evidence led by both sides in this suit that all the parties thought that all these three transactions were valid and effective mortgages and that they considered them to be so right up to the time when this suit was brought; for shortly before the suit was filed Ma Mo E went to all the persons who at different times had had possession of this land, purporting to be mortgagees thereof, and asked them to permit her to redeem it, and the suit was only brought when respondents 3 and 4 refused to allow her to get back possession of the land on payment of what she considered to be a reasonable sum. Had their demands not been extortionate this suit would not have been brought. And then it is quite plain that when Ma Mo E obtained legal advice she found that the mortgages were invalid and that she should bring a suit for possession based on title.

In order that an estoppel can be raised under the provisions of S. 115, Evidence Act, the representation must be a representation of fact and not of law; and also there can be no estoppel against the provisions of a statute. In this case the only representation which was made by Ma Mo E was to tell Po Kun that he could exercise what she thought to be his legal rights, namely, a right to sub-mortgage the land, and Po Kun then went and exercised that right and mortgaged the land with Law Pan. Such representation as Ma Mo E made, if she made any at all, was a representation in regard to a matter of law and not in regard to a matter of fact. Moreover, no question of estoppel can arise in this case, because Maung Law Pan says that he does not know Ma Mo E or her late husband, and, therefore, they never made any representation of any kind to him. Further, reference has been made to the provisions of S. 41, T. P. Act, and it is said that by this statement to Po Kun, Ma Mo E and her husband made him their agent to sell or mortgage their property, and that they were holding him out as owner, and, consequently, they cannot now turn round and deny his authority to deal with the land as ostensible owner. The answer to that contention is clearly, as I have already said, that at no time did Ma Mo E and her husband meet Law Pan or make any representation to him, or hold out Po Kun as the owner. In fact, the whole of this argument is based on a statement contained in the deed which was executed by Po Kun in favour of Law Pan, in which Po Kun has falsely described himself as the owner of this land.

On another ground also S. 41, T. P. Act, can have no application, because the slightest enquiry on the part of Law Pan would have disclosed that Po Kun was not the owner, although it might not have disclosed in view of the ignorance of law amongst these cultivators, that Po Kun had no right to make a mortgage. The land records register and map for the year 1938-39 have been produced, and they still show Ma Mo E and her children as the owners of this land. It is said that that may be so, but it affords no proof that they were shown in the land record registers and maps for the years 1928 and 1929 as the owners; but, in the absence of any evidence of transfer of ownership, and on the evidence which shows that before 1928 Ma Mo E and her husband were the owners, the inference arises that the entries have continued to be the same throughout this period, and nothing has been proved to the contrary by respondents 3 and 4. In my opinion, there were no grounds upon which an estoppel could rest in this case, and as Ma Mo E has clearly proved her title to this land she is entitled to succeed in this suit. This Letters Patent appeal is, therefore, allowed, and the judgment and decree of the learned Judge in second appeal are set aside, and the judgment and decree of the Assistant District Court of Minbu on first appeal are restored with costs in all Courts in favour of the appellants against respondents 3 and 4: advocate's fee in this appeal eight gold mohurs.

Roberts C. J. — I agree and have nothing to add.

D.S./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Rangoon 236

MYA BU J.

Bank of Chettinad Ltd. — *Applicant*

v.

U Chan Hmwe — *Respondent.*

Civil Revn. No. 239 of 1940, Decided on 23rd January 1941, from order of Asst. District Court, Pyapon, D/- 10th July 1940.

(a) Civil P. C. (1908), O. 41, Rr. 20 and 23— Receiver appointed in rent suit taking possession of defendant's property alleged to be in

third person's possession—Court refusing to allow application by third party for directing receiver to give up possession—Appeal by third party impleading plaintiff alone as respondent — Failure to make defendant party to appeal held rendered it incompetent.

The receiver appointed in a rent suit took over possession of the defendant's property alleged to be in possession of a third party who filed an appeal against the order of the Court which appointed the receiver refusing his application to direct the receiver to give up possession. The plaintiff alone was made respondent to the appeal :

Held that the failure to implead the defendant as a party to the appeal rendered it incompetent : ('25) 12 A I R 1925 Rang 108 and ('27) 14 A I R 1927 P C 252, *Rel. on.* [P 238 C 1]

(b) Civil P. C. (1908), O. 40, R. 1—Receiver appointed in suit taking possession of defendant's property in possession of third party—Third party being outsider to proceedings has no right of appeal against order appointing receiver—He can only apply to Court to direct receiver to release property.

Where the receiver appointed in a suit takes over in pursuance of the Court's order possession of the defendant's property alleged to be in possession of a third party, the third party being an outsider to the proceedings has no right of appeal against the order appointing the receiver. When his property is seized he can only apply to the Court to direct the receiver to release the property : 36 Cal 713 and ('18) 5 A I R 1918 Pat 301, *Expl., and Dissent.* [P 238 C 1]

(c) Civil P. C. (1908), O. 40, Rr. 1 and 4—Receiver appointed in suit taking possession of defendant's property in possession of third party—Court refusing application by third party to direct receiver to release property—Order of refusal is not appealable as it does not fall under O. 40, R. 1 or R. 4.

Where the receiver appointed in a suit takes over possession of the defendant's property alleged to be in possession of a third party in pursuance of an order of the Court no appeal lies by reason of O. 43, R. 1 (s), Civil P. C., from an order merely refusing the third party's application to direct the receiver to release the property inasmuch as the order of refusal does not fall under O. 40, R. 1 or Rule 4. [P 238 C 1]

P. K. Basu — for Applicant.

U Ba Sein for U E Maung — for Respondent.

Order.—This is an application for revision of an order of an appellate Court, setting aside an order of the Court of first instance appointing a receiver. The appeal was instituted by respondent U Chan Hmwe, who was not a party to the suit in connexion with which the appointment of receiver was made. The suit was by the applicant bank against one Maung Tun Wa and his wife Ma Ngwe Hmyin for recovery of 280 baskets of paddy or their value, Rs. 364, being the rent of the plaintiff's paddy land which had been leased to the defendants for the agricultural season of 1939-40. The lease was effected by means of a bond executed by the defendants, under which the tenants agreed to cultivate the land and plant paddy during the season and pay at harvest 280 baskets of paddy out of the produce of the land as rent. It was one of the terms of the bond, that the tenants were to regard the whole produce of the land as the property of the lessors until the quantity payable as rent was paid and to treat the remainder only as the tenants' property. Simultaneously with the institution of the suit, the applicant bank filed an application for appointment of a receiver of a certain quantity of paddy alleged to have formed part of the produce of the land. In the application it was pointed out that that quantity of paddy had been removed to the threshing-floor of the respondent U Chan Hmwe. The Court of first instance granted the application by appointing a receiver. The formal order of appointment was worded in the ordinary way and ran as follows :

> You are hereby appointed receiver of the said property, under O. 40, Civil P. C., with full powers under the provisions of that order . . . .

The property referred to in the order was described as

> about 500 baskets of Kauk-kyi paddy which has been removed to U Chan Hmwe's threshing-floor by the respondents and is lying there.

It appears that on receipt of the order of appointment, the receiver proceeded to U Chan Hmwe's threshing-floor and took actual possession of the five hundred baskets of paddy which he found lying there. U Chan Hmwe thereupon applied to the Court, stating that the paddy which the receiver had seized was his own paddy, that part of the land in respect of which the suit for recovery of rent was filed was actually worked by him as the lessee of the defendants and that consequently the crops raised on the land were those which he had raised and the produce thereof belonged to him, and praying that the order of appointment of receiver might be set aside. In spite of the form in which the prayer was put, U Chan Hmwe's application was treated in my opinion correctly as an application for directing the receiver to release the paddy which the receiver had seized. Proceeding upon that footing, the Court of first instance refused to grant U Chan Hmwe's application, which was opposed not only by the plaintiff but also by the defendants, who supported the plaintiffs' allegation that the paddy belonging to them had been removed from their land to U Chan Hmwe's threshing-floor. U Chan Hmwe, being dissatisfied with the order, filed the appeal which re-

sulted in the order which is now sought to be revised. U Chan Hmwe made the bank only respondent to the appeal. The defendants in the suit were not made parties to the appeal in any capacity whatever.

The main grounds of revision are that the appeal was incompetent inasmuch as the defendants were not joined as parties thereto, and that in any event no appeal lay from the order passed by the Court of first instance, and consequently, the appellate Court acted without jurisdiction in entertaining the appeal. In my opinion, this application for revision succeeds upon both grounds. As regards the first, the incompetency of the appeal is clearly shown by the principles that are enunciated by this Court in 2 Rang 541,[1] and by their Lordships of the Privy Council in 6 Rang 29.[2] As regards the second ground, inasmuch as U Chan Hmwe was not a party against whom the order of appointment of receiver was made, he had no right of appealing against the order of appointment. The order of appointment of receiver did not affect him until the paddy in his possession was seized. So far as the appointment itself is concerned, U Chan Hmwe was an entire outsider to the proceedings. But when the property in his possession was seized by the receiver who was an officer of the Court, U Chan Hmwe had the right to apply to the Court to direct the receiver to release the property. It was only upon that footing that he could make the application to the Court of first instance which appointed the receiver, and it was only upon that footing that the Court of first instance considered and enquired into his application. Consequently, the order passed by the Court of first instance in disposing of the application was tantamount to a mere order refusing to direct the receiver to release the property. There is no provision whatever in the Code of Civil Procedure to enable a party aggrieved by such an order to appeal against it. Order 43, R. 1 (s) allows an appeal from an order under R. 1 or R. 4 of O. 40. The order passed on U Chan Hmwe's application by the Court of first instance does not fall within any of the descriptions of orders under either R. 1 or R. 4 of O. 40.

If U Chan Hmwe had been a party to the suit against whom the order appointing receiver was made, then he would have a right to appeal under O. 40, R. 1 (a) read with O. 43, R. 1 (s); or, if the Court had ordered the removal of U Chan Hmwe from the possession or custody of the paddy in question, he would have had a right of appealing against that order under O. 40, R. 1 (b) read with O. 43, R. 1 (s). In considering the right of appeal, the distinction between an order appointing a receiver and an order removing a person from the possession or custody of the property should not be lost sight of, because an order merely appointing a receiver does not affect the person in possession of the property directly, whereas an order for the removal of any person from the possession or custody of the property affects him directly. In 36 Cal 713,[3] it was held that an order made under S. 503, cl. (b), Civil P. C., 1882, (corresponding to O. 40, R. 1 (b) of the present Code), was appealable. The report of the case clearly shows that the order was an order directing the removal of the appellant from the possession of the property concerned. In 3 Pat L J 573,[4] a Bench of the Patna High Court purporting to follow 36 Cal 713,[3] held that :

> An order dismissing an objection to the appointment of a receiver of property of which the objector is in possession falls within O. 40, R. 1, Civil P. C., and is appealable.

With due respect, the decision, as couched in the headnote of the case, is an extension of the principle underlying in 36 Cal 713,[3] rather than an adoption of it; but, the report of the case leads me to think that the receiver was not only appointed, but was put in possession of the property concerned. Inasmuch as it is always open to a third party like U Chan Hmwe to sue for recovery of possession from the receiver on the ground of title, I do not think that the Legislature would have given such third party the right of appeal against the refusal by the Court appointing the receiver to direct the receiver to give up possession of the property of which the receiver has obtained possession. In my opinion, therefore, the respondent had no right of appeal, and the Assistant District Court had no jurisdiction to entertain the appeal. Upon this as well as upon the other ground, the application for revision succeeds and the order of the Assistant District Court is accordingly set aside. It is open to U Chan Hmwe to resort to remedies which are open to him

1. ('25) 12 A I R 1925 Rang 108 : 84 I C 522 : 2 Rang 541, Chokalingam Chetty v. Seethai Ache.
2. ('27) 14 A I R 1927 P C 252 : 107 I C 237 : 6 Rang 29 : 55 I A 7 (P C), Chokalingam Chetty v. Seethai Ache.
3. ('09) 36 Cal 713 : 1 I C 356 : 13 C W N 654 : 9 C L J 563, Hudson v. Morgan.
4. ('18) 5 A I R 1918 Pat 301 : 48 I C 133 : 3 Pat L J 573, Agabeg v. Mt. Sundari.

according to law, for recovery of possession of the paddy in question. The respondent will pay the petitioner's costs in all the Courts; advocate's fee in this Court two gold mohurs.

G.N./R.K. *Revision allowed.*

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(28) A. I. R. 1941 Rangoon 239

MACKNEY J.

R. C. Dass — Applicant

v.

Secretary of Burma Oil Subsidiary Provident Fund Trust (India), Ltd. — Respondent.

Civil Revn. No. 386 of 1939, Decided on 25th January 1940, against order of Small Cause Court, Rangoon, D/- 24th August 1939.

(a) Civil P. C. (1908), S. 60 (1) (m)—Burma Oil Subsidiary Provident Fund Rules—Member has vested interest in deposits made by him.

According to the rules of Burma Oil Subsidiary Provident Fund the member's money is handed over to the trustees to be dealt with by them in accordance with these rules. A subscriber relinquishes his right of complete control but nowhere is it suggested that the money ceases to be his property. A member has a vested interest in the deposits made by him himself. It may be that that interest is liable to be divested by a condition subsequent, for instance on the member's becoming insane. [P 240 C 2]

(b) Provident Fund — Burma Oil Subsidiary Provident Fund Rules, R. 9 — Effect of R. 9—Third person obtaining order of Court to attach member's interest in fund—Trustee and member cannot agree between themselves that member's interest in fund should cease to exist.

Two parties cannot by a mutual agreement do away with the existing rights of independent third parties. Hence the member and the trustees cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees that interest should cease to exist. When the attachment is received it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. On an attachment being made the only effect of R. 9 is that that portion of the interest of the member which is not covered by the attachment, or which exceeds the amount mentioned in the prohibitory order, is forfeited to the trustees. Nothing in R. 9 however can render an attachment order ineffective so far as regards the amount referred to therein, and when the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. [P 241 C 1]

P. K. Basu — for Applicant.

Mootham — for Respondent.

Order. — This is an application to revise an order of the Court of Small Causes, Rangoon, on an application under O. 21, R. 63 (b), Civil P. C., wherein the Court declined to order the respondent to pay into Court a sum of money which the applicant claims was held to the credit of his judgment-debtor. The applicant R. C. Dass is the holder of a decree for payment of money against Abool Hussein. This person was formerly employed by Messrs. The Burma Oil Co., Ltd. As such employee he was a member contributing to the provident fund organized by the company. For the purposes of this provident fund trustees have been appointed under a trust deed made between the company of the one part and the company and the Burma Oil Subsidiary Provident Fund Trust Ltd., of the other part. Rules have been drawn up with respect to the fund. Under these rules the company deduct from the salary of each member one-twelfth part thereof and pays the same forthwith to the trustees who credit these amounts to an account opened in the name of each member designated his "A" account. At the end of each year a bonus equal to the amount contributed by each member to his 'A' account during the year is paid over by the company to the trustees to the credit of another account opened in the name of each member designated his 'B' account.

The applicant, before obtaining his decree, had moved for an attachment before judgment of the account standing to the credit of Abool Hussein in the provident fund. The prohibitory order of the Court was returned with the endorsement of some person on behalf of the trustees stating that there were no funds. This order had been received on 12th July. Abool Hussein was on leave which expired on 16th July 1939. On 5th July 1939 he wrote to the company asking that the amount standing to his credit in the provident fund should be paid to him. It is alleged, but not proved, that he also asked for his discharge. There is some confusion as to what were the final orders passed in his case. The learned Chief Judge of the Court of Small Causes has found that Abool Hussein was discharged on 17th July 1939. I consider that this finding must be accepted. It is based on the evidence of the Labour Superintendent who is best able to explain the true circumstances of the case. The applicant having obtained his decree on 25th July 1939 proceeded in execution and asked for the attachment of the amount standing to the credit of his judgment-debtor in the provident fund. The order was served on 26th July and was returned with the remark that there were no funds. It is claimed that the trustees are entitled to say

that Abool Hussein has no funds in virtue of R. 9 of the rules already referred to. Rule 9 is as follows :

If any member shall assign or transfer his interest or any part of it in the Burma Fund, i.e. "provident" fund or shall attempt so to do (save and except as is permitted under cl. 7 hereof) or if any prohibitory order or attachment or process of a civil Court shall be served on the trustees or any of them or on the company or any person on their or its behalf by which any moneys standing to the credit of a member in the books of the Burma Fund shall be attached or be ordered to be paid into a civil Court or be ordered to be withheld from such member the right of a member to the amount standing to his credit in both the 'A' and 'B' accounts shall be forfeited and cease to exist and the amount then or thereafter standing to the credit of his 'A' account or "B" account and the interest thereon shall thenceforward (subject to any claim of the company arising out of cl. 12 hereof) revert to the Burma Fund provided always that the trustees may in their uncontrolled discretion pay over the whole or any part of the monies standing to the credit of the 'A' account for the benefit of relatives or dependants of the member.

It is said that as soon as the prohibitory order was received the funds existing to the credit of Abool Hussein immediately became forfeited and ceased to exist. Consequently when the second prohibitory order was received on 26th July, although that was received after Abool Hussein had been dismissed or discharged, there were no funds standing to his credit because they had all been forfeited when the first prohibitory order was received. It is claimed on behalf of the respondent that the interest of subscribers to the fund in the amounts standing to their credit is merely a contingent interest and therefore is not liable to attachment in virtue of S. 60 (1), Cl. (m), Civil P. C. An examination of the rules of the fund does not support this contention. I have already referred to Rr. 5, 6 and 9. Rule 10 allows a member to withdraw the amounts at the credit of his 'A' account in special circumstances. Under R. 12 the company retains a lien, as it were, on the amount in the members 'B' account so as to be able to call upon the trustees to pay to the company such amount as shall be requisite to satisfy any claim the company may have against a member by reason of an act of embezzlement, neglect or default, where a member has been dismissed from the service of the company or has voluntarily resigned otherwise than on account of ill-health or other unavoidable cause before the expiration of twenty years' continuous service. Rule 13 provides that when a member is dismissed or retires from the service of the company without the consent of the company without having completed an unbroken period of of five years' service for any reason other than ill-health or other sufficient cause, he shall be paid only the amount then standing to the credit of his 'A' account. All moneys standing to the credit of his 'B' account, subject to the claim of the company under R. 12, revert to the Burma Fund.

Rule 14 provides that on retirement with the consent of the company of any member who shall have served for an unbroken period of five years from the service of the company he shall be paid the full sum standing to his credit. Rule 15 provides that if any member whilst still in the service of the company shall die or become insane the sum standing to his credit without any deduction, subject to the satisfaction of any claims by the company under R. 12, shall be paid to the person or persons named in the declaration form prescribed under R. 7 or failing such declaration at the discretion of the trustees whose decision shall not be open to question in any civil Court. Rule 7 enacts that upon becoming a subscriber to the Burma fund each member shall be required to furnish a declaration signed by himself in the presence of two witnesses as to the disposition of the money at the credit of his account in the event of his dying or becoming insane before retirement. The form provided is in the style of a will. It begins :

I hereby declare that in the event of my death the following persons shall be entitled to receive payment of the amount of my deposit in the Burma Oil Subsidiary Provident Fund (Burma) in the proportions noted against their names and I make this my will so far as regards such deposits.

An examination of these rules makes it quite clear, in my opinion, that the member's money is handed over to the trustees to be dealt with by them in accordance with these rules. A subscriber relinquishes his right of complete control but nowhere it is suggested that the money ceases to be his property. The actual wording of R. 9 itself seems to emphasize this where it speaks of "forfeiture." It appears to me, looking at S. 19, T. P. Act, that a member has a vested interest in the deposits made by him, himself. It may be that that interest is liable to be divested by a condition subsequent, for instance, on the member's becoming insane. I think, however, that the true way of regarding R. 15 is not as a subsequent condition on which the member is divested of his interest, but as a declaration that the trustees are the heirs of the member in default of having designated any heirs in the

form of declaration prescribed by R. 7. Rules 7 and 15 appear to me to make it obvious that the money held in the member's 'A' account is his property which, if it be not paid to him under the provisions of Rr. 13 and 14, is to form part of his estate if he dies and is to be disposed of in the manner indicated in R. 15 or, if he becomes insane before retirement, is to be handed to some person in charge of his estate. In any event I fail to see how the existence of these rules can justify our holding that the interest of the subscriber in the fund is a contingent interest. Having regard to the wording of S. 21, T. P. Act, it cannot be said that the interest is to take effect only if the subscriber does not die or become insane.

Rule 9 can be effective only so far as the acts of members themselves are concerned, that is to say, if a member voluntarily assigns or transfers his interest then in virtue of this agreement (all members agree to be bound by the regulations and conditions herein set out) the moneys standing to his credit are at once deemed to be forfeited. Two parties, however, cannot by a mutual agreement do away with the existing rights of independent third parties. The member and the trustees cannot agree between themselves that when a third party obtains an order of the Court to attach the interest of the member in the fund held by the trustees that interest should cease to exist. When the attachment is received, it is in existence and no understanding between the member and the trustees can ensure that it shall be deemed to have disappeared. On an attachment being made, the only effect of R. 9 is that that portion of the interest of the member which is not covered by the attachment, or which exceeds the amount mentioned in the prohibitory order, is forfeited to the trustees. Nothing in R. 9, however, can render an attachment order ineffective so far as regards the amount referred to therein, and when the money becomes payable to the subscriber it must not be paid otherwise than under the orders of the Court. The interest of the member in his 'B' account is quite different. Under the rules he obtains no interest in this money save in specified circumstances which may or may not come into existence. As regards the amounts in the 'A' account, these are payable when the services of the member terminate whether by dismissal, retirement, death or by the onset of insanity. I hold that the attachment made before judgment had the effect of preserving from forfeiture so much of the amount in Abdool Hussein's 'A' account as was mentioned in the order. When Abdool Hussein was dismissed or discharged on 17th July 1939 that amount became payable to him under R. 13. Consequently when the applicant-decree-holder having obtained his decree made a further attachment of that sum the trustees were bound to pay that sum, together with interest up to the date of the discharge or dismissal, into Court when called upon to do so. For these reasons this application is allowed, the order of the Court of Small Causes is set aside and the application of the decree-holder applicant is allowed with costs in both Courts, advocate's fee in this Court four gold mohurs : that is to say, the application is allowed to the extent of the amount attached before judgment, namely, Rs. 873, or such lesser amount as was then standing to the credit of Abdool Hussein in his 'A' account.

D.S./R.K. *Application partly allowed.*

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(28) A. I. R. 1941 Rangoon 241

ROBERTS C. J. AND DUNKLEY J.

Yup Soon E—Appellant

v.

Saw Boon Kyaung—Respondent.

First Appeal No. 69 of 1940, Decided on 6th February 1941, against order of High Court, in Civil Misc. Case No. 245 of 1938, D/- 7th May 1940.

(a) Succession Act (1925), Ss. 263 and 283 — Probate—Revocation of—Fact that no citations were ordered and none served is not by itself just cause for revoking probate.

The fact that no citations were ordered and none were served does not by itself constitute just cause for revocation of probate : ('38) 25 A I R 1938 Rang 261 (FB), *Foll.* [P 242 C 1]

(b) Buddhist law (Chinese)—Will — Chinese Buddhist in Burma is competent to make will on ground of custom.

A Chinese Buddhist domiciled in Burma though governed by the Burmese Buddhist law which does not recognize a will, is competent to make a will on the ground of custom : ('25) 12 A I R 1925 P C 29, *Rel. on*; ('29) 16 AIR 1929 Rang 22, *Expl., and Rel. on*; ('39) 26 A I R 1939 P C 228 and ('41) 28 A I R 1941 Rang 66, *Ref.* [P 242 C 2]

(c) Buddhist law (Burmese)—Chinese marrying Buddhist wife and at her death performing Buddhist rites—He also adopting Buddhist son and shin-byuing him—This is no evidence that Chinese is Buddhist.

The fact that a Chinese married a Buddhist wife and performed Buddhist rites at her death or that he adopted a Buddhist son and shin-byued him cannot justify an inference that the Chinese was a Buddhist himself. [P 243 C 1]

Dr. Ba Han—for Appellant.

U E Maung (1) and A.A. Darwood — for Respondent.

Roberts C. J. — This appeal arises out of the failure of the plaintiff-appellant in her petition upon the original side of this Court for revocation of probate of the will of Tan Kim Tau deceased granted to the respondent in Civil Miscellaneous No. 237 of 1938 of this Court on 28th November 1938. The appellant is the surviving widow of the testator who died at Rangoon on 13th October 1938 having executed a will on 28th August 1938. The respondent was the sole executor named therein and is said to be the eldest son of the testator by adoption and a nephew by marriage. No citations were ordered and none were served, but this fact does not by itself constitute just cause for revocation of probate: 1938 RLR 360.[1] By her petition, as amended, the plaintiff challenged the signature of the testator and the due execution of the will propounded. She further alleged undue influence, apparently on the part of the respondent though this is not specifically pleaded. It is contended that the testator was of weak mind and addicted to opium and was either incapable for these reasons of making a will, or was the more easily susceptible to undue influence. It is further pleaded that the testator was a Chinese Buddhist and that as "the succession to his estate is governed by Burmese Buddhist law he cannot make a will."

As was pointed out by Lord Dunedin in 3 Rang 29[2] at p. 35, although the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory this has so far been impinged upon that a Chinese Buddhist is allowed to make a will. Tan Kim Tau was a Chinese; it is agreed that he was a Chinese confucian. His testamentary capacity would be unaffected if he were a Chinese Buddhist as well. But I desire to add that the plaintiff in seeking to prove that Tan Kim Tau was a Buddhist appears to me to have failed. This task was apparently undertaken in the view that the decision of the Privy Council in 1939 R L R 548[3] extends beyond cases of intestacy and has reference to the administration of every estate of a Chinese Buddhist. Now a Chinese who is a Buddhist comes within the term "Buddhists" in cl. (a) of sub-s. (1) of S. 13, Burma Laws Act XIII of 1898. In any question regarding the matters there set out the Buddhist law is therefore the rule of decision "except in so far as such law has by enactment been altered or abolished or is opposed to any custom having the force of law." But the custom prevalent amongst Chinese Buddhists of making a will has been already recognized and given judicial sanction by the judgment of Lord Dunedin to which I have just referred. Moreover, Mr. Saw Lain Lee who was a witness for the respondent and has resided in Burma for 46 years gave evidence to the effect that he has known of over forty wills made by the Chinese; in three such cases he declared he personally saw the will being made. Mr. Saw Taik Leong an advocate of this Court with 17 years practice is himself Chinese and associates with members of his race and does business for them; he says that during this period both Chinese confucian and Chinese Buddhists have been making wills though his knowledge of the fact is limited to the authorized law reports. He drew up the will of Tan Kim Tau himself. I need not repeat, on this point, what has been said by the learned trial Judge who has referred to the decision in 6 Rang 623.[4] Although the view taken by the Bench in that case, that Chinese Customary law governs the succession to the estate of a Chinese domiciled in China, has been overruled by the recent decision of the Privy Council, yet, the finding that there is a custom having the force of law prevalent amongst the Chinese in Burma whereby they dispose of their property by will remains unimpaired. And as the learned trial Judge has observed

> the fact of their happening to be Buddhists and so being governed by the Buddhist law of Burma does not affect that custom which is well established.

But I agree further with the learned Judge that there is no satisfactory evidence that Tan Kim Tau was ever a Buddhist. It was contended that he was a regular worshipper of Kwan Yin at the Strand Road Temple. He had lived for many years in Rangoon and was a person of some wealth; the suit was heard within eighteen months of his death; many persons occupying responsible positions must have been available to prove that he was a Buddhist if such were the case, but the only evidence

1. ('38) 25 A I R 1938 Rang 261 : 176 I C 614 : 1938 R L R 360 (F B), Eusoof Ahmed v. Ismail Ahmed.
2. ('25) 12 A I R 1925 PC 29 : 84 IC 899 : 3 Rang 29 : 52 I A 73 (P C), Maung Dwe v. Khoo Haung Shein.
3. ('39) 26 A I R 1939 P C 228 : 182 I C 993 : 1939 R L R 548 (PC), Tan Ma Shwe Zin v. Khoo Soo Chong.
4. ('29) 16 A I R 1929 Rang 22 : 114 I C 513 : 6 Rang 623, Chan Pyu v. Saw Sin.

on this point is given by a candle seller who acts as caretaker of the temple and who said that the testator went to the temple to worship once or twice monthly; he was not even asked over what period of time these visits were continued. Daw Thant was the testator's first wife; she was a Buddhist and at her death Buddhist rites were performed by direction of Tan Kim Tau. Tan Koon Poe was an adopted son and went through the shin-byu ceremony because his natural parents were Burmese Buddhists. From neither of these two facts could it be inferred that Tan Kim Tau was a Buddhist himself. U Alawka, a Buddhist pongyi, stated that he used to visit the testator's house and obtain a daily meal from Daw Thant, but never spoke to the testator. He says there was a tharanagon ceremony at the time of Tan Kim Tau's death, he said in examination-in-chief that he was present at it, and in cross-examination that he was not present. Evidence of the profession of the Buddhist religion by Tam Kim Tau in his lifetime is tenuous and unconvincing.

The due execution of the will at a time when the testator was of sound mind, memory and understanding has been clearly proved. Mr. Saw Taik Leong, advocate, and Mr. Tan Eue Kim, pleader were both present with Dr. Kundu. The evidence of the doctor, which was accepted by the learned Judge, shows that the testator though in poor health and an occasional consumer of opium was not of weak mind. No particulars of undue influence were given in the petition and it is not even pleaded who exercised undue influence. Indeed the petitioner who was in the house at the time of making the will said frankly that her husband listened to what the respondent said because he liked the respondent better than he liked the petitioner herself. Respondent, whose mother was a sister of Daw Thant, and who is therefore a nephew of the testator by marriage, was summoned by telegram by his daughter at the time of testator's illness. Testator said he wanted to make a will and respondent took his instructions and went to Mr. Saw Taik Leong. The prepared will was then brought to the testator for execution. Not only does the respondent say that after the doctor's arrival testator sent the women attending on him downstairs and away from the room when the will was being executed, but he is corroborated by one of the women themselves, Ma Shu Tin, a witness for the petitioner. Eight days after the testator's death the petitioner's advocate, writing upon her instructions to Mr. Saw Taik Leong and stating that she does not recognize the validity of the will, omits entirely to suggest either that the deceased was not in a fit state mentally at the time of its execution or that he was ever subjected to undue influence. It is plain that she was in the house when Mr. Leong accompanied by Dr. Kundu and the respondent visited the testator two months before his death, and if her present contentions rested upon any real foundation she would surely have advanced them directly she knew that this will was being propounded. For all these reasons I am of opinion that the appeal fails and must be dismissed. Advocate's fee twenty gold mohurs.

Dunkley J. — I agree. The issue regarding testamentary capacity and / or undue influence was abandoned on behalf of the appellant during the course of the hearing of this appeal. I agree with my Lord that the evidence called by the appellant to prove that the deceased Tan Kim Tau was a Buddhist is extremely unconvincing, but in my opinion, it is unnecessary to decide whether he was a Buddhist or not. In 1939 R L R 548[3] their Lordships of the Privy Council held that prima facie inheritance to the estate of a Chinaman who was domiciled in Burma and was a Buddhist is governed by the Buddhist law of Burma, and the burden of proving any special custom or usage varying the ordinary Buddhist rules of inheritance is on the person asserting the variance. The effect of this decision was considered by a Bench of this Court in 1940 R L R 685,[5] in which it was held that it is open to a person to prove that the law applicable in a case of inheritance to the estate of a Chinese Buddhist domiciled in Burma is the Chinese Customary law as prevalent in Burma. Now a will is not recognized under Buddhist law, but the custom or usage varying this strict rule in the case of a Chinese Buddhist has already received the recognition of the highest judicial authority. In 3 Rang 29[2] at p. 35, Lord Dunedin, delivered the judgment of the Judicial Committee of the Privy Council, said this :

> Further, though the whole theory of succession depends upon the strict Buddhist view that intestacy is compulsory, this has so far been impinged upon that a Chinese Buddhist is allowed to test.

5. ('41) 28 A I R 1941 Rang 66 : 1940 R L R 685, Yin Win Lin v. Ma Kyin Sein.

It is unnecessary for us to look beyond this decision, by which the right of a Chinese Buddhist to make a will was recognized. Consequently, whether Tan Kim Tau was a Buddhist or not, his will was validly made.

G.N./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Rangoon 244

BLAGDEN J.

Bhawani Sankar Jaisi — Applicant

v.

Ganga Prasad — Respondent.

Civil Revn. Appln. No. 122 of 1940, Decided on 12th July 1940, against decree of Dist. Court, Myitkyina, D/- 16th January 1940.

(a) Limitation Act (1908), S. 19—Acknowledgment of liability express or implied is good evidence of debt even if it does not give fresh cause of action.

As between solvent persons an acknowledgement express or even implied by *A* that he owes money to *B* is about as good evidence as could be had that *A* owes *B* that money, even if it does not give *B* a fresh cause of action : ('28) 15 A I R 1928 Rang 304, *Rel. on.* [P 245 C 1, 2]

(b) Burma Court Manual, Para. 104-A — Burma Court Manual has not force of law but is mere collection of directions by High Court to its subordinates — Departure by Court from aforesaid directions does not of itself give right of appeal — Para. 104-A applies only to documents translation of which is disputed — Correctness of translation submitted by party not challenged in trial Court cannot be challenged in appeal — Point as to invalidity of translation by reason of Para. 104-A cannot be raised in appeal by the Court suo motu when party relying on it has waived it by conduct.

The Burma Courts Manual has not the force of law but is a mere collection of directions given by the High Court to its subordinates. A departure by a Court from a course it prescribes does not of itself give an unsuccessful litigant a right of appeal. Para. 104-A only applies to documents the translation of which is disputed, and has no application where the parties agree to a translation, or, if the Court were willing to shoulder the resulting burden, dispense with one altogether. [P 245 C 2]

A party who does not challenge the translation submitted by the other party in the trial Court cannot challange it in appeal: (1810) 2 Camp 511, *Rel. on.* [P 245 C 2]

Nor can the appellate Court suo motu take the point as to the invalidity of the translation by reason of Para. 104-A where the appellant has himself by his conduct waived it inasmuch as the point involves only a procedural error. [P 246 C 1]

(c) Deed — Construction — What English words are equivalent to words of other language is question of fact — Question as to what given set of English words connote in particular context is generally question of law.

What English words together form the equivalent of a given series of words of other language is a question of fact while what in particular circumstances and a given context, a given set of English words connotes is, generally, a question of law. [P 245 C 2]

*(d) Civil P. C. (1908) S. 115—Material irregularity — Circumstances in which Court acts with, stated — Appellate Court deciding appeal on point of law in favour of party who had waived it — Appellate Court not bound to take cognizance of aforesaid point irrespective of parties — Appellate Court acts with material irregularity.

A Court acts with material irregularity, "if not illegally," within the meaning of S. 115,

(i) if it shuts its eyes to a proposition of law or to an important fact in evidence before it as distinct from misapplying the one or attaching a wrong legal consequence: ('29) 16 AIR 1929 Rang 97 (F B) and 2 L B R 333, *Rel. on.* [P 246 C 2]

(ii) if it saddles the wrong party with a burden of proof: ('24) 11 A I R 1924 Rang 849, *Rel. on.* [P 246 C 2]

(iii) if it decides an appeal on a point of fact not raised at all before the Court from which the appeal is brought: ('26) 13 A I R 1926 Rang 214, *Rel. on.* [P 246 C 2]

It is also a material irregularity if a Court decides an appeal on a point of law which the party in whose favour it decides has waived and which is not one (such, for example, as public policy), of which the Court is bound to take cognizance irrespective of the parties. [P 246 C 2; P 247 C 1]

A. N. Basu — for Applicant.

C. A. Soorma — for Respondent.

Order. — The suit out of which this application arises was commenced by the applicant against the respondent in the Township Court of Mogaung by a plaint dated 2nd December 1938. Therein the applicant alleged a bond by the respondent in his favour for Rs. 500 with interest at Rs. 2 per mensem payable on demand hypothecating certain moveable property by way of security, a sum then due and owing thereon of Rs. 436, demand, and non-payment. He prayed for a money decree and a declaration of lien. The bond relied on (which was written in Urdu) was exhibited to the plaint and apparently there was attached to the bond what purported to be (and, as now transpires, in fact was) a correct translation of it. By his written statement dated 9th January 1939 the respondent denied all the material facts pleaded by the applicant, including the respondent's execution of the bond. But he did not in terms deny that the English words in the translation were a correct rendering of the Urdu words in the bond. On these pleadings two issues only were framed viz:

1. Whether the exhibit mortgage bond was executed by the defendant for consideration or not?
2. If so, to what relief is the plaintiff entitled?

It is observable that no issue was framed as to what the correct translation of the bond was. On those issues the suit proceeded to trial and no evidence was led by either side as to what was the English equivalent of the Urdu words in the bond nor is any reference to this question to be found in the elaborate written argument lodged by the respondent's advocate on his behalf. On 1st September 1939 the learned Township Judge gave judgment and passed an order in favour of the applicant for Rs. 436 with costs and a declaration as prayed. Of the execution of the bond by the respondent there was abundant evidence and the bond recited a debt due by the respondent to the applicant of Rs. 500 made up of seven items accrued due prior to the bond totalling Rupees 488.13.0 and a present advance of Rs. 11.3.0 to make up the round sum of Rs. 500. Given, therefore, that the respondent executed the bond there was ample evidence of the consideration for the bond. On the same supposition, the accrual of interest amounting to Rs. 207 before suit brought was a matter admitting of arithmetical check, and the payment by the respondent of Rs. 271 which reduced the applicant's claim to Rs. 436 was admitted by the applicant in the respondent's favour. There was evidence of a demand duly made for the balance and it was not suggested that it or any part of it was ever paid. The learned Township Judge had therefore every justification for passing the order he did if (as he did) he accepted the evidence adduced by the applicant.

From this judgment and order the respondent appealed to the District Court of Myitkyina. Even in his grounds of appeal he said no single word of complaint against the translation of the bond. The learned District Judge allowed the appeal except as to Rs. 11.3.0 on the grounds: (a) that the plaintiff had failed, save as to the present advance of Rs. 11.3.0, to prove the consideration for the bond and (b) that the requirements of Para. 104A (as now numbered) of the Burma Courts Manual had not been observed. This application in revision is made against the judgment of the District Court, and I have to consider (first) whether on either ground that judgment is right and (secondly), if not whether I can and should interfere in revision, there being no right of appeal. The first of these questions is not, I think, very difficult. As to the first of his grounds, the learned Judge seems to forget that as between solvent persons an acknowledgment express or even implied by A that he owes money to B is about as good evidence as you could have that A owes B that money; even if it does not, as in some circumstances it clearly does, give B a fresh cause of action: 6 Rang 538.[1] A shopkeeper, for example, suing for the price of goods sold and delivered on credit over a period, is not bound to call an assistant to prove the sale of every item and a packer and an errand boy to prove its delivery. He can if he chooses (at his own risk) rely entirely on a detailed account rendered and not disputed. The present case is far stronger, the acknowledgement being in express terms. Mr. Soorma, who conducted the respondent's case in this Court with his usual discretion did not seriously defend the judgment on this ground.

The learned District Judge's other ground appears to me equally untenable. To begin with, the Burma Courts Manual has not the force of law but is a mere collection of directions given by this Court to its subordinates. A departure by a Court from a course it prescribes does not of itself give an unsuccessful litigant a right of appeal, furthermore, the paragraph in question appears to me only to apply to documents the translation of which is disputed. I see no reason why the parties should not agree to a translation, or, if the Court were willing to shoulder the resulting burden, dispense with one altogether. Mr. Soorma in the course of his able argument submitted that the Court cannot relieve itself of its duty to construe documents and that therefore the Court must, whenever a particular document is neither in the language of the Court nor (if the parties consent to leave the question to him) in a language which the Judge in fact understands, have a translation made or verified in one of the prescribed manners. But this in my opinion confuses the construction of an English document with the interpretation of a document written in some other language. What English words together form the equivalent of a given series of Urdu words is a question of fact, while what, in particular circumstances and a given context, a given set of English words connotes is, generally, a question of law.

Last but not least, this point if taken by the respondent (and it is but fair to him to say that he did not take it) would have been taken too late. Suppose that the well-

1. ('28) 15 A I R 1928 Rang 304 : 117 I C 572 : 6 Rang 538, Maung Chit U v. Maung Pya.

known case in (1810) 2 Camp 511[2] had taken the form of a suit for libel and that the libel in question had contained no English words, but had consisted merely of a portrait of the plaintiff and his wife with the French legend beneath it "*La Belle et le Bete.*" Suppose that the plaintiff failed either to aver or to prove that these words meant "beauty and the beast" but had obtained (without objection from the defendant on this score) a verdict in his favour. Suppose that then the defendant moved in arrest of judgment that the plaintiff had neither averred nor proved the meaning in English of the French words "*La Belle et le Bete.*" The answer would have been that the jury's verdict being only consistent with their having some defamatory meaning it must be assumed that they were in fact defamatory—in other words that any defect in the plaintiff's pleading and evidence was cured by verdict. The truth is that a litigant cannot blow hot and cold in Court any more than he can before he gets there. He must not at any rate in a civil suit be allowed to go through a whole trial on a particular assumption of fact, and, when the result of the trial is adverse to him, to turn round with a bland smile and say that anyhow that assumption was quite unfounded. Here, it is true, the point was taken by the appellate Court and not by the then appellant, and there are some points such as limitation, gambling, and public policy, which the Courts must take of their own initiative whether or not the parties take them. This point, however, arose from a mere procedural error (if, contrary to my opinion, it arose from any error at all) and it cannot be right for an appellate Court to take such a point when the appellant has himself, by his conduct, waived it.

In my opinion, therefore, the learned District Judge went wrong, and his error is so clear and so serious that I ought, if I lawfully may, to put it right. The question remains, if I may, fettered as I am by S. 115, Civil P. C. It is common ground that any power I have to interfere is derived from the words "with material irregularity" in S. 115, Civil P. C., and what these words exactly mean has been a vexed question for all the sixty years that they have formed part of the section. Some of the Indian cases seem to me quite irreconcilable with others. It is, I hope, "irregular" (in the sense of being the exception and not the rule) for Courts to decide questions wrongly, but clearly the mere fact that a decision is wrong gives this Court no power to interfere in revision : 11 Cal 6.[3] Otherwise there would in effect be a right of appeal where there is none. Metaphorically speaking, a Court whose decision is unappealable may, without being liable to revision, travel to a wrong destination provided that throughout its journey it observes the rule of the road: *see* 4 Rang 202.[4] But it is difficult if not impossible to define what are infractions of that rule which are not illegal and yet are more than mere errors such as would be corrected on appeal. In most of the grosser instances one can think of to which cl. (c) would apply the Court would be acting not only irregularly but illegally : if, for example, a Judge admitted that he was deciding for the defendant because the latter had bribed him. Perhaps it would be an instance of "irregularity" falling short of actual illegality if the Judge said "I won't have the witness sworn—I don't believe in it and it wastes time" or "I can't make up my mind about this so I 've tossed up and as it is heads there will be judgment for the plaintiff."

However that may be, the decisions of this Court do, I think, establish that in the following instances a Court acts "with material irregularity," if not "illegally," within the meaning of this clause: (1) If it shuts its eyes to a proposition of law or to an important fact in evidence before it, 7 Rang 345,[5] as distinct from misapplying the one or attaching a wrong legal consequence and the other, as to which *see* 2 L B R 333[6] at p. 340. (2) If it saddles the wrong party with a burden of proofs: 2 Rang 202.[7] (3) If it decides an appeal on a point of fact not raised at all before the Court from which the appeal is brought : 4 Rang 202.[4] In the absence as far as I can find of any authority binding on me I am prepared to hold that it is also a material irregularity if a Court decides an appeal on a point of law which the party in whose favour it decides has waived and which is not one (such, for example, as public policy), of which the Court is bound

2. (1810) 2 Camp 511 : 11 R R 782, Du Bost v. Beresford.

3. ('85) 11 Cal 6 : 11 I A 237 : 4 Sar 559 (P C), Amir Hassan Khan v. Sheo Balsah Singh.

4. ('26) 13 A I R 1926 Rang 214 : 97 I C 1029 : 4 Rang 202, Maung Pa v. Abdul Ganni.

5. ('29) 16 A I R 1929 Rang 97 : 115 I C 901 : 30 Cr L J 540 : 7 Rang 345 (F B), U Po Hla v. Ko Po Shein.

6. ('03-04) 2 L B R 333, Zeya v. Mi On Kra Zan.

7. ('24) 11 A I R 1924 Rang 349 : 82 I C 658 : 2 Rang 202, Rasu v. Kattara.

to take cognizance irrespective of the parties. In so holding I think I am not going beyond the spirit of the last cited decision. The principle is just the same—if the Court acts in either way suggested it is in effect not maintaining its impartiality but is taking a side in the dispute before it.

With the greatest respect to him, I think the learned District Judge has erred in all four of these ways he has: (1) ignored both the legal proposition that an admission by a solvent person is good evidence of a debt due by him, and the fact that there was such an admission in the case before him; (2) wrongly held that it was incumbent on the applicant to prove his debt item by item; (3) taken in favour of the respondent a point of fact not taken in the Township Court, viz., that there was no evidence of what the Urdu bond meant in English, and (4) taken in favour of the respondent a point of law not taken in the Township Court (incidentally, I think an erroneous one) viz., that Para. 104A of the Burma Courts Manual has the force of law and applies to undisputed translations. This application is allowed, the judgment and order of the District Court set aside and those of the Township Court restored, the applicant must have his costs here and in the District Court, advocate's fee before me five gold mohurs. I am most grateful to the learned advocates on both sides for the assistance they have given me.

G.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Rangoon 247

MOSELY J.

Maung Tun Zan — Applicant

v.

Ma Myaing — Opposite Party.

Criminal Revn. No. 51B of 1941, Decided on 6th March 1941, from orders of Headquarters Magistrate, Second Class Tavoy, in Crim. Misc. Trial No. 31 of 1940.

(a) Criminal P. C. (1898), S. 488 (3)—Person cannot be sentenced to imprisonment a second time for default in respect of same identical arrears.

A defaulter may be sentenced to one month's imprisonment in respect of the arrears of each month or a further broken period but he cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears: ('41) 28 AIR 1941 Rang 135 and ('32) 19 AIR 1932 Rang 93, *Rel. on.* [P 248 C 1]

(b) Criminal P. C. (1898), Ss. 488 (7), 386 — Costs—Recovery of, is only by distress warrant under S. 386.

The only method provided for the recovery of costs awarded is by distress warrant (S. 386), and it is only for default of payment of each month's allowance that imprisonment may be awarded. [P 248 C 1]

(c) Criminal P. C. (1898), S. 488 (3)—Imprisonment should be ordered only if distress warrant is ineffective.

Where the person ordered to pay maintenance refuses to pay it, the Magistrate cannot straightway order him to be committed to jail; the first thing that must be done is to issue a distress warrant and it is only for the whole or part of each month's allowance that remains unpaid after the execution of the warrant that imprisonment may be awarded. [P 248 C 1, 2]

(d) Criminal P. C. (1898), Ss. 488 and 490 — "Any Magistrate"—Order for maintenance can be enforced by any Magistrate under S. 490 and not only by Magistrates mentioned in S. 488(1).

Section 490 gives an alternative remedy by enabling an application for execution to be made direct to the Magistrate within whose jurisdiction the person against whom the order is passed may be, as well as to the Magistrate who passed the original order, or his successor. And such Magistrate need not be a Magistrate of the categories mentioned in S. 488 (1). All that the Magistrate is required to do is to execute the order after being satisfied as to the identity and non-payment within the power conferred on him by S. 32: ('35) 22 AIR 1935 Mad 572, *Dissent.* [P 249 C 1, 2]

The Magistrate is not allowed to go into any other question, e.g., whether the status of the parties has altered since the order was made: 25 All 165, *Rel. on.* [P 249 C 2]

(e) Criminal P. C. (1898), S. 490 — Power to order imprisonment is not excluded under S. 490.

It cannot be said that the power to enforce an order of maintenance under S. 490 does not necessarily include the power to sentence to imprisonment. There is no such limitation in S. 490, and S. 488 (3) shows that the power to levy a distress warrant and where that fails to sentence to imprisonment are part and parcel of the same process in execution, and these are the only two methods of execution which are allowed: ('35) 22 A I R 1935 Mad 572, *Dissent.* [P 249 C 2]

Order. — This is an application for revision of an order, passed under S. 490, Criminal P. C., for enforcement of an order of maintenance. The application was made to the District Magistrate, Tavoy, who has reported it to this Court for orders with the recommendation that the proceedings be set aside and fresh action taken by the Magistrate. Notice has been issued to the applicant, the husband, Maung Tun Zan, and to the opposite party, his wife Ma Myaing, but neither party has appeared. The order for maintenance in question was passed by the First Additional Magistrate of Tavoy, a First Class Magistrate, on 9th September 1940. It was ordered that Maung Tun Zan pay his wife maintenance at the rate of Rs. 15 a month with effect from the

date of her application, the 24th June 1940, together with the costs of the case.

On 24th September, Ma Myaing filed an application for an enforcement of the order for maintenance, which was then due for exactly three months. The application was made to the District Magistrate, who transferred it for disposal to the Headquarters Magistrate of Tavoy, a second class Magistrate. I do not know why the application was not transferred to the Magistrate who passed the order, or to his successor or to the Sub-divisional Magistrate, all of whom had jurisdiction to pass order for maintenance under S. 488, Criminal P. C. The Headquarters Magistrate in question is a Second Class Magistrate. Maung Tun Zan had already filed a suit for restitution of conjugal rights. The Court refused to stay action on the application until the decision of that suit, and ordered Maung Tun Zan to pay the arrears. He paid only Rs. 10 into Court, and did not pay the balance Rs. 25, and the costs, Re. 1-8-0 (Diary of 12th October 1940). On 9th November he was sentenced to one month's rigorous imprisonment in respect of these arrears, due up to 24th September, Rs. 25, and also the costs, now amounting to Rs. 6-8-0 (Diary of 9th November 1940).

It has been held in a recent Bench decision of this Court, 1941 R L R 65,[1] reversing 7 L B R 351,[2] that a defaulter may be sentenced to one month's imprisonment in respect of the arrears for each month or a further broken period. However in the present case the offender was sentenced to one month's rigorous imprisonment in respect of all arrears, and that matter is concluded. A man cannot be sentenced to imprisonment a second time for default in respect of the same identical arrears: 10 Rang 176.[3] I may note that the only method provided for the recovery of costs awarded is by distress warrant (S. 386), and that it is only for default of payment of each month's allowance that imprisonment may be awarded. The illegality in the Magistrate's proceedings has not been noticed. It is that after he had ordered Maung Tun Zan to pay the amount in question, and after Maung Tun Zan had refused to pay it, the Magistrate straightway ordered him to be committed to jail, although the first thing that must be done is to issue a distress warrant, (S. 488 (3), Criminal P. C.) and it is only for the whole or part of each month's allowance that remains unpaid after the execution of the warrant that imprisonment may be awarded.

The respondent was committed to jail for one month, and on 13th December 1940 that is to say, some three or four days after Maung Tun Zan's release from jail, Ma Myaing filed a second application in Criminal Miscellaneous No. 31 of 1940 before the same Magistrate for enforcement of the order in respect of the same arrears, Rs. 25 and costs, and, apparently, the amount due from 24th September until 13th December. Maung Tun Zan then applied in revision to the District Magistrate. The learned District Magistrate's order is in error when he says that Ma Myaing had applied for arrears due previous to those for which imprisonment had been awarded. The Magistrate in the second case issued a notice to the respondent on 13th December to appear on 20th December and pay the arrears. The respondent was away from Tavoy at the time. The Magistrate, without giving the respondent a chance to appear, or to pay the old arrears and the fresh arrears now due, and, again, without issuing a distress warrant, issued a new warrant of arrest against Maung Tun Zan. It is only necessary to say that this was wholly improper and illegal. It is now some two and a half months later, and all that need be done now in this case is to allow the proceedings to continue, and say that the applicant should be allowed to put in a fresh application for recovery of the arrears due up to date, and then Maung Tun Zan should be called upon to pay these arrears. If the Magistrate is of the opinion that he has failed without sufficient cause to comply with the order, then the Magistrate should issue a distress warrant, and if that is ineffective, he may sentence the respondent to imprisonment.

The learned District Magistrate has referred to a matter raised before him in argument. It has been said in a judgment of the Madras High Court (not officially reported), that a Second Class Magistrate is not competent to pass a sentence of imprisonment for breach of an order under S. 488. This is a judgment of Pandrang Row J. in A I R 1935 Mad 572.[4] I do not profess to be able to understand this judg-

1. ('41) 28 AIR 1941 Rang 135 : 195 I C 190 : 1941 R L R 65, Ma Tin Tin v. Maung Aye.
2. ('14) 1 AIR 1914 L B 163:24 I C 170:15 Cr L J 434 : 7 L B R 351, Zaw Taw v. Emperor.
3. ('32) 19 A I R 1932 Rang 93 : 137 I C 673 : 33 Cr L J 554 : 10 Rang 176, Maung Kyi Po v. Ma Htu In.

4. ('35) 22 AIR 1935 Mad 572 : 155 I C 694 : 36 Cr L J 830 : 68 M L J 493, Emperor v. Kuppini Naicken.

ment. It is an extremely short order in revision, where the learned Judge first said that he concurred in the view of the District Magistrate that a Second Class Magistrate was not competent to pass a sentence of imprisonment for breach of an order directing payment of maintenance. I will quote the remainder of the judgment in full: It is as follows:

Even assuming that the words 'any Magistrate' in S. 490, Criminal P. C., have not been used with reference to the class of Magistrates referred to in Ss. 488 and 489, Criminal P. C., the power to enforce an order of maintenance does not necessarily include the power to sentence the person against whom it was passed to imprisonment.

Section 488 (1) (omitting unnecessary portions) says that in case of a refusal to maintain the wife or child, the District Magistrate, a Sub-divisional Magistrate, or a Magistrate of the first class may order such person to maintain his wife or child. Section 488 (3) provides that if any person so ordered fails to comply with the order, any such Magistrate may issue a distress warrant, or sentence such person to imprisonment. The words "any such Magistrate," of course, mean Magistrates of the categories or with the powers abovementioned. Section 488, sub-sec. (8) says that proceedings may be taken against any person in any district where he resides or is, or where he last resided with his wife. Section 490 lays down that any order for maintenance may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due. This section gives an alternative remedy by enabling an application for execution to be made direct to the Magistrate within whose jurisdiction the person against whom the order is passed may be, as well as to the Magistrate who passed the original order, or his successor. Section 490 is couched in perfectly plain and categorical terms. It means what it says—that, application for execution may be made to any Magistrate in a place where the person against whom it is made is. Had it been intended that the Magistrate should be of the categories or have the powers prescribed in S. 488, it would have been easy to say so. Perhaps the words "any such Magistrate" would have been sufficient. It is clear that the intention of the Legislature was to facilitate execution of an order. It might well be that the person against whom execution was sought had moved to a place in the mofussil where a first class Magistrate was not resident or ordinarily resident. All that the Magistrate is required to do is to execute the order after being satisfied as to identity and non-payment. The Magistrate is not allowed to go into any other question, i. e., whether the status of the parties has altered since the order was made : *vide* the judgment of Knox J., in 25 ALL 165[5] at p. 166.

Reluctance to give its plain effect to S. 490 may perhaps have arisen from provisions in the Civil Code as to transfer of execution to a Court of competent jurisdiction. I do not understand what is meant by saying that the power to enforce an order of maintenance does not necessarily include the power to sentence to imprisonment. There is no such limitation in S. 490, and S. 488 (3) shows that the power to levy a distress warrant and where that fails to sentence to imprisonment are part and parcel of the same process in execution, and these are the only two methods of execution which are allowed. Of course the power of a Magistrate to sentence to imprisonment under S. 490 does not mean that the Magistrate can exceed his ordinary powers conferred by S. 32 of the Code. Let the record be returned with these remarks.

K.S./R.K. *Order accordingly.*

5. ('02) 25 All 165 : 1902 A W N 224, Prabu Lal v. Rami.

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(28) A. I. R. 1941 Rangoon 249

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND BLAGDEN JJ.

Saw Tun Win — Applicant

v.

Ma Hnin Byu and another — Respondents.

Civil Ref. No. 11 of 1939, Decided on 16th June 1941, made by District Judge, Pyapon, for confirmation of decree for dissolution of marriage.

Divorce Act (1869), S. 17 — Wife's allegation as to adultery on husband's part denied by husband — Decree should not be made absolute without further inquiry — Wife though given opportunity to prove allegation not proving it— Decree nisi may be made absolute.

Where the wife has made allegations before the District Judge that her husband was committing adultery by keeping a mistress, the decree against her ought not to be made absolute without further inquiry. And where the allegations made by the wife are denied by the husband and the wife, though given an opportunity to prove the truth of her allegations declines to cite witnesses and there is in fact no evidence to support her allegations, the decree may be made absolute. [P 250 C 1]

A. Loo Nee — for Applicant.

Roberts C. J. — We are now satisfied that a decree absolute may be pronounced in this case. On the previous occasion when this matter was before the Full Bench we were satisfied as to the adultery alleged in the petition; but the case was sent back on remand for two reasons. One was because the marriage of the petitioner with respondent 1, had not been satisfactorily proved. It is now shown by the order of the learned District Judge that the parties have been proved to have been married by Thra Tso Talu, the pastor of the American Baptist Mission at Thatyetchaung village: there is evidence to that effect.

The second matter on which we were not satisfied was that Ma Hnin Byu, respondent 1, made allegations before the learned District Judge that her husband was committing adultery by keeping a mistress, and in those circumstances the decree against her ought not to be made absolute without further inquiry. We directed the learned District Judge to take evidence on this point. He has, in his order, stated that Ma Hnin Byu was given an opportunity to file an affidavit, which she did. The counter-affidavit denied all the allegations, and when an opportunity was afforded to the respondent to prove the truth of her allegations she declined to cite witnesses and there is in fact no evidence to support her allegations. In those circumstances the decree will be made absolute.

Dunkley J. — I agree.

Blagden J. — I agree.

K.S./R.K. *Decree made absolute.*

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(28) A. I. R. 1941 Rangoon 250

ROBERTS C. J. AND DUNKLEY J.

Vissalakshi Achi — Appellant

v.

Official Assignee — Respondent.

Civil Misc. Appeals Nos. 28 and 30 of 1940, Decided on 28th January 1941, against order of High Court, D/- 5th April 1940.

(a) Presidency Towns Insolvency Act (1909), Ss. 7, 55 and 36—Jurisdiction under S. 7 is discretionary—Scope of S. 7—Insolvent's debtors in satisfaction of their debts transferring property at insolvent's request to his wife—Consideration flowing from insolvent—Application by Official Receiver to set aside transfers—S. 55 does not apply — Nor S. 53, T. P. Act — Court held had jurisdiction under S. 7 to decide issue raised in Official Assignee's petition—Flow of consideration for transfers from insolvent held raised presumption of his being real owner — Onus to rebut presumption held on wife.

The jurisdiction conferred by S. 7 is discretionary. S. 7 is very wide in its language and gives the insolvency Court jurisdiction to decide all questions whatsoever, whether of law or fact, which may arise in any case of insolvency. Section 7 is not limited in its scope to matters in which the Official Assignee by the operation of the insolvency law claims a higher title than what the insolvent himself would have had : ('32) 19 A I R 1932 Bom 566; ('29) 16 A I R 1929 Mad 705 (FB) and ('26) 13 A I R 1926 Cal 597, *Rel. on.* [P 252 C 2; P 253 C 1]

The debtors of the insolvent transferred their immovable properties, at the request of the insolvent, to the insolvent's wife and the consideration for the transfers flowed from the insolvent himself, namely, the liquidation of their debts due to the insolvent. The Official Assignee applied to set aside the transfers under S. 55, Insolvency Act and prayed, in the alternative, that the transfers be declared voidable at the instance of the creditors of the insolvent under S. 53, T. P. Act, or, the transfers be declared collusive and benami and that the real owner of the properties which purported to have been transferred to his wife was the insolvent:

Held that (1) the word 'purchaser' in S. 55 meant a person from whom the alleged consideration for the transfer moved and not necessarily the transferee and hence the insolvent having occupied the role of a 'purchaser' and not of a 'transferor' in respect of the transfers to his wife, S. 55 did not apply : (1888) 20 Q B D 732, *Rel. on*; [P 252 C 1]

(2) For the same reason S. 53, T. P. Act, did not apply. [P 252 C 1]

(3) Since the wife was in possession through her agents of the properties in question, and the dispute between her and the Official Assignee was not a matter of possession but a matter of title to the properties, the matter was not one "arising under S. 36," and the jurisdiction of the insolvency Court under S. 7 was not ousted by the proviso to that section. Consequently, it was for the insolvency Judge, in his discretion, to decide whether to permit the trial before himself of the issue between the Official Assignee and the insolvent's wife on the petition of the Official Assignee or to direct the Official Assignee to institute a suit in the ordinary Court having jurisdiction in the matter. [P 253 C 1]

(4) Since the consideration for the transfer flowed from the insolvent there was a presumption that the insolvent was the real owner of the properties transferred and the onus to rebut the presumption was on the wife. [P 253 C 2; P 254 C 1]

(b) Presidency Towns Insolvency Act (1909), S. 36—S. 36 does not contemplate cases of conflict as to title.

Section 36 affords a summary means of enabling the Official Assignee to obtain an order of the Court, when the admitted property of the insolvent has been traced to the possession of a third party, for its delivery to him. It has no reference to cases in which there is a dispute as to whether certain property belongs to the insolvent or not. Such a question of title is not within the scope of S. 36 at all: ('37) 24 A I R 1937 Mad 775 and ('40) 27 A I R 1940 Rang 39, *Rel. on.* [P 256 C 1]

(c) Presidency Towns Insolvency Act (1909), S. 7—Discretion under S. 7 exercised in proper

and judicial manner — High Court in appeal will not interfere.

Where the insolvency Court exercises its discretion under S. 7 in a proper and judicial manner the High Court in appeal will not interfere. [P 253 C 1, 2]

(d) Presidency Towns Insolvency Act (1909), S. 36—High Court will not extend its insolvency jurisdiction to cases where Official Assignee does not claim higher title than insolvent against third person.

As a rule proceedings against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's are not brought in the insolvency jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably should be refused as the High Court is in no way obliged in the insolvency jurisdiction to try such a question: ('26) 13 A I R 1926 Cal 597, *Foll.* [P 253 C 2]

(e) Presidency Towns Insolvency Act (1909), S. 55—Burden of proof.

Under S. 55 burden of proof is on the Official Assignee seeking to set aside a transfer. [P 254 C 2]

(f) Presidency Towns Insolvency Act (1909), S. 55—Insolvent's property under attachment—Insolvent transferring property to his wife—Inference is against bona fide nature of transfer—Onus is on wife to rebut it.

The transfer by an insolvent to his wife of property which is under attachment in execution of a decree against him raises an inference against the bona fide nature of the transaction. The onus lies on the wife to rebut the inference: ('37) 24 A I R 1937 Rang 276, *Rel. on.* [P 254 C 2; P 256 C 2]

F. S. Doctor — for Appellant.

P. K. Basu — for Respondent.

Dunkley J. — These cross-appeals arise out of a petition of the Official Assignee, dated 9th November 1938, in the insolvency of one S. A. L. S. Sathappa Chettyar, whereby the Official Assignee sought to have set aside five transfers of property made in favour of one Visalakshi Achi, who is the insolvent's wife and is the appellant in Appeal No. 28 of 1940 and the respondent in Appeal No. 30 of 1940. By his judgment, dated 5th April 1940, the learned insolvency Judge has held that in respect of the properties purporting to have been conveyed by four of the transfers Visalakshi Achi is merely the benamidar of her husband and these properties are properties of the insolvent which vest in the Official Assignee under the provisions of S. 53 (2), (a) and (b), Rangoon Insolvency Act, but in respect of the properties purporting to have been conveyed by the remaining transfer the petition of the Official Assignee was dismissed. Hence these cross-appeals, and in Appeal No. 28 of 1940, Visalakshi Achi seeks to have the petition of the Official Assignee dismissed in regard to the first four transfers mentioned above, and in Appeal No. 30 of 1940 the Official Assignee seeks to have his petition allowed in regard to the fifth transfer. The petition of the Official Assignee prayed that these five transfers be declared to be void against the Official Assignee under the provisions of S. 55, Rangoon Insolvency Act, or, in the alternative, that the transfers be declared voidable at the instance of the creditors of the insolvent under the provisions of S. 53, T. P. Act, or, in the further alternative, that it be declared that the transfers were collusive and benami and that the real owner of the properties which purported to have been transferred to his wife was the insolvent. The four transfers, in respect of which the petition of the Official Assignee succeeded, and which, therefore, now form the subject-matter of Appeal No. 28 of 1940, were transfers of immovable properties situated in Burma; while the fifth, in respect of which the petition of the Official Assignee failed, and which now forms the subject-matter of Appeal No. 30 of 1940, was a transfer of immovable property of which a very small part is situated in Burma while the rest is situated in Madras.

Dealing first with the four transfers of Burma properties, which form the subject-matter of Appeal No. 28 of 1940, it was urged before the learned Insolvency Judge that the Insolvency Court had no jurisdiction to call these transfers in question by reason of the proviso to S. 7, Rangoon Insolvency Act, and this is one of the main points which have been urged before us in this appeal. The four transfers were made by three persons who were debtors of the insolvent. They transferred their immovable properties, at the request of the insolvent, to the insolvent's wife, Visalakshi Achi, and the consideration for the transfers flowed from the insolvent himself, namely, the liquidation of their debts due to the insolvent. Two of the transfers were made by the M. K. S. Chettyar Firm of Pegu. This firm was indebted to the insolvent in a sum of nearly Rs. 45,000 and in March 1935, that is, fifteen months before the insolvent presented his petition for adjudication, the M. K. S. Firm agreed to transfer, in satisfaction of this debt, 310 acres of agricultural land to the insolvent or his nominee. The two conveyances now in question were executed on 6th July 1935, and 26th March 1936, respectively, and by then the M. K. S. Firm transferred outright to the insolvent's wife 214 acres of land for a consideration of over

Rs. 26,000. The deeds set out that these conveyances were made at the request of the insolvent and in pursuance of the previous agreement between the M. K. S. Firm and the insolvent, and that they were made in partial cancellation of the indebtedness of the M. K. S. Firm to the insolvent.

The remaining two transfers were conveyances by two Burman debtors of the insolvent, Maung Po Di and Maung Lu Pe. They had mortgaged agricultural land to the insolvent, and subsequently, on 12th July 1935, and 17th August 1935, respectively, the mortgaged properties were conveyed by them, free from incumbrance, to the insolvent's wife. In both conveyances the consideration is stated to be a cash payment made by the insolvent's wife to the transferor, but it is admitted that there was no such payment in either case. The deeds are written in English, a language which neither of the transferors understands. They have both given evidence, and have stated that the transfers were made by them in satisfaction of the debts which they owed to the insolvent, and that they had no idea, and were not informed, that the transfers were being made in favour of the insolvent's wife. Maung Po Di says that he was told that the transfer was being taken in the name of some other person and not in the name of the insolvent, but he was not told who that person was and he was indifferent about the matter so long as he obtained satisfaction of his debt to the insolvent. Maung Lu Pe says that he made his transfer in favour of the insolvent himself, and had no idea that the deed expressed that the transfer was made in favour of the insolvent's wife. Their evidence was not challenged at the hearing of the petition.

Now, S. 55, Rangoon Insolvency Act, deals with a transfer in favour of a purchaser, and by "purchaser" is meant the person from whom the alleged consideration for the transfer moved, not necessarily the transferee: (1888) 20 Q B D 732.[1] In regard to these four transfers, the insolvent occupied the role of "purchaser," and not of transferor and consequently S. 55, Rangoon Insolvency Act, has no application thereto. For the same reason, these transfers cannot be attacked under the provisions of S. 53, T. P. Act. In fact, it is clear that in respect of these transactions the Official Assignee cannot claim a higher title than what the insolvent himself would have had. Consequently he must rely on the second alternative averment in his petition, namely, that in spite of the transfers in favour of the insolvent's wife the insolvent is the real owner of these properties. The case of the Official Assignee in support of this contention is that although the original owners conveyed these properties to the insolvent's wife, the consideration for the transfers was paid by the insolvent, and hence in each case the insolvent's wife is a bare nominee, and there is a resulting trust in favour of the insolvent, who and not the transferee is the real owner of the properties: 14 Rang 242.[2] The reply of the wife, Visalakshi Achi, to this averment is that she took these transfers in good faith and for valuable consideration. She alleges that her stridhanam, amounting to nearly Rs. 60,000 was invested in her husband's business, and that she accepted these transfers in partial repayment of the moneys due to her by her husband. For the decision of the question at issue between the Official Assignee and Visalakshi Achi by the Insolvency Court, the jurisdiction conferred by S. 7, Rangoon Insolvency Act, must be invoked. That section is very wide in its language. It gives the Insolvency Court jurisdiction to decide all questions whatsoever, whether of law or fact, which may arise in any case of insolvency, or

> which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case;

that is, the jurisdiction is discretionary. But the section is subject to a proviso which reads as follows:

> Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under S. 36, be exercised only in the manner and to the extent provided by that section.

Section 36, so far as it relates to property, provides for the examination by the Insolvency Court of any person known or suspected to have in his possession any property belonging to the insolvent, and if on such examination the person admits that he has in his possession any property belonging to the insolvent the Court may order him to deliver that property to the Official Assignee. The Rangoon Insolvency Act is except for certain unimportant incidental variations, exactly the same as the Indian Presidency

1. (1888) 20 Q B D 732 : 57 L J Q B 403 : 59 L T 659 : 36 W R 629, Hance v. Harding.

2. ('36) 23 A I R 1936 Rang 256 : 163 I C 211 : 14 Rang 242 (FB), Maung Tun Pe v. B. K. Haldar.

Towns Insolvency Act, and the provisions of S. 7, and its proviso, of the latter Act have been considered on several occasions by Indian High Courts. In 52 Mad 717,[3] a Full Bench of the Madras High Court held that S. 7 is not limited in its scope to matters in which the Official Assignee by the operation of the Insolvency Law claims a higher title than what the insolvent himself would have had, following the earlier decision of the Calcutta High Court in 54 Cal 251.[4] In I L R (1938) Mad 72[5] a Bench of the same Court held that S. 36 of the Act relates only to property admittedly belonging to the insolvent of which the possession is in question, and not to property admittedly in the possession of the person examined of which the ownership is in dispute. In 1930, in the case in 34 Bom L R 1166,[6] the learned Insolvency Judge of the Bombay High Court came to the same conclusion, although he refused to exercise his discretion in favour of the Official Assignee, and directed the Official Assignee to institute a suit in the ordinary Courts.

Now, in the present case, Visalakshi Achi asserts that she is in possession through her agents of the properties in question, and the dispute between her and the Official Assignee is not a matter of possession but a matter of title to the properties. Therefore the matter is not one "arising under S. 36" and the jurisdiction of the Insolvency Court under S. 7 is not in this case ousted by the proviso to the section. Consequently it was for the learned Insolvency Judge, in his discretion, to decide whether he would permit the trial before himself of this issue between the Official Assignee and Visalakshi Achi on the petition of the Official Assignee, or whether he would direct the Official Assignee to institute a suit in the ordinary Court having jurisdiction in the matter. He has, after giving due consideration to the question, assumed jurisdiction and decided the issue. The learned Judge has exercised his discretion in a proper and judicial manner, and consequently it would be wrong for this Bench on appeal to interfere with his exercise of that discretion. The present case presents a special feature in the close relationship of Visalakshi Achi to the insolvent; but I feel bound to say that, in my opinion, this Court ought not to seek to extend its insolvency jurisdiction in the manner in which the High Court of Madras has done. The better practice is the English practice, which has been adopted by the High Courts of Calcutta and Bombay. Rankin J. stated the rule in the following words in 54 Cal 251[4] at p. 258:

> As a rule, however, that class of proceeding against a mere third person as against whom the Official Assignee claims no higher title than the insolvent's is not brought in the insolvency jurisdiction, and in any ordinary case any such motion brought in that jurisdiction unfairly and unreasonably would be refused as the learned Judge is in no way obliged in the insolvency jurisdiction to try such a question.

Dealing now with the facts, the Official Assignee has proved that in 1935 the Bank of Chettinad, a secured creditor of the insolvent, sold the property mortgaged to it in execution of a mortgage decree, and there was a balance of over Rs. 20,000 still due to the bank under this decree, and that in 1934 the A. S. P. V. L. R Chettyar Firm obtained against the insolvent two money decrees for a sum exceeding Rs. 16,000. These decrees remained unsatisfied. At that time the insolvent was carrying on business in Rangoon as S. A. L. S. Chettyar. In 1935 he closed the Rangoon place of business and transferred his business to Dallah, where he carried on business under the vilasam "S. A. L." This transfer of the business to Dallah under a new name when the insolvent was admittedly in serious financial difficulties is extremely suspicious, and the suspicion becomes confirmed by the fact that none of the books of the Rangoon business have been produced. The excuse that they have all been destroyed by white ants is unworthy of serious notice. The insolvent's wife must have been aware of these facts, and she must also have had knowledge of the manner in which these transfers to her were made. It has been established by evidence that the two Burman transferors were kept in ignorance of the real nature of the transactions in which they were taking part. Admittedly, the consideration for all four transfers was paid by the insolvent, and as Page C. J., said in 14 Rang 242,[2] where property is conveyed to A but the purchase price is paid by B, the prima facie inference is that there is a resulting trust in favour of B and that he and

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3. ('29) 16 AIR 1929 Mad 705 : 118 I C 506 : 52 Mad 717 : 57 M L J 145 (FB), Official Assignee, Madras v. Narasimha Mudaliar.
4. ('26) 13 AIR 1926 Cal 597 : 93 I C 834 : 54 Cal 251 : 30 C W N 346, Jnanendra Bala Debi v. Official Assignee of Calcutta.
5. ('37) 24 AIR 1937 Mad 775 : 172 I C 346 : I L R (1938) Mad 72 : (1938) 2 M L J 377, Mrs. Evelyn Popaly v. Official Assignee of Madras.
6. ('32) 19 AIR 1932 Bom 566 : 141 I C 664 : 34 Bom L R 1166, In re Nathuram Gopal Mantri.

not A is the real owner of the property. It was incumbent on Visalakshi Achi to rebut the presumption, which arises in the circumstances of this case, that the insolvent is the real owner of these properties, by proving, as she alleges, that the purchase price was adjusted against her stridhanam deposited in her husband's business. She has completely failed to do so. She has not given evidence herself, although she might well have done so on commission if she was not prepared to come to Rangoon to give evidence before the insolvency Court in a matter of such importance to her. None of her witnesses, not even her own husband, has given evidence that her stridhanam was invested in the insolvent's business, and there is no evidence regarding this allegation, except certain entries in the Dallah account books, which have no probative value whatever in view of the non-production of the Rangoon account books and a copy of a letter, (Ex. 6), which is said to have been sent by the insolvent's agent to the insolvent's wife on 13th March 1929, acknowledging that this money was on deposit in the insolvent's business. The insolvent has failed to account satisfactorily for the non-production of the Rangoon books, and this letter has not been proved by calling the agent in question, and it may well have been written at any time. Moreover, neither the insolvent nor his wife can utilize the insolvent's agent for the purpose of manufacturing evidence on their behalf by writing a letter of this kind, and the letter is worthless. In my opinion, Visalakshi Achi has completely failed to rebut the presumption which arises that the insolvent is the real owner of the properties conveyed to his wife by these four transfers. Appeal No. 28 of 1940 therefore fails, and is dismissed with costs both in this Court and in the insolvency Court, advocate's fee ten gold mohurs in each Court.

Turning now to Appeal No. 30 of 1940, the subject-matter of which is the transfer of the Madras properties, the deed is dated 22nd July 1935, and the transfer was a direct conveyance by the insolvent to his wife, Visalakshi Achi. It therefore falls within the scope of S. 55, Rangoon Insolvency Act. The Official Assignee avers that the transfer was made in bad faith and without consideration. Visalakshi Achi in reply states that she took the transfer in good faith and that the consideration therefore was, as in the case of the other four transfers, partial repayment of her stridhanam which was invested in the insolvent's business. The burden of proof was, of course, on the Official Assignee, and the learned Insolvency Judge has stated in his judgment that there is no evidence to show that the respondent, Visalakshi Achi did not pay consideration for the transfer of the insolvent's Madras properties or that this transfer was not made in good faith. With the greatest respect, the learned Judge has, I think, overlooked that in para. 4 of Visalakshi Achi's written objection she admitted the facts stated in para. 7 of the Official Assignee's petition. This paragraph reads as follows :

> That by a deed which was registered on 1st August 1935, at Karaikudi sub-registration office, Ramnad District, the insolvent transferred his share in two box spaces in Mogul Street, Rangoon, and all his properties in India to the respondent for an alleged consideration of Rs. 22,000 which the insolvent is supposed to have owed to her. The sale was effected when the property was still under attachment in execution of a decree of A. S. P. L. V. R. Firm, obtained against the insolvent. At first she filed an application on the ground that she held an equitable mortgage over the India properties, the application was dismissed. She then filed a regular suit, under O. 21, R. 63, Civil P.C., which was also dismissed. During the pendency of that suit the conveyance was executed in her favour.

Consequently, Visalakshi Achi has admitted that this trasfer was made to her at a time when the properties were under attachment in execution of a decree obtained against the insolvent, and that she had knowledge of the attachment at the time of the transfer. What better proof of bad faith could be forthcoming on the part of the Official Assignee, I can hardly imagine. The admission by Visalakshi Achi of these averments in the Official Assignee's petition affords proof of facts from which bad faith can legitimately be inferred, and as my Lord the Chief Justice said in 14 Rang 704,[7] the burden of adducing cogent evidence in rebuttal of the prima facie case made out by the Official Assignee lay on Visalakshi Achi. I have already dealt with the evidence, or rather lack of evidence, on behalf Visalakshi Achi to show that her stridhanam was invested in the insolvent's business. She clearly failed to rebut the prima facie case which the Official Assignee made out in regard to this transfer. Consequently the transfer must be held to be void against the Official Assignee. Appeal No. 30 of 1940 is therefore allowed, and the Official Assignee is granted a declaration that the transfer of

7. ('37) 24 A I R 1937 Rang 276 : 170 I C 471 : 14 Rang 704, Maung Hmoot v. Official Receiver, Mandalay.

22nd July 1935, by the insolvent in favour of Visalakshi Achi is void against him, with costs both in this Court and in the insolvency Court, advocate's fee in each Court ten gold mohurs. That is, on the whole matter, the Official Assignee is granted an advocate's fee of 20 gold mohurs in respect of the petition in the insolvency Court, and an advocate's fee of 20 gold mohurs for these two appeals together.

Roberts C. J. — I have had the opportunity of reading the judgment which is about to be delivered by my learned brother and with which I respectfully agree. The petition of the Official Assignee was in relation to five transfers of immovable property made in favour of the wife of an insolvent, S. A. L. S. Sathappa Chettyar, who was adjudicated on his own petition on 26th June 1936. Four of these transfers were made by debtors of the insolvent, and one was a direct conveyance by the insolvent to his wife Visalakshi Achi. The Official Assignee sought to have them all set aside under S. 55, Rangoon Insolvency Act, or alternatively under S. 53, T. P. Act. And as regards the four transfers made by creditors of the insolvent to his wife he asked in the alternative for a declaration that the transfers having been made by reason of consideration moving from the insolvent himself were made to the wife as a mere benamidar. The learned trial Judge accepted this last contention in relation to the four transfers and in his discretion exercised his jurisdiction under S. 7, Rangoon Insolvency Act, and granted the declaration prayed for; as regards the other transfer made by the insolvent himself he dismissed the petition. The insolvent's wife has appealed against his decision in respect of four transfers, and there is a cross-appeal by the Official Assignee against the dismissal of the petition in relation to the fifth.

I proceed first to deal with the wife's appeals. Two of the four transfers were made by the M. K. S. Chettyar Firm which owed the insolvent money. At his request and in part performance of an agreement in March 1935 they transferred in the aggregate 213.58 acres of paddy land for Rs. 26,220 to his wife. The two conveyances set out these facts quite clearly. They are dated 6th July 1935, and 26th March 1936 respectively. Two other transfers were made by debtors of the insolvent, Ko Po Di and Maung Lu Pe who had each mortgaged paddy lands to the insolvent, and they conveyed these properties free from incumbrances to his wife on 12th July 1935, and 17th August 1935, respectively. The deeds were in English, a language not understood by the transferors, and according to their evidence they were not told at the time that they were making over the properties to the insolvent's wife. Ko Po Di says that the insolvent told him he would take the sale deed in the name of someone else, but he did not even know the name of the insolvent's wife. Maung Lu Pe says that one month after the transaction he was told it was in the name of the insolvent's wife. In neither case was there any payment by the transferee.

In all these four cases there is evidence to show that the true consideration for the transfers passed from the insolvent himself and was the release of his debtors, the transferors. The insolvent's wife contends that she was a creditor of her husband in respect of stridhan due to her; there is no satisfactory evidence at all of the truth of this contention. We have not seen the account books of the Rangoon firm of S. A. L. S. Chettyar. It is suggested that they have been eaten by white ants in circumstances which are left to our imagination. But there is an entry in the books of the Dalla branch of the firm crediting amounts paid as due to her by way of stridhan "through the account of S. A. L. Rangoon." The vilasam was altered at a time when the insolvent was in serious financial straits since there were unsatisfied decrees outstanding against him.

But although it is clear that the insolvent's wife has not rebutted the inference to be drawn from all these facts that the consideration for the transfers passed from the insolvent, it is equally clear that neither S. 55, Rangoon Insolvency Act, nor S. 53, T. P. Act, has any application. Upon the authority in (1888) 20 Q B D 732[1] the purchaser was the insolvent himself, and the statutes mentioned relate only to transactions in which the insolvent is the transferor and the purchaser is some other person. The learned trial Judge accordingly dealt with these four transfers under S. 7, Rangoon Insolvency Act, which says :

> Subject to the provisions of this Act, the Court shall have full power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

Then there is a proviso :

Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under S. 36, be exercised only in the manner and to the extent provided in that section.

The insolvent's wife could certainly have been, but was not summoned by the Court under S. 36; but the result of such a summons, as her written statement makes clear, would have been a denial that there was any property belonging to the insolvent in her possession. She does not, however suggest that she is not in possession of the properties transferred; her denial relates not to her possession of them but of her husband's title to them. In 55 Mad 385[8] Cornish J. said (at p. 390) :

If the person supposed to be a debtor of the insolvent or to have the insolvent's property in his possession does not admit the fact, then, unless all the parties otherwise agree the insolvency Court cannot determine the matter under S. 7.

The "fact" in the Madras case is the fact of possession. But the question raised here does not relate to possession. It does not ask where the admitted property of the insolvent may be. It asks whether property admittedly in his wife's hands belongs to him or not; and it is therefore a question of title. Section 36 (5) affords a summary means of enabling the Official Assignee to obtain an order of the Court, when the admitted property of the insolvent has been traced to the possession of a third party, for its delivery to him. It has no reference to cases in which there is a dispute as to whether certain property belongs to the insolvent or not. Such a question of title is not within the scope of S. 36 at all. This was pointed out in 1939 R L R 731[9] and indeed had already been made clear in ILR (1938) Mad 72.[5] The power given to the Court under S. 7 was not therefore affected by the proviso in this case, and the learned Judge was entitled to exercise jurisdiction in the way he did. As was pointed out by Rankin J., in 30 C W N 346[4] the rule that the Official Assignee should have recourse to the jurisdiction in insolvency only when he has a higher title than that of the insolvent is not a rule of law in the sense that the insolvency Court cannot entertain such a case in proper circumstances; but care must be taken to see that the rights of third parties are not prejudiced by the omission to proceed by way of a regular suit. That decision was before the enactment of the proviso to S. 7. Since its enactment, a Full Bench of the Madras High Court in 52 Mad 717[3] has restated the first proposition enunciated by Rankin J., but does not appear to have uttered the caution which followed it. The circumstances of the present case are such as bring it well within the limits, of the Calcutta decision which appears to me, with great respect, to lay down a salutary rule of practice which should guide the Court in the exercise of its discretion whether to assume jurisdiction or not.

The cross-appeal relates to a transfer of properties mainly in Madras by the insolvent direct to his wife and effected on 22nd July 1935. The question of its validity falls to be decided under S. 55, Rangoon Insolvency Act, and is dealt with in para. 7 of the Official Assignee's petition. This was admitted as "substantially correct" in para. 4 of the written statement. The transfer was made when the property was still under attachment in execution of a decree obtained against the insolvent. The wife first claimed that she was a mortgagee by deposit of title deeds, and this claim was dismissed. She then filed a regular suit under O. 21, R. 63, Civil P. C., and that was also dismissed. During the pendency of that suit the conveyance was executed in her favour. With due respect to the learned trial Judge I feel that his attention was not sufficiently drawn to the effect of para. 4 of the written statement, and these facts appear to me to raise an inference against the bona fide nature of the transfer which has been in no way rebutted. The appeals of the insolvent's wife must therefore be dismissed and the cross-appeal of the Official Assignee must be allowed. I agree with the decree and orders as to costs as set out in the judgment of my learned brother.

G.N./R.K. *Order accordingly.*

8. ('32) 19 AIR 1932 Mad 167 : 135 I C 585 : 55 Mad 385 : 62 M L J 103, Chinappa Mudali v. Official Assignee of Madras.
9. ('40) 27 A I R 1940 Rang 39 : 187 I C 45 : 1939 R L R 731, In re T. S. N. Chettyar Firm.

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*(28) A. I. R. 1941 Rangoon 256

MYA BU AND MOSELY JJ.

Secretary Burma Oil Subsidiary Provident Fund (India) Ltd.—Applicant

v.

Dadibhar Singh—Respondent.

Civil Revn. No. 198 of 1940, Decided on 18th February 1941, against order of Small Cause Court, Rangoon, in C. Misc. No. 185 of 1940, D/- 4th June 1940.

* Civil P. C. (1908), S. 60 and O. 21, R. 46 — "Debt" means actually existing debt — Provident fund amount standing to credit of person cannot be attached in execution of decree against him.

The word 'debt' as used in S. 60 and in O. 21, R. 46 means an actually existing debt that is a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen: 27 Cal 38, *Rel. on.* [P 259 C 1]

Even though in a Provident Fund account an amount stands to the credit of a member, he obtains no interest in it until the payment, which shows that the mere fact that a certain amount is credited to a member's account does not indicate that he holds an interest in such amount. The member's right to have the money paid to him will arise only in the event of his dismissal or retirement as provided in the rules of the fund which may or may not happen before his death, or his becoming insane. And this applies both to contribution or subscription made by the member out of his salary and the contributions made by the company. Hence such money even though credited to the member's account cannot be attached in execution of a decree against him: ('39) 26 A I R 1939 Bom 90; ('33) 20 A I R 1933 Cal 701 and (1887) 3 T L R 354, *Rel. on.* [P 258 C 2; P 259 C 1]

Mootham — for Applicant.

R. K. Roy — for Respondent.

Mya Bu J. — This is an application for revision of an order passed by the Court of Small Cause, Rangoon, under O. 21, R. 63 (B), Civil P. C., directing the applicant to pay into Court the sum of money mentioned in a prohibitory order which had been served on the applicant at the instance of the respondent in execution of his decree against one Maung Hla Kyaw, a clerk employed by the Burmah Oil Company at their store at Chauk. Maung Hla Kyaw, as an employee of the Burmah Oil Company, has been a a member contributing to the provident fund organised by the Company. The fund is administered under a deed of trust made between the Company of the one part and the Burmah Oil Subsidiary Provident Fund Trust Ltd. of the other part. Under the rules drawn up with respect to the fund, the company deducts from the salary of each member one-twelth part thereof and pays the same forthwith to the trustees, who credit these amounts to an account opened in the name of each member, which is designated as his "A" account. At the end of each year a bonus equal to the amount contributed by each member to his "A" account during the year is paid over by the company to the trustees, to the credit of another account opened in the name of each member, which is designated as his "B" account. The maintenance of these accounts is provided for by Rr. 5 and 6.

Rule 7 requires a subscriber upon his becoming a member, to furnish a declaration in the form provided, as to the disposition of the money at the credit of his account in the event of his dying or becoming insane before retirement. Rule 9 provides for the forfeiture of the right of a member, to the amount standing to his credit in both "A" and "B" accounts, in the event inter alia of a prohibitory order or attachment or process of a civil Court being served on the trustees or any of them or on the company or on any person on their or its behalf by which any monies standing to the credit of a member in the books of the fund shall be attached or be ordered to be paid into a civil Court or be ordered to be withheld from such member. Rule 10 prohibits withdrawals from the amount at the credit of any subscriber's "A" or "B" account until he finally leaves the service of the company or dies, although the same rule permits the trustees in the exercise of their discretion and with the previous consent in writing of the general manager to make certain payments from the employee's "A" account during his service under certain special circumstances and upon certain conditions. Under Rule 12 the company retains the first and paramount claim on the amount standing to the credit of a member in his "B" account upon the member being guilty of an act of embezzlement, neglect or default causing loss or injury to the company, or on his dismissal or voluntary resignation from the service of the company (otherwise than on account of ill-health or other unavoidable cause) before the expiration of 20 years' continuous service. Rule 13 provides that when a member is dismissed, or retires, from the service of the company without the consent of the company without having completed an unbroken period of five years for any reason other than ill-health or other sufficient cause, he shall be paid only the amount then standing to the credit of his "A" account, all the monies standing to the credit of his "B" account reverting to the fund. Rule 14 provides that on the retirement with the consent of the company, of any member, who shall have served for an unbroken period of five years, from the service of the company, he shall be paid the full sum standing to his credit. Rule 15 provides that if any member while still in the service of the company, shall die or become insane, the

sum standing to his credit without any deduction (subject to the satisfaction of any claims of the company under R. 12) shall be paid to the person or persons named in the declaration form prescribed under R. 7 or failing such declaration at the discretion of the trustees. Maung Hla Kyaw became a member of the fund on 1st July 1935. The prohibitory order in question was served on the Secretary, Burma Oil Subsidiary Provident Fund Trust (India) Limited, on 19th February 1940, restraining him from making payment of a sum of Rs. 175-12-0 out of the amount standing to the credit of Maung Hla Kyaw in his "A" account to any person whomsoever or otherwise than into Court. The sum standing to the credit of Maung Hla Kyaw's "A" account on 19th February 1940 was Rs. 268-2-0. It is not disputed that an employee of the company on becoming a subscriber to the provident fund, agrees to be bound by the rules and regulations framed under the scheme of trust. The trust itself was created by a deed in which it is laid down (in cl. 4) that:

> The trustees shall stand possessed of all the monies and investments forming part of the fund and the income thereof respectively as and when received by them upon trust to deal with the same in accordance with the rules.

The question that falls for determination is whether the amount standing to the credit of the "A" account of a member of the fund is susceptible of attachment. Two distinct lines of argument have been submitted to us by the learned advocate for the applicant. One is that a member's interest, so long as his membership subsists, is merely a contingent interest and not a vested one until it is due and payable to him under the rules, and therefore no part of such amount is his property and does not constitute a debt payable to him. The other is that upon the service of the prohibitory order the right of the member to the amount standing to his credit not only in the "B" account but also in the "A" account became forfeited and reverted to the fund under R. 9. The latter proposition was dismissed by the learned trial Judge on the authority of a previous decision of a single Judge of this Court in Civil Revn. No. 336 of 1939,[1] in which an amount standing to the credit of a member's "A" account in the same fund was sought to be attached. The learned Judge, after setting out the rules framed, said:

> An examination of these rules makes it quite clear, in my opinion, that the member's money is handed over to the trustees to be dealt with by them in accordance with these rules. A subscriber relinquishes his right of complete control, but nowhere is it suggested that the money ceases to be his property.

Examining R. 9 from this standpoint, it was held that it could be effective only so far as the acts of members themselves are concerned, but the mutual agreement to do away with the existing rights of independent third parties could not be valid. With all respect, in my opinion, cl. 4 of the deed of trust, which most probably was not placed before the learned Judge, read with the rules of the fund, indicate that the trustees retain the complete control over the money until it is due to be paid under the rules. It cannot be disputed that even though an amount stands to the credit of a member's "B" account he obtains no interest in it until the payment, which shows that the mere fact that a certain amount is credited to a member's account, either "A" or "B," does not indicate that he holds an interest in such amount. Under the rules, a member is entitled to receive the money standing to the credit of his "A" account upon his dismissal or retirement at any time, but such dismissal or retirement is a condition precedent to his right to obtain the money. So long as the member continues to remain in the service of the company he has no right of withdrawing the amount or part of the amount standing to the credits of his "A" or "B" accounts. If he dies or becomes insane while in service, the amount becomes payable to the person or persons nominated by him under R. 7. Therefore, the member's right to have the money paid to him will arise only in the event of his dismissal or retirement, which may or may not happen before his death, or his becoming insane.

The Court of Appeal Case in (1887) 3 T L R 354[2] and the case in A I R 1939 Bom 90[3] which followed (1887) 3 T L R 354[2] show that although one has deposited his money with another person or an institution that money is not his property and attachable in execution of a decree against him under O. 21, R. 46 (i) (c), Civil P. C., unless and until it is due to be repaid to him; therefore, from the mere fact that the money is the accumulation of subscriptions paid out of a member's salary, together with interest, it

1. *Reported in* ('41) 28 AIR 1941 Rang 239, R. C. Dass v. Burma Oil Subsidiary Provident Fund Trust (India) Ltd.

2. (1887) 3 T L R 354, Hutt v. Shaw.

3. ('39) 26 AIR 1939 Bom 90 : 180 I C 360 : ILR (1939) Bom 109 : 41 Bom L R 19, Gajraj Sheokarandas v. Hukamchand Sarupchand.

does not follow that it is his property until it is due to be paid to him. Certain observations of Lort-Williams J., in 60 Cal 926[4] appear to me to be in point although the main decision in that case turns upon a certain question which is quite different from those arising in the present case. At p. 928 the learned Judge stated :

> It is clear that no member has any property in the fund, nor can make any claim upon it, except as provided by the rules, so far as these are legally valid.
>
> Except as regards the extent of the operation of R. 9, the validity of the Burma Oil Subsidiary Provident Fund Rules is not in question, and the observations quoted above apply both to contribution or subscription made by the member out of his salary and the contributions made by the company. The fact that the money is credited to the member's "A" account cannot make the slightest difference. With reference to the forfeiture clause in the rules under consideration in 60 Cal 926[4] the learned Judge observed :
>
> The company contends that, if and when, any order of the Court is served upon the trustees, by which any such sum standing to the credit of any member is ordered to be paid into Court or to be withheld from the member, such sum is forthwith forfeited to the use of the fund. This means really that, in such circumstances, the member forthwith loses his right to make any claim on the fund, because no member has any property in the fund, which belongs to the trustees, and cannot, therefore, forfeit any part of it.

This, in my opinion, is the proper way of construing R. 9, Burma Oil Subsidiary Provident Fund Rules. The rule does not connote that any property of the member of any vested interest of his is forfeited, but the member forthwith loses upon the happening of any of the events mentioned in the rule, his right to make a claim on the fund, which is contingent on his ceasing to be in the employ of the company. The forfeiture does not vest the money in the trustees, the money having already vested in them. The money cannot be attached as a 'debt' due to the judgment-debtor, because the word "debt" as used in S. 60, and in O. 21, R. 46, Civil P. C., means an actually existing debt that is a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen : *see* 27 Cal 38.[5] For these reasons, this application must be allowed, and the order of the Court of Small Causes set aside : the respondent to pay the applicant's costs in both Courts : advocate's fee in this Court, three gold mohurs.

Mosely J.—I agree.

K.S./R.K. *Application allowed.*

4. ('33) 20 AIR 1933 Cal 701 : 147 I C 422 : 60 Cal 926 : 37 C W N 1050, In re Ernest Clarence O'Brien.

5. (1900) 27 Cal 38 : 4 C W N 87, Haridas Acharjia v. Baroda Kishore Acharjia.

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(28) A. I. R. 1941 Rangoon 259

MYA BU AND MOSELY JJ.

Gulam Ali — Appellant

v.

Rahmatulla Khan — Respondent.

First appeal No. 11 of 1940, Decided on 7th February 1941, against order of Dist. Court, Sagaing, D/- 16th October 1939.

(a) Succession Act (1925), S. 263 — Surety to administration bond—Application by surety for cancellation of bond on ground of maladministration—Court has no power to cancel bond and release surety from liability for future transactions — S. 130, Contract Act, does not apply to such bonds.

The Court has power to require fresh security where the existing security fails, or, revoke a grant where such fresh security is not given; but it has no power to cancel a surety bond and release the surety from liability for future transactions on the ground of maladministration as the very object of requiring security is to prevent maladministration. *Case law discussed.* [P 261 C 1]

Section 130, Contract Act, does not apply to contracts of suretyship on administration bonds : ('26) 13 AIR 1926 P C 32, *Rel. on.* [P 260 C 1]

(b) Succession Act (1925), S. 263 — Scope — S. 263 is exhaustive of cases of just cause.

Section 263 of the Act is exhaustive of the cases in which just cause shall be deemed to exist for the revocation or annulment of the grant of letters of administration. ('20) 7 AIR 1920 Cal 584; 28 Mad 161 and 24 Cal 95, *Rel. on.* [P 261 C 1]

K. C. Sanyal — for Appellant.

Mosely J. — This appeal arises out of an order passed by the District Judge rejecting an application by the appellant, one of the sureties of a person to whom letters of administration of a certain estate had been granted, for cancellation of his surety bond on the ground that the administrator had been maladministering the estate. The application was opposed by the administrator. The learned District Judge, after a full discussion of the law and of the authorities on the subject, dismissed the application as incompetent. It is contended in appeal that the guarantee given by the surety was a continuing one revocable as to future transactions by the surety by notice under the provisions of S. 130, Contract Act, (the section says "by notice to the creditor"). Alternatively it is argued that the Court had

power to discharge the surety, or should equitably do so. There is admittedly no express provision in the Succession Act enabling the Court to discharge the surety or cancel his bond; nor is there any provision in the Act as to what is to be done if the surety dies or wants to be relieved. Section 291, Succession Act, is the section providing for the giving of administration bonds. Section 264 is the section which deals with the grant and revocation of letters of administration. It was held by the Chief Court of Lower Burma in 10 Bur L T 237,[1] following 28 Mad 161,[2] and by the Judicial Commissioner Upper Burma in 4 U B R 22[3] that S. 130, Contract Act, does not apply to contracts of suretyship on administration bonds. It was held in 29 Cal 68[4] that S. 130 did apply but the matter has been set at rest by the decision of their Lordships of the Privy Council in 30 C W N 266.[5] In that case the decision of a Bench of the High Court of Calcutta was affirmed. That Bench had held that when a surety had been accepted as such by the Court he could not free himself from liability without the consent of the Court. The further question, whether the Court could grant such a request, did not come up for consideration.

Two cases have been cited, where it was held that it was equitable that the surety, (who is not a beneficiary and cannot bring an administration suit to prevent waste), should have a right to be discharged as regards future transactions in the case of maladministration. The remarks, really obiter, to this effect in the first of these cases 29 Cal 68[4], were based on (1872) 13 Eq 450[6] at page 457. That, however, was a case of a continuing guarantee for all money due, or which should become due, by a customer to a bank. The leading English case (1865) L R 1 P 76[7] was not cited. There it was held that the Court will not discharge the original sureties to an administration bond and allow other sureties to be substituted for them. The question whether a surety to an administration bond may be discharged from future liability, upon good cause shown, with the sanction of the Court was discussed, but not decided in A I R 1925 Cal 158.[8] 19 Bom 245[9] is a case where the surety of the guardian of a minor's estate applied to be released from his obligation as surety on account of the guardian's maladministration of the estate. It was remarked there that the very object of requiring security was to guarantee the minor against such mismanagement on the part of the guardian. So in the case of an administration bond, the object of requiring security is to prevent maladministration. In 28 Mad 161[2] also it was held that a surety could not be discharged from his bond on the ground of maladministration by the administrator. The making of such an order, it was said, might defeat the object for which an administrator is required to find sureties for his adminstration bond. 33 Mad 373[10] is to the same effect. The other case, where it was held that the Court had power to release the surety, is 54 ALL 293.[11] The judgment of Sulaiman C. J. said that the surety admittedly could not claim as of right to be relieved of all future liability on application to Court; yet it was held that the Court to which the guarantee had been given, had the power to cancel that guarantee in a proper case. That was a case where letters of administration had been revoked because it had been found that the administrator had omitted to bring certain material facts to the knowledge of the Court. It was said that it would be astonishing if there were no provision of law which would give the surety a remedy. But it does not follow that every grievance has a remedy in law, and the judgment itself began by admitting that the surety could not claim as of right. It was said that the case was similar to one where the security bond becomes inoperative subsequently, as, for example, where the surety becomes an insolvent, and that if it were held that the Court had no jurisdiction to entertain the application, it would have to be held that the Court was functus officio whenever a bond was executed, and

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1. ('17) 4 AIR 1917 L B 173 : 36 I C 1000 : 10 Bur L T 237, Maung Ba Oh v. Pa Pwa.
2. ('05) 28 Mad 161 : 14 M L J 482, Subroya Chetty v. Ragammal.
3. ('21) 8 AIR 1921 U B 25 : 4 U B R 22, Ma Myo Zin v. Ma Pwa.
4. ('02) 29 Cal 68 : 6 C W N 7, Raj Narain Mookerjee v. Ful Kumari Debi.
5. ('26) 13 AIR 1926 P C 32 : 98 I C 506 : 30 C W N 266 (PC), Mahomed Ali Mamoojee v. Howeson Brothers.
6. (1872) 13 Eq 450 : 41 L J Ch 515 : 26 L T 540 : 20 W R 811, Burgess v. Eve.
7. (1865) L R 1 P 76 : 35 L J P 42 : 13 L T 682 : 14 W R 349, In the goods of Stark.
8. ('25) 12 AIR 1925 Cal 158 : 76 I C 1009, Radhikanath Biswas v. Rati Kanta Bakshi.
9. ('95) 19 Bom 245, Bai Somi v. Chokshi Ishardas.
10. ('10) 33 Mad 373 : 5 I C 311 : 7 M L T 160, In the matter of Arthur Gerald Norton Knight.
11. ('32) 19 AIR 1932 All 262 : 140 I C 127 : 54 All 293 : 1932 A L J 140, National Guarantee and Suretyship Association v. Prayag Deb Banerji.

would be unable to direct a fresh security to be filed by another surety.

I do not consider that the two cases are similar. There is no question of the security bond having become inoperative where the surety asks that he be discharged by reason of mismanagement of the administrator. On this point I am of opinion that the proper point of view is that given in 47 Cal 115.[12] It was rightly said there, as in 28 Mad 161,[3] 24 Cal 95[13] and 26 Bom 792[14] that S. 50, Probate and Administration Act, (which corresponds to S. 263, Succession Act), is exhaustive of the cases in which just cause shall be deemed to exist for the revocation or annulment of the grant of letters of administration. The relevant part of S. 263 is S. 263 (d), which says that just cause should be deemed to exist where the grant has become useless and inoperative through circumstances. It was rightly said in 47 Cal 115[12] by Mookerjee and Walmsley JJ. that the Court may require a new bond or additional security where the interest of the estate requires it, and especially where a new situation arises, such as an unforeseen increase of assets or an unexpected breakdown of sureties. If new surety is not given the Court may cancel the grant. It is essential for the purpose of the bond, if due administration is not to be defeated, that the bond should remain operative and effective until the administration has terminated. In such cases, if new security cannot be given, the bond becomes inoperative, for sub-s. (d) applies to cases where the circumstances contemplated have happened since the date of the grant. Several English authorities are cited on this point, including 1900 L R P 154.[15] It is clear, I consider, that the Court has power to require fresh security where the existing security fails, or revoke a grant where such fresh security is not given; but it is equally clear that the Court has no power to cancel a surety bond and release the surety from liability for future transactions on the ground of maladministration. I agree with what was said in ILR (1939) 2 Cal 1,[16] where all or nearly all of these authorities have been discussed. This appeal will be dismissed.

Mya Bu J. — I agree.

K.S./R.K. *Appeal dismissed.*

12. ('20) 7 AIR 1920 Cal 584 : 51 I C 936 : 47 Cal 115 : 29 C L J 496 : 23 C W N 763, Surendra Nath v. Amrita Lal.
13. ('97) 24 Cal 95, Annoda Prosad Chatterjee v. Kalikrishna Chatterjee.
14. ('02) 26 Bom 792 : 4 Bom L R 637, Bal Gangadhar Tilak v. Sakwarbai.
15. (1900) L R P 154 : 69 L J P 48 : 82 L T 692, In the goods of Loveday.
16. ('39) 26 AIR 1939 Cal 737 : 185 I C 431 : I L R (1939) 2 Cal 1, In the goods of Nani Lal Das.

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(28) A. I. R. 1941 Rangoon 261

FULL BENCH

ROBERTS C. J., BA U AND DUNKLEY JJ.

Maung Daw Na and another
— Defendants — Appellants

v.

Maung Wa Maung and others
— Plaintiffs — Respondents.

Special Second Appeal No. 280 of 1940, Decided on 24th July 1941, against decree of Dist. Court, Sagaing, D/- 15th June 1940.

Mortgage — Unregistered — Mortgagor suing for possession — Title proved — Invalid mortgage can be used for proving nature of possession — Evidence of title vague — Mortgage unregistered cannot be used to prove title.

Although a person cannot sue for redemption on the strength of an abortive or invalid usufructuary mortgage, yet if he sues for possession and proves his title and then the defendant sets up adverse possession the plaintiff may prove that the character of the possession was not adverse to him by giving evidence of the factum of the unregistered mortgage though not of its terms .But where the plaintiff's evidence as to ownership is vague, an unregistered mortgage cannot be used for proving the plaintiff's title to the land : 1937 Rang L R 442, *Approved;* ('35) 22 A I R 1935 Rang 230 (FB) and ('40) 27 A I R 1940 Rang 11 (FB), *Ref.*

[P 262 C 2]

U E Maung — for Appellants.

U Aye Maung for U Ba Soe — for Respondents.

Roberts C. J.—In Civil Regular No. 51 of 1938 in the Township Court of Myaung the respondent brought a suit against the appellants for delivery of possession of some two and a quarter acres of land on repayment of Rs. 180 which they said they had borrowed from appellant 1, Maung Daw Na. The Township Court framed no issue as to the title of the plaintiffs-respondents, (although in the written statement the defendants-appellants had challenged their title to the land) ; but passed a decree in the terms of the plaint. On first appeal the learned District Judge allowed the appeal and set aside the judgment and decree of the trial Court; he held that the suit was really one for redemption of a mortgage which should have been registered, but in respect of which no registration had been effected, and that consequently it was not maintainable. On second appeal Wright J. remanded the case to the Township Court under the provisions of O. 41, R. 23, Civil P. C., directing that suitable issues with

regard to the plaintiffs' title and their right to recover possession of the property, based on that title, should be framed. The learned Township Judge held that the plaintiffs had failed to prove their title. In his judgment he says that the plaint is rejected, but this technical phrase does not accurately describe what happened: a plaint may be "rejected" on any of the grounds set out in O. 7, R. 11 of the Code; where it discloses no cause of action, or where it appears from the plaint that the suit is barred by any law, or by reason of incorrect valuation or stamping and subsequent default. But in this case issues were framed upon the plaint and written statement, and were determined when the learned Judge had heard evidence. He then decided that the plaintiffs had failed to prove their case. In my opinion he was right in so deciding, and in dismissing their suit as he plainly intended to do and must be deemed to have done. The plaint was admitted but the suit was dismissed. Upon appeal to the District Court the learned District Judge rightly observed that the case had been remanded by the High Court to be dealt with as a suit for possession. However, he allowed the appeal and gave the plaintiffs, the present respondents, a decree for possession on payment of Rs. 180 by them to the defendants. If they had really proved that they were the owners of the land they would be entitled to a decree without any such condition being affixed: 13 Rang 274.[1]

The defendants, the present appellants, appealed, and my learned brother Sharpe J. in second appeal has referred this appeal to us, in order to deal with a point of law which may be of far-reaching application by reason of some observations of Baguley J. in his order of reference in 1939 R L R 645[2] upon the decision of Mosely J. in 1937 R L R 442.[3] I welcome this opportunity to state that in my respectful opinion the decision in the latter case was entirely correct, but that the present situation shows that its true nature has been misconceived; and possibly Baguley J. with his long experience felt that it required some explanation if misconception as to its scope were to be altogether avoided. When a person sues for possession of land he must prove his title to it, unless that title is admitted. Section 110, Evidence Act, is quite plain upon the point. Suppose, however, that his title is admitted, or that he successfully proves it, the defendant may set up a possession which is adverse to that title and, which (he claims) defeats it; and the question will at once arise whether such possession is adverse to the title and does defeat it, or whether it may be explained on other grounds. Although a person cannot sue for redemption on the strength of an abortive or invalid usufructuary mortgage, yet if he sues for possession and proves his title and then the defendant sets up adverse possession, the plaintiff may prove that the character of the possession was not adverse to him by giving evidence of the factum of the mortgage though not of its terms. This is all that the judgment in 1937 R L R 442[3] decides, and Mosely J. was most careful to say so.

Baguley J. nevertheless must have entertained some apprehension lest this decision should be mistakenly cited as an authority for the proposition that proof of the abortive or invalid usufructuary mortgage should be admitted to establish the plaintiff's title, whereas it is not authority for any such proposition, which would be manifestly incorrect. So, here, the fact that the plaintiffs were dealing with the land as their own does not show that the land belonged to them, though if the land were proved to have belonged to them it might show that the person or persons in possession of it were not holding it upon a title adverse to the true owners. The learned District Judge has described the evidence as to the ownership of this land as 'somewhat vague.' I agree with him and in my opinion he would not, and could not have held that the plaintiffs had proved their title unless he had considered the unregistered mortgage. But evidence of this can only be given for 'the collateral purpose of showing the nature of the defendants' possession' (to use the words of Mosely J.) and not for the purpose of proving the plaintiffs' title to the land. The plaintiffs were unable to surmount this preliminary difficulty and consequently the decision in 1937 R L R 442[3] has no application here. Accordingly, I would allow the appeal and direct that the judgment of the learned District Judge must be set aside and that the judgment and decree of the Township Court of Myaung dismissing the suit for the respondents must be restored. The respondents must pay the costs of the appellants

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1. ('35) 22 A I R 1935 Rang 230 : 157 I C 565 : 13 Rang 274 (F B), Ma Kyi v. Mg. Thon.
2. ('40) 27 A I R 1940 Rang 11 : 186 I C 69 : 1939 R L R 645 (F B), Maung Lu Pe v. Maung San Mya.
3. ('37) 1937 R L R 442, U Thet Pan v. Ma Phu Saing.

in all Courts; advocate's fee in this Court eight gold mohurs.

Ba U J.—I agree.

Dunkley J.—I agree.

R.K. *Suit dismissed.*

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(28) A. I. R. 1941 Rangoon 263

SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

Commissioner of Income-tax, Burma

v.

A. K. A. R. Chettiar Family — Assessees.

Civil Ref. No. 1 of 1941, Decided on 10th April 1941.

(a) Income-tax Act (1922), S. 4 (2) — Money remitted to assessee from foreign branch of his business—Remittance must be presumed to be made out of profits — Remittance must belong to assessee—Assessee Bank's customer instructing assessee's foreign branch to send his money to assessee Bank in Burma to be credited to his account in Burma — Remittance does not fall under S. 4 (2) and cannot be taxed.

When money is remitted from a foreign country, where the assessee carries on business, the remittance must be presumed to have been made out of profits : ('33) 20 A I R 1933 Mad 14 (SB) ; ('37) 24 A I R 1937 Lah 884 and 8 I T C 112, *Rel. on.* [P 263 C 2]

But in order that the presumption may be applicable, the remittance must, of course, be a remittance by the assessee of money belonging to the assessee. Consequently where the remittance to the assessee Bank from the foreign branch of his business consists of money belonging to a customer of his and not to the assessee and is sent on the customer's instructions to be credited to his account in Burma with the assessee the remittance does not fall within the purview of S. 4 (2) and is not liable to income-tax : 8 I T C 112, *Disting.* [P 263 C 2 ; P 264 C 2]

(b) Income-tax Act (1922), Ss. 4 and 6— Assessee banker and money-lender taking over land in liquidation of his debt—Land is not fixed capital but working assets — Land sold by assessee piecemeal — Transaction between assessee and debtor cannot be said to be complete until entire land is sold — Transaction can be assessed only in accounting year in which it is completed.

The lands and other immovable property taken over by the assessee bankers and money-lenders in liquidation of debts due to them in respect of loans are not fixed capital but working assets, and part of the stock-in-trade of their business as money-lenders. Where the property taken over from the debtor is sold in parts from time to time, the transaction between the assessee and his debtor cannot be said to be complete until the whole of the property has been sold. It is possible only then to ascertain whether a profit chargeable to income-tax has accrued or a loss has been incurred. Such a transaction cannot therefore be assessed except in the accounting year in which it is completed : ('34) 21 AIR 1934 Rang 274 and ('40) 8 I T R 179, *Rel. on*; ('32) 19 A I R 1932 P C 178, *Expl.* [P 264 C 2; P 265 C 1]

Foucar — for Assessees.

Tun Byu, Government Advocate — for the Crown.

Dunkley J. — In this reference, under the provisions of S. 66 (2), Burma Income-tax Act, the Commissioner of Income-tax has referred to us for decision two questions of law arising out of the assessment to income-tax in Burma of the Hindu undivided family of A. K. A. R. Chettiar for the year 1938-39. This family carries on a banking and money-lending business with branches at Mandalay and Ngathainggyaung in Burma and at Taiping in the Federated Malay States. The matters with which this reference is concerned arise out of the working of the branch at Ngathainggyaung. There is no connexion between the two questions referred, except that they arise out of the same assessment, and the questions must be dealt with separately. The first question is as follows :

Whether on the facts proved there were materials to support the finding of the Assistant Commissioner that the sum of Rs. 10,000 sent by the applicants' branch at Taiping to the applicants under the instructions from and on behalf of a creditor of the applicants were a remittance to the applicants of foreign profits taxable under S. 4 (2), Burma Income-tax Act.

Under S. 4 (2), Burma Income-tax Act, income, profits and gains accruing or arising without British Burma to a person resident in British Burma shall, if they are received in or brought into British Burma, be deemed to have accrued or arisen in British Burma, and to be income, profits and gains of the year in which they are so received or brought; and the assessment of the sum of Rs. 10,000 with which we are now concerned is based on the presumption that when money is remitted from a foreign country, where the assessee carries on business, the remittance is made out of profits, A I R 1933 Mad 14;[1] A I R 1937 Lah 884;[2] 8 I T C 112.[3] In order that the presumption may be applicable, the remittance must, of course, be a remittance by the assessee of money belonging to the assessee.

Now the facts of the present case are that one Meenakshi Achi had a current account with the Taiping branch of the assessee,

1. ('33) 20 AIR 1933 Mad 14 : 141 I C 330 : 63 M L J 796 (SB), Meyappa Chettiar v. Commissioner of Income-tax, Madras.
2. ('37) 24 AIR 1937 Lah 884 : 176 I C 294, Spedding Dinga Singh & Co. v. Commissioner of Income-tax.
3. ('34) 8 I T C 112, A. K. A. C. T. V. Family v. Commissioner of Income-tax, Burma.

which account was in credit in a considerable sum. On 15th October 1937, Meenakshi Achi instructed the Taiping branch to send a sum of Rs. 10,000 by banker's draft to their branch at Ngthainggyaung, this amount to be placed to her credit in a new account to be opened at Ngathainggyaung, and the cost of the draft to be debited to her account at Taiping. Her instructions were duly carried out. A draft for a sum of Rs. 10,000 on the Chartered Bank at Rangoon was purchased, and this amount was paid by the Chartered Bank to the Ngathainggyaung branch to the credit of Meenakshi Achi. Clearly the money sent was the money of Meenakshi Achi, and not the money of the assessee, and the remittance was made by her and not by the assessee. 8 I T C 112[3] is readily distinguishable for in that case the money was transferred at the instance and under the instructions of the assessees, and not under the instructions of the client. It is idle to say that the relation between a banker and his client is that of debtor and creditor, and that when the client deposits money in his account that money becomes the money of the banker which he can use as he thinks fit for the purpose of his business; that consideration is irrelevant to the facts of this case. In purchasing the draft on the Chartered Bank the Taiping branch of the assessee was acting as the agent of Meenakshi Achi, and the position was exactly the same as if Meenakshi Achi had herself withdrawn the necessary funds from the Taiping branch and herself purchased the draft. If the Chartered Bank at Rangoon had failed to honour the draft, the loss would have fallen on Meenakshi Achi and not on the assessee. The legal position disclosed by the facts of this case is exactly the same as it would have been if Meenakshi Achi had withdrawn this sum from the Taiping branch in cash and had personally carried it in cash to Ngathainggyaung and deposited it in cash with the Ngathainggyaung branch. A suggestion is made in Para. 5 of the order of reference that this remittance was made in an attempt to defraud the Income-tax authorities, and the Income-tax officer in his assessment order said that the assessee had been "clever enough" to transfer part of the liability of Meenakshi Achi to Ngathainggyaung. We deprecate such vague charges made on no evidence whatever. This remittance was made at the express request of a client of the assessee, and there is no foundation whatever for the suggestion that she had entered into a conspiracy with the assessee to defraud the revenue. She desired to have part of her money at Ngathainggyaung and her reason for wishing to have money there is no concern of the Income-tax authorities. If a remittance of this kind is to be taxed as foreign profits brought by a banking concern into the country, no bank will ever be able to make a remittance from a branch in one country to a branch in another on behalf of and at the instructions of a client. It is clear that the first question must be answered in the negative. The second question is:

> Whether in the circumstances of the case the loss of Rs. 5137-8-0 suffered by the applicants on the sale of some lands and a house, which were taken ever together without separate valuation for the lands and the house and sold in parts from time to time, the sale of the entire block of the said assets having been completed only in the accounting year, is not an admissible deduction in computing the total income of the applicants for the accounting year ?

With all due respect, I should have thought that this question, as framed, provided its own answer. As I have said, the assessee family carried on a money-lending business, and it has been pointed out in 12 Rang 483[4] that in this country Chettyars are bankers and money-lenders, and not landowners. They may be compelled to take over lands and other immovable property in liquidation of debts due to them in respect of loans, but the land which is received in repayment of a loan is the equivalent of cash, and should be treated as money's worth, and as such not fixed capital but working assets, and part of the stock-in-trade of their business as money-lenders. Furthermore, in assessing the amount of the profits and gains of a year which are chargeable to income-tax account must necessarily be taken of all losses incurred in that year. The Commissioner of Income-tax does not contest these propositions. Now, in the year 1928-29 the assessee took over 63.34 acres of paddy land and a house in settlement of a debt of Rs. 9000. The land and the house have been sold at different times since then, at the best prices available at the time of the respective sales. The assessee has kept an account of these sales, and the account shows that when all the property had been sold there was a loss on the whole transaction of Rs. 5137-8-0. The last sale was the sale of the house, and that took place during the accounting year.

4. ('34) 21 A I R 1934 Rang 274 : 151 I C 907 : 12 Rang 483, Commissioner of Income-tax, Burma v. P. L. S. M. Concern Minhla.

No claim on account of any loss on this transaction has been made in any previous year, and in the accounting year the assessee claimed to deduct as a trading loss the total loss on the whole transaction. In my opinion, he was clearly entitled to do so, for not until the transaction had been completed could he know what his loss was. The Income-tax authorities put forward the, to my mind, untenable proposition that in each year in which a sale of a part of the property took place the assessee ought to have made an estimate of his loss on that particular sale and ought to have claimed the loss estimated to have been incurred on that particular sale in the accounting year in which it took place. How any such estimates could possibly be made in this piecemeal fashion passes my comprehension. On some sales a loss might be estimated, on others a profit, and in every case the estimated result would be a matter, to a considerable extent, of guess-work, and the final result of this series of guesses might be entirely different to what the result of the whole transaction was in actual fact. In 12 Rang 483[4] at page 498 the learned Chief Justice said :

> It is fair and reasonable that an adjustment of the assessment should be made in the accounting year in which the assessees sell the lands, when it will be possible finally to ascertain whether or not in respect of the transaction a profit chargeable to income-tax has accrued to the assessees.

With this opinion I am, with the greatest respect, in complete agreement, and it is plain that when the learned Chief Justice referred to the "accounting year in which the assessees sell the lands" he meant the year in which the lands are finally and completely sold and the transaction is completed. In endeavouring to support the contention of the Commissioner of Income-tax, the learned Government Advocate has referred to the case in 59 I A 290,[5] and it is said, on the authority of this case, that, whenever it can be done, the assessee ought and must estimate his losses each year and allocate them to the year in which they are in fact incurred. This is undoubtedly correct. But in the course of their judgment in this case at p. 297 their Lordships of the Privy Council said this:

> Whether a debt is a bad debt, and if so at what point of time it became a bad debt, are questions which in their Lordships' view are questions of fact, to be decided in the event of dispute by the appropriate tribunal, and not by the ipse dixit of anyone else.

In the present case, no one could say that a loss had been incurred on this transaction, or what the amount of that loss, if any, was, until the transaction had been completed by the sale of the whole of the property. The case in (1940) 8 I T R 179[6] is clear authority for the proposition that when only a part of a property has been sold, whilst the rest remains in the hands of the assessee, and might result in a profit or might result in a loss, and the whole transaction is not yet complete, no assessment can be made. The answer to the second question must therefore be that the loss of Rs. 5137-8-0 is an admissible deduction in computing the profits and gains of the assessee for the accounting year. The assessee is entitled, as against the Commissioner of Income-tax, to the costs of this reference, advocate's fee fifteen gold mohurs, and to a refund of the deposit made under section 66 (2).

Roberts C. J. — I agree.

Sharpe J. — I agree.

G.N./R.K. *Reference answered.*

5. ('32) 19 A I R 1932 P C 178 : 137 I C 772 : 59 I A 290 : 28 N L R 205 (P C), Commissioner of Income-tax, C. P. & Berar v. S. M. Chitnavis.

6. ('40) 8 I T R 179, In re K. H. Mody.

(28) A. I. R. 1941 Rangoon 265

ROBERTS C. J. AND DUNKLEY J.

Ma Tin Aye — Appellant

v.

Khin Khin Gyi and another — Respondents.

First Appeal No. 94 of 1940, Decided on 27th March 1941, against decree of District Court, Mandalay, D/- 3rd June 1940.

(a) Buddhist Law (Burmese)—Adoption—Keittima adoption—Proof of — Formal ceremony of adoption is not necessary — Whether ceremony takes place or not there must be proof of publicity—Ceremony public—Publicity may be established by proof of that fact alone — Adoption private — There must be proof of publicity and notoriety in addition — No specific occasion appealed to—Evidence of isolated conversations with number of persons in which adoptive parent is alleged to have made remarks indicating adoption of child does not constitute publicity and notoriety — Publicity and notoriety in such case should be established by evidence of opinion as expressed by conduct of persons having special means of knowledge — Publicity should be of adoptive parent's intention that child adopted should inherit his or her property.

In the case of a keittima adoption a formal ceremony of adoption is not necessary. Whether there is or is not a ceremony of adoption, there must be proof of publicity; if the ceremony of adoption is public then publicity may be established by proof of

that fact alone; but if it be private, then there must be proof of publicity and notoriety in addition in order to establish the existence of the relationship. When a person alleging a keittima adoption relies for proof of the factum of adoption on a course of conduct which is said to be inconsistent with any other supposition, then adequate proof of the publicity and notoriety of the relationship must be insisted upon : 36 Cal 978 (P C); ('17) 4 AIR 1917 PC 136 and ('28) 15 AIR 1928 P C 197, *Rel. on.* [P 267 C 1, 2 ; P 268 C 1]

In the case of a keittima adoption when no specific occasion is appealed to, the evidence of isolated private conversations with a number of persons in which the adoptive parent is alleged to have made, remarks indicating that she had adopted a certain child is not sufficient to establish publicity or notoriety so as to establish relationship of parent and child. In such case the notoriety or publicity must be established by the evidence of opinion expressed by conduct of persons having special means of knowledge. If a person puts himself or herself outside the reach of the public so as to be unable to give the status of an adopted child by according publicity to the new relationship, the only way which is left is the method of a public ceremony. The publicity of which proof is required must be publicity of the fact that the adoptive parent intended the child to inherit his or her property : ('36) 23 AIR 1936 Rang 344, *Rel. on.* [P 267 C 1]

(b) Buddhist Law (Burmese) — Adoption — Apatitha adoption—Apatitha child living apart from parents is not entitled on surviving parent's death to inherit—Circumstances of case pointing to separation having been more desirable— Proof of joint living cannot be dispensed with.

An apatitha child who lives apart from his or her parents is not entitled on the surviving parent's death to inherit. Merely because the circumstances of the case point to a separation having been more desirable the proof of joint living cannot be dispensed with in seeking to establish a claim to inheritance on the ground of apatitha adoption : ('37) 24 AIR 1937 Rang 455, *Rel. on.* [P 267 C 2]

A. N. Basu — for Appellant.

S. B. Leong — for Respondents.

Roberts C. J.—This is an appeal from a decision of the learned District Judge of Mandalay who dismissed the appellant's application for letters of administration to the estate of one Daw Tint who died in a kyaung in the Sagaing Hills (mainly inhabited by women who are devoted to religious observances) on 4th January 1939. The evidence is that Daw Tint took the appellant when the latter was three years of age from Ma Kin She, the grandmother of the little girl with whom she was living. Ma Kin She said that the appellant was the child of Ma Shwe Hman by one So Maung but that Ma Shwe Hman, who was the daughter of the witness Ma Kin She, was not permitted to marry So Maung and was married later to somebody else, and therefore the present appellant would be born out of wedlock. Daw Tint, on the other hand, was a person of some social standing before she entered the zayat in which she began to live a meditative life as a recluse. The little girl was admittedly of very youthful age and became a nun at the age of six, and the learned Judge has pointed out that that in itself does not suggest that Daw Tint desired at that time that the little girl should inherit her worldly possessions but is rather an argument to the contrary although in no way conclusive. The appellant became tired of being a nun and ran away with a pongyi by whom she gave birth to a child. She then came back and Daw Tint, overlooking this lapse, took her again to live with her and the appellant married some one else at the age of eighteen, and thereafter they lived for a time at the kyaung but, of course, it was an unsuitable place for family life, and the evidence is that Daw Tint did not like to see her son-in-law loafing about the place with nothing to do, and accordingly she encouraged the married couple to go and live at Mandalay, which they did in a house which was Daw Tint's property. The appellant has said with great candour that at no time prior to Daw Tint's death in 1939 was she aware that she was anything but the natural daughter of Daw Tint, and this fact, to my mind, is of the greatest importance in deciding whether the status of keittima adoption contended for by the appellant has ever been reached. In 5 L B R 118[1] at p. 123 Lord Dunedin said :

It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

These very words were quoted again in 44 I A 251[2] at p. 254 by the late Lord Phillimore. In 6 Rang 520,[3] another decision of the Privy Council, the decision in 5 L B R 118[1] was referred to in the following terms :

It was held that, according to the law of Burma, no formal ceremony is necessary to constitute adop-

1. ('09) 36 Cal 978 : 3 I C 797 : 5 L B R 118 : 36 I A 192 (P C), Ma Ywet v. Ma Me.
2. ('17) 4 A I R 1917 P C 136 : 42 I C 863 : 45 Cal 1 : 44 I A 251 (P C), Maung Thwe v. Mg. Tun Pe.
3. ('28) 15 A I R 1928 P C 197 : 110 I C 306 : 6 Rang 520 (P C), Maung Ba Pe v. Maung Shwe Ba.

tion. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved.

These cases, which may be taken as representing the settled law upon this matter, all go to show that, whether there is or is not a ceremony of adoption, there must be proof of publicity; if the ceremony of adoption is public then publicity may be established by proof of that fact alone; but if it be private, then there must be proof of publicity and notoriety in addition in order to establish the existence of the relationship. In the present case, as the learned District Judge has pointed out, the evidence tendered in support of keittima adoption has been the testimony of a number of sayadaws and other persons who visited the kyaung in which Daw Tint lived on different occasions and to whom Daw Tint is alleged to have made remarks indicating that she had adopted the appellant. There was no occasion when all these persons were together and anything like a public declaration was made; on the contrary they all give evidence of isolated private conversations, and therefore even if all that evidence is accepted at its face value, it does not amount to evidence of publicity or notoriety such as is required in a case of this kind. There is no evidence here of the opinion of those with special means of knowledge which has been expressed by conduct so as to bring it under S. 50, Evidence Act. If a number of persons had been called to say that the appellant was treated in a way which the Court could hold as only consistent with the wish of Daw Tint that she should inherit her property, that would be a different thing. But, as has been pointed out in 14 Rang 557,[4] the publicity of which proof is required must be publicity of the fact that the adoptive parent intended the child to inherit his or her property. Mr. Basu has urged upon us that in the particular circumstances of the case it was not easy for Daw Tint to give publicity to the factum of adoption; all she could do was to tell a number of persons who came there that she had in fact adopted this child and did intend that she should inherit her property; but the answer to that appears to me to be a simple one. A formal ceremony of adoption is not necessary; but if it does not take place the publicity which is requisite for proof of the factum of adoption must be supplied in some other way, and if a person puts himself or herself outside the reach of the public so as to be unable to give the status of an adopted child by according publicity to the new relationship, the only way which is left is the method of a public ceremony.

In my opinion, therefore, the learned District Judge, having considered all this evidence and directed himself rightly with regard to the evidence of publicity, was correct in coming to the conclusion that no keittima adoption had been established. He has said in his concluding remarks that the most he could hold was that the adoption was in the apatitha form; but it is admitted by Mr. Basu that since the decision in 1937 R L R 426[5] an apatitha child who lives apart from his or her parents is not entitled on the surviving parent's death to inherit, and in this case it is clear that after the appellant's marriage she went to live in Mandalay. We have been told that it was inconvenient that they should live at this zayat for nuns; but the rule of law appears to be one which has been established; merely because the circumstances of the case point to a separation having been more desirable the proof of joint living cannot be dispensed with in seeking to establish a claim to inheritance on the ground of apatitha adoption. There is one matter to which I ought to have referred before in connexion with the question of keittima adoption. It has been urged that at the time of Daw Tint's death when the wife of U Lun, the municipal assessor in Mandalay, advanced some money for the funeral the fact that the appellant received the advance jointly with other persons is a point in her favour. In my view this contention cannot be sustained. This lady advanced money not only to Ma Tin Aye but to Khin Khin Gyi and Khin Maung Hpone, the respondents. She demanded on the promissory note the signature of all parties who were in any way interested in Daw Tint or might possibly have any claim to the inheritance after Daw Tint's death, and she did that from a motive of caution which can be easily understood. If there had been any publicity of the fact that Ma Tin Aye was the keittima daughter of Daw Tint, there would have been no necessity whatever to ask for the signatures of Khin Khin Gyi and Khin Maung Hpone to the promissory note. For all these reasons I am of the opinion that this appeal must

4. ('36) 23 AIR 1936 Rang 344 : 164 I C 272 : 14 Rang 557, Ma Than Nyun v. Daw Shwe Thit.

5. ('37) 24 AIR 1937 Rang 455 : 173 I C 238 : 1937 R L R 426, Ko Pe Kyai v. Ma Thein Kha.

be dismissed with costs, advocate's fee ten gold mohurs.

Dunkley J. — I agree. From the judgments of their Lordships of the Privy Council on this question of adoption one principle emerges very clearly, and that is that when a person alleging a keittima adoption relies for proof of the factum of adoption on a course of conduct which is said to be inconsistent with any other supposition, then adequate proof of the publicity and notoriety of the relationship must be insisted upon. The principal judgments of their Lordships on this point have been cited by my Lord the Chief Justice. Now, apart from the fact that it is extremely unlikely that a woman who had withdrawn herself from the world and was living as a recluse in a place inhabited by nuns would ever think of adopting a child with a view to inherit, there is in this case no adequate proof of the publicity or notoriety of the relationship for which the appellant contends. She has called certain persons who have given evidence of alleged oral admissions made to them by the deceased, but that does not amount to publicity or notoriety; and, in my view, in a case of adoption where no distinct and specified occasion is appealed to, it would be extremely difficult to establish the necessary publicity or notoriety without evidence of opinion expressed by conduct of persons having special means of knowledge, and there is no such evidence in this case. Moreover, if the necessary publicity had been given to this relationship during the lifetime of the deceased, it is, in my opinion, impossible that the appellant herself, who was 23 years of age when her alleged adoptive mother died, would not have known of this relationship. She must, in fact, have come to know of it long before she reached that age if the keittima adoption was a fact which was publicly known. She herself has stated in her evidence that it was not until after Daw Tint's death that she came to know that she was not Daw Tint's natural child. For these reasons, therefore, I agree with my Lord the Chief Justice that this appeal fails and must be dismissed, and I agree with my Lord's order as to the costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Rangoon 268

BA U J.

U Shwe Yon — Applicant

v.

Maung E — Respondent.

Civil Revn. No. 258 of 1940, Decided on 25th February 1941, from order of Township Court, Tharrawaddy, in C. R. No. 84 of 1940.

Burma Tenancy Act (10 of 1939), S. 40 — Dispute relating to compensation between two tenants.

The jurisdiction of a Civil Court is not barred from trying a dispute relating to compensation between two tenants. [P 269 C 1]

Chan Htoon — for Applicant.

Hla Min — for Respondent.

Order.—The point raised for decision is whether the jurisdiction of a civil Court is barred from trying a dispute of the nature now in question. The applicant Shwe Yon took a lease of paddy land from Ma Sein for the agricultural year 1939-40. When the year was over the lease was not renewed in favour of Shwe Yon but it was given to the respondent Maung E and he was put in possession thereof. Maung E started raising a nursery bed, ploughed up the land and made other arrangements for cultivation. In the meantime Shwe Yon applied to the Revenue Officer to direct the owner to renew the lease to him but the application was dismissed. On appeal to the Deputy Commissioner the order of the Revenue Officer was set aside and the owner was directed to renew the lease and put Shwe Yon in possession of the land. In compliance with the order of the Deputy Commissioner the respondent Maung E was turned out of the land and the applicant Shwe Yon was put in possession thereof. In consequence thereof the present suit was instituted by Maung E against Shwe Yon. By his plaint Maung E claims damages in respect of the nursery bed which he had raised and the other arrangements which he had made for cultivation. The defence is that a civil Court is debarred from taking cognizance of a suit of the present nature. The defence was rejected by the Township Judge and the suit was directed to proceed to trial on the merits. The present application is for revision of the order rejecting the aforesaid defence of the applicant. The only relevant section dealing with the question of jurisdiction is S. 40, Tenancy Act. It provides :

40. **Except as hereinbefore expressly provided no civil Court shall exercise jurisdiction in respect of the adjudication of any matters the determination of which is expressly entrusted to Revenue Officers by this Act.**

The matters the determination of which is expressly entrusted to Revenue Officers by the Act are set out in Chs. 3, 4 and 5 of the said Act; the operation of some of these provisions has been suspended by the Ordinance 12 of 1940. None of these provisions, whether they are still in force or not, applies to a matter of the kind now in question. Therefore, in my opinion, the jurisdiction of a civil Court is not barred from trying a dispute relating to compensation between two tenants. For these reasons I dismiss the application with costs two gold mohurs which will follow the final result of the case.

K.S./R.K. *Application dismissed.*

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* (28) A. I. R. 1941 Rangoon 269

BA U J.

Ma Wa Nu and others — Appellants

v.

Ma Than — Respondent.

Reference arising out of S. A. No. 164 of 1940, Decided on 27th February 1941.

Court-fees Act (1870), Sch. 2, Art. 17 (iii) — Suit for declaration that certain gift deed to which plaintiff is not party does not affect his right, title or interest to land is one for mere declaration—Plaintiff through mistake treating his suit as one for declaration with consequential relief in lower Courts and paying court-fees accordingly — Memorandum of appeal can be stamped as for mere declaration.

Where in a suit what the plaintiff asks for is a declaration that under a deed of gift to which he is not a party no right, title or interest has passed to the defendant, or the declaration he asks for is that his right, title or interest in the lands in suit is not affected by the said deed of gift, the suit is a suit for a declaration without consequential relief. And because the plaintiff by mistake over-paid the court-fees both in the Court of first instance and in the lower appellate Court by treating the suit as one for declaration with consequential relief it does not follow that he should be called upon to do so in the second appellate Court : 10 Cal 380, *Expl.;* 30 Cal 788; ('15) 2 A I R 1915 Mad 948 (FB) and ('17) 4 A I R 1917 Cal 668, *Rel. on.*

[P 270 C 1]

Dangali — for Appellants.

Tun Byu, Government-Advocate — for the Crown.

Order. — In this case the plaintiffs who are the appellants before this Court treated the suit which they instituted in the Subdivisional Court of Pyinmana as a suit for a declaration with consequential relief. They valued the relief at Rs. 3000 and paid court-fees thereon. They lost the suit and went up on appeal to the District Court of Pyinmana and in that Court also they paid court-fees on Rs. 3000. There again they lost the appeal and so they have now come up to this Court on second appeal and paid Rs. 10 as court-fees, arguing that their claim is one for a declaration without any consequential relief and that therefore the memorandum of appeal should be stamped under Art. 17 (iii), Sch. 2, Court-fees Act. The Taxing Master does not agree with this view. In the opinion of the learned Taxing Master the plaintiff-appellants cannot now claim that the suit is one for a mere declaration since they have treated it originally as one for a declaration with consequential relief. In support of this view the learned master relies on 10 Cal 380.[1] What has been decided in that case is that the appellants cannot change the nature of the suit in appeal for the purpose of determining the court-fees payable. The question is whether the appellants have now changed the nature of the suit for the purpose of determining the court-fees payable.

Now, the facts are these: Originally there were five plaintiffs. Plaintiff 1, Ko Tun Hlaing was the brother of the deceased U Sein and plaintiff 2 Ma Wa Nu was the first wife of U Sein. The minor plaintiffs are the children of Ma Wa Bu by her deceased husband U Sein. Sometime before his death U Sein made a gift of three pieces of suit land to his second wife Ma Than (now respondent before this Court) by a registered deed. In consequence thereof, the present suit was instituted. In their plaint the plaintiffs say that plaintiff 1, Ko Tun Hlaing, is the owner of the land described in para. 2 (a) of the plaint and that the other plaintiffs are the owners of the other pieces of land and that under the deed of gift executed by U Sein no right, title or interest in the said lands has passed to the defendant Ma Than. They further allege that by the deed of gift a cloud has been cast on their title to the lands and their right to possession thereof. They therefore pray for a declaration that the plaintiffs are legally in possession of the suit properties, no right, title or interest to the said properties having passed to the defendant under the registered deed of gift.

Now, the question is whether on the plaint as it stands, the suit is a suit for a mere declaration or a suit for a declaration with consequential relief. In 38 Mad 922[2] the Madras High Court says that the sub-

1. ('84) 10 Cal 380, Mohamed Nasik v. Malkai Mukhadrai Uzwa Badshah Mehal Saheba.
2. ('15) 2 A I R 1915 Mad 948 : 28 I C 79: 38 Mad 922 : 28 M L J 118 (FB), Arunachalam Chetty v. Rangasawmy Pillai.

stance and not the language of the plaint is to be looked to and that a suit for a declaration that an instrument of mortgage or sale executed by the plaintiff or a decree that has been passed against the plaintiff is not binding upon him is a suit for a declaration with consequential relief, but it adds that where the suit is by a person not a party to the bond or the decree it may be regarded as one for a declaration only. The Calcutta High Court in 30 Cal 788[3] also holds the same view. It says that a suit in which the only prayer is to have it declared that a certain decree is ineffectual and inoperative against the plaintiff is a suit for a declaratory decree without consequential relief and falls under Art. 17, cl. (iii), Sch. 2, Court-fees Act. This was followed in 21 C W N 375.[4] In principle there is no difference between the present case and the cases cited above. The plaintiffs were not parties to the deed of gift executed by U Sein in favour of the defendant and so all they ask for is a declaration that under the said deed of gift no right, title or interest has passed to the defendant. In other words, the declaration they ask for is that their right, title or interest in the lands in suit is not affected by the said deed of gift. The suit out of which the present appeal arises, is, therefore, in my opinion, a suit for a declaration without consequential relief. Because the plaintiffs by mistake over-paid the court-fees both in the Court of first instance and in the lower appellate Court it does not follow that they should be called upon to do so in this Court.

It is, however, not within my province to see whether the suit is properly framed, whether the plaintiff is entitled to the declaration asked for or what would be the effect if the plaintiffs succeed in obtaining a declaration as prayed for. If the Court trying the appeal finds that the suit as framed is not maintainable, it will either dismiss it or make such other order as it considers proper. I have only to see whether it is a memorandum of appeal in a suit to obtain a declaratory decree where no consequential relief is prayed : (per *Ghose J.* in 27 C W N 972.[5])

I may also refer to 30 A L J 466[6] and 31 A L J 1537.[7] For all these reasons I hold that the memorandum of appeal has been correctly and properly stamped under Art. 17 (3) of Sch. 2 to the Court-fees Act.

K.S./R.K. *Reference answered.*

3. ('03) 30 Cal 788, Zinnatunnessa Khatun v. Girindra Nath.
4. ('17) 4 AIR 1917 Cal 668: 35 I C 797: 21 CWN 375, Bagala Sundari Debi v. Prosanna Nath.
5. ('24) 11 AIR 1924 Cal 183: 80 I C 589: 27 C W N 972, Gokul Nath Jiu v. New Birbhum Coal Co., Ltd.
6. ('32) 19 AIR 1932 All 560: 141 I C 112 : (1932) 30 A L J 466, Brij Gopal v. Suraj Karan.
7. ('34) 21 AIR 1934 All 56 : 149 I C 802 : (1933) 31 A L J 1537, Abdul Samad Khan v. Anjuman Islamia Gorakhpur.

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(28) A. I. R. 1941 Rangoon 270

ROBERTS C. J. AND DUNKLEY J.

S. M. Bholat — Appellant

v.

Yokohama Specie Bank Ltd. — Respondent.

First Appeal No. 9 of 1941, Decided on 7th April 1941, against decree of High Court, in Suit No. 32 of 1940, D/- 11th December 1940.

(a) Negotiable Instruments Act (1881), Ss. 115 and 113 — S. 113 does not apply to "drawee in case of need"—Vendor taking bill of exchange to his own order — Property in goods cannot pass to purchaser until he accepts bill and meets it on presentation—Purchaser accepting bill but dishonouring it on presentation—Contract with purchaser ends — Vendor presenting same to "drawee in case of need" who accepted it — Property in goods passed to "drawee in case of need."

Section 113 does not apply to a "drawee in case of need" in a bill of exchange. Where the vendor takes a bill of exchange to his own order, the property in the goods cannot pass to the purchaser until he accepts the bill and meets it on presentation. But when the purchaser accepts the bill and dishonours it on presentation the contract between him and the vendor comes to an end and thereafter when the bill is accepted and met on presentation by the "drawee in case of need" the property in the goods passes to the "drawee in case of need" unless the purchaser can show some new contract between him and the vendor. [P 271 C 1, 2]

(b) Contract Act (1872), S. 2 (b) — Silence to letter is not acceptance of its terms.

Silence to a letter does not amount to an acceptance of the terms proposed: (1862) 11 C B (N S) 869, *Rel. on.* [P 272 C 1]

Talukdar — for Appellant.

Cowasjee — for Respondent.

Roberts C. J.—This appeal must be dismissed. It raises an astonishing amount of misconception with regard to the law of negotiable instruments, for the facts are plain and admit of no real dispute and the conclusions arising out of them have been quite clearly expressed by the learned Judge on the original side who tried the case and who, quite rightly, was not bound to explain the difference between a "drawee in case of need" and a "payer for honour" in the case of negotiable instruments. The facts show that some time in May 1939 the plaintiff was the consignee of certain coils of galvanized wire which he had obtained

from a firm named Toho of Osaka and the consignors sent to the bank in Osaka, who forwarded them to the branch of the Yokohama Specie Bank in Rangoon, a bill of lading which was a document of title to the goods and a bill of exchange. On the discounting of the latter the bill of lading would pass title in the goods to the payer. When the bill of exchange arrived at the bank it was seen that there was, in addition to the name of Bholat upon it, the name of the Central Commercial Corporation as "drawee in case of need," and that of course means that if the bank for any reason were unable to obtain payment from Mr. Bholat, the plaintiff, they could resort to the "drawee in case of need" who might, not out of consideration for Mr. Bholat or any wish to be his creditor but purely as a matter of its own concern, pay the money, and obtain title to the goods themselves under the bill of lading. The bank, as it was bound to do, first presented the bill of exchange to the plaintiff, and it was accepted by him on 30th May 1939 for payment on 20th July. There had been a dispute as to whether the coils of galvanized wire were in accordance with the specification, and it is common ground that through a mistake in Japan far too much wire was sent and the coils weighed a great deal more than had been stipulated for, and therefore as the learned Judge has pointed out, Mr. Bholat was in a position either to repudiate the contract or accept it, but he chose to follow the middle line and fell between two stools in the matter. At the outbreak of war long after his bill had been dishonoured Mr. Bholat became aware that coils of galvanized wire might command a much readier sale in the market than had previously been the case, and due to difficulties which traders would have in order to obtain supplies the price was going up, and consequently it would be a very good thing for him to have purchased the amount in excess of what he originally wanted at a much higher price, and he endeavoured to get a reconsideration of the matter. But, as Mr. Talukdar has very properly admitted,—and could not do otherwise, — the property in the galvanized wire coils never passed to him and the contract which he had originally entered into by reason of his accepting the draft came to an end when the draft was dishonoured on 20th July 1939.

In those circumstances the bank had recourse to the "drawee in case of need," and they first of all met with some hesitation, but it is quite wrong to say that the bill was ever dishonoured by the "drawee in case of need." It was accepted finally by the Corporation on 11th September. At that stage the position, of course, was that when the bill was met on presentation the documents of title to the goods would pass to the "drawee in case of need." There is no kind of ground for the suggestion that they would pass to the plaintiff who had renounced his position under the old contract and had not made any new one. In the case of a "payer for honour" the situation is quite different because the name of the "payer for honour" is not on the face of the document; he does not come in in order to assist an acceptor who is temporarily pressed for funds and to whom he desires to offer some kindness or whose creditor he is ready to be. The "drawee in case of need" comes in as an entirely independent person and his name is inserted in the bill because the drawer desires to receive payment of the money for the goods which had been consigned to him. Consequently the provisions of S. 113, Negotiable Instruments Act, have no application to a "drawee in case of need," as he is called in the Act itself.

As the learned Judge has pointed out, there is authority for saying that no property in the goods passes to the purchaser until acceptance of the draft where the vendor (in this case the bank) takes the bill to his own order, and it is clear that the bank were the owners of these goods after 20th July and that the first persons to make a contract with them were the "drawees in case of need" by their acceptance of the draft on 11th September. The bill was met on presentation on 27th September and thereupon the Central Commercial Corporation were entitled to the goods. If on any date between those two dates and while the Central Commercial Corporation yet had interest in the goods by reason of the fact that they had accepted the bill drawn on them in case of need, another contract had been ever made with Mr. Bholat, he might no doubt sue the bank on that contract.

He has here contended up to a certain point that he was entitled at all time to the goods by reason of the fact, as he says, that there was an understanding between him and the Yokohama Specie Bank at Rangoon that there would be a settlement after instructions were received from Osaka. Learned counsel has been unable to show on his behalf when a firm contract was entered into

but he has tried to rely upon the visit of the plaintiff to the bank on 22nd September and upon some subsequent correspondence in which no reference is made to a firm contract having been entered into. Indeed from the terms of one of the letters it seems that an offer was made for the first time, and that no acceptance had been forthcoming. We are invited to say that although there is no answer to this letter there was an implied acceptance by the bank. It is enough to remark that plaintiff has not shown that any assistant in the bank had any authority to enter into any such contract, much less that he had done so. The learned Judge has found as a fact that there was no acceptance by the bank. Silence to a letter is not acceptance of the terms proposed in it. In (1862) 11 C B (N S) 869,[1] Mr. Felthouse offered by letter to buy his nephew's horse for £30 15S., adding "If I hear no more about him I shall consider the horse is mine at £30 15S." It was held—and it is now a very elementary proposition of law — that Felthouse was wrong in considering that the horse was his at £30 15S. or any other figure.

It is, I think, clear that the great anxiety on the part of Mr. Bholat to change his mind and to secure these coils of galvanized wire made him think that somehow the position became altered when on 26th September he received a letter from Mr. Toho who had been a long time before, but was not at that date any longer, the owner of the coils of galvanized wire. Mr. Toho referred to his own conversations with the bank and communications with them and was obviously ready and willing that Mr. Bholat should receive these consignments and was saying so to Mr. Bholat; he was using his endeavours on Mr. Bholat's behalf and at the same time asking if he wanted goods of some other description. It is quite plain that Mr. Toho was doing his best to do further business with the plaintiff and was saying that, so far as he was concerned, he was quite ready to accept payment from the plaintiff. But the true owners of the goods, the bank, had already made a contract with another person; that contract was due to Mr. Bholat's default. Therefore, in my opinion, there can be no doubt that the learned Judge was right in the view which he took, that Bholat was blowing hot and cold, had made default in his first contract, that no second contract was ever entered into with him, and that on the contrary the right, title and interest in these goods had passed to the third parties in case of need when the bill which they accepted was met by them on presentation. It follows that this appeal must be dismissed with costs on the ad valorem scale.

Dunkley J.—I agree. It seems to me to be a plain case. The consignor handed over the documents of title and also a bill of exchange at 60 days sight to the head office of the Yokohama Specie Bank at Osaka, and when the bank discounted the bill the goods, which were being consigned, became the property of the bank. Consequently, on arrival of these documents and the bill of exchange at Rangoon it was, of course, for the Yokohama Specie Bank at Rangoon to carry through the contract, which so far was merely executory, with the appellant. To this contract the provisions of Ss. 25 (1) and 46 (2), Sale of Goods Act, are clearly applicable. Under S. 25 (1) the property in the goods did not pass to the appellant until he had accepted and met the bill upon presentation. He accepted the bill, but when the bill was presented for payment on 20th July he dishonoured it. His learned counsel concedes that thereupon the contract with him for the sale of these goods came to an end, and that is clear from the provisions of the two sections which I have just quoted.

Then the appellant is bound to say that there was some new contract entered into between the Rangoon branch of the respondent bank and the appellant, and for this purpose he relies on a letter of 22nd September which he sent to the bank. To this letter no reply was given. The letter stated that the appellant was at that stage prepared to pay the amount due on the bill of exchange and all charges provided he could get delivery of the goods. Of course, that was a mere offer which had to be accepted and for its acceptance the appellant relies on oral evidence, regarding an alleged oral acceptance by Mr. Paul. But, unfortunately for the appellant, apart from any question as to what Mr. Paul did say to the appellant, the appellant has omitted to prove that Mr. Paul had any authority from the bank to enter into a contract on the bank's behalf. Therefore the appellant's case was bound to fail.

G.N./R.K. *Appeal dismissed.*

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1. (1862) 11 C B (NS) 869 : 31 L J C P 204 : 10 W R 423 : 6 L T (NS) 157 : 132 R R 784, Felthouse v. Bindley.

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SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHAW JJ.

Commissioner of Income-tax

v.

S. P. K. A. R. M. Family.

Civil Ref. No. 9 of 1941, Decided on 21st August 1941, made by the Commissioner of Income-tax, Burma.

(a) Income-tax Act (1922 as amended in 1939), S. 4A (b) — Hindu joint family business — Family cannot be said to reside at place of residence of individual member where such residence is fortuitous and divorced from control and management of business.

Section 4A (b) does no more than clarify the existing position by pointing out that in the case of a joint Hindu family business the residence of individual members of the undivided family cannot be material from which it could be inferred that the family resided there if such residence were fortuitous and divorced from control and management of the business. Consequently, the family cannot be said to reside in all those places where members of the family live, and the fact that one member of the undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there : ('32) 19 A I R 1932 Mad 435 (S B), *Disting.*

[P 273 C 2 ; P 274 C 1]

(b) Income-tax Act (1922), Ss. 10 and 66 (2) — Book debts taken over by assessee turning out to be irrecoverable — Loss is capital loss and not trading loss — Determination of aforesaid matter is entirely point of law once facts have been ascertained.

Where the book-debts taken over by an assessee turn out to be irrecoverable the loss incurred by the assessee is a capital loss and not a trading loss. The determination of this matter is entirely a question of law once the facts have been ascertained. [P 274 C 1]

U Tun Byu, Government Advocate — for the Commissioner of Income-tax.

E. C. V. Foucar — for Assessees.

Roberts C. J. — The two questions referred to us are as follows :

(1) Whether there was material upon which the Assistant Commissioner of Income-tax could come to the conclusion that the family of the S. P. K. A. R. M. was resident in Burma during the account period relevant to the 1939-40 assessment?

(2) Whether there was material to hold that unrealized outstandings of Rs. 8979 was a capital loss or otherwise disallowable under the Burma Income-tax Act ?

As stated in the reference :

During the account period, a major son of the family, which consists of three members, the father, Ramanathan Chettyar, and two sons, Annmalai, a major, and Subramanian, a minor, resided in Burma for educational reasons. During the period of his residence, he had nothing to do with the family's business, which was in the hands of a fully empowered agent. He neither messed nor lived at the family shop but in quarters of his own and no provision was made at the shop for residence or cooking for members of the family, the business being conducted in a room common to several other Chettyar firms and the agent and employees messing in a hotel.

The Commissioner has relied on 55 Mad 885,[1] in which the facts were very different. The case is also reported in 6 I T C 96,[1] and it appears from the case stated, as there set out, that the Hindu undivided family consisted of the manager of the family and his son whose permanent home was in Pudukottah and this son was a student permanently residing in Madura. This latter fact was not alluded to at all in the judgment, and was not even mentioned in the official report, and formed no part of the grounds for deciding that there was material upon which the Commissioner could find that the Hindu undivided family was resident in Madura. The reference to it in the headnote in the report, 55 Mad 885,[1] is therefore misleading. The relevant facts were set out in the concluding passages of the judgment of Ramesam J. as follows :

In this case it cannot be said that there is no evidence on which the Commissioner can come to a conclusion as to the place of residence. There is some evidence which is set out by the Commissioner as follows : 'The manager visits these places periodically for the purpose of supervising the business. During such visits he stays at Madura for varying periods as will be seen from the sworn statement given by the petitioner. Whenever the manager comes to Madura he resides in the business premises which are provided with a kitchen and other conveniences of a residential house.' These circumstances are certainly some evidence and the question as to whether there is enough evidence is not a matter for us but for the Commissioner.

It was not necessary for the Full Bench in Madras to proceed further, but there is no obiter dictum in the judgment to the effect that "in the case of a Hindu joint family, the family should be said to reside in all those places where members of the family live." With the greatest respect I think that this is capable of misapprehension; the fact that one member of a Hindu undivided family eats, drinks and sleeps at a particular place is not necessarily any evidence that the family resides there. The amended Act of 1939 in India states in S. 4A (b),

a Hindu undivided family, firm or other association of persons is resident in British India unless the control or management of its affairs is situated wholly outside British India,

and under that section the Madras case[1] would have been rightly decided although

1. ('32) 19 A I R 1932 Mad 435 : 138 I C 301 : 55 Mad 885 : 63 M L J 22 : 6 I T C 96 (S B), Commissioner of Income-tax, Madras v. Somasundaram Chettyar, Madura.

the obiter dictum would be incorrect. And in my judgment the Indian Legislature did no more than to clarify the existing position by pointing out that the residence of individual members of a Hindu undivided family could not be material from which it could be inferred that the family resided there if such residence were fortuitous and divorced from control and management of the business. I do not understand why it is remarked in the case stated that Mr. Annamalai Chettyar was a major son of the family, when it is admitted that he took no part in the business and was in Burma for educational reasons only and lived in quarters of his own, and I am not prepared to extend the decision in the Madras case so as to cover circumstances which would clearly not amount to residence in British India. During the course of the argument I inquired in what premises it was contended that the Hindu undivided family resided. It could not be contended that the business premises were used as a residence and the only answer which could be given was that the "quarters of his own" in which Mr. Annamalai Chettyar ate, drank and slept were such premises. I would hold that there was no evidence that these quarters were or would be the residence of the family. Moreover if the Commissioner of Income-tax were right, it seems to me that if a child of eight or ten years of age were sent to a boarding school a hundred miles away from the business premises but still in British Burma it would be possible to say on that ground alone that the Hindu undivided family of which he was a member resided there and that appears to me to lead to an absurd conclusion. Very different materials were available to the Commissioner in the case stated to the Full Bench in Madras: on the present facts I would answer the first question in the negative.

As to the second question the respondents' advocate has not pursued the point raised. The respondents took over some book-debts at the dissolution of the S. P. K. A. A. M. Firm and these turned out to be irrecoverable. It is enough to say that the loss sustained by the respondents was not one incurred as a trading loss in the year under assessment, but was a capital loss. The determination of this matter is however entirely a point of law once the facts have been ascertained and the proper question to have asked was whether in the circumstances of the case the sum of Rs. 8979 was a capital loss or not, and not whether there was material upon which the Commissioner could so determine. The answer to this question is in the affirmative. Each side must pay its own costs, but the respondent is entitled to a refund of his deposit.

Dunkley J. — I agree.

Shaw J. — I agree.

G.N./R.K. *Answer accordingly.*

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SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHAW JJ.

Commissioner of Income-tax, Burma

v.

Bhagwandas Bagla.

Civil Ref. No. 10 of 1941, Decided on 21st August 1941, made by Commissioner of Income-tax, Burma.

Income-tax Act (1922), S. 4 (2)—Remittances from foreign business—Presumption of remittances being profits of business is rebuttable—Assessee purchasing timber in Burma and exporting it to India for sale—Remittances from India to extent of cost of timber consigned to India are remittances of working capital and not remittances of profits at all.

The presumption that a remittance made by a foreign business is a remittance from out of the profits of the foreign business, is rebuttable: (1903) A C 129 and ('33) 20 A I R 1933 Rang 217, *Rel. on.* [P 276 C 1]

Where the assessee purchases timber in Burma, converts it into a saleable commodity in Burma and then consigns it to India to be sold, all expenditure incurred up to the stage the timber reached the sales depots in India must be regarded as a capital expenditure of the Burma business and therefore to the extent of the cost of production of the timber consigned to India all remittances from India must be regarded as remittances of working capital and not remittances of profits: ('33) 20 A I R 1933 Rang 217, *Rel. on.* [P 276 C 1]

U Tun Byu, Government Advocate — for Commissioner of Income-tax.

R. Clark — for Assessee.

Roberts C. J.—The question referred to us is as follows:

Whether there was any material or evidence upon which it could be found that the sum of Rupees 1,09,723 was profits or income earned by the assessee and remitted during the year of account to Burma.

The respondents are a Hindu undivided family resident in Burma. Broadly speaking, they have saw mills and a buying organization in Burma; they extract timber in this country and export it to India for sale. Nobody can say what profits they earn till the timber is sold in India. In the accounting year they sent timber valued at Rupees 11,09,512 to India for sale and the excess over that figure at which it might be sold would be a profit. Hence the respondents computed the commission they would

receive upon sales and reached a notional figure which was accepted by the Commissioner. After allowing for losses in connexion with the business in Rangoon as opposed to profits in Moulmein, and for depreciation, the sum of Rs. 10,150 was arrived at. The question is whether in addition to this sum they received other profits from British India. What they received from British India was a sum of Rs. 10,02,450. It is perfectly true that profits were made in India from the sale of timber. The sum so realized amounted to Rs. 1,09,723. Now in computing what profit there would be from the sale of the timber in India it was valued at Rs. 11,09,512. The Commissioner does not question this figure. No profit was made by the firm in Burma until it got back the value of this commodity. If any sum in excess of this sum were remitted from British India to British Burma there would be material on which it might well be held that the remittance of such an excess was a remittance of profits. But the Burma business has not got any profit from this source and indeed has sustained a loss. The Commissioner has stated in his order dated 29th October 1940, Annexure B:

> It is argued by the applicants that the remittances were payment of the price of the goods shipped. It is not apparent in what way this argument supports the applicant's case. But whether it does or not it is misconceived. There can be no question of a trader paying himself the costs of his own goods. He purchases or manufactures at a certain cost to himself; when he sells what he receives is the sale proceeds of those goods which if more than his cost gives him a profit and if less involves him in a loss.

The last sentence is of course correct. But in his earlier remarks the Commissioner appears to have confused profit with turnover. Though the respondents may have made a profit in India they have not received it in British Burma; what they have received in British Burma is less than their costs. The business in Burma no longer has the timber nor has it received the full value of the timber much less any profits connected with its sale. The Commissioner appears to recognize in para. 7 Annexure B that the remittances do not cover the value of the timber exported and that there is no apparent reason why profits arising from other sources should be brought to Burma. In (1903) 4 Tax Cas 591[1] Lord Chancellor Halsbury said :

> This is a large amount of profit which has been made, a large amount which, out of profits, has been remitted to this country. If that is true, then income-tax is payable upon it. If that is not the exact amount, but the parties would be able to show that some part of it ought to be appropriated to capital, and if they could make it apparent that the thing which was received in this country was not only profit, or was not at all profit, but was simply a repayment of capital, I think it is for them to show that.

It seems to me that this is what the respondents have done here: they have sent to Burma a sum less than the value of the timber received. Consequently what the business in Burma has obtained was a payment in cash towards replenishment of what I may term the depleted stock in trade of the business there, namely timber. And this was in the nature of a repayment of capital. As Page C. J. pointed out in 11 Rang 397[2] the only question of law that can arise upon such a case is whether there was any material before the income-tax authorities on which they could find that a sum remitted during the year of assessment to Burma was profits or income earned by the assessees. Where it is shown that a sum of money remitted in return for a commodity exported is less than the cost price of that commodity the sum remitted cannot be a profit on the sale thereof. This seems to me to dispose of the whole matter.

Annexure C is devoted to a series of summaries or head notes of cases relating to money remittances in money-lending businesses and these do not assist us in the present matter. The timber exporters in Burma did not get any profits from India; they received some part of the turnover which was less than the value of the timber and before there could be a remittance of some part of the profits the amount remitted would have to exceed the admitted price of the commodity sold. This question must therefore be answered in the negative. The Commissioner must pay the costs of this reference; advocate's fee 15 gold mohurs; and the respondent is entitled to the refund of his deposit.

Dunkley J. — I agree. At the end of para. 6 of his order in revision, from which this reference arises, the Commissioner of Income-tax said in regard to the present case:

> There is no question of drawing any inference from facts, much less of entering the domain of presumption, in determining the character or the purpose of the remittances.

That is undoubtedly correct; but in coming to the conclusion that part of these

1. (1903) 1903 A C 129: 72 L J P C 70: 88 L T 478: 67 J P 341: 19 T L R 432: 4 Tax Cas 591, Scottish Provident Institution v. Allan.

2. ('33) 20 A I R 1933 Rang 217: 148 I C 330: 11 Rang 397, V. P. R. P. L. Family v. Commissioner of Income-tax, Burma.

remittances was a remittance of profits the Commissioner really acted on the presumption that when a remittance is made by a foreign business the remittance is a remittance from out of the profits of the foreign business. That presumption is rebuttable, 11 Rang 397,[2] and the facts show that in this case the remittances were remittances of working capital. The raw material was extracted or purchased in Burma; it was converted into a saleable commodity in Burma, and was then consigned to India to be sold. Clearly, up to the stage when the timber reached the sales depots in India all expenditure incurred was capital expenditure, incurred by the Burma business. The Burma business had to be reimbursed to this extent, otherwise it would come to a standstill. Hence, to the extent of the costs of production of the timber consigned to India, all remittances from India were remittances of working capital and not remittances of profits at all. Now, for the purpose of maintaining the accounts of the Burma business and of the India business, a value was placed on the timber consigned to India. In the Burma accounts this value was shown as the sale value of the timber to the branches in India, and in the India accounts it was shown as the purchase value from Burma. It represented the cost of production in Burma of the saleable article. These figures might have been challenged by the income-tax authorities, and the assessee might have been called upon to prove the actual cost of production, but he was not and the assessee's figures were accepted by the income-tax authorities. Hence the value of the timber consigned to India, as shown in the assessee's books of account, represented the cost of production of that timber in Burma. Up to that amount all remittances from India were therefore remittances of working capital. Since the total remittances were less than that amount, there was no remittance of profits, and the question referred must be answered in the negative.

Shaw J.—I agree and have nothing further to add.

G.N./R.K. *Answer accordingly.*

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(28) A. I. R. 1941 Rangoon 276

ROBERTS C. J. AND DUNKLEY J.

Ma Nyun Yin — Appellant

v.

Ma Kyin and others — Respondents.

First Appeals Nos. 78 and 79 of 1940, Decided on 21st March 1941, from judgment of High Court in C. R. No. 120 and C. M. No. 77 of 1939 and F. A. No. 76 of 1940.

(a) Buddhist Law (Burmese) — Adoption — Keittima and apatitha adoptions proved— Keittima adoptee excludes apatitha adoptee who acquires no interest in adoptive parent's estate — Apatitha adoption alone proved — Adoptee acquires equal interest in adoptive parent's estate with parent's legal representatives.

Where adoptions both in the keittima and apatitha form are proved the keittima adoptee excludes the apatitha adoptee who acquires no interest in the estate of his adoptive parent. But where apatitha adoption alone is established the adoptee acquires an equal interest in the estate of his adoptive parent with the legal representatives of the parent : ('36) 23 A I R 1936 Rang 344, *Rel. on.* [P 278 C 2]

(b) Appeal — Appeal from original side of High Court — Principles to be applied by appellate Court in dealing with appeal, stated.

In appeals from the original side of the High Court the appellate Court should see first, whether the principles of law applicable to the case were appreciated and correctly applied ; secondly, whether there was evidence upon which the Court of first instance could find the facts as it did; thirdly, whether any mistake of fact or of inference, or any material oversight has occurred, any one of which might reasonably affect the result and, fourthly, whether the weight of the evidence shows that the trial Court came to a right conclusion bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the appellate Court which has not had that advantage: ('40) 27 A I R 1940 Rang 117, *Affirmed.* [P 279 C 1]

(c) Buddhist Law (Burmese) — Adoption — Publicity must be given to relationship — No formal ceremony is necessary — Adoption may be inferred from course of conduct inconsistent with other supposition — In such case publicity must be satisfactorily proved — Keittima adoption—Formal ceremony of giving and taking in adoption before credible witnesses summoned to secure publicity and notoriety established — Proof of adoption is complete.

No doubt under the Burmese Buddhist law in the case of an adoption publicity must be given to the relationship : 5 L B R 118 (P C), *Rel. on.* [P 280 C 1]

No formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition ; but in that case the publicity or notoriety of the relationship must be satisfactorily proved : ('28) 15 A I R 1928 P C 197, *Rel. on.* [P 280 C 1]

But where a formal ceremony of giving and taking in keittima adoption is shown to have taken place in the presence of credible witnesses

who were summoned in order to secure publicity and notoriety to the factum of adoption, proof of adoption is complete. Where the formal giving and taking is done privately, publicity must afterwards be given to the fact. But where the ceremony itself is public the fact of its having been so ensures at once and for all time the degree of notoriety requisite for the establishment of the relationship, and no amount of negative evidence pointing to the lack of such relationship by reason of subsequent conduct can affect the conclusion unless it is directed towards showing the breaking of the adoptive tie. [P 280 C 1 ; P 282 C 2]

(d) Buddhist Law (Burmese) — Adoption — Keittima — Adoptive parent cannot disinherit keittima adoptee or on his death defeat grandchild's claim.

The relationship between an adoptive parent and his keittima adopted child cannot be terminated by the unilateral act of the parent. It is not open for the adoptive parent who repents of his choice to disinherit the keittima adopted child ; or when such a child has died, to defeat the grandchild's claim on his estate by conduct which shows a desire to defeat it : ('41) 28 A I R 1941 Rang 87, *Rel. on.* [P 280 C 1]

(e) Evidence Act (1872), S. 32 (5)— Adoption — Statement as to relationship by adoptive parent's deceased sister is admissible under section 32 (5).

In the case of an alleged adoption a statement as to the relationship between the adoptive parent and the adoptee made by the adoptive parent's deceased sister is admissible under S. 32 (5). [P 281 C 1]

(f) Buddhist Law (Burmese) — Adoption — Declaration by Burman Buddhist as to devolution of property being declaration as to some degree of relationship is admissible under S. 32 (5), Evidence Act — It is also relevant as conduct by alleged adoptive parent throwing light on question of adoption.

Amongst Burman Buddhists who are incapable of making wills a declaration as to the devolution of property being a declaration as to some degree of relationship is admissible under S. 32 (5), Evidence Act, in a case of alleged adoption. It is also relevant as conduct by the alleged adoptive father throwing a light upon the question of adoption. [P 281 C 1]

(g) Buddhist Law (Burmese) — Adoption — Reputation can be established only by admissible evidence — Rumours or gossip as to existence or non-existence of adoption is inadmissible — Evidence of persons with special means of knowledge as to behaviour of parties between whom relationship is alleged is admissible—Witness acquainted with adoptive parents who discussed their social and family relations with him — Evidence by witness as to adoptive parents' silence on question of adoption is admissible.

In the case of an adoption by a Burman Buddhist a reputation as to the relationship can only be established by admissible evidence. Section 50, Evidence Act, excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child. The opinion of anyone who has special means of knowledge as to the existence of the relationship of one person to another being relevant when that opinion is expressed by conduct, evidence as to the behaviour of the parties between whom the relationship is alleged to exist towards each other and as to the treatment accorded to them by others is admissible. The evidence of a witness, who was acquainted with the adoptive parents and with whom they discussed their social and family affairs, as to the silence of the adoptive parents on the question of adoption is admissible under S. 50, Evidence Act. But unless it were first established that the witness was a person who in the ordinary course would be likely to be told, the fact that he was not informed about the adoption would not be relevant. Other evidence admissible in proof of adoption is that falling under S. 32 (5) and (6), Evidence Act. [P 282 C 2 ; P 293 C 2 ; P 294 C 1]

(h) Buddhist Law (Burmese) — Adoption — Keittima and apatitha — Fact of formal ceremony indicates adoption with view to inheritance that is keittima adoption — There would be no object in formal ceremony in apatitha adoption.

The fact of a formal ceremony is only explicable on the ground that adoption with a view to inheritance that is a keittima adoption is taking place : in the lesser form of adoption, apatitha, there would be no object in any formal ceremony at all. [P 284 C 1, 2]

(i) Buddhist Law (Burmese)—Keittima adoption—Proof — Adoptee's natural parents residing near her adoptive parent's house — Fact that adoptee's marriage took place at adoptive parents' house and that her husband came to live with her at her adoptive parents' house are of considerable importance.

In considering the evidence relating to the proof of keittima adoption the fact that though the natural parents of the adoptee resided near the house of her adoptive parents the marriage festivities of the adoptee took place at her adoptive parents' house and that after the marriage her husband came to reside with her at her adoptive parents' house are of considerable importance. [P 285 C 1]

(j) Buddhist Law (Burmese) — Inheritance — Grandchild's right to inherit is not conditioned by performance of moral obligation owing to grandparent.

Under the Burmese Buddhist law a grandchild's right to inheritance is not conditioned by the performance of any moral obligation which he or she may owe to a grandparent : ('33) 20 A I R 1933 Rang 50, *Rel. on,* [P 290 C 1]

(k) Civil P. C. (1908), O. 6, R. 17 — Person claiming to be keittima child cannot be allowed to amend his petition by stating in alternative that he was apatitha child when whole evidence of his rival claiming to be keittima child has been recorded.

A person claiming to be a keittima child cannot be allowed to amend his petition at a late stage by stating that in the alternative he was the apatitha child after the whole of the evidence of his rival claiming to be a keittima child has been recorded. [P 294 C 1]

Dr. Ba Han and Ba U — for Appellant.

N. M. Cowasjee and Doctor — for Respondents 1 to 14.

Roberts C. J.—The three appeals, with which we are dealing in these judgments, arise out of two applications for letters of administration to the estate of U San Chein, who died on 19th November 1938, and one application for a succession certificate to collect the debts due to U San Chein's estate. The original applicant for a succession certificate was U Aung Gyi, who claimed to be the sole heir of the deceased as being his sole surviving brother. U Aung Gyi died after presenting his application, and the name of his daughter Ma Chit was substituted as the applicant. The two applicants for letters of administration were Ma Nyun Yin, who claimed to be the legitimate daughter of the keittima adopted daughter, named Ma Thin Hlaing, of the deceased, and Maung Saw Maung, who claimed that he and his brother Maung Hla Shwe were the keittima adopted sons of the deceased. The relationship of U Aung Gyi to the deceased was admitted by the other parties. The alleged relationship of Ma Nyun Yin and of Maung Saw Maung was, in each case, denied by the opposite parties. Consequently the two applications for letters of administration became contested and were converted into suits, being Civil Regular Nos. 120 and 239 of 1939 of this Court, and the application for a succession certificate was heard as Civil Miscellaneous Case No. 77 of 1939. The three matters were tried together, and after a hearing which occupied 36 days and during which nearly 1100 typed pages of oral evidence were recorded, the learned Judge on the original side, in a considered judgment, dated 17th May 1940, which was delivered in Civil Regular No. 12 of 1939, held that Ma Nyun Yin had failed to prove that her deceased mother, Ma Thin Hlaing, had been adopted as a keittima child by the deceased, and that Maung Saw Maung had not been adopted by the deceased either in the keittima or in the apatitha form. Consequently he dismissed both the applications for letters of administration and granted a succession certificate to Ma Chit.

Against these decisions both Ma Nyun Yin and Maung Saw Maung have filed appeals. In First Appeal No. 78 of 1940 Ma Nyun Yin has appealed against the decision that her mother, Ma Thin Hlaing, was not adopted in the keittima form by U San Chein and his wife, Ma E Byu; the respondents in this appeal are the legal representatives of U Aung Gyi (deceased) and Maung Saw Maung. In First Appeal No. 79 of 1940 Ma Nyun Yin has appealed against the decision granting a succession certificate to Ma Chit; Ma Chit and Maung Saw Maung are respondents in this appeal. In First Appeal No. 76 of 1940 Maung Saw Maung has appealed against the decision that he is not an adopted son of the deceased, and the legal representatives of U Aung Gyi (deceased) and Ma Nyun Yin are respondents in this appeal. Maung Saw Maung does not appear to have been made a party to the application of Ma Chit for a succession certificate. Of course, he ought to have been joined as a respondent in these proceedings, and the failure to join him as a party is probably the reason why he has not filed an appeal against the grant of a succession certificate.

It is common ground that if either Ma Nyun Yin can prove the keittima adoption of her mother, or Maung Saw Maung can prove his keittima adoption, U Aung Gyi, or rather his legal representatives as now representing him have no interest at all in the estate of U San Chein, and therefore Ma Chit's application for a succession certificate must fail. It is further common ground that if Ma Nyun Yin can establish the keittima adoption of the mother, but Maung Saw Maung fails to prove his keittima adoption, then Ma Nyun Yin is the sole heir of U San Chein. If Ma Nyun Yin and Maung Saw Maung both succeed in establishing keittima adoptions, then Maung Saw Maung has the major interest in the estate and should be granted letters of administration. If Ma Nyun Yin fails to establish the adoption of her mother, but Maung Saw Maung succeeds in establishing his keittima adoption, then he and his brother, whom he admits to be on the same footing as himself, are the sole heirs of U San Chein, and he should be granted letters. Proof of an apatitha adoption by Maung Saw Maung will not help him if Ma Nyun Yin is able to establish the keittima adoption of her mother, for adoption in the apatitha form would in that case give him no interest in the estate. But if Ma Nyun Yin is not able to establish the keittima adoption of her mother, proof of adoption in the apatitha form would give Maung Saw Maung an equal interest in the estate with the legal representatives of U Aung Gyi, and entitle him to the grant of letters: 14 Rang 557.[1] Under these circumstances, in order to decide the three applications before him it was incumbent on the learned trial

1. ('36) 23 A I R 1936 Rang 344 : 164 I C 272 : 14 Rang 557, Ma Than Nyun v. Daw Shwe Thit.

Judge to hear all the evidence of all the parties and to arrive at definite findings as to whether Ma Nyun Yin and Maung Saw Maung were the adopted children of U San Chein. I desire at the outset to reaffirm what I said in 1940 R L R 168,[2] with reference to appeals from the original side of this Court :

> What the appellate Court has to do is to see first, whether the principles of law applicable to the case were appreciated and correctly applied ; secondly, whether there was evidence upon which the Court of first instance could find the facts as it did ; thirdly, whether any mistake of fact or of inference, or any material oversight has occurred, any one of which might reasonably affect the result; and, fourthly whether the weight of the evidence shows that the trial Court came to a right conclusion bearing in mind that the Judge who saw and heard the witnesses is in a much better position to form an estimate of the worth of the testimony than the appellate Court which has not had that advantage.

Many of the witnesses in these proceedings were interested persons being related in one way or another to the parties or to some of them, and before a clear view can be obtained of the whole matter it is necessary to give some account of the families to which U San Chein and his wife Daw E Byu belonged. U Paik and Daw Min Thu, the adoptive parents of U San Chein, had three natural children. One was Ma Pu, also referred to as Daw Pu, who married U Po Tha, afterwards Sir Po Tha; another was U Aung Gyi to whom reference has already been made; and the third was Daw E Mya whose son Maung On is a witness for the respondents. U San Chein married Daw E Byu in about 1891. They had a child born in 1893 who died in infancy at the age of five or six weeks. Daw E Byu was born in about 1876 and would be about seventeen when her baby died. It has not been easy to get exact dates but fortunately there is no substantial disagreement between the parties as to the dates on which admitted facts occurred. Daw E Byu was the daughter of U Shwe Ya by the latter's first wife Daw Hpaw. Her mother died whilst Daw E Byu was a baby and U Shwe Ya married his deceased wife's sister Ma Thai Nu. They had eight children (half sisters and half brothers of Daw E Byu). Their names were : Daw Hnin Yin (who subsequently became the wife of U Tun Si), Daw E Kin (now a widow), Maung Maung, Ma Kyin Kyin, Ma Thin Hlaing (the mother of Ma Nyun Yin), Ma E Nyun, Maung E Hpe and Ma Sein Net. The only survivors of these eight children are Daw Hnin Yin and Daw E Kin. U Shwe Ya's second wife Ma Thai Nu died in 1893. U Shwe Ya lived at Yegyaw until a fire broke out in that quarter. The date of this fire was stated by counsel in the trial Court to be 1897, but it is now agreed that it was 1895. (U Tun Si in his evidence gives the date as 1257 B.E. which would make it 1895.) At the time of the fire U Shwe Ya was a widower. All his children were living with him including Daw E Byu and his son-in-law U San Chein and another son-in-law U Tun Si. Ma Thin Hlaing was born about 1890, and was about three years old when Daw E Byu's child died; and Daw E Byu as the eldest daughter brought up Ma Thin Hlaing under her father's roof. After the fire U Shwe Ya went to live at Nyaungdan Singapore quarter. U San Chein and Daw E Byu also went to live at Nyaungdan but in a separate house. Ma Thin Hlaing continued to live with her father U Shwe Ya for a short period after this. He subsequently married Ma Thin Htun, and was absent at Phagu a good deal. He died in 1908.

The case for the appellant Ma Nyun Yin is that her mother Ma Thin Hlaing was formally adopted in the presence of elders by U San Chein and Daw E Byu. Daw E Byu missed the little girl, and as she had no child of her own U Shwe Ya agreed to give her Ma Thin Hlaing provided it was understood beyond doubt that the adoption was in the keittima form; and this was agreed to and publicly done. If the factum of adoption in or about 1896 can be established then the appellant Ma Nyun Yin would succeed in her claim. It is admittedly not easy to prove the happening of this event alleged to have taken place over forty years ago, but the appellant urges that the subsequent course of conduct pursued by U San Chein and Daw E Byu corroborates the evidence of a formal adoption at an earlier date. The learned trial Judge says in his judgment :

> Now what is clear is that even if an alleged keittima child can refer to a distinct and specified occasion on which he was asked for and taken in adoption, he must still prove publicity and notoriety of his relationship with his adoptive parents; the publicity and notoriety mean the publicity and notoriety of the intention of the person who takes the child of another in adoption that the child shall inherit: 14 Rang 557.[1] The intention can be proved by the course of conduct of the adoptive parents towards the adopted child and the admission made by the adoptive parents. If the intention of the adoptive parents is that the child

2. ('40) 27 A I R 1940 Rang 117 : 188 I C 634 : 1940 R L R 168, Ma Than Yin v. Ma Than May.

shall inherit from them on their death they will treat the child in the same way as they will treat their natural child.

Now does the evidence produced by the plaintiff prove this point satisfactorily ?

The learned Judge examined the evidence and stated later (at page 25 of the judgment) :

What in my opinion clinches the matter is the absence of reliable and trustworthy evidence on the questions of publicity and notoriety of the relationship of U San Chein with the plaintiff's mother.

It is true that he has rejected the evidence of the plaintiff on the issue of the formal adoption, but he seems to have thought it necessary for the plaintiff to prove the subsequent publicity and notoriety of the relationship, and to have considered that a want of knowledge as to that relationship, on the part of persons who knew U San Chein in his later years is conclusive against the plaintiff-appellant, Ma Nyun Yin. Now it is true that publicity must be given to the relationship, as pointed out by Lord Dunedin in 5 L B R 118[3] at p. 123. But where a formal ceremony of giving and taking in keittima adoption is shown to have taken place in the presence of credible witnesses who were summoned in order to secure publicity and notoriety to the factum of adoption, proof of adoption is complete. It is not open for an adoptive parent who repents of his choice to disinherit a keittima adopted child; or when such a child has died, to defeat the grandchild's claim on his estate by conduct which shows a desire to defeat it. In 6 Rang 520[4] at p. 523, Sir Lancelot Sanderson said :

In 5 L B R 118[3] it was held that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved.

In the other case, that is to say, where there is a formal giving and taking, if it be done privately, publicity must afterwards be given to the fact. But where the ceremony itself is public the fact of its having been so ensures at once and for all time the degree of notoriety requisite for the establishment of the relationship. Ma Thin Hlaing married Maung Hla Maung in 1908 and the present appellant was born in 1911. Ma Thin Hlaing died in 1916 and Daw E Byu died in 1918. After the latter's death U San Chein went into a zayat on the slopes of the Shwedagon Pagoda, and though he did not take the yellow robe he eschewed society in his later years. Much evidence has been directed to the course of conduct which he adopted to his grandchild after Ma Thin Hlaing's death until his own death in 1938, Ma Nyun Yin and her aunt Daw Hnin Yin endeavouring to show that the former was treated with generosity and attention by U San Chein, whilst the respondents called evidence of conduct which they contended would show not only that the alleged relationship was far from being notorious at that time but that U San Chein was acting in a manner inconsistent with Ma Nyun Yin's present claim. In this connexion however it must be observed that the fact in issue is whether Ma Thin Hlaing was the keittima daughter, and not whether U San Chein wished to acknowledge the fact after she was dead. Though his conduct in the last twenty years of his life may not assist this appellant's case at all, yet it cannot be conclusive in favour of the respondents: even if U San Chein were shown to have publicly declared during that period that he had never adopted Ma Thin Hlaing, though considerable weight might be attached to such evidence it would still be necessary to see whether this declaration was a truthful one or was prompted by a desire to defeat this appellant's claim. I make these observations at an early stage in this judgment because it seems to me that the learned trial Judge attached undue weight to the relevance of the evidence given by a number of gentlemen whom he described as "the cream of Burmese society." They were witnesses upon whose testimony the Court could rely without the least hesitation, but they were not persons who were bound or even likely to have known of the adoption of Ma Thin Hlaing if it had taken place.

Sir U Thin, a Senator and President of the Burma Chamber of Commerce, said he was not well acquainted with U San Chein prior to the marriage of U Aung Gyi's daughter in 1912. It was after the witness became a trustee of the Shwedagon Pagoda in 1921 that he began to meet U San Chein frequently ; he had no occasion to discuss the latter's family affairs with him, and never heard he had any children. U Thein Maung, the Advocate-General of Burma, used to meet U San Chein sometimes at the Shwedagon Pagoda from about 1928 onwards: U San Chein never discussed his family matters with the witness ; they conversed

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3. ('10) 5 L B R 118: 36 Cal 978: 36 I A 192: 3 I C 797: 10 C L J 253: 14 C W N 111 (P C), Ma Ywet v. Ma Me.

4. ('28) 15 A I R 1928 P C 197: 110 I C 306: 6 Rang 520 (P C), Maung Ba Pe v. Maung Shwe Ba.

on matters concerning religion and a trust connected with the Pagoda trustees. Consequently the witness never heard anything about Ma Thin Hlaing. Dr. U Set is Vice-Chancellor of Rangoon University. He assented to the suggestion put to him that U San Chein was a mere acquaintance and not a particular friend. The acquaintanceship dated as far back as 1913 but at no time did they discuss personal or family matters. U Po Byaw is a director of the Reserve Bank of India and a trustee of the Shwedagon pagoda. He was another acquaintance of U San Chein but he gave no evidence of any conversation with him, and could carry the matter no further. Finally there was U Po Han, a member of the Public Services Commission who has at one time officiated as a Judge of this High Court. He said he knew U San Chein for roughly 20 years before his death. (It must be remembered that Ma Thin Hlaing died about 22 years before U San Chein.) Sometimes they passed each other on morning walks and would wish each other good day: they had no occasion to discuss family affairs. The witness says he "would have heard of it" if San Chein had adopted any children, and explains that he was rather intimate with Daw E Mya (that is San Chein's sister): she was a talkative lady and discussed family matters with great relish, and the witness cannot believe that she would not have referred to San Chein's adopted child or children, if he had any. Daw E Mya being now dead any such statement by her would be admissible under S. 32 (5), Evidence Act. But it must be remembered that Daw E Mya was the sister of U Aung Gyi, and it does not seem likely that she would want to give publicity to the fact that U San Chein had adopted a half sister of his wife's and that this adopted daughter had died and that a grandchild was surviving.

U Po Han says that U San Chein declared that his estate would go to U Aung Gyi after his death. There was some argument as to the admissibility of this statement as not referring to the existence of a relationship within the meaning of S. 32 (5), Evidence Act. However, amongst Burman Buddhists who are incapable of making wills a declaration as to the devolution of property may be a declaration as to some degree of relationship, and might also be relevant as conduct by the alleged adoptive father which throws a light upon the question at issue. But when it is admitted it shows very little. Some time shortly before his death when U San Chein was living on the pagoda slopes he gave away a lakh of rupees; and it was at this time that he said he had made adequate provision for U Aung Gyi during his lifetime and that on his death Aung Gyi would get his estate. Moreover it is established in evidence that U San Chein opened a joint account in his own name and U Aung Gyi's at Lloyds Bank in Rangoon on 28th October 1938, less than a month before his death, with the sum of Rs. 50,000. The learned Judge deals with this in the following way (p. 24 of the judgment) :

> That U San Chein did make a gift to U Aung Gyi is not in dispute. Therefore if U San Chein was liberal enough to make a gift of Rs. 50,000 to his brother by adoption one would also expect him to be liberal enough to make a gift of a similar sum (if not a bigger one) to the plaintiff if the plaintiff was really his grandchild by adoption. He did not do so.

With great respect to the learned Judge's view I confess that this argument seems surprising to me. To begin with, it was not an outright gift but the opening of a joint account. U Aung Gyi could not get any of this money during U San Chein's lifetime without the latter's consent; but he could draw it out, and did in fact do so, after U San Chein's death. If U San Chein knew that his brother could get the whole of the estate, where would be the necessity for making such provision for him? In my view the fact of his doing so in such a way goes a considerable distance towards proving that whatever U San Chein may have said he was well aware that if all the relevant facts could be proved U Aung Gyi would not get his estate. It is true that U Aung Gyi was in poor health; that would be all the more reason for making him an outright gift but that is not what was done. What was done was to ensure that if he survived U San Chein he would receive a substantial sum. The statement of U San Chein that he had already made this provision for his brother must have been made within a very short time of his death, when Ma Thin Hlaing had been dead for over 20 years. There was no need for U San Chein to make such provision for the plaintiff at that time: if she was the daughter of his adopted keittima daughter she would be his heiress. U Ba Cho gave evidence similar to that of U Po Han. He was an old schoolfellow of and a little younger than U San Chein, and gave his age as 66 at the hearing early in 1940. He said that U San Chein never mentioned

to him that he had an adopted child or grandchild, but said his property would go to his elder brother. He used to see U San Chein at the zayat especially just before his death, and it was on his advice that U San Chein made this provision for U Aung Gyi. The witness said he told U San Chein "although you say that your property will go straight to your elder brother there is nothing definitely done for that purpose." The need to do something definite must have arisen through the apprehension that U Aung Gyi might not turn out to be his brother's heir after all. When however U Ba Cho was asked about his visits at a much earlier date to the house of U San Chein and Daw E Byu during the lifetime of Ma Thin Hlaing and Ma Nyein May (a cousin who was living in the house and who it is said was also adopted) he answered "I mean to say I did not see how U San Chein and Daw E Byu treated these two girls." Another witness U Kalayanabai-Wuntha is a Buddhist monk with the distinction of Aggamanapandita, conferred (as the learned Judge observed) by His Excellency the Governor only on such monks as are renowned for scholarship and piety. He came to know U San Chein in 1919 when the latter first came to the zayat shortly after Daw E Byu's death. "U San Chein said he had already lost his wife and that he had no children." (This was three years after Ma Thin Hlaing's death.) "He said, I am alone and I have made up my mind to lead a pious life." This witness was most careful to confine himself to statements within his own knowledge. He never saw or heard of Ma Nyun Yin and U San Chein never mentioned that he had adopted any child. U Kalayana on one occasion suggested that he should do so, but he replied "what is the use of my adopting anyone now?"

Now all this evidence greatly impressed the learned Judge against the plaintiff Ma Nyun Yin. It certainly appears to me that when he came to consider her case as a whole he approached it from the point of view that so many persons of integrity had either stated they never heard of any adoption or that during the last years before U San Chein's death they believed U Aung Gyi to be his heir, that the story told by the plaintiff's witnesses of what happened in 1896 was bound to be false. But I have not approached the question at issue in this way. First of all it appears to me that the probative value of all this evidence is small though the truthfulness of those who gave it is beyond question. As I said in 1940 R L R 562[5] "a reputation can only be established by admissible evidence" and S. 50, Evidence Act, excludes evidence of mere rumour or gossip to the effect that an adoption has taken place or that such and such a person has no adopted child. The opinion of anyone who has special means of knowledge as to the existence of the relationship of one person to another is a relevant fact, if that opinion is expressed by conduct. Evidence may therefore be given as to the behaviour of the parties between whom the relationship is alleged to exist towards each other and as to the treatment accorded to them by others. But further than that it cannot go unless it is admissible within cls. 5 and 6 of S. 32 of the Act. Witnesses cannot be allowed to speak as to current gossip in the neighbourhood of the existence of a relation or of the absence of any relationship at all.

So far as oral testimony is concerned, therefore those who had opportunities of seeing the treatment accorded by U San Chein and Daw E Byu to Ma Thin Hlaing or by other persons to Ma Thin Hlaing, can come to the Court and describe such treatment. And the Court will consider such evidence as relevant under S. 50, and will seek to infer from the conduct described a conclusion as to the existence or non-existence of the relationship. Once there is evidence which is conclusive in establishing the fact of a public adoption by means of a formal ceremony, no necessity exists for further evidence on the point; and no amount of negative evidence pointing to the lack of such relationship by reason of subsequent conduct can affect the conclusion unless, indeed, it is directed towards showing the breaking of the adoptive tie. If, however, the evidence in support of a public adoption is scanty or in other ways of doubtful value, the Court will consider the effect of the evidence under S. 50 in order to assist it in forming a conclusion as to the existence of the alleged relationship. Section 32, cl. (5) admits oral evidence of statements by deceased persons as to relationship by blood, marriage or adoption, provided they had special means of knowledge, and provided the statement was made before the question in dispute was raised. But no section of the Evidence Act admits evidence of the current talk of a neighbourhood, for the very good reason that a man's neigh-

5. ('40) 27 A I R 1940 Rang 181 : 192 I C 49 : 1940 R L R 562, Maung Maung v. Ma Sein Kyi.

bours may be and often are quite misinformed as to his private affairs, and that their opinions are purely conjectural, unless they are derived from some one who has special knowledge of the question at issue. If such a person is alive he can come to the Court and state the facts on which he bases his opinion; if he is dead his special knowledge must be shown to exist before any statement made by him prior to the controversy is admitted in evidence.

It appears from what has been set down upon the record that there was a good deal of surprise after U San Chein's death at the claim of the plaintiff. A great many persons who gave evidence in this case had never heard of her. Still the question remains whether long before these persons came to have their conversations with U San Chein he had not adopted her mother. It is very important to notice, and I think that at times it has been lost sight of in this case, that the real issue relates to events long before U San Chein entered the zayat in 1919. There was, in the evidence, a tendency to consider how U San Chein behaved to the plaintiff, but this is quite a secondary matter and I do not regard it as a determining factor in disposing of her appeal. If undue weight has been attached to it no small part of the blame lies in the urgency with which the plaintiff herself put forward this part of her case.

With these preliminary remarks I pass on to consider the evidence called in support of the formal adoption ceremony in or about 1896. At this time Ma Thin Hlaing was six years of age and Daw E Byu was about twenty. Although the latter's baby had died some three years before there is no evidence one way or the other as to her state of health or whether she might be deemed likely in the ordinary course of events to bear further children. It is, however, clear that she did not do so. It is said upon the one hand that the husband of a young married woman of twenty is not likely to have adopted a child of six; and no doubt there is some force in that contention when the bare proposition is stated without reference to the attendant circumstances of a particular case. The learned trial Judge has taken it into account in arriving at his conclusions. But, on the other hand, we know that Daw E Byu had no further children, and that she had brought up Ma Thin Hlaing, her half sister, who lost her mother at about the same time as the death of Daw E Byu's very young baby. Then there was a separation after the Yegyaw fire, and for the first time Daw E Byu found herself living apart from Ma Thin Hlaing. The latter's father U Shwe Ya was a good deal away at Phagu and there was really no one upon whom the care of this young child devolved. Daw Hnin Yin, the eldest sister of the whole blood, had already married U Tun Si and according to her they had adopted her younger brother Maung E Hpe, and on the death of Daw Hnin Yin's mother had also adopted Ma Kyin Kyin. As for Daw E Kin if her age is correctly given she would only be thirteen in 1896. It is difficult to see who would look after Ma Thin Hlaing and it is not disputed that Daw E Byu had done so before the separation of the families resultant on the Yegyaw fire.

There is therefore no inherent improbability in the suppositions that the evidence that Daw E Byu asked for Ma Thin Hlaing to go and live with her is correct. U Shwe Ya was going to and from Phagu, not at a great distance from Rangoon but still at least two hours journey, where he had some business dealings in paddy at this time. He had a large family. U San Chein was well to do even in 1896. I do not find it unlikely that U Shwe Ya should stipulate that if his daughter was going to live with U San Chein and Daw E Byu she should be taken in keittima adoption, and that assent was given to this counter proposal. It was the case of Ma Nyun Yin that Daw E Mya, the sister of U San Chein, interested herself in bringing about this relationship. The persons who give evidence of the formal ceremony of adoption in 1896 are Daw Hnin Yin and her husband U Tun Si, Daw E Kin, U Pe, who is a cousin of Daw E Byu, and Daw Thin, who is the only person not related to the parties who testifies on this point. And the question is whether their evidence is conclusive, or whether it is to be brushed aside altogether; or whether it contains material on which it would be safe to act if, and only if, it is substantially corroborated by evidence of the course of conduct of the parties on subsequent occasions. One of the great difficulties in considering this is that Daw Hnin Yin has given evidence in relation to another matter, namely the treatment by U San Chein of his alleged grandchild, which cannot be accepted. For this reason I prefer to take as a basis for the appellant's contentions the story told by Daw E Khin. She states that U San Chein and Daw E Byu came and asked

U Shwe Ya not once but several times for Ma Thin Hlaing to be given in adoption to them. They said: "We have no children." They were finally encouraged to make a formal request in the presence of elders, and did so in the presence of fourteen or fifteen of them. U Shwe Ya said : "Well if you are taking my child or daughter you can take her as keittima daughter of yours." The adoptive parents said "Very well" and took the child away. The witness said that U Po Tha, husband of Daw Pu, and brother-in-law of U San Chein persuaded her and her elder sister not to obstruct this adoption. He was present with Daw Pu his wife, and her sister Daw E Mya. All these persons are dead. There were also present Daw Hnin Yin and her husband U Tun Si, U Pe and Daw Thin. An elder who was present was U Pan U. It is not stated whether he is dead or alive, but if he were an elder in 1896 it is hardly likely that he would be alive now. This witness is a widow of 57 years of age. She insists that her father said "It must be a keittima adoption or my daughter does not go out of my house." At that time Ma Nyein May had not been adopted by U San Chein and Daw E Byu.

U Pe is a rice mill owner and a cousin of the late Daw E Byu; he was 77 years old at the time of giving his evidence. He says that U San Chein asked him to speak to U Shwe Ya and to get him to allow Ma Thin Hlaing to be adopted as his keittima daughter; he says there was a formal ceremony and U Po Tha said "Koyingale, give away" to which U Shwe Ya replied "Will give." The learned advocate asked "Give what? and witness responded: 'I will give daughter with a right to inherit.' This witness was asked about the other persons who were present. He did not mention Daw Thein. Nevertheless Daw Thien claims to have been present: she was the only non-relative there who has given evidence. She says she lived in a neighbouring house and was called in to a gathering consisting of Ko Po Tha, Daw Pu, Daw E Mya, U Tun Si, Daw Hnin Yin, Daw E Kin, U Pan U and his wife. (She gives the younger members of the party the names which they would have possessed at that date.) There was a formal giving in adoption. Though she does not say that any word indicating keittima adoption was used the fact of a formal ceremony is only explicable on the ground that adoption with a view to inheritance is taking place: in the lesser form of adoption, apatitha, there would be no object in any formal ceremony at all: *see* Richardson, Laws of Menoo, vol. 10, p. 319. If her evidence is to be believed it is clear that there was a formal ceremony. The learned trial Judge has disbelieved her evidence. He says she is only what is often termed in this country a shampooer, which means a kind of masseuse, and that he was not impressed with her behaviour in the witness box. He says "even if her evidence is accepted it does not prove the keittima form of adoption" but only the apatitha form. However she certainly said in cross-examination:

> U Po Tha said to U Shwe Ya — Brother, don't you be taking trouble on yourself. Give her to them to be adpoted as a keittima child. U Shwe Ya said — Well, they have no children of their own. If they are going to adopt her as a keittima child I will give.

And thereupon, she says, he handed the child over to them there. If this evidence were believed it is plainly evidence of a giving and taking in keittima adoption. Now why was the learned Judge so sceptical of her evidence? We have to bear in mind that he saw and heard her and could form an expression of the value of what she said, but I think we must also bear in mind that it is not accurate to say that her evidence went no further than to suggest apatitha adoption. She gave her age as 78. She was no relation to anyone connected with this case but a mere neighbour of U San Chein. She was closely cross-examined and on the 36th foolscap page of our record of the type written evidence it is shown that she was a bit resentful of being described as a professional shampooer. It was next suggested that she supplied medicines to U San Chein for a small reward, and she said that was true and added "I used the little knowledge I had. Do you want medicine now ? I can give you." The learned Judge described this as flippancy in offering to treat the lawyer for defendant 1. Let it be so, for he saw her demeanour and we did not. Yet I am very doubtful if this should discount the whole value of her testimony. She denied that she was a professional shampooer or masseuse and the defendants-respondents were bound by her answer. She is of an age which is reckoned very advanced indeed in this country and she says she is " sitting tight " on what she owns. Having regard to the expressed view of the learned trial Judge it is right to accept her evidence with some caution but not in my view to disregard it altogether. U Tun Si is the husband of Daw Hnin Yin; he and his wife both corrobo-

rate the evidence given in favour of a keittima adoption ceremony. Both of them say that Daw Thin was present and U Tun Si says that U Pa was there, but Daw Hnin Yin says she is not sure about this. The mere fact of her saying this makes me think that so far as this event is concerned she is trying to speak the truth.

Pausing at this point I cannot feel confident that this evidence is conclusive, neither do I think that it should be altogether brushed aside. What the appellate Court must therefore do is to see whether it contains material on which it would be safe to act if it is substantially corroborated by evidence of the course of conduct of the parties and those in a position to know the real facts on subsequent occasions. I am quite unimpressed by the contention that some of the elders ought to have been called. After a lapse of 44 years it is remarkable that any first-hand evidence of this alleged ceremony should be forthcoming. From the point of view of the respondents no assistance can be forthcoming. Sir Po Tha, Daw Pu, his wife, U Aung Gyi and Daw E Mya are all dead, whilst Ma Chit, the daughter of U Aung Gyi, and Maung On, the son of Daw E Mya, were too young at that date to have known what did or did not happen. The first piece of corroborative evidence in favour of the keittima adoption of Ma Thin Hlaing is afforded by the events surrounding her marriage in 1908 to U Hla Maung. Although the house of her natural father U Shwe Ya was close by, the marriage festivities took place at Daw E Byu's house; and after the marriage U Hla Maung came to live under the roof of U San Chein and Daw E Byu. Both these facts in my view are of considerable importance. By the year 1908 U Shwe Ya had amassed sufficient property to be described as well off. Yet he was never present at the wedding of his natural daughter Ma Thin Hlaing. A very full account of what happened has been given by the witnesses for the plaintiff. As Sir Lancelot Sanderson said in 6 Rang 520[4]:

> The learned Judges of the Chief Court in Lower Burma held that for a young man on his marriage to go and live with his parents-in-law was strictly in accordance with the Burmese custom ;

and this finding was impliedly accepted. The marriage was said to have been arranged by Daw E Mya who approached Daw Kyin, the elder sister of the prospective bridegroom. U Hla Maung learned that he was expected to bring to the marriage a sum of Rs. 5000. (It is necessary to note here that the use of the word dowry is the mistake of a translator and has no meaning in Burmese Buddhist marriages.) U Hla Maung says that two or three hundred guests were present and U Po Tha took a leading part at the festivities whilst U May Oung (apparently subsequently Home Member of the Executive Council) delivered an address. Daw E Kin says that U Ala Maung came of a good family, and Daw Hnin Yin agreed. Daw Thin was another guest present. The learned Judge describes her as 'ubiquitous' but I do not see why a near neighbour should not have been invited. She says it was remarked that the bridegroom was bringing Rs. 5000 as his marriage portion, and Daw E Byu said they were bearing the expenses of the festivities whilst U San Chein said "I have got two daughters as heirs; except these two daughters who else would be entitled to inherit my estate." They also said that Ma Thin Hlaing had already got jewellery for herself. U Po Yin, called as a witness on the other side, denies that U May Oung was present at the marriage; asked in cross-examination whether Rupees 6000 was brought by the bridegroom he at once remarked that the sum was Rs. 5000. This makes it at least likely that inquiry was made by the bridegroom's party as to what the bride's relatives intended to do. Daw Kyin, the elder sister of U Hla Maung, said that before the marriage Daw E Byu told her that the bride was her keittima adopted daughter. She continues the account of what took place at the marriage. She says that U San Chein expressly said at the wedding that Ma Thin Hlaing was keittima adopted daughter. U Sint who attended as a friend of the bridegroom corroborates the story generally but does not say that anyone who is now deceased and had special means of knowledge at that time referred explicitly to the fact of keittima adoption, though he remembers that U San Chein said he had taken two daughters "in adoption". This would be a pointless statement unless keittima adoption was meant. Maung So Hlaing, a brother of the bridegroom, stated that his elder sister Daw Kyin told him at the time that the bride was the keittima adopted daughter of U San Chein. This evidence is admissible under S. 157, Evidence Act. He says that at the wedding U San Chein said he had only these two daughters who were to inherit his estate. The other, of course, was Ma Nyein May.

But the really important matter which arises out of all this is that U Hla Maung went to live under U San Chein's roof. It is most difficult to believe that this would ever have happened if his bride had been merely the half sister of Daw E Byu. In that event they would have sought other quarters. But as Maung So Hlaing said in his evidence: "Mostly sons-in-law start living with their father-in-law after the wedding." U Hla Maung's own story is that he worked for his father-in-law and was provided with sustenance for himself and his wife and with ample pocket money. In view of this arrangement there would be no need for U San Chein to provide any specific sum at the marriage of Ma Thin Hlaing for she would have no need of it. The sum of Rs. 5000 brought by the bridegroom and paid over in cash would make it apparent that apart from being a decent young man of good family the bridegroom was not entirely without resources and would convince the guests, to use a familiar expression, that the bride was not being thrown away upon an adventurer. It is also natural that if the sum of Rs. 5000 was brought to the marriage from the bridegroom's side U San Chein would be asked what contribution he would make, and would thus be given the opportunity of making the statement attributed to him.

The respondents' case is that U Hla Maung lived in U San Chein's house because he was helping the latter in his business. Bearing in mind prevalent customs I find this unconvincing. He remained there even after his wife's death in 1916 until his subsequent marriage to Ma Thaung of Pegu. He then left. This was his third wife, for after Ma Thin Hlaing's death he married Ma Nye in May who was his younger sister-in-law by adoption but this marriage was terminated by her death within a year. There is a good deal of evidence that U San Chein treated Ma Thin Hlaing as his keittima daughter. U Pe says she had the keys of the house. Maung Po Hmyn a tenant of U San Chein, says that U San Chein stated that she was the keittima adopted daughter. She used to produce money and hand it over to the witness to pay cultivators and U Po Kyi, a field labourer, gave evidence to the same effect. Such evidence as there is to the contrary comes from Ma Chit herself, Maung On, the son of Daw E Mya, and a witness named Ma Sein. This last witness has a claim against the estate and it is suggested that if the appellant Ma Nyn Yin is successful this will be contested, but that her cousin Ma Chit will not contest it. Some reliance has been placed, in my view unadvisedly, by the respondents upon a document which is Ex. 3. After the death of U Shwe Ya, U San Chein had a claim upon his estate and his legal representatives conveyed some 222 acres paddy lands to U San Chein and Daw E Byu. In this indenture Daw E Byu who was a daughter of U Shwe Ya appears both as transferor and transferee. She did not execute a release to her brothers and sisters in consideration of this transfer by him to herself and her husband as might have been expected, but we are asked to say that because Ma Thin Hlaing's name appears as the daughter of U Shwe Ya, her natural father, and as a transferor, that this shows she had not then been taken in adoption. The evidence is that U San Chein insisted on the names of all U Shwe Ya's natural children including that of his own wife and of Maung E Hpe (said by Daw Hnin Yin to be her adopted son) to be included in this conveyance in order to avoid any kind of uncertainty and subsequent dispute. In view of the way in which the document was drawn up I do not regard these recitals as evidence of any importance. It does however show that Ma Thin Hlaing was residing at No. 13, Lower Poozoondaung, Rangoon, in the same house as U San Chein and Daw E Byu at a time subsequent to her marriage to U Hla Maung. If she were merely a half sister of Daw E Byu she and her husband would have ceased to reside there after their marriage.

The next corroborative evidence of importance relates to an alleged visit of U San Chein and Daw E Byu to Mandalay Hill on the occasion of the gilding of the Kuthoedaw Pagoda by Sir Po Tha in 1912. Mandalay is distant some 400 miles from Rangoon and a very large party of friends and relations visited Mandalay to take part in this ceremony: and as persons who visit a distant town will do, they saw the sights after the libation ceremony in Mandalay, and many of them climbed the numerous steps up Mandalay Hill to pay respects to U Khanti, the hermit, and to make offerings in commemoration of their visit to Mandalay. U Khanti's evidence was taken on commission. He said :

When the gilding of Kuthoedaw pagoda was made U Po Tha was present. That was in the year 1274 as shown in the book, Ex. A, (now 1274 would be 1912 A. D.). U San Chein and Daw E Byu were present and they made donation as per

entry made in the book. Ko Hla Maung and Ma Thin Hlaing also made donation and the fact was recorded in the book as shown in the entry.

The relevant entries are as follows :

On 4th waning of Thadingyut Paya-amagyi Daw Thu of house No. 13 Nyaungdan Pazundaung Rangoon — 2 compartments — 200; Sandawdwin Tazaung-ama Ma E Mya and daughter Ma Nu Nu of house No. 14 Nyaungdan Pazaundaung Rangoon —1 compartment—100; Kyaungtaga U San Chein, Kyaung Ma E Byu, daughters Ma Thin Hlaing and Ma Nyein May of house No. 13 Nyaungdon Pazundaung Rangoon—2 compartments—200;

then follows :

Maung Hla Maung, Ma Thin Hlaing and children of house No. 13 Nyaungdan Pazundaung Rangoon —1 compartment—100.

. . . .

Meritorious deed of Kyaungtaga U San Chein, Kyaungama Ma E Byu, daughters Ma Thin Hlaing and Ma Nyein May of Nyaungdan Pazundaung Rangoon.

It is customary to put up name boards with the names of donors inscribed thereon, and it is beyond all question that a name board was put up and that on it Ma Thin Hlaing was described as the daughter of U San Chein and Daw E Byu. When U Khanti was cross-examined he agreed that owing to the big crowd he could not say whether all the persons recorded in the book were present when the entries were made. It is quite true that his evidence does not conclusively prove that U San Chein was present. It is, however, admitted that Daw E Byu, Ma Thin Hlaing and U Hla Maung were there and there is a strong *a priori* probability that U San Chein would accompany his wife on such an occasion. U Sa Be who is a retired head clerk of the Deputy Commissioner gave evidence on commission. He remembers the gilding of the pagoda by Sir Po Tha, and states that he was asked by U San Chein and Daw Hbin Yin to take them up to Mandalay Hill and see U Khanti. He did so and he states :

I saw U San Chein give currency notes to U Khanti. I saw U Khanti make entries in a register of donors from the dictation of U Saw Chein.

The learned Judge says this evidence must be left out of consideration altogether because it appears that the witness stated that this pagoda gilding ceremony took place in 1925 or 1926 whereas the real date was 1912. He was not cross-examined but it is clear that he is not speaking of any different visit since this particular pagoda gilding was attended with great publicity and was one of the most spectacular benefactions of Sir Po Tha. In the absence of any challenge by the other side, I find it impossible to conclude that U Sa Be was never there and has come forward with a story which is a pure invention to please this appellant and her aunts. Her witnesses of course state that U San Chein was of the party. The witnesses for the defendants admitted that Daw E Byu came but they strenuously deny that U San Chein accompanied her. The reason they give is that Sir Po Tha had recently married a young dancing girl, Ma Ngwe Sein, shortly after the death of his wife, Daw Pu who was U San Chein's sister, and this has greatly offended the latter. The learned Judge says he had no reason to doubt that U San Chein was angry and he accepts this explanation of U San Chein's absence from Mandalay. It is well to observe in this connexion that Daw Kin, the mother of Ma Ngwe Sein, was called by the defendants. She says that U San Chein did not go to Mandalay but she admits that Daw Min Thu and her family were all there and all putting up in the same house as U Po Tha's party. Daw Min Thu was the mother of Daw Pu and if she did not take umbrage at the remarriage of U Po Tha after her daughter's death, it seems difficult to understand why U San Chein should do so.

It appears to be undisputed by the defence witnesses that Daw E Mya was of the party which visited Mandalay : *see* the evidence of Maung On and Ma Sein. She was sister of Daw Pu and she had taken no offence at U Po Tha's remarriage. It might of course be possible for any man to resent his sister's husband marrying again after her death or the nature of the match he made; but the evidence here shows that it was not resented by the womenfolk of the family, and that being so I see no reason (and no special reason has been offered) why U San Chein should resent it any more than they. It must be remembered that the names both of Daw Thu and Ma Aye Mya are shown in EX. A. They undoubtedly accompanied the party. It is frankly admitted that Daw E Mya went to Mandalay, and the question is who caused this inscription to be put up and these entries to be made in the records at Mandalay Hill showing Ma Thin Hlaing and Ma Nyein May as the daughters of U San Chein and his wife. The defence have conjectured that U Hla Maung might have done it, but this is the purest surmise. If these instructions had been falsely given by U Hla Maung and Daw E Byu or U San Chein had discovered the fact, it might have led to a serious

quarrel. U San Chein was by no means an old man; it seems most unlikely that U Hla Maung in 1912 was busying himself in fabricating evidence which might possibly be of use many years later. And if he desired to do so there is no kind of explanation as to why he should include the name of Ma Nyein May as another daughter of U San Chein. Although the suggestion that these witnesses were prompted by U Hla Maung was made in the appellate Court he was not cross-examined in the Court below on this point.

Having arrived at the conclusion that U San Chein did not go to Mandalay Hill at all, and indeed never even accompanied the party to Mandalay for the gilding of the pagoda, the learned Judge has dismissed these entries and the resulting inscription from further consideration. I cannot help thinking that inasmuch as both the husband and wife must consent to the factum of adoption the learned Judge concluded that this evidence was valueless if U San Chein was not actively associated in person with these transactions at Mandalay Hill. But the plaintiff does not seek to prove an adoption by a formal act to which publicity was given on Mandalay Hill in 1912. Her case is that her mother had been adopted formally and publicly in 1896 and that the evidence supporting this is corroborated by the entries in U Khanti's books at a much later date. Assuming that the witnesses who testify to U San Chein's presence are mistaken, and have grown to persuade themselves after this long lapse of time and bearing in mind the book entries that he was actually there when in fact he was not, still Daw E Byu was admittedly there. If it were she who caused these entries to be made she might well be doing so, not only on her own behalf but on behalf of her husband, by reason of the fact that the real adoption had taken place long before.

In the trial Court the tendency seems to have been to find out what a number of highly reputable people thought after U San Chein's death in 1938 and to approach the evidence of long past events with great suspicion because of their lack of knowledge of any adoption. But from the evidence of events prior to and including the visit to Mandalay Hill I am of opinion that the plaintiff made out a very strong prima facie case; the circumstances of her marriage, the dwelling of her husband under U San Chein's roof, and the entries in U Khanti's books all affording valuable corroboration of the account given by her witnesses of a formal ceremony of adoption in 1896.

Ma Thin Hlaing died of plague in 1916. The defendants called Saya Kha as a witness; he described himself as a Burmese physician and his story is that U San Chein sent for him and said "my youngest sister-in-law is sick." He says he treated her: the disease was plague; and he told U San Chein it was not curable. In cross-examination he said he had been a broker for paddy firms and that he used to visit U San Chein's house every three or four days for at least four years before Ma Thin Hlaing died, but he never knew her name till he attended her on her death bed. U Hla Maung says Saya Kha was not there at all: he knows of Saya Kha as a paddy broker only. Dr. Pedley attended his wife on her death bed. U Tun Si saw Dr. Pedley there. Daw Hnin Yin also says that Dr. Pedley was called in and no Burmese doctor was in attendance. The learned trial Judge said (on page 24 of his judgment):

> Further there is no dispute that U San Chein put up several religious buildings in Rangoon after the death of his wife and on all these buildings he put up inscriptions saying that they were the gift of himself and his wife Daw E Byu. In none of these inscriptions Exs. 19 to 23 was the name of the plaintiff included. If a Burman Buddhist dedicates any building to religious uses or gives any charity he generally does it in the name of his wife, children and grand-children; see the evidence of U Po Han on this point.

Some misapprehension must have existed in the learned Judge's mind on this point for U Po Han did not say that at all. All he said was that it was usual to have dedication ceremonies and that the donor's intimate and near relations would be present; and Sir U Thwin gave evidence to the same effect. But Ma Thin Hlaing had died in 1916 and Daw E Byu outlived her by two years. Ma Thin Hlaing could not therefore have been present at any ceremony of dedication of a building put up after Daw E Byu's death. On this matter Daw Hnin Yin was cross-examined, and asked why U San Chein should not have mentioned the names of his two daughters with that of his deceased wife. She said "after the death of a person nobody cares to have the name inserted." There is no evidence that it is customary for the name of a deceased child to be added to such an inscription, although the name of a deceased wife may be inserted. It is perhaps hardly likely that the name of Daw E Byu's child who died in early infancy would be put on the inscription; it is clear that this name was not in

fact added to it. Again although the buildings were put up by U San Chein it is not clear how the inscriptions got there. U Kalayanah-Bi-Wontha who was his spiritual adviser for the last 20 years of his life was never asked about this and he might surely have known whether the directions for inscriptions emanated from U San Chein. According to Saya Thin who was a building contractor, U San Chein instructed that a Tazaung which had been destroyed by fire should be repaired. This was in about 1931. About the same time a brick cave was built rather to the west of the Shwedagon pagoda platform, and about a year later some bridging work was done and later on still further work. The witness was given some iron carving to do but he did not actually construct the buildings. He does not know who ordered the inscriptions or when they were put in place, but he was asked to supervise the photographing of them by Ma Chit the daughter of the late U Aung Gyi and this took place on 20th March 1939. One of the inscriptions at least was not put up till after U San Chein's death. This was admitted by the defendants' counsel during the course of U Kuniya's evidence.

The conduct of U San Chein to Ma Nyun Yin after the former had retired to the pagoda slopes in 1919 seems to me to be a relatively unimportant matter. It must not be forgotten that it was not Ma Nyun Yin but her dead mother who is alleged to have been the adopted daughter. After the death of Ma Thin Hlaing, U San Chein may well have been averse to giving any fresh publicity which would assist a possible claim by the plaintiff to his estate after his death. There was no ear-boring ceremony for Ma Nyun Yin. If this had taken place, the normal time first would have been about 1921 when she was ten years old. U Hla Maung married Ma Nyein May about five months after the death of Ma Thin Hlaing; but his second wife died in child birth 11 months after the marriage, and was dead before Daw E Byu's death. Eight months after U San Chein moved to the pagoda slopes, U Hla Maung, who had been living in the same house all these years and was still buying and storing paddy for U San Chein, left it to go and get married again to Ma Thaung at Pegu. He was asked if U San Chein consented and said in evidence :

> I dare not approach the old man myself. I approached through Daw Hnin Yin. Subsequently the old man did give his consent.

The plaintiff did not live in Pegu with her father but with Daw Hnin Yin. She had been taken to her aunt's house by U San Chein before the latter went to live a life of meditation. It is said that he gave Rs. 200 a month for the plaintiff's maintenance, and no doubt some provision may have been made. The learned Judge has rejected the evidence of Daw Hnin Yin and U Tun Si, and I feel obliged to say that in my view the plaintiff and Daw Hnin Yin cannot be believed in relation to some gifts which were said to have been made to Ma Nyun Yin. None of the jewelleries alleged to have been given to her have been produced. It is said that U San Chein gave her Rs. 2500 when she was thirteen or fourteen. She says her grandfather used to come and see her once a week; Daw Hnin Yin says once in a month or two months, and they say that constant presents were given. I find this difficult to reconcile with the evidence of U Kalayana-Bi-Wontha who never heard of the plaintiff during the whole of the twenty years which U San Chein lived at the zayat. At the same time it is possible that Daw Hnin Yin knowing the fact of adoption has tried to improve her niece's case in an effort to ensure by means which are wholly to be condemned, that there shall be no miscarriage of justice. In view of her attitude I have paid but little attention to the rest of her evidence, preferring to rely upon other witnesses.

It is however undisputed that Ma Nyun Yin eloped with Ko Chan in about 1928. She left her aunt's house, and was brought back by her parents-in-law. Maung Ba Maung is a cousin of Ko Chan and he states that he went to see U Tun Si and Daw Hnin and found them weeping. He accompanied Daw Hnin Yin to the zayat in order if possible to smooth over matters with U San Chein. He was successful in doing so, according to his own story, and the bride's parents contributed rupees 6000 and U San Chein gave Rs. 1000 and was present at the wedding. The plaintiff's witnesses try to show that Ma Byun Yin was recognized as a grandchild by U San Chein right up to his death. There is little doubt that this was not the case. It is clear from the evidence of U Kalayana-Bi-Wontha that she rarely, if ever, visited him and that when he was ill he sent for one or other of U Aung Gyi's children, and in his last illness for Ma Chit. These facts and the evidence of the elopement of the plaintiff and her subsequent marriage afford some ground for the belief that latterly U San Chein

would not be likely to wish his grandchild to be able to prove her claim to his estate and that there was an estrangement between them. Once this is realized the evidence of U San Chein's neglect to refer to her, and the lack of knowledge on the part of those who became acquainted with him for the first time (or renewed their acquaintanceship after a lapse of many years) of any adopted child or grandchild becomes easily explicable. Almost the last business transaction of his life was to put Rs. 50,000 in this joint account in Lloyds Bank in the name of U Aung Gyi and himself. This would be a needless precaution if he knew that U Aung Gyi would get his estate, but very easily to be understood if he were irked by the reflection that Ma Nyun Yin might establish her present claim whatever he might do or say. In this case there can be no question of the forfeiture of the right to inherit owing to failure of the appellant or her mother to perform filial duties towards U San Chein. It cannot be suggested that her mother was lacking in the performance of filial duties and a grandchild's right to inheritance is not conditioned by the performance of any moral obligation which he or she may owe to a grandparent: *see* 11 Rang 158[6] at p. 161.

Some argument was devoted to the wording on the invitation card alleged to have issued at Ma Nyun Yin's wedding. The plaintiff's witnesses deny that any such card was ever issued and contend that it was fabricated for the purpose of this case. It bears no reference to U San Chein at all, and it is said that if he had been her grandfather he would have been mentioned since he was well to do and highly respected. It is not easy to say whether it is a genuine production or not, but in any case it contains the name of Sir Po Tha and Lady Po Tha as her uncle and aunt or perhaps as the uncle and aunt of Daw Hnin Yin. They were important people and as U San Chein had retired from social life some years previously I regard the card as of little significance. Summarizing all this evidence I have come to the conclusion, respectfully differing from the learned trial Judge, that the factum of adoption has been established and that therefore the appeals of Ma Nyun Yin should be allowed. Though the available evidence as to what took place in 1896 is necessarily scanty after this long lapse of time and proceeds, at least in the main, from interested sources, it is corroborated by the following matters, namely (1) evidence of acknowledgment of the adoption by the adoptive parents at the marriage of Ma Thin Hlaing and subsequently; (2) the living of U Hla Maung under San Chein's roof as a son-in-law would do with his wife's parents; (3) the entries in the books of Mandalay Hill showing Ma Thin Hlaing as a daughter of U San Chein; and (4) the steps taken by U San Chein to ensure that U Aung Gyi should not be left unprovided for at his death. I regard the negative evidence of the witnesses on which the Judge placed so much reliance as of little importance, since when it is examined it becomes apparent that they were not persons likely to have known whether Ma Thin Hlaing was adopted or not. In 1940 R L R 783,[7] my learned brother Dunkley explained (at page 791) the value of evidence given by persons who were likely to know the true situation, but this is almost the converse case.

These witnesses establish no more than absence of a desire on the part of U San Chein to refer to his grand-daughter or to his deceased daughter Ma Thin Hlaing, and I do not think that their evidence can throw any justifiable suspicion on the rest of the evidence brought on the plaintiff's behalf. (His Lordship agreed with the learned trial Judge that Maung Saw Maung's claim was quite without foundation.) The result therefore is that the two appeals of Ma Nyun Yin (Nos. 78 and 79 of 1940) succeed, and the judgment and decree of the original side of this Court in Civil Regular No. 120 of 1939 and the order in Civil Misc. No. 77 of 1939 are set aside, and instead thereof there will be a decree directing that letters of administration to the estate of U San Chein shall be granted to Ma Nyun Yin on her furnishing security to the satisfaction of the Registrar, original side, and giving the usual undertakings regarding the filing of inventory and accounts, and the application of Ma Chit for a succession certificate to collect the debts due to the estate of U San Chein is dismissed. As regards the costs, Ma Nyun Yin must have her costs against the respondents in her appeals both in this Court and in the original Court in both cases, advocate's fee for the two appeals together to be 30 gold mohurs for the first day and ten gold mohurs for each succeeding day of hearing; and the appeals are

6. ('33) 20 A I R 1933 Rang 50 : 144 I C 306 : 11 Rang 158, U Sein v. Ma Bok.

7. ('41) 28 A I R 1941 Rang 87: 193 I C 507: 1940 R L R 783, Ma Kyin Sein v. Maung Kyin Htaik.

certified for two counsel. Maung Saw Maung must pay to the respondents in his appeal costs both in this Court and in the original Court, advocate's fee for his appeal 20 gold mohurs.

Dunkley J.—I have had the advantage of reading the judgment of my Lord the Chief Justice, and I am in complete agreement with the conclusions at which he has arrived; but in view of the importance of this litigation I think it is desirable that I should state my reasons in my own way for arriving at these conclusions, even at the risk of some repetition. I propose to deal first with the two appeals of Ma Nyun Yin. In Book X of the Manukye Dhammathat (Richardson's translation, at page 319) the 12 classes of children are stated. Of these, six classes are entitled to inherit and six are not entitled to inherit. The fifth class of children entitled to inherit are "children obtained by request from their parents and adopted publicly." These are the keittima children. The law in regard to such publicly adopted children has been stated by the late May Oung J. in his well-known work entitled "Leading Cases on Buddhist Law" (2nd Edn., p. 141) in the following words:

> The best evidence of an adoption is as to what actually took place when the child was taken over by the adoptor. A deed may have been drawn up and executed; public announcement may have been made to relatives, neighbours, friends and others at a ceremony held for that or any other purpose; the fact may have been advertised in the press or information purposely circulated to the whole village or neighbourhood; or at the very least, a few elders may have been called in to witness the handing over of the child. Proof of any of these, or, perhaps, other acts of volition would be sufficient to enable the Court to pronounce for the adoption. And it may safely be held in all such cases that it is of the keittima variety on account of the formality observed. Indeed, when the formal handing over has been made by one or both of the natural parents, it would be impossible to believe that he or she or they would have allowed a transfer in the way of adoption of any inferior kind.

May Oung J.'s work is an authority of established repute, and this statement of the law was quoted and adopted by a Bench of this Court in 12 Rang 634[8] at p. 647. In 5 L B R 118[3] at pp. 123-124 their Lordships of the Privy Council said:

> It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

And further:

> It would have been easy for the parties, by means of an actual, though not ceremonial, adoption in presence of witnesses to have precluded the raising of subsequent questions. Where that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is, in their Lordships' opinion, a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on.

The decision was followed by Maung Kin J. in 9 Bur L T 154,[9] the headnote of which reads as follows:

> It is only when the fact of adoption is left to be inferred from past statements and conduct that adequate proof of publicity or notoriety of the relationship should be insisted upon. When there are admissions of the adoptive parents and the positive evidence of persons present at the adoption no further proof of publicity is required.

With the greatest respect, this is, in my opinion, a correct statement of the law. Where the party alleging the adoption relies for proof thereof on an actual giving and taking of the child in adoption, and satisfactorily establishes that the child was given and taken in adoption in the presence of witnesses on a distinct and specified occasion, and this giving and taking of the child was made known at the time to all those likely to be concerned, no further proof of the publicity or notoriety of the relationship, as evidence by subsequent statements or conduct, is required. The child is taken on this occasion in adoption with a view to inherit "for better or for worse", which phrase is an almost literal translation of the words commonly used by the natural parents in giving the child and by the adoptive parents in taking the child on such an occasion; and an adoptive parent, who may subsequently repent of his act, cannot divest himself of his responsibility towards his adopted child or deprive the latter of his right of inheritance by subsequent conduct or by failing during the subsequent period of his life to acknowledge the relationship or treat the adopted child as a natural child would be treated. Recently, in 1940 R L R 783[7] the question as to how the tie between the adoptive parents and a keittima adopted child can be broken fell for decision, and it was held that the relationship between an adoptive parent and his adopted child cannot be terminated by the unilateral act of the parent.

8. ('34) 21 AIR 1934 Rang 323 : 12 Rang 634, Ma Mu v. U Nyun.

9. ('16) 3 A I R 1916 L B 85 : 33 I C 927 : 9 Bur L T 154, Maung Seik v. Ma Thit Pu.

In the argument on behalf of the respondents before us there appeared to be considerable confusion of thought regarding the claim of the appellant, Ma Nyun Yin, and submissions were made which were without basis except on the footing that Ma Nyun Yin was claiming to be herself the adopted daughter of U San Chein, and that has never been her case. A perusal of the evidence recorded at the trial and the judgment of the learned trial Judge also seem to show that the same confusion existed during the trial and that it was not kept steadfastly in mind that Ma Nyun Yin was claiming, not as adopted daughter, but as the only legitimate child of a deceased adopted daughter, who had predeceased her adoptive father. With the greatest respect, I venture the opinion that because of this confusion of thought the learned trial Judge has failed properly to appreciate the effect of some of the evidence, and in particular has given too much weight to evidence of events, and statements and conduct of the deceased, occurring after the death of Ma Thin Hlaing, the mother of the appellant. The learned Judge has also, I think, with the greatest respect, not correctly appreciated the case put forward on behalf of the appellant. He has dismissed the appellant's claim because she has not proved a course of conduct by U San Chein towards her mother which is inconsistent with any other supposition than that her mother was the keittima adopted daughter of U San Chein. But it was unnecessary for her to do so. She has endeavoured to establish the factum of adoption by proving that the adoption took place on a distinct and specified occasion, and evidence of statements of U San Chein and Daw E Byu, and of their conduct towards Ma Thin Hlaing, subsequent to that occasion, has been led for the purpose of corroborating the evidence of the witnesses who allege that they were present when the adoption took place, in order to persuade the Court of the truthfulness of the evidence of these witnesses, but not to prove a course of conduct which would by itself suffice to establish the factum of adoption, even in the absence of any evidence regarding a specified occasion on which the adoption took place.

It seems to me that when these considerations are borne in mind the evidence recorded at the trial assumes an entirely different aspect and leads to conclusions contrary to those at which the learned trial Judge has arrived. (His Lordship went into the evidence on behalf of the appellant and proceeded.) I now come to the actual adoption itself, which is said to have taken place in the year 1896. The witnesses for the appellant in regard to this adoption are Daw E Kin, Daw Hnin Yin, Daw Thib, U Tun Si and U Pe. They state that when U Shwe Ya made his third marriage, Daw E Byu, with the consent of U San Chein, pressed him to allow Ma Thin Hlaing to be adopted by them, and after some pressure he consented, and then a formal adoption ceremony was held at which all the relatives were present and about 20 to 25 residents of the quarter as witnesses. This was a formal ceremony of adoption such as has been referred to by May Oung J. in the extract from his work on Buddhist Law which I quoted at the beginning of this judgment. If their evidence is accepted then that is the end of the matter and no further evidence in proof of the adoption is required, for there was a public giving and taking of the child in adoption, and the child comes within the fifth class mentioned in the Manukye, that is, "children obtained by request from their parents and adopted publicly." The evidence of these witnesses regarding the ceremony is consistent and it has not been shaken in cross-examination. For the respondents only two witnesses make any reference to this alleged adoption. Ma Chit, who is the principal respondent, said in regard to it :

> As regards Ma Thin Hlaing, she also having lost her natural mother and having had to live with her stepmother, her father brought her and gave to him (i. e. U San Chein) to be brought up by him.

This is an admission by Ma Chit of at least an apatitha adoption. Maung On, the only other witness who refers to it, says that there was no adoption ceremony; but as he was only seven years old at the time it is unlikely that he would have any recollection of the event if it did take place. In argument it was said that U Pe in his evidence failed to state that, when the child was given by U Shwe Ya and taken by U San Chein and Daw E Byu, it was expressly said that the child was taken with a view to inherit; but that is a matter of no importance at all when there had been a public ceremony of giving and taking the child, or, as May Oung J. has pointed out, a public adoption of this kind is always a keittima adoption and cannot be of any other kind. The learned trial Judge has pointed out that all these witnesses except one, namely Daw Thin, are more or less related to the appel-

lant, and that Daw Thin is what he calls an "ubiquitous witness," because she has deposed that she was present on most of the important occasions of which evidence has been given in this case. That seems to me to show no more than that she was very intimate with this family and for that reason was present on important occasions. The learned Judge has not rejected this large body of evidence on the ground of relationship or the ubiquity of Daw Thin; he could not very well do so on this slender ground; but he has rejected it on the ground that the evidence of the course of conduct of U San Chein and Daw E Byu towards Ma Thin Hlaing after his alleged ceremony was not of such a kind as to be inconsistent with any other supposition than that of keittima adoption. With the greatest respect, as I have already pointed out, this is not the correct way to appraise the evidence of subsequent events, which evidence was called, not to prove such a course of conduct as would in itself suffice to establish adoption but to corroborate the evidence regarding the adoption on a distinct and specified occasion.

There is nothing strange about the adoption of a half-sister, but in ordinary circumstances it would be a factor tending against the evidence of adoption that Daw E Byu was still a young woman at that time and there is no evidence that she had no prospect of having further natural children, and also that the difference between her age and Ma Thin Hlaing's age was not more than 16 years. The evidence on this point of age is very vague, but it would appear that the difference of ages was not less than 14 years and not more than 16. However, in the particular circumstances of this case, when the natural father of Ma Thin Hlaing had married another wife who was living outside Rangoon and the probabilities were that the small children of U Shwe Ya's earlier marriage would be neglected, it is not strange that a well-to-do couple like U San Chein and Daw E Byu should feel a special responsibility towards these young children, when Daw E Byu was the eldest child of U Shwe Ya, and should take one of them into their family. In my opinion, the appellant by this evidence has set up a very strong case that her mother Ma Thin Hlaing was adopted in the keittima form by U San Chein and Daw E Byu. In rebuttal the respondents have called a great deal of evidence to prove absence of publicity or notoriety of the adoptive relationship. The evidence is of two kinds, namely, (1) evidence that Ma Thin Hlaing was not generally known to be the adopted daughter of U San Chein and Day E Byu, and (2) evidence of persons acquainted with U San Chein and Daw E Byu that they were not informed of the adoption. As I have reiterated several times in the course of this judgment, the appellant appeals to a distinct and specified occasion on which the adoption took place; hence the only possible effect of this evidence, to give it its highest value, would be to throw doubt on the evidence of the actual adoption by showing that the relationship did not subsequently exist.

Now, publicity and notoriety are facts which, like all other facts, must be proved or disproved by admissible evidence; and evidence of the kinds which I have mentioned can only be admissible under either of Ss. 19, 32 (5) or 50, Evidence Act. Evidence of statements made by living persons may be admissible under S. 19 as admissions provided those persons fall within the class mentioned in that section. Evidence of statements made by persons who are dead is admissible under S. 32, cl. (5), if they were persons who would have had special means of knowledge of the relationship. The evidence which is admissible under S. 50 is evidence of the opinion of a person who had special means of knowledge when that opinion is expressed by conduct. Hearsay evidence is inadmissible, and evidence of mere gossip in the neighbourhood is inadmissible because it is opinion not expressed by conduct of persons having no special means of knowledge. So, a mere statement that a person was or was not an adopted child is not evidence, for that is the opinion of the witness as to whether there was an adoption or not, which is the very point which the Court has to decide; to be admissible, the evidence must be evidence of facts from which the Court may draw an inference in favour of or against the adoption. A witness might be able to depose that he was intimate with the family and a frequent visitor to the house, and that the alleged adoptive parents ordinarily discussed their social and family affairs with him, and that they never mentioned the alleged adoption to him. Evidence given by such a witness of their silence would be evidence of conduct admissible under S. 50, Evidence Act; but unless it were first established that the witness was a person who in the ordinary course would be likely to be told, the fact

that he was not informed would not be relevant. These considerations dispose of almost all the evidence called by the respondents on this point as being inadmissible evidence. (After going through the evidence on behalf of the respondent his Lordship proceeded.) It is necessary for me to say very little regarding the appeal of Maung Saw Maung (No. 76 of 1940). I agree with my Lord the Chief Justice that Maung Saw Maung has failed to establish that he was adopted by U San Chein either as keittima or as apatitha son. In his original petition he set up that he and his brother Maung Hla Shwe (who has not made any claim) were the adopted sons of U San Chein, and as such were entitled to the whole of U San Chein's estate; that is, he set up that he and his brother had been adopted in the keittima form. When the whole of the evidence for Ma Nyun Yin and for himself had been recorded, and the evidence on behalf of the legal representatives of U Aung Gyi was being recorded, he made a belated application, on 10th February 1940, to be allowed to amend his petition by stating in the alternative that they were the apatitha sons of U San Chein. The learned Judge in his discretion refused to allow that amendment, and we have heard considerable argument on this point, and it is perhaps desirable that I should state that I think that the learned trial Judge exercised his discretion rightly in refusing to allow this amendment at that late stage. But however that may be, the learned Judge examined all the evidence called by Maung Saw Maung and came to the conclusion that no adoption in either form was proved, and with that conclusion, for the reasons stated by my Lord the Chief Justice, I agree. Maung Saw Maung was unable to appeal to any distinct and specified occasion on which he was publicly adopted, and he has endeavoured to establish his adoption by proving a course of conduct inconsistent with any other supposition. He has signally failed to prove any such course of conduct. His learned counsel, in argument before us, conceded that the evidence for Maung Saw Maung did not go further than proving an apatitha adoption, and as we have held that Ma Nyun Yin is a direct descendant of U San Chein proof of an apatitha adoption would not give him any interest in U San Chein's estate. Maung Saw Maung's case is concluded against him by evidence which was given by U San Chein before the third Additional Magistrate of Hanthawaddy on 28th April 1938, that is little more than six months before his death. In that case Maung Hla Shwe was the accused, and in the course of his evidence U San Chein said (referring to Maung Hla Shwe): "I employed Hla Shwe since then. I am not related to him, but his mother left him in my charge." This statement shows that the position of Maung Hla Shwe was that of a servant. Maung Saw Maung's case is that he and Maung Hla Shwe occupied the same status, and hence this statement of U San Chein himself proves that Maung Saw Maung was never adopted. The appeal of Maung Saw Maung therefore fails. Hence I agree with my Lord the Chief Justice that the two appeals of Ma Nyun Yin must be allowed and that the appeal of Maung Saw Maung must be dismissed. I agree with my Lord's order regarding the costs of the appeals and the original trial.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 294

ROBERTS C. J. AND DUNKLEY J.

U Chit Hlaing — Applicant

v.

U Lun — Respondent.

Civil Misc. Appln. No. 6 of 1941, Decided on 19th March 1941, for leave to appeal to His Majesty in Council, *Reported in ('41) 28 A I R 1941 Rang 49.*

Court-fees Act (1870), Sch. 1, Arts. 6 to 9 — Copies of judgments and decrees filed with application under S. 81 (2), Government of Burma Act, not stamped — Deputy Registrar admitting copies — Applicant held should be given time to furnish necessary stamp.

Where the Deputy Registrar whose duty is to see that all documents presented in the High Court are duly stamped admits copies of judgments and decrees filed with an application under S. 81 (2), Government of Burma Act, which have not been stamped as required by Arts. 6 to 9, Court-fees Act, the applicant is entitled to time to furnish the necessary stamps. [P 295 C 1]

U Kyaw Din — for Applicant.

U Ba Sein for U E Maung (1)—for Respondent.

Dunkley J. — This is an application for leave to appeal to His Majesty in Council. The applicant undoubtedly has a right of appeal under S. 87(1), Government of Burma Act. But it is said on behalf of the respondent that the application is out of time, and that in fact there is really no application before the Court, because certain certified copies of judgments and decrees of this Court have not been filed with the application. True copies of the judgments and decrees were filed within time, although they

were filed three days after the application itself; but these copies have not been stamped under the provisions of Arts. 6 to 9 of Sch. 1, Court-fees Act. U Kyaw Din, for the applicant, says that it is unnecessary for the applicant to stamp these copies in accordance with the provisions of those articles. But, without waiving this point, he is prepared to furnish the necessary stamps, and we think that, as the acceptance of the copies without the stamps by the Deputy Registrar, whose duty it is to see that all documents presented in this Court are duly stamped, was an implied decision that the copies were in order; clearly now that this point has been raised by the respondent the applicant must be given time in which to provide the necessary stamps as required by these articles of the Court-fees Act. Consequently, we shall give U Kyaw Din time for seven days in which to provide the necessary stamps, which he will give to the Deputy Registrar to be affixed to the copies of the judgments and decrees. We mention again that U Kyaw Din is furnishing these stamps without prejudice to his argument that, in law, the stamps are not really requisite. On the condition that the stamps are furnished within seven days, this application for leave to appeal is granted.

Roberts C. J. — I agree.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 295

MOSELY J.

The King

v.

Maung Hla Pe and others — Respondents.

Criminal Appeal No. 1235 of 1940, Decided on 3rd March 1941, against orders of the Township Magistrate (1), Kyaukpadaung, D/- 12th August 1940.

(a) Criminal P. C. (1898), Ss. 236, 237 and 423 (1) (b)—Theft and demanding illegal gratification — Person charged with one can be charged alternatively with the other—Court can convict for either offence even if accused is not charged with it.

A person charged with theft under S. 379, Penal Code, can be charged in the alternative with demanding illegal gratification for the return of the same. The Court can convict the accused of either offence even if the accused has not been charged with it. [P 296 C 1]

(b) Penal Code (1860), Ss. 215, 511—Substantive offence under S. 215 and attempt to commit — Difference explained.

In the substantive offence under S. 215 there is a giver and a taker of the illegal gratification; in an attempt to commit the offence there is merely a proposal or an attempt to enter into an agreement to take from a person who is being induced to give and the person who makes such a proposal can be convicted of attempt to commit the offence under S. 215: ('23) 10 A I R 1923 All 83 and 2 L B R 310, *Rel. on*; 20 All 389, *Dissent.* [P 296 C 2]

U E Maung (1), Government Advocate — for the Crown.

Judgment. — This is an appeal by the Local Government against the acquittal in appeal of the four respondents, Hla Pe, Kan U, Tun Tin and Maung Bu alias Daw Yin. These men were charged by the Township Magistrate of Kyaukpadaung under S. 379 and under S. 215, Penal Code, with the theft of a bullock or in the alternative with demanding an illegal gratification for its return. They were all convicted under S. 215, Penal Code, and Hla Pe and Tun Tin, who had previous convictions, were sentenced to one year's rigorous imprisonment each, and the other two accused Hla Pe and Kan U, to six months' rigorous imprisonment each. The case against them was a simple one, and, I think, quite clearly proved. A letter had been sent to the complainant to demand Rs. 30. His relative Kyaw Din came with the money, and the accused Tun Tin and Maung Bu and two men unknown to Kyaw Din, whom he could not then or later recognize, met him, and Maung Bu asked for the money. Kyaw Din was willing to pay, but the agreement fell through as he wanted to see the bullock first and they would not show it to him. After this Hla Pe was found under suspicious circumstances and told the headman that Tun Tin and Maung Bu had brought the bullock and that they had all arranged to get money from the complainant, and Hla Pe showed the headman, U Shwe Mya (P. W. 5), the place where the bullock was tied up in the jungle. Then Kan U admitted to the headman that he had gone along with Hla Pe, Tun Tin and Maung Bu to demand the money.

The learned Sessions Judge of Myingyan in appeal acquitted all four accused. He said that Kan U's statement to the headman could not be regarded as a confession. I confess I do not understand this. Kan U clearly admitted taking part in the demand. Then the Judge said that Hla Pe should have been convicted of the theft. He had been charged alternatively under S. 379 and S. 215, and as no orders had been passed under S. 379, it was said that he had been impliedly acquitted of that offence, and that that acquittal could not be set aside in appeal. As he was the actual thief, he could not or should not, it was said, be

convicted of taking ransom, as S. 215 is not intended to deal with the actual thief, *vide* the cases in 4 L B R 199[1] and 2 U B R 43.[2] The allusion to implied acquittal comes, I presume, from the judgment of their Lordships of the Privy Council in 50 ALL 722.[3] But that was a case where it was held that the High Court in revision had no power to convert a conviction for the lesser offence of culpable homicide, (which implied an acquittal on a charge of the greater offence of murder), into a conviction for murder or thereon to enhance the sentence. In the present case there was an alternative charge as allowed by S. 236, Criminal P. C., and the trial Court could have convicted the accused of either offence even if they had not been charged with it, as is provided in S. 237. In appeal the appellate Court has power: *vide* S. 423 (1) (b). "(2) to alter the finding, maintaining the sentence . . . ." The matter has exhaustively been dealt with in the judgment of Nanavutty J. in 35 Cr L J 973,[4] which cites the previous cases on the subject, and rightly distinguishes the case in 50 ALL 722.[3] As regards the other appellants the learned Judge said that as they had not actually taken money they had not committed any offence. No authority was quoted, and the learned Judge did not consider whether an attempt to commit an offence had been made.

There are, as far as I know, only three cases reported on the subject. The first case is 20 ALL 389[5] at p. 391. The facts there were that the accused demanded Rs. 30 as a reward for return of the bullock, and the complainant offered him Rs. 15, but that offer was refused. In that case Dillon J. said that an attempt to take gratification within the meaning of S. 215, Penal Code, necessarily includes the idea of a concurrence of wills between the giver and the taker, with this much superadded thereto, that some act has been done preliminary to the act of taking it; in other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement and consent and the actual taking. This was dissented from by the Chief Court of Lower Burma in 2 L B R 310.[6] The learned Judges there said that a proposal is an attempt to complete an agreement. While there must be a concurrence of wills between the giver and the taker as regards a taking or a consenting to take, there was a distinction as regards an agreement to take, and that when a proposal had once been made for the payment of the illegal gratification, that in itself amounted to an attempt to take (or receive or get) an illegal gratification, and amounted to an attempt to commit an offence under S. 215. In 45 ALL 159[7] again a Bench of the Allahabad High Court disagreed with the former decision of that Court in 20 ALL 389.[5] They said much, as was said in 2 B L R 310,[6] that the accused could not have done anything more in order to be guilty of an attempt of the commission of the offence, than by proposing to the owner of the lost property to recover it on the receipt of a certain amount. They remarked, too, that if an attempt to take a gratification within the meaning of S. 215, Penal Code, necessarily included the idea of a giver and taker, it would no longer be a mere attempt to commit an offence, but would be the substantive offence itself.

If I may so put it, in the substantive offence there is a giver and a taker; in an attempt to commit the offence there is merely a proposal or an attempt to enter into an agreement to take from a person who is being induced to give. It is clear that Hla Pe should have been convicted of the theft, and the other three accused of an attempt to receive gratification under S. 215 read with S. 511, Penal Code. This appeal will be allowed and the original sentences restored with effect from the date of this judgment, that is to say Hla Pe will be convicted under S. 379, Penal Code, and sentenced to six months rigorous imprisonment; Kan U will be convicted under S. 215, read with S. 511, Penal Code, and sentenced to six months rigorous imprisonment, and Tun Tin and Maung Bu will be convicted under S. 215, read with S. 511, Penal Code, and sentenced to one year's rigorous imprisonment each : these sentences to be in continuation of any sentence that any of the appellants may now be serving.

K.S./R.K. *Appeal allowed.*

1. ('07) 4 L B R 199 : 14 Bur L R 67 : 7 Cr L J 464 (F B), Twet Pe v. Emperor.
2. ('14) 1 AIR 1914 U B 43 : 28 I C 997 : 2 U B R 43 : 16 Cr L J 421, Emperor v. Nga Nyan U.
3. ('28) 15 A I R 1928 P C 254 : 111 I C 332 : 29 Cr L J 828: 50 All 722 : 55 I A 390 (P C), Kishan Singh v. Emperor.
4. ('34) 21 AIR 1934 Oudh 200 : 149 I C 533 : 35 Cr L J 973 : 9 Luck 607 : 11 O W N 534, Lukhan Singh v. Emperor.
5. ('98) 20 All 389 : 1898 A W N 84, Queen-Empress v. Chittar.
6. ('04) 2 L B R 310, Emperor v. Nga Nya.
7. ('23) 10 AIR 1923 All 88: 76 I C 191: 25 Cr L J 127 : 45 All 159 : 20 A L J 927, Emperor v. Hargayan.

(28) A. I. R. 1941 Rangoon 297

MYA BU AND SHAW JJ.

K. N. Narayanaswamy Konar and others — Appellants

v.

K. A. Munuswamy Konar and others— Respondents.

First Appeal No. 95 of 1940, Decided on 7th January 1941, against decree of Dist. Court, Insein, D/- 21st February 1940.

Court-fees Act (1870), S. 7 (iv) (b) and Sch. 2, Art. 17 (vi) — Partition — S. 7 (iv) (b) makes no difference between plaintiff in actual possession and one in constructive possession of property sought to be partitioned — Joint family property — Suit to enforce right to share in falls under S. 7 (iv) (b) — Partition suit— Joint family property —Plaintiff not alleging to be in actual or constructive possession but asking for delivery of his share to him and also for accounts and his share in amount found to belong to joint estate — Suit held fell within S. 7 (iv) (b) and not Sch. 2, Art. 17 (vi).

According to its plain wording S. 7 (iv) (b) makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Partition is enforcement of the right to share in the joint family estate, and S. 7 (iv) (b) is specifically meant to govern suits for the enforcement of the right to share in the joint Hindu family estate. [P 298 C 2]

The plaintiff suing for partition of the joint family estate never alleged that he was either in actual or constructive possession but asked for delivery of his share to him. Further he asked for accounts and delivery to him of a one-third share of the amount that might be found to be belonging to the joint estate :

Held that the suit fell within the purview of S. 7 (iv) (b) and not Sch. 2, Art. 17 (vi) : 28 All 340, *Rel. on*; 8 Cal 757; 20 Cal 762 and 34 All 184, *Expl.* [P 298 C 2]

N. K. Bhattacharya — for Appellants.

Wellington — for Respondents.

Mya Bu J. — In this appeal the order for payment of costs made by the trial Court has been assailed by the appellants who were some of the defendants in the suit. The suit was by respondent 1, K. A. Munuswamy Konar against K. A. Narayanaswamy Konar and his children and K. A. Ramaswami Konar and his daughter as well as the plaintiff's own children. The plaintiff and the defendants K. A. Narayanaswamy Konar and K. A. Ramaswamy Konar were the children of one Annamalai Konar who died in 1926 and the plaintiff and those two defendants were therefore members of a joint Hindu family which was managed by K. A. Narayanaswamy Konar as the karta of the joint Hindu family. The plaintiff in his plaint prayed for a decree for partition of the estate, for accounts, for delivery to him of his one-third share and for such other and further reliefs as may be deemed fair and proper and paid court-fee on Rupees 96,013 being the value of his one-third share in the properties shown in the schedule attached to the plaint stating that if on taking accounts the plaintiff's share be found to be in excess of the amount then tentatively fixed the plaintiff undertook to pay the necessary additional court-fee. The plaintiff having obtained the decree that he prayed for, the trial Court awarded costs to him against Narayanaswamy Konar and Ramaswamy Konar who were the contesting defendants calculating the court-fee for the plaint on the actual amount of the fee which the plaintiff had paid on the plaint.

The appellants object to that amount of court-fee being allowed on the ground that under the law the court-fee payable on the plaint in the suit was only Rs. 10. The appellants' contention has proceeded upon the footing that the plaintiff being a member of the joint Hindu family was in constructive possession of the estate along with the other members of the family and that therefore all that he wanted being a mere right to partition and nothing more, was not liable to pay a court-fee over and above what would be necessary in a suit for a mere declaration of his right without prayer for consequential relief. In support of this contention, our attention has been drawn to the decision of Sir Richard Garth C. J. in 8 Cal 757[1] to the effect that in suits asking for partition, the separation of a share and for khas possession of that share after separation, the court-fee leviable is that under Art. 17, cl. (vi), sch. 2, Court-fees Act. But the learned Chief Justice plainly pointed out in his judgment that if the plaintiff's suit had been to recover possession of, or establish his title to, the share which he claims in the property, he must have paid an ad valorem court-fee upon the value of that share. In the statement of facts of that case, we find that the plaintiff was in actual possession of his share in the joint estate and merely sought for the partition of the estate, the separation of his share and for his khas possession of such share when separated. In a later case, namely, 20 Cal 762,[2] the judgments of Petheram, C. J. and Norris, J. are reported in which their Lordships observed :

1. ('82) 8 Cal 757 : 11 C L R 95, Kirty Churn Mitter v. Aunath Nath Deb.
2. ('93) 20 Cal 762, Mohendro Chandra Ganguli v. Ashutosh Ganguli.

So far as this plaint is concerned, the only relief which is sought is the partition of property which the plaintiff says is family property, and which he says he is in possession of jointly with the others, because he says the possession of one member of a joint family of family property is the possession of all; and consequently, so far as the plaint is concerned, this is a suit for partition, and nothing else.

Upon this footing, the learned Judges held that Rs. 10 was the proper court-fee for such suit. Similarly, in 34 ALL 184[3] it was held that in a suit for partition where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court-fee stamp of Rs. 10 is sufficient. But in 28 ALL 340[4] which was referred to in 34 ALL 184[3] already quoted where on the face of the plaint it appeared that the suit was in fact a suit to establish the plaintiff's title to a one-third share in certain property and to recover possession of the same, a claim for partition being added to make the relief sought effectual, it was held that an ad valorem fee was payable on the plaint and not a fee of Rs. 10 as provided by Article 17, cl. (vi) of sch. 2, Court-fees Act. In the course of their judgment, the learned Judges drew a distinction between the case before them and the case in 8 Cal 757[1] pointing out the plaintiff merely claimed partition which had been considered to be analogous to a change in the form of his enjoyment. For the matter in hand, it is quite sufficient to point out that in this case what was prayed for in the plaint was much more than a mere prayer for partition. The plaintiff never alleged that he was either in actual or constructive possession but asked for delivery of his share to him. Further he asked for accounts and delivery to him of a one-third share of the amount that might be found to be belonging to the estate. Therefore, this is clearly not a case of the kind in which Sir Richard Garth or the learned Judges who followed his Lordship's decision in later cases, held that a ten rupees stamp fee was sufficient. With reference to the provision of Art. 17, cl. VI, Sch. 2, Court-fees Act, we are of opinion that this suit is not one where it is not possible to estimate at a money value the subject-matter in dispute. The value of the subject-matter in dispute in such a suit as this is capable of being estimated in money value though in some cases it may be too difficult to be accurately valued. The plaintiff himself has estimated the value of his share and it is by no means a suit in which the value of the relief claimed cannot be estimated at a money value. Section 7, cl. (iv) (b) runs as follows :

The amount of fee payable under this Act in suits to enforce the right to share any property on the ground that it is joint family property shall be computed according to the amount at which the relief sought is valued in the plaint.

According to its plain wording, this section makes no difference between a plaintiff who is in actual possession and one who is merely in constructive possession of the property which is to be partitioned. Partition is enforcement of the right to share in the joint family estate. There are authorities for the proposition that this clause is specifically meant to govern suits for the enforcement of the right to share in the joint Hindu family estates. Since in all joint Hindu families, all coparceners are in constructive possession of the family property along with the karta who is ordinarily in actual possession, if the Legislature intended to recognize the right of a member of the joint Hindu family, who in law is in constructive possession of the family property, to enforce partition and delivery to him of a share in the estate by payment of a court-fee other than as provided for by S. 7, cl. IV (b), we would expect to find some specific provision to that effect. For all these reasons, we consider that the court-fee paid on the plaint was correct. There is no substance in this appeal which is dismissed with costs, advocate's fee in this Court five gold mohurs.

G.N./R.K. *Appeal dismissed.*

3. ('12) 34 All 184 : 8 A L J 1329, Tara Chand Mukerji v. Afzal Beg.
4. ('06) 28 All 340 : 3 A L J 181 : 1906 A W N 38, Wall-Ullah v. Durga Prasad.

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(28) A. I. R. 1941 Rangoon 298

ROBERTS C. J. AND DUNKLEY J.

Ma Aye Tin — Applicant

v.

Ellerman's Arracan Rice and Trading Co., Ltd. — Respondent.

Civil Revn. No. 368 of 1940, Decided on 4th March 1941, against order of Dist. Court, Mandalay, D/- 2nd October 1940.

Civil P. C. (1908), O. 21, R. 100—O. 21, R. 100 does not apply where decree-holder is given symbolical possession—Decree-holder in execution of his decree putting property jointly owned by judgment-debtor and third party to sale and purchasing same—Decree-holder asking tenant of judgment-debtor and third party to pay rent to him — Third party cannot be said to be dispossessed by decree-holder—O. 21, R. 100 does not apply.

Order 21, R. 100 does not apply where symbolical possession is given to a decree-holder. Where a decree-holder in execution of his decree puts the property jointly owned by the judgment-debtor and a third party and purchases the same a requisition by the decree-holder on the tenant of the judgment-debtor and third party to pay rent to him cannot amount to dispossession of the third party within the meaning of O. 21, R. 100. Even if the third party can be said to be dispossessed he would be dispossessed by the tenant and not the decree-holder and hence even then O. 21, R. 100 cannot be attracted : 30 Cal 710, *Rel. on*; 33 Cal 487, *Disting.* [P 299 C 1,2]

P. B. Sen — for Applicant.

Mootham — for Respondent.

Roberts C. J.—This is an application in revision from a judgment of the learned District Judge of Mandalay in these circumstances. The respondents, Ellerman's Arracan Rice & Trading Co. Ltd., obtained a decree against one Tun Byan Seng, the brother of the applicant, who was alleged to be joint owner with her of certain property which had been mortgaged to the Ellerman's Company. As a result of the decree the mortgaged property was sold and bought by the decree-holders and the sale was subsequently confirmed and possession was obtained by them, and in those circumstances the tenant of the judgment-debtor and his sister was informed that he ought to pay the rent to the decree-holders. Mr. Sen has contended that this amounts to dispossession of his client who was never a party to the mortgage and whose interest could not be sold. But, in my opinion, that proposition is not tenable, and I agree with the learned District Judge in his view that 30 Cal 710[1] shows that a person who is actually in possession cannot be considered as having been dispossessed within the meaning of the rule. Moreover, even if Mr. Sen were right in saying that his client had been dispossessed in any way, the dispossession would be on his own showing, by the tenant of the property. Order 21, R. 100, says plainly that where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree he has a remedy under that rule, and therefore on that ground again Mr. Sen has not brought his client within the scope of the order. I make these observations because in my opinion the learned Judge was entirely right in the course which he took; but there is another ground upon which this application in revision must fail. It is that if the learned Judge were wrong, he has exercised his discretion by saying that the application was not maintainable; he has not refused to exercise a jurisdiction vested in him, or to act in such a way as to make the proceedings before him susceptible of a successful application in revision. Attempts have been made to assail the learned Judge's conduct in other respects; but there is no error apparent on the face of the record. In my opinion this application in revision is misconceived, and must be dismissed with costs, advocate's fee five gold mohurs.

1. ('03) 30 Cal 710, Ibrahim Mullick v. Ram Jadu.

Dunkley J. — I agree. Rule 100 of O. 21, has no application to a case where symbolic possession is given to a decree-holder. Mr. Sen referred also to 33 Cal 487,[2] but that is a case where the tenant was actually ousted from possession of the land, and it is admitted on behalf of the applicant that her tenant is still in possession of the property now in question.

G.N./R.K. *Application dismissed.*

2. ('06) 33 Cal 487 : 3 C L J 293, Brajabala Devi v. Gurudas Mandal.

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(28) A. I. R. 1941 Rangoon 299

ROBERTS C. J. AND DUNKLEY J.

Daw Saw Nyun — Applicant

v.

Daw Pwa and others — Respondents.

Civil Misc. Appln. No. 72 of 1940, Decided on 3rd March 1941, for leave to appeal to His Majesty in Council against judgment and decree of High Court in F. A. No. 23 of 1940, D/- 30th July 1940.

Privy Council—Leave to appeal to—Rangoon High Court Rules (Appellate Side), R. 5—Application for — Copies of judgment and decree are necessary.

A petition for leave to appeal to His Majesty in Council is an application for the very purpose for calling a decree of the High Court into question and under R. 5 of the Appellate Side Rules, such an application should be accompanied by copies of judgment and decree or orders. Where the copies of the judgment and decree are not filed and are not even applied for until after the period of limitation has expired, it must be held that the original petition for leave is inchoate and cannot be entertained: ('36) 23 A I R 1936 Rang 82, *Rel. on.* [P 300 C 2]

Hay — for Applicant.

Chowdhury — for Respondents 1, 2 and 3.

Dunkley J.—This is a petition for leave to appeal to His Majesty in Council against the judgments and decrees of this Court in Civil First Appeals Nos. 23 and 25 of 1940. The judgments in these two appeals were delivered on 30th July 1940, and hence the period for the filing of a petition for leave to appeal to His Majesty in Council expired before the end of October. The actual petition in this case was filed on 1st November,

and was prima facie within time because it was filed during the vacation of the Court. It was then pointed out to learned counsel for the applicant that under the rules of the Court copies of the judgments and decrees appealed against must be filed with the petition and that the petition as filed without these necessary documents was inchoate. On the Deputy Registrar making this order, copies of the judgment and decree in Civil First Appeal No. 25 of 1940 were filed on 5th December, but the copies of the judgment and decree in Civil First Appeal No. 23 of 1940 were not filed until 16th December 1940, and the copies show that application for the copies of the judgment and decree in this appeal was not made to the Copying Department of the Court until 9th December; that is, there was no attempt to comply with the rules of the Court and to obtain the necessary copies until the period of limitation prescribed had expired by more than 40 days. It is said that because, when due allowance is made for the time requisite for obtaining copies, the copies of the judgment and decree in First Appeal No. 25 of 1940 were filed within time, this petition ought to be admitted. But the judgment and decree in First Appeal No. 25 of 1940 were merely of a formal character, and as this appeal was dismissed and there was in consequence no alteration of the judgment and decree of the original Court, so far as this appeal is concerned there is no further appeal as of right to His Majesty in Council, and from the petition which has been filed it is clear that no question of law arises in the appeal.

The real appeal is against the judgment and decree in First Appeal No. 23 of 1940, which reversed the judgment and decree of the District Court, and the petition now filed shows that it is desired to appeal to His Majesty in Council for the purpose of restoring the judgment and decree of the District Court. So far as First Appeal No. 23 is concerned, which is the substantive appeal in regard to which a certificate for leave to appeal to His Majesty in Council is desired, no steps to obtain copies of the judgment and decree in that appeal were taken until after the period of limitation had expired. It is further urged that it is unnecessary to file copies of the judgment and decree with a petition for leave to appeal, and that therefore the original petition was in order. Under R. 57 of the rules of this Court on the Appellate Side a petition for leave to appeal to His Majesty in Council shall be presented to the Deputy Registrar, who, if the petition is in order, will issue notice on the respondent to show cause. Consequently, the petition must be in order; and in order to see what are the requirements so that a petition may be in order, clearly it is necessary to refer to the provisions of the Code of Civil Procedure and the rules of the Court in respect of such petitions. The rule of the Appellate Side of this Court dealing with memoranda of appeal and applications is R. 5. This rule says that memoranda of appeal and applications shall be accompanied by as many copies thereof as there are respondents, and by certified copies of (1) the decree or order against which an appeal or an application is made, and (2) the judgment on which such decree or order is founded, unless the Court dispenses therewith. It is said on behalf of the applicant that a petition for leave to appeal to His Majesty in Council is not an application against any decree or order; but, to my mind, it is clearly an application of that kind, for it is an application for the very purpose of calling a decree of this Court into question, and, in ascertaining whether a petition for leave is in order within the meaning of Rule 57, the Deputy Registrar, who receives the petition, must see whether it complies with the provisions of R. 5. I am confirmed in this opinion by the judgment of a Bench of this Court in 13 Rang 762,[1] in which it was said that it is necessary on an application for leave to appeal to His Majesty in Council that a copy of the judgment from which it is sought to appeal should be before the Court. Consequently, in this case, as the copies of the judgment and decree in First Appeal No. 23 of 1940 were not filed and were not, as I have said, even applied for until after the period of limitation had expired, it must be held that the original petition for leave was inchoate, and therefore that there is no petition before the Court upon which leave can be granted. Since the application for copies of the judgment and decree required was not made until after the period of limitation had expired, there are no grounds on which this delay can be excused under the provisions of S. 5, Limitation Act. This petition must therefore be dismissed with costs, advocate's fee five gold mohurs.

Roberts C. J.—I agree.

K.S./R.K. *Petition dismissed.*

1. ('36) 23 A I R 1936 Rang 82 : 161 I C 464 : 13 Rang 762, R. K. Banerjee v. Alagammai Achi.

(28) A. I. R. 1941 Rangoon 301

MOSELY J.

Sulaiman — Accused — Appellant

v.

The King.

Criminal Appeal No. 1263 of 1940, Decided on 22nd January 1941, from order of Sess. Judge, Arakan, in Sess. Trial No. 36 of 1940.

(a) Penal Code (1860), Ss. 34, 325 and 304 — Essentials to be proved for establishing under S. 34 joint responsibility for offence stated— Common intention is sole test of joint responsibility — Common assault by accused and his party on deceased with fists and by one of them with stick and assault by accused in lifting up and dropping down deceased extremely severe —No proof of common intention to cause injury likely to cause death though combined effect of injuries caused likely to cause death—Accused held knew that he was likely to cause not only hurt but grievous hurt and that common intention of his party was to cause grievous hurt.

It is not sufficient for joint responsibility for an offence under S. 34 that the offence actually committed was likely to occur as a result of the several persons acting together; but the existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and it must also be proved that the common act for which the accused were to be made responsible was acted in furtherance of that common intention : i('23) 10 A I R 1923 Rang 268 and ('25) 12 A I R 1925 P C 1, *Rel. on.* [P 302 C 2]

Not only the common assault on the deceased by the accused and his party with fists and by one only with a stick but also the individual assault by the accused in lifting up the deceased and dropping him down more than once was an extremely severe one. There was no proof of common intention to cause injury known to be likely to cause death though the combined effect of the injuries actually caused was likely to cause death:

Held that the offender knew that he was likely to cause not only hurt but grievous hurt and that the common intention of his party was to cause grievous hurt. [P 302 C 2]

(b) Criminal P. C. (1898), S. 164 — Dying declaration made to Magistrate not competent to record it—Declaration is not inadmissible — But declaration in such case must be proved — Presumption under S. 80, Evidence Act, does not arise—Declaration even if made in course of investigation would be admissible under S. 32, Evidence Act.

A statement relevant under the provisions of S. 32, Evidence Act, is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record a statement of a witness under S. 164, Criminal P.C. Consequently a dying declaration made to a Magistrate is not inadmissible because the Magistrate was not empowered under S. 164 to record it as it was not made in the course of investigation under Chap. 14, Criminal P. C.: ('30) 17 A I R 1930 Lah 60 and ('32) 19 A I R 1932 Lah 14, *Rel. on.* [P 303 C 1]

But the dying declaration in such a case must be proved, for it cannot be said to be a record of the evidence given by a witness before an officer authorized by law to take such evidence and the presumption mentioned in S. 80, Evidence Act, cannot arise. But even if the dying declaration is made in the course of investigation under Chap. 14, Criminal P. C., it would be admissible under S. 32, Evidence Act. [P 303 C 1]

(c) Criminal P. C. (1898), Ss. 164, 529 and 530 — Proceedings under S. 164 void on ground of Magistrate not being empowered — S. 529 or S. 530 does not prohibit setting aside of proceedings.

Proceedings under S. 164, Criminal P. C., are not mentioned in either S. 529 or S. 530 as proceedings which are not to be set aside on the ground of a Magistrate not being empowered, or as void owing to that lack of power. [P 302 C 2]

(d) Evidence Act (1872), S. 32 — Dying declaration recorded by Magistrate — Method of proof—Magistrate need not repeat record seriatim in his evidence — It is sufficient for him merely to refer to record and testify to its correctness.

Where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record seriatim in his evidence if he is satisfied that it was correctly recorded; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question : ('36) 23 A I R 1936 Rang 42, *Rel. on.* [P 303 C 1]

(e) Evidence Act (1872), Ss. 32, 33 and 80 — Cases dealt with by S. 32 and S. 33 are quite distinct—S. 33 does not govern S. 32—Presumption under S. 80 cannot be limited to evidence recorded where accused has had opportunity of cross-examination — Statement to Magistrate authorized to take it need not be proved—Proof of identity of person who made statement is necessary — Some witness and not Magistrate should be called for that purpose.

Section 32 makes relevant statements by a deceased person as to the cause of his death; while S. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. The cases dealt with by the two sections are quite distinct, the first relating to a statement whether given in evidence or not, made by a deceased person as to the cause of his death; the second to a previous statement made by a deceased witness in any kind of legal proceeding, civil or criminal, with the qualification that the former evidence must have been taken subject to cross-examination there being no such qualification as regards the first instance. But the statement made to a Magistrate authorized to take it is evidence within the meaning of the definition under S. 3 of the Act. It cannot therefore be said that S. 33 governs S. 32, for if it did so no statement made under S. 32 to a Magistrate empowered to record it would be relevant at all unless the accused had had opportunity of cross-examination, and hence the presumption given by S. 80 cannot be limited to cases of evidence recorded where the accused had had an opportunity of cross-examination. Consequently where the Magistrate is empowered to record a statement it is not necessary for him to prove that he took the statement, and the fact that the accused was not present at the time when the dying declaration was taken makes no difference in this respect: ('34) 21 A I R 1934 All 340, *Rel. on*; 11 Bom H C R 247; 8 Cal 211; 36 Cal 659; ('31) 18 A I R 1931 Mad 430 and (1872-92) L B R 157, *Not foll.* [P 303 C 2; P 304 C 1]

But the proof of the identity of the person who made the statement is necessary. To prove the

identity of the declarant it is desirable not to summon the Magistrate for that purpose but to prove it from the mouth of some one else, preferably some other witness in the case who was present at the time that the declaration was taken: 11 Cal 580; ('34) 21 A I R 1934 All 81 (FB) and ('26) 13 A I R 1926 Cal 705, *Rel. on*; 26 All 108 (PC), *Disting.*; ('30) 17 A I R 1930 Lah 60 and ('32) 19 A I R 1932 Lah 14, *Not approved.* [P 304 C 1]

(f) Evidence Act (1872), S. 32—Dying declaration to Magistrate not authorized to record it—Magistrate called to prove same — He may be questioned whether deceased was in fit state to make declaration and understood what he said.

Where a Magistrate not authorized to record the dying declaration is called to prove the same, he can be questioned as to whether the deceased was in a fit state to make the declaration and understood what he was saying where such a course is rendered desirable by the statement itself or other circumstances: 11 Bom H C R 247, *Approved.* [P 304 C 1]

Judgment. — The appellant Sulaiman, aged 25, was sentenced to eight years rigorous imprisonment, under S. 304 (1), Penal Code, for causing the death of Taw Bwe, a man of about 64. There is no doubt that the appellant did assault the deceased, an Arakanese, in common with some six or seven other Indians, and that they inflicted injuries on him, the combined effect of which was likely to cause his death. What happened was that the deceased, a doctor, went to demand his fees from Sulaiman and there was a quarrel about the money. Sulaiman's brother knocked Taw Bwe down. He ran away with a companion of his, Mra Dah Aung, (P. W. 1), a man of 40, who kept ahead of him. The deceased was overtaken and assaulted first by two other Indians, one of them with a stick, and then by the appellant and two others, and then by four or five more Indians. Sulaiman and others struck the deceased with their fists; Sulaiman lifted him up and dropped him down more than once. The evidence to prove this is that of Mra Dah Aung and the dying declaration of the deceased. There is no reason to doubt this evidence.

The deceased had two abrasions and six contusions. The medical witness, Dr. Manual, (P. W. 2), said that there were only eight marks, but there must have been many more blows, and that each injury was caused by more than one blow. The deceased died of shock. A contributory cause of his death was adherent pericarditis with emphysema of both lungs. His resistance to the injuries was greatly lowered by this. The doctor was of the opinion that death would be a likely but not a probable result to a man over 40, but not a likely result to a man under 40. By "probable" I understand the doctor to mean "very likely." What the law requires is that the death should be caused with the knowledge of the offender that he is likely by that act to cause death. But, as was said in 1 Rang 390[1]:

> . . . it is not sufficient for joint responsibility for an offence under S. 34, Penal Code, that the offence actually committed was likely to occur as a result of the several persons acting together; but that the existence of a common intention being the sole test of joint responsibility, it must be proved what the common intention was and it must also be proved that the common act for which the accused were to be made responsible was acted in furtherance of that common intention.

Or as was said by their Lordships of the Privy Council in 52 Cal 197,[2] at p. 207:

> Questions arise in such cases as to the extent to which the common intention and the common contemplation of the gravest consequences may have gone.

There is no proof in this case that the common intention was to cause injury known to be likely to cause death, though the combined effect of the injuries actually caused was likely to cause death. I would hold, however, that the offender knew that he was likely to cause not only hurt but grievous hurt and that the common intention of his party was to cause grievous hurt, for not only the common assault but also the individual assault committed by the accused was an extremely severe one. The complaint of the deceased was at first merely recorded in the general diary at the police station and no investigation was opened. On the 23rd April a third class Magistrate took the dying declaration of the deceased at 12-30 P. M. at the hospital. A police officer came to the hospital later (3.15 P. M.) and got the deceased to affix his thumb mark to his former statement to the police; after this only an investigation was opened. The learned Judge was correct in saying that the statement to the Magistrate was not inadmissible because the Magistrate was not empowered under S. 164, Criminal P. C., to record the statement, for it was not made in the course of an investigation under Chap. 14, Criminal P. C. But even had the statement been made in the course of such an investigation the statement, in my opinion, would have been admissible in evidence as a statement made by a person as to the cause of his death: Section 32 (2), Evidence Act. I

1. ('23) 10 A I R 1923 Rang 268 : 76 I C 705 : 25 Cr L J 241 : 1 Rang 390, Maung Gyi v. Emperor.
2. ('25) 12 A I R 1925 P C 1 : 85 I C 47 : 26 Cr L J 431 : 52 Cal 197 : 52 I A 40 (P C), Barendra Kumar v. Emperor.

agree with what was said in 31 Cr L J 79[3] by a Bench of the Lahore High Court, that where a statement is relevant under the provisions of S. 32 (1), Evidence Act, it is not inadmissible by reason of the fact that the Magistrate who recorded it was not competent to record a statement of a witness under S. 164, Criminal P. C. This was followed by the same Court in 32 Cr L J 1118.[4] Proceedings under S. 164, Criminal P. C., are not mentioned in either S. 529 or S. 530, as proceedings which are not to be set aside on the ground of a Magistrate not being empowered, or as void owing to that lack of power.

There is another thing which I think it is desirable to comment on. The dying declaration which was made in the absence of the accused was proved by the Magistrate who recorded it, and the method of proof employed was that the Magistrate refreshed his memory from the record, under the provisions of S. 159, Evidence Act, and then repeated seriatim what was on the record. I agree with what was said in A I R 1936 Rang 42[5] that where a dying declaration has to be proved by a Magistrate it is unnecessary for him to repeat the record seriatim in his evidence if he is satisfied that it was correctly recorded; it is sufficient for him merely to refer to the record and testify to its correctness, and that it was made by the person and under the circumstances in question. I agree that the dying declaration had to be proved, for it was not a record of the evidence given by a witness before an officer authorised by law to take such evidence. Therefore, the presumption mentioned in S. 80, Evidence Act, could not arise. Section 80, Evidence Act, is as follows :

> Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

If the Magistrate had been empowered to record the evidence, however, in my opinion, it would have been unnecessary for him to prove that he took the statement, and the fact that the accused was not present at the time when the dying declaration was taken made no difference in this respect. "Evidence" is defined in S. 3, Evidence Act, as all statements which the Court permits or requires to be made before it by witnesses, i. e., oral evidence, and all documents produced for the inspection of the Court, i. e., documentary evidence. "Court" is defined as including all Judges and Magistrates and all persons except arbitrators legally authorised to take evidence.

Section 32 says that statements, written or verbal, of relevant facts, made as to the cause of his death, are themselves relevant facts. Section 33, Evidence Act, says that evidence given by a witness before any person authorised by law to take it is relevant for the purpose of proving the truth of the facts which it states, when the witness is dead, or cannot be found. . . . : Provided . . . that the adverse party in the first proceeding had the right and opportunity to cross-examine, etc. It is to be noted that S. 32 and S. 33 give different instances where evidence is relevant. Section 32 makes relevant statements by a deceased person as to the cause of his death; S. 33 makes relevant evidence given by a witness when the witness is dead or cannot be found, etc. These are two quite distinct cases, the first relating to a statement whether given in evidence or not, made by a deceased person as to the cause of his death; the second to a previous statement made by a deceased witness in any kind of legal proceeding, civil or criminal. In the latter instance there is a qualification which is obviously necessary, that the former evidence must have been taken subject to cross-examination. There is no such qualification as regards the first instance, but the statement made to a Magistrate authorised to take it is evidence within the meaning of the definition already quoted. It cannot be said that S. 33 governs S. 32, for if it did so no statement made under S. 32 to a Magistrate empowered to record it would be relevant at all unless the accused had had opportunity of cross-examination, and I do not see therefore how the presumption given by S. 80 can be limited to cases of evidence recorded where the accused had had such an opportunity. I must dissent with respect from authorities which lay down that statements made to a Magistrate authorised to take them must be proved by that officer if not made in the

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3. ('30) 17 A I R 1930 Lah 60 : 120 I C 274 : 31 Cr L J 79, Chandgi v. Emperor.
4. ('32) 19 A I R 1932 Lah 14 : 134 I C 117 : 32 Cr L J 1118 : 33 P L R 8, Rahman v. Emperor.
5. ('36) 23 A I R 1936 Rang 42 : 160 I C 597 : 37 Cr L J 299, Mya Da v. Emperor.

presence of the accused. I would however agree with rulings which hold that proof of the identity of the person who made the statement is necessary.

The earliest case on the subject is 11 Bom H C R 247.[6] This was a case of 1874, two years after the passing of the Evidence Act. It was said that the law does not provide that the mere signature of the Magistrate should be a sufficient authentication of a dying declaration and that proof was necessary, and that the statement could not be presumed to be genuine without evidence that it had been made by the dying man. It was also said that it was desirable that the person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it. It is not necessary that the deceased should have been in expectation of death when he made the statement, though I would agree that in some instances, where the statement itself or other circumstances render this course desirable, questions should be put to the Magistrate as to whether the deceased was in a fit state to make the declaration and understood what he was saying. To prove the identity of the declarant it is desirable not to summon the Magistrate for that purpose, (in any event he would rarely be in a position to prove it) but to prove it from the mouth of some one else, preferably some other witness in the case who was present at the time that the declaration was taken. The matter is one of practical importance, for, it frequently happens that Magistrates have been transferred to a station at a considerable distance from the district in which the declaration was made and the trial is held. 8 Cal 211[7] at p. 213 is to the same effect as 11 Bom H C R 247.[6] In neither case was S. 80, Evidence Act, discussed, though it was quoted in argument in the former case. In 36 Cal 659[8] it was held that a dying declaration made in the absence of the accused must be proved by the person who recorded it or heard it made. There again S. 80, Evidence Act, was not referred to. Nor was it in 54 Mad 678,[9] where it was said that such a declaration cannot be treated as substantive evidence without calling the person who recorded it. 11 Bom H C R 247[6] was followed in the Judicial Commissioner's Court of Lower Burma in (1872-92) L B R 157[10] without comment.

As to identity the Lahore High Court in 31 Cr L J 79[3] and 32 Cr L J 1118[4] admitted a statement recorded under S. 164, Criminal P. C., without requiring proof of identity. On the other hand such proof was required in 11 Cal 580[11] a direct ruling on this point, and was also required in 35 Cr L J 385[12] and in 93 I C 115.[13] I do not think that the matter was considered in a decision of their Lordships of the Privy Council · 26 ALL 108.[14] In 26 ALL 108[14] their Lordships after hearing argument as to the effect of S. 80, Evidence Act, rejected a former deposition as inadmissible because the material part of it was the description of the witness in the heading where she was described as the wife of so and so, and there was no proof that that description was elicited by questions put by the Magistrate; it might equally likely have been a description filed in by a clerk on the deposition sheet before the evidence was recorded. Nor was there evidence that that description had been read over to the witness.

Some of the cases cited here were considered in 56 ALL 750,[15] where it was held that a dying declaration recorded by a Magistrate can be tendered in evidence without the Magistrate who recorded it being called, in virtue of the section applicable to depositions which could be proved by the production of the document. If the language of S. 80 is compared with that of S. 90, Evidence Act, it would seem clear that though a presumption is to be made under S. 80 as to the genuineness or authenticity of the evidence no presumption can be drawn that the statement was made by the person by whom it purports to have been made. In the present case the statement was duly proved, and the proof included proof of identity. The conviction and sentence passed under S. 304, part 1, Penal Code, are set aside, and in lieu thereof the appellant will be convicted under S. 325,

6. ('74) 11 Bom H C R 247, Reg. v. Fata Adaji.
7. ('82) 8 Cal 211: 10 C L R 11, Empress v. Samiruddin.
8. ('09) 36 Cal 659 : 2 I C 841 : 13 C W N 680, Gouridas Namasudra v. Emperor.
9. ('31) 18 A I R 1931 Mad 430 : 135 I C 337 : 33 Cr L J 115 : 54 Mad 678 : 60 M L J 404, In re Krishnama Naickan.
10. ('72-92) 1872-92 L B R 157, Ram Loochun v. Queen-Empress.
11. ('85) 11 Cal 580, Queen-Empress v. Durga Sonar.
12. ('34) 21 A I R 1934 All 81 : 147 I C 390 : 35 Cr L J 385 : 56 All 302 : 1933 A L J 1551 (F B), Mohamed Ali v. Emperor.
13. ('26) 13 A I R 1926 Cal 705 : 93 I C 115 : 39 C W N 254, Brajaballav Ghose v. Akhoy Bagdi.
14. ('04) 26 All 108 : 31 I A 38 : 8 Sar 583 (P C), Maqbulan v. Ahmed Husain.
15. ('34) 21 A I R 1934 All 340 : 152 I C 249 : 36 Cr L J 65 ; 56 All 750, Emperor v. Surajbali.

Penal Code and sentenced to seven years' rigorous imprisonment.

G.N./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Rangoon 305

ROBERTS C. J. AND DUNKLEY J.

C. W. Mariano — Appellant

v.

The Rt. Rev. F. Provost — Respondent.

First Appeal No. 87 of 1940, Decided on 13th March 1941, from judgment of High Court, in C. R. No. 154 of 1939.

* (a) Succession Act (1925), S. 118 — Interpretation of—Intention of Legislature explained — Bequest to charity by testator having near relations — Will deposited with Registrar — Withdrawal of will from custody of Registrar renders bequest to charity void.

The intention of the Legislature in enacting S. 118 is to prevent death-bed bequests to charitable trusts by persons having near relatives, and the section must be construed in a sense which is in harmony with that intention and so as to give a real meaning to each part of the section, if that can be done without doing violence to the plain language thereof, and not so as to reduce one of the provisions of the section to an absurdity. By enacting the provision regarding the deposit of such wills the Legislature intended to remove the decision of the question whether the charitable bequest was a death-bed bequest or not out of the hazard of oral evidence by the incontrovertible proof contained in the entries in Registers Nos. 3 and 5 that the will was in the custody of the Registrar of deeds at the time of the testator's death and had been in that custody for a period of at least six months prior to the testator's death. The Legislature has not contemplated the withdrawal of a will from such custody except upon the terms that the charitable bequests in it are rendered void. If a testator desires such charitable bequests to fall into residue all he need do is to withdraw the will from such custody. [P 313 C 1, 2]

The removal of the will by the testator from the safe custody of the Registrar amounts to a renunciation of the power to make a charitable bequest; he might of course make a new will containing charitable bequests but in that event he would have to deposit it within six months of execution and would have to survive for 12 months: (1910) A C 409; (1910) A C 444; (1892) 1 Q B 273; (1893) A C 468 and ('29) 16 A I R 1929 P C 121, *Rel. on.* [P 307 C 1]

(b) Succession Act (1925), S. 114 — S. 114 applies to interests arising in futuro — Bequest to charity — Vesting not delayed beyond statutory period — Bequest is valid though made in perpetuity.

Section 114 deals only with interests arising in futuro. The section makes no difference between charitable and non-charitable objects. Hence a gift to trustees for a religious or charitable object, if created or existing in praesenti is not objectionable on any ground of perpetuity. Thus charitable trusts though made in perpetuity are not within the mischief of S. 114 provided the vesting is not delayed beyond the statutory period: (1860) 2 De G & J 75; (1860) 1 De G F & J 399; 11 Cal 591; 6 C W N 321 and 15 Mad 424, *Rel. on*; ('19) 6 A I R 1919 Cal 809, *Disting.*; 25 Cal 112; 40 Cal 192 and 33 Bom 122, *Ref.* [P 308 C 2; P 310 C 2; P 311 C 1]

(c) Registration Act (1908), Ss. 42 to 46 — Effect of, stated.

The object and effect of Ss. 42 to 46 are that the contents of the sealed cover deposited by the testator, that is, the provisions of his will, shall remain secret during his lifetime, but on his death the terms of his will shall be made public and copies of the will shall be available to the public: 10 Cal 976 (P C), *Ref.* [P 311 C 2]

John Dhar — for Appellant.

Paget — for Respondent.

Roberts C. J.—The defendant-appellant Mrs. Camilla Winifred Mariano is the widow and surviving executrix and trustee of the will of the late Victor Joseph Mariano who died on 1st March 1929. Probate was granted to her (and to another executor who has since died) on 8th June 1929 of a will dated 25th January 1923. Clause 12 of the will ran as follows:

12. After the whole capital has been received from the Rangoon Gazette office my executors and trustees shall pay to the Right Revd. Bishop Cardot Vicariat Apostolic of Southern Burma or his successor in office a sum of rupees two lakhs to be held by him in trust in perpetuity so that the income and profits thereof shall be used for the religious and charitable objects connected with the Roman Catholic Church and Mission in Rangoon as he may deem fit. One year after my death and until such time as the said sum of two lakhs has been paid an amount equivalent to interest at 5 per cent. per annum for the said sum of rupees two lakhs shall be paid for the said charitable objects to the Right Revd. Bishop Cardot or his successor in office.

In cl. 13 there was a similar bequest to Bishop Sagrada of Toungoo, Vicar Apostolic of Eastern Burma or his successors in office of the sum of Rs. 50,000. The plaintiff-respondent in this appeal is the successor in office of Bishop Cardot named in cl. 12. It appears that the appellant had entertained doubts as to the validity of the charitable bequests in the will, and the effect of S. 114, Succession Act, (dealing with the rule against perpetuities in this country), and of S. 118 of the same Act (dealing with the execution and deposit of wills containing charitable bequests when the testator has near relatives living). Although she had paid interests on the two lakhs of rupees, as directed by cl. 12 of the will, she decided not to pay any more money, and when in April 1939 the Bishop's claim to the property was denied he brought this action against the defendant-appellant. The plaintiff-respondent's case was that a higher grade pleader named Mr. Boudville had prepared a draft will for the testator and a

will very similar to Mr. Boudville's draft was executed on 25th January 1923 and deposited on the same day with the Registrar of Assurances at Rangoon in accordance with the provisions of S. 118, Succession Act, and S. 42, Registration Act. It remained in his custody for just over six years. On 9th May 1927 a codicil dated 4th April 1927 is also said to have been deposited. The sealed cover bore the superscription 6th May 1927. Early in February 1929 the testator who was then in very poor health desired to see his will and codicil and possibly to make some change in the bequests to his relatives. He authorized Mr. Boudville to withdraw the will and codicil under the provisions of S. 44, Registration Act.

Mr. Boudville withdrew the sealed covers from the Registrar on 9th February (and I think it is important to notice that he could not know whether they really contained a will or not), and handed them to the testator. About eight or nine days after this the testator sent for Mr. Boudville and handed "those packages over to me ..... still intact, in the same condition as they were when I delivered them to him. He said: Keep them with you in your house'. In cross-examination Mr. Boudville said he knew that the packages containing the will and the codicil "were exactly the same at a glance; curiosity compelled me to examine it and I found it exactly the same." Mr. Victor Joseph Mariano died on 1st March 1929 and at that time the will and codicil of which probate has since been granted were in Mr. Boudville's possession. He opened the sealed covers in the presence of half a dozen members of the family and now says, respecting the will, "it was almost word for word like the one I drew up in my language," and he adds that the codicil is similar. On this evidence the learned trial Judge found as a fact that the will and codicil in the sealed covers opened by Mr. Boudville after the testator's death were identical with those deposited by Mr. Mariano in January 1923 and some time after April 1927 respectively. Mr. Mariano's will was duly executed on 25th January 1923. A sealed cover purporting to contain a will was deposited on this date; two sealed covers purporting to contain a will and codicil respectively were withdrawn by Mr. Boudville and the testator undertook the custody of them. He handed back certain sealed covers to Mr. Boudville in the middle of February 1929 and these are proved to contain a will purporting to have been executed on 25th January 1923 and a codicil dated 4th April 1927, bearing on the sealed cover the date of 6th May 1927.

Now the law does not prevent a testator with near relatives from making a charitable bequest; but it has enacted, in S. 118, Succession Act, a safeguard against his doing so by a disposition made when death is imminent. And not only are such bequests void unless the will was executed 12 months before the testator's death, but in order to render them valid the will must have been deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons. Such provision has been made in the Registration Act. The will is to be deposited in a sealed cover bearing the name of the testator and a statement that it contains a will. The testator may later withdraw the cover, if he chooses to do so, and in the present case he did withdraw it. If he had not withdrawn it, the Registrar would have had to keep it in his fire-proof box until the testator's death, and might not open it till then. Sections 45 and 46 of the Act describe the procedure after the death of the testator: the will is to be copied in one of the Registrar's books on application being made to him and the original is to be deposited afresh. When probate of it or letters of administration with the will annexed has been granted, the original will is to be filed in conformity with S. 294, Succession Act. The Court may also order the production of the original will. The Registrar is to make a copy of the will, if he has not already done so, before it leaves his possession.

The effect of all this is that a will containing charitable bequests must be in the custody of the Registrar for at least six months prior to the testator's death. It appears to me that the Legislature has not contemplated the withdrawal of a will from such custody except upon the terms that the charitable bequests in it are rendered void. If a testator desires such charitable bequests to fall into residue all he need do is to withdraw the will from such custody. If this were not so, a testator could make his charitable bequests valid by deposit of his will as a mere matter of form, withdrawing it on the same day. The Legislature cannot have intended that such an empty formality should have the effect of complying with its provisions. Proof of execution 12 months before the testator's death is not all that the law requires; and the additional requirement that the will should

be deposited cannot be satisfied by taking it in a sealed cover to the Registrar, causing it to be placed in his fire-proof box, and the lid to be shut, and then opening it and taking the sealed cover away again. Section 43, Registration Act, says that the Registrar shall place and retain the sealed cover in his fire-proof box, and Ss. 43 and 44 show that unless the testator withdraws it it is retained till his death. Upon withdrawal the sealed cover is no longer a matter of concern to the Registrar. He has never seen the contents of the sealed cover. It might contain a document which had never been witnessed or even signed by the testator; whatever it is, it is delivered in its sealed cover to the depositor and the contents are never divulged. No copy is taken of it by the Registrar, nor is any mark or stamp placed upon it showing that it has been deposited.

Now, it might be difficult to say whether Mr. Mariano realized the effect of what he was doing when he procured the withdrawal of these sealed covers from the Registrar's custody; but the point is not what effect was intended but what was actually produced. They might contain a perfectly good will, but in my judgment their removal from the safe custody of the Registrar amounts to a renunciation of the power to make a charitable bequest; he might of course make a new will containing charitable bequests but in that event he would have to deposit it within six months of execution and would have to survive for 12 months. Mr. Paget has argued that to hold thus would amount to reading into the statute something which is not there, and he has cited (1910) A C 409[1] and (1910) A C 444.[2] He contends that all the Succession Act says is (provided the will has been executed at least 12 months before the testator's death) that it must have been "deposited;" and that it was so deposited whether it was afterwards withdrawn from the custody of the Registrar or not. This view commended itself to the learned trial Judge.

But the second requirement of S. 118 is a "deposit within six months of its execution in some place provided by law for the safe custody of wills of living persons." In my judgment it contemplates the remaining of the will in such a place of safe custody whilst the person remains alive. When one looks at the Registration Act one sees that if the sealed cover is still in the custody of the Registrar at the time of the testator's death it cannot leave his possession until a copy of its contents has been made. Proof of the deposit of the will can then be effected by the production of it by a public officer, and it is not necessary to depend on the oral evidence of parties who may be interested in the will to show that the will propounded is identical with the contents of the sealed cover deposited. It has been urged upon us that all the testator contemplated doing was to alter a bequest to some relative; he did not do so in fact because he changed his mind, and the obvious intention of the Legislature is that a testator in such circumstances may get back his will so as to refresh his memory as to its exact contents; it may have been deposited for years and he may have no copy of it in his possession.

This attractive argument seems to be met by saying that if the Legislature had desired that a fresh deposit of a will so inspected, and unaltered as regards charitable bequests, should take effect from the time of the original deposit it would be quite easy to have said so, and to have made provision for such a fresh deposit. It has been pointed out that under S. 48 of Act 16 of 1864 the Court might permit the withdrawal of a will if it sees fit; under the Registration Act it is easier for the testator to withdraw the sealed cover for the Registrar has no discretion to retain it. And the Succession Act of 1925 was enacted in these altered circumstances. Be that as it may the Act is silent as to the effect of the withdrawal of a will; and I apprehend that, if it is withdrawn five minutes after deposit, no safeguard additional to that of execution twelve months before death could be said to have been imposed by the Legislature to ensure that the will executed was in fact deposited, and that the testator remained of the same mind in relation to his charitable bequests for a period of six months prior to his death. The Legislature has chosen to make these facts susceptible of ready proof by reason of the retention of the documents deposited with the Registrar in a sealed cover till after the date of the death of the testator, from which date the will speaks. Even so, the validity of the charitable bequests must depend on the testament in the custody of the Registrar

1. (1910) 1910 A C 409 ; 79 L J K B 905 : 103 L T 81 : 54 S J 599 : 26 T L R 526, Thompson v. Goold & Co.

2. (1910) 1910 A C 444 : 79 L J K B 954 : 103 L T 292 : 54 S J 651 : 26 T L R 548, Vickers Sons & Manim v. Evans.

being the last will and testament of the testator.

It is necessary to see whether the testator had powers to bequeath sums of money to charities, since it is admitted that he possessed a nephew or niece or some nearer relative. This power could only arise if at the time of his death he had executed a will at least twelve months previously and had deposited it within six month from its execution in some place provided by law for the safe custody of the wills of living persons. The power of bequest does not arise from the date of execution of the will; it is dependent upon the requisite deposit and the subsequent survival. It is only to be ascertained at the death, and ascertained by reference to acts previously performed. One of these acts is the deposit, and I cannot (with all respect to the learned trial Judge) hold that this is a momentary act and that the requirements of the statute would be complied with by a mere five-minute formality in the course of which the Registrar sees no will and is merely told that the sealed cover deposited contains one. In the present appeal the sealed cover remained in his possession for six years, but it seems impossible to draw any line, and to say if the requirements of the statute were complied with that they would not equally have been complied with if the sealed cover had been deposited for five minutes. Oral evidence in each case must be relied on to show that the sealed cover contained the propounded will, and I must hold that the Legislature intended to dispense with the hazard which must be created whenever oral evidence is relied on in preference to the production of a document from the custody of a public official. It is not a question of accepting or rejecting the oral evidence in this case but of deciding whether the restrictions placed upon charitable bequests have been overcome. Holding as I do the view that the charitable bequests in Mr. Mariano's will are void it would seem unnecessary to decide whether, as was contended by the appellant, they infringe the rule against perpetuities. However, it may be desirable to consider this contention and I would hold that S. 114, Succession Act, has no application to the present bequests.

Some interests although arising in praesenti have been held to be void in English law when bequests have been made to societies which have a non-charitable object and have been extended to an indefinite time: (1860) 2 De G & J 75;[3] (1860) 1 De G F & J 399.[4] But here there is a charitable object. Charitable trusts though made in perpetuity are not within the mischief of S. 114 provided the vesting is not delayed beyond the statutory period: 11 Cal 591;[5] 6 C W N 321;[6] 15 Mad 424[7] at pp. 443, 444. Provided there is no remainder over, a bequest in perpetuity for charitable objects does not offend against S. 114, Succession Act. During the prolonged argument which took place on this point I became convinced that the effect of the decision in 46 Cal 485[8] had not been fully appreciated. The testator there left bequests of capital to trustees upon trust to remit the income to the deacons of Lower Circular Road Chapel, half for the poor, and half for the general fund of the Chapel, provided the deacons complied with certain conditions; and, in default of compliance, to other persons interested in another charity for the purposes of that charity. The deacons expressed their inability to comply with the conditions in the will, almost immediately upon the death of the testator, and the question was whether the gift over took effect. It was held that as they might have complied with the conditions for a period exceeding that which is contemplated as permissible by the section, and might then have made default, the bequest was bad from the beginning because the gift over came within the mischief of S. 101 of the former Succession Act, now re-enacted as S. 114.

But here the vesting is not in futuro but is in praesenti. The bequest operates in favour of the Bishop at once, and the statute has no application. It was suggested that the word "thereafter" in cl. 8 of the will meant that the Bishop should receive no money till the executors had carried out all their duties in connexion with the earlier clauses of the will; to this argument cl. 14 appears to me to be a sufficient refutation. The property bequeathed is to vest in the Bishop within a period which cannot extend beyond that which is laid down in S. 114

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3. (1860) 2 De G & J 75 : 29 L J Ch 503 : 6 Jur 639 : 8 W R 570 : 45 E R 550 : 129 R R 15, Carne v. Long.
4. (1860) 1 De G F & J 399: 125 R R 489 : 29 L J Ch 276 : 6 Jur (NS) 281 : 2 L T 479 : 8 W R 265, Thomson v. Shakespear.
5. ('85) 11 Cal 591, Malchus v. Broughton.
6. ('02) 6 C W N 321, Fanindra Kumar Mitter v. Administrator-General of Bengal.
7. ('92) 15 Mad 424, Colgan v. Administrator-General of Madras.
8. ('19) 6 A I R 1919 Cal 809 : 47 I C 393 : 46 Cal 485, Jones v. Administrator-General of Bengal.

and the rule against perpetuities has no application to the charitable bequest. These latter observations appear to me to be beside the point holding as I do that the provisions of S. 118, Succession Act, have not been complied with; but I express my view upon them in case our decision is challenged on appeal to the Judicial Committee of the Privy Council. The suit of the plaintiff was maintainable under S. 42, Specific Relief Act. He claimed a right to have the property which was the subject of a charitable bequest paid over to him, and this claim was denied by the surviving executrix of the will. Since the money (we are informed) is still in the possession of the Rangoon Gazette office and by the terms of the will it is not payable till the executrix has received it from that source he could only ask for a bare declaration; he has received the interest upon it, and therefore the proviso to S. 42 has no application since further relief cannot be claimed. In the result the appeal must be allowed. The defendant-appellant entertained the doubts which have been the subject of argument but took out no originating summons under S. 302, Succession Act. The plaintiff-respondent took the only course open to him. The judgment and decree of the learned trial Judge are set aside and the suit of the plaintiff-respondent is dismissed. In view of the fact that the plaintiff-respondent was forced to bring this suit by the attitude adopted by the defendant-appellant as executrix, we think that the plaintiff-respondent should not be mulcted in the costs of this litigation, and we direct that the costs of both parties, both of the suit and of this appeal, shall be paid by the appellant as executrix out of the estate, and we assess the advocate's fee for this appeal at thirty gold mohurs.

Dunkley J. — This suit arose from an originating summons taken out by the plaintiff-respondent for the construction of the will of one V. J. Mariano, who died at Rangoon on 1st March 1929. The defendant-appellant is the widow of the testator and the sole surviving executrix of his will. By cl. 12 of this will a bequest of two lakhs of rupees was made to the Roman Catholic Bishop of Southern Burma or his successor in office to be held by him in trust in perpetuity so that the income and profits thereof should be used for religious and charitable objects connected with the Roman Catholic Church and Mission in Rangoon. This was a bequest to religious and charitable uses. The capital sum of the bequest was to be paid to the Bishop when it was received from the Rangoon Gazette, a newspaper in which the testator's fortune was invested, and the executors were directed in the meantime, until the sum of two lakhs could be paid to the Bishop, to pay interest on this capital sum at the rate of 5 per centum per annum to the Bishop. The plaintiff-respondent is the present Roman Catholic Bishop of Southern Burma. The sum of two lakhs has not yet been paid, but the interest thereon has been paid, as directed by the will, up to and including the year 1939. Then doubts arose in the mind of the appellant as to the validity of the charitable bequest, and she informed the respondent that no further payments under cl. 12 of the will would be made. She did not, as she ought to have done, take out an originating summons under S. 302, Succession Act, and R. 171 of the Rules of Procedure of the Original Side of this Court, for the determination of the question whether the bequest was valid or not. Consequently the respondent, as he had a right to do, was compelled to take out a summons. In view of the complexity of the points of law raised by the appellant in her written statement in answer to this summons, when the summons came on for hearing the learned Judge who heard it came to the conclusion that the matter in respect of which relief was sought could not be disposed of in a summary manner, and acting under the power conferred upon him by R. 189 of the Rules of Procedure of the Original Side, by his order of 10th July 1939, he directed that the plaint filed in support of the summons should be admitted as the plaint in an ordinary suit. Hence the originating summons became converted into a regular suit by the plaintiff-respondent against the defendant-appellant for a declaration that the plaintiff-respondent is entitled under the will of V. J. Mariano to the bequest contained in cl. 12 of the said will. By the judgment, dated 10th June 1940, of the trial Court the plaintiff-respondent has been granted a declaration as prayed, and this appeal has been brought against that judgment by the defendant-appellant. At the hearing of the appeal it was urged somewhat tentatively on behalf of the appellant that the suit as framed was incompetent. Paragraph 15 of the amended written statement of the defendant-appellant, dated 5th August 1939, reads as follows :

"15. That this Honourable Court has no jurisdiction to try this suit."

However, in argument before us it was explained that this paragraph was not intended to be a denial of the jurisdiction of the Court (for this Court in its ordinary original jurisdiction plainly had jurisdiction to try the suit if it was competent) but was intended to be an averment that a suit for a bare declaration did not lie. It was so treated by the learned trial Judge in his judgment, and it is on this basis that the matter has been canvassed before us. The learned Judge has held that a suit for a bare declaration lies because the defendant-appellant having as executrix assented to the specific legacy cannot now plead that the plaintiff-respondent has not acquired a vested interest therein. With the greatest respect, I think he might have based his decision on a broader and better ground. The defendant-appellant, as executrix of the estate of V. J. Mariano, deceased, was requested by the plaintiff-respondent to take out an originating summons for the determination of the question of the rights of the respondent as an alleged legatee under the will of the deceased. She declined to do so, and the respondent was therefore compelled to take out this originating summons. That the respondent had a right to take out such a summons cannot be denied, and as I have explained it was converted into an ordinary suit by the order of the Judge. The respondent could not sue for more than a bare declaration for no consequential relief was open to him ; the capital sum bequeathed by cl. 12 of the will has not even yet been received from the Rangoon Gazette and therefore he could not sue for payment thereof, and he has received the interest payable thereon under the second part of cl. 12 up to the date of taking out the summons. He was therefore entitled under S. 42, Specific Relief Act, to sue for a bare declaration of his right to this property which was denied. Illustrations (b) and (h) to S. 42, Specific Relief Act, make it clear that a suit of this nature does lie.

The memorandum of appeal is a long and discursive document, but, apart from a brief reference to the facts, the extremely lengthy argument on behalf of the appellant before us was confined to two grounds on which it was asserted that the bequest contained in cl. 12 of the will of V. J. Mariano failed. First, it was urged that the testator had no power to make the bequest by reason of his failure to comply with the provisions of S. 118, Succession Act, in regard to the deposit of his will, and in this connexion it should be mentioned that the deceased left legitimate children surviving him. Secondly, it was said that the bequest is void because it transgresses the rule against perpetuities as enacted in S. 114, Succession Act. I propose first to deal with the latter point. The only statutory provision dealing with the rule against perpetuities is contained in S. 114, Succession Act, which enacts as follows :

> *114.* No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong.

Under English law, the rule against perpetuities is concerned both with interests arising in futuro and also with interests arising in praesenti. As regards interests arising in futuro the general rule is to the effect that every limitation of property must, to be valid, vest, if at all, within a life or lives in being and twenty-one years and a period of gestation afterwards. This is substantially the rule which has been enacted in S. 114, Succession Act. As regards interests arising in praesenti, the following are, under English law, void as creating perpetuities, namely (1) interests held on perpetual nonchartitable trust where no person or persons can take any benefit, and (2) gifts to trustees for non-charitable indefinite objects, or for non-charitable unincorporated institutions or societies which may last for an indefinite time. But an interest held on a charitable trust or a gift to trustees for a charitable object, if created or existing in praesenti, so as to be vested in some person, persons, or corporation, is not objectionable on any ground of perpetuity.

As I have said, S. 114, Succession Act, deals only with interests arising in futuro. It is rightly urged that the section makes no difference between charitable and non-charitable objects : *see* 46 Cal 485[8] at p. 511. It is then argued that the bequest to the Bishop in cl. 12 of Mr. Moriano's will creates an interest arising in futuro and within the mischief of S. 114 because the interest has not yet vested in the Bishop and may not vest for an indefinite period. Clause 12 of the will has been set out at length in the judgment of my Lord the Chief Justice, and I need not repeat it. This argument asserts that cl. 12 contains two separate and distinct bequests, one a bequest of an annual income of 5 per cent. per annum on two

lakhs of rupees, and the other a bequest of two lakhs of rupees to take effect when the capital invested by the testator in the Rangoon Gazette is received; and it is said that the latter is an interest arising in futuro which has not yet vested and may not vest within the period allowed by S. 114.

This is not, in my opinion, a true construction of the will. It is abundantly clear, to my mind, when the will is read as a whole, and particularly when cls. 8 and 14 are read with cl. 12, that the testator intended by cl. 12 to make a pecuniary legacy of two lakhs of rupees to the Bishop, which was to vest one year after his death. Clause 8 directed that the executors should realize all the testator's interest, amounting to Rs. 4,33,663 in the Rangoon Gazette, and stated that the Rangoon Gazette had agreed to allow 5 per cent. per annum interest on this amount so long as it remained unpaid. Clause 12 directed that the bequest of two lakhs of rupees to the Bishop should be paid out of the amount standing to the credit of the testator with the Rangoon Gazette, and that with effect from one year after the death of the testator the interest allowed by the Rangoon Gazette on this sum of two lakhs should be paid to the Bishop until such time as the capital sum was received from the Rangoon Gazette. The interest of the Bishop in this bequest of two lakhs arose one year after the death of the testator, when the interest received thereon from the Rangoon Gazette was first paid to the Bishop. The bequest to the Bishop was an interest arising in praesenti. Such interests are not dealt with by S. 114, Succession Act, and have therefore been dealt with by the Indian Courts in accordance with English law, as being according to justice, equity and good conscience. Hence it has always been held that a gift to trustees for a religious or charitable object, if created or existing in praesenti, is not objectionable on any ground of perpetuity. As examples of such decisions the following cases may be referred to: 11 Cal 591,[5] 25 Cal 112,[9] 6 C W N 321,[6] 40 Cal 192,[10] 33 Bom 122[11] and 15 Mad 424.[7] Consequently, it must be held that the bequest now in question is not invalid by reason that it is contrary to the law affecting perpetuities. It remains to deal with the other point, which is the really important point in this case. Section 118, Succession Act, reads as follows:

118. No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.

The "place provided by law for the safe custody of the wills of living persons" is the office of the Registrar of deeds, appointed under S. 6, Registration Act, 1908. Under S. 42 of that Act any testator may, either personally or by duly authorized agent, deposit with the Registrar his will in a sealed cover superscribed with the name of the testator and with a statement of the nature of the document enclosed in the cover. Under S. 43 the Registrar, on receiving the cover, shall record the particulars written on the cover and particulars as to date and time of presentation and certain other particulars in register No. 5, and shall then place and retain the sealed cover in his fire-proof box. Under S. 45, if and when the Registrar is satisfied that a testator who has deposited a sealed cover is dead, the Registrar shall open the sealed cover and cause the contents of the cover to be copied into register No. 3, and shall then redeposit the will in his fire-proof box. Under S. 46, if a competent Court makes an order to produce the will, thereupon, if this has not already been done, the Registrar shall open the sealed cover and cause the contents of the cover to be copied into register No. 3. The object and effect of these sections of the Registration Act plainly are that the contents of the sealed cover deposited by the testator, that is the provisions of his will, shall remain secret during his lifetime, but on his death the terms of his will shall be made public and copies of the will shall be available to the public: 10 Cal 976[12] at p. 984. Under S. 44, Registration Act, if the testator who has deposited such a sealed cover wishes to withdraw it he may do so on applying either personally or by duly authorized agent to the Registrar, and thereupon the sealed cover shall be delivered to him or his agent.

Now, in this case probate was obtained by the appellant and her co-executor, the Rt. Rev. Bishop F. Perroy, of a will, executed on 25th January 1923, and a codicil to that will, executed on 4th April 1927. Mr.

9. ('98) 25 Cal 112, Bhuggobutty Prosonno Sen v. Gooroo Prosonno Sen.

10. ('13) 40 Cal 192 : 21 I C 183, Administrator-General of Bengal v. Hughes.

11. (09') 33 Bom 122: 1 I C 834: 10 Bom L R 417, Jamshedji Cursetjee v. Soonabai.

12. ('84) 10 Cal 976 : 11 I A 121 : 4 Sar 555 (PC), Abdul Razzak v. Amir Haidar.

F. J. S. Boudville, a higher grade pleader, who gave evidence for the plaintiff-respondent, says that he made the original draft of this will, although he did not engross it and knows nothing about its execution ; he further says that the codicil was actually typed out in his office, although he was not present when it was executed. Mr. Boudville knows nothing about the deposit of the will or the codicil in the registration office. Register No. 5 (Register of Deposits of Wills) of the Rangoon Registration Office shows that on 25th January 1923, at 11-45 A. M. V. J. Mariano personally deposited a sealed envelope which bore the superscription "The last will and testament of V. J. Mariano (senior)" and that on 9th May 1927, at 12-25 P. M. Mr. Mariano personally deposited another sealed envelope which bore the superscription "Mr. V. J. Mariano's codicil will 6-5-27." Samples of the seals with which these envelopes were sealed are contained in the register; they were both sealed in the same way with a seal bearing the inscription "Rangoon Gazette and British Burma Press," that is, the office seal of the Rangoon Gazette, and not a private seal of the testator. The register further shows that both these sealed covers were withdrawn by F. J. S. Boudville, pleader for V. J. Mariano, on 9th February 1929. Mr. Boudville says that he was asked by the late Mr. Mariano to withdraw the two sealed envelopes from the registration office and was granted a power of attorney for the purpose. He says that Mr. Mariano informed him that he wished to make an alteration in the will and for that purpose desired to withdraw it. Mr. Boudville carried out his instructions, obtained the two sealed covers from the Registrar, and handed them, as they were, to Mr. Mariano on 9th February. Mr. Mariano kept them in his possession for eight or nine days, and then handed back the envelopes to him, merely saying " keep them with you in your house, " and giving no further instructions. Mr. Boudville has deposed that the two envelopes which were handed back to him by Mr. Mariano were the same two envelopes which he had withdrawn from the registration office, that the seals were still intact, and that the envelopes had not been opened. He says that he kept these envelopes, unopened and in the same condition, in his possession until after Mr. Mariano's death, and then opened them in the presence of the members of Mr. Mariano's family extracted therefrom the will and codicil which have been admitted to probate and read them out to the members of the family, and then handed over the two documents to the appellant. No one troubled about the sealed envelopes and they have disappeared.

The above is a summary of Mr. Boudville's evidence, which has been accepted as wholly truthful by the learned trial Judge, who has come to the conclusion that this evidence proves that the will of 25th January 1933, which has been admitted to probate, was deposited in the custody of the Registrar of the Rangoon Town District from 25th January 1923 to 9th February 1929. Without desiring to differ from the learned trial Judge on this question of fact, it is necessary, with the greatest respect, to point out how this conclusion of fact is susceptible of error. Mr. Boudville drew up the codicil of 4th April 1927. This was an alteration of the original will, and he says that it was drafted by reference to a copy of the original will which Mr. Mariano gave to him; the original will, which according to the respondent was deposited in the registration office, was not withdrawn. The story that subsequently in 1929 the will was withdrawn for the purpose of making a small alteration therein is therefore very unconvincing; why was not a second codicil drawn up by reference to the copy in the same way as the first? Moreover, I do not understand how it is possible for Mr. Boudville to state with certainty that the envelopes which were handed to him by Mr. Mariano on or about 17th February were the very same envelopes that he handed to Mr. Mariano on 9th February ; nor, even if it be conceded that the envelopes were the same, can I understand how Mr. Boudville is able to state with certainty that these envelopes had not been opened while they were in Mr. Mariano's possession, especially as they were sealed with only an ordinary office seal procurable by many persons at any time. And this uncertainty is, in my view, heightened by the fact that the inscription on what may be called "the codicil envelope" stated that it contained a codicil dated 6th May 1927, whereas when it was opened by Mr. Boudville it was found to contain a codicil dated 4th April 1927. Except by inferences drawn from Mr. Boudville's evidence, there is no proof whatever that the sealed envelopes deposited with the Registrar contained, while so deposited, either a will or a codicil, they may have contained merely blank sheets of paper. I mention these considerations in order to

show that a conclusion of fact in a matter of this kind is liable to a considerable margin of error when it is based solely on oral evidence.

The real point at which the parties are at issue is the true construction of S. 118, Succession Act. For the appellant it is contended that, in order to comply with the provisions of the section, the will must be deposited and retained in the custody of the Registrar until the testator's death, when as a necessary consequence it will be copied into register No. 3. For the respondent it is contended that so long as a sealed cover containing the will is deposited that is a sufficient compliance with the section, and the sealed cover may be withdrawn at any subsequent time. It is argued that the fact that the will was contained in the sealed cover deposited may be proved aliunde, and not necessarily by the Registrar opening the cover and copying the will contained therein into register No. 3 after the testator's death. In submitting this argument, learned counsel for the respondent had necessarily to go so far as to say that a monetary deposit, long enough to enable the Registrar to make the necessary entries in register No. 5 and to place the sealed cover in his fire-proof box and take it out again, was a sufficient compliance with the provisions of the section. Such a construction, in my opinion, reduces the provision of the section regarding the deposit of wills to a nullity, a mere worthless formality. If that were the true construction, the section might just as well have provided that the testator, after executing his will, should place it in the custody of his lawyer or his banker, or in a safe deposit, or in any other place commonly used for the custody of valuable documents. It is common ground that the intention of the Legislature in enacting this section was to prevent death-bed bequests to charitable trusts by persons having near relatives, and the section must be construed in a sense which is in harmony with that intention, and so as to give a real meaning to each part of the section, if that can be done without doing violence to the plain language thereof, and not so as to reduce one of the provisions of the section to an absurdity.

In my opinion, it is abundantly plain that by enacting the provision regarding the deposit of such wills the Legislature intended to remove the decision of the question whether the charitable bequest was a death-bed bequest or not out of the hazard of oral evidence by the incontrovertible proof contained in the entries in registers Nos. 3 and 5 that the will was in the custody of the Registrar of deeds at the time of the testator's death and had been in that custody for a period of at least six months prior to the testator's death; and I have shown, by reference to the facts of this particular case, how hazardous reliance on oral evidence must be in the nature of things. It is urged that in adopting such a construction we shall be legislating, and not interpreting the law, and shall be adding to the section the words, "and retained in deposit until the testator's death" when the language used by the Legislature is clear and capable of only one meaning, that is, the meaning for which the respondent contends and that this meaning must be adopted even though the result may seem to be absurd. [(1892) 1 Q B 273[13] at p. 290 approved in (1893) A C 468[14] at p. 477.] But this is not so. Deposit connotes retention; this is clear from sub-s. (2) of S. 43, Registration Act, which says that the Registrar shall "place and retain" the sealed cover in his fire-proof box. The learned trial Judge has referred to the Mortmain and Charitable Uses Acts of 1735 and 1888 (9 Geo. II, c. 36 and 51 and 52 Vict., c. 42) and has said that the provisions of S. 118, Succession Act, were undoubtedly derived from these English Acts. These Acts made provisions for the enrolment of assurances of land or personal estate for the benefit of any charitable uses within six months from execution, and the learned Judge has concluded that in place of the requirement of enrolment adopted in England there has been provided in this country the requirement of deposit to serve the same purpose. With the greatest respect, I am in complete agreement with this opinion of the learned Judge. By S. 29 (4), Settled Land Act, 1925 (15 Geo. V, c. 18), instead of the requirement of enrolment, the deed of assurance must now be sent to the Charity Commissioner for the purpose of being recorded in their books. Now what is enrolment? A record of the deed is taken and the fact and date of enrolment are noted on the deed itself which is then returned. The record of the deed enrolled is open to public inspection and copies thereof can be obtained by the public. It is

13. (1892) 1 Q B 273 : 61 L J Q B 337 : 66 L T 135 : 40 W R 215 : 7 Asp M C 140, Reg. v. Judge of the City of London Court.
14. (1893) 1893 A C 468: 63 L J Adm 17: 1 R 307: 69 L T 630 : 7 Asp M C 369 : 57 J P 660, Mersey Docks and Harbour Board v. Turner.

important to notice that it has always been necessary in England that there should be an official record of the provisions of the will. Can it be suggested that a mere temporary deposit of a sealed cover, which can be withdrawn at any time has been substituted for this procedure? In my opinion, the difference between the English procedure and the Indian procedure is that in England the contents of the will are made known even during the life-time of the testator, whereas under S. 118, Succession Act, and Ss. 42, 43, 45 and 46, Registration Act, the will remains secret during the life-time of the testator, but on his death becomes known, and the copying of the will in Register No. 3 is the equivalent in this country of enrolment.

In order to give a testator with near relatives power to make a bequest to religious or charitable uses, under S. 118, Succession Act, and S. 42 *et seq.* of the Registration Act three conditions have to be satisfied: first, the will must be executed; secondly the will must be deposited within six months of execution with the Registrar of deeds; thirdly, the testator must survive for a period of 12 months after the execution of the will. Under S. 118 there is no question of a bequest being made and then becoming invalid; the power to make a bequest of this nature does not arise until these three conditions have been fulfilled. A will is a disposition of property which is ambulatory in character; it may be revoked or altered at any time during the life of the testator. In 4 Luck 122[15] at p. 127, their Lordships of the Privy Council said :

> The will of the testator . . . . must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time.

Hence, in this case it is necessary to see whether the three conditions essential to give to Mr. V. J. Mariano the power to make this particular bequest were in existence at the time of his death. One of these conditions is that the will must be deposited in the place provided by law for the safe custody of the wills of living persons; that is, it must be deposited at the time of his death. Therefore I am of opinion that the true construction of S. 118, Succession Act, in regard to the requirement of the deposit of the will is that the will shall be deposited within six months from its execution and shall remain in deposit until the death of the testator. Consequently, by his action in withdrawing his will from the registration office on 9th February 1929 Mr. V. J. Mariano divested himself of the power to make a bequest to religious or charitable uses.

In issue 4 framed at the trial a question of estoppel was raised. It was said on behalf of the respondent that because the appellant had for several years paid the interest on the bequest under part. 2 of cl. 12 of the will she was estopped from denying the validity of the bequest. As I have already pointed out, the question at issue in this suit was not whether the bequest was valid or not, but was whether the testator had power to make the bequest, and there can be no estoppel against the provisions of a statute. Hence I agree with my Lord the Chief Justice that the suit of the plaintiff-respondent failed, and that this appeal must be allowed and the suit dismissed. I agree with my Lord's order regarding the costs of the suit and of this appeal.

R.K. *Appeal allowed.*

15. ('29) 16 A I R 1929 P C 121: 116 I C 397: 4 Luck 122: 56 I A 156 (P C), Krishna Kumari Devi v. Rajendra Bahadur.

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(28) A. I. R. 1941 Rangoon 314

BA U J.

U Oak and others — Applicants

v.

Ma Khin and others — Respondents.

Civil Revn. Appln. No. 284 of 1940, Decided on 15th January 1941, from order of Sub-Divisional Court, Shwebo, in C. R. No. 10 of 1939.

Civil P. C. (1908), O. 3, R. 4 (2) and O. 9, R. 13 — Application to set aside ex parte decree or dismissal order is part of proceeding in suit — To oppose or consent to such application is also part of proceeding in suit — Counsel need not have fresh authority for aforesaid purpose.

An application to set aside an ex parte decree or dismissal order is part of the proceeding in a suit and so in the same way to oppose or consent to such an application being also a part of the proceeding in a suit, a counsel need not have fresh authority for that purpose: ('23) 10 AIR 1923 Bom 412 ; ('25) 12 AIR 1925 Pat 692 ; ('22) 9 AIR 1922 Bom 207 and ('29) 16 AIR 1929 Lah 96, *Approved.* [P 315 C 2]

K. C. Sanyal — for Applicants.

A. N. Basu — for Respondents.

Order.—This is an application to revise the order of the learned Judge of the Sub-divisional Court of Shwebo by which he set aside the order dismissing the respondents' suit for default. The facts leading up to this application are these: On 5th July 1940, two preliminary issues were framed. Then

the case was adjourned to 9th July for argument. On that day arguments were heard and the case was adjourned to 15th July for orders. On that day both the plaintiff and his pleader were absent, but the defendants with their pleader were present. The suit was thereupon dismissed for default. On 17th July the pleader for the plaintiff applied to have the dismissal order set aside. When the application was filed the pleader who had been acting for the defendant in the case was present and the Judge passed the following order:

> U Ba On appears and files application to have the dismissal order set aside. U On Pe for defendants present and agrees. He does not claim costs. Case is restored to file. Dismissal order set aside. I want to read Civil Procedure Code in Burmese. Put up same. I will pass order on 22nd July 1940.

The present application is to revise this order. The following submissions are made in support of the application: (1) That the pleader for the defendants did not agree to the setting aside of the dismissal order: (2) That even if the pleader did agree as alleged, the defendants were not bound by his act inasmuch as the authority of the said pleader ceased with the dismissal of the suit: (3) That the suit having been dismissed, under O. 17, R. 2, Civil P. C., notice should have been issued to the defendants. In support of the first submission the learned advocate for defendant applicants refers to the affidavit of U On Pe. U On Pe is the pleader who acted for the defendants in the suit. In the course of his affidavit U On Pe states:

> That it is not at all true that I gave any consent with the approval of my clients. In fact I had no authority to do it, and I had received no instruction from my clients for this purpose on that day, i. e., 17th July 1940. I even mentioned to the Court that my clients were absent and I must inform them.

This is directly contradictory to what the learned Judge says in his order. I do not think this contradiction is due to the deliberate misstatement of facts. Either the learned Judge or U On Pe must be making a mistake. I am inclined to think that the memory of U On Pe is at fault on this point because if he did not agree to the setting aside of the dismissal order, I do not think the learned Judge would have passed the order which he did in the presence of U On Pe. If he did it in spite of the protest of U On Pe, I do not think U On Pe would have accepted the decision tamely. He would have undoubtedly asked the Judge to make a note of his protest. Nothing was done. That he did agree to the setting aside of the dismissal order is borne out by what the learned Judge says in the course of his order. The learned Judge, as stated above, says that U On Pe did not claim costs on behalf of his client. Further, the learned Judge would not have said that he wanted to read the Code of Civil Procedure in Burmese and asked his Bench clerk to put it up later. That the learned Judge said so was apparently due to the fact that he had not then passed his order on the two preliminary issues yet. All this, in my opinion, clearly shows, as I have said above, that U On Pe was fully aware of what went on in Court. Therefore I must hold that U On Pe did consent to the setting aside of the dismissal order. The next point is, had he authority to consent to the setting aside of the dismissal order? It has been held that a fresh authority is not necessary for the purpose of appearing in execution proceedings: A I R 1923 Bom 412;[1] A I R 1925 Pat 692;[2] or for setting aside an ex parte decree: 47 Bom 11;[3] or for an application to restore a suit: 47 Bom 11;[3] or for an application to restore a suit dismissed for default: 10 Lah 570.[4] I respectfully agree with these views. These views are in consonance with the plain language of O. 3, R. 4, sub-r. (2) which provides:

> Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

An application to set aside an ex parte decree or dismissal order is part of the proceeding in a suit and so in the same way to oppose or consent to such an application is also in my opinion part of the proceeding in a suit. Therefore I am of opinion that U On Pe's power of attorney was still in force when he appeared and agreed to the setting aside of the dismissal order. Therefore the defendant-applicants were bound by his act. For these reasons I dismiss the application with costs two gold mohurs.

G.N./R.K. *Application dismissed.*

1. ('23) 10 AIR 1923 Bom 412 : 73 I C 455 : 25 Bom L R 462, Dagdu Rajaram v. Laxman Pandushet.
2. ('25) 12 AIR 1925 Pat 692 : 91 I C 211 : 7 P L T 220, Gobind Prasad v. Hriday Thakur.
3. ('22) 9 AIR 1922 Bom 207 : 69 I C 169 : 47 Bom 11 : 24 Bom L R 744, Bachubhai Jhivad v. Ibrahim Isak.
4. ('29) 16 AIR 1929 Lah 96 : 114 I C 76 : 10 Lah 570 : 30 P L R 628, Abdul Aziz v. Punjab National Bank, Ltd.

(28) A. I. R. 1941 Rangoon 316

ROBERTS C. J. AND DUNKLEY J.

V. M. R. P. Chettyar Firm—*Appellants*

v.

Hajee Mahomed Sultan and others — *Respondents.*

First Appeals Nos. 133, 134 and 135 of 1940, Decided on 8th April 1941, against orders of Dist. Court, Hanthawaddy, D/- 3rd September 1940.

(a) Civil P. C. (1908), O. 23, R. 3 and O. 21, R. 2 — Mortgage suit does not end until mortgaged property is sold and proceeds dealt with or until personal decree under O. 34, R. 6, Civil P. C., is passed in case of right to such decree —Compromise relating to whole subject-matter of mortgage suit entered into before conclusion of proceedings falls under O. 23, R. 3 and not under O. 21, R. 2.

A mortgage suit does not come to an end until the mortgaged property has been duly sold and the sale proceeds dealt with, or if there is a right to a personal decree under O. 34, R. 6, Civil P. C., until that personal decree has been passed, and therefore any agreement of compromise relating to the whole of the subject-matter of the suit which is entered into by the parties before the conclusion of the proceedings in a mortgage suit is an adjustment of the suit which falls to be dealt with under O. 23, R. 3 and not under O. 21, R. 2 : ('36) 23 AIR 1936 Mad 34 (FB), *Rel. on* ; and ('28) 15 AIR 1928 Rang 194, *Disting.* [P 317 C 2]

(b) Civil P. C. (1908), O. 23, R. 3—Agreement recorded—Decree can be passed any time.

The procedure under O. 23, R. 3 consists of two steps : first the agreement or compromise has to be recorded, and secondly a decree must then be passed in accordance therewith so far as it relates to the suit. When the agreement has been recorded a decree can be passed any time. [P 318 C 1]

(c) Civil P. C. (1908), O. 43, R. 1 (m) and O. 23, R. 3 — Judge on Original Side of High Court directing compromise to be recorded under O. 23, R. 3—Deputy Registrar recording compromise and holding that no fresh decree could be drawn up — Defendant acquiescing in procedure held could not subsequently urge that no decree should be passed because plaintiff failed to get Deputy Registrar's opinion corrected — Deputy Registrar's order holding that no fresh decree could be passed does not fall under O. 43, R. 1 (m) — High Court held could direct that operative part of adjustment with certain modifications should be treated as if it was decree.

The Judge on the Original Side of the High Court directed a compromise to be recorded under O. 23, R. 3. The Deputy Registrar recorded the same but was of the opinion that no fresh decree could be drawn up. The defendant also acquiesced in the procedure adopted by the Deputy Registrar :

Held that the Deputy Registrar's order holding that no fresh decree could be passed did not fall under O. 43, R. 1 (m). [P 318 C 1]

Held further that the defendant having acquiesced in the procedure adopted by the Deputy Registrar could not subsequently urge that decree ought not to be passed because the plaintiff failed to take necessary steps to get the erroneous opinion of the Deputy Registrar corrected. [P 318 C 1, 2]

Held also that the High Court had power to direct that the operative part of the recorded adjustment with certain modifications should be treated as if it was a decree ; ('22) 9 A I R 1922 P C 249, *Rel. on.* [P 318 C 1, 2]

(d) Execution — Application for — Technical defect can be remedied any time and is no ground for refusing to execute decree.

A technical defect in an execution application can be remedied at any time and affords no proper ground for refusing to execute the decree : ('22) 9 A I R 1922 P C 249 and (1880) 4 A C 504, *Rel. on.* [P 319 C 1]

(e) Civil P. C. (1908), O. 23, R. 3 — Terms forming consideration for adjustment of matters in dispute whether they form subject-matter of suit or not can be embodied in decree.

Under O. 23, R. 3 all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree : 35 Cal 837; 33 Mad 102 and ('37) 24 A I R 1937 Rang 287, *Rel. on*; ('35) 22 A I R 1935 P C 119, *Ref.*; ('37) 24 A I R 1937 P C 256, *Disting.* [P 319 C 1]

R. Clark, V. S. Venkatram and P. K. Basu — for Appellants.

E. Hay, P. B. Sen and A. H. Paul — for Respondents.

Roberts C. J. — These three appeals arise out of the orders passed by the learned District Judge of Hanthawaddy in his execution cases Nos. 26, 27 and 28 of 1939, whereby he came to the conclusion that there were no decrees of the appellants which were capable of execution and consequently, dismissed the applications of the appellants for execution. In Civil Regular Suits Nos. 256, 257 and 258 of 1934 of this High Court the appellants brought three separate suits on simple mortgages against Hajee Abdul Rahman and Hajee Mohamed Sultan, personally and as the legal representatives of one Khatiza Bibi, deceased. Since the suits were instituted Hajee Abdul Rahman has died and respondents 2 to 5 in these three appeals are his heirs and legal representatives. In Suit No. 256 of 1934 a preliminary decree for sale of the mortgaged property was passed and in the other two Suits (Nos. 257 and 258 of 1934) final decrees for sale of the mortgaged properties were passed; but in neither of the suits have any of the mortgaged properties been brought to sale. After those decrees had been passed, a joint petition in each suit was made to the Court by the parties on 29th November 1935, stating that each suit had been compromised on the terms recorded in the petition filed in that suit and requesting that a decree in each suit be passed in accordance

with the terms of the petition. These petitions were stated to be petitions under the provisions of O. 23, R. 3, Civil P. C., which reads as follows :

> Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise . . . . the Court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

This rule has since been amended by the Rule Committee of this Court, but the form that we have set out is in accordance with the wording of the rule at the time of the presentation of the petitions. There was another suit between the same parties for the recovery of a sum due on a promissory note, and a decree for a specified amount had been passed in that suit. That decree was also included in the compromise agreement between the parties, and considerable confusion has arisen, not only in the minds of the parties themselves but also in the mind of the Deputy Registrar of the Original Side who dealt with the petitions, by reason of the fact that these three mortgage suits and this suit on a simple money claim were dealt with together. When the petitions in these four suits were presented to the Deputy Registrar, he recorded the following order in the money suit on 16th December 1935 :

> Heard the advocates. I do not think that a fresh decree can be drawn up. The adjustment may be recorded if it appears that it is to the interest of the minor;

there being a minor party as defendant in each of the four suits. He then recorded an opinion regarding the question as to whether the proposed compromise was for the benefit of the minor and ordered that the application should be placed before the learned Judge sitting on the original side for orders. The order of 16th December 1935, which was made in the money suit, was copied by the Deputy Registrar into Suit No. 256 in exactly the same terms, and a reference to it merely was made in Suits Nos. 257 and 258. The learned Judge came to the conclusion that the agreements whereby these suits were proposed to be adjusted were for the benefit of the minor and directed that the adjustments should be recorded. The adjustments were then recorded accordingly in all four proceedings.

Now, so far as the money suit was concerned, the Deputy Registrar's opinion that a fresh decree could not be drawn up was correct, for this adjustment had to be recorded under the provisions of O. 21, R. 2. It may be that the Deputy Registrar thought that O. 21, R. 2, applied also to the mortgage suits, and it may be that the decision in 6 Rang 285[1] has been considered authority for this opinion, although it is not ; for the adjustment which was dealt with in that case was a mere extension of time for payment under the preliminary decree and did not comprise an adjustment of the whole suit, and the learned Judges held that such an adjustment of part only of the preliminary decree must be certified and recorded under O. 21, R. 2. But a mortgage suit does not come to an end until the mortgaged property has been duly sold and the sale proceeds dealt with, or, if there is a right to a personal decree under O. 34, R. 6, until that personal decree has been passed, and, therefore, any agreement of compromise relating to the whole of the subject-matter of the suit which is entered into by the parties before the conclusion of the proceedings in a mortgage suit is an adjustment of the suit which falls to be dealt with under O. 23, R. 3, and not under O. 21, R. 2. The authority for this proposition is the decision of the Full Bench of the Madras High Court in 59 Mad 188,[2] which, with the greatest respect, in our opinion correctly lays down the law. Consequently the petitions which were presented by the parties, praying that the adjustments should be recorded and decrees passed under O. 23, R. 3 were correct so far as the three mortgage suits were concerned, and the opinion expressed by the Deputy Registrar in his order of 16th December 1935 was wrong. We feel however that this error probably arose because of the fact that a money suit was dealt with at the same time and in the same manner as the three mortgage suits. The parties themselves acquiesced in the opinion of the Deputy Registrar, and although they had asked for decrees they took no steps to see that decrees were passed.

Now the learned District Judge of Hanthawaddy has held that the opinion of the Deputy Registrar was considered by the learned Judge on the original side because it was subsequently before him when the petitions were placed before him for orders, and that therefore it must be held that the failure to pass decrees was a deliberate act of the Court, and, consequently, that no decrees on these compromise agreements

1. ('28) 15 A I R 1928 Rang 194 : 110 I C 873 : 6 Rang 285, Ahmed Rahman v. A. L. A. R. Chettiar Firm.
2. ('36) 23 A I R 1936 Mad 34 : 160 I C 270 : 59 Mad 188 : 69 M L J 765 (F B), Palaniappa Chettiar v. Narayanan Chettiar.

can now be passed because there is a final and binding decision of the Court that decrees cannot be made, and therefore that there are no decrees which can be executed. With all due respect, we think that this is an erroneous conclusion of the learned District Judge. The only matter which was before the learned Judge on the original side was whether the proposed compromises were for the benefit of the minor party, and he came to the conclusion that they were for the minor's benefit and consequently ordered that the adjustments should be recorded. The procedure under O. 23, R. 3, consists of two steps : first, the agreement or compromise has to be recorded, and, secondly, a decree must then be passed in accordance therewith so far as it relates to the suit. Therefore the order of the learned Judge directing that the agreements should be recorded in these suits was not an order that decrees should not be passed and did not imply any such order, but it was left to the Deputy Registrar to carry out his duty according to law. He however merely recorded the terms of the agreements and did not pass any decrees in accordance therewith. As we have said, all the parties acquiesced in this procedure, apparently under the erroneous view that O. 21, R. 2 and not O. 23, R. 3 applied to these suits. It is, however, clear that the rule applicable is O. 23, R. 3, and the decree which follows upon a judgment or order can be made at any time. It is therefore open to us now to send the cases back to the original side and direct that the provisions of O. 23, R. 3 shall be followed and that decrees shall be passed in accordance therewith.

It is said on behalf of the respondents that the opinion of the Deputy Registrar "I do not think that a fresh decree can be drawn up" is an order which was appealable under O. 43, R. 1 (m); but that is not so, for the order which is appealable under this rule is the order recording or refusing to record an agreement, compromise or satisfaction, and there was no refusal by the Deputy Registrar to record the agreements of compromise, which were in fact recorded. The decrees then had to follow as a matter of course and it was imperative for the Court to pass such decrees. It is unfortunate that neither of the parties took this opinion of the Deputy Registrar on review before the Judge, but that was not done; and since the respondents themselves acquiesced in this opinion, although they had by their petitions asked for decrees, they cannot now be permitted to urge that decrees ought not to be passed because the appellants did not take the necessary steps at the time to get the opinion of the Deputy Registrar corrected. So the position now is, as we have said, that we could send back these three mortgage suits to the original side for decrees to be passed as required by O. 23, R. 3, but we think it unnecessary to adopt such a cumbrous procedure, for the terms of compromise set out in the three petitions were drawn up in the form of decrees because the parties expected that decrees would be passed thereon, and when the Deputy Registrar recorded the terms of the agreements he recorded them verbatim from the petitions, and, consequently, the three formal orders which were passed on 15th January 1936, are to all intents and purposes, decrees except that, instead of beginning with the words,: "It is by consent ordered and decreed," they begin with the words "it is ordered that the said terms of adjustment be, and the same are hereby recorded." We shall therefore treat the terms of adjustment, as recorded in these formal orders of this Court of 15th January 1936, in each of the three mortgage suits as decrees passed under O. 23, R. 3 and we direct the learned District Judge of Hanthawaddy, in accordance with the directions of this judgment, to treat the operative part of each of the three formal orders of 15th January 1936, under the heading "terms of adjustment" as if it was a decree, and to proceed with the execution thereof accordingly on the applications of the appellants (decree-holders). We realize that the applications for execution made to the District Court of Hanthawaddy, after the decrees had been transferred to that Court for execution, are by no means happily framed, but they were sufficient to make it quite clear what it was that the appellants desired to execute and the respondents (judgment-debtors) have never been under any misapprehension in regard to that matter. In 4 U B R 30[3] at p. 32 their Lordships of the Privy Council said :

> All rules of Court are nothing but provisions intended to secure the proper administration of justice, and it is therefore essential that they should be made to serve and be subordinate to that purpose.

In (1880) 4 A C 504[4] at page 525 Lord Penzance said :

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3. ('22) 9 A I R 1922 P C 249 : 63 I C 914 : 48 Cal 832 : 48 I A 214 ; 4 U B R 30 (PC), Ma Shwe Mya v. Maung Mo Hnaung.
4. (1880) 4 A C 504 : 48 L J C P 705 : 41 L T 418 : 28 W R 97, Kendall v. Hamilton.

Procedure is but the machinery of the law after all — the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating it is permitted to obstruct, or even extinguish, legal rights, and is thus made to govern where it ought to subserve.

Objection to the execution of the adjusted decrees on the ground that the applications for execution are defective is an objection to a technical defect which can be remedied at any time, and affords no proper ground for refusing to execute these decrees. It is further argued on behalf of the respondents that under O. 23, R. 3, the agreement or compromise can be incorporated in a decree only in so far as it relates to the suit, and it is argued that, because the terms of the agreement in these three suits included a charge over properties which were not subject to the mortgages and also gave power to attach in execution the produce of these properties, those terms did not relate to the suit and consequently a decree could not be passed; and the cases in 62 I A 196[5] and 64 I A 302[6] are referred to. The first case is authority for the proposition that a decree under O. 23, R. 3, cannot extend to matters collateral to the suit, and the contrary is not contended by the appellants. The second case is easily distinguishable, because after the final decree in the mortgage suit had been passed in that case new parties were introduced and became parties to the agreement of compromise. Consequently this case has no application to the matter before us. Under O. 23, R. 3, all terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree: *see* 35 Cal 837[7] at p. 842 and 33 Mad 102[8] at p. 105. A decree of this kind was actually passed by this Bench in 14 Rang 766.[9] In the present cases the terms of the compromise petitions all formed the consideration for the adjustment of the mortgages in suit and, consequently, they can all be embodied in the decrees passed under O. 23, R. 3.

It is said that the matter is now concluded against the appellants by lapse of time, and that as the decrees have not been passed and the appellants have acquiesced in the failure to pass decrees for all these years, we ought not now to exercise in their favour our power to pass decrees, and we should relegate the appellants to such rights as they may have and may be able to enforce by bringing suits on the terms of the recorded adjustments. But, in our opinion, we should not accede to this attempt to deprive the appellants (decree-holders) of their right to proceed to execution on account of a manifest error which is to be explained by the confusion which arose over the compromise in a single agreement of three mortgage suits and a money suit, which has resulted in the failure to pass the necessary decrees in the mortgage suits, when the confusion was shared and the failure to pass decrees was acquiesced in by the respondents themselves. Bearing in mind the dictum of their Lordships of the Privy Council in 4 U B R 30,[3] to which we have already referred, we consider that the right course for us to adopt is the one which we have already indicated, as being the only course by which the rules of Court can be made to serve and be subordinate to the securing of the proper administration of justice. These three appeals are therefore allowed, the order of the learned District Judge of Hanthwaddy is set aside, and three execution applications are restored to his file, and he is directed to proceed with the execution of the terms of adjustment in the three mortgage suits on the footing that they are decrees made under the provisions of O. 23, R. 3, and in accordance with law. The appellants are entitled to their costs of these appeals, advocate's fee five gold mohurs in each appeal.

G.N./R.K. *Appeals allowed.*

5. ('35) 22 A I R 1935 P C 119 : 156 I C 694 : 62 I A 196: 14 Pat 545 (P C), Sheonandan Prasad v. Abdul Fateh Mohammad.
6. ('37) 24 A I R 1937 P C 256: 169 I C 547: I L R (1938) 1 Cal 66: 64 I A 302: 31 S L R 637 (P C), Pradymna Kumar Mullick v. Dinendra Mullick.
7. ('08) 35 Cal 837 : 7 C L J 492 : 12 C W N 849, Gobinda Chandra Pal v. Dwarka Nath Pal.
8. ('10) 33 Mad 102 : 3 I C 701 : 20 M L J 20, Natesa Chetti v. Vengu Nachiar.
9. ('37) 24 A I R 1937 Rang 287 : 170 I C 434 : 14 Rang 766, Alagappa Chettyar v. Chettyar Firm.

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(28) A. I. R. 1941 Rangoon 319

ROBERTS C. J. AND DUNKLEY J.

Nga Khwet — Appellant

v.

The King.

Criminal Appeal No. 211 of 1941, Decided on 18th March 1941, from order of the Addl. Sess. Judge Hanthawaddy, D/- 18th February 1941.

(a) Penal Code (1860), Ss. 300 and 299 — Murder — Not only bodily injury but also that such bodily injury should be sufficient in ordinary course of nature to cause death must be intended — Injury on vital part such as head causing substance of brain to protrude from head — It is no defence that accused did not intend injury to be fatal.

In order to constitute the offence of murder not only must bodily injury be intended to be inflicted, but it must be intended that such bodily injury should be sufficient in the ordinary course of nature to cause death : ('37) 24 AIR 1937 Rang 396 (FB) and ('40) 27 AIR 1940 Rang 259, *Rel. on.* [P 321 C 1]

Where a man inflicts a wound in a vital spot such as on the head causing the substance of the brain to protrude from the head and death ensues, it is no defence to a charge of murder for the accused to say that he did not intend the injury to be fatal. [P 321 C 1, 2]

(b) Penal Code (1860), S. 302—Youth by itself is not enough to justify lesser sentence — But fact that persons of immature age are more easily provoked and behave in less responsible manner than their elders may be considered — Accused, cowherd aged 17 years suspecting missing cowbell to be with deceased aged 15 years virtually meeting with blank refusal from deceased—Accused losing temper and inflicting with dah injury on deceased's head resulting in his death—Lesser sentence in circumstances of case held justified—Case held fit to be dealt with under S. 29, Prevention of Crime (Young Offenders) Act.

Although youth by itself is not such an extenuating circumstance as to justify the imposition of the lesser penalty, regard may be had to the fact that persons of immature age are sometimes more easily provoked and behave in a less responsible manner than their elders. [P 321 C 2]

The accused, a cowherd aged 17 years, who was searching for a missing cow-bell, which he had good reason to suspect was in the possession of the deceased was virtually met with a blank refusal by the deceased, a boy two years younger than himself; and, in those circumstances, he lost his temper and committed a terrible assault with a dah which resulted in a serious injury on the head of the deceased and subsequent death of the deceased:

Held that in all the circumstances of the case the sentence of transportation for life was proper and that the case was a fit one to be dealt with under S. 29, Prevention of Crime (Young Offenders) Act. [P 321 C 2]

U Tun Aung—for Appellant.

E. W. Lambert, Government Advocate — for the Crown.

Roberts C. J.—The appellant Nga Khwet was convicted by the learned Additional Sessions Judge of Hanthawaddy of the murder of Maung Kwin, a youth of 15 years of age, at Sankauktaw in the Hanthawaddy District at about noon on 3rd September last and was sentenced to death. The facts are that the appellant was a cowherd of Maung Ba Hla, and among his duties was the taking care not only of the cows but also the cow-bells which they wore: some time prior to the murder a cow-bell was missing and it appears that the appellant had reason to suspect — and such was in fact that case—that Maung Kwin, the deceased, had this cow-bell in his house; in act, he had been given it by another person. On the day in question the deceased, his mother Ma Kyaw, and a younger brother Chit Ti, a little boy of eight, went to cut firewood and met the appellant there. The appellant said to the deceased, "Here, give me back my cow-bell," whereupon the latter replied, I did not take your cow-bell: why should I return it to you ?" To a person with the appellant's duties, and a youth two or three years older than himself, this might well be regarded as rather an impudent answer. The fact is that the cow-bell had been given to Maung Kwin by one Maung Chit Maung, who is not a witness. The appellant then said with an oath, "If you don't give it to me, you will know about it." And he inflicted one blow with a dah on Maung Kwin's head.

As his learned counsel has said, it would be difficult to persist in the defence that the appellant was not there and did not inflict this injury. The deceased's younger brother, Chit Ti, who was only eight years of age, gave corroborative evidence which, when recorded, reads as though it were intelligently given, and he says:

> The accused came up to us and said to my brother, "Give up my cow-bell." My brother said "I did not take it." My brother was then bending and tying up the fuel in bundles and the accused cut him on the side of his head with a saung dah.

Now, there can be no doubt as to the identity of the accused, because the deceased, who was taken to hospital, in a statement which he made subsequently, denounced him as his assailant, not, it is true, by name, but as the cowherd of U Ba Hla; and it is clear from the evidence that U Ba Hla has no other cowherds and that the deceased was agreeing with his mother and younger brother when he described his assailant as U Ba Hla's cowherd, meaning the appellant and no one else. The deceased also picked out the appellant at the hospital as his assailant and an additional important matter is that the appellant was identified by the little boy Chit Ti as well as by Ma Kyaw at Kungyangon police station. Ma Kyaw also denounced the appellant as the author of this attack to one Hla Htun shortly after this occurrence.

The medical evidence shows that a serious injury was inflicted upon the deceased. The brain protruded from the head, which had been cut at a point just above the right ear, and when the deceased was taken to hospital he was unconscious. An operation with chloroform for the removal of some small pieces of bone improved his state for a short

time, but thereafter facial paralysis supervened and he died on the 1st December just three months after the attack upon him. The doctor has said that the injury was sufficient in the ordinary course of nature to cause death. There is one slip in the judgment, which, however, has been lucidly written and contains a useful and clear summary of the evidence in the case, which, I notice, was well tried. The learned Judge, however, remarks that

> it is clear that the accused intended to cause bodily injury to the deceased and as that bodily injury was sufficient in the ordinary course of nature to cause death the accused must be deemed to have committed murder.

This, however, is not quite right, as was pointed out in 1937 R L R 384[1] and in 1940 R L R 441[2] and in subsequent cases: not only must bodily injury be intended to be inflicted, but it must be intended that such bodily injury should be sufficient in the ordinary course of nature to cause death. This statement of the law has now the authority of a number of leading cases behind it and although, in my respectful view, an error has recently been made by a bench in the Punjab, there is no ground for considering that that decision, to the report of which I shall not refer, has in any way altered the law in this country.

We are both of opinion that it would be wrong to say that the offence in this case was other than murder. The appellant did not hurl the dah at the deceased, as he stated to Maung Po Nyun. Maung Po Nyun is the father-in-law of the appellant's employer, and the appellant went to him with a cow-bell (which was not the cow-bell in the possession of Maung Kwin) on the day of the murder and said: "A boy collecting firewood stole this brass bell. I hurled a dah at him, took the bell and came running." This was not a truthful account of what had happened, and it is clear from the other evidence, and from the fact that no dah was picked up, that the weapon used never left the appellant's hand. Under S. 288, Criminal P. C., the evidence of U Po Nyun in the committal Court was allowed before the Sessions Court and became Ex. F, and there the phrase is not that the dah was "hurled," but, "a boy who was chopping firewood had stolen this brass bell. I have cut him and come running."

Having regard to the nature of the wound, which was a wound 6 inches long and which caused the substance of the brain to protrude from the head, it would be idle to say merely that the appellant knew that it was likely to cause death. It has been, as the learned Additional Sessions Judge has remarked, held over and over again that, where a man inflicts a would in a vital spot and death ensues it is no defence to a charge of murder for the accused to say that he did not intend the injury to be fatal. We are therefore of opinion that the appellant was rightly convicted of murder.

However, when it comes to the question of sentence, we think there are some grounds for taking a merciful view. As the learned Additional Sessions Judge has observed, it is quite true that youth by itself is not such an extenuating circumstance as would justify the imposition of the lesser penalty, but regard may be had to the fact that persons of immature age are sometimes more easily provoked and behave in a less responsible manner than their elders. In this particular instance, the cowherd who was searching for a missing cow-bell, which he had good reason to suspect was in the possession of the deceased, was virtually met with a blank refusal by the deceased, a boy two years younger than himself; and, in those circumstances, there is no doubt that he lost his temper and committed this terrible assault which resulted in the serious injury and subsequent death of this young boy. That, in itself, is a deplorable fact. But we think, in all the circumstances of the case, that we are justified not only in commuting the sentence, which we accordingly do, to one of transportation for life, whilst refusing to confirm the sentence of death passed in the appellant by the learned Additional Sessions Judge, but also in drawing the attention of the executive authorities to the provisions of S. 29, Prevention of Crime (Young Offenders) Act, 1930.

Dunkley J.—I agree and have nothing to add.

G.N./R.K. *Order accordingly.*

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1. ('37) 24 A I R 1937 Rang 396 : 171 I C 574 : 38 Cr L J 1097: 1937 R L R 384 (FB), The King v. Abor Ahmed.
2. ('40) 27 A I R 1940 Rang 259 : 191 I C 306 : 42 Cr L J 124 : 1940 R L R 441, The King v. Aung Nyun.

(28) A. I. R. 1941 Rangoon 322

FULL BENCH

ROBERTS C. J., DUNKLEY AND SHARPE JJ.

Maung Ya — *Appellant*

v.

Maung Lu Gyaw and another — *Respondents.*

Civil Ref. No. 9 of 1940, Decided on 10th April 1941; reference made by Mya Bu J., in Civil Revn. No. 220 of 1940, D/- 12th December 1940.

Court-fees Act (1870), S. 7 (iv) (f)—Administration suit being suit for accounts falls under S. 7 (iv) (f)—Plaintiff can place his own valuation for relief sought—Defendant cannot question plaintiff's valuation — Defendant's remedy lies under S. 24, Civil P. C.

In a suit for administration the valuation for purposes of court-fees and/or of jurisdiction made by the plaintiff, cannot be questioned by the defendant, inasmuch as a suit for administration being a suit for accounts falls under S. 7 (iv) (f) and the plaintiff is entitled to place his own valuation on the relief sought. The remedy of the aggrieved defendant who considers that the relief has been undervalued and he is being deprived of his rights of appeal thereby lies under S. 24, Civil P. C. : ('31) 18 A I R 1931 Rang 146 (F B), *Foll.*; ('29) 16 A I R 1929 P C 147; ('35) 22 A I R 1935 Rang 13 and ('37) 24 A I R 1937 Rang 320 (F B), *Rel. on.* [P 323 C 2; P 324 C 1]

C. A. Soorma — for Appellant.

U. Ba Sein for U E Maung (1) — for Respondents.

ORDER OF REFERENCE

Mya Bu J. — The main point on which this case turns lies in what is the true meaning and effect of the sentence, "In all such suits the plaintiff shall state the amount at which he values the relief sought," appearing at the end of S. 7 (iv), Court-fees Act. The plaintiff Maung Lu Gyaw filed a suit against Maung Ya and Ma Chei in the Sub-Divisional Court of Thaton for administration and accounts of the estate of the plaintiff's late grandfather U Khe, the father of the defendants. Asserting that he was the only child of U Khe's eldest child who had pre-deceased U Khe, he claimed a ⅓rd share in the estate. To the plaint a list of immovable property belonging to the estate of U Khe was attached setting out four items of property valued at Rs. 3900. He valued the subject-matter of the suit for the purpose of court-fees at Rs. 1300 and valued the same for the purpose of jurisdiction at the same figure. Defendant 1 Maung Ya filed a written statement in which he inter alia stated that the estate of his late father was worth over Rs. 37,500 and that therefore the plaintiff's claim was beyond the pecuniary jurisdiction of the Sub-divisional Court. The learned Sub-divisional Judge without holding an enquiry as to the value of the estate of U Khe for the purpose of making an estimate of the value of the subject-matter of the suit came to the conclusion, under the authority of the rulings in 9 Rang 165,[1] 12 Rang 512[2] and 1939 R L R 134[3] that the plaintiff was at liberty to place any value which he likes in a suit of this character and overruled the objection. Among the cases quoted by the learned Sub-divisional Judge, in the first one, which is a Full Bench case, it was observed at p. 168 :

The intention of the Legislature in enacting S. 7 (iv) was that in cases where it is impossible a priori to ascertain with accuracy the value of the relief that is sought, the plaintiff in the trial Court and the appellant in the Court of appeal should be the sole arbiter designata to make an estimate of the value of the relief that is claimed.

It is not at all clear to me that this observation can constitute any authority for the proposition that the plaintiff or the appellant, as the case may be, is the sole arbiter of valuation in a suit of the category mentioned in S. 7 (iv), Court-fees Act ,or in an appeal therefrom as the case may be, as the direct question before the Full Bench was merely whether the appellant was bound to take the valuation of the subject-matter of the suit stated by the plaintiff as the valuation of the subject-matter of the dispute in the appeal. The next case quoted by the learned Sub-divisional Judge is one in which a Bench, of which I was a member, decided that the value for the purpose of jurisdiction must be the same as the value for the purpose of court-fees in an administration suit and therefore if the subject-matter of the suit is valued at a certain figure for the purpose of court-fees, the same figure must be taken as the value of the suit for the purpose of jurisdiction and that the suit must be filed in the Court of the lowest jurisdiction competent to entertain a suit of that value. In the course of the judgment it was observed :

A preliminary issue was framed and heard on this question of court-fee payable and on this issue the learned Assistant District Judge following the ruling in 9 Rang 165[1] correctly held that an administration suit is a suit for an account and that the court-fees thereon are payable under cl. (iv) (f) of S. 7, Court-fees Act, and the plaintiff is the person to make such estimate as he pleases as to the value

1. ('31) 18 A I R 1931 Rang 146 : 133 I C 91 : 9 Rang 165 (F B), C. K. Ummar v. C. K. Ali Ummar.
2. ('35) 22 A I R 1935 Rang 13 : 153 I C 858 : 12 Rang 512, Ma Thin On v. Ma Ngwe Hmon.
3. ('39) 26 A I R 1939 Rang 115 : 181 I C 841 : 1939 R L R 134, U Po Mya v. Father Rioufreyt.

of the relief that he claims and therefore it was open to the plaintiff-respondents in this suit to value the relief claimed at Rs. 100 for the purpose of court-fees.

The question as to whether the plaintiff was the sole arbiter of the valuation of the subject-matter of the suit in such a case or whether he was bound to make an estimate, that is to say, a reasonable approximation of the value, did not arise in that case. The third case quoted by the learned Subdivisional Judge followed the decision of the Full Bench in 1937 R L R 214.[4] There, too, this question did not directly arise. The question that arose was whether the Court, having entertained and tried a suit which was valued in the plaint at a figure falling within the jurisdiction of the Court, had jurisdiction to pass a decree in that suit upon finding that the value of the subject-matter of the suit was in reality beyond the pecuniary jurisdiction of the Court. But Leach J. observed at p. 221: "The plaintiff in a suit is entitled to place his own value on the relief sought," which appears to favour the view that the plaintiff can place any valuation that he wishes reasonably or unreasonably. Decisions in 17 Cal 680[5] and 31 Bom 73[6] which were followed in 40 Cal 245[7] in which the point in question was expressly considered, lay down that the Court-fees Act, S. 7, cl. (iv) does not contemplate that a plaintiff should assign an arbitrary value to the subject-matter of the suit and that it is a matter for the judicial determination by the Court in cases where objection as to the valuation has been taken at the proper time. Although these decisions coincide with my views, I consider, in view of the observations made in the various cases of this High Court that I have referred to above—though they were made in cases in which the present question did not directly arise — that this matter should be reconsidered by a Full Bench. I therefore propound the following question and refer the same for the decision of a Full Bench namely: "In a suit for administration, can the valuation for purposes of court-fees and/or of jurisdiction made by the plaintiff, be questioned by the defendant?"

Opinion of the Full Bench

Roberts C. J. — The following question comes to us by way of reference from a learned Judge of this High Court sitting in civil revision proceedings:

> In a suit for administration can the valuation for purposes of court-fees and/or of jurisdiction made by the plaintiff, be questioned by the defendant?

In my opinion, the answer to this question must be in the negative, for the decision in 9 Rang 165[1] appears to me to be conclusive on the point. A suit for administration is a suit for accounts and falls under sub-para. (f) of cl. (iv) of S. 7, Court-fees Act. In the judgment of the Full Bench some observations of Lord Tomlin made in the course of the argument in 56 I A 232[8] were adopted. He said that no complaint could be made that the amount valued in a memorandum of appeal was not the proper amount. By parity of reasoning, no complaint can be made on the ground that the amount valued in the plaint is incorrect. And Page C. J. said in terms that the plaintiff in the trial Court was the persona designata to make an estimate of the value that is claimed. He pointed out that the valuation must be to some extent arbitrary (using the word in its strict sense as a notional or speculative valuation), and said that the Legislature had determined that the plaintiff should make the estimate, but that if in the event it turned out that too small a sum had been paid in court-fees, provision was made under S. 11, Court-fees Act, for payment of the additional court-fees. This decision was followed by a Bench in 12 Rang 512.[2] Where a suit is one for an account the court-fees are not fixed under the Court-fees Act. The matter falls within S. 7 (iv) (f) of the Act. The valuation for the purposes of jurisdiction must be the same as the valuation for purposes of court-fees (*see* S. 8, Suits Valuation Act): because the court-fees are payable ad valorem and none of the paragraphs set out, namely (v), (vi) and (ix) and para. (x), cl. (d) apply.

The dictum of Leach J. in 1937 R L R 214[4] that the plaintiff in a suit is entitled to place his own value on the relief sought was a considered dictum in a Full Bench case. Some fear has been expressed lest a plaintiff by undervaluing a suit for the purposes of jurisdiction might deprive a defendant of his rights of appeal. But the High Court or the District Court may at any stage, either of its own motion or upon hearing an application by one of the parties to a suit, transfer any suit, appeal or other proceeding pending

4. ('37) 24 AIR 1937 Rang 320 : 170 I C 39 : 1937 R L R 214 (FB), Chidambaram Chettiar v. Muthia Chettiar.
5. ('90) 17 Cal 680, Boidya Nath v. Makhan Lal.
6. ('07) 31 Bom 73 : 8 Bom L R 885, Dayaram Jagjivan v. Gordhandas Dayaram.
7. ('13) 40 Cal 245 : 17 I C 162 : 16 C L J 194 : 17 C W N 591, Raj Krishna Dey v. Bipin Behari Dey.
8. ('29) 16 AIR 1929 P C 147 : 117 I C 493; 10 Lah 737 : 56 I A 232 (PC), Faizullah Khan v. Mauladad Khan.

before it to any Court subordinate to it and competent to try or dispose of the same. Hence if a suit has been filed in a particular Court for the purpose of defeating some right which would otherwise enure to a defendant, or of obtaining some unfair advantage by the misuse of legal process, the party aggrieved has a remedy open to him under S. 24, Civil P. C. No doubt the apprehension that an unreasonable valuation might lead to injustice has prompted the reference which has been made to us; in my opinion however the Court is bound by its own Full Bench ruling in 9 Rang 165.[1] This does not mean that a suit cannot be transferred to another Court competent to deal with it, where good cause is shown and despite the valuation for purposes of jurisdiction which the plaintiff has chosen to make. The answer to the question propounded must therefore be in the negative. The costs of this reference advocate's fee five gold mohurs will be costs, in the revision proceedings.

Dunkley J. — I agree.

Sharpe J.—I agree. I only wish to point out, as I did in the last case 1941 R L R 495[9] at p. 511, that it is incumbent upon a plaintiff to state in his plaint the value of the subject-matter of the suit for the purposes of jurisdiction and of court-fees, so far as the case admits. That is required of him by R. 1 (i) of O. 7, Civil P. C.

G.N./R.K. *Answer accordingly.*

9. ('41) 28 AIR 1941 Rang 187 : 195 I C 613 : 1941 R L R 495 (F B), Khem Raj v. Durji.

(28) A. I. R. 1941 Rangoon 324

ROBERTS C. J. AND DUNKLEY J.

A. H. Gandhi — Applicant

v.

The King.

Criminal Revn. No. 176-B of 1941, Decided on 22nd May 1941, for review of order of Second Addl. Special Power Magistrate, Insein, D/- 21st December 1940.

(a) Criminal P. C. (1898), S. 497 — Offence punishable with transportation — Magistrate cannot grant bail.

Section 497 gives the Magistrates unfettered discretion to grant bail in case of non-bailable offences except in cases punishable with transportation for life or with death : ('27) 14 A I R 1927 Rang 205 (F B), *Foll.* [P 326 C 1]

(b) Criminal P. C. (1898), S. 17 (5) — Subordinate.

A Magistrate is not subordinate to the Sessions Judge. [P 326 C 2]

(c) Criminal P. C. (1898), S. 561A—Expunction of passage from judgment—Power of High Court when to be exercised — Sessions Court has no such power.

The power of the High Court under S. 561A to order the expunction of irrelevant and scandalous remarks from a judgment of a lower Court can be exercised only when the passage objected to amounts to an abuse of the process of the Court and never when it is relevant to the points at issue before the Court: ('27) 14 A I R 1927 All 193 and ('28) 15 A I R 1928 Lah 740, *Rel. on ;* ('22) 9 A I R 1922 All 107, *Ref.* [P 327 C 1]

But this jurisdiction being of an extraordinary nature has to be exercised with great care and caution : ('28) 15 A I R 1928 Lah 740, *Rel. on.* [P 327 C 1]

There is no provision of law which gives to a Sessions Judge, or to any other Court, the power to expunge remarks from a judgment. [P 327 C 1]

(d) Criminal P. C. (1898), Ss. 561A and 537 —Magistrate refusing to grant bail — Sessions Judge in appeal while granting it making strong remarks against Magistrate—Magistrate while proceeding with case making comments on remarks of Sessions Judge — Sessions Judge ordering expunction of remarks from Magistrate's judgment — Appeal by accused to Sessions Judge against conviction—Sessions Judge having heard appeal on incomplete copy of Magistrate's judgment, appeal held not heard at all — Sessions Judge's action in ordering expunction of Magistrate's comments held illegality incurable by S. 537.

On Magistrate's refusal to grant bail the accused appealed to the Sessions Judge who while granting the same made strong remarks against the Magistrate's refusal to grant bail. The Magistrate while proceeding with the case made some comments on the remarks of the Sessions Judge who by an order directed the expunction of the comments from the Magistrate's judgment. The accused appealed to the Sessions Judge against his conviction by the Magistrate. The Sessions Judge thus heard the appeal on an incomplete copy of the Magistrate's judgment :

Held that since the Sessions Judge heard the appeal on an incomplete copy of the Magistrate's judgment the appeal was not heard at all. [P 327 C 2]

Held further that the order expunging the remarks from the Magistrate's judgment was an illegality which raised an irrebuttable presumption that the accused must have been prejudiced thereby and which, therefore, could not be cured under section 537. [P 327 C 2]

Held also that the expurgated passage was not objectionable and being favourable to the accused he was in fact prejudiced by its expunction. [P 328 C 1]

(e) Evidence Act (1872), S. 15 — One evidentiary act can form series within S. 15 with fact to be proved — Proximity in time of evidentiary fact — Importance — Evidentiary act must be of same specific kind as act to be proved.

Evidence of a single act is admissible under S. 15 and in this sense one evidentiary fact can form a series within the meaning of S. 15 with the fact to be proved : (1906) 2 K B 389 and (1922) 2 K B 555, *Rel. on.* [P 328 C 2]

The question of proximity of time of the acts tendered to that in question goes rather to the

weight to be given to the evidentiary facts than to their admissibility : (1889) 1 Q B 77, *Rel. on*; ('16) 3 A I R 1916 Cal 188, *Not approved*. [P 328 C 2]

The acts of which evidence is tendered must be of the same specific kind as the act to be proved : ('16) 3 A I R 1916 Cal 188 ; ('20) 7 A I R 1920 Cal 500 (F B) and (1915) 84 L J K B 1785, *Rel. on*. [P 328 C 2]

Consequently in the case of an act which has formed the subject of a charge of arson under S. 436, Penal Code, a previous act which was not the subject of a criminal charge at all is inadmissible under S. 15. [P 329 C 1]

(f) Evidence Act (1872), Ss. 14, 8 and 11 — Applicability of S. 14 — Fact to be proved that fire in soap factory in 1940 was intentional — Evidentiary fact sought to be tendered in evidence being fire in mill in 1932—Accused concerned in both because he was principal share-holder in both companies — Evidentiary fact held inadmissible under Ss. 14, 8 and 11.

Section 14 applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does at a trial for the offence of arson: 34 All 93, *Rel. on*. [P 329 C 1]

The fact to be proved was that the fire at the soap factory in 1940 was an intentional fire, and the evidentiary fact sought to be tendered in evidence was the fire at a mill in 1932, the accused being concerned in both the facts concerned because he was the principal share-holder in both companies :

Held that the evidentiary fact was inadmissible under Ss. 14, 11 and 8. [P 329 C 1, 2]

(g) Criminal trial — Evidence—Insurance — Fire whether intentionally caused by insured — Evidence of excessive claim by insured is inadmissible.

Where the allegation against the insured is that the fire was intentionally caused by him the fact that the claim made by the insured against the insurance company after the fire was excessive is inadmissible in evidence. [P 329 C 2]

(h) Criminal trial—Revision — In convicting accused lower Court considering inadmissible evidence—Revision Court can go into evidence and see whether it is sufficient to convict accused.

When a revisional Court holds that in deciding on the guilt of the accused the lower Courts have taken into consideration inadmissible evidence, it is incumbent on the revisional Court to satisfy itself that the remaining evidence, which the lower Courts could properly take into consideration, is sufficient to establish as against the accused proof of his guilt beyond reasonable doubt. [P 329 C 2]

(i) Criminal P. C. (1898), S. 44 — Charge of arson—Accused not admitting that fire was intentional — Accused is not bound to make any report.

In the case of a charge of arson under S. 436, Penal Code, where the accused does not admit that the fire was intentionally caused, the accused is under no obligation to make any report. [P 331 C 1]

(j) Penal Code (1860), S. 436 — Property lost by fire soon after insurance—Insured cannot be suspected of arson.

A person whose property is lost by fire soon after he had effected a fire insurance cannot be suspected of arson. [P 331 C 2]

Dr. Ba Han — for Applicant.

U Chan Htoon, Government Advocate — for the Crown.

Roberts C. J. — This is an application in revision, under the provisions of S. 439, Criminal P. C., by Amritlal Harjivandas Gandhi, by which we are asked to set aside the conviction and sentence of the applicant and to set him at liberty. The applicant and one Joshi were tried together by the Second Additional Special Power Magistrate of Insein (Criminal Regular No. 57 of 1940) on a charge of arson, under S. 436, Penal Code, and were both convicted and each was sentenced to undergo rigorous imprisonment for a term of four years. On appeal by them to the Court of Session, Insein, (Criminal Appeal No. 315 of 1940) Joshi was acquitted, but the conviction of the applicant was altered to one of abetment of arson, under S. 436, read with S. 109, Penal Code, and the sentence was maintained. The applicant was the principal share-holder and managing-director of the Burma Soap Co., Ltd., which had a factory for the manufacture of soap at Bauktaw, one of the suburbs of Rangoon. The co-accused Joshi was the manager of the factory. Both the applicant and Joshi lived at a short distance from the factory. Three insurances were effected by the Burma Soap Co. with the National Fire and General Insurance Co., Ltd. on 17th February 1940, with respect to this soap factory at Bauktaw, the building being insured for Rs. 10,000, the machinery and plant for Rs. 37,500, and the stocks of oils, fats, chemicals and other materials for Rs. 30,000. There has been no suggestion at any stage of the trial that either insurance was effected for a sum in excess of the true value of the property covered thereby. The factory was burnt down in the early hours of 12th April 1940, the fire being discovered at about 2 A. M. There appears to have been a suspicion from the very beginning that this fire was not accidental; but the investigation was at first dilatory and perfunctory, although, as the Magistrate has remarked in his judgment, the investigating officer displayed an excess of zeal amounting almost to impropriety after the case had been sent up for trial. A report which the police station officer, S. Robinson, compelled Joshi to make in writing on the afternoon of 12th April, was used as a first information report. U Tin, Inspector of the Crimi-

nal Investigation Department, took up the investigation on the morning of 13th April and was responsible for the whole investigation and for sending the case up for trial.

For the prosecution emphasis was laid on the fact that the durwan who was on night duty at the factory during the night of 11-12th April has disappeared, and the trial Magistrate was asked to infer, which he did, a suspicious circumstance against the two accused on this account. It is therefore convenient to observe at this stage that U Tin in his evidence stated that this durwan did not disappear until 15th April, and, consequently, the police had ample time before them to take his statement and/or to take him into custody, as quite clearly they ought to have done if there was any suspicion that this fire was intentionally caused. Joshi was arrested on 17th April. The applicant was arrested on 27th April, but was immediately released on bail. The case against the two accused was sent up to the Second Additional Magistrate for trial on 1st May. Joshi applied to the Magistrate for bail, but bail was refused, and consequently he made an application to the learned Sessions Judge of Insein, and was released on bail by the order of the learned Sessions Judge, dated 11th May 1940.

It is unfortunately necessary for us to make some reference to the contents of this order, as it is intimately connected with the subsequent errors committed by the learned Sessions Judge. In the course of this order granting bail the learned Sessions Judge made a number of unnecessarily strong observations, which must have carried great weight with the trial Magistrate. He said that the grant of bail in a non-bailable case is the rule and refusal is the exception, although the case against Joshi, which he was considering, was a case in which the charge made was punishable with transportation for life, and therefore this observation was directly opposed to the decision of a Full Bench of this Court in 5 Rang 276.[1] He further said that the District Magistrate was ill-advised in opposing this application for bail, and yet in view of the ruling in 5 Rang 276[1] he was bound to oppose it as the offence was punishable with transportation for life. Thirdly, he said that no sufficient grounds appeared, on the materials placed before him, for believing that the applicant was guilty of the offence with which he was charged.

In the original list of witnesses cited with the charge sheet 14 witnesses were cited for the prosecution, but, on the 6th July a list of 24 more witnesses was cited, and the Magistrate was asked to permit them to be examined for the prosecution. Naturally, the Magistrate gave his permission. Some of these witnesses were examined; about half of them were waived, and several of those who were waived were examined as witnesses for the defence. The name of the witness Kasinath, to whose evidence reference will have to be made, occurs at the head of this additional list. The trial made slow progress, owing mainly to the difficulty of obtaining an interpreter to examine the Chittagonian witnesses, but ultimately, on 21st December 1940, in a careful and well-considered judgment, for which (although we feel bound to differ from his conclusions) the Magistrate deserves commendation, both accused were convicted.

An appeal was filed in the Court of Session on 23rd December, and was admitted by the learned Sessions Judge for hearing on 3rd January 1941. Then, on 1st January, that is, on a day when the Court was closed, without any intimation to anyone of his intention to pass such an order, the learned Sessions Judge passed an order which we have read with astonishment almost amounting to incredulity. The learned Sessions Judge took exception to a paragraph in the Magistrate's judgment which he thought reflected on himself, and he ordered the Magistrate to expunge immediately this paragraph from his judgment, and to recall all copies of the judgment which had been issued to any Court or person and to issue fresh copies from which the offending paragraph had been omitted.

In this extremely surprising order the learned Sessions Judge has failed to mention by what provision of the law he considered himself authorised to direct the expunction of the passage from the Magistrate's judgment; and naturally so, because there is no provision of the law which gives to a Sessions Judge, or to any other Court, such a wide authority. In the course of his order the learned Sessions Judge observed that the Magistrate was subordinate to the Sessions Court, an observation which is contrary to the express provisions of S. 17 (5), Criminal P. C. The most charitable view we are able to take of his action is that he acted hastily in a moment of exasperation

1. ('27) 14 A I R 1927 Rang 205: 104 I C 101: 28 Cr L J 773: 5 Rang 276 (FB), Emperor v. Nga San Htwa.

and ill-temper, without pausing to reflect that by this action he was arrogating to himself the power to tamper with a judicial record. The expurgated judgment became a false document in that it was not a true record of the Magistrate's proceedings; but it is all that the learned Sessions Judge intended should be available for the purpose of the appeal before himself, or to the High Court if a subsequent application in revision was made. Plainly this was very wrong.

Prior to the enactment of S. 561A, Criminal P. C., in 1923, it was even doubted whether a High Court had power to order the expunction of irrelevant and scandalous remarks from a judgment of a lower Court, *see* 44 ALL 401,[2] although some High Courts considered that they had such power, basing their authority on the general powers of superintendence of all subordinate Courts conferred by S. 107, Government of India Act. It is however now settled law that the High Courts have such power under S. 561A, but only when the passage objected to amounts to "an abuse of the process of a Court" and never when it is relevant to the points at issue before the Court: *see* 49 ALL 254[3] and 9 Lah 269.[4] But, as Tek Chand J. remarked in the latter case, this jurisdiction is of an extraordinary nature and has to be exercised with great care and caution. A Sessions Court has never possessed any such authority, and we have never before heard of a case in which a Sessions Judge has exercised such a power and we hope that we shall never hear of one again. Even though the learned Sessions Judge took this erroneous view of his powers, we should have thought that common sense would have told him that either the Crown or the accused were bound to be prejudiced by expunging this passage from the Magistrate's judgment, and that therefore before taking any such action as he did take, it was necessary to issue notice to both sides and to hear what they had to say. Had the learned Sessions Judge adopted this very ordinary practice he would no doubt have been apprised by learned counsel of what was the correct view of the law and this grievous mistake would not have been made. Fortunately, although the learned Sessions Judge seems to have taken all possible precautions to prevent this offending paragraph of the Magistrate's judgment being known to anyone, the applicant secured an unexpurgated copy of the judgment and declined to return it to the Magistrate, and therefore we know what that passage is. It reads as follows :

> The case therefore stands as it was before the Sessions Court at the time of granting bail. The Sessions Court was of opinion that there were only grounds of suspicion. With all due respect to the Sessions Court, whose opinion this Court is not bound by, I shall now proceed to recapitulate the circumstances found against the accused in my discussion of the various items.

We do not find anything in this passage to which a reasonable person could take the least objection, and we fail entirely to understand what was the learned Sessions Judge's objection thereto. The Magistrate had remarked that the only witnesses whose testimony was of any use to the prosecution case were the witnesses whose statements to the police were before the learned Sessions Judge at the time when he granted bail to Joshi, and in view of the strong remarks made by the learned Sessions Judge in granting bail, to which we have already referred, it is not surprising that the Magistrate thought it necessary to make some comment on this matter in his judgment ; and, of course there was no impropriety in his doing so for he was not bound by any opinion expressed by the Sessions Court in its order granting bail. We therefore now direct that this paragraph shall be restored to its proper place in the Magistrate's judgment. However the result of this order of 1st January 1941 of the learned Sessions Judge was that he heard the appeal on an incomplete copy of the Magistrate's judgment, and therefore, in our view, the appeal was not heard at all. The learned Government Advocate does not seek to uphold the action of the learned Sessions Judge in expunging this passage from the Magistrate's judgment, but says that it is merely an irregularity which is curable under the provisions of S. 537, Criminal P. C. We are unable to accede to this view. It was clearly an assumption of authority which was not conferred on the Sessions Judge by the Code of Criminal Procedure, and therefore was an illegality, and the irrebuttable presumption arises that the accused must have been prejudiced thereby: *see* 25 Mad 61[5] at p. 97 and

2. ('22) 9 A I R 1922 All 107 : 66 I C 1005 : 23 Cr L J 349 : 44 All 401 : 20 A L J 261, Emperor v. C. Dunn.
3. ('27) 14 A I R 1927 All 193 : 98 I C 719 : 27 Cr L J 1407 : 49 All 254 : 25 A L J 100, Panchanan Banerji v. Upendra Nath.
4. ('28) 15 A I R 1928 Lah 740 : 109 I C 812 : 29 Cr L J 620 : 9 Lah 269 : 29 P L R 461, In the matter of H. Daly.
5. ('02) 25 Mad 61 : 28 I A 257 : 11 M L J 233 : 8 Sar 160 (P C), Subrahmania Ayyar v. Emperor.

I L R (1938)2 Cal 295[6] at p. 304. The appellants *ex necessitate* must have been prejudiced by their appeals being considered on an expurgated copy of the Magistrate's judgment, and when the passage itself is read it is clear that it was favourable to the appellant and could form the basis of considerable argument on their behalf, and therefore prejudice in fact is also established. At the very least, in this application in revision we should have to hold that the appellate proceedings before the Sessions Court of Insein were vitiated and must be set aside, and that a rehearing of the appeal before another Sessions Judge must be ordered. But on other points which have been presented to us in argument on behalf of the applicant we are clear that the conviction of the applicant cannot, in any event, stand, and we therefore now proceed to deal with these points.

At the trial the evidence was sought to be introduced by the prosecution that the applicant was also the principal share-holder in a company known as the Burma Timber Co. Ltd., that this company had a fire on its premises in the year 1932 and in consequence of this fire the New India Assurance Co. Ltd., paid to the Burma Timber Co. a sum of Rs. 51,290-12-0 on a fire insurance policy for Rs. 90,000. It is desirable to set out two further facts in connexion with this insurance, namely first, that the insurance was taken out in 1930, and secondly, that, although investigation was made after the fire, there was no reason to suspect that the fire was intentionally caused and no question ever arose of the claim being fraudulent. Learned counsel for the applicant objected to the admission of this evidence at the trial, but it was admitted by the Magistrate under the provisions of S. 15, Evidence Act, which reads as follows:

> When there is a question whether an act was accidental or intentional . . . . . the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned is relevant.

In regard to both these facts, that is, the fact to be proved that the fire at the soap factory was an intentional fire, and the evidentiary fact regarding the fire at the Burma Timber Company's mill, the applicant was concerned because he was the principal share-holder in both companies. Before us objection on behalf of the applicant to the admissibility of this evidence under S. 15 has been taken on two grounds, namely (1) that a single act cannot form a series with the act which is the subject of the charge, and (2) that in order to form a series there must be a nexus, between the fact to be proved and the evidentiary fact, of proximity of time and similarity of the acts; that is, they must be so connected with one another as to authorize a reasonable inference of the systematic pursuit of the same criminal object. Seeing that the first two illustrations to S. 15 are taken from decisions of the English Courts, it is clear that S. 15 lays down neither more nor less than the English law of evidence on this subject and, consequently, in applying this section we are entitled, and in fact ought to refer to English decisions.

As regards the point that one evidentiary fact cannot form a series with the fact to be proved, the cases in (1906) 2 K B 389[7] and (1922) 38 T L R 631,[8] show that evidence of a single act is admissible and that in this sense one evidentiary fact can form a series, within the meaning of the section, with the fact to be proved. It was, no doubt, held in 42 Cal 957[9] at p. 998 that the acts tendered must have been proximate in time to that in question, but the decision in (1889) 1 Q B 77[10] shows that this question of proximity of time goes rather to the weight to be given to the evidentiary facts than to their admissibility. It is, however, plain from all the decisions that the acts of which evidence is tendered must be of the same specific kind as that in question. 42 Cal 957[9] is authority for this proposition. Further authority is to be found in 47 Cal 671[11] at p. 692 and in (1915) 84 L J K B 1785.[12] This last case is particularly apposite to the question now before us. Baird was charged with obtaining credit by fraud and evidence was given of two previous occasions on which he had obtained credit and had not paid. It

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6. ('38) 25 A I R 1938 P C 130 : 174 I C 1 : 32 S L R 476 : 65 I A 158 : 39 Cr L J 452 : I L R (1938) 2 Cal 295 (P C), Babu Lal Chaukhani v. Emperor.

7. (1906) 2 K B 389 : 75 L J K B 693 : 95 L T 296 : 54 W R 586 : 70 J P 424 : 21 Cox C C 252 : 22 T L R 633, Rex v. Bond.

8. (1922) 2 K B 555 : 91 L J K B 904 : 16 Cr App R 149 : 127 L T 221 : 86 J P 209 : 66 S J 540 : 38 T L R 631, Rex v. Armstrong.

9. ('16) 3 A I R 1916 Cal 188 : 29 I C 513 : 16 Cr L J 497 : 42 Cal 957 : 21 C L J 331 : 19 C W N 676, Amrita Lal Hazra v. Emperor.

10. (1889) 1 Q B 77 : 68 L J Q B 83 : 79 L T 360 : 15 T L R 37 : 47 W R 121 : 62 J P 774 : 19 Cox C C 182, Rex v. Rhodes.

11. ('20) 7 A I R 1920 Cal 500 : 58 I C 929 : 21 Cr L J 849 : 31 C L J 402 : 24 C W N 501 : 47 Cal 671 (F B), Emperor v. Panchu Das.

12. (1915) 84 L J K B 1785 : 113 L T 609, Rex v. Baird.

was held by the Court of Criminal Appeal that the evidence was inadmissible as these two transactions could not properly have been the subject of a criminal charge and therefore they were not transactions of a similar nature with the transaction in question. This is exactly the case here. As we have already pointed out, the evidence led by the prosecution shows that when the claim made by the Burma Timber Co. was preferred and an investigation made, it was disputed solely on the ground of amount, and no element of fraud could be alleged after careful inquiry, and hence that transaction could not have formed the subject of any criminal charge, and was not a transaction similar to the fire at the soap works which has formed the subject of a charge of arson. Hence this evidence was inadmissible under the provisions of S. 15, Evidence Act, and was wrongly admitted at the trial.

The learned Government Advocate has contended that if this evidence is not admissible under S. 15, it must be admissible under S. 14, but that contention is clearly wrong. Section 14 refers to evidence of facts showing the existence of a state of mind, and Expln. 1 to the section lays down that a fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists in reference to the particular matter in question; and hence evidence regarding what occurred in the year 1932 could not be admissible under that section. Section 14, Evidence Act, applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does at a trial for the offence of arson: *see* 34 ALL 93[13] at p. 95. Reference has also been made to Ss. 8 and 11, Evidence Act. This evidence could not be relevant as evidence of motive or preparation, and it could not be relevant as evidence of conduct because it is not conduct in reference to the proceeding before the Court or to any fact in issue therein. It could not be admissible under S. 11, which says that facts not otherwise relevant are relevant if by themselves or in connexion with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable. We are unable to understand how it can be said that a bona fide claim made in 1932 by one company in which the applicant was interested could be said to make probable the allegation that he deliberately set fire in 1940 to the property of another company in which he was interested. We must therefore hold that this evidence regarding the previous fire at the Burma Timber Company's mill was wrongly admitted by the Magistrate.

Further evidence led by the prosecution to which objection has been taken is evidence to prove that the claim made by the Burma Soap Company after the fire was an excessive claim. The Magistrate reviewed the evidence on this point and came to the conclusion that the claim made was not excessive. His finding on this point was not accepted by the learned Sessions Judge in his appellate judgment, although he gave no reasons for differing from the Magistrate. In our opinion, this evidence also was inadmissible. If it was admissible at all, it could be admissible only under S. 11, and the connexion between an excessive claim against an insurance company made by an insured after a fire has occurred and the allegation that the fire was intentionally caused, is not apparent to us. The learned Government Advocate has then strenuously urged that, although we hold that these parts of the prosecution evidence were inadmissible and cannot be taken into consideration we, sitting as a Court of revision, should decline to enter into questions of fact and we should accept the findings of fact of the lower Courts; and he has quoted to us a number of cases in which dicta to this effect have been made. He has argued that if there is any admissible evidence on which the conviction of the applicant could be based we ought not to consider whether that evidence was sufficient or not. We are well aware of the rule to which the learned Government Advocate has referred, but he has in this case endeavoured to stretch it to a dangerous extent. When a revisional Court holds that in deciding on the guilt of the applicant the lower Courts have taken into consideration inadmissible evidence, it is plainly incumbent on the revisional Court to satisfy itself that the remaining evidence, which the lower Courts could properly take into consideration, is sufficient to establish as against the applicant proof of his guilt beyond reasonable doubt. The evidence led by the prosecution was rightly summarized by the Magistrate under ten heads. Two of these we have held to be inadmissible evidence. A brief reference to

13. ('12) 34 All 93 : 12 I C 987 : 8 A L J 1269, Emperor v. Abdul Wahid Khan.

the others must now be made to see whether they can support a conviction.

The first is regarding the visits made by the applicant and Joshi to the Burma Soap Company's factory on the evening of 11th April. Abdul Gani, the principal witness for the prosecution, says that they made three visits, one at 7-30 P. M., one at 9 P. M. and another at 1-30 A. M. The trial Magistrate rightly refused to believe Abdul Gani's evidence in regard to the third visit. He was clearly an unreliable witness whose evidence on no point could be accepted unless amply corroborated by other evidence, and no witness corroborates him in regard to the third visit. The applicants themselves admit the first two visits but they place these visits at somewhat earlier times than Abdul Gani and the one prosecution witness who supports him. They say that the first visit was at about 5-30 P.M. and the second visit at about 7-30 P.M., and there is ample evidence to show that some of the employees were still at work until 8 P. M. The statements of the applicant and Joshi in regard to this matter are supported by three witnesses who were called for the defence after having been cited as prosecution witnesses and waived. It is therefore somewhat doubtful as to the times when these visits were made; but we are unable to understand how these visits can be connected with the fire. Gani says that on the first visit the applicant talked to him about cleaning the boilers on 18th April, and while he was having this conversation with the applicant Joshi went up to the second storey of the factory. Gani says that on the second visit the applicant stayed in the motor car and spoke for a few moments with the durwan who has disappeared, while Joshi went into the laboratory and fetched a book, and then they both drove away. The fire did not break out in either of the places visited by Joshi. Two Burman witnesses who alleged that they saw the fire at an early stage have given such vague evidence about it that their testimony is worthless. Abdul Gani, who says he was awakened at the beginning of the fire, says that it began in a fan which was used for drying soap, this being a fan which was, according to him, "driven by steam," and, we understand from this that it was connected by a pulley and shaft with the engine and was in operation whenever the engine was working. According to Gani the engine stopped at 4-30 P.M. on that day. Now it is quite clear that neither the applicant nor Joshi went on that evening to the place where this fan was, and therefore neither of them could have been directly responsible for the fire. The learned Sessions Judge has realized this and has had to ascribe the fire to the absent durwan, and he has done so on pure conjecture and without any evidence whatever in support of this theory. The two visits of the applicant and Joshi to the factory on the evening of 11th April are capable of the most innocent explanation.

Secondly, it is said that Joshi refused to allow the villagers to put the fire out, but the evidence in regard to this seems to us to be rather in favour of Joshi than against him and it certainly does not affect the applicant.

Thirdly, the prosecution says that the fire occurred inside the factory, which was locked, and that after the fire the padlock of the door was found, and it was then still locked and apparently the factory must have been locked during the fire. This suggests, not that the fire was intentionally caused, but that it must have been caused by some spontaneous combustion owing to the overheating of the fan. In order to make it possible under these circumstances, that the fire was intentionlly caused it has to be assumed that the key of the factory was handed over to the durwan, and this is a second supposition which is based on no evidence whatever. In fact, Abdul Gani has deposed that on the second visit to the factory Joshi had the keys in his possession, and other witnesses for the prosecution have stated that Joshi ordinarily kept the keys of the factory.

The fourth point which has been made by the prosecution is the disappearance of the durwan who was on duty on that night. We have already dealt with that. The durwan did not disappear until the 15th, and his disappearance was due to the slackness of the beginning of the investigation and not to any fault of the applicant. There was no reason why he should retain this durwan in his employ after the fire, when the premises had passed into the custody of the fire insurance company and were guarded by the police.

Fifthly, it is said that there was delay on the part of Joshi in reporting the fire. We do not at all agree with the observations of the learned Sessions Judge when he says that the fire should have been observed at a police station over four miles away. There is no reason to suppose that any delay took place in the presence of the

police at the scene of the fire. We have asked the learned Government Advocate to indicate under what provision of law there was any obligation on Joshi to make any report, and he has been unable to do so. Of course, if this was a case of arson, Joshi was bound to make a report at the nearest police station, but Joshi does not admit that this fire was intentionally caused, and if he had rushed to the police station and made a report no doubt his report would have been used against him as an admission of arson.

Sixthly, it is said that the applicant is very heavily indebted; but this contention is based on a wrong view of the evidence. The stocks of timber of the Burma Timber Company are mortgaged to the Chartered Bank to secure an overdraft, but the Burma Timber Company has never been pressed by the bank in any way to pay up this overdraft, and a mortgage on stocks is an ordinary incident of trading. If the stocks were not greater in value than the amount of the overdraft, the prosecution would have been able to bring evidence that the bank was pressing for its reduction; but there is no such evidence. Also, the Burma Soap Company's works were mortgaged for a sum of one lakh of rupees to B. Amritlal & Sons; but the defence has established that B. Amritlal & Sons is only the name of a joint family business of which the applicant is the principal member, and, consequently, as the Magistrate has said, this is nothing more than a paper transaction by which one business of the applicant has obtained capital from another business of the applicant.

Seventhly, reliance is placed by the prosecution on the evidence of Kasinath, but his evidence was rightly discredited by the Magistrate. It has been pressed upon us by the learned Government Advocate that Kasinath's evidence was accepted by the learned Sessions Judge, but we are not impressed with the reasons which led the learned Sessions Judge to accept this evidence. As we have already set out, Kasinath's name did not appear in the original list of prosecution witnesses. He was first examined by the investigating officer on 11th June, that is, long after the accused had been sent up for trial, and it is a curious fact that Kasinath came forward on the next day after the investigating officer had obtained a copy of the letter, Ex. F, which Abdul Gani, the principal prosecution witness who has proved himself to be thoroughly unreliable, had sent to the Head Office of the Insurance Company at Calcutta. Kasinath's evidence is to the effect that he was asked by the applicant to obtain a durwan on a pay of Rs. 35 a month and a passage to India before the fire, for the purpose of setting fire to the soap factory. He says that he was so asked by the applicant about two or three months before the fire occurred. This is oral evidence of an alleged oral admission, and is, in our opinion, almost the weakest kind of evidence which can be given, and is not worthy of credit unless supported by the evidence of other witnesses or by the circumstances. The statement made by Kasinath that the applicant disclosed his plan to him is hardly credible. Moreover, Kasinath says that he was taken to the applicant by a person named Prasad; but Prasad has not been called, and, consequently, the inference is that either no such person as Prasad exists or that, if he does exist, his evidence, if called, would not support that of Kasinath. In our opinion, no reliance whatever can be placed on Kasinath's statement.

Consequently, there only remains against the applicant one suspicious factor, and that is that the insurances on the soap factory, machinery and materials were effected only two months before the fire, although the soap factory had been in existence for several years. In regard to the delay in effecting insurance the explanation of the applicant is not satisfactory, namely that the stocks were previously not much and the premia demanded by the insurance company were too high. We are impelled to the conclusion that it was this circumstance, and this circumstance alone, which originally led to the suspicion that this fire was not an accident, and caused the beginning of the investigations against the applicant and Joshi. But, quite clearly, this factor alone which may have a perfectly innocent explanation, is hardly sufficient to raise even a suspicion against the applicant. It would indeed be strange if every person whose property was lost by fire soon after he had effected a fire insurance were to be suspected of arson; and yet, when the inadmissible evidence has been left out of consideration, that is the only remaining circumstance which could create any suspicion against the applicant.

The learned Sessions Judge has convicted on evidence rightly disregarded by the Magistrate. The Magistrate was, upon his showing, about to write a judgment discharg-

ing the applicant, when he was constrained to allow the inadmissible testimony as to the earlier fire to be admitted and to turn the scale in favour of conviction. The conviction of the applicant cannot therefore be sustained. It is quashed accordingly and the applicant will be set at liberty.

G.N./R.K. *Conviction quashed.*

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(28) A. I. R. 1941 Rangoon 332

MOSELY J.

The King

v.

Yoo Ngoon.

Criminal Revn. No. 66-A of 1941, Decided on 7th April 1941, for review of the order of Headquarters Magistrate, Falam, D/- 21st December 1940.

(a) Chin Hills Regulation (5 of 1896), S. 34-A — "Whoever" — Meaning explained.

Though S. 34 begins with the word "whoever" that wording merely refers to any person who commits an offence punishable under the Regulation. [P 332 C 2]

(b) Chin Hills Regulation (5 of 1896), Ss. 3, 4, 34-A — Chinaman committing offence under S. 34-A in Chin Hills — Conviction should be under Excise Act.

A Chinaman who commits an offence in Chin Hills which falls under S. 34-A of the Chin Hills Regulation should be convicted under the Excise Act and not under the Chin Hills Regulation. [P 332 C 2]

(c) Chin Hills Regulation (5 of 1896), S. 34-A Accused manufacturing and in possession of liquor need not be charged with two offences.

Where the accused is found in possession of liquor manufactured by him, he need not be charged with and convicted of two offences, for the offence of manufacture necessarily includes the possession of the articles manufactured. It would be otherwise where the accused was not found manufacturing but only in possession of apparatus for manufacturing plus the article manufactured : ('34) 21 A I R 1934 Rang 338 and (1904-06) 1 U B R P C 1, *Ref.* [P 332 C 2]

(d) Chin Hills Regulation (5 of 1896), Ss. 10, 41—High Court has no power of revision—High Court in revision is the Commissioner.

The High Court of Rangoon has no power of revision in proceedings from Chin Hills, whatever the nationality of the accused or the law under which he has been or should be tried. The High Court in revision is the Court of the Commissioner. [P 333 C 1]

Order. — The accused Yoo Ngoon, a Chinaman, was found guilty by the Headquarters Magistrate of Falam, Chin Hills, of two offences under S. 34-A, Chin Hills Regulation, 1896, namely manufacture of spirit and possession of one and a half quarts of spirit. He was sentenced to a fine of Rs. 100 or 4 weeks rigorous imprisonment, for the manufacture, and a fine of Rs. 50, or 2 weeks rigorous imprisonment for the possession of the spirit illegally manufactured. The first question to be considered in revision is whether the accused should have been tried of an offence under S. 34-A of the Regulation or of an offence under the Excise Act. Section 3 (1) of the Regulation lays down that it shall be deemed to be the only enactment which applies to any tract in the Chin Hills. But S. 4 (1) provides that

> so far as regards persons other than Chins, the law in force in the Chin Hills shall subject to the provisions of sub-s. (4) and (5), be the law for the time being in force in Upper Burma. . . . . .

Sub-section (4) enacts that S. 4 and Ss. 9, 16, 22, 23, 33 and 34 shall apply to all persons within the Chin Hills. Section 5 refers to civil proceedings and need not be considered here. Sub-section (4) does not include Section 34-A, which was only enacted in 1937 by the Chin Hills (Amendment) Regulation 1937, Regulation No. 8. Section 34-A says :

> Whoever manufactures spirit in the Chin Hills, or possesses spirit manufactured in the Chin Hills shall be punished with rigorous imprisonment which may extend to one year or with fine. . . . . .

Though the section begins with the word "Whoever," it is quite clear, in my opinion that that wording merely refers to any person who commits an offence punishable under the Regulation : compare for example Ss. 28 and 29, which begin with the words "any person." Sections 23, 33 and 34 also begin with the word "whoever," but it has been expressly enacted, as I have said that these three sections, unlike S. 34-A, shall apply to all persons within the Chin Hills. The law in force in Upper Burma is the Excise Act, the Penal Code, and the Criminal Procedure Code, subject to the provisions of the Burma (Frontier Districts) Criminal Justice Regulation 1925, (enactments declared in force in Upper Burma, vide the schedule to the Burma Laws Act 13 of 1898 at page 112 of the Burma Code, vol. 1). The accused should have been convicted under the Excise Act. As regards the sentences, if it appeared that the liquor found was the product of the manufacture or distillation in question the accused need not have been charged with and convicted of two offences, for the offence of manufacture necessarily includes the possession of the article manufactured. It would be otherwise where the accused was not found manufacturing but only in possession of apparatus for manufacturing plus the article manufactured : *see* 12 Rang 419[1] and ('04-06)

1. ('34) 21 A I R 1934 Rang 338 : 154 I C 75 : 12 Rang 419, Emperor v. Mi Hlwa.

1 U B L R P C 1.[2] In any event, the sum total of the fines imposed was not excessive and did not offend against S. 71, Penal Code.

The other question to be considered is whether this Court has the power to call for and examine proceedings from the Chin Hills in revision. I think that it is quite clear that this Court has no such power, whatever the nationality of the accused or the law under which he has been or should be tried. Section 10 of the Regulation, which is the only enactment which applies to the trial of any offence in the Chin Hills, says that for the purposes of the Code of Criminal Procedure 1882, the Local Government shall exercise the powers of a High Court. Section 41 provides that the Local Government (now Government) may, by notification in the Burma Gazette delegate to the Commissioner of any division in Upper Burma certain powers; by Defence Department, Political Branch, Notification No. 633, dated 21st December 1939, the powers conferred by the Governor by the Regulation, including the right of exercising the powers of a High Court under S. 10, have been delegated to the Commissioner of the Magwe Division. It is evident, then, that the High Court in revision is the Court of the Commissioner of the Magwe Division. Let the record be returned with these remarks.

K.S./R.K. *Order accordingly.*

2. ('04-06) 1 U B R P C 1, King-Emperor v. Nga San Dun.

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(28) A. I. R. 1941 Rangoon 333

MOSELY J.

Aung Kim Sein — Appellant

v.

The King.

Criminal Appeal No. 353 of 1941, Decided on 7th April 1941, from order of Western Subdivisional Magistrate, Rangoon, D/- 31st March 1941.

(a) Criminal P. C. (1898), S. 103 — Irregularity in search does not necessarily invalidate proceedings.

Irregularity in the search does not necessarily invalidate the proceedings. It always affords ground for scrutiny, and if, after careful scrutiny, the Court comes to the conclusion that an excisable article was recovered from the possession of the accused, then the conviction is a sound one : *Case law referred.* [P 333 C 2]

(b) Criminal P. C. (1898), S. 103 — Searches of persons.

Section 103 is inapplicable to searches of persons : ('27) 14 A I R 1927 Rang 170, *Foll.* [P 334 C 1]

(c) Criminal P. C. (1898), S. 103—Same persons as search witnesses.

It is objectionable to be calling the same persons to witness searches : 4 L B R 121, *Approved.* [P 333 C 1]

W. A. Gregory — for Appellant.

Judgment. — The appellant, Aung Kim Sein, was found in possession of 240 tolas of raw opium, and was sentenced, under S. 9 (a), Opium Act, to four months rigorous imprisonment. The main contention in appeal is that the search was not made in accordance with the provisions of S. 103, Criminal P. C. The facts are briefly that a Sub-Inspector of Excise was lying in wait for the accused, on information received, at a street corner. The informant shouted out that he was the man, and he arrested and searched him and found opium concealed on him. Two of the witnesses have given evidence several times before for the same officer. Witness 3 was an excise peon. The excise officer having been told in advance where to wait for the accused, it is suggested that he should have obtained as witnesses respectable residents of the locality. There is ample authority, of this and other High Courts, to show that irregularity in the search does not necessarily invalidate the proceedings. As is said it always affords ground for scrutiny, and if, after careful scrutiny, the Court comes to the conclusion that an excisable article was recovered from the possession of the accused, then the conviction is a sound one. This was held by this Court in 4 L B R 121[1] which was followed in 7 Rang 771.[2] There are numerous decisions of Indian High Courts to the same effect. I need only quote: 33 Cr L J 943,[3] 27 Cr L J 265,[4] 41 Cal 350,[5] 54 Bom 471[6] and 47 ALL 575.[7] There was, however, no irregularity at all in the present case. Section 15, Opium Act, directs that an officer of the

1. ('08) 4 L B R 121 : 7 Cr L J 87 : 14 Bur L R 202, Mi Hauk v. King-Emperor.
2. ('30) 17 A I R 1930 Rang 49 : 121 I C 715 : 31 Cr L J 303 : 7 Rang 771, Maung San Myin v. Emperor.
3. ('32) 19 A I R 1932 All 185 : 140 I C 246 : 33 Cr L J 943 : 1932 A L J 104, Mohamed Bashir v. Emperor.
4. ('26) 13 A I R 1926 All 188 : 92 I C 441 : 27 Cr L J 265 : 24 A L J 173, Abdul Hafiz Khan v. Emperor.
5. ('14) 1 A I R 1914 Cal 456 : 23 I C 995 : 15 Cr L J 385 : 41 Cal 350, Romesh Chandra v. Emperor.
6. ('30) 17 A I R 1930 Bom 169 : 125 I C 713 : 31 Cr L J 927 : 54 Bom 471 : 32 Bom L R 344, Emperor v. Dinkar Nhanu.
7. ('25) 12 A I R 1925 All 434 : 88 I C 280 : 26 Cr L J 1112 : 47 All 575 : 23 A L J 364, Emperor v. Kutroo.

Excise Department (and certain other departments) may
(a) seize in any open place, or in transit, any opium . . . . . or (b) detain and search any person whom he has reason to believe to be guilty of any offence against this or any other such law, and, if such person has opium in his possession, arrest him.

Section 16, Opium Act, directs that all searches under S. 15, (and under S. 14, which refers to searches of buildings, vessels or places) shall be made in accordance with the provisions of the Code of Criminal Procedure. There is, however, no provision in the Code of Criminal Procedure relating to searches of persons, except S. 102 (3), which refers to persons in or about a place liable to search. Section 103, Criminal P. C., deals with "places to be searched"; it lays down that two or more respectable inhabitants of the locality in which the place to be searched is situate shall be called upon to witness the search. The inapplicability of this section to searches of persons (S. 15 (b), Opium Act), was pointed out by this Court in 28 Cr L J 372.[8] It was rightly said in 4 L B R 121[1] that it is objectionable to be calling the same persons to witness searches. But in the present case I can see no possible reason not to believe that the opium in question was found on the person of the appellant. This appeal will be summarily dismissed.

K.S./R.K. *Appeal dismissed.*

8. ('27) 14 A I R 1927 Rang 170 : 100 I C 980 : 28 Cr L J 372, Kali Kumar De v. Emperor.

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(28) A. I. R. 1941 Rangoon 334

ROBERTS C. J. AND DUNKLEY J.

Ma Aye Mya — Appellant

v.

Chew Cheng Guat and others — Respondents.

First Appeal No. 6 of 1941, Decided on 11th June 1941, against decree of Dist. Court, Insein, D/- 26th October 1940.

(a) Buddhist law (Chinese)—Adoption—Proof of adoption connotes right to inherit.

Amongst the Chinese there is nothing which corresponds to appatittha adoption as known amongst Burmese Buddhists and therefore if a child had been adopted at all it would be either adoption with a view to inherit or no adoption at all, that is to say, proof of adoption amongst the Chinese would connote the right to inherit. Therefore there must be proof not only that the child was brought up in the family but that it was brought up with a view to inherit. [P 334 C 2; P 335 C 1]

(b) Practice—Witness—Cross-examination of —Court stopping cross-examination on ground that witness was embarrassed held not proper.

Where the Judge actually forbade the further cross-examination of a witness on the ground that she was embarrassed :

Held that the trial was badly conducted. [P 335 C 2]

Wellington — for Appellant.

N. P. Bhattacharya and U Ba Sein — for Respondents 2 and 3, respectively.

Roberts C. J.—This appeal arises out of an administration suit tried by the District Court of Insein, not, I should say, by the present District Judge. In it the plaintiff-appellant claimed that she was the adopted daughter of Saw Lein Neoh. Defendant 2 in the suit said that the deceased was a Confucian and Taoist besides being a Chinese Buddhist and that the plaintiff was, far from being adopted, bought, in accordance with a custom alleged to exist amongst the Chinese, with money, for the sum of Rs. 30 by the plaintiff, and was in her household upon that status and that status alone; and, alternatively, by her unsatisfactory conduct, even if she had any other status but that of a bought help, she had forfeited it and was not now entitled to be considered an adopted child.

The plaintiff says that defendant 1, Chew Cheng Guat, is an adopted son, and he agrees that she is an adopted daughter. Amongst the Chinese there is nothing which corresponds to appatittha adoption as known amongst Burmese Buddhists and therefore if a child had been adopted at all it would be, as the parties to the suit had every reason to believe at the time the action was brought, either adoption with a view to inherit or no adoption at all, that is to say, proof adoption amongst the Chinese would connote the right to inherit. Of all the issues in this administration suit — and 14 were framed—the only one which the learned Judge saw fit to try was issue 1, namely "Is the plaintiff Ma Aye Mya the adopted daughter of Chew Chin Cheang and Saw Lein Nyaw (a) Saw Lein Neoh as alleged in para. 1 of the plaint?," and he answered that issue in the negative. We think that upon a proper consideration of the evidence and after a proper trial of the case it should have been unhesitatingly answered in the affirmative, and although it is unnecessary to go at great length into our reasons it is desirable to say a few words about the trial of this issue in the District Court.

The learned Judge has laid great stress on the necessity for proof of keittima as distinct from appatittha adoption, that is to say, of proof not only that the child was brought up in the family but that it was

brought up with a view to inherit. And having stressed this undoubtedly important point, he has dismissed in the most casual manner a great many documents which all refer to the plaintiff as an adopted child as though none of them carried the case any further than to show that there may have been an appatittha adoption. But amongst the Chinese at that time there being no such thing as appatittha adoption, every person who used the term "adoption" meant, in my opinion, adoption with a view to inherit, and this fact seems to have been lost sight of by the learned District Judge. The documents which were produced were a school certificate, which certified that Ma Shu Lwan (which was another name by which the plaintiff went) was admitted into the Empress Victoria Buddhist Girls' School as the daughter of Saw Lein Neoh. Then there was a photograph of the tomb of Chew Chin Cheang, the former husband of Saw Lein Neoh, and that shows that the plaintiff's name was engraved upon the tomb as the daughter of that couple. Then there is the will of Chew Chin Cheang, and that is important because he describes in terms Ma Aye Mya as his adopted daughter. And there is not only that will but the will of Saw Lein Neoh herself which Mr. Bhattacharyya, for respondent 2, has told us he relies upon. In the will of Saw Lein Neoh she says in terms that Chew Cheng Guat has actually inherited property worth some thirty-thousand rupees from his father and Chew Cheng Guat acknowledges that the plaintiff's claim in this case is well founded.

At the time of the death of Chew Cheng Liam, a half-brother by adoption, there were disputes about his estate and these disputes were settled, the deceased Saw Lein Neoh entering into a compromise whereby something was obtained out of that estate both for the plaintiff and respondent 1 and there was paid over in this respect the sum of Rs. 5771 odd to Saw Lein Neoh in circumstances which, in my judgment, go a very long way to show that she was the mother of these two children in the sense that they were to inherit from her. Then there are also admissions by respondent 3, Saw Chin Cheng, in Exs. F and G, and, in my opinion, taking the evidence as a whole there was a strong prima facie case made out by the plaintiff in her favour. The learned Judge was not apparently impressed with her evidence. She, however, admitted that she had eloped but stated quite clearly that she often used to see her adoptive mother afterwards. In cross-examination it was suggested that she swept the floor and cleaned various utensils and that she got the same money in this lady's will as the cook. Admittedly, she got the same money as the cook, but she was described differently; and she denied all the questions put to her in cross-examination, with the single exception that she did not dress in sack cloth at her mother's funeral. We do not know what reason there was for this, but it is a small point and by itself inconclusive, although it might have told in her favour if she had proved the contrary. There is other evidence that the deceased told persons that she had adopted the plaintiff and we think that this prima facie case was not displaced by the evidence brought on behalf of respondent 2. Defendant 1, as I have already said, admits the plaintiff's claim. When one turns to the judgment of the learned District Judge to find out the way in which he has summed up the facts it is difficult to avoid some criticism. He observes, as is the case, that there is only one witness who says anything about this alleged sale of the plaintiff to Saw Lein Neoh. He says :

> With regard to the evidence relating to the purchase of Ma Kye Mya and Chew Cheng Guat, this is given by Saw Leng Neoh's sister Daw Saw Sim and she told the Court that she was informed by her sister Saw Leng Neo that Ma Aye Mya was purchased by her for Rs. 30 and that on another occasion she saw her sister pay Rs. 40 for Chew Cheng Guat.

Then the learned Judge says : "I must say that I was favourably impressed by the evidence that this witness gave before me" and continues : "It may be reasonably held that she has sacrificed the truth ..." I find it difficult to understand the mentality of one sitting on the Bench to reconcile these two statements. The trial was badly conducted, the Judge actually forbidding the further cross-examination of a witness on the ground that she was embarrassed, which clearly shows that the trial was most unsatisfactorily conducted. There was, in my opinion, no satisfactory evidence in rebuttal of the plaintiff's case and it must be noticed that Daw Saw Sim, upon whom the Judge so much relied, when speaking of Chew Cheng Guat said that when he grew up his mother told her he played truant. This seems to me to have been a natural thing for her to say, since she no doubt always regarded Saw Lein Neoh as really the mother of Chew Cheng Guat, and the relationship would be mentioned in a natural

way without her realising that this completely knocked the bottom out of the case which she was supposed to support. There was also called a Mrs. Ban Hwat, who was a sister of the natural father of the second defendant. She admitted in cross-examination that the plaintiff and defendant 1 were brought up together as the deceased's own children and neglects to make any mention of defendant-respondent 2 Chew Taik Aun. I have observed with some concern an order passed by the learned Judge on 1st March 1940, in connexion with this case, and I feel I should refer to it. There is a Privy Council decision, *see* 3 Rang 29,[1] to the effect that a Chinese Buddhist can make a will and this seems to have been unknown to the learned District Judge when he said that the case in 1939 R L R 548[2] recently decided by the Privy Council could be any authority to the contrary.

The conclusion at which we have arrived, therefore, is that the plaintiff has proved already in the Court below that she is the keittima adopted daughter of Saw Lein Neoh. Consequently this case must go back to the learned District Judge of Insein, (who is not the same Judge as the Judge who tried it before) for trial upon the other issues. We are of opinion that no new witnesses should be called, but in view of the restrictions placed upon the evidence by the Judge who tried the case first, we think it is only fair for either side to have an opportunity of recalling such witnesses as they desire and putting to them any necessary and relevant questions which they were debarred from putting by the District Judge before. We say nothing, of course, about the merits of the other issues. The suit must be re-tried upon the footing that the plaintiff-appellant is the keittima adopted daughter of Saw Lein Neoh. The plaintiff-appellant must have the costs of this appeal as against respondents 2 and 3 in any event. The costs on the other issues will abide the determination of the case. Advocate's fee in this Court fifteen gold mohurs.

Dunkley J.—I agree with my Lord that the issues in regard to the adoption of the plaintiff-appellant and defendant-respondent 1 were wrongly answered by the learned District Judge, and that the evidence, especially the documentary evidence, clearly establishes their keittima adoption by Saw Lein Neoh. Consequently, the judgment and decree of the District Court, dismissing the plaintiff-appellant's suit, must be set aside; the suit must be restored to the file of the District Court for the trial by that Court of the other issues which arise on the pleadings, the most important of which are the issue regarding respondent 2's alleged adoption and the issues connected with the alleged will of Saw Lein Neoh which has been produced by respondent 3.

I also agree that, in view of the number of erroneous rulings given by the learned trial Judge concerning the admission of evidence, the parties shall have the right at this further trial to recall for further examination or cross-examination any person who has already given evidence, but not the right to call any new witnesses. To my mind, it is astonishing how on the evidence the learned District Judge could come to any other conclusion than that the appellant was the keittima adopted daughter of the deceased. He relied mainly on the evidence of a lady named Daw Saw Sim, whose demeanour in the witness-box impressed him most favourably, although he admitted in his judgment that she had told untruths in regard to a number of matters. In my opinion, it is quite clear that the whole of her evidence is untrue. She was called to say that the appellant was purchased for a sum of Rs. 30, but was not satisfied with giving that evidence and proceeded to say that respondent 1 was also purchased for a sum of Rs. 40. Now, so far as respondent 1 is concerned, he was acknowledged in his adoptive father Chew Chin Cheang's will to be an adopted son entitled to inherit. He has also been acknowledged in the will, alleged to be that of Saw Lein Neoh, which has been produced by respondent 3 and is supported by respondent 2, as being the adopted son, entitled to inherit, of herself and Chew Chin Cheang. Hence the evidence of Daw Saw Sim that this respondent was purchased is directly contradictory to the case which respondents 2 and 3 have put forward themselves. Her evidence against the appellant was evidence of an alleged oral admission by Saw Lein Neoh of the purchase of the appellant when a child and, as I have had so frequently to remark, that is almost the weakest evidence that can be given. It is entirely uncorroborated by any other evidence and it is contrary to the evidence

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1. ('25) 12 A I R 1925 P C 29 : 84 I C 899 : 3 Rang 29 : 52 I A 73 (PC), Mg. Dwe v. Khoo Haung Shein.
2. ('39) 26 A I R 1939 P C 228 : 182 I C 993 : 1939 R L R 548 (P C), Tan Ma Shwe Zin v. Koo Soe Chong.

as to the manner in which the plaintiff-appellant was brought up.

In regard to the adoption of the appellant it seems only necessary to refer to Chew Chin Cheang's will in which he refers to the appellant as his adopted daughter and grants her a legacy, which she has already received, and to the fact that when the estate of a son of Chew Chin Cheang was being administered in a suit in this Court and that suit was compromised, although the appellant was not a party to the suit, yet in the petition of compromise she was given a share in the estate, which Saw Lein Neoh received some years ago on her behalf, on the footing that she was the adoptive half-sister of the deceased. Furthermore, in the alleged will of Saw Lein Neoh, which has been produced by respondent 3 and is supported by respondent 2 because he is the sole legatee thereunder, it is specifically mentioned that respondent 1 is the adopted son of herself and Chew Chin Cheang, but that she is not bequeathing to him any part of her estate, not because he is not her son, but because he had already been amply provided for in her husband's will. Respondent 1 admits the adoption with a view to inherit to the appellant. Therefore if he was adopted with that intention then so was the appellant, and the evidence that respondent 1 was so adopted is overwhelming. In fact, respondents 2 and 3 are not in a position to contest his adoption in view of the alleged will of Saw Lein Neoh, on which they rely. Hence, in my opinion, it is quite clear that the plaintiff-appellant and defendant-respondent 1 are the adopted children of Saw Lein Neoh who were adopted with the intention that they should be her heirs. I agree with the order which my Lord has made in regard to the costs of this appeal and of the suit in the District Court.

K.S /R.K. *Case remanded.*

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(28) A. I. R. 1941 Rangoon 337

MOSELY J.

G. H. Astell — Applicant

v.

T. Eng Take — Respondent.

Criminal Revn. No. 131-B of 1941, Decided on 6th May 1941, against order of the Sessions Judge, Myaungmya, D/- 3rd February 1941.

(a) Criminal P. C. (1898), S. 235 — Same transaction — Community of purpose or design and continuity of action are essential — Purpose must be something particular and definite — Further advances obtained on strength of original misrepresentation held formed part of same transaction.

In order that a number of acts may be so connected together as to form part of the same transaction community of purpose or design and continuity of action are essential elements. To constitute community of purpose, the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite. There is no continuity of action where each act is a completed act in itself and the original design accomplished so far as that act is concerned. [P 339 C 2]

Where there was only one initial misrepresentation in the case of each contract and at the time of the original misrepresentation the accused induced the complainant to give him the first instalment of the sum advanced on the contract, and also then and there induced him to later give him further instalments according to the original agreement, the purpose was particular and definite and there was continuity of action, for the first advances were not intended to be the only advances to be made on each contract. These were not a recurring series of similar transactions but according to the ordinary use of language and commonsense all the advances made on each contract were part of the same transaction : 33 Mad 502, *Disting.*

[P 338 C 1; P 339 C 2]

(b) Criminal P. C. (1898), Ss. 234, 239 (d) and 537 — Separate and distinct offences committed in course of separate transactions cannot be tried together — S. 537 does not apply to such trials.

The provisions of S. 239 (d) cannot be combined with those of S. 234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together. Such procedure is prohibited because it is likely to work injustice in the majority of cases, and it is unnecessary therefore to consider whether it in fact causes injustice in any particular instance, and S. 537 does not apply as it deals with mere errors and irregularities in the charge, and not with illegalities such as trials for a plurality of offences in a manner not allowed by law : *Case law referred.* [P 338 C 2; P 339 C 1]

Paget — for Applicant.

U Chan Htoon — for Respondent.

Order. — This is an application for revision of the order of the Sessions Judge passed in appeal ordering a retrial of the accused T. Eng Take on the ground of misjoinder of charges. It is argued that there was no misjoinder and that the learned Sessions Judge should have disposed of the appeal on its merits. The accused was charged with and convicted of three offences of cheating. He was a head paddy broker working for the complainant Mr. Astell, the manager of a buying station of Messrs. Steel Brothers. The first charge was that on 18th and 20th March 1940 the accused cheated Mr. Astell by dishonestly inducing him to deliver Rs. 3838 to him. The amount actually paid was Rs. 10,000 as an advance on a contract. It was paid in two instalments of Rs. 8000 and Rs. 2000 and Rs. 3838 represent the value of the paddy still due on the con-

tract. The cheating alleged was a false representation that the accused had already bought 8500 baskets of paddy from four specified persons, when he had in reality only bought paddy from two of them. The second charge was a similar one of cheating in respect of a sum of Rs. 1086-13-0 on 21st, 22nd and 28th March on another contract. The third charge was one of cheating on 26th March in respect of a sum of Rs. 1470-8-0 on a third contract by misrepresentations as to the amount of paddy bought from a single person. The learned Sessions Judge was of opinion that two distinct offences of cheating had been committed in respect of the first charge and three distinct offences in respect of the second charge.

What the complainant said in evidence was this: Before each contract was entered into the accused brought the written contracts executed by the paddy owners themselves, called the jungle contracts, showing the amount of paddy he had bought from them and the names and addresses of the paddy owners. Then the contract between the complainant and the accused was made and the accused was given what money he required on that contract. Usually at the time of signature he was advanced 20 per cent. of the value of the paddy which he said he had purchased; but the agreement was that if he subsequently asked for more money than that to pay the paddy owners, it would be given. Cheating is defined (S. 415 of the Code) as deceiving a person by fraudulently or dishonestly inducing the person so deceived to deliver any property to any person. It seems to me to be clear that there was only one initial misrepresentation in the case of each contract, and that at the time of the original misrepresentation the accused induced the complainant to give him the first instalment of the sum advanced on that contract, and also then and there induced him to later give him further instalments according to the original agreement. It appears to me to be impossible to say that where the accused obtained further advances on the strength of the original misrepresentation and in accordance with the original agreement between the parties the obtaining of the several sums of money did not form part of the same transaction, or constitute one offence. It would, of course, have been quite different if a further independent misrepresentation had been made by the accused when further advances were obtained, and if there had not been an agreement originally to pay such further sums of money as he might represent that he needed. I was of the same opinion in a similar case in the same Court, Criminal Revision No. 176-B of 1939, which I am informed was quoted to the learned Judge. If I had held otherwise I should have agreed with the learned Sessions Judge that a retrial was necessary, for in my opinion S. 537, Criminal P. C., deals with mere errors and irregularities in the charge, and not with illegalities such as trials for a plurality of offences in a manner not allowed by law. The learned Sessions Judge has quoted some of the decisions on the subject of misjoinder, including of course the leading case on the subject 25 Mad 61,[1] a decision of their Lordships of the Privy Council. I must dissent with respect from the view taken (obiter) in 60 Bom 148[2] at p. 159. It was said there :

> It was held by the Privy Council in 25 Mad 61[1] that where an accused was charged on an indictment alleging forty-one acts extending over a period of two years the trial was plainly prohibited by the Code and illegal, and that the conviction must be set aside. It has usually been held on the authority of this case that where there has been misjoinder of charges of this kind the whole trial is vitiated and the conviction must be set aside quite apart from any question of prejudice to the accused. As I pointed out recently in 34 Bom L R 590[3] it is not altogether clear from the language used by their Lordships that they intended to go so far as that. In a later case, 54 I A 96,[4] *Subramania Iyer's case*[1] was referred to and distinguished on the ground that the procedure adopted was one which the Code positively prohibited and it was possible that it might have worked actual injustice to the accused. On the authority of this later case it has been held in 53 Mad 937,[5] that S. 537, Criminal P. C., affords no real ground for the assumption that, if a mandatory provision of the Code is infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused, and the impugned procedure must be one that is not only prohibited by the Code but also works an actual injustice to the accused.

A later decision of their Lordships of the Privy Council is I L R (1938) 2 Cal 295.[6] That

1. ('02) 25 Mad 61:28 IA 257 : 11 MLJ 233: 8 Sar 160 (PC), Subrahmania Ayyar v. King-Emperor.
2. ('36) 23 A I R 1936 Bom 154 : 162 I C 399 : 37 Cr L J 688 : 60 Bom 148 : 38 Bom L R 106, Shapurji Sorabji v. Emperor.
3. ('32) 19 A I R 1932 Bom 277 : 138 I C 520 : 33 Cr L J 619: 34 Bom L R 590, Emperor v. Krishnaji Anant.
4. ('27) 14 A I R 1927 P C 44 : 100 I C 227 : 28 Cr L J 259 : 5 Rang 53 : 54 I A 96 (P C), Abdul Rahman v. Emperor.
5. ('30) 17 A I R 1930 Mad 857 : 127 I C 654 : 32 Cr L J 30 : 53 Mad 937 : 59 M L J 945, In re Ramaraju Tevan.
6. ('38) 25 A I R 1938 P C 180 : 174 I C 1 : 39 Cr L J 452 : 32 S L R 476 : 65 I A 168 : I L R (1938) 2 Cal 295 (P C), Babu Lal Choukhani v. Emperor.

was a case where a number of persons were charged with theft of electricity over a period nearly extending to one year. A single charge was framed against each person. It was remarked by their Lordships that the offences did not constitute a single continuing offence; they were separate offences committed on particular dates and should have been separately charged. Their Lordships felt that the form of the charge was most irregular and regrettable and one which should be avoided. But they could not regard this objection as one which in the circumstances of this case should receive effect, especially because they agreed with the High Court that no injustice was inflicted on the appellants. There was no miscarriage of justice. In addition the irregularity was such as could be, and was, cured under Ss. 225 and 537 by the finding that the accused had not been prejudiced. That was a case however in which only an irregularity in the charge was concerned, (really nothing more than an irregularity in the form of the charge), and not a disobedience of a mandatory regulation as to the mode or subject-matter of the trial. 54 I A 96[4] too was concerned with a mere irregularity—there in the mode of recording depositions. In the present case if the taking of the subsequent advances had constituted separate and distinct offences of cheating something more would have been concerned than I L R (1938) 2 Cal 295.[6] The provisions of S. 239 (d) cannot be combined with those of Sec. 234 so as to allow of three sets of offences committed in the course of three transactions or six offences in all being charged and tried together. Had such an illegality been committed, I should have been constrained to hold on the authority in 25 Mad 61[1] that the trial must be bad. Such procedure is prohibited because it is likely to work injustice in the majority of cases, and it is unnecessary therefore to consider whether it in fact causes injustice in any particular instance.

The view of the law taken in 60 Bom 148[2] was obiter, for the Court held that an injustice might have occurred and set aside the trial. As was remarked there, when you have evidence called to prove the commission of offences extending over a long period and you have a joinder of charges prohibited by the law of procedure, it is always extremely difficult to feel confident that the accused has not been prejudiced. The learned Sessions Judge quoted 33 Mad 502[7] on what constitutes the same transaction. It was said there that in order that a number of acts may be so connected together as to form part of the same transaction community of purpose or design and continuity of action are essential elements. To constitute community of purpose, the mere existence of some general purpose or design will not be sufficient. The purpose in view must be something particular and definite. There is no continuity of action where each act is a completed act in itself and the original design accomplished so far as that act is concerned. That case however dealt with a number of disconnected acts of misappropriation, each complete in itself, extending over a very lengthy period. Small sums were misappropriated from many persons. In the present case the purpose was particular and definite and there was continuity of action, for the first advances were not intended to be the only advances to be made on each contract. These were not a recurring series of similar transactions but according to the ordinary use of language and commonsense all the advances made on each contract were part of the same transaction. In my opinion therefore S. 235, Criminal P. C., applied and the trial was legal. It will be directed in revision that the order of remand be set aside and that the Sessions Judge dispose of this appeal on the merits.

K.S./R.K. *Order set aside.*

7. ('10) 33 Mad 502 : 5 I C 847 : 20 M L J 220 : 1910 M W N 65, Venkatadri v. Emperor.

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(28) A. I. R. 1941 Rangoon 339
SPECIAL BENCH

ROBERTS C. J., DUNKLEY AND SHAW JJ.

Dawsons Bank, Ltd., Pyapon, by Managing Director, Lawrence Dawson

v.

Municipal Committee, Kyaiklat.

Civil Ref. No. 8 of 1941, Decided on 21st August 1941, made by Deputy Commissioner, Pyapon.

(a) Burma Municipal Act (3 of 1898 as amended by Act 5 of 1933), S. 79 (5) and (2) (b) —Question whether Municipal Sub-Committee's decision was duly communicated to assessee does not fall under S. 79 (5).

The question whether the Municipal Sub-Committee's decision was duly communicated to the assessee or not is a question of fact which may affect the maintainability of the appeal but does not affect the liability to or the principle of assessment, and consequently does not fall within the purview of S. 79 (5). [P 340 C 1]

(b) Companies Act (1913), S. 72—S. 72 is merely permissive and not imperative — It

merely provides one of several methods of serving communication or notice on company.

Section 72 is merely permissive and not imperative; it only provides one of several methods whereby a communication or notice may be served on a company. [P 340 C 1]

Roberts C. J.—This is a reference made by the Deputy Commissioner of Pyapon purporting to act under S. 79, sub-s. (5), Municipal Act. Under this sub-section, on the hearing of an appeal to the Deputy Commissioner against the decision of the sub-committee of the Municipal Committee appointed under S. 79 (1) to settle the assessment list, the Deputy Commissioner may refer for the decision of the High Court any question as to the liability to or the principle of assessment which arises in the appeal and on which he entertains doubt. The question which the Deputy Commissioner has referred to us is not such a question. Under S. 79, sub-s. (2), cl. (b) a notice in writing of intention to appeal must be given by the assessee to the President of the Committee within seven days from the date of communication to him of the sub-committee's decision, and at the hearing of the appeal before the Deputy Commissioner the Kyaiklat Municipal Committee set up that notice of intention to appeal was not given until after the expiry of the period of seven days. Then in reply the assessee alleged that the decision of the sub-committee had not been communicated to him. This is the point on which the Deputy Commissioner has asked for our decision.

We feel obliged to point out that the question whether the sub-committee's decision was duly communicated to the assessee or not is a question of fact which may affect the maintainability of the appeal but does not affect the liability to or the principle of assessment, and consequently we must decline to answer the question which has been referred. We think, however, that we may, for the guidance of the Deputy Commissioner, point out that S. 72, Burma Companies Act, which says that all communications and notices intended for a company may be addressed to the registered office of the company, is merely permissive and is not imperative; it only provides one of several methods whereby a communication or notice may be served on a company. The proceedings will be returned with these remarks.

G.N./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Rangoon 340

MOSELY J.

The King

v.

Nga Po Nyein — Respondent.

Criminal Appeal No. 354 of 1941, Decided on 26th May 1941, from order of Sess. Judge, Myingyan, D/- 23rd October 1940.

(a) Criminal P. C. (1898), Ss. 423 (1) (b) (2) and 236 — Accused charged alternatively with offence under S. 379, Penal Code, and with offence under S. 215, Penal Code, convicted only under S. 215 — Appellate Court finding no evidence for offence under S. 215 but finding satisfactory evidence for offence under S. 379 acquitting accused altogether—Appellate Court held ought to have altered conviction to one under section 379.

A person who was charged alternatively with an offence under Sec. 379, Penal Code, and with an offence under S. 215, Penal Code, was convicted of the offence under S. 215, Penal Code, alone. The appellate Court found that there was no evidence for the offence under S. 215 but that there was satisfactory evidence for the offence under S. 379 and acquitted the accused altogether :

***Held* that the appellate Court ought to have altered the conviction to one under S. 379 and maintained the sentence : ('28) 15 A I R 1928 P C 254, *Expl.*; ('34) 21 A I R 1934 Oudh 200, *Ref.*; ('41) 28 A I R 1941 Rang 295, *Rel. on.* [P 341 C 1]**

*** (b) Penal Code (1860), Ss. 215 and 379 — Actual thief also taking gratification — Double conviction under Ss. 215 and 379 is not illegal — But ordinarily more severe sentence than for theft alone should not be passed for both offences *(Obiter)*.**

It cannot be said that S. 215 does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratifications shall be punished unless he uses all means in his power to bring the actual thief to justice. No doubt the wording of the section makes it apply in the majority of cases of offenders other than the actual thief. But cases may well occur where a thief having stolen cattle without a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent. Therefore there is nothing illegal in the double conviction of the actual thief who also takes a gratification, (Ss. 215 and 379) : 4 L B R 199 (FB), *Dissent.*; *Case law referred.* [P 342 C 1]

But it is only in exceptional cases that a more severe sentence should be passed for both offences than would have been inflicted for the theft alone: 4 L B R 199 (F B), *Rel. on.* [P 342 C 1]

Rajagopal for Government Advocate — for the Crown.

R. Basu — for Respondent.

Judgment. — This is an appeal by Government against the order of acquittal passed on appeal by the Sessions Judge, Myingyan, in the case of the respondent Po Nyein who had been convicted of an offence

under Sec. 215, Penal Code, and sentenced in view of ten previous convictions to 18 months rigorous imprisonment. The learned Sessions Judge said that Po Nyein had been charged alternatively with theft of two bullocks under S. 379, Penal Code, and with accepting a ransom under S. 215, Penal Code; there was no evidence against him, however that he had accepted the ransom and he should have been convicted of the theft, as there was satisfactory evidence that after the co-accused in his presence had accepted the ransom Po Nyeim went and brought back the stolen animals. On this the learned Sessions Judge should clearly have altered the conviction to one under S. 379, Penal Code, and have maintained the sentence. The Judge however went on to say that as Po Nyein had been alternatively charged under S. 379, and not convicted under that section, this was in effect an order of acquittal of an offence of theft, and he directed Po Nyein to be acquitted altogether.

In Cri. App. No. 1235 of 1940[1] I dealt in an appeal by the Government from an order of acquittal by the same Judge with exactly t he same point, and I there pointed out that the learned Judge appeared to have been relying for the basis of his order on 50 ALL 722.[2] That was a case where it was held that the High Court in revision had no power to convert a conviction for the lesser offence of culpable homicide, (which implied an acquittal on a charge of the greater offence of murder), into a conviction for murder or thereon to enhance the sentence. I went on to say that there was an alternative charge as allowed by S. 236, Criminal P. C., and the trial Court could have convicted the accused of either offence even if they had not been charged with it, as provided in S. 237. In appeal the appellate Court has power, *vide* S. 423 (1) (b), "(2) to alter the finding, maintaining the sentence . . . " I quoted 35 Cr L J 973[3] where the previous cases on the subject are dealt with and 50 ALL 722[2] distinguished. It follows then that this appeal must be successful and the appellant convicted of theft. He will be sentenced to 18 months rigorous imprisonment under S. 379, Penal Code.

I have been asked by the learned Government Advocate to consider the case in 4 L B R 199[4] where it was held by a Full Bench, Irwin J. dissenting, "that the actual thief is not liable to be convicted of an offence under S. 215 in respect of the property which he himself stole." In 4 L B R 199[4] several previous decisions of the Judicial Commissioner's Court were cited in which divergent views on the subject were expressed. This question is obiter here for there is no evidence that Po Nyein took or agreed to take any gratification, though no doubt the thief must have shared in the ransom. I am bound to say however that I do not consider that 4 L B R 199[4] was rightly decided. It followed 23 ALL 81,[5] where it was said that S. 215 was never intended to apply to the actual thief, but to some one in league with the thief who receives gratification on account of helping the owner to recover the stolen property, without at the same time using all the means in his power to cause the thief to be apprehended and convicted of the offence. 23 ALL 81,[5] I may remark, has been subsequently dissented from in 46 ALL 915.[6] The correctness of the decision in 4 L B R 199[4] was doubted in 2 U B R 43.[7] It appears to me that 4 L B R 199[4] wrongly quotes the view taken by the English Courts on a similar provision of English law, section 101 of 24 & 25 Vic. c. 96, which is practically identical with Statute 7 & 8 Geo. IV, c. 29, S. 58. I see that in (1844) 1 Cox C C 36[8] at p. 37, Tindal C. J. said that if the person taking the money had anything to do with the commission of the theft itself, it would not be otherwise than corrupt to receive money for the restitution of the property. Section 215, Penal Code, is as follows:

> Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any moveable property of which he shall have been deprived by any offence punishable under this Code, shall unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

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1. *Reported in* ('41) 28 A I R 1941 Rang 295: 1941 R L R 395, The King v. Maung Hla Pe.
2. ('28) 15 A I R 1928 P C 254 : 111 I C 332 : 29 Cr L J 828: 50 All 722: 55 I A 390 (P C), Kishan Singh v. Emperor.
3. ('34) 21 A I R 1934 Oudh 200: 149 I C 533: 35 Cr L J 973: 9 Luck 607: 11 O W N 534, Lakhan Singh v. Emperor.
4. ('07) 4 L B R 199 : 14 Bur L R 67 (F B), Twet Pe v. King-Emperor.
5. (1900) 23 All 81 : 1900 A W N 205, Queen-Empress v. Muhammad Ali.
6. ('24) 11 A I R 1924 All 783 : 85 I C 225 : 26 Cr L J 481 : 46 All 915 : 22 A L J 838, Emperor v. Mukhtara.
7. ('14) 1 AIR 1914 U B 43 : 28 I C 997 : 16 Cr L J 421 : 2 U B R 43, Emperor v. Nga Nyan U.
8. (1844) 1 Cox C C 36, Queen v. John King.

It does not appear to me to be correct to say, as Fox C. J. said in 4 L B R 199,[4] that the section does not apply to the actual thief because he is under no legal obligation to bring himself to justice. All that the section says is that the person who takes the gratification shall be punished unless he uses all means in his power to bring the actual thief to justice. No doubt the wording of the section makes it apply in the majority of cases of offenders other than the actual thief. But cases may well occur, as was pointed out by Aston J. C. in (1893-1900) L B R 226,[9] where a thief having stolen cattle without a view to obtain money by restoring them to the owner, may offer to restore them for a gratification merely because he knows that detection is becoming imminent. Other cases occur where the cattle thief has all along had no intention of altogether depriving the owner of his property, but merely steals in order to return the property when he has been paid something, and after such payment does return the cattle. I would agree however with the remark of Fox C. J. in 4 L B R 199[4] that it could not have been intended ordinarily to make the thief liable to greater punishment because he takes money for restoring the property, if he does restore it, thereby benefiting the owner. As Shaw J. C. said in 2 U B R 43[7]:

> The object of the Legislature in the clause 'unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence' was to exempt from liability to punishment a person who is acting honestly, and not to exempt the thief.

I am of opinion therefore that there is nothing illegal in the double conviction of the actual thief who also takes a gratification, (Ss. 215 and 379), but it is only in exceptional cases that a more severe sentence should be passed for both offences than would have been inflicted for the theft alone.

K.S./R.K. *Order accordingly.*

9. ('93-1900) 1893-1900 L B R 226, Queen-Empress v. Nga Tun Byu.

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(28) A. I. R. 1941 Rangoon 342

MOSELY J.

Velagala Venkata Reddy — Applicant

v.

Kovvuri Chinna Venkata Reddy — Respondent.

Criminal Revn. No. 21-B of 1941, Decided on 3rd April 1941, for revision of order of Sess. Judge, Hanthawaddy, D/- 3rd December 1940.

(a) Penal Code (1860), Ss. 378, 403 and 405 — "Larceny" and "embezzlement" in English law—Equivalents of, in Indian law.

"Larceny" and "embezzlement" in English law are the offences which represent what is known in India as theft, criminal misappropriation and criminal breach of trust. There is no exact equivalent in English law of "criminal breach of trust."

[P 343 C 2]

(b) Penal Code (1860), Ss. 403 and 405 — Partner can be tried under Ss. 403 and 405.

A partner is liable to be tried for criminal misappropriation or criminal breach of trust of partnership property under Ss. 403 and 405 : 21 W R Cr 59 (FB), *Rel. on*; ('33) 20 A I R 1933 Cal 582, *Dissent.*; *English and Indian case law referred.*

[P 344 C 1]

Foucar — for Applicant.

Sir O. De Glanville — for Respondent.

Order. — This is an application in revision to this Court by Velagala Venkata Reddy against an order of discharge of the respondent, Kovvuri Chinna Venkata Reddy, whom he prosecuted on a complaint for offence under Ss. 403 and 477A, Penal Code, i. e., with dishonest misappropriation of property and falsification of accounts. The complainant is the attorney of the widow of Kovvuri Pedha Venkata Reddy, the older brother of the accused and partner. The accused was made a partner in the widow's business after the death of Kovvuri Pedha Venkata Reddy. The application in revision was first made to the Sessions Judge, who dismissed the case on the ground that a partner could not commit dishonest misappropriation of partnership joint property, following 60 Cal 1316,[1] a decision of a Bench of two Judges which runs counter to a Full Bench decision of the same High Court.

I do not think that the case was satisfactorily dealt with by the learned Judge in revision, who merely quoted the case in question, and said that the applicant's advocate had not been able to cite any case to him to show that that decision was incorrect. The question whether partners can commit criminal breach of trust or criminal misappropriation of partnership property is a question commonly arising, and there are many decisions, including the one quoted by the learned Judge which say that such an offence can be committed by a partner, though in the decision quoted Lort-Williams J. said that he found it difficult to conceive in practice how a partner could be entrusted with dominion over his "own" property, or could dishonestly misappropriate it or convert it to his own use. These

1. ('33) 20 A I R 1933 Cal 582: 145 I C 416: 34 Cr L J 958: 60 Cal 1316: 37 C W N 982, Bhupendranath v. Giridharilal.

decisions may be found in any text book or commentary on the Penal Code. I do not find any difficulty myself in conceiving such a situation. Where, for example, a partner realizes the whole of the partnership property, of which only a small fraction may be his own share, and converts it all to his own use, he has clearly dishonestly misappropriated it; and working partners are frequently entrusted by sleeping partners with dominion over the whole partnership property.

However, the learned advocate for the respondent here admits that he cannot support the basis of the Sessions Judge's decision and cannot argue that a partner cannot be guilty of dishonest misappropriation. It is unnecessary to dwell on this point, but I would like to make a few remarks on it. In 60 Cal 1316,[1] Lort-Williams J. said that a partner who received money belonging to the partnership on account of himself did not do so in a fiduciary capacity, quoting an English case, (1894) 1 Ch 343.[2] He also said that no criminal prosecution was sustainable (in England) by one partner against another for stealing or embezzling or misappropriating property of the firm. He quoted cases referred to in Lindley on Partnership (the reference in Edn. 10 is at p. 549); these are (1860) 29 L J M C 132[3] (stealing), (1863) 9 Jur (N S) 184[4] (false pretences) and (1863) 9 Cox C C 398[5] (embezzlement). He said that this disability had been removed in England by 31 & 32 Vic. C. 116 (1868), now replaced by S. 40 (4), Larceny Act, 1916, but no similar legislation had been enacted in India. The learned Judge did not quote five other cases mentioned in Lindley *loc cit*, where members of a friendly society or the share-holder in a bank or a director of a limited company were convicted of larceny or embezzlement. In three of these cases there were special circumstances constituting a trust. The wording of sub-s. (4) of S. 40, Larceny Act, is as follows :

> If any person, who is a member of any copartnership, or is one of two or more beneficial owners of any property, steals or embezzles any such property, ... he shall be liable to be dealt with, ... as if he . . . . was not a member of such co-partnership, or one of such beneficial owners.

I do not see any benefit to be derived from a consideration of the old state of the law in England. It was not until 1799 that misappropriation of chattels entrusted by a third person to a servant for his master was made felonious (39 Geo. III c. 85), as an act of embezzlement. It was not until 1857 that it was made a crime for a trustee to commit a breach of trust (20 and 21 Vic. c. 54), and it was only in 1868 that it was made a crime for a partner to steal the partnership property. The definition of "theft" in India is quite different from that of "larceny" in England. "Larceny" and "embezzlement" in English law are the offences which represent what is known in India as theft, criminal misappropriation and criminal breach of trust. There is no exact equivalent in English law of "criminal breach of trust." I find it difficult to paraphrase or give the effect of sub-s. (4) of S. 40, Larceny Act. But it clearly starts with the proposition or assumption that in law a partner can steal the joint partnership property though he be part owner thereof and entitled to its possession, and can embezzle it, that is to say a partner is in a fiduciary capacity. The old English common law was followed in 9 W R Cr 37,[6] which was dissented from in the leading case in 21 W R Cr 59[7] at p. 61, where Sir Richard Couch C. J., delivering the judgment of a Full Bench of the Calcutta High Court said :

> We think the words of S. 405 of the Penal Code, are large enough to include the case of a partner, if it be proved that he was in fact entrusted with the partnership property, or with a dominion over it, and has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of the section. Indeed there is every reason that it should be included in it . . . If it be made out by the evidence that one partner was entrusted by his copartners with property, or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property he ought to be tried for that offence.

The principle of this case was followed in 35 Cal 1108,[8] though there it was held that no dishonest conversion could be found. It was also followed in 33 Bom L R 1518[9] by Beaumont C. J. and Barles J. It is clear,

2. (1894) 1 Ch 343: 63 L J Ch 246: 8 R 104: 70 L T 553: 42 W R 248, Piddocke v. Burt.
3. (1860) 29 L J M C 132: 6 Jur (N S) 513: 2 L T 254: 8 W R 422: 8 Cox C C 302, Reg. v. Loose.
4. (1863) 9 Jur (N S) 184, Reg. v. Isaac Mark Evans.
5. (1863) Le & Ca 346: 33 L J M C 59: 9 L T 452: 12 W R 107: 9 Cox C C 398, Reg. v. Bren.
6. (1868) 9 W R Cr 37, In re Lall Chand Roy.
7. (1874) 21 W R Cr 59 (FB), Nrigendro Lall Chatterjee v. Okhoy Coomar Shaw.
8. ('08) 35 Cal 1108 : 9 Cr L J 74, Debi Prasad Bhagat v. Nagar Mull.
9. ('32) 19 A I R 1932 Bom 57 : 136 I C 493 : 33 Cr L J 317 : 33 Bom L R 1518, Emperor v. Jagannath Raghunathdas.

I consider, that whatever may have been the old state of the law in England, in India a partner has always been liable to be tried for criminal misappropriation of property or for criminal breach of trust of property under the law as laid down in Ss. 403 and 405, Penal Code. The learned Sessions Judge did not discuss the offence alleged under S. 477A, Penal Code. As to the merits of the case, which the Sessions Judge did not deal with, it is not only undesirable but impossible to say much. One of the reasons given by the Magistrate for discharging the accused was that he was unable to understand the drift of the evidence ; and the reason for that was that he had recorded the evidence in a way from which it was difficult to draw any conclusions. A long list of figures was given without anything to show what the effect of these figures was, or what they were intended to prove. The complainant's case was a simple enough one, that the accused, who was in sole charge of the management of the firm and of collection of its debts, had collected a good deal of money, which he had failed to enter into the cash book (Ex. C) or to account for. Evidence was tendered to show that certain payments were made in 1938, which were not so entered.

The defence relies on Ex. 4, which purports to be a day book for 1937-38, written by V. Ramireddy, a clerk of the firm and cousin of the complainant. This day book, it is said, shows and credits certain of the payments missing in Ex. C. Now, it is an astonishing fact that this Ex. 4 was never put in cross-examination to the complainant at all. It was only produced when Ramireddy, witness 10 for the prosecution, was cross-examined. What is more, it is in doubt whether it was a genuine book of account at all, or made up for the purposes of this case. It does bear, or purports to bear, the seal of the Income-tax Office, which seal is dated 26th September 1938 (?), but it would appear from Ex. C, a letter of the income-tax officer of February 1940, that the account books for 1938 were in Court then and that they did not include Ex. 4. The account books which were in Court were ordered to be sent to the income-tax officer after the decision of the case in October 1940. Exhibits 5 and 6 do not bear the income-tax office seal. The Magistrate in his judgment — which I find is as difficult to understand as the evidence — relied largely in his order of discharge on Ex. 4. It appears to me that further enquiry is necessary in this case and it will accordingly be ordered that further enquiry be made by the District Magistrate or such Magistrate subordinate to him as he may order other than the Magistrate who originally tried the case.

G.N./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Rangoon 344

BA U AND SHAW JJ.

Fatima Bee Bee and others—Appellants

v.

Official Trustee — Respondent.

First Appeal No. 84 of 1940, Decided on 9th April 1941, from decree of Asst. Dist. Court, Insein, D/- 3rd June 1940.

(a) Limitation Act (1908), S. 20—Payment by cheque — When amounts to acknowledgment explained — Only if primary evidence of cheques cannot be obtained, secondary evidence can be admitted.

A cheque proved to be signed by a debtor and given by him in payment, which has been accepted by the creditor and duly honoured by the bank drawn on, would amount to an acknowledgment of payment within the meaning of the proviso to S. 20, Limitation Act : ('16) 3 A I R 1916 Cal 580 and ('30) 17 A I R 1930 All 392, *Rel. on.* [P 345 C 2]

It is only if the primary evidence of the cheque itself is not obtainable, for reasons to be made out, that secondary evidence would be permissible to be given of it and what that contained. [P 345 C 2]

(b) Appeal — Finding of trial Court based on inadmissible evidence is vitiated.

Where the trial Court has acted upon evidence which was not legally admissible its finding is vitiated. [P 346 C 1]

(c) Banker's Books Evidence Act (1891), S. 2 (8)—Extracts taken from ledger books not being true copy signed by sub-accountant for manager held not certified copy within S. 2 (8).

An extract was prepared from the ledger books of the bank. It was not a true copy and it was signed by the sub-accountant for the manager. The certificate read as follows: "We certify that this is a true extract from the books of the bank:"

Held that it was not a certified copy as defined in section 2 (8). [P 346 C 2]

(d) Civil P. C. (1908), O. 41, R. 27 — Person choosing to rely on certain evidence in trial and appellate Court even though objection is raised in trial Court as to its admissibility—Appellate Court holding such evidence inadmissible—He should not be given further opportunity to produce additional evidence.

The plaintiff chose to rely on such evidence as was produced before the trial Court, in spite of the objections taken by the opposite party as to the admissibility of that evidence. Even in the appellate Court that evidence was argued to be sufficient to prove what the plaintiff had to prove. The appellate Court held such evidence to be inadmissible whereupon the plaintiff asked for further opportunity to produce additional evidence :

Held that the plaintiff had ample opportunity of giving that necessary evidence in the trial Court

but he elected not to do so. He knew clearly what he had to prove and chose to prove it in a particular manner and took the chance of a judgment in his favour on that evidence. He would not therefore be allowed to give the evidence which he could have given before. [P 347 C 1]

Clark and K. C. Ray — for Appellants.

N. K. Bhattacharyya — for Respondent.

Shaw J. — This appeal arises out of a proceeding on an application for a personal decree in a suit wherein a mortgage decree for sale was made. The mortgaged property was sold in pursuance of the final decree for sale for Rs. 1050 but the amount due to the plaintiff exceeded Rs. 10,000. A personal decree was therefore sought by the plaintiff for the payment of the balance and such a decree was passed against the defendants as the legal representatives of M. O. A. Gany. The question which arose for determination was whether that balance due to the plaintiff was legally recoverable because the personal remedy was not barred by limitation.

The debt was due on a promissory note executed by M. O. A. Gany on 3rd January 1928 and the mortgage security was created by a deposit of title deeds on the same date. The suit was instituted on 18th December 1937 against the legal representatives of M. O. A. Gany who had died. The personal remedy would be barred unless the plaintiff could show that payments of interest as such or of part of the principal of the debt were made by the debtor or by his agent duly authorized in that behalf and acknowledgments of the payments appeared in the handwriting of or in writings signed by the person making the payments to keep the debt alive up to the date of the institution of the suit under S. 20, Limitation Act. The payments relied on to save limitation were of interest as such on 29th April 1929, 12th January 1931 and 15th February 1933, the amount paid on each occasion being Rs. 75, and of part payments towards principal and interest in two sums of Rs. 2000 on 3rd May 1934 and 19th July 1934. The two payments of Rs. 2000 each were said to have been noted on the reverse of the promissory note (Ex. A) and initialled by M. O. A. Gany. These two payments were also mentioned in a letter dated 29th June 1935 from M. O. A. Gany to the Official Trustee (Ex. B). So far as the three payments of interest as such are concerned they were said to have been made by cheque by M. O. A. Gany and it is with reference to these that the case on appeal turns. It was essential for the plaintiff to prove that each of the payments relied on as made for interest was supported by an acknowledgment of the payment in the handwriting of or in a writing signed by M. O. A. Gany who was alleged to have made the payments. As those payments are said to have been made by cheque in order to prove that those cheques were at least signed by M. O. A. Gany they should have been produced. It was only if the primary evidence of the cheques themselves was not obtainable, for reasons to be made out that secondary evidence would be permissible to be given of them and what they contained. Sections 65 and 66, Evidence Act, contain the circumstances to be established before secondary evidence may be given of a document.

There is authority that a cheque proved to be signed by a debtor and given by him in payment, which has been accepted by the creditor and duly honoured by the bank drawn on, would amount to an acknowledgment of payment within the meaning of the proviso to S. 20, Limitation Act: 42 Cal 1043,[1] 52 ALL 459,[2] 14 Lah 580[3] and I L R (1938) 2 Cal 320.[4] On behalf of the appellants the correctness of the proposition of law is not challenged. What is contended is that there must be proper proof of the cheque or cheques relied on as having been used to make payment. It is admitted that it may not be possible to prove a cheque by primary evidence and that in the circumstances laid down by the Evidence Act secondary evidence may be admitted to enable advantage to be taken of the saving provision of the Limitation Act. The correctness of 12 Cal 267[5] is not questioned. The trial Court in the case before us has used as evidence what is attacked as not admissible as such. Firstly, evidence of cheques having been given was accepted as if that proved that particular cheques were given by M. O. A. Gany in payment of certain interest, received by the then trustee and duly honoured by the bank concerned. Secondly, a document was admitted as a certified copy

1. ('16) 3 A I R 1916 Cal 580 : 31 I C 626 : 42 Cal 1043 : 19 C W N 724, Kedar Nath v. Dinabandhu Saha.
2. ('30) 17 AIR 1930 All 392 : 127 I C 581 : 52 All 459 : 1930 A L J 590, M. B. Singh & Co. v. Sircar & Co.
3. ('33) 20 A I R 1933 Lah 341 : 141 I C 611 : 14 Lah 580 : 34 P L R 179, Jagtu Mal-Sada Sukh Rai v. Charanji Lal Fakir Chand.
4. ('38) 25 A I R 1938 Cal 538 : 177 I C 508 : I L R (1938) 2 Cal 320 : 42 C W N 548, Prafulla Chandra v. Jatindra Nath.
5. ('86) 12 Cal 267, Shambhu Nath v. Ram Chandra.

of an extract from the books of the Mercantile Bank of India when it was on the face of it not signed by the principal accountant or manager of the bank and did not contain the certificate required by S. 2 (8), Bankers' Books Evidence Act, 1891. We find that the trial Court has acted upon evidence which was not legally admissible and that therefore its finding is vitiated.

It does not appear that the production of the cheques relied on was called for either from the defendants or from the Mercantile Bank of India. Harry Oppenheimer was formerly the trustee of the Storz Trust and as such he lent money, which was the subject-matter of the suit, to M. O. A. Gany on a mortgage by deposit of title deeds. He maintained account books in which he entered the payments received from M. O. A. Gany towards the debt. He was paid by cheque or in cash. Where payment was by cheque M. O. A. Gany drew on the Mercantile Bank of India and Harry Oppenheimer had the cheque encashed through the Netherlands Bank. Generally, interest payments were collected by a durwan employed by Harry Oppenheimer. The two payments of Rs. 2000 were received by Harry Oppenheimer personally. Even so he could not remember if they were made by cheques. He referred to one of his account books but he could not tell whether the payment of Rs. 2000 on 19th July 1934 was in cash or by cheque. His account books do not show whether the smaller payments with which we are really concerned were made in cash or by cheque. He admitted that smaller payments made before 1934 were some in cash and some by cheque. Regarding the payment of Rs. 75 for interest on 29th April 1929 he did not state definitely that it was made by cheque. It was only by a reference to the document marked as EX. S that he was able to show that the same amount appeared against the date 29th April 1929. From that it had to be gathered that that payment was made by a cheque drawn on the Mercantile Bank of India by M. O. A. Gany. But the cheque was not produced, nor is there any evidence that it was no longer available. The evidence of P. David, a clerk in the Mercantile Bank of India, has been used to fill up gaps in the rest of the evidence on behalf of the plaintiff. He was called to prove EX. S, but his evidence only served to show that the document was not one which could be admitted in evidence as will be clear in a moment. He gave some general evidence to the effect that old cheques were kept in the record room but very old cheques were destroyed, and that he did not know "the bank rules as to how many years the cheques should be preserved." There was thus no evidence that any of the cheques which may have been made by M. O. A. Gany on 29th April 1929, 12th January 1931 and 15th February 1933 had been destroyed. In the absence of such evidence or of any other evidence that the production of such cheques was sought to be obtained without success no evidence could be considered which would have the effect of making out that M. O. A. Gany wrote out and/or signed cheques of those dates.

Even if EX. S were admissible it would at best have been secondary evidence so far as it went of the passing of the cheques and it could only be used to that extent if secondary evidence were admissible. Section 4, Bankers' Books Evidence Act, 1891, provides no more than that subject to the provisions of the Act a certified copy of any entry in a banker's book shall, in all legal proceedings, be received as prima facie evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as the original entry itself is now by law admissible, but not further or otherwise. Exhibit S was wrongly admitted in evidence. Its defects were immediately pointed out by the learned advocate for the defendants. Nevertheless P. David was examined with reference to the document with a view to supply the omissions from it. He stated it was certified by a Mr. Meyer, sub-accountant of the bank, who signed for the manager. That he may have had authority to sign for the manager is beside the point. He was neither the principal accountant nor the manager of the bank who alone could certify the document. The certificate reads : "We certify that this is a true extract from the books of the bank."

That is not a certificate which is prescribed as requisite in S. 2 (8), Bankers' Books Evidence Act, 1891. P. David also stated that the extract was prepared by him from the books of the bank and that the books of the bank were kept in the ordinary course of business and that the books from which the extracts were taken were still in the bank. In cross-examination however he stated that the extracts were taken from the ledger books and that there were "daily cash book, ledger and balance books" in all of which

a customer's accounts will appear as did M.O.A. Gany's account. He further stated that in the ledger there were the following columns: date, particulars, cheque number, debit column, credit side and balance. These have not been reproduced in EX. S. He said he picked out and chose such columns as were thought necessary. There is no column "nominee" in the ledger. He put in that column which was not in the ledger. It is therefore perfectly clear that EX. S is not a true copy of the ledger entries. It follows that EX. S is not a certified copy of entries in a banker's book as defined in the Bankers' Books Evidence Act, 1891. P. David's evidence instead of supplying the defects as it was meant to do to enable EX. S to be admitted in evidence in our opinion had exactly the opposite effect, and he made it plain that it should have been rejected. There was therefore no receivable evidence before the Court that the payments of Rs. 75 on 29th April 1929, 12th January 1931 and 15th February 1933 were made by cheques signed by M. O. A. Gany. The failure to prove the cheque alleged to have been given on 29th April 1929 amongst those relied upon would alone suffice to make the debt not legally recoverable by a personal remedy on the date of the institution of the suit.

It has been urged before us that the plaintiff should now be given a further opportunity to produce additional evidence. We are not satisfied however that a case has been made out for any action to be taken under O. 41, R. 27, Civil P. C. The plaintiff chose to rely on such evidence as was produced before the trial Court, in spite of the objections taken by the opposite party as to the admissibility of that evidence. Even in this Court that evidence has been argued to be sufficient to prove what the plaintiff had to prove. It is only by way of escape if we should be of a different opinion that the request was put forward for the plaintiff to be given a chance to produce the evidence which it was necessary that he should have called at the trial. The plaintiff had ample opportunity of giving that necessary evidence in the trial Court, but he elected not to do so. He knew clearly what he had to prove and chose to prove it in a particular manner and took the chance of a judgment in his favour on that evidence. He will not therefore be allowed now to give the evidence which he could have given before. We therefore do not propose to remand the case for the taking of further evidence. We allow the appeal, set aside the personal decree given by the trial Court and dismiss the application for such a decree, with costs in both Courts.

K.S./R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Rangoon 347

MOSELY J.

Hari Prasad and others — Applicants

v.

Bailiff, Small Cause Court, Rangoon — Respondent.

Criminal Revn. No. 213-B of 1941, Decided on 9th June 1941, to quash proceedings of Fifth Addl. Magistrate, Rangoon, in Criminal Regular Trial No. 215 of 1941.

Civil P. C. (1908), O. 21, R. 43—Order allowing attachment of moveable property wherever found is illegal—Resistance is not offence under S. 353, Penal Code.

An order allowing attachment of the moveable property of the judgment-debtor wherever found is illegal and resistance to such an attachment is not an offence under S. 353, Penal Code : 3 C W N 605, *Rel. on.* [P 348 C 1]

K. C. Sanyal and J. Ghosh — for Applicants.

Respondent in person.

Order.—This is an application to quash the proceedings in Criminal Regular Trial No. 215 of 1941 of the Court of the Fifth Additional Magistrate, Rangoon, where the applicants were charged under S. 353, and with S. 353 read with S. 114, Penal Code, with resisting the bailiff of the Small Cause Court, Rangoon, in the discharge of his official duties, that is to say the execution of a warrant of attachment. The proceedings were clearly irregular and illegal, and I am surprised that the learned Chief Judge should have issued the order complained of to the bailiff. In execution of a decree against one Daw Sein, the decree-holder applied under O. 21, R. 43 for attachment by seizure of some films and cinematographic apparatus in the possession of M. H. Bajaj, the agent of the judgment-debtor, at either No. 68, 30th Street, or Manek Mahal Theatre at the corner of Montgomery Street and Phayre Street. This warrant was issued on 1st April, and the bailiff was unable to find the property at those addresses. Then, on 7th April the decree-holder filed an application with an affidavit in which he asked that the Court direct the bailiff to attach the films and machinery "wherever they may be found within the local limits of the jurisdiction of the Court."

On this being granted, the bailiff went to 12 Kokine Avenue, a film studio, which, I am informed by the applicants, belongs to M. H. Bajaj. The bailiff brought the pre-

vious warrant and, he now says (though that is not in evidence), that he also brought the order of the Judge. He was then resisted by M. H. Bajaj's two sons and two durwans. It is hardly necessary to say that a roving commission for seizure of property belonging to the judgment-debtor wherever it may be found is not contemplated by the Code and is entirely illegal. The order of the Judge—(he merely wrote "granted" on the application)—amounts to an order to attach the property whether it is found in the possession of the judgment-debtor or of a third party and wherever it is found. Of course, property in the possession of third persons can only be attached by prohibitory order [O. 21, R. 46 (1) (iii)]. But taking the order on its best footing, and assuming that the Judge meant to direct that the property should be attached by actual seizure wherever found in the possession of the judgment-debtor, and not of third parties, it is still illegal. Rule 64 of the Rangoon Small Cause Court Recovery of Possession and Distress Rules issued under the authority of the High Court by Notifications 8 and 9 of October 1937 requires that :

In applications for execution by attachment of moveable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment-debtor or not, and the place where the property is to be found shall be clearly indicated.

The warrant must of course follow the application. The provision that the applicant must specify the venue of the property is doubtless intended to be a bar to wild claims, random searches and oppressive action. In the present instance the property to be attached may be unique, but the general rule has to be followed. It is hardly necessary to quote a precedent, but Mr. Sanyal's research for the applicants has produced one, 3 C W N 605[1] at p. 607, where it is said :

The area of the search is not described, and if it were a valid warrant it would be competent to the nazir to seize any property that he believed belonged to the judgment-debtor at any place within the jurisdiction of the Court issuing it. It seems unnecessary to point out the serious objections that there would be to allowing such a warrant to be regarded as a valid warrant.

The warrant issued on 1st April did not authorize an attachment in Kokine Avenue. The order allowing attachment anywhere and everywhere was illegal. It follows that the accused applicants cannot be punished for resistance to the attachment. This application in revision will be successful, the criminal proceedings in question quashed, and the accused will be discharged of the offence under S. 353/114, Penal Code.

K.S./R.K. *Application allowed.*

1. ('99) 3 C W N 605, Chunder Coomar Sen v. Queen-Empress.

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(28) A. I. R. 1941 Rangoon 348

MOSELY J.

The King

v.

N'Hkum Naw — Accused.

Criminal Revn. No. 1274-A of 1940, Decided on 5th March 1941, from order of Sub-divisional Magistrate, Sinlumkaba, in Cr. T. No. 19 of 1940.

(a) Kachin Hill-Tribes Regulation (1 of 1895), Ss. 2 (2), 31 — Definition of hill-tribe does not imply residents in hill-tracts — Kachin from China temporary resident, in Sinlumkaba should be charged under this Regulation and not under Opium Act.

The definition of "hill-tribe" in S. 2 (2) of the Regulation does not imply "residents in the hill-tracts." Therefore a Kachin from China who was a temporary resident in the Sinlumkaba subdivision, Bhamo District, cannot be charged with an offence under the Opium Act, but should be charged, if at all, with an offence under S. 31 of the Kachin Hills Regulation, which prohibits possession of opium under certain conditions, and also, incidentally, lays down a presumption as regards opium above 25 tolas. [P 349 C 1]

(b) Kachin Hill-Tribes Regulation (1 of 1895), S. 9 — Accused Kachin — High Court has no jurisdiction in revision.

Where the accused is a Kachin the Regulation applies and the Rangoon High Court has no jurisdiction in revision to deal with the case. The High Court is the Commissioner of the division, as provided in S. 9 of the Regulation. [P 349 C 1]

E Maung, Government Advocate — for the Crown.

Order. — The respondent, N'Hkum Naw alias Zau Mai Tu, was convicted under S. 9 (a), Opium Act, of possession of something under 25 tolas of opium by the Subdivisional Magistrate, Sinlumkaba, Bhamo District, who is also Assistant Superintendent, Kachin Hills. This case was called in revision to consider whether the accused could have committed an offence against the Opium Act, or whether the Kachin Hill-Tribes Regulation No. 1 of 1895 was not applicable to the case. The accused is a Kachin from China who was a temporary resident in the Sinlumkaba subdivision. The Kachin Hill-Tribes Regulation extends to such hill-tracts, and applies to such hill-tribes, as may be notified by Government (S. 1, sub-s. (3)). Section 2, sub-ss. (1) and (2) defines "hill-tract" and "hill-tribe" as any hill-tract and hill-tribe to which the regulation has been made applicable.

By Political Department Notification No. 49 of 2nd December 1935, it was directed that the Regulation extends to all hill-tracts in the Bhamo District and applies to the undermentioned hill-tribes in these tracts: "Kachins, Yawyins, Nungs, Marus, Lashis, Atsis and Chins (Nagas)," and also to Shans and Gurkhas permanently resident in a hill-tract. The Sub-divisional Magistrate was of the opinion that the accused could not be considered a member of a hill-tribe in a hill-tract, and that the definition (presumably the definition of "hill-tribe" in Sec. 2 (2) of the Regulation) must imply "residents in the hill-tracts." I can see no such implication myself. The expression "hill-tribe" in my opinion, is a racial designation. The word "member" rather begs the question, as it imports an implication of residence. The Regulation is made applicable to certain hill-tribes in these hill-tracts, e. g., Kachins, the emphasis being on the race of the persons in question. This is also shown by the fact that the Regulation is only to apply to Shans and Gurkhas who are permanently resident in that hill-tract. There is no such qualification in the case of the hill-tribes abovementioned. It appears to me, therefore, that the respondent could not be charged with an offence under the Opium Act, but should have been charged, if at all, with an offence under S. 31, Kachin Hills Regulation, which prohibits possession of opium under certain conditions, and also incidentally lays down a presumption as regards opium above 25 tolas.

The case in 1939 R L R 614[1] may be referred to in this connexion, though the exact point was not involved there. It follows that, as the accused was a Kachin, and Kachins are one of the hill-tribes to which the Regulation applies, this Court has no jurisdiction in revision to deal with the case, as was pointed in that ruling, the High Court being the Commissioner of the division, as provided in S. 9 of the Regulation. Let the record be returned with these remarks.

K.S./R.K. *Order accordingly.*

1. ('41) 28 A I R 1941 Rang 31 : 192 I C 250 : 42 Cr L J 261 : 1939 R L R 614, Ba Ku v. The King.

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(28) A. I. R. 1941 Rangoon 349

BA U J.

Ismail Mohamed Hajee and others
Appellants
v.
The King.

Criminal Appeal No. 192 of 1941, Decided on 1st April 1941, from order of Western Sub-divisional Magistrate, Rangoon, D/- 11th January 1941.

(a) Defence of Burma Act (1939), S. 2, Rules under, Rr. 130 and 2 (9) — Public servant — Meaning—Head clerk to Controller of Prices is public servant within R. 2 (9).

A public servant within the terms of S. 21, Penal Code, is one who is appointed to some office for the performance of some public duty: 28 Cal 344, *Rel. on*; 12 Bom H C R 1, *Not approved.* [P 350 C 2]

The Head Clerk to the Controller of Prices is a public servant within the meaning of Rule 2 (9), Defence of Burma Act, and therefore is competent to lay complaint under R. 130. [P 351 C 1]

(b) Defence of Burma Act (1939), S. 2 (1) and (3) (ii)—Control of Prices Order (1940), para. 6 is not inconsistent with S. 2 (1) and (3) (ii)—Master is liable for acts of servant and partner for acts of copartner.

Ordinarily a person is not liable for a criminal act of another. No person can be charged with the commission of an offence unless a particular intent or knowledge or "mens rea" is found to be present; but in cases where a particular intent or state of mind is not of the essence of an offence, the person can be held liable for the act or omission of another. The Defence of Burma Act is designed and intended, amongst others, to prevent profiteering so as to ensure the proper working of the normal economic life of the people. The Act will entirely fail in its object if a master is not held liable for the act of his servant or a partner for the act of his copartner. Therefore para. 6 of the Control of Prices Order 1940 is not inconsistent with S. 2 (1) and (3) (ii). [P 351 C 1, 2]

Paget—for Appellants.

E. W. Lambert, Government Advocate — for the Crown.

Judgment.—This is an appeal from the conviction and sentence of fine passed on the appellants under R. 81 (4) of the Defence of Burma Rules read with para. 10 of the Control of Prices Order, 1940. Appellants 2, 3 and 4 are partners and have been carrying on business as grocers under the name and style of Esoof Mohamed Abowath & Sons at 107, 27th Street, Rangoon. Appellant 1 is their salesman. On 1st October 1940, Mr. E. J. Martin, proprietor of the Dalhousie Stores sent his cooly, Yanagalaya, to the shop of the appellants to buy a bag of sugar weighing 63 viss, the price of which would be Rs. 34-10-6 according to the price fixed by the Controller of Prices. A short while

later the cooly returned and told Mr. Martin that the shop-keeper asked for Rs. 4 more than the fixed price; whereupon Mr. Martin rang up Mr. Arnold, Controller of Prices and made a complaint. Mr. Arnold advised Mr. Martin to send his cooly back with a witness to pay the price demanded by the shop-keeper. Mr. Martin accordingly gave Rs. 40 to his cooly Yanagalaya and sent him back to the shop of the appellants with a man called Naidu. Some little time later they returned bringing a bag of sixty viss of sugar and told Mr. Martin they had to pay Rs. 38-10-6 although the price written in the cash memo was Rs. 34-10-6. On the same day Mr. Khan, Inspector of Police, inspected the stores of Mr. Martin and the shop of the appellants. From the former he seized the cash memo and from the latter some account books. On these facts a complaint was made by Maung Lay Pe, head clerk, to the Controller of Prices.

The defence of all the appellants was that the charge was a false charge made at the instance of Mr. Martin as he could not get three bags of sugar. The further defence of appellant 3, Mohamed Esoof Abowath, is that he instructed the salesman not to sell for far more than the price fixed by the Controller. In support of these defences the appellants called a good number of witnesses, but the learned trial Magistrate said he preferred to accept the evidence of the prosecution witnesses and recorded his finding accordingly. There are several grounds raised in the memorandum of appeal but in the course of the argument the learned counsel for the appellants has confined himself to the following three grounds only : (1) That Maung Lay Pe is not a public servant within the meaning of R. 130 read with R. 2 (9), Defence of Burma Rules and that therefore the proceedings initiated on his complaint are null and void. (2) That para 6 of the Control of Prices Order is ultra vires inasmuch as it is not consistent with the provisions of S.2 (1) (read with ?) sub-s. (3) (ii), Defence of Burma Act; (3) That the learned Magistrate should have accepted the evidence of the defence witnesses in preference "to that of the prosecution witnesses as it is supported by documentary evidence." Rule 130 says :

> No Court or tribunal shall take cognizance of any alleged contravention of these rules, except on a report in writing of the facts constituting such contravention made by a public servant.

"Public servant" according to Rule 2, sub-r. (9) means and includes :

> Any public servant as defined in the Penal Code and any servant of any local authority or railway administration.

Section 21, Penal Code, after enumerating several classes of persons who are public servants states inter alia in sub-cl. (9) :

> Every officer in the service or pay of the Crown or remunerated by fees or commission for the performance of any public duty is a public servant.

The learned trial Magistrate says that as Maung Lay Pe is in the service and pay of the Crown he is a public servant. That is where the learned counsel for the appellants joins issue with the learned Magistrate. The contention of the learned counsel is that though Maung Lay Pe is in the service and pay of the Crown he is not an officer and that therefore he is not a public servant. Now, what is meant by "an officer?" In 12 Bom H C R 1[1] at p. 5, West J. explains the word "officer" as follows :

> It is clear that it is not every one who has to do with Government in pecuniary matters, or who has to render accounts, or to submit documents, who is a Government officer. Seeking the help of English law, we find, in Bacon's Abridgment at Vol. 6, p. 2, the article headed 'Of the nature of an officer, and the several kinds of officers' commencing thus: 'It is said that the word 'officium' principally implies a duty, and, in the next place, the charge of such duty; and that it is a rule that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer'.

And the next paragraph goes on to say :

> There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of officers; such as an agreement to make hay, herd a flock, &c., which differ widely from that of steward of a manor, &c. The first of these paragraphs implies that an officer is one to whom is delegated, by the supreme authority, some portion of its regulating and coercitive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause which we have to construe, we think that the word 'officer' there means some person employed to exercise, to some extent, and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed.

A Bench of the Calcutta High Court in 28 Cal 344,[2] while not actually differing from this view of West J. observe :

> We think that an 'officer in the service or pay of Government' within the terms of S. 21, Penal Code, is one who is appointed to some office for the performance of some public duty.

I respectfully agree with the view taken by the Bench of the Calcutta High Court.

1. ('75) 12 Bom H C R 1, Reg. v. Ramajirav Jivbajirav.
2. ('01) 28 Cal 344: 4 C W N 798, Nazamuddin v. Queen-Empress.

The interpretation put by West J. is, in my opinion, too narrow. "An officer" as defined in Murray's Oxford Dictionary is "one who holds an office, post or place." The word "office" is explained inter alia as follows :

A position or place to which certain duties are attached, especially one of a more or less public character ; a position of trust, authority, or service under constituted authority; a place in the administration of Government, the public service, the direction of a corporation, company, society, etc.

A head clerk is a person who occupies a position to which certain duties of a public character are attached or a person who occupies a place in the administration of Government. He is accordingly a public servant. Even assuming that the interpretation, as put by West J., is to be accepted, Maung Lay Pe is still a public servant within the meaning of S. 21, Penal Code. In the course of his evidence he says :

It is part of my duty to go out and make inquiries about prices. I am head clerk in the office of the Controller of Prices and my immediate head is Mr. Arnold.

His duties are thus immediately auxiliary to those of the Controller of Prices, to whom the Government has delegated part of its functions. In connexion with the second ground the contention of the learned counsel for the appellants is that the ordinary principle of criminal law is that no man should be punished for an offence which he himself has not committed and that this is the principle which underlies S. 2 (1), sub-s. (3) (ii), Defence of Burma Act. Therefore, he says that para. 6, Control of Prices Order, 1940, which punishes a master for an act of his employee or a partner for an act of his co-partner, being contrary to the ordinary principle of the law is ultra vires. I agree with the learned counsel for the appellants that ordinarily a person should not be held liable for a criminal act of another. No person can be charged with the commission of an offence unless a particular intent or knowledge or, to use the English term "mens rea" is found to be present ; but in cases where a particular intent or state of mind is not of the essence of an offence, the person can be held liable for the act or omission of another. To explain what this means I cannot do better than quote the observations made by Lord Atkin (then Atkin, J.) in (1917) 2 K B 836[3] at p. 845 which are as follows :

I agree, but I should like to add a few words in view of the argument of Mr. Atkinson. I think that the authorities cited by my Lord make it plain that while prima facie a principal is not to be made criminally responsible for the acts of his servants, yet the legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute ; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular act of Parliament has that effect or not regard must be had to the object of the statute, the word used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

Here, in the present case, the Defence of Burma Act is a piece of emergency legislation. It is designed and intended, amongst others, to prevent profiteering so as to ensure the proper working of the normal economic life of the people. The Act will entirely fail in its object if a master is not held liable for the act of his servant or a partner for the act of his copartner. Because of this, para. 6 of the Control of Prices Order 1940 has been enacted. If this is borne in mind, it will be found that there is nothing inconsistent between this paragraph and S. 2 (1), (read with?) sub-s. (3) (ii), Defence of Burma Act ; dealing with the facts of the case, I am entirely in agreement with the learned trial Magistrate. I cannot accept the argument that this case was initiated falsely by Mr. Martin out of anger or pique. His conduct throughout the proceedings negatives this suggestion. Further, there is the evidence of two witnesses to prove the payment of Rs. 38-10-6. I admit that the cash memo and the account book of the appellants show that the bag of sugar weighing 60 viss was sold for Rs. 34-10-6, but what must be remembered is that the cash memo and the account book were written by one of the partners of the firm and he would not have written that his firm had charged more than the price fixed by the Controller of Prices, knowing that if he had done it he would be creating evidence against himself and his copartners.

I may refer to the paragraph set out in the grounds of appeal not touched upon by the learned counsel for the appellants in the course of his argument and that is the defective nature of the charges framed against appellants 2, 3 and 4. The defect which I notice is only this: instead of writing R. 81 the Magistrate by inadvertence wrote R. 84. But the charge sheets clearly set out what the charges against these three appellants were. They knew what charges they had got to meet. They were, therefore, in my opinion, not in any way prejudiced

3. (1917) 2 K B 836 : 87 L J K B 82 : 118 L T 25 : 81 J P 305 : 15 L G R 706, Mousell Brothers Ltd. v. London & North-Western Railway Co.

by the slip made by the Magistrate. This defect is curable under S. 537, Criminal P. C. For these reasons I dismiss the appeal.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Rangoon 352

MOSELY J.

The King

v.

Kala Nyo.

Criminal Revn. No. 64-A of 1941, Decided on 2nd April 1941, for review of order of 3rd Addl. Special Power Magistrate, Thaton, D/- 27th November 1940.

(a) Criminal P. C. (1898), Ss. 471, 469, 470 and 464 (1)—Accused acquitted being insane at time of offence — Medical evidence as to his insanity is not necessary under S. 471 for keeping him in safe custody—It is necessary only in proceedings such as under S. 464 (1).

Where an accused is acquitted on the ground of his being insane at the time of the commission of the offence, medical evidence as to his insanity is not necessary under S. 471 for his being ordered to be kept in safe custody : ('28) 15 AIR 1928 Lah 796, *Rel. on.* [P 352 C 1, 2]

Medical evidence is necessary only in such proceedings as those under S. 464 (1). [P 352 C 2]

(b) Criminal P. C. (1898), Ss. 471 and 423 (d) —Appellate Court can pass order under S. 471.

The appellate Court can pass order under S. 471, such order being consequential within the meaning of S. 423 (d) : ('15) 2 AIR 1915 L B 34 ; ('18) 5 AIR 1918 Bom 110 and ('22) 9 AIR 1922 Mad 54, *Rel. on.* [P 352 C 2]

Order. — The respondent Kala Nyo was sentenced to nine months rigorous imprisonment, under S. 326, Penal Code, for an assault on his wife. In appeal he was acquitted by the learned Sessions Judge on the ground that he was insane at the time of the commission of the offence, and it was ordered, under S. 471, Criminal P. C., that he be kept in safe custody in the Moulmein Jail until orders were passed concerning him by Government. This case was taken up in revision to consider the action taken by the learned Judge. Evidence was not given by a medical witness as to the insanity of the accused at the time that the crime was committed. It is suggested that the accused should have been placed under medical observation by the learned Sessions Judge, and that the evidence of the medical officer should have been taken. The law, however, does not make this necessary. Section 469 read with S. 470 provides that the Magistrate shall acquit the accused where he is satisfied from the evidence given before him that the accused was at the time of the commission of the crime, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that it was wrong or contrary to law. It is only in proceedings where an enquiry is made as to whether the accused is of unsound mind at the time of the trial and, therefore, incapable of making his defence, that the law makes it requisite for the accused to be examined by a medical officer (S. 464 (1)). It is obvious that the medical officer is in a much better position to put the accused under observation when the accused appears at the time to be of unsound mind; while it is difficult, very often, for a medical officer to give any conclusive evidence, when the accused is at the present time of sound mind, as to whether he could have been of unsound mind at some time previous. The same view of the law was taken in 9 Lah 371.[1]

As regards the power of the appellate Court to pass an order under S. 471, it is true that the section in terms gives such power to the Magistrate or Court before whom or which the trial has been held; but it has always been held that such orders by the appellate Court are consequential orders within the meaning of S. 423 (d) : *see* on this 8 L B R 290,[2] 43 Bom 134[3] and 23 Cr L J 71.[4] The procedure adopted by the learned Sessions Judge was correct. No action is therefore necessary in revision.

G.N./R.K. *Order accordingly.*

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1. ('28) 15 AIR 1928 Lah 796 : 106 I C 796 : 9 Lah 371 : 29 Cr L J 204, Emperor v. Bahadur.
2. ('15) 2 AIR 1915 L B 34 : 30 I C 654 : 16 Cr L J 670: 8 L B R 290, Emperor v. Nga E Maung.
3. ('18) 5 AIR 1918 Bom 110 : 46 I C 691 : 19 Cr L J 771 : 43 Bom 134 : 20 Bom L R 629, Emperor v. Somya Hirya Mahar.
4. ('22) 9 AIR 1922 Mad 54 : 65 I C 423 : 23 Cr L J 71 : 42 M L J 72, A. B. Mahammad v. Emperor.

END

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SIND CHIEF COURT

1941

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THE
ALL INDIA REPORTER
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Sind Chief Court

* A. I. R. 1941 Sind 1

LOBO J.

In re Firm of Thawerdas Kalumal

Insolvents.

Insolvency Case No. 15 of 1938, Decided on 15th March 1940.

* *(a) Presidency Towns Insolvency Act (1909), S. 8 (1) — Application under S. 8 (1) cannot be made by person not party to proceeding in which order was made.*

The power of an Insolvency Court under cl. (1) of S. 8 to review, rescind or vary any order made by it is not restricted as the jurisdiction conferred by O. 47, Civil P. C., but is far wider. However, there is no indication in the wording of the section that review is to be available to a person not a party to the proceeding sought to be rescinded. The intention was to confer a wider jurisdiction without departing from the ordinary rule that that jurisdiction could be invoked only by a party to the insolvency proceeding which culminated in the offending order: *Case law referred.* [P 6 C 1, 2]

(b) Interpretation of Statutes — Inconvenience and hardship should not be allowed to influence Court in interpretation of statute.

In the matter of the interpretation of a statute the *argumentum inconvenienti* is always a weak argument. Inconvenience and hardship are to be relieved by the Legislature and should not be allowed to unduly influence a Court in the interpretation of a section of a statute. [P 6 C 2]

* *(c) Presidency Towns Insolvency Act (1909), S. 8 (1)—There is no period of limitation prescribed for application under S. 8 (1)—But application filed for purpose of extending time for appeal should not be entertained.*

There is no period of limitation prescribed for an application under cl. (1) of S. 8 and the principles of English law are to govern; and according to these principles an application for review, rescission or variation should not be entertained to save the time provided for appeal when the application has been filed for the purpose of extending the time for appealing. [P 7 C 2]

Fatechand Assudomal and Srikishindas H. Lulla — for Official Assignee.

Kundanmal Dayaram — for Applicant.

Order.—This is an application by the firm of Manghanmal Gurnomal under S. 8 (1), Presidency Towns Insolvency Act, made in the following circumstances: On a petition dated 25th April 1938 presented by certain creditors to adjudge insolvents the firm of Thawerdas Kalumal and its three partners (1) Chellomal, (2) Hariomal and (3) Dewanmal an adjudication order was passed by me on 22nd November 1938. One of the acts of insolvency on which that order was made is thus set out in the formal order:

That in suit No. 1257 of 1938 M/s Manghanmal Gurnomal applied for attachment before judgment and before the judgment was given the debtors with intent to defeat and delay their creditors gave undue preference to M/s Manghanmal Gurnomal by transferring some of their shop goods and then got the attachment raised and thus made a transfer of property with intent to defeat or delay their creditors on 23rd April 1938.

The applicants contend that this was no case of fraudulent preference: that the insolvents parted with their goods "under pressure of attachment &c.:" that the applicants acted bona fide. They pray that the Court will be pleased to "review and rescind the order that the transfer of the goods was an act of insolvency and/or was a fraudulent preference." Messrs. Fatehchand and Lulla who appear for the petitioning creditors and the official assignee respectively raise two preliminary objections to the application. They contend, firstly, that the applicants have no locus standi, they were not a party to the proceedings in which the order of adjudication was made; they cannot therefore apply for review or rescission under cl. (1) of S. 8, Presidency Towns Insolvency Act. If they are 'a party aggrieved' their remedy is by appeal under clause (2) of S. 8, Presidency Towns Insolvency Act. Their second contention is that in any event an application by the applicants under cl. (1) of S. 8 is barred by limitation. It is with these preliminary objections that I proceed to deal. Now, S. 8, Presidency Towns Insolvency Act, reads thus:

8. (1) The Court may review, rescind or vary any order made by it under its insolvency jurisdiction.

(2) Orders in insolvency matters shall, at the instance of any person aggrieved, be subject to appeal as follows, namely :—

(a) an appeal from an order made by an officer of the Court empowered under S. 6 shall lie to the Judge assigned under S. 4 for the transaction and disposal of matters in insolvency and no further appeal shall lie except by leave of such Judge;

(b) save as otherwise provided in clause (a) an appeal from an order made by a Judge in the exercise of the jurisdiction conferred by this Act shall lie in the same way and be subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.

The Presidency Towns Insolvency Act, as I have had occasion to remark before, is modelled on the English Bankruptcy Act and S. 8 therein is practically a reproduction of S. 108, English Bankruptcy Act, 1914. One should therefore have thought that the first of these preliminary objections could present no difficulty, and that the question involved would be found covered by judicial decisions both English and Indian. Strange as it may seem, however, there is a curious lack of judicial authority on the point. In 30 S L R 281,[1] S. 8, Presidency Towns Insolvency Act, and the interpretation of cls. (1) and (2) thereof were touched upon by Rupchand A. J. C. An order of adjudication had been passed against a debtor and duly published in the local Government Gazette: one of the acts on which that order of adjudication was passed was an assignment of his outstandings made by the debtor, and an application was filed by the official assignee to have this assignment, declared void as being a fraudulent preference. The assignee appeared to oppose the application and sought to prove that the assignment was not a fraudulent preference. It was held by Rupchand A. J. C., that it was not open to the assignee to urge and prove the validity of the assignment unless and until he had got the order of adjudication vacated either by making an application for review under S. 8 (1), Presidency Towns Insolvency Act, or by filing an appeal against the order of adjudication under cl. (2) of S. 8, Presidency Towns Insolvency Act. In the course of his judgment the learned Judge states :

> On behalf of the opponents reliance has been placed on the case in 50 Mad 541[2] which is perhaps the only case decided by a High Court in India on this point and which takes a contrary view.
>
> This point has been fully discussed in para. 788 of Mulla's Law of Insolvency. The learned annotator has expressed the view that the sections of the Indian Act which are based on the corresponding sections of the English Act should be interpreted in the same way in which the English sections have been interpreted in the Chancery case, and that according to the true interpretation of the sections as they at present stand, the Madras case has not been rightly decided. With this view I entirely agree.

Again the learned Judge states :

> But assuming for the moment that the act of insolvency, which is the subject-matter of the present inquiry, was the only act of insolvency relied upon in the petition and the order of adjudication was passed on the footing of such act, and if, in the present application, the Court was to reagitate that question, and if the contention of the opponent were allowed, what would be the result? On the one hand the Court's order adjudicating the debtors as insolvents stands and is binding on the debtors, and, on the other hand, the Court would stultify itself by holding the transfer of the outstandings to the opponents was not a fraudulent transfer, and that being so, the order of adjudication, although it stands, is not a good order. Such a state of affairs cannot be permitted . . . For these reasons it would appear that the view taken by the Chancery Court in the case referred to above is the proper view and should be acted upon in preference to that taken in 50 Mad 541.[2]

The learned Judge goes on to state :

> I am also not satisfied that if this view is accepted it results in any real hardship upon third persons whose title to property is affected by the adjudication. Such persons are, as pointed out in the Chancery case, "aggrieved persons" within the meaning of the Act. It is, therefore, open to them to move the Court which passed the order of adjudication under S. 8, cl. (1) of the Act, or, if so advised to appeal against that order to a higher Court under cl. (2), sub-cl. (b) of the same section, to review or rescind the order of adjudication.

The Chancery case referred to by the learned Judge was the case in (1878) 10 CH D 3,[3] the Madras case is reported in 50 Mad 541.[2] A foot-note at the end of the report in the case in 30 S L R 281[1] states that an appeal was filed against the decision of the learned Judge but was compromised and withdrawn. Now this is not an authoritative decision on the question involved in the first of the two preliminary objections. The point was not before the learned Judge for decision and his remarks therefore with regard to cls. (1) and (2) of S. 8, Presidency Towns Insolvency Act, are more or less obiter. But the learned Judge had many years' experience of the working of Insolvency law in India and his remarks, though obiter, are without doubt entitled to great weight.

This point came up again in an indirect manner before a Bench of this Court in

1. ('36) 23 AIR 1936 Sind 246 : 166 I C 133 : 30 S L R 281, In re Devkinandan & Co., Official Assignee v. Hassasing Tahilsing.
2. ('27) 14 AIR 1927 Mad 526 : 101 I C 12 : 50 Mad 541 : 52 M L J 352, Official Assignee of Madras v. O. R. M. O. R. S. Firm.
3. (1878) 10 Ch D 3 : 48 L J Bk 17 : 39 L T 525 : 27 W R 277, Ex parte Learoyd; In re Foulds.

A I R 1936 Sind 71.[4] In this case there was an application by one Phulumal Bashumal purporting to be under Ss. 8 and 90, Presidency Towns Insolvency Act, read with S. 151, Civil P. C., that there should be deleted from the order of adjudication passed by the Insolvency Court an act of insolvency the inclusion of which the applicant contended was greately to his prejudice. There had been an appeal by the debtor against the adjudication order made by the Insolvency Judge and certain remarks of the learned Judges of the Appellate Court were relied upon as upholding the order of the Insolvency Judge on one act of insolvency but excluding the particular act of insolvency which affected the applicant. The High Court refused to interfere for the reason that the applicant was the brother-in-law of the insolvent, that he was an aggrieved party within the provisions of S. 8 (2), Presidency Towns Insolvency Act, and that he could have appealed against the order of adjudication but he had not done so. The concluding words of the judgment are these:

> He could have appealed from the order of the Insolvency Judge dated 6th February 1934, but he did not do so. Instead of that he applied to us in review on 11th September 1935. We do not think that there have been shown to us any grounds at all why we should extend the period of limitation, or why we should exercise in review our powers under S. 8, Presidency Towns Insolvency Act, even if we should hold that upon the application of a person who is not a party to these proceedings we could so exercise these powers. We think that justice requires that this application should be dismissed.

The same Bench of which I was a member has again in *Bhawanidas Jethanand* v. *Jethsingh Ramsingh*[5] and others referred to cls. (1) and (2) of S. 8, Presidency Towns Insolvency Act, in these words:

> Now no doubt the appellant is a person aggrieved by the order against which he appeals and there were open to him two remedies under S. 8, Presidency Towns Insolvency Act. He could have asked the Insolvency Court to review, rescind or vary its order under cl. (1) of this section. Under cl. (2) of the section he has a right of appeal from the order of the learned Judge to the High Court. In (1878) 10 Ch D 3,[3] it was held that a third person whose title to property is affected by an adjudication order is a person aggrieved by it and is entitled to appeal from it. The appellant took no action under cl. (1) of S. 8. He did not apply to the Insolvency Court to review or rescind its order as he could have done. Nor is he entitled in any appeal under cl. (2) of S. 8 to succeed on the basis merely of absence of notice by the Insolvency Court before it passed the order appealed against. He can only urge before us that the circumstances of the case are such that it is highly inequitable and unjust that an order so vitally affecting his interests should have been passed behind his back and without notice to him and in circumstances when he had no means of knowing of the existence of the proceedings in which that order was passed against him. In the present case, however, it appears to us idle to contend that the appellant was placed in such a situation. On the contrary we have every reason to hold that the appellant deliberately refrained from participating in the proceedings which culminated in the order of adjudication.

The matter before this Bench however was an appeal under cl. (2) of S. 8, Presidency Towns Insolvency Act, and the remarks in the judgment referred to above must therefore again be regarded as obiter. It is thus clear that so far as our own Court is concerned there is no authoritative decision upon this point. Turning to the other High Courts in India the case in 21 Bom L R 190,[6] is a case in point. It is a judgment of a single Judge, Sir A. Marten, then Mr. Justice Marten. The point in that case was this. An order of adjudication had been made on a petition by certain creditors against a firm in which there were five partners. Later the order of adjudication was annulled by the Court in respect of two out of the five partners. Another set of creditors thereupon presented a petition asking for the re-adjudication of the two partners in respect of whom the adjudication order had been annulled. One of the questions before the learned Judge was whether the petition fell under cl. (1) of S. 8, Presidency Towns Insolvency Act, and whether the petitioners were competent to apply under that sub-section. The learned Judge says:

> The Advocate-General rather hinted that as the petitioning creditors No. 2 were not present at the hearing of or served with the application when the annulment order was made that therefore they would not be persons who can obtain a review. I have not had the benefit of a detailed argument on the point or been referred to such authorities as there may be, but personally I think that this S. 8 ought to be given as wide an operation as it has in the English Bankruptcy Court, and that when one considers the nature of bankruptcy jurisdiction, affecting as it does a large number of persons all of whom are not necessarily before the Court, one may properly consider that bankruptcy cases are pre-eminently those where a review of previous decisions may be useful. This case is, I think, a good illustration of what I mean. Petitioning creditors No. 1 got an order of adjudication. It is alleged . . . . they have been squared by the alleged insolvents. At any rate they do not appear to oppose the annulment, and accordingly the adjudication order is annulled on a statement of facts which, to say the least of it, omits many material matters. In my opinion that is a class of case where people like petitioning creditors No. 2 who

4. ('36) 23 AIR 1936 Sind 71 : 163 I C 122, Jethanand Murijmal v. Ghanshamdas.
5. ('38) 25 AIR 1938 Sind 82 : 175 I C 214 : 32 S L R 672.
6. ('18) 5 AIR 1918 Bom 20 : 50 I C 437 : 21 Bom L R 190, In re Joharmal Pannaji; Ex parte Prithviraj Bhagwan.

were not present or given any notice of the proposed annulment are undoubtedly aggrieved or prejudiced by the decision of the Court. That is exactly a class of case where in my opinion the Court may usefully review or rehear its decision in the case. It is quite different from an ordinary litigation between A and B where the case is heard out and where to ask the Judge to rehear the case is almost intolerable. The proper remedy in that case is to appeal if the party has reason to think that the decision is erroneous. But bankruptcy cases are different, for ordinarily the Court does not hear each creditor individually but looks to the official assignee to represent the general body of creditors. It may sometimes happen therefore that an individual creditor who does not inform the official assignee of the true position may be prejudiced by a decision of the Court passed on imperfect information. I accordingly think that the proper procedure here is not to appeal to the Court of appeal by leave, but is to apply to the Court under its powers of review under S. 8.

It is to be noted that the learned Judge admits that the point as to the applicability of S. 8 (1), Presidency Towns Insolvency Act, was "rather hinted at" by the learned Advocate-General. It is also to be noted that the learned Judge admits in the passage quoted above that he is merely expressing a view but has not had the benefit of a detailed argument on the point or been referred to any authorities. It is to be further noted in regard to this case that the decision of the Judge actually turned on a question of fact. The learned Judge found as a fact that the two persons in respect of whom the adjudication order had been annulled were partners and as a result of that finding they were re-adjudicated insolvent. No doubt in making this order the learned Judge exercised the jurisdiction vested in him under cl. (1) of S. 8, but it would appear that he acted suo motu and that the question whether petitioning creditors No. 2 were or were not entitled to present a petition for review under cl. (1) of S. 8 was not decided or found necessary to be decided.

The one other Indian case referred to from the Bar in which the question involved in the first preliminary objection I am dealing with was touched upon is the Full Bench decision of the Calcutta High Court in 56 Cal 667.[7] But here again it would appear that the remarks on the point were in the nature of obiter dicta. The facts in this case were these. In the matter of the insolvency of one Sailendra Krishna Roy a firm of creditors called Nabin Chandra Ram Chandra Shah applied to the Registrar in insolvency for an examination of Kumar Sarat Roy the father-in-law of the insolvent under S. 36, Presidency Towns Insolvency Act. An examination was held. But the creditors Nabin Chandra Ram Chandra Shah apparently were not satisfied and applied to the Registrar in insolvency for further examination of Kumar Sarat Kumar Roy. This application was acceded to by the Registrar. Kumar Sarat Kumar Roy however appealed to the Judge in insolvency to vacate the order of the Registrar and dispense him from appearing before the Registrar pursuant to his order. The learned Insolvency Judge came to the conclusion that on the merits the order of the Registrar should not be interfered with. Kumar Sarat Kumar Roy appealed to a Division Bench and this Division Bench referred the following question of law to the Full Bench :

> Whether an application to a learned Judge exercising insolvency jurisdiction on the original side for the discharge of an order made by the Registrar in insolvency for the attendance of a witness under S. 36 of the Act is an appeal under cl. (a), sub-s. (2), S. 8; or is an application under sub-s. (1) of that section or is an application of another and what kind.

The judgment of the Court was delivered by Rankin C. J. He held in the first instance that the Registrar in insolvency was a Court within the meaning of S. 8, Presidency Towns Insolvency Act. Referring to sub-s. (1) of S. 8 the learned Chief Justice states :

> Now the provision in sub-s. (1) of S. 8, is a provision of no narrow character. It is quite true that when a Court has decided a matter in the presence of all the parties it will not readily listen to the party who has lost, making an application that the matter be re-opened and re-heard. At the same time this consideration has no place in cases of ex parte orders and it is well settled under the same words of the English section that the powers given to the Court from time to time to alter or modify its own orders is circumscribed by no narrow limits.

The learned Judge then quotes a paragraph from the judgment of Mr. Cave J., (1891) 1 Q B 463.[8] Later in his judgment the learned Judge states referring again to sub-s. (1) of S. 8 :

> It is contrary to the motion of a re-hearing or of a review such as is contemplated in that sub-s. (1) that the application should be made to any tribunal except the tribunal that made the order .... The particular case in which it is necessary to have recourse to a higher tribunal than the Registrar in order that his order may be revised is the matter dealt with by sub-s. (2) of S. 8. That is in contrast to the first sub-section by reason of the fact that the right of appeal is given not merely to persons who are parties to the original order but to any person aggrieved thereby, and it is an impor-

7. ('28) 15 AIR 1928 Cal 786 : 115 I C 29 : 56 Cal 667 : 33 C W N 21 (F B), Sarat Kumar v. Nabin Chandra.

8. (1891) 1 Q B 463 : 60 L J Q B 244 : 64 L T 115 : 39 W R 399 : 8 Morrell 30, In re Tobias ; Ex parte Tobias.

tant principle in insolvency that persons may be aggrieved by an order to which they are not parties; and if they are, there is a right of appeal.

Now here again it appears quite plainly that the remarks of the learned Chief Justice relating to cl. (1) of S. 8 are merely obiter. The petitioner in this case Kumar Sarat Kumar Roy was a party to the proceedings in which the Registrar had made an order for examination under S. 36, Presidency Towns Insolvency Act, and therefore even upon a restricted construction placed upon cl. (1) of S. 8 such as is contended for in the present case he was entitled to move the Court for review. The real matter before the Full Bench was that contained in the reference which has been set out above, and the answer of the Full Bench thereto was that in the opinion of the Full Bench an application to the Judge exercising insolvency jurisdiction to discharge an order made by the Registrar for attendance of a witness under S. 36 was an appeal under cl. (a) of sub-s. (2) of S. 8. It would appear therefore that a decision on the point involved in the first preliminary objection is not to be found in any reported case of any of the High Courts in India. Sir Dinshaw Mulla in his work on the Law of Insolvency in para. 777 states :

An application for a rehearing under S. 8 (1) can only be made by a person who was a party to the proceeding in which the order was made. In this respect the right of rehearing is much more limited than the right of appeal in insolvency, for the right of appeal is given not merely to persons who are parties to the original order but to any person aggrieved thereby.

The learned author relies for this statement on the Full Bench decision of the Calcutta High Court reported in 56 Cal 667[7] and on the case in (1904) 2 K B 299.[9] The learned author proceeds to state :

In a Bombay case, 21 Bom L R 190,[6] a firm was adjudicated insolvent on the petition of a creditor. Subsequently two of the partners constituting the firm applied for an annulment of the adjudication, and the order was made. Afterwards another creditor of the firm applied to the Court to re-adjudicate them insolvent. The Court held that the proper course was to apply to rescind the annulment under S. 8 (1). The application was accordingly amended and the annulment set aside. The Court observed that the proper course was not to proceed by way of appeal, that the applicant was a person aggrieved by the order of annulment, and that according to the English cases the applicant was entitled to a review. It is quite true that the applicant was a 'person aggrieved' within s. 8 (2) (b), but that circumstance gave him a right of appeal from the order of annulment, and not a right of review under S. 8 (1), he not being a party to the original order. The English cases which the learned Judge had in view were cases not of review or rehearing, but of appeal.

It would appear therefore that the judgment of Marten J., in 21 Bom L R 190[6] has not the approval of Sir Dinshah Mulla, an acknowledged authority on insolvency law. I have neither myself found nor have I been referred to any English decision bearing directly on the point involved in the first of the preliminary objections I am dealing with. The case in (1878) 10 Ch D 3[3] has been cited at the Bar but is of little assistance because it was held in that case that a third person whose title to property was affected by an adjudication order was a 'person aggrieved' by it and was entitled to appeal against the order. The only other English case to which I have been referred is the one to which Sir Dinshah Mulla refers namely the case in (1904) 2 K B 299.[9] But if that case is examined it will be found to be of little use. In the report of the case, however, the argument of the learned counsel of the parties has been set out and at p. 302 of the report, Vaughan Williams L. J. is reported to have made the following statement :

I think that an application under S. 104 for rehearing can only be made by the person against whom the previous order was made.

In Halsbury's Laws of England, vol. 2, Hailsham Edition, para. 551 it is stated :

It is provided that every Court with bankruptcy jurisdiction has power to review, rescind or vary any order made by it whilst acting under such jurisdiction. In this respect the Court exercising bankruptcy jurisdiction has larger powers than it has in the exercise of its ordinary jurisdiction, the general principle being that a final order of a Court made in a litigation cannot be altered by the Court which made it.

The power to review an order can only be exercised by the Court which made it. And so where the order of the Judge has been wrongly drawn up by the Registrar and filed, the Registrar cannot afterwards alter it.

It would seem that an application for a re-hearing can only be made by the person against whom the original order was made.

In the foot-note to this paragraph the statement of Vaughan Williams L. J., in (1904) 2 K B 299[9] is referred to in support of this statement. Of necessity therefore one has to fall back on the wording of S. 8, Presidency Towns Insolvency Act, itself, and try to gather from it the intention of the Legislature. Section 90, Presidency Towns Insolvency Act, provides that :

In proceedings under this Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its original civil jurisdiction:

9. (1904) 2 K B 299 : 73 L J K B 724 : 91 L T 222 : 11 Manson 134 : 20 T L R 474, In re John Roberts & Co. ; Ex parte Bonzoline Manufacturing Co.

Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act . . . . . .

Reading Ss. 8 and 90 together it is, I think, apparent that a Court exercising insolvency jurisdiction has the power of review conferred on a Court of ordinary original civil jurisdiction by O. 47, Civil P. C. But the jurisdiction to review contained in O. 47, Civil P. C., is of a restricted nature. As by S. 90, Presidency Towns Insolvency Act, it is provided that nothing in sub-s. (1) is to limit the jurisdiction conferred on the Insolvency Court by the Presidency Towns Insolvency Act it follows that the power of an Insolvency Court under cl. (1) of S. 8 to review, rescind or vary any order made by it is not restricted as the jurisdiction conferred by O. 47, Civil P. C., but is far wider.

Now in cl. (1) of S. 8 it is not specified who may move the Insolvency Court for a review, rescission or variation of an order made; in cl. (2) of the same section which provides for an appeal, the right of appeal is specifically conferred on 'any person aggrieved', and clearly the words 'any person aggrieved' are not confined to the parties to any proceeding in an insolvency Court but extend to persons not parties to a proceeding who may be prejudicially affected by an order of the Insolvency Court. If it was the intention of the Legislature to confer upon an aggrieved person not only the right to appeal from an order from Insolvency Court prejudicial to his interest but the right also to apply to an Insolvency Court to review, rescind or vary its order, there seems to be no reason why the Legislature should not have specifically said so. If such was the intention of the Legislature one should have expected cl. (1) of S. 8 to read: "any person aggrieved by an order made by a Judge in the exercise of the jurisdiction conferred by this Act may apply for review, rescission or variation of such order." Ordinarily it is only the parties to a legal proceeding who are entitled to question the correctness of a decision or order made therein by a civil Court by appeal, revision or review. While it is clear that the intention of the Legislature in enacting cl. (1) of S. 8 was to extend the jurisdiction of an Insolvency Court in the matter of review to cases not covered by O. 47, Civil P. C., there is no indication in the wording of the section that review is to be available to a person not a party to the proceeding sought to be rescinded. The intention was to confer a wider jurisdiction without departing from the ordinary rule that that jurisdiction could be invoked only by a party to the insolvency proceeding which culminated in the offending order. It would appear also that the Legislature, aware of the fact that orders in insolvency proceedings often affected prejudicially the rights of persons not parties to a proceeding, of set purpose in cl. (2) of S. 8 conferred the right of appeal against an order of an Insolvency Court not only on the parties to a proceeding before that Court but on 'any person aggrieved' by an order made by the Insolvency Court.

It has been argued that it could not have been the intention of the Legislature to differentiate between an aggrieved person who is a party to a proceeding in an Insolvency Court and an aggrieved person not a party; if the former has two remedies against an order of the Insolvency Court, review and appeal, why should the latter have one remedy by appeal only? The Legislature could not have intended to impose this hardship upon one set of aggrieved persons to have one remedy only, that of appeal, was a definite hardship when one considered what would be the scope of an appeal when the person aggrieved had had no opportunity to place on the record any material whatever for consideration by an Appellate Court. I think this argument is not difficult to answer. In the first place in the matter of the interpretation of a statute the *argumentum inconvenienti* is always a weak argument. Inconvenience and hardship are to be relieved by the Legislature and should not be allowed to unduly influence a Court in the interpretation of a section of a statute. In the second place it is a matter of considerable doubt whether any hardship at all results to an aggrieved person by the fact that the one remedy of appeal alone is open to him. The powers of a civil Appellate Court under the Civil Procedure Code are very wide and Rr. 25, 26, 27 and 33 of O. 41 entitle the Appellate Court to meet any difficulty or fill any lacuna that may have been occasioned by the fact that the appellant aggrieved person was not a party to the proceeding in which the order appealed against was passed. It appears to me that the opinion of Vaughan William L. J., and of Sir Dinshah Mulla, acknowledged authorities on the law of insolvency, is the correct opinion and must be followed. I hold, therefore, that the applicants in this case have no locus standi and have no right to apply under cl. (1) of S. 8, Presidency

Towns Insolvency Act, for a review of the adjudication order. Their remedy is by appeal under S. 8, cl. (2) (b).

In the view that I have taken of the first preliminary objection the second really does not arise. But as the matter has been argued before me at considerable length, I propose to deal with it but as briefly as possible. Here again there is a conflict as to what Article, if any, of Sch. 1, Limitation Act, is applicable to an application under cl. (1) of S. 8 praying for a review, rescission, or variation of an order made by an Insolvency Court. In 13 Bom 520[10] a decision of their Lordships of the Privy Council, it was held that an Insolvency Court was a Court of ordinary original civil jurisdiction. Now Art. 162 of Sch. 1, Limitation Act, provides for a review of judgment by certain High Courts in India and the Chief Court of Sind. As our Court is still the Court of the Judicial Commissioner of Sind, it does not appear that Art. 162 can apply in the present case. Article 173 however applies to a review of judgment except in the cases provided for by Arts. 161 and 162. If Art. 173 applies in the present case the period of limitation is 90 days from the date of the order sought to be reviewed. In A I R 1929 Rang 229 : 7 Rang 201[11] it was held that Arts. 162 and 173 of Sch. 1, Limitation Act, were not applicable to an application under S. 8 (1), Presidency Towns Insolvency Act, but that the Article applicable was Art. 181. The point is thus dealt with in Sir Dinshah Mulla's Law of Insolvency, page 525, para. 780 :

As under the Bankruptcy Act, so under the Presidency Towns Insolvency Act, no limit of time is fixed for an application for re-hearing. It has been held under the Bankruptcy Act that an application for a review should be made within the time limited for appeal, though it may be entertained on special grounds after the expiration of that time. No review, however, is allowed after the time for appealing has expired if the real object is to get the benefit of an appeal by means of a re-hearing. In a Madras case the question arose whether the Limitation Act, 1908, applied to an application under S. 8 (1), Presidency Towns Insolvency Act. The Court did not express any opinion on the point but held that even if Art. 162 which provides a period of 20 days from the date of the order, applied to the case, the Court had the power under S. 5 of that Act to extend the time if sufficient cause was shown, and that sufficient cause had been shown in that case to extend the time. The same question arose in a Rangoon case where it was held that Art. 181, Limitation Act, applied and the period of limitation was three years from the date when the right to apply accrued. It is submitted that this decision is erroneous, and that there is no time limit for an application under S. 8 (1), Presidency Towns Insolvency Act. The section provides not only for a review, but also for a rescission or variation of an order. It is submitted that the principles of English law apply to cases under the Presidency Towns Insolvency Act.

Obviously Art. 162 of Sch. 1, Limitation Act, can have no application, nor in my opinion is Art. 173 applicable, for, sub-s. (1) of S. 8 provides not only for review but for rescission and variation. The view of the Rangoon High Court was that of a Single Judge of that Court and with all respect to that learned Judge his reasoning is by no means convincing. It would appear that Art. 181 is confined to applications under the Civil Procedure Code. It would appear then that Sir Dinshah Mulla's opinion is correct that there is no period of limitation prescribed for an application under cl. (1) of S. 8 and that the principles of English law are to govern ; and according to these principles an application for review, rescission or variation should not be entertained to save the time provided for appeal when the application has been filed for the purpose of extending the time for appealing. Under the last clause of S. 8 the period of limitation for an appeal under S. 8 (2) (b) will be 90 days. In (1884) 12 Q B D 497,[12] Cotton, L. J. said :

This is an appeal from the refusal of the Registrar to rehear a bankruptcy petition and to reverse an order of adjudication which he had made upon it. The objection is taken that no provision is made by the Act or the rules as to the time within which an application for a re-hearing is to be made and that the application was made to the Registrar in the present case after the time for appealing from the order had expired, and it is said that that is a fatal objection. Possibly, in our view of the present case, it is not necessary for us to decide this point. But I am unwilling that any doubt should be entertained as to the power of the Court to rehear. It is, however, a power which must be exercised with great caution, and it ought not to be used in order to extend the time for appealing.

Reference may also be made to the case in (1873) 43 L J Bk 105.[13] In (1891) 1 Q B 463,[8] Cave J. said :

One general although not invariable rule has been laid down for guiding the Court in the exercise of its discretion under this section, viz., that the Court should not grant a re-hearing where the only object of the applicant is to obtain another opportunity for appealing from the decision of the Judge when he has let the time for appealing from the original decision go by. The universal practice of fixing a limit of time on the power to appeal is

10. ('89) 13 Bom 520 : 16 I A 156 (P C), Candas Narrondas Navivahu v. C. A. Turner.
11. ('29) 16 AIR 1929 Rang 229 : 118 I C 615 : 7 Rang 201, In re L. W. Nassee.
12. (1884) 12 Q B D 497 : 53 L J Q B 571 : 50 L T 744 : 32 W R 839 : 1 Morrell 50, Ex parte May ; In re, May.
13. (1873) 9 Ch 127 : 43 L J Bk 105 : 29 L T 718 : 22 W R 198, Ex parte Mackay; In re Jeevons.

derived from the general maxim, "*interest reipublicæ ut sit finis litium*" but the maxim should not be extended beyond the limit of its utility.

In India under S. 5, Limitation Act, an applicant would be required to show "sufficient cause" for delay in prosecuting an application for review. Now in the present case, the order of adjudication was made on 22nd November 1938 and the application with which I am now dealing was filed on 28th September 1939. It has therefore been made nearly ten months after the order of adjudication, and long after the expiry of the period of appeal. As a result of this order of adjudication the official assignee addressed a letter to the applicants on 7th February 1939 calling upon them to furnish a list of the goods taken possession of by them and return the same or the value thereof to him. To this letter the applicants through their advocate replied on 18th February 1939 repudiating the claim of the official assignee, contending that the transfer was not with the intention to defeat and delay the creditors of Thawerdas Kalumal or to give undue preference to any one creditor. The entertainment of the application for review in these circumstances must clearly be refused as a mere attempt on the part of the applicant to enlarge the time for presenting an appeal. No attempt has been made to show sufficient cause for the delay of ten months. The preliminary objections raised on behalf of the official assignee accordingly prevail and this application must be dismissed. As the law on these points was by no means clear I think I should make no order as to costs.

D.S./R.K. *Application dismissed.*

A. I. R. 1941 Sind 8

DAVIS C. J. AND LOBO J.

Mohanlal Jokhuram — Defendant — Applicant

v.

Parmanand Hotchand, Firm — Plaintiffs — Opponents.

Revn. Appln. No. 64 of 1938, Decided on 9th May 1940, to revise order passed by Judge, Small Cause Court, Karachi, D/- 10th May 1938.

Civil P. C. (1908), O. 21, R. 50 and O. 30— Suit under O. 30—O. 21, R. 50 does not exclude enquiry as to whether a party to suit is liable as partner because he held himself out as such—O. 21, R. 50 is not limited to finding of fact whether particular person is or is not partner.

O. 21, R. 50 (2) is not limited to a finding of fact as to whether a person is or is not a partner. A Court has under O. 21, R. 50 jurisdiction to inquire and decide whether a party to the suit under O. 30 is liable as a partner within the meaning of O. 21, R. 50 (2) because he held himself out to the plaintiff as such : (1903) 88 L T 284, *Rel. on*; A I R 1929 Mad 733 (FB), *Disting.* [P 9 C 1]

Fatehchand Assudomal for P. S. Shahani — for Applicant.

Hukumatrai M. Eidnani — for Opponents.

Davis C. J. — This is an application in revision against the judgment of the Judge of the Small Cause Court, Karachi, who decided that in execution of a compromise decree in a suit by a firm against a firm under O. 30, Civil P. C., he could under the provisions of O. 21, R. 50, Civil P. C., inquire and decide whether a party to the suit was liable as a partner within the meaning of O. 21, R. 50 (2), because he held himself out to the plaintiff as such. The defendants in the suit under O. 30, Civil P. C., were father and son, and finally the suit was compromised, and it was agreed under the terms of the compromise that the question of the liability of the father Mohanlal as a partner should be inquired into and decided in execution proceedings, and it is now said that the inquiry in the execution proceedings cannot extend beyond an inquiry as to the simple question of fact, whether Mohanlal was a partner of his son Ramchand, and the further question as to whether he held himself out within the meaning of S. 28, Partnership Act, to be a partner could not be inquired into.

But we do not think that it was ever intended that O. 21, R. 50, Civil P. C., should be construed in so narrow a manner as to exclude an inquiry under this order and rule, as to whether the person named as a defendant in a suit under O. 30 is liable as a partner because he held himself out as such. Mr. Fatehchand who appeared for the applicant said that he had no direct case upon the point and referred us to a case which relates to the liability of legal representatives of a partner, arguing that by analogy the words under O. 21, R. 50, Civil P. C., should be strictly construed "as being a partner" meaning "as being in fact a partner." The case he referred us to was 52 Mad 885.[1] But we do not think that we are here concerned with the question of the liability of a partner's legal representative, and we shall deal with such a case when it arises. We have however a case before us, (1903) 88 L T 284,[2] in which the terms of O. 48A, R. 8, of the Supreme Court were interpreted. But

1. ('29) 16 AIR 1929 Mad 733 : 119 I C 603 : 52 Mad 885 : 57 M L J 344 (FB), Mahomed Yusuf v. Muhammad Sadulla Badsha.
2. (1903) 1 K B 854: 72 L J K B 426: 88 L T 284: 51 W R 598: 19 T L R 348, Davis v. Hyman & Co.

there is no difference of any substance between the terms of that order and the terms of O. 21, R. 50 (2), Civil P. C. The words quoted in the judgment of Sterling, L. J. are (p. 285) :

> If the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm

he may apply for leave to do so and the Lords Justice in that case held that those words were wide enough to include a person who held himself out to be a partner, and therefore was liable as such. And reading O. 21, R. 50 (2), Civil P. C., we think that the words "as being a partner in the firm" which are in effect the same words as "as being a member of the firm" in O. 48A, R. 8 of the Supreme Court Rules, are wide enough, when read with the words which follow, to include a person who holds himself out as a partner in the firm and is therefore liable as such. The words "as being a partner in the firm" in sub-r. (2) of O. 21, R. 50, Civil P. C., mean also, it appears to us, as if he were a partner in the firm, and that sub-rule refers to this liability as a partner. It is not limited to a finding of fact as to whether a particular person is or is not a partner. In (1903) 88 L T 284[2] Sterling L. J. said :

> In my opinion the meaning of the rule is that such questions are to be tried in this proceeding under the rule and not in another action. It is suggested that, if this be allowed, the person alleged to be liable might be deprived of a defence to the claim in the action which he might otherwise have had. But the issue is a general one, whether he is liable as a member of the firm, and the issue could in a proper case be so framed as to have that question determined if it really arises.

Under O. 21, R. 50 (2), Civil P. C., it is provided that the liability of an individual as a partner in the firm may be tried and determined in the same manner as an issue in the suit. Therefore, we cannot see that the applicant, Mohanlal in this case, would in any way be prejudiced by the fact that this issue is raised and decided in execution proceedings and not in the suit itself. It is true that he has no right of appeal from the decision of the Judge of the Small Cause Court. But he would have in no case the right of appeal from the decision of a Judge of the Small Cause Court. He has a right to come in revision just as much against a finding upon the issue as to whether he is liable as a partner because he has held himself out to be such as upon any other issue decided by the Judge of the Small Cause Court where a right to come to this Court in revision lies. On the merits we cannot say that the Judge was not justified in drawing the inference from the facts on the record that this father sitting and serving in the shop of his son did not hold himself out, so far as the plaintiff was concerned, as a partner within the meaning of S. 28, Partnership Act. We can see, therefore, no reason to interfere with the findings of the Judge on law or fact, and we dismiss the revision application with costs accordingly.

G.N./R.K. *Application dismissed.*

A. I. R. 1941 Sind 9

DAVIS C. J. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant

v.

Ibrahimji Hakimji Firm and others — *Assessees* — Opponents.

Reference No. 81 of 1938, Decided on 26th July 1940, made by Commissioner of Income-tax, Bombay &c., D/- 14th November 1938.

(a) Practice—Errors in procedure.

Errors in procedure can be condoned. [P 11 C 1]

(b) Income-tax Act (1922), Ss. 33, 34 and 35 —Powers of Income-tax Officers in matter of revision are limited by Ss. 33, 34 and 35.

It is not open to an Income-tax Officer, when he has proceeded to a final assessment to reopen that assessment whenever and however he pleases. The powers of Income-tax Officers in the matter of revision are limited by Ss. 33, 34 and 35 of the Act. [P 11 C 1]

(c) Income-tax Act (1922), S. 4 (3) (i)—Private wakf created for maintenance of settlor's family—Income is liable to taxation.

A difference must be drawn between property dedicated in name and in fact to God, in short a difference must be drawn between a private wakf created, if not primarily, at least in part, for the maintenance of the settlor's family, and a wakf created for charitable or religious purposes falling within the exception in S. 4 (3) (i) of the Act. So far as the wakf operates as a wakf for charitable and religious purposes, immunity from taxation can be claimed, but so far as the wakf operates for the maintenance of the settlor's family or other quasi secular purposes, the income is liable to taxation : A I R 1933 All 407, *Rel. on.* [P 12 C 1]

(d) Income-tax Act (1922), Ss. 6 and 9 — Trustees of private wakf are not owners of income—Income should be taxed in hands of beneficiaries.

Trustees of private wakf created for maintenance of settlor's family are not owners of income for the purposes of Ss. 6 and 9. Hence the income should be taxed in the hands of the beneficiaries and not in the hands of the trustees. [P 12 C 2; P 13 C 1]

(e) Income-tax Act (1922), S. 3 — Trustees under private wakf constitute association of individuals.

The trustees under a private wakf constitute an association of individuals within the meaning of S. 3 of the Act. [P 13 C 1]

Partabrai D. Punwani, Advocate-General — for Applicant.

Suganlal Hassanand — for Opponents (Assessees).

Davis C. J. — This is a reference by the Commissioner of Income-tax, Bombay Presidency and Sind under S. 66 (2), Income-tax Act, relating to the assessment for the year 1937-38 of an association of individuals Messrs. Ibrahimji Hakimji Ghulam Hussain Ibrahimji and others, Trustees of the wakf properties of Seth Ibrahimji Hakimji. This is a case of a private wakf, now valid under the Mussalman Wakf Validating Act of 1913, and the real question at issue is whether the tax is to be assessed upon the income in the hands of the trustees as an association or upon the income in the hands of the beneficiaries.

The Advocate for the assessees relies principally upon a Bombay case in 41 Bom L R 232.[1] Some confusion appears to have arisen in the first instance as to the proper designation or identity of the assessees. The assessment was first made by the Income-tax Officer upon the Ibrahimji Hakimji trust on an income of Rs. 2967 left after payments to charities and various beneficiaries had been deducted. An appeal was made against this assessment principally upon the ground that the wakf as a charity was exempt, but also upon the question of the identity of the assessees. Before this appeal was decided however the Income-tax Officer came to the conclusion that this assessment was incorrect and he issued a second notice in the matter of this same income but addressed it, as he thought, to other assessees, namely, Seth Ibrahimji Hakimji, Ghulam Hussain Ibrahimji and others, trustees of the wakf properties of Seth Ibrahimji Hakimji as "per Seth Ghulam Hussain Ibrahimji, Garden Road, Karachi". Though we accept for the purpose of this reference the finding of fact by the Commissioner that these two assessees, the Ibrahimji Hakimji trust in the first case, and the trustees by name in the second case, were different entities, and he answers the questions referred to us on this basis, were we deciding this question of fact, we think we should have come to the conclusion that the trust on whom the first notice was issued and the individual trustees who composed the trust were essentially the same. Indeed, the fact that the Income-tax Officer issued these two notices has been made the basis of much argument before us, for relying upon the case in 32 S L R 549,[2] it has been argued before us that the Income-tax Officer had no power to cancel his first assessment, he having proceeded finally under the Act to make a formal assessment on the assessees, the trust. He could not therefore make a second assessment upon the same income on the second assessees, the trustees, as an association of individuals. Therefore it was argued the second assessment was bad; and there is no first assessment in existence because that has been quashed on appeal by the Assistant Commissioner, when by consent the appeals against both assessments were heard together and the second assessment upon the trustees as an association was confirmed.

There is, however, no need for us to decide in this reference the general question of how far an Income-tax Officer, having proceeded to a formal assessment upon the income in the hands of A, can treat that assessment as of no effect and proceed to a formal assessment upon the same income in the hands of B. The third question referred to us, which involves this question of what might be called a double assessment of the same income, is in the following form :

(iii).—Whether the assessment in dispute is invalid because the appeal lodged against the assessment in the name of "Ibrahimji Hakimji Trust" was not decided by the Assistant Commissioner but was kept back for hearing along with the appeal against the assessment in dispute as agreed to by the assessees,

and must be decided on its own particular facts.

It could have been argued that if the Income-tax Commissioner had not found as a matter of fact that the "trust" and the "trustees" were different persons, and second notice issued nominally under S. 22 could have been regarded as essentially a notice by the Income-tax Officer under S. 34, on the principle that what has to be looked at is what in fact and in substance has been done, and that mere labels, mere references to sections, do not count. So it might be held that the second notice on the assessees under S. 22 in the circumstances of the case substantially complied with and was in effect a notice under S. 34. We must, however, treat this case on the basis that the two notices were on two different persons. Thus, it might well be argued that the first

1. ('39) 26 AIR 1939 Bom 195 : 182 I C 712 ; I L R (1939) Bom 284 : 41 Bom L R 232, Commissioner of Income-tax, Bombay v. Abubakar Abdul Rehman.

2. ('38) 25 AIR 1938 P C 175 : 175 I C 1 : I L R (1938) Bom 487 : 65 I A 236 : 32 S L R 549 (PC), Commissioner of Income-tax, Bombay Presidency & Aden v. Firm Khemchand Ramdas.

assessment under the order dated 21st July 1937, was valid until it was set aside in appeal, and that the second assessment made under the order dated 14th January 1938, and while the appeal against the first assessment was pending, was contrary to law because it was made after the first assessment, which had not been set aside and was still in force and the same income cannot be assessed twice in the hands of different persons.

It appears, however, that it was agreed between the assessees and the Assistant Income-tax Commissioner that the appeal against the first assessment, when it came up for hearing before the Assistant Commissioner on 5th October 1937, should be adjourned pending an appeal to be made against the second assessment when it was made and that both appeals should be heard together. Otherwise the Assistant Commissioner would have heard the appeal against the first assessment on 5th October 1937, before the second assessment was made, when, if the appeal had been dismissed, presumably the second assessment would not have been made, while if the appeal had succeeded, the way for the second assessment would have been left open.

It would thus appear that the assessees themselves agreed to the course that was taken, and that in equity they had no cause for complaint. We do not think that we have here a question of jurisdiction which consent cannot give but a matter of errors in procedure which could be, and were in this case, in fact, condoned. It cannot be said that the Income-tax Officer had no inherent jurisdiction over the subject-matter in dispute so as to attract the principle laid down in 13 I A 134,[3] referred to in 29 S L R 455.[4] We would invite the attention of the Income-tax Officers concerned to the case in 32 S L R 549,[2] to which we have referred, and the necessity of following the principles laid down therein. It is not open to an Income-tax Officer, when he has proceeded to a final assessment to reopen that assessment whenever and however he pleases. The powers of Income-tax Officers in the matter of revision are limited by Ss. 33, 34 and 35 of the Act. Now the questions referred to us are four in number and are as follows :

(i) Whether in the circumstances of the case, the assessees formed an association of individuals within the meaning of S. 3 of the Act; (ii) whether the said association can be said to be the owner of the wakf properties within the meaning of S. 9 of the Act and is rightly assessed as such; (iii) whether the assessment in dispute is invalid because the appeal lodged against the assessment in the name of "Ibrahimji Hakimji Trust" was not decided by the Assistant Commissioner but was kept back for hearing along with the appeal against the assessment in dispute as agreed to by the assessees; and (iv) whether the procedure adopted by the Income-tax Officer in serving notices on Seth Ghulam Hussain Ibrahimji contravened the provisions of Ss. 2 (12) and 63.

With the third question we have already dealt as it was argued first before us. But the second question really covers the decision in this case whether it is the trustees or the beneficiaries under the trust who are to be assessed to income-tax, and it does appear that in answering this question as he had done, the learned Income-tax Commissioner has fallen into the same error as is referred to in the Bombay case in 41 Bom L R 232,[1] for in this case, as in that, the learned Commissioner quotes a passage from the judgment of the Bombay High Court in the case of Kantisen Mohanji Ganjawalla and Brothers (Civil Reference No. 10 of 1937) as follows :

In the case of the other property involved the assessees did not purchase this, but it was conveyed to them by the trustees of a settlement under which they were the beneficiaries. It seems to me to be irrelevant to consider how the property vested in the association of individuals became vested in them. The question is how they have it and are using it. If they are using it for the purpose of producing income, I think the property is vested in them as an association of individuals, and they are properly assessable under Section 9.

And with reference to this passage also cited by the learned Commissioner in the reference to the High Court at Bombay in 41 Bom L R 232[1] the learned Chief Justice remarked :

The main question which arises is whether under this wakf the trustees or the beneficiaries ought to be assessed. Up to a recent date, the Commissioner of Income-tax had assessed the beneficiaries on the income which they received under the wakf deed, as appears from his order of 20th June 1935, which is an accompaniment to Ex. "E". But recently he has altered that practice in accordance with what he considers to be the law as laid down by this Court in *Commissioner of Income-tax, Bombay* v. *Laxmidas*[5] and *Commissioner of Income-tax, Bombay* v. *Dwarkadas Pitale*,[6] and in two unreported cases to which the learned Commissioner refers. Those cases, in my opinion, do

3. ('87) 9 All 191 : 13 I A 134 : 4 Sar 741 (P C), Ledgard v. Bull.
4. ('36) 23 A I R 1936 Sind 99 : 164 I C 43 : 29 S L R 455, Allahbux v. Nusserwanji & Co.
5. *Reported in* ('38) 25 AIR 1938 Bom 41 : 173 I C 482 : ILR (1937) Bom 830 : 39 Bom L R 910.
6. *Reported in* ('38) 25 A I R 1938 Bom 353 : 177 I C 447 : 40 Bom L R 455.

not govern the present questions, because in none of those cases was the Court dealing with trustees. In all those cases immovable property had become vested in two or more persons who were using it for the purpose of producing income for their own benefit, and the Court held that they were properly assessable as an association of individuals under S. 3 in respect of the property and were not assessable separately in respect of their respective interests in the property. But in none of those cases, as I have said, was there any question as between a trustee and beneficiary. The trustees in this case are no doubt an association of individuals, but that consideration does not determine the question whether they or their beneficiaries should be assessed to income-tax.

Now under the wakf deed made by Ibrahim Hakimji, dated 17th February 1932, which made certain immovable properties the subject of the wakf, after the payment of rates and taxes, and 10 per cent. of the net income into a depreciation fund for repairs, Rs. 35 per month was to be spent on the Dawoodi Borah Madressah in Karachi, and of the balance of the net income, Rs. 300 per month was to be paid to the wife of the settlor Amtullabai, Rs. 50 per month to each of the four daughters of the settlor, while the residue was to be divided in equal shares among the four sons. The settlor appointed himself and his four sons as trustees, but we do not think that this makes any difference to the decision of the case. After the extinction of all male descendants in the direct line the wakf property was to go to its ostensible purpose, charities, such as musjids, madressahs, musaffirkhanas of the Dawoodi Borah community and other uses such as the maintenance of the poor and needy of the Dawoodi Borah community.

It was argued before us on behalf of the assessees that a wakf being a dedication to God could not be the subject of taxation ; but we think a difference must be drawn between property dedicated in name and in fact to God, in short a difference must be drawn between a private wakf created, if not primarily, at least in part, for the maintenance of the settlor's family, and a wakf created for charitable or religious purposes falling within the exception in S. 4 (3) (i) of the Act. So far as the wakf operates as a wakf for charitable and religious purposes, so far, it appears to us, immunity from taxation can be claimed, but so far as the wakf operates for the maintenance of the settlor's family or other quasi secular purposes, so far it appears to us the income is liable to taxation. This is the opinion of the Bombay High Court in 41 Bom L R 232[1] already referred to. This is also the opinion of a Bench of the Allahabad High Court in 55 ALL 512,[7] at p. 517. At p. 517 the learned Judges say :

> It is true that according to the view taken in 42 ALL 609,[8] the estate in the wakf property vests in God after the creation of a public wakf. But we doubt if it can be argued that in private wakfs the estate vests in God. The correct view would be to hold that the estate vests in the beneficiaries.

It was argued by the learned Advocate-General that not only was the income of the wakf other than that part spent on charitable purposes liable to taxation, but it was liable to taxation in the hands of the trustees, and he referred to the case in 12 Lah 725 ;[9] but the question there at issue was not as to whether the income was liable to taxation in the hands of the trustees or the beneficiaries, but whether it was liable at all. It of course makes a difference to the revenue whether the income is liable to taxation in the hands of the trustees before it is divided up among the beneficiaries or after it is divided up.

In this case the total income assessed in the hands of the trustees for the second assessment confirmed in appeal was Rs. 8967 liable to a tax of Rs. 455-5-0, but the position will be very different if the wife, each of the four daughters and each of the four sons is to be taxed on their individual shares. But this we think was the intention of the Legislature and the scheme of the Act, and must be done. We have heard arguments on behalf of the assessees that the trustees, so misnamed under the deed of trust, are not owners, for the owner is God, but are merely managers or superintendents. We doubt if God can be rightly described as the owner of wakf properties subject to the quasi religious or charitable burden of the maintenance of the settlor or his family, at least not within the meaning of the Income-tax Act. But we do not think for the purpose of Ss. 6 and 9, Income-tax Act, that the trustees are the owners of the income, for after all it is income which is taxed under the Income-tax Act. It is true the language of S. 9 does give rise to some difficulty. Section 9 (1) is as follows :

> Th tax shall be payable by an assessee under the head 'property' in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner,

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7. ('33) 20 AIR 1933 All 407 : 147 I C 926 : 55 All 512 : 1933 A L J 685, Muhammad Qamar Shab v. Muhammad Salamat Ali Khan.

8. ('21) 8 A I R 1921 P C 105 : 57 I C 329 : 42 All 609 : 47 I A 224 (P C), Muhammad Rustam Ali Khan v. Mushtaq Husain.

9. ('31) 18 A I R 1931 Lah 578 : 132 I C 689 : 12 Lah 725 : 33 P L R 349 (F B), Umar Bakhsh v. Commissioner of Income-tax, Punjab.

other than such portions of such property as he may occupy for the purposes of his business, subject to the following allowances.

Now, we think this must mean that the "annual value" is the "assessable income" of the immovable property. The person liable to taxation is the owner of the income of the annual value, and we think this is the beneficiary who receives and keeps the income and not the trustees who, in this case are the mere channel through which the income passes to its named recipients. It is, we think, no answer to say that the trustees first receive the income, and a person is not immune from income-tax on his own income because he chooses to give that income away. But the trustees do not here receive an income which they can give away or retain as they wish. It is not their income; they cannot keep it; they must deal with it as the trust declares.

We think the decision in 61 I A 209 : 58 Bom 317,[10] must be read in the light of its own facts. Under the Act endowing the Baronetcy the trustees paid only the balance to the Baronet. In their hands was the disposal of the income, it is true, in accordance with the terms of the trust, but the beneficiary had no claim on any particular sum. We think, therefore, this is a case where the income is found with the beneficiaries and should be taxed in their hands. There remain then only questions (i) and (iv). So far as question (i) is concerned, we have no doubt that the trustees under the trust constitute an association of individuals within the meaning of S. 3 of the Act, but that does not make them owners within the meaning of S. 9. The answer to the first question is in the affirmative. The answer to the fourth question is, we think, also in the affirmative. In this case it has been found as a matter of fact that Seth Ghulam Hussain Ibrahimji was the managing trustee. He was therefore properly served with notice under S. 2 (12) (a) read with S. 63, Income-tax Act, but in view of our answer to the second question, the answers to the three other questions are irrelevant.

We think the assessees are entitled to their costs, and the refund of the Rs. 100 fee. The questions are answered accordingly. We have also a reference relating to the assessment on the same assessees for the year 1936-37. There is no material difference in the two cases; the questions referred to us are the same, and the answers will be the same as the answers given on the case stated for the year 1937-38 for the reasons given in the order. It is true that in the course of the proceedings for the assessment of 1936-37, the Income-tax Officer issued a notice to the assessees under S. 34 of the Act, but this makes no material difference to the answers to be given on the questions referred to us. The order as to costs in this case will be the same as the order as to costs in the connected case.

D.S./R.K. *Answer accordingly.*

10. ('34) 21 A I R 1934 P C 116 : 148 I C 855 : 58 Bom 317 : 61 I A 209 (P C), Currimbhoy Ebrahim v. Commissioner of Income-tax, Bombay.

A. I. R. 1941 Sind 13

DAVIS J. C. AND WESTON J.

Pribhomal Teoomal — Appellant

v.

Kishnomal and another — Respondents.

Second Appeal No. 16 of 1938, Decided on 14th February 1940, against judgment of Assist. Judge, Sukkur, D/- 31st January 1938.

(a) Civil P. C. (1908), O. 38, R. 9 and O. 21, R. 55—Construction — O. 38, R. 9 is not exhaustive—It does not provide for what happens when suit is decreed—O. 21, R. 55 provides for what is to happen when decree in suit in which attachment before judgment was obtained is satisfied.

Order 38, R. 9 is in fact not exhaustive. It provides for what is to happen upon two events, when the defendant furnishes the security or when the suit is dismissed. It does not provide and is not intended to provide for what happens when the suit is decreed. O. 38, R. 11, Civil P. C., provides for that, so far as the actual attachment is concerned and O. 21, R. 55 provides for what O. 38, R. 9 does not provide, namely, for what is to happen when the decree in a suit in which attachment before judgment was obtained is satisfied. [P 14 C 2]

(b) Civil P. C. (1908), O. 21, R. 57—Applicability—Attachment before judgment — Execution application after judgment for sale of property attached—O. 21, R. 57 applies.

Order 21, R. 57 applies to the case of attachment before judgment where after judgment an execution application is made for the sale of the property attached, but would not apply when the execution application is for the sale of other properties. Consequently on dismissal of an execution application for sale of attached property the attachment existing by reason of an order passed before judgment, ceases under O. 21, R. 57: A I R 1929 Bom 321; AIR 1931 Bom 550 and AIR 1924 Mad 494 (F B), *Rel. on* ; A I R 1929 Cal 465, *Not approved.* [P 15 C 1]

Manghanmal Bhojraj — for Appellant.

Dipchand Chandumal — for Respondent 2.

Davis J. C. — This is an appeal against an order of the Second Assistant Judge, Sukkur, who dismissed an appeal against an order of the subordinate Judge, Jacobabad, dismissing an application in execution by the present appellant. The application in execution was dismissed because both the

lower Courts held that O. 21, R. 57 applied in the case of attachment before judgment as in the case of attachment after judgment. It is not disputed that the appellant had obtained an attachment before judgment of certain land sold in execution of a mortgage decree in another suit or that he has applied to execute his own decree by the sale of this attached property. In fact he has filed no less than three execution applications for the sale of this attached property, the first and last of which were dismissed for default; the second was withdrawn as the result of a compromise. The appellant however contends that in spite of these dismissals the attachment still subsists for his benefit and gives him preference over the claims of all others who attached only after and not before judgment. There are conflicting rulings upon this point and the learned Judges in the Courts below have preferred the view taken by the Madras and Bombay High Courts to that taken by the Calcutta and Allahabad High Courts. The view of the Allahabad High Court in 46 ALL 894[1] is that attachment before judgment is raised only under the circumstances set out in O.38, R. 9 which is in effect exhaustive. Only in the manner provided in that rule can an attachment before judgment be withdrawn, that is to say, when the defendant furnishes security required together with the security for the costs of the attachment or when the suit is dismissed. So when I asked the learned advocate for the appellant what happened if the suit was not dismissed but was decreed and no application in execution was made he said the attachment would remain in force for twelve years, nor would he concede the position was otherwise, even if the decree were satisfied. He would not admit, for instance, that O. 21, R. 55 applied directly or by analogy the property would remain attached for twelve years.

In the *Calcutta case*[2] Rankin C. J., took the view that O. 21, R. 57 was intended to deal only with the case of attachments in execution of a decree and not to attachments before judgment and the rule was intended to guard against that accumulation of execution applications which would inevitably arise if applications were allowed as the result of the default of the decree-holders to accumulate upon the files of the Court, and the learned Chief Justice agreed with the dissenting judgments of Schwabe C. J. and Wallace J., though not with all their arguments in 47 Mad 483.[3] The judgment of Coutts-Trotter J., in 47 Mad 483[3] proceeds mainly upon the basis that after judgment an attachment before judgment becomes just as much an attachment in execution, once an application in execution is made, as an attachment after judgment and with all respect I agree with the learned Judge and cannot discover that essential difference between attachment before judgment and attachment in execution to which Schwabe C. J., on page 492 refers. The purpose of attachment before judgment is merely to secure the judgment-creditor the fruits of the decree once judgment is passed in his favour. Once judgment has been obtained the attachment before judgment has served its purpose. It is true one advantage still remains to him. He need not do again that which has been already done. He need not re-attach that which has been once attached. That is only common sense. The attachment before judgment becomes in virtue of the decree in favour of the attaching creditor an attachment after judgment. There can be *in rerum natura* no attachment before judgment once judgment is given.

Order 38, R. 9 is in fact not exhaustive. It provides for what is to happen upon two events, when the defendant furnishes the security or when the suit is dismissed. It does not provide and is not intended to provide for what happens when the suit is decreed. Order 38, R. 11 provides for that, so far as the actual attachment is concerned, and O. 21, R. 55, for instance, in my opinion, provides for what O. 38, R. 9 does not provide, namely for what is to happen when the decree is satisfied, as in my opinion O. 21, R. 57 provides for what is to happen when an execution application is made for sale of the attached property and as the result of the default of the decree-holder the application is dismissed. We are not here concerned with a case where an execution application is made for sale of property belonging to the judgment-debtor other than the property attached before judgment. We will deal with that case when it arises, but according to the learned advocate for the appellant a judgment creditor can get his decree satisfied from the sale of property other than the property attached before judgment, but that property will

1. ('24) 11 A I R 1924 All 860 : 80 I C 106 : 46 All 894 : 22 A L J 823, Akhey Ram v. Basantlal.
2. ('29) 16 A I R 1929 Cal 465 : 119 I C 118 : 56 Cal 416, Shibnath Singh v. Saberuddin Ahmed.
3. ('24) 11 A I R 1924 Mad 494 : 79 I C 144 : 47 Mad 483 : 46 M L J 415 (FB), Meyyappa Chettiar v. Chidambaram Chettiar.

remain attached for twelve years, because an attachment before judgment can be withdrawn only on the happening of the two events mentioned in O. 38, R. 9. This is not, however, the case before us and I am not called upon to express my opinion on this proposition.

The two Bombay cases 53 Bom 543[4] and 55 Bom 693[5] are further authorities for the view that O. 21, R. 57 applies to the case of attachment before judgment where after judgment an execution application is made for the sale of the property attached, but would not apply when the execution application is for the sale of other properties. The judgment in 55 Bom 693[5] was the judgment in appeal from the case in 53 Bom 543[4] and prefers the majority judgment in 47 Mad 483[3] to the Calcutta judgment in 56 Cal 416[2] and with that opinion I respectfully agree. I think, therefore, the lower Courts were right in holding that O. 21, R. 57 applies to a case where application is made in execution against certain property attached before judgment and the application is dismissed on default of the decree-holder. I would therefore dismiss this appeal with costs accordingly.

Weston J.—I agree but as there is considerable difference of opinion on the main question arising in this appeal I give briefly my reasons for so doing. The question may be stated as follows:

> Whether on dismissal of an execution application for sale of attached property the attachment existing by reason of an order passed before judgment, the attachment ceases under O. 21, R. 57.

With all respect I am not able to appreciate the argument of essential difference which has found favour in 56 Cal 416[2] and in the minority judgments in 47 Mad 483.[3] There is of course this difference, that an attachment obtained before judgment subsists for the benefit of the future execution application, while attachment after judgment requires application for execution by attachment and sale. But the fact that in the former case execution may never be sought does not seem to me to create a material difference between the two forms of attachment, assuming for the moment that it is proper to speak of two forms. The attachment before judgment is sought for the same purpose as that after judgment, namely satisfaction of a claim. The anticipatory nature of the attachment before judgment naturally requires a special procedure which is contained in O. 38. But once judgment has been obtained I can see no good reason for creating a distinction because of differences in preliminary procedure. The procedure of O. 38 does not deal with the position after judgment except that R. 11 in effect provides that attachment does not cease by reason of judgment. In my view R. 9 has no application after judgment.

I think it is clear that provisions of O. 21 must be applied after judgment to attachments which happen to have been obtained before judgment. Questions arise after judgment relating to attachments obtained under O. 38 and those questions are just as much questions relating to execution within the meaning of S. 47 as questions arising from attachments obtained by execution application. For example the learned Chief Justice in 47 Mad 483[3] at p. 494 contemplates that an end may be put by order of the Court to attachment obtained before judgment. I do not think it could be urged seriously that a judgment-debtor who has satisfied the decree must nevertheless suffer his property to remain under attachment for a period which may be of years, because O. 38 contains no provision for its release. I see no difficulty in applying O. 21, R. 55 to such a case. If it is conceded that, when dealing after the stage of judgment with attachments obtained before judgment recourse must be had to O. 21, I think much of the foundations upon which the argument of essential difference is based has disappeared. And when points of identity rather than of difference are looked to reference may be made to the words of Ramesam J., in 47 Mad 483[3] at p. 512, where he says:

> But do these differences make the attachment before judgment so entirely different in character, from one after judgment that one can never pass into the other? I am of opinion it is not. In my view, the attachment before judgment and that after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character: *vide* 1 N W P H C R 81[6] at pp. 96 and 97. Just as the effect of two attachments of the same property in execution of the same decree (the second one being effected in forgetfulness of the first) is merely that the property is under attachment, the first attachment merging in the second, similarly the effect of an attachment before judgment followed by a redundant re-attach-

4. ('29) 16 AIR 1929 Bom 321 : 119 I C 769 : 53 Bom 543 : 31 Bom L R 652, Shrinivas v. Hari.
5. ('31) 18 AIR 1931 Bom 550 : 134 I C 972 : 55 Bom 693 : 33 Bom L R 1130, Hari v. Shrinivas.
6. ('69) 1 N W P H C R 81, Sarkies, Agent of the Official Assignee of the Insolvent Court, Calcutta v. Mussumar Bundoo Baee.

ment after judgment is merely that the property is under attachment. In such cases it is meaningless to say that the property is under two attachments. It is still more meaningless to say that one attachment is dropped but another subsists. All the earlier attachments, in all such cases, merge into the last. Where there are several attachments, it is not that every attachment has an individuality of its own but the property is under a state of attachment.

I can see therefore no reason to presume that the Legislature must have intended that when a decree is being executed varying considerations should apply to an attachment by reason of the point of time, in relation to the decree, at which it was effected; that in one case the negligence on the part of the decree-holder should be tolerated while in the other it should receive an appropriate punishment. I consider that such an interpretation should be given to R. 57 of O. 21, only if the wording requires it. The rule is as follows:

Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

Having regard to the purpose for which the attachment was obtained before judgment and the purpose for which it subsists after judgment, namely for execution of the decree I can see no difficulty in holding that an attachment obtained under O. 38 is, after judgment, as much an attachment in execution as an attachment obtained on application under O. 21, R. 11. I consider therefore that the question should be answered in the affirmative and I agree with the order proposed.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Sind 16

DAVIS C. J.

Rochi Bhojomal v. *Emperor.*

Criminal Appeal No. 50 of 1940, Decided on 30th July 1940.

Bombay District Police Act (4 of 1890), S. 61D — Magistrate merely referring to previous convictions of accused — Offences for conviction neither specified nor convictions proved — Conviction under S. 61D cannot be sustained.

It is particularly necessary that when there is a penal statute with sections of wide scope such as S. 61D, those sections when they are applied by a Magistrate should be carefully applied and the Magistrate should be careful that all conditions necessary for their application are satisfied before they are applied. [P 16 C 2]

Previous convictions, for theft or for housebreaking, may be sufficient evidence of bad character, when such evidence is admissible, to sustain the charge that the accused are "reputed thieves." Where the Magistrate merely refers to the previous convictions which are neither proved nor the offences for those convictions are specified a conviction under S. 61D cannot be sustained: A I R 1939 Sind 203, *Ref.* [P 16 C 2]

Ranjit J. Chandnani for Gopaldas N. Lala — for Appellant.

D. N. O'Sullivan, Public Prosecutor — for the Crown.

Judgment.—I have before me an appeal by one Rochi who was convicted with one Loku by the Third Additional City Magistrate, Karachi, of an offence under S. 61D, Bombay District Police Act, and sentenced to three months' rigorous imprisonment. The accused Loku has not appealed, but as his case is much the same as the case of Rochi, I shall deal with his case in revision, for it appears to me that the Magistrate has not sufficiently appreciated the provisions of S. 61D, Bombay District Police Act, and the convictions of the accused must be set aside, and as they have been already in prison for more than a month, I can see no useful purpose in ordering a retrial.

Section 61D, cl. (d) requires that the person who is found loitering in the street must be a reputed thief. The words are: "being a reputed thief", but beyond referring to the fact that both have previous convictions the Magistrate does not show that either Rochi or Loku is a "reputed thief". The previous convictions, of course, may be for theft, they may even be for house-breaking, which may be sufficient evidence of bad character, when such evidence is admissible, to sustain the charge that they are "reputed thieves". But we do not know for what offences these previous convictions are; furthermore, even in summary proceedings previous convictions must be properly proved, and how these are to be proved is explained in ILR (1939) Kar 677,[1] to which ruling the attention of the learned Magistrate is invited. It is I think particularly necessary that when there is a penal statute with sections of wide scope such as S. 61D, Bombay District Police Act, those sections when they are applied by a Magistrate should be carefully applied and the Magistrate should be careful that all conditions necessary for their application are satisfied before they are applied. I think, therefore, the convictions must be set aside and the accused acquitted and for the reasons I have given, I see no necessity to order a retrial. Order accordingly.

G.N./R.K. *Conviction set aside.*

1. ('39) 26 AIR 1939 Sind 203 : 183 I C 219 : 40 Cr L J 770 : ILR (1939) Kar 677, Ghous Bakhsh v. Emperor.

**** A. I. R. 1941 Sind 17**

DAVIS C. J. AND WESTON J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant

v.

Indian Life Assurance Co. Ltd., Karachi — *Assessees* — Opponents.

Ref. No. 46 of 1938, Decided on 19th September 1940, made by Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, D/- 20th May 1938.

** *(a) Income-tax Act (1922), S. 8, Proviso 2— Life Assurance Company holding tax free securities is entitled to ask that whole interest of tax-free securities should be deducted from total income before tax is assessed even if that total income is calculated according to statutory rules.*

The mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in R. 25, Income-tax Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities given by the proviso to S. 8, Income-tax Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the whole of the interest of their tax free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules: view of Derbyshire C. J., in I L R (1937) 2 Cal 540, *Approved.*

[P 17 C 2; P 18 C 1, 2]

(b) Income-tax Act (1922), S. 8, Proviso 2 — Assessee company in obedience to direction of income-tax department inserting certain figure as interest on tax free securities in their return — They can challenge it in appeal.

Even if the assessee company in obedience to the direction of the income-tax department and under protest accepted certain figures as interest on tax free securities, and inserted it in their return, they are free to challenge it in appeal within the time allowed. [P 17 C 2; P 19 C 2]

Partabrai D. Punwani, Advocate General — for Applicant.

D. N. O'Sullivan — for Opponents (Assessees).

Davis C. J. — This is a reference by the Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan, relating to the income-tax assessment of the Indian Life Assurance Co., Ltd., for the year 1937-38 and the question for our decision put briefly is, whether the assessee company is entitled to deduct from the total income the whole or only part of the interest on tax free securities. The assessee company claims that it is entitled to deduct the whole of the interest of tax-free securities relying on the proviso to S. 8, Income-tax Act, and the Calcutta case in I L R (1937) 2 CAL 540,[1] while the learned Income-tax Commissioner claims that the assessee company is entitled to deduct from the income or actuarial surplus only such part of the interest on tax-free securities as, to use the words of the Advocate-General, "finds its way" according to the calculation of the actuary into this actuarial surplus.

The question for our decision as stated by the learned Commissioner is as follows:

In view of the expert evidence of the actuary of the assessees certifying that the total actuarial surplus for the quinquennium dated 31st May 1932 included Rs. 4,21,468, only on account of receipts from interest on tax-free securities and in view of the declaration by the assessees in the return of income put in by them saying that the annual average of such interest was only Rs. 84,294, were they entitled to a deduction from the aforesaid surplus of a greater amount viz., Rs. 7,63,945, than the one thus proved to have been included therein and that too when there was no evidence whatever to show that anything beyond the aforesaid amount of Rs. 4,21,468 was included in the said surplus on account of such interest?

It was agreed, however, that this question could more conveniently be divided into two, with the arguments omitted, *see* 28 S L R 174,[2] and the questions arising out of the stated case were agreed as follows:

(1) whether the whole or part of the income earned from tax-free securities by the assessee-company is to be deducted from the total income, and

(2) whether the assessee-company can challenge the figure of Rs. 84,294 shown as interest on tax-free securities in the return for 1937-1938.

Our answer to the first question is that the whole income from tax-free securities is to be deducted, and our answer to the second question is that the assessee-company can challenge the figure given. The decision of the first question appears to us to depend upon the question whether the provisions of S. 8, Income-tax Act, apply to the calculation of the assessable income of a Life Assurance Company, and we think the mere fact that the accounts of a Life Assurance Company have to be kept under the provisions of the Life Assurance Companies Act and the rules made thereunder in a particular manner or that the income, profits and gains are to be calculated in the manner prescribed in R. 25, Income-tax

1. ('37) ILR (1937) 2 Cal 540 : 41 CWN 905, In re North British and Mercantile Insurance Co., Ltd.
2. ('34) 21 A I R 1934 Sind 46 : 149 I C 1204 : 28 S L R 174, Khemchand Ramdas v. Commissioner of Income-tax, Bombay Presidency.

Rules, does not affect in any way the statutory exemption from income-tax on the interest of certain securities, given by the proviso to S. 8, Income-tax Act.

It is argued that a Life Assurance Company has no real income in the ordinary sense of the word; it has a mere notional income, a mere actuarial profit which is a fictitious figure, and that this must be so in view of the fact that the actuarial account is not a profit and loss account, in it are taken contingent liabilities and no actual profit is ascertained. For instance, it cannot be said what part of this actuarial surplus is derived from the interest on tax-free securities; it cannot be analysed or split into its component parts so that it can be said that so much derives from tax-free securities; and so much from securities which are not tax-free. But the different sources of the income of the company are to be shown. Schedules 3 and 4 of the Life Assurance Companies Act require this. As Derbyshire, C. J. said in ILR (1937) 2 CAL 540[1]:

It is clear, therefore, that the actuarial valuation prescribed for by the Life Assurance Companies Act is not simply concerned with a final figure like the answer to an arithmetical sum but sets out the various assets of the company and the interest derived from them. In fact, it informs and is intended to inform all concerned, what the assets and the income and liabilities of the company are in a way which goes much beyond the ordinary company balance-sheet. It may be that the forms in Sch. 3 and Sch. 4 of the Act do not provide for each individual investment and item of interest to be set out. Nevertheless, they do show the different classes of investment, the interest as a whole derived therefrom and the income-tax paid thereon. If the assessee making a full and proper return chooses to show that he has has certain tax-free investments and the income derived therefrom, it is, in my view, impossible to say that he had not made a proper return in accordance with the Life Assurance Companies Act of 1912. Where the return shows that some of the interest has been derived from securities of the Government of India declared to be tax-free, it is impossible, in my view, for the income-tax authorities to ignore the plain provisions of the proviso to S. 8, Income-tax Act, which says that no income-tax shall be payable on the interest receivable on any security of the Government of India issued or declared to be income-tax free.

We do not think the fact that the income or balance or actuarial surplus, however it be called, be calculated in a particular manner excludes the operation of the proviso to S. 8 of the Act. However the income or actuarial surplus be called, however arbitrary be the manner of its calculation, it is an income on which the company is assessed; it is sufficiently real to them, and if the assessee-company hold income-tax free securities, they are entitled to a real and not an illusory benefit from such holding, and they are entitled to ask that the interest of their tax-free securities should be deducted from their total income before the tax is assessed, even if that total income be calculated according to statutory rules.

We do not think that there is any real conflict between R. 25 and S. 8 of the Act. Rule 25 merely provides for the manner in which the income shall be calculated; it does not deal with the manner of assessment of the tax. We see no reason why credit should not be given to the assessee for the tax upon tax-free securities as it is admittedly given in the case of taxes deducted at source: see, for instance, the form in R. 18 and deductions on account of tax at source in the assessment of the Income-tax Department for 1937-1938, EX. C. In (1894) A C 347[3] at p. 360, dealing with this question of the conflict between a statutory provision and a rule with the force of law, Herschell L. C. said:

No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two section to be found in the same Act. You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to rules which are to be treated as if within the enactment. In that case probably the enactment itself would be treated as the governing consideration and the rule as subordinate to it.

And in (1936) 53 T L R 258[4] at p. 268, Greene L. J. said:

Section 46, Income-tax Act, 1918, provides that the interest of certain securities shall be exempt from tax and super-tax. The securities in question are securities which have been issued with a particular condition annexed to them, that condition being: "that the interest thereon shall not be liable to tax or super-tax, so long as it is shown, in manner directed by the treasury that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom." Speaking for myself, I find in that language a perfectly clear legislative provision that, so long as the securities are in the beneficial ownership indicated in the section, no tax is to be levied in respect of the interest on them. To say, as has been said on behalf of the Crown, that the true effect of the section is merely that the interest is not to be taxed as interest but can be taxed as part of an aggregate of profits of trade appears to me to override the perfectly plain language of the section.

But the Advocate-General distinguishes this case before us from the Calcutta case in I L R (1937) 2 CAL 540,[1] because in this case the income-tax authorities asked and ob-

3. (1894) A C 347, Institute of Patent Agents v. Joseph Lockwood.
4. (1936) 53 T L R 258, Hughes (Inspector of Taxes) v. Bank of New Zealand.

tained an analysis of the actuarial surplus into its component parts and the actuary states as his opinion that for the quinquennium ended 31st May 1932 the actuarial surplus consisted as to Rs. 4,21,468 of interest from tax-free securities, and this divided by 5 would give the figure of Rs. 84,294, which, it is stated, the assessee-company accepted and which was shown as a deduction in the assessment by the income-tax officer. It is admitted that this is not one-fifth of the total of the interest on tax-free securities held by the assessee-company for the quinquennium. This, it is admitted, is Rs. 1,52,789, for which sum, indeed, until the Income-tax Department revised its views, allowance had been made, for instance, in the assessment for 1934-1935, a copy of which is now on the record. It is, of course, only right and proper that the officers of the Income-tax Department should revise their views on such a matter if they think they have good reason for so doing, but when we asked the Advocate-General if he could refer us to any statutory authority or any case in which the actuarial surplus had been split up into its component parts and the income from interest on tax-free securities proportioned to the income from other sources, all together constituting the actuarial surplus, he could not do so, but he referred to the following passage in the judgment of Derbyshire C. J. at page 555:

> In the conflict here between the income-tax authorities' contention under R. 25 and the assessees' contention under the proviso to S. 8 of the Act, it seems to me that the true position is that in this particular case the actuarial valuation as prescribed by law discloses the existence of an item of interest, Rs. 48,08,196. That item of interest was (at the request of the income-tax officer) shown to contain an item of Rupees 8,32,858 as interest derived from tax-free securities of the Government of India. That item of interest does not affect the liabilities of the company and clearly contributes pro tanto to the total profit concerned. In my view, therefore, it is not open to the income-tax authorities to disregard that item or to say that it cannot be differentiated from the total. In my view, that tax-free interest or its annual one-fifth part must be deducted from the income, profits and gains and is not assessable to income-tax.

The learned Commissioner also refers to this passage but relies upon it to justify the splitting up of the actuarial surplus into its component parts, but when the Chief Justice uses the phrase "pro tanto," he is referring to the whole of the item of income on tax-free securities as contributing to the total profits; as to its whole extent it contributed to the total profit; and it did not affect the liabilities of the company; but the phrase "pro tanto" was not intended to be used to reduce the item of interest on tax-free securities from the whole to a part, as the learned Commissioner argues. We think ourselves that it was not the intention of Legislature, provided S. 8 of the Act applies to the income of life assurance companies, that the income-tax payer should receive only part of the statutory benefit of his holding of tax-free securities and not the whole. We see no reason to suppose that the Legislature did not intend the proviso to S. 8 to apply to all appropriate cases, and, indeed, we observe that in the Act as recently amended under S. 10 (vii), S. 8 is excluded in the case of an insurance business, and the profits and gains are to be determined in accordance with the schedule to the Act. In R. 3 in that schedule occurs the following:

> 3. (c) the whole amount of interest received in respect of any securities of the Central Government which have been issued or declared to be income-tax free shall be deducted.

It is true that interest on tax-free securities issued or declared to be so by a Provincial Government is no longer to be deducted, but we do not think this affects the principle. We appreciate the fact that this new rule may have been made not to remove doubts but to give a relief not hitherto granted, and we mention this only by the way. We prefer on the merits, with all respect, the judgment of Derbyshire C. J. in the Calcutta case in I L R (1937) 2 CAL 540,[1] to the dissenting judgment of Panckridge J. and we think it makes no difference that an actuary had in response to a request of the Income-tax Department divided or purported to divide the actuarial surplus into parts proportioned to the income of the company from different sources. Nor do we think that because the assessee-company in obedience to the direction of the Income-tax Department and under protest accepted this figure of Rs. 84,294 and inserted it in their return, they were not free to challenge it in appeal within the time allowed, as they did. It was suggested to us that some form of estoppel operated against the company by reason of their obedience to the direction of the Income-tax Department, but this argument was not elaborated or pressed before us, and we see no room for an estoppel in this matter at all. We, therefore, answer the two questions accordingly. The assessee-company is entitled to the costs and the refund of the fee of Rs. 100. Order accordingly.

D.S./R.K. *Answer accordingly.*

**** A. I. R. 1941 Sind 20**

Full Bench

DAVIS C. J., LOBO AND WESTON JJ.

Emperor

v.

Karimbaksh Rehmatkhan.

Criminal Ref. No. 196 of 1940, Decided on 26th November 1940, made by District Magistrate, Nawabshah.

** *(a) Criminal P. C. (1898), Ss. 82 and 83—Warrants issued by Courts in British Baluchistan can be executed at any place in British India :* AIR 1940 Sind 154=190 I C 661, OVERRULED.

British Baluchistan is part of British India. Hence warrants issued by Courts in British Baluchistan can be executed under S. 82, Criminal P. C., at any place in British India. Therefore the warrant issued by the District Magistrate of Sibi for the arrest of an accused in the district of Nawabshah can be lawfully executed in that District : AIR 1940 Sind 154=190 I C 661, *OVERRULED.* [P 21 C 1; P 22 C 2; P 23 C 2]

* *(b) Criminal P. C. (1898), Ss. 82 and 83—Magistrate exercising jurisdiction in Baluchistan Agency Territories cannot issue warrant for arrest of person in British India.*

The Baluchistan Agency Territories are not part of British India, but are areas in which by lease, treaty or otherwise the Governor-General in Council, now to be replaced by the Crown Representative, has acquired jurisdiction. Hence a Magistrate exercising jurisdiction in those places cannot issue a warrant for the arrest of a person in British India, and require its execution under S. 83, Criminal P. C.: AIR 1938 Sind 46, *Approved.* [P 22 C 2; P 23 C 2]

Partabrai D. Punwani, Advocate-General — for the Crown.

Weston J.— This reference which concerns the legality of arrests in British India executed under S. 83, Criminal P. C., on warrants issued by Magistrates in Baluchistan territories has come before us in the following manner. In the year 1937, the first class Magistrate, Nasirabad, and Jhat Pat, in the Baluchistan Agency Territories, purporting to act under S. 83, Criminal P. C., sent a warrant to the District Magistrate, Karachi, for execution against one Tahilram. The warrant was executed, but the legality of the arrest was challenged and the matter came before a Bench of this Court, which held that as Nasirabad and Jhat Pat are not within British India, a Magistrate exercising jurisdiction in those places cannot issue a warrant for the arrest of a person in British India, and require its execution under S. 83, Criminal P. C.: 32 S L R 134.[1] The correctness of this decision was disputed by the political authorities, and after certain correspondence with the Government of India, an understanding was arrived at that when further opportunity arose, the decision in 32 S L R 134[1] would be reconsidered by this Court.

This opportunity arose in May 1939 when the District Magistrate, Sibi, again purporting to act under S. 83, Criminal P. C., sent to the District Magistrate, Nawabshah, a warrant for the arrest of one Karimbux, who was charged with the offence of murder. In view of a circular issued following the decision in 32 S L R 134[1] the District Magistrate, Nawabshah, returned the warrant unexecuted. The Political Agent, Sibi, who is the District Magistrate, Sibi, then addressed this Court stating that the Sibi District forms part of British Baluchistan, representing that his action in sending the warrant under S. 83 was legal, and requesting its execution. His letter with the accompanying warrant was forwarded to the District Magistrate, Nawabshah, who was invited to make a reference to this Court, so that the decision in 32 S L R 134[1] might be further considered. The District Magistrate made a reference accordingly, which was heard by a Bench of this Court, which by judgment[2] dated 29th September 1939, held in effect that the Criminal Procedure Code applies to British Baluchistan and to the Baluchistan Agency Territories by order or by regulation made under the Indian (Foreign Jurisdiction) Order in Council, 1902, that these applications of the Code must be taken as applications to self-contained territories, and that reference to British India in the Code as applied must be taken to be references to those self-contained territories, that is to say as references to British Baluchistan and to the Baluchistan Agency Territories respectively; that the power of Magistrates in those territories to forward warrants under S. 83 of the Code as applied must be restricted to the territories to which the Code was so applied, and that Magistrates in those territories have no authority to require the service of warrants in this province or in other places outside those territories.

Following this decision the Advocate-General filed a petition requesting the grant of a certificate under S. 205, Government of India Act, 1935, for appeal to the Federal Court. When the learned Advocate-General was heard on this petition, it appeared to us, the Division Bench before whom the petition came, that he now relied, in support of his contention that the decision in *Karimbux's case*[2] is wrong upon an argu-

1. ('38) 25 AIR 1938 Sind 46 : 173 I C 322 : 39 Cr L J 298 : 32 S L R 134, Tahilram v. Emperor.

2. *Reported in* ('40) 27 AIR 1940 Sind 154 : 190 I C 661, Emperor v. Karimbux.

ment which had not been advanced previously by him or considered by the learned Judges who decided that case and that if this argument based upon the fact that British Baluchistan is part of British India, had been raised or considered, the decision in that case might well have been other than it was. We suggested therefore that the political authorities might consider the advisability of re-issuing the warrant against Karimbuksh and having the matter again brought before this Court when it would be referred to a Full Bench; and as the learned Advocate-General stated that such a course would commend itself to Government the hearing of the petition for certificate under S. 205 was adjourned. A further warrant against Karimbaksh was then issued, and a further reference made to this Court and it is in this way that the matter is now before a Full Bench. We are informed that the arrest of Karimbaksh has actually been effected in Baluchistan territory, but although the reference has ceased to have importance in relation to the particular facts the Advocate-General asks that we should consider it as it raises questions of general importance.

Prior to the Government of India Act, 1935, the area geographically known as Baluchistan could be said to consist of three parts and for our present purpose this division can be considered as still existing. The first part comprises the States of Kalat and Las Bela which have their own administration and in which, generally speaking, British or British Indian enactments have no application. But with these States we are not concerned. The second and third parts consist of what are usually called the Baluchistan Agency Territories and British Baluchistan. The extent of these areas is given at p. 1, Vol. 1 of MacPherson (British Enactments in force in Indian States), and this shows that Sibi is part of British Baluchistan while Nasirabad is part of the Agency Territories. Although, as will be shown, very different considerations apply to these two parts, geographically they appear closely connected, and as the statement in MacPherson shows, areas from each part have been combined to form administrative units. It will be convenient to consider first British Baluchistan. We accept that the District Magistrate, Sibi, when issuing the warrant in respect of Karimbux acted as a Magistrate of British Baluchistan. There can be no doubt that British Baluchistan is part of British India. It was constituted a Chief Commissionership as long ago as 1887 under the Government of India Act, 1870, and has continued to be declared a Chief Commissionership under successive Government of India Acts: *see* S. 58 of the Act of 1915, and S. 94 of the Act of 1935. That as a Chief Commissionership it has always been part of British India is clear from the Government of India Acts, creating Chief Commissionerships, from the definition of British India in S. 3 (7), General Clauses Act, (Act 10 of 1897) and from the present definition of British India in S. 311 (1), Government of India Act, 1935. This last definition is as follows:

> 'British India' means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces.

Acts of the Indian Legislature applicable to the whole of British India will apply *proprio vigore* to Chief Commissioners' Provinces save as excepted or modified by the Government of India Act or by special or local enactment. Section 96 (2), Government of India Act, 1935, now provides that no Act of the Federal Legislature shall apply to British Baluchistan unless the Governor-General in his discretion so directs. There does not appear to have been similar exclusion of British Baluchistan from the sphere of the Indian Legislature in the earlier Government of India Acts, but in all those Acts there was provision for legislation by the Governor-General in Council for special areas by means of regulation [*see* S. 1, Government of India Act, 1870 and S. 71 of the Act of 1915] and the Baluchistan Code (1914) shews that this power to make regulations was used extensively for British Baluchistan. The practice followed for legislation for British Baluchistan has been to emphasize in certain Acts of the Indian Legislature their applicability to British Baluchistan by adding the words "including British Baluchistan" after the words "the whole of British India" in the application sections of those Acts, as for example in the Extradition Act (15 of 1903) and the Prisons Act (9 of 1894), and by regulation made under the sections of the 1870 and 1915, Government of India Acts quoted above, to apply or extend other enactments with or without modifications and in certain cases to make purely local laws. Such a regulation is Regulation 2 of 1913, entitled a regulation to consolidate and amend the regulations declaring the law in force in British Baluchistan. Section 3 of this regulation is as follows:

(1) So much of each of the enactments specified in Sch. 1 as is in force in the territories to which the enactment generally applies shall be deemed to be in force in British Baluchistan or in the part thereof specified in the schedule, subject to the modifications therein stated, and to any amendments to which the enactments are for the time being subject in the territories to which they generally apply.

(2) An enactment not comprised in Sch. (1) shall not be deemed to be, or to have been, in force in British Baluchistan or in any part of British Baluchistan unless it is expressed, by special mention of British Baluchistan, or a part of British Baluchistan, to extend thereto, or after the commencement of this regulation, is extended thereto in exercise of the powers conferred by S. 5, Scheduled Districts Act, 1874, or by any other enactment for the time being in force.

(3) The Local Government, with the previous sanction of the Governor-General in Council, may by notification in the Gazette of India, declare that any enactment which is comprised in Sch. 1, or which may, after the commencement of this regulation, be extended in exercise of any such powers as aforesaid, shall no longer be in force in British Baluchistan or in any part of British Baluchistan specified in the notification.

The Criminal Procedure Code 1898 is not one of those Acts in which British Baluchistan is specifically mentioned in the application section, but it finds place in Sch. 1 of Regulation 2 of 1913, and the modifications enjoined in its application are those of an earlier Regulation, 7 of 1896, which applied the then Criminal Procedure Code of 1882 to 'the whole of British Baluchistan so far as it can be made applicable in the circumstances for the time being.' The schedule to that regulation contained certain modifications, but these modifications did not affect in any way the provisions now contained in Chap. 6 of the present Code, and this chapter therefore applies to British Baluchistan in the same manner as it applies to British India. British Baluchistan is part of British India, and although the Code has been applied to it by regulation, once it has been applied, in the absence of express provision, there is no reason of construction for giving purely local meanings to general expressions appearing in the Code. If it was intended that references in the Code to British India should be read as references to British Baluchistan we think that this would have found place in the schedule of the applying regulation. For reasons to be stated shortly, we consider that in the application of the Code to the Agency Territories, which are not part of British India, it is a necessary implication that references to British India shall be read as references to the Agency Territories. But such an interpretation in the case of British Baluchistan would assist in no way to remove any inconveniences which may arise from different considerations applying to two territories which administratively are closely connected. The power to legislate by regulation is confined to certain parts of British India. Such legislation in the absence of express provision cannot affect areas outside British India. Similarly, legislation for areas outside British India is effected under one or other of the Orders in Council made under the Foreign Jurisdiction Act, 1890, and such legislation cannot affect British India. Even if the application of the Criminal Procedure Code to British Baluchistan were taken to be self-contained, and references in the Code to British India were to be read as references to British Baluchistan this would not assist in enabling warrants issued by Courts outside British Baluchistan, as for example by Courts in the Agency Territories, to be executed within British Baluchistan.

While there is no argument of convenience to assist a restricted interpretation of the words "British India" in the application of the Code to British Baluchistan, there is an obvious argument of inconvenience against such an interpretation. For, if S. 82 of the Code were to be read as "A warrant of arrest may be executed at any place in British Baluchistan" there would exist no machinery for effecting the apprehension in British India of fugitive offenders from British Baluchistan. The Extradition Act applies to British Baluchistan as a part of British India, and there can be no extradition between one part of British India and another. The Fugitive Offenders Act also could be of no assistance. We consider therefore that warrants issued by Courts in British Baluchistan can be executed under S. 82, Criminal P. C., at any place in British India, that the District Magistrate, Sibi, acted legally in sending the warrant for the arrest of Karimbux to the District Magistrate, Nawabshah, under S. 83 and that the Bench decision in *Karimbux's case*[2] therefore was not correct. It remains for us to consider warrants issued not by Courts in British Baluchistan, but by Courts in the Baluchistan Agency Territories as in 32 S L R 134.[1] The Agency Territories are not part of British India, but are areas in which by lease, treaty or otherwise the Governor-General in Council, now to be replaced by the Crown Representative, has acquired jurisdiction. By the Government of India Act, 1935, special areas known as tribal areas have been created in Baluchistan. These areas are defined by

S. 311 of the Act as the areas in Baluchistan which are not part of British India or of any Indian State or of any foreign State. We are not aware whether the tribal areas will include all the present Agency Territories, but except for a question arising under the Extradition Act referred to at the end of this judgment, this is not important for our present purpose, as the Indian (Foreign Jurisdiction) Order in Council, 1937, amending the principal Order in Council of 1902, provides for the continuance of all orders, rules and so on made under the principal Order unless expressly revoked or amended.

Legislation for the Agency Territories, as for other administered areas in India, not forming part of British India, has been effected by notifications under the Order in Council 1902, referred to above, or under earlier Orders in Council; and the various enactments applied or made for these territories appear in volume I of MacPherson. In certain cases British Indian enactments have been applied directly in whole or in part to the Baluchistan Agency Territories, but the general practice has been to apply such British Indian enactments as have been applied to British Baluchistan. By a notification made under the Order in Council, 1902, dated 23rd May 1929 (MacPherson Vol. I, p. 9) all enactments then or thereafter in force in British Baluchistan are to be deemed to be in force in the Agency Territories. As already seen these enactments include the Code of Criminal Procedure. This attempt at securing homogeneity in the two administered areas of Baluchistan is liable to be confusing, but when the fundamental difference between British Baluchistan and the Agency Territories, the one being part of British India and the other being outside British India, is kept in mind, it is clear that the application to the Agency Territories of any British Indian enactment as in force in British Baluchistan differs in no way from an independent application of that enactment to the Agency Territories, with any necessary modifications, but without any reference to British Baluchistan. It is a necessary implication, if not expressly appearing in the notification, that when an enactment in force in British India is applied to territory outside British India, references to British India must be read as references to the territory to which the enactment is being applied. In individual applications of British Indian enactments by notification under the Order in Council express provision for this is usually made in the notification, but in the notification of 23rd May 1929 there is only a very general clause which reads as follows:

> For the purpose of facilitating the application of any of the aforesaid enactments, notifications, rules, orders or bye-laws, any Court in the said territories may construe them with such alterations not affecting the substance as may be necessary or proper to adapt them to the matter before the Court.

Even if the Courts of the Agency Territories consider that this clause gives them latitude to execute warrants issued by Courts of British Baluchistan or even those issued by Courts in other parts of British India, a matter on which we have no information, this clause cannot modify the law enacted for British India by the Indian Legislature. It cannot operate to make the Agency Territories part of British India for the purposes of the Code, and it cannot throw upon District Magistrates in British India the duty of executing warrants issued by Courts not in British India. The learned Advocate-General in fact has conceded before us that 32 S L R 134[1] was correctly decided, and we have no hesitation in holding that it was correctly decided. We may remark that except perhaps for those areas in the Agency Territories which cannot be said to be the territories of any State, and it is true that the definition of tribal areas suggests that there are such areas, no difficulty exists in obtaining under Chap. 3, Extradition Act, the surrender of criminals who have fled from the Agency Territories to British India. No amendment of S. 7, Extradition Act, seems to have been made by the Adaptation of Laws Order in Council to meet the case of tribal areas, but whether or not such amendment is necessary is a matter outside the scope of this reference, and we do not see reasons to consider it further. Our answer to the reference is that the warrant issued by the District Magistrate of Sibi for the arrest of Karimbakhsh in the district of Nawabshah could be lawfully executed in that district.

D.S./R.K. *Answered accordingly.*

A. I. R. 1941 Sind 23

TYABJI J.

Asmabai d/o Haji Ahmed Mirza — Plaintiff

v.

Umer Mahomed Sidik Mirza — Defendant.

Suit No. 188 of 1939, Decided on 22nd May 1940.

(a) Muslim Dissolution of Marriages Act (1939), S. 2 (ii)—Suit for dissolution of marriage by wife — Husband neglecting and failing to provide for wife's maintenance for ten years — Husband on Magistrate's order paying maintenance to wife for some months during two years prior to suit — Latter fact held did not debar wife from relying on S. 2 (ii) in respect of earlier period of ten years.

A Muslim husband neglected and failed to provide maintenance for his wife for a period of ten years. In pursuance of a Magistrate's order, however, he had been paying maintenance allowance to his wife for some months during two years preceding the suit by the wife for the dissolution of the marriage:

Held that the payment of maintenance during two years preceding the suit did not debar the wife from relying on S. 2 (ii) in respect of the earlier period of ten years as a good ground for the dissolution of her marriage. [P 26 C 1]

(b) Muslim Dissolution of Marriages Act (1939), S. 2 (viii) (a)— Husband's ill-treatment — Wife forced to degrading position of having to live with and being burden upon her parents for about twelve years — Wife compelled to do without society of her husband and could not remarry—Husband held made her life miserable by cruelty of conduct — Fact that wife could by resorting to distress warrants obtain from unwilling husband monthly maintenance of Rs. 7-8-0 held did not relieve her of her misery.

The wife was forced to live away from her husband for about 12 years on account of his ill-treatment and her life was being made miserable by reason of the fact that a return to her husband's house was out of the question as it meant submission to conditions impossible to a self-respecting woman. She was compelled to do without the society of her husband and could not marry any other person. She was forced to the degrading position of having to live with and be a burden upon her parents:

Held that it was reasonable in the circumstances to say that the husband was making her life miserable by cruelty of conduct within the meaning of S. 2 (viii) (a). The fact that she could by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month—a sum wholly insufficient for maintaining her in any comfort—was not enough to relieve her of her misery. [P 26 C 1]

(c) Muslim Dissolution of Marriages Act (1939), S. 2 (viii) (f)—Only very gross failure to render to wife her just rights will be considered by Court as ground for dissolution of marriage—Wife separating from husband due to ill-treatment—No real intention or positive effort on husband's part to treat wife as wife at all much less to treat her equitably in accordance with injunctions of Quran — Case falls within purview of S. 2 (viii) (f).

It is only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution of the marriage. Where there has never after the separation of the wife due to ill-treatment been any real intention on the part of the husband or positive effort to treat the wife as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which having regard to human imperfections and to the circumstances of the husband could be condoned as an honest effort in that direction, the case falls within the purview of S. 2 (viii) (f). [P 28 C 1]

Jethanand L. Nain — for Plaintiff.

Pribhdas for K. H. Nagrani — for Defendant.

Judgment.—The plaintiff Asmabai was married to the defendant Umar about 15 years ago, in 1925. Her suit is for a dissolution of her marriage with the defendant, on the grounds, first, that the defendant had neglected or failed to provide for her maintenance for a period of two years, secondly that the defendant had made her life miserable by cruelty of conduct, and thirdly that having more than one wife the defendant did not treat the plaintiff equitably in accordance with the injunctions of the Quran. It is claimed that these are valid grounds for a dissolution of a Muslim marriage under the Dissolution of Muslim Marriages Act, 8 of 1939: *cf.* S. 2, sub-cls. (ii), (viii) (a) and (viii) (f) of the Act. The plaintiff, the defendant Umar, and one Ramzan have given evidence in this case. There can be no doubt with regard to the principal facts in this case. The plaintiff was married somewhere about 1925 when she was about 18 years of age. The defendant is a first cousin of the plaintiff. After the marriage the defendant and the plaintiff lived together for about one month, after which the plaintiff left the defendant's house and went back to her parents. It is quite clear from the evidence in the case, although the defendant Umar and his witness Ramzan do not admit it, that the plaintiff's father and the defendant's father who are brothers, have not been on good terms and were not on good terms at the time of the marriage. The plaintiff states that while she was living with her husband there were constant quarrels between her and her husband and her husband's relations. She states that the defendant and others in her husband's house used to speak disparagingly of her father and when she intervened on behalf of her father there were quarrels, that she was frequently beaten, and that it was after a period of such continued ill-treatment that she was one day driven out of the house by her husband and her husband's relations. She was on that account unwilling to go back to her husband. Efforts were then made by other parties to bring about a reconciliation, and the plaintiff was induced to live again with the defendant. But she had to leave him again after a few days. Thereafter the plaintiff has continued to live with her parents and according to the plaintiff the defendant did not ever wish

or seek to take her back again. Admittedly nothing was paid to the plaintiff by way of maintenance or otherwise by the defendant who soon married a second wife.

In 1928 the plaintiff filed a suit in this Court, being Suit No. 58 of 1928, against the defendant for maintenance. A certified copy of the judgment in that case dated 20th September 1929 has been filed and is Ex. 6. One of the issues in that case was: "Did the defendant desert the plaintiff and neglect to maintain her?" and the finding on this issue was that he had neglected to maintain her. The learned Judge in that case (Barlee A. J. C.) held that the plaintiff had been ill-treated, to some extent as he said, and stated that he would, if he could have done so under the law, have ordered past maintenance to be paid to the plaintiff, but he held that the law did not permit him to do so. He however did not consider that under the circumstances of the case the plaintiff was entitled to get a decree for future maintenance. Some six years later (at the end of 1935 or in 1936) an application was made by the plaintiff in the Court of the Additional City Magistrate of Karachi for an order against the defendant for payment of a monthly allowance under S. 488, Criminal P. C. The Magistrate had to consider the question whether the plaintiff was entitled to any order under S. 488 as the plaintiff admittedly was not living with the defendant, and it became necessary for him to consider whether the plaintiff had just or sufficient grounds for refusing to live with the defendant. After a lengthy inquiry, he held it to be clearly proved that the defendant had neglected to maintain the applicant for many years, and accepting the plaintiff's allegations of ill-treatment to be true he held that the plaintiff had sufficient grounds for refusing to live with the defendant, and on 28th February 1936 passed an order ordering the defendant to pay Rs. 10 every month to the plaintiff by way of a monthly allowance.

This order was challenged by the defendant who filed a revision application against it which was rejected by this Court in its High Court jurisdiction on 5th May 1936. Exhibit 8 is a certified copy of the High Court's order from which it is clear that the High Court did not accept the defendant's contention that the plaintiff ought to go back to the defendant and was of the opinion that it would be wrong to interfere with the order of the Magistrate and force the plaintiff back to conditions to which no self-respecting woman should be compelled to submit. The plaintiff states, and I have no doubt truly, that even after these orders the defendant has not been regularly paying the sum ordered to be paid under S. 488, Criminal P. C., and that on no less than twelve occasions the plaintiff had been forced to apply to the Magistrate for a distress warrant, and it was only after such distress warrants had been issued that she was able to obtain the payments. It is also clear that the defendant has been making applications for a reduction of the amount ordered to be paid by him, which has since been reduced to Rs. 7-8-0; for this of course he cannot in any way be blamed.

Having regard to these circumstances, and to the attitude of the parties and the allegations made by them in the proceedings above referred to, and the evidence given by the three witnesses who have been examined before me in this suit, I have no doubt that the plaintiff's allegation that she was ill-treated by the defendant and that it was on that account that she could not live with the defendant is true. It appears that this ill-treatment had a good deal to do with the fact that the father of the plaintiff and the father of the defendant were on very bad terms. It is quite impossible to accept the evidence of the defendant and of his witness Ramzan who have now stated that there was no ill-feeling of any kind between the two families, that there was never any question at all of any ill-treatment of the plaintiff by the defendant, that the defendant and the plaintiff in fact lived very happily together after their marriage, and that even the parents of the defendant and the plaintiff had always been on very good terms, but that after the plaintiff, about a month after her marriage, left the defendant's house with the permission of the defendant in order to spend the Idd with her parents, the plaintiff's parents without any reason whatever which these witnesses knew of or could assign therefor refused to allow the plaintiff to go back to the defendant and insisted very perversely, that the defendant should instead go and live with them. It is perfectly clear that this is a false story put up for the purposes of this case, which is wholly absurd under the circumstances of this case.

Now with regard to the first ground urged by the plaintiff, it has been admitted by the defendant that nothing by way of maintenance or otherwise was paid by him to the plaintiff after the plaintiff left him,

admittedly some time in or about 1925, until after 28th February 1936 when the order was made by the Magistrate. It is therefore clear that during this period of about 10 years the defendant did wholly neglect and fail to provide for the plaintiff's maintenance. It is true that after the order made by the Magistrate in 1936, certain payments have been made by the defendant to the plaintiff under the orders of the Court, and it cannot therefore be said that during the two years immediately preceding the suit the defendant had not paid anything towards the plaintiff's maintenance, but I do not think that in the circumstances of this case the plaintiff is thereby debarred from relying on S. 2 (ii) of the Act in respect of the earlier period as a good ground for the dissolution of her marriage. I also think that the plaintiff has succeeded on the second ground, that is in showing that the defendant has made her life miserable by cruelty of conduct within the meaning of those words in S. 2 (viii) (a). The language of S. 2 (viii) (a) is:

> 2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:
>
> (viii) That the husband treats her with cruelty that is to say, (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment.

As the plaintiff has now for many years past been living away from the defendant, it is not alleged and it cannot be said that he now habitually assaults her and there is no question of any present physical ill-treatment. But the plaintiff has been forced to live away from her husband on account of his past ill-treatment and her life is undoubtedly being made miserable by reason of the fact that a return to her husband's house is out of the question as it must mean submitting to conditions impossible to a self respecting woman. She is compelled to do without the society of her husband and cannot marry any other person. She is forced to the degrading position of having to live with and be a burden upon her parents. The fact that she can by resorting to distress warrants obtain from her unwilling husband Rs. 7-8-0 per month—a sum wholly insufficient for maintaining her in any comfort is not enough to relieve her of her misery. I think it is reasonable in these circumstances to say that the defendant is making her life miserable by cruelty of conduct, and as stated before, in my opinion, the plaintiff has also succeeded on this ground.

The third ground relied upon is that mentioned in S. 2 (viii) (f) of the Act, that is to say the cruelty of the defendant in that having more than one wife he did not treat the plaintiff equitably in accordance with the injunctions of the Quran.

It is admitted that the defendant married a second wife about 10 or 12 years ago, that is soon after the defendant and the plaintiff separated. It does not appear to me that the defendant ever had any intention or made any bona fide effort to induce the plaintiff to live with him, or to offer to her a home which she could reasonably be expected to accept, and to render to her the rights which it is incumbent upon a Muslim husband to render to his wife.

According to the Quran and to all Muslim texts, a Muslim wife has rights corresponding to those of her husband and in no way less than those of the husband, in the fulfilment by the husband and the wife of their respective marital duties towards each other. As is stated in verse II, 228 of the Quran: "And they (the wives) have rights similar to those (of their husbands) against them as regards just treatment." As is so often insisted upon in the Quran, it is incumbent upon a Muslim husband to treat his wife or wives with "husn-e-muashirat," which means such kindly behaviour as is recognized as good by all. For example in verses IV, 19 it is enjoined: "Wa ashiru hunna bil maaroof" which literally means "and behave with them (your wives) in such a manner as is accepted as good and kind by all."

Not only is the Muslim husband bound to treat his wife "bil maaroof," with kindness and consideration, but the wife is, by virtue of the very subsistence of the marriage state, entitled as of right to her just share in the society and companionship of her husband. Under Muslim law this right could be enforced by an order from a Judge: *cf.* Baillie I, 190. A man could be directed to be attentive to his wife and to occupy the same apartment with her at times though no exact times have been prescribed: Baillie I, 189. According to Shiah texts every wife is at least entitled to the exclusive companionship of her husband for one out of every four nights: Baillie II, 83. All texts agree that it is incumbent for a husband to spend a reasonable amount of time with each of his wives in an apartment exclusively allotted to her.

Where a husband has more than one wife strict equality "adl-fil-qismut" must be observed by the husband amongst the wives; for, it is only on the condition that the husband will do so, that the Quran permits marriage with more than one wife. In verse IV, 3 of the Quran it is said :

. . . Then marry such women as seem good to you, two and three and four; but if you fear that you will not act with justice (between them) then marry only one . . . . Thus it is more likely that you will not deviate into injustice.

The Arabic word which has been rendered by the word "justice" is "adl" and all Muslim jurists agree that what is made incumbent upon every Muslim marrying more than one wife by this verse is "adl-fil-qismut," that is an equality in the sharing of such things as the time spent with his wives, the expenses incurred by him on his wives, and his outward general behaviour towards his wives. The word "adl" in this context is not, it is generally agreed, to be construed as meaning "adl-fil-kul" or "adl fil kule shain," that is absolute equality in all respects, and does not include "adl-fil-mohabat" or equality in respect of the inner love of a man for his wives which the Quran itself regards as impossible. For, in verse IV, 129 where the word "adl" is used in its more complete and absolute sense, meaning "adl-fil-kul" and including "adl-fil-mohabat," the Quran says :

And it is not within your power to act with (complete) justice (adl) between wives, even though you may most desire it; but be not disinclined (from any one of them) with a total disinclination, so that you leave her as it were in suspense.

Muslim commentators of all schools agree that while it is incumbent on every husband to treat all his wives with strict equality in all matters covered by the term "adl-fil-qismut," which means for example that a husband cannot spend more time with or spend more money upon or show an open preference in his general behaviour in favour of any one of his wives, it is sufficient in respect of actual coition if he does not entirely neglect any particular wife. Intentional total neglect in respect of coition which amounts to a suspension of the marriage is clearly prohibited. So Baillie relying on Sunni texts says (Part I, 189):

And when he has two wives who are free women, he must be just and equal in dividing his attentions among them. What is required of him in this respect is justice and equality in matters that are within his power, and living with them for society and acquaintanceship, not in matters that are beyond his control, such as love and matrimonial intercourse. . . . . .

And with regard to wives, equality must be observed between the old and the new, the virgin and the suyyib, the healthy and the sick, even the paralytic and the insane if not dangerous, the woman in her courses, and one who is purified from them, the pregnant woman, and one in an interval of pregnancy, the young girl unfit for matrimonial converse, the pilgrim and the wife under eela, or zihar.

and relying on Shiah texts says (Part II, 83-85) :

Kismut, or a partition of his time amongst his wives, is a duty which is incumbent on a husband, whether he be free or a slave, and even though he should be impotent or an eunuch ; . . . . .

If a man be married to one wife she has a right to one night out of every four, and the other three are at his own disposal to sleep where he pleases. If he has two wives they are entitled to two nights, and if he has three they are entitled to three, while he has a right to dispose of the excess in each case up to four, as he pleases. If he has the full complement of four wives, each one of them has a right to a night in her turn, and he cannot absent himself from the proper partner of that night without a just pretext or being on a journey, or her permission. . . . . .

What is incumbent on a man in respect of partition is merely to spend his time with the wife to whom it is due, and does not extend to coition. . . .

Equality among wives should be observed in respect of maintenance, general behaviour, and coition.

With reference to last extract he adds in a note that in respect of coition equality is proper but not an incumbent duty. How far this "Husn-e-muashirat" and "adl-fil-qismut" are to be observed, is clear from the fact that even after friction and dissensions have arisen, and a husband has pronounced one or two divorces against a wife, the Quran enjoins in verse II, 229 and again in verse II, 231 that even in such circumstances the wife in question should either be retained "be maaroof" that is in the approved kindly manner, or should be generously allowed to go away (i. e., be completely divorced) with kindness ("be maaroof" and "be ehsan"), and that she should not be retained to her injury. It is on these verses that in Muslim States the Kazi's powers to insist that a husband should either render to a wife her just rights or divorce her were based. The Hadis, sayings of the Prophet, are full of exhortations to his people to treat women kindly and to render to them all their just rights. The position of a wife in her husband's house is stated in one of his most often quoted sayings :

Every one of you is a ruler, and every one shall be questioned about his subjects ; the Amir (King) is a ruler, and the man is a ruler over the people of his house, and the woman is a ruler over the house of her husband and his children, so every one of you is a ruler and every one shall be questioned about his subjects.

In his famous farewell address at the Hajatul Widaa shortly before his death

speaking with the knowledge that he would not be able to address his people again, the Prophet said :

Oh my people: You have certain rights over your wives and so have your wives over you. They are the trust of Allah in your hands, so you must treat them with all kindness.

This is the position in the Quran and the Shariat and expresses the ideal that has to be aimed at. It is of course only a very gross failure to render to a wife her just rights that could be considered by a Court as a ground for dissolution. But in this case as is clear from what has been stated before, there has never after the separation in 1925 been any real intention on the part of the defendant or positive effort made by the defendant to treat the plaintiff as a wife at all, much less to treat her equitably in accordance with the injunctions of the Quran, or even on a footing which having regard to human imperfections and to the circumstances of the defendant could be condoned as an honest effort in that direction. The plaintiff therefore succeeds on this ground also. I am therefore of the opinion that this is a case where in the contemplation of Act 8 of 1939 good grounds exist for a dissolution, and the plaintiff will accordingly have a decree as prayed with costs.

G.N./R.K. *Suit decreed.*

A. I. R. 1941 Sind 28

WESTON J.

Haji Hussain Habibullah—Applicant

v.

Haji Vali Mahammad and another — Respondents.

Civil Revn. Appln. No. 4 of 1938, Decided on 15th March 1940, to revise judgment and decree of Dist. Judge, Hyderabad, D/- 19th October 1937.

Civil P. C. (1908), O. 3, R. 1—Vakalatnama in Form IV, Sind Civil Courts Circulars authorising advocate to appear and act in case does not empower him to compromise — Authority to compromise in aforesaid vakalatnama is unwarranted by Form IV—Specific authority for specific compromise is essential.

A vakalatnama in Form IV prescribed by the Sind Civil Courts Circulars authorising an advocate or a pleader to appear and act in a case does not empower him to compromise the case on behalf of his client. A power to compromise contained in a vakalatnama is not warranted by Form IV and is inadequate to validate a compromise made by the advocate or pleader. Specific authority for a specific compromise is necessary : A I R 1916 Sind 64, *Foll.*; A I R 1936 Sind 59; A I R 1930 P C 158, *Disting.*; A I R 1936 Lah 199, *Ref.* [P 29 C 1]

M. L. Lalvani — for Applicant.

Fatehchand Assudamal — for Respondents.

Weston J. — This is a revision application against the order of the District Judge of Hyderabad in Civil Appeal No. 63 of 1937 of this Court directing a decree in terms of the compromise application filed by the advocates of the parties, and the ground upon which we are asked to set aside this order is that the advocates of the parties had no authority to compromise on behalf of their clients. In 9 S L R 218[1] following earlier decisions of this Court it was held that a pleader duly appointed to act for a party has authority to do all acts incidental to that general authority. He may make applications referring the matter in dispute to arbitration or make admissions so as to bind his client. A presumption of such powers having been delegated to him is essential to the due conduct of the litigation. No such presumption however is necessary in the case of a power to compromise the suit. A power to compromise contained in a vakalatnama is not warranted by Form IV prescribed in the Sind Courts Civil Circulars and is inadequate to validate a compromise made by the pleaders and proof of specific authority for the specific compromise is necessary. It should be stated here that in the present case the pleaders were advocates and that they had filed powers in Form IV which empowered them to appear and act. It is not suggested that they had any general or any special powers from their clients to compromise. In 29 S L R 437,[2] it was held that

when parties do not themselves notify a compromise to the Court or give their written consent thereto and pleaders act as agents of the parties to compromise, their authority must be clear and unequivocal. When such an authority is not contained in a vakalatnama giving power to compromise either generally or specially, or in any other writing but there is a mere statement by the pleaders themselves at the foot of the compromise that they have special powers to compromise, this is not enough.

This was a case of pleaders, not advocates, and the learned Judges in the course of their judgment state :

We should make it clear that we are not concerned here with the power of advocates either in this Court or in the mofussil, far less are we concerned with the power of barristers.

We have been referred to the case in 57 Cal 1311,[3] where it was held that

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1. ('16) 3 A I R 1916 Sind 64 : 34 I C 928 : 9 S L R 218, Mt. Sirdarkhatun v. Muradali.
2. ('36) 23 A I R 1936 Sind 59 : 163 I C 240 : 29 S L R 437, Ghanshamdas Lokumal v. Nanikram Khubchand.
3. ('30) 17 A I R 1930 P C 158 : 123 I C 545 : 57 Cal 1311 : 57 I A 133 (P C), Sourendranath Mitra v. Tarubala Dasi.

an advocate in India who derives his general authority from being briefed in a suit on behalf of his client has implied authority to settle and compromise in all matters connected solely with the action in which he has received a brief.

But their Lordships state at p. 1319 :

Their Lordships desire to confine their decision on this point to the case of advocates, whatever their qualifications, admitted as such by the respective appropriate Courts in India, who derive their general authority from being briefed in a suit on behalf of a client. Where the legal representative in Court of a client derives his authority from an express written authority such as a vakalatnama, different considerations may well arise, and in such cases their Lordships express no opinion as to the existence of any implied authority of the kind under discussion.

The Lahore High Court in 17 Lah 456,[4] relying upon this Privy Council decision has extended the power of advocates to compromise to advocates who appear only to plead without power of attorney. The question decided in 9 S L R 218[1] was left expressly undecided by Privy Council in 57 Cal 1311.[3] The present case is on all fours with the Sind case which was decided by Bench of this Court and which we think we are bound to follow. We must therefore hold that the advocates had no power to compromise in the present case. We must allow the application, set aside the decree of the District Judge and remand the appeal to him for disposal on its merits. We think the parties should bear their own costs in this Court. Order accordingly.

G.N./R.K. *Application allowed.*

4. ('36) 23 A I R 1936 Lah 199 : 161 I C 764 : 17 Lah 456 : 38 P L R 961, Ramzan v. Gopal Das.

A. I. R. 1941 Sind 29

DAVIS C. J. AND LOBO J.

Emperor

v.

Muhammad Hassan Allahdad.

Criminal Ref. No. 131 of 1940, Decided on 3rd July 1940, made by Dist. Magistrate, Larkana, D/- 18th April 1940.

Criminal P. C. (1898), S. 397, proviso (2) — Ss. 20 to 26, Sind Frontier Regulations should be read with S. 397, proviso (2).

Sections 20 to 26, Sind Frontier Regulations should be read with S. 397, Criminal P. C. S. 397, proviso (2) therefore applies to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations. [P 29 C 2; P 30 C 1]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is a reference by the learned District Magistrate, Larkana, who recommends that we modify an order passed by the Resident Magistrate of Kambar who has directed a sentence of imprisonment for twelve months passed on one Muhammad Hassan to commence after the expiry of a sentence of imprisonment he was already undergoing under Ss. 21 and 24, Sind Frontier Regulations. The learned District Magistrate is of the opinion that the order of the Resident Magistrate was wrong for under proviso 2 to S. 397, Criminal P. C., a sentence of imprisonment for an offence under S. 411, Penal Code, should be concurrent with the sentence of imprisonment this Muhammad Hassan was already serving under Ss. 21 and 24, Sind Frontier Regulations. It may be said that it is a question of some doubt whether proviso (2) to S. 397, Criminal P. C., would apply at all to cases where imprisonment has been imposed under Ss. 21 and 24, Sind Frontier Regulations, because S. 27 of that Regulation reads as follows :

Sections 20 to 26 (both inclusive) shall be read with and construed as part of Chap. 8, Criminal P. C., 1882, which shall, except when the contrary is expressed or implied, be applicable, so far as may be, to cases requiring or giving security under Ss. 20, 21 or 26.

But S. 27 of the Regulations does not say that Chap. 28 in which S. 397, Criminal P. C., occurs shall also apply, but we think it is clear that the intention of the Legislature was to put security proceedings under the Sind Frontier Regulations, so far as possible, on the same footing as security proceedings under the Criminal Procedure Code and when it enacted that Ss. 20 to 26, Frontier Regulations, shall be construed as part of Chap. 8, Criminal P. C., so it must have intended that other provisions of the Criminal Procedure Code which are necessarily to be construed with Chap. 8 of that Code shall also be read with Ss. 20 to 26, Sind Frontier Regulations. It is true that proviso (2) to S. 397, Criminal P. C., relates specifically to S. 123, Criminal P. C.; but S. 123, Criminal P. C., makes general provision for imprisonment in default of security under Chap. 8, Criminal P. C., and we think, therefore, that as Ss. 20 to 26, Sind Frontier Regulations are to be read with S. 123, Criminal P. C., which occurs in Chap. 8 in accordance with the terms of S. 27, Sind Frontier Regulations, so Ss. 20 to 26 should be read with proviso 2 to S. 397, Criminal P C., which itself refers to S. 123, Criminal P. C.

In this case the order passed against Muhammad Hassan committing him to prison for default was dated 21st April 1938; the offence under S. 411, Penal Code, of which he was convicted, was committed on 9th September 1937; the date on which he was convicted for this offence under S. 411, Penal

Code, was 17th October 1938. These dates, therefore, comply with the requirements of proviso (2) to S. 397, Criminal P. C. We think, therefore, that the learned District Magistrate was right and that the order of the Resident Magistrate, Kambar, should be modified so as to provide that the sentence of 12 months' rigorous imprisonment passed under S. 411, Penal Code, should commence at once and not after the expiry of the sentence of three years' imprisonment passed under Ss. 21 and 24, Sind Frontier Regulations.

G.N./R.K. *Order accordingly.*

A. I. R. 1941 Sind 30

DAVIS C. J. AND LOBO J.

S. E. Naylor and another — Applicants

v.

Emperor.

Criminal Revn. Applns. Nos. 152 and 153 of 1940, Decided on 19th July 1940, to revise order of the Addl. City Magistrate, Karachi, D/- 30th March 1940.

Criminal P. C. (1898), S. 197 — Port trust estate does not fall within term 'village, town or district' within meaning of S. 21 (10), Penal Code — No sanction of Central Government is necessary for prosecution of chief store-keeper and assistant superintendent of machinery employed for port trust estate.

The port trust estate does not fall within the term "village, town or district" within the meaning of cl. (10) of S. 21, I. P. C. The chief store-keeper and assistant superintendent of machinery for the port trust estate entrusted with the keeping, and the expending of property by the port trustees of the port on their behalf upon their estate are not therefore public servants. Hence no sanction of the Central Government is necessary for their prosecution. [P 31 C 2]

Dingomal Narainsing and P. S. Shahani — for Applicants (Naylor and Donde, respectively.)

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — We have before us two revision applications one by R. A. Donde, chief store-keeper, now under suspension, of the Karachi Port Trust, and the other by S. E. Naylor, assistant superintendent of machinery at Keamari, now under suspension, and they are both being prosecuted for offences under S. 120B read with S. 420, Penal Code, for offences alleged to have been committed by them in the discharge or purported discharge of their duties. The prosecution started many months ago and the plea that the sanction of the Central Government was necessary for the prosecution of the applicants under S. 197, Criminal P. C., has been raised at a very late stage in the proceedings. To bring themselves within the ambit of S. 197, Criminal P. C., the applicants must show that they are "public servants" within the meaning of S. 21 (10), Penal Code.

The Additional City Magistrate, against whose order these applications are made, held that the applicants were merely employees of the Karachi Port Trust employed by them to carry out the necessary repairs, maintenance and sanitation of the numerous properties which are vested in the port trust under the provisions of the Karachi Port Trust Act, Bombay Act, VI of 1886, and that they were not "public servants" within the meaning of section 21 (10), Penal Code. There is in clause (10) of S. 21, I. P. C., a reference to "any village, town or district," but there is no reference to "port," and Mr. Dingomal and Mr. Shahani for the applicants have both argued that a "port" is a town, or that, at least, there is included in the port trust properties a village called Keamari Indian village shown as such on all the maps; and that as Donde under the order of the chief engineer, supplied from stock or by purchase stores necessary for the repairs or maintenance of the houses and roads in this village, and Naylor as assistant superintendent of machinery was in charge of the fresh water supply and lighting and fire service of this village, so it was their duty to keep and expend property for the secular common purposes of the village within the meaning of cl. (10) of S. 21, I. P. C. Naylor also says that he received timber jointly with Donde for the purposes of the village. Clause (10) of S. 21, I. P. C., reads as follows:

> Every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village, town or district.

But we think clause (10) has to be read with clause (9), and while clause (9) is intended to relate to Government servants, cl. (10) is intended to relate to local authorities responsible for the local administration of villages, towns or districts. It is not difficult to relate these terms to statutes relating to municipalities and local boards, but there is no mention in clause (10) of a "port," and were it the intention of the Legislature to include a "port" within cl. (10), we think there would be reference to a "port" such as there is reference to a "body of port commissioners" in S. 3 (28), General Clauses Act, 10 of 1897. We have had cited to us defi-

nitions from the Oxford Dictionary and Murray's Dictionary to prove to us that a "port" while meaning many things, also means a town with a harbour, and it may be, of course, that a town with a harbour is a "port," but we think regarding S. 3, Karachi Port Trust Act, the definition in "Wharton's Law Lexicon," (Edn. 14), is more appropriate, that is "a place for the lading and unlading of ships," and this is borne out by the words of S. 3 themselves. Section 3, Karachi Port Trust Act, is as follows :

Government may, by notification in the Bombay Government Gazette (a) define the limits of the port for the purpose of this Act, and (b) from time to time alter such limits.

Such limits may extend to any part of the navigable approaches to the port, and may include any wharves, tramways, warehouses, sheds and other works made on behalf of the public for convenience of traffic, for safety of vessels, or for the improvement, maintenance and good government of the port, whether within or without high water mark, and, subject to any rights of private property therein, any portion of the shore within fifty yards of high water mark.

From the evidence of the present chief store-keeper Rozario, it appears, the principal immovable properties owned by the port trust are wharves and cargo sheds ; all else is incidental. It appears to us, therefore, that any property the port trust possesses is merely incidental for the fulfilment of its purpose as a port. The mere fact that groups of houses built on the port trust estate primarily for the accommodation of its employees is called a village is not enough to bring those who have charge of and supply stores for the maintenance and repairs and sanitation of these houses and the necessary roads, and who supervise and carry out repairs to the water supply and lighting of these houses and these roads, within that class of public servants who keep or expend property for the common secular purpose of a village within the meaning of cl. (10) of S. 21, I. P. C. As the Magistrate says, the port trustees are, so far as the houses and shops on their estate are concerned, in the position of landlords and the applicants are their employees for the purpose of the upkeep of their properties. It is difficult then to see how the terms "village, town or district" within the meaning of cl. (10) of S. 21, I. P. C., can be applied in the circumstances of this case.

The applicants were the chief store-keeper and assistant superintendent of machinery for the port trust estate as a whole; they were entrusted with the keeping, and it may be said, the expending of property by the port trustees of the port on their behalf upon their estate, and we do not think we can read into cl. (10) of S. 21, I. P. C., the word "port". After all the applicants claim that the ordinary criminal law shall be modified in their favour, and we think that they must prove this strictly. It is true that both the applicants come within the provisions of S. 24, Port Trust Act, so that orders made by the Board, which affect them within the meaning of S. 23, require now the sanction of the Central Government, but S. 23 does not relate to the prosecution of these special officers, and S. 71, Karachi Port Trust Act, makes provision for the punishment of officers who are not public servants within the meaning of S. 21, I. P. C., but this does not mean that cl. (10) of S. 21, I. P. C., has any necessary application to the applicants. Clauses (1) or (2) might apply, for instance, to the chairman, so that it cannot be said that if cl. (10) does not apply to the applicants, S. 71, Port Trust Act, is meaningless. Our view then is that the port trust estate does not fall within the term, "village, town or district" within the meaning of clause (10) of S. 21, I. P. C., and, therefore, no sanction of the Central Government is necessary for the prosecution of the offences alleged to have been committed by the applicants. These revision applications must be dismissed accordingly.

D.S./R.K. *Applications dismissed.*

A. I. R. 1941 Sind 31

DAVIS C. J. AND LOBO J.

Muradali Muhammad Ibrahim
Applicant
v.
Emperor.

Criminal Revn. Appln. No. 120 and Criminal Ref. No. 79 of 1940, Decided on 3rd July 1940, to revise order of the Dist. Magistrate, Dadu, D/- 3rd March 1940.

Criminal P. C. (1898), Ss. 499 and 514 — Liability of surety continues so long as he is not discharged or bail bond cancelled and accused taken in custody—Surety undertaking to produce accused on fixed date and thereafter as directed by Court — Surety producing accused on fixed date — Accused with Court's permission leaving Court house for prayers and absconding—Surety's liability does not cease—Forfeiture of bond held justified and inasmuch as surety was taken off his guard penalty for forfeiture could be reduced to something nominal.

The liability of a surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in

the custody of the Court only when his bail bond is cancelled. [P 32 C 2]

In his bond the accused bound himself to appear in the Court on a fixed date and thereafter as directed by the Court and the surety bound himself that the accused would so attend and in default of his so attending he bound himself to forfeit Rs. 1000. The surety produced the accused on the fixed date. During the course of the proceedings the accused with the Court's permission left the court house to say his prayers and absconded. The bail bond was not cancelled at that time nor was the surety discharged:

Held that the surety's liability did not cease merely on the production of the accused in Court but continued thereafter and the forfeiture of his bond was justified. [P 32 C 2; P 33 C 1]

Held further that there were mitigating circumstances in the case whereby the penalty for forfeiture could be reduced to something nominal inasmuch as the surety was taken off his guard. [P 33 C 1]

Fatechand Asudamal — for Applicant.

Advocate-General — for the Crown.

Davis C. J. — This is an application in revision by a surety who has been ordered by the District Magistrate of Dadu to pay a penalty of Rupees 500 upon proof that his bond for Rs. 1000 for the attendance of one Dilawar son of Abdul Rehman Brohi in the Court of the first class Magistrate Kotri was forfeited. We have in addition to this revision application a reference by the learned District Magistrate himself who asks us to give for the guidance of Magistrates a ruling on the question which arises in this case the facts of which are unusual. It appears that in accordance with his bond the applicant-surety secured the attendance in Court on 14th September 1939 at Kotri of Dilawar against whom an inquiry for offences under Ss. 366 and 376, Penal Code, was proceeding and it appears that while the question as to whether the bail bond should be cancelled and the accused remanded to custody was being argued, the accused left the Court on the excuse that he wished to say his prayers. After more than sufficient time for these pious exercises had passed, it was noticed the accused had not returned. Consequently a search was made and it was found that he had absconded. The accused had left the Court with the permission of the Magistrate and his surety the applicant contended, when called upon by the Magistrate to show cause why the bond should not be forfeited and a penalty enforced, that he had satisfied the terms of his bond and had secured the attendance of the accused, and that if he, the accused, had absconded, it was not due to any fault of his but due to the fact that permission had been given by the Magistrate of the Court in whose custody the accused then was. But we do not think that in this case or in cases like this there can be any confusion between the case of an accused who was on bail and whose bail bond has not been cancelled and the case of an accused who is in custody. An accused does not cease to be on bail and his surety does not cease to be liable for his attendance merely because during the course of the day the Court has adjourned or the Court should have given the accused permission to leave the Court for some purpose. An accused person, for instance, would have reasonable ground for complaint if when attending Court on bail and the Court adjourned, the Court ordered him to be watched by a policeman, for, he might well say he was on bail, that he was not in custody and so long as the bail bond was not cancelled or the surety discharged, he was entitled to come and go freely and be at liberty subject of course to the orders of the Court as to his attendance in Court.

We have had the bond in this case translated and it is the usual form of bond taken from the surety for the attendance of an accused in Court. There is nothing in the bond about the production of the accused. The applicant has argued that he bound himself to produce the accused before the Court; he did produce him before the Court, the accused was then in the custody of the Court and his liability under the bond had ceased. But there is nothing in the bond of the surety about production. In his bond the accused binds himself to appear in the Court on 29th January and thereafter as directed by the Court and the surety binds himself that the accused shall so attend and in default of his so attending he binds himself to forfeit Rs. 1000.

We think, therefore, that the liability of the surety must continue so long as the surety has not been discharged or the bail bond cancelled and the accused taken into the custody of the Court. The accused will be taken in the custody of the Court only when his bail bond is cancelled. The bail bond was not cancelled in this case and although the Magistrate did upon that day decide to cancel the bail bond and remand the accused to custody, it was during the discussion as to whether this should be done that the accused left the Court. He was therefore on bail when he left the Court and he was not in custody and the surety was by the terms of his bond bound to see that the accused should return to and attend

the Court as the Court directed, which in this case was after he had finished his prayers.

We think, therefore, that the learned Magistrate was right when under S. 514, Criminal P. C., he held that the bond must be forfeited and ordered a penalty for such forfeiture to be paid by the surety. But we think there are in this case mitigating circumstances, whereby the penalty can be reduced to something nominal, such as Rs. 50. In this case the surety was taken off his guard. He had secured the attendance of the accused in the Court, the accused had left the Court for a temporary purpose with the permission of the Court and the surety might well think that as the Court had allowed the accused to leave the Court for this purpose, the accused would obey the order of the Court and return; otherwise, the surety might have accompanied the accused to his prayers or taken some measure to secure his return and attendance. This is, as the learned District Magistrate says, an unusual case, but we think the principle on which it should be decided is plain, that is to say, that an accused is either on bail or in the custody of the Court. There is no half-way house between or any combination of these two conditions, and until the bail bond is cancelled and the accused has been taken into custody, we do not think that merely because he attends the Court one day, the surety ceases to be liable for that day and the Court has custody of the accused. We therefore allow this revision application only on the question of the amount of the penalty for, we think in principle the order of the learned Magistrate forfeiting the bond was right. We will, for the reasons we have given in the exceptional circumstances of this case, reduce the penalty to Rs. 50. We order a copy of this order to be sent to the learned District Magistrate, Dadu, in answer to his reference.

G.N./R.K. *Revision allowed.*

A. I. R. 1941 Sind 33

DAVIS C. J.

Sanoo Manaji — Appellant

v.

Emperor.

Criminal Appeal No. 34 of 1940, Decided on 30th August 1940, against conviction and sentence passed by Addl. City Magistrate, Karachi, D/- 5th March 1940.

(a) Penal Code (1860), Ss. 297 and 441 — Section 297 is self-contained and is not to be interpreted by reference to S. 441 — Meaning of "trespass" in S. 297 explained — Section 297 is not limited to religious feelings — Feelings contemplated by it are limited by reference to place of worship on sepulture — Section 297 does not punish acts merely of earthly vanity or pride — It does not refer to intention only but also to trespass which is likely to wound feelings — On death of his married daughter and two children complainant in their memory erecting stones over their ashes in cremation ground — Accused, complainant's son-in-law, eleven years after his wife's death deleting complainant's name from all the stones including that in memory of his wife — On evidence and circumstances of case accused held committed trespass with intent to wound complainant's feelings — Allegation that stones were erected at his expense did not entitle accused to delete complainant's name therefrom.

Section 297 fully deals with offences to which it refers and is self-contained and requires no interpretation by reference to S. 441. The word "trespass" in S. 297 means any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Section 297 does not refer to "religious feelings" though the kind of feelings which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places. It does not punish acts which are merely of earthly vanity or pride. That S. 297 is not limited to feelings of a religious nature is clear by the fact that in S. 298 which follows it "religious feelings" are expressly referred to. Section 297 does not refer only to "intention" but also to trespass which is likely to wound the feelings.

[P 34 C 1, 2; P 35 C 2; P 36 C 1]

The complainant on the death of his married daughter and two children erected stones in their memory over their ashes in the cremation ground. The accused who was the complainant's son-in-law eleven years after the death of his wife as a result of a dispute about money matters with the complainant went to the cremation ground and deleted the complainant's name from all the stones on the ground that they were erected out of money provided by him :

Held that on the evidence and the circumstances of the case the accused's trespass was committed with something more than knowledge; it was committed in a spirit of spite and vindictiveness with intent to wound the feelings of the complainant and that the feelings which were wounded were not merely worldly feelings of vanity and pride. The fact that the stones were erected out of the money provided by the accused did not give him the right to enter the cremation ground and delete the name of the complainant therefrom.

[P 36 C 1]

(b) Criminal trial — Evidence — Statements by persons not called as witness — Court is not bound to accept statements merely because case is criminal or certain facts have been admitted.

A Court is not bound to accept statements by persons who were not called as witnesses merely because the case is a criminal one and certain facts were admitted. [P 35 C 2]

Gopaldas N. Lalla — for Appellant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Judgment.—This is an appeal against a judgment of the Additional City Magistrate, Karachi, who convicted the appellant Sanoo, a police constable, of an offence under S. 297, Penal Code, but instead of sentencing him to imprisonment directed him to be released on his entering into a bond of Rs. 300 with one surety for twelve months to keep the peace and be of good behaviour under S. 562, Criminal P. C. I admitted this appeal though no substantive sentence of imprisonment and no fine had been imposed because the section was a section which does not often come before the Courts, and because there was not much authority as to its interpretation. But even now I have been referred to only three cases: the principal case is reported in 40 Cal 548,[1] which is followed by the Rangoon High Court judgment in 1 Rang 690;[2] while there is a third judgment of the Allahabad High Court reported in 18 ALL 395,[3] and which was prior in time to the Calcutta judgment. There is a case of the Bombay High Court, but this is an unreported case, and I see no reason to refer further to it, which differs from the Calcutta case and takes the view that trespass under S. 297, Penal Code, has the same meaning as criminal trespass under S. 441, Penal Code.

But after having heard arguments upon this point, I am quite satisfied that S. 297, Penal Code, is a section which fully deals with offences to which it refers and is self-contained and requires interpretation by no reference to S. 441, Penal Code, and I would say at once that I agree, with all respect, with the view of Richardson J., in 40 Cal 548,[1] that "trespass" in S. 297, Penal Code, appears to mean any violent or injurious act committed in such place and with such knowledge or intent as defined in that section. Further, it is to be noted that S. 297, Penal Code, does not refer to "religious feelings," though the kind of feelings, if I may use the phrase, which comes within the section is clearly limited in its nature by the second paragraph to the section by reference to a place of worship, to a place of sepulture, to feelings of a spiritual nature than a material kind, feelings associated with such sacred places. It does not, as the learned advocate for the appellant, I think, rightly contends, punish acts which are merely of earthly vanity or pride. But that S. 297, Penal Code, is not limited to feelings of a religious nature is, I think, clear by the fact that in S. 298, Penal Code, which follows it, "religious feelings" are expressly referred to. Further, while the learned advocate for the appellant has based his case upon the argument that there was no intention on the part of the appellant to wound the feelings of the complainant, S. 297, Penal Code, does not refer only to "intention." It refers also to trespass which is likely to wound the feelings. It will however make the matter clearer if the section is cited, and the section is as follows:

> *297.*—Whoever, with the intention of wounding the feelings of any person, or of insulting the religion of any person, or with the knowledge that the feelings of any person are likely to be wounded, or that the religion of any person is likely to be insulted thereby, commits any trespass in any place of worship or on any place of sepulture, or any place set apart for the performance of funeral rites or as a depository for the remains of the dead, or offers any indignity to any human corpse, or causes disturbance to any persons assembled for the performance of funeral ceremonies, shall be punished. . . . . .

Now, the facts of this case are that the appellant, one Sanoo, was married to one Aushabai, daughter of the complainant. The appellant himself does not in his statement say when he was married to Aushabai. The complainant says that it was about sixteen years before he gave evidence; but the exact date is not of much importance, and there is no reason to doubt the complainant's word when he said that his daughter died about eleven years ago, and thereafter he erected in her memory in the cremation ground a stone over her ashes and stones over the ashes of his two children who had also died, and the appellant admits that he went to the cremation ground, and there is no reason to doubt the accuracy of the date given by the complainant, 15th November 1939, and deleted the name of the complainant from the stone in memory of his wife and two other stones in memory of the complainant's children. The appellant said in his statement he did this because he had given month after month his salary to the complainant, it was his money that was spent on the stones and not the complainant's money; therefore, the complainant had no right to have engraved upon these stones the words "Built by Eknath Sakaram", and therefore his advocate says that in assertion of his rights the appellant went and deleted the name of Eknath Sakaram from all three stones. In any case if this act did not fall

1. ('13) 40 Cal 548 : 18 I C 677 : 14 Cr L J 117 : 17 C W N 534, Jhulan Sain v. Emperor.
2. ('24) 11 A I R 1924 Rang 106 : 81 I C 41 : 25 Cr L J 553 : 1 Rang 690, Mustan v. Emperor.
3. ('96) 18 All 395 : 1896 A W N 119, Queen-Empress v. Subhan.

within S. 297, Penal Code, it would appear to mean a despicable act arising, as it clearly does, from a dispute about money matters between the appellant and the complainant who was his father-in-law. It appears from the evidence of one Babu, the secretary of the Daxni Mahratta Panch, that the complainant on 11th December 1936, sent an application asking the panchayat to be summoned so that he might obtain money due from the appellant himself. He gave details of his claim which amounted to Rs. 2056. The appellant in his reply stated that from 1924 to 1931 he had paid the complainant month by month Rs. 30 and paid him also other money. He had in fact paid him Rs. 3335, of which Rs. 1985 had been spent and properly spent by the complainant and he, the appellant, should receive the balance of Rs. 1350. There was also a dispute about ornaments and this dispute the panchayat could not decide.

The learned Magistrate came to the conclusion that the appellant's contention that he paid Rs. 30 month after month to the complainant and that these stones were built with his money could not be believed. He relied upon the evidence of one Haridas, a pujari, who lives near Eknath, the complainant, who lives in one of the tenements in the *mandir* belonging to Marahttas and who knows something of the way of life of the complainant and his family, to prove that the appellant and his wife, the complainant's daughter, did not live always with the complainant, but as might be supposed, lived from time to time in the police quarters. The Magistrate has rejected, as he was entitled to reject, the evidence of Mohandas, whom he describes as a discharged pujari and a discontented man of this temple. The learned advocate for the appellant has drawn my attention to the evidence of La Franais, a sergeant in the Karachi police to support the defence contention that he lived with his wife in the house of the complainant and gave him all or nearly all his pay. He also argues that the complainant could not on Rs. 80 a month support without the assistance of the appellant's money two wives, two daughters, a brother's wife and a son and himself. But as he paid only Rs. 11 a month rent, I see no reason why he should not decently support these women and these children out of this money; and even if the appellant did, for some time or from time to time with his wife, the daughter of the complainant, live and mess with the complainant and paid him from time to time money, the messing charges, that does not appear to me to give him the right to enter the cremation ground and delete in a vindictive spirit, and because of his quarrel about money, the name of the complainant from the three stones. The Magistrate says that he did not believe the appellant's contention that the stones were erected at his expense. It is said on behalf of the appellant that he could not be expected to prove this, but it would appear to me that if he had some real and just grievance in this matter, he would not have allowed the matter to rest for eleven years since the death of his wife, and that if he did not enter this cremation ground in the vindictive spirit, that it was not his intention to wound the feelings of the complainant, he would long before this have given notice to the complainant that his name should be deleted from the stones of his wife and children which were built and erected with the appellant's money.

It is said that if the appellant desired to wound the feelings of the complainant, he would not have gone openly to this cremation ground and in the presence of a keeper deleted these names from the stones. The keeper of the cremation ground was not called as a witness and I do not know whether the appellant did or did not under the keeper's eyes mutilate these stones in this manner. Antarsing is mentioned as a chowkidar or watchman of the cremation ground in the evidence of Eknath, and Eknath says that he prohibited the appellant from doing this, but the appellant insisted that he would do this and enter his name in the book. I can see no reason, merely because this is a criminal case and certain facts were admitted, why I should accept statements made by persons who were not called as witnesses. But I do not think it makes any difference to the case whether the appellant did do this in spite of Antarsing's prohibition. It cannot be expected that a chowkidar would enter into a brawl with this police constable in this sacred place.

It might be said that if it could be proved that there was not the intention of the appellant to wound the complainant's feelings, but merely to assert his rights, and that merely because as a result of such assertion the feelings of the complainant were wounded, the offence under S. 297, Penal Code, would not have been committed. Section 297, Penal Code, refers to something more than an intention: it refers to trespass committed with the knowledge that feelings

of any person are likely to be wounded. But I am satisfied that the evidence and the circumstances in this case show, that the appellant's trespass was committed with something more than knowledge; it was committed with intent to wound the feelings of the complainant. It was done in a spirit of spite and vindictiveness, and it was by injuring the complainant's feelings that the appellant's feelings of spite and vindictiveness had to be satisfied. This is not a case where the feelings which were wounded are merely worldly feelings of vanity and pride. It appears to me therefore that the conviction was perfectly proper and all the essential conditions for an offence under S. 297, Penal Code, have been proved. The trespass and deletion of the names from the three stones or their disfiguration was never denied. The third condition, that of intention, within the meaning of S. 297, Penal Code, has, in my opinion, been fully proved. The sentence errs, if anything, on the side of leniency. The appellant should, I think, consider himself fortunate that he has been so leniently dealt with. The appeal therefore is dismissed.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Sind 36

DAVIS C. J.

Mansharam Gianchand and another

Appellants

v.

Emperor.

Criminal Appeals Nos. 63 and 64 of 1940, Decided on 25th September 1940, against convictions and sentences passed by City Magistrate, Karachi, D/- 17th June 1940.

(a) Penal Code (1860), Ss. 383 and 385—Extortion under S. 383 includes putting any person in fear of injury and covers offence under Section 385.

Extortion as defined in S. 383 includes putting any person in fear of injury and covers S. 385 which is a less serious offence punishable only with two years' imprisonment as against three years' imprisonment for an offence under S. 384. [P 37 C 2]

(b) Penal Code (1860), Ss. 347 and 342 — S. 347 includes offence under S. 342.

The offence under S. 342 is included in the offence under S. 347. [P 37 C 2]

(c) Penal Code (1860), Ss. 220, 347 and 342 —Words "corruptly or maliciously" in S. 220 cover confinement for extortion under S. 347— Police Sub-Inspector wrongfully confining complainants on charge of gambling in futures and extorting money from them by putting them in fear of being challaned for offences which he knew to be fictitious—Offence falls under S. 220 and not S. 347 or S. 342 and is triable by Court of Session.

The words "corruptly and maliciously" in S. 220 are wide enough to cover confinement for the purpose of extortion under S. 347. Where a police Sub-Inspector wrongfully confines certain persons on charges of gambling in futures and extorts money from them by putting them in fear of being challaned in Court upon offences which he knew to be fictitious the offence falls under S. 220 and not S. 347 or S. 342 and is triable only by a Court of Session. [P 38 C 2]

(d) Criminal Trial—Jurisdiction—Magistrate should not usurp jurisdiction he has not got by merely altering numbers of sections, e.g., by treating offence under S. 220, Penal Code, as one under S. 347, Penal Code — Offence of serious nature such as under S. 220, Penal Code — Magistrate even if he has jurisdiction should commit case to Court of Session so far as law permits.

Where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a first class Magistrate, however proper be his motives, should not himself remove that case from the Court of Session, and try it himself by merely altering the numbers of the sections, for after all the numbers of the sections are mere labels, and what is to be looked at is the allegation of facts. A Magistrate cannot therefore usurp a jurisdiction to himself he did not possess by placing an offence, which rightly falls under S. 220, Penal Code, under S. 342 or S. 347, Penal Code, so as to give himself jurisdiction and trying it himself. It is however desirable from all points of view, that serious cases, involving offences such as under S. 220, Penal Code, should, so far as the law permits, be committed to the Court of Session even if a first class Magistrate had power to try them. [P 38 C 1]

(e) Criminal P. C. (1898), S. 423 (1) (b) — Appellate Court can commit accused to Sessions Court without repeating inquiry or writing committal order.

An appellate Court under S. 423 (1) (b) has power to commit the accused for trial to the Court of Session, without repeating the inquiry or writing a long committal order when the alleged facts are set out clearly in the judgment of the trying Magistrate and the evidence is very fully upon the record. [P 38 C 2]

(f) Criminal P. C. (1898), S. 215—Magistrate convicting accused for offence falling under S. 220, Penal Code, and his confederate under S. 384 read with S. 114, Penal Code — High Court cannot while quashing proceedings and committing case to Sessions Court order that proceedings against confederate be dropped merely because he has served part of sentence — Both accused and confederate should be tried together for offences arising out of same transaction.

Where a Magistrate by usurping jurisdiction convicts an accused for an offence falling under S. 220, Penal Code, and his confederate under S. 348 read with S. 114, Penal Code, the High Court cannot while quashing proceedings and committing the case to the Court of Session order that no further proceedings be taken against the confederate merely because he has served a part of his sentence. It is in the interests of all concerned that the confederate and the accused should be tried together for offences which form part of the same transaction. [P 39 C 1]

(g) Criminal Trial—Jurisdiction—Court cannot get jurisdiction it does not possess merely because objection is taken at late stage.

A Court does not get a jurisdiction it does not possess merely because objection to it is taken by the accused at a late stage. [P 39 C 1]

(h) Criminal P. C. (1898), Ss. 537, 531 and 530—Trial of offence under S. 220, Penal Code, by Magistrate is not merely irregularity within meaning of S. 537 or S. 531 but is illegal and void.

A Magistrate has no jurisdiction to try an offence under S. 220, Penal Code. Consequently, the trial of such an offence by him is not a mere irregularity within the meaning of S. 531 or even S. 537 but an illegality comparable to those irregularities under S. 530 which render proceedings void. [P 39 C 1]

Partabsingh S. Shahani and Balkrishna H. Lulla — for Appellants (Mansharam and Shanker, respectively).

Kazi Khuda Baksh, Public Prosecutor — for the Crown.

Judgment. — I have before me two appeals: (1) by one Mansharam Gianchand, at one time a Sub-Inspector of police, and (2) by his alleged confederate Shanker Kashiram, a clerk in the accounts branch of the Karachi Municipal Corporation. So far as Mansharam is concerned he has been convicted by the City Magistrate of Karachi of offences of wrongful confinement and extortion, and so far as Shanker is concerned, he has been convicted of abetment of the offence of extortion. The sections under which the appellants have been convicted are set out in the order of the learned Magistrate. So far as Mansharam is concerned, the sections are 384, 385 and 347, Penal Code, and so far as Shanker is concerned, the sections are 384 read with S. 114, Penal Code, and 385 read with S. 114, Penal Code. For the offence under Ss. 384 and 385, Penal Code, Mansharam was sentenced under each section to six months' rigorous imprisonment, and for the offence under S. 347, Penal Code, he was sentenced to six months' rigorous imprisonment, the punishment under S. 347, Penal Code, to run consecutively with the two sentences of six months each passed under Ss. 384 and 385, Penal Code, which were to run concurrently. Mansharam was, therefore, to suffer one year's rigorous imprisonment in all. The appellant Shanker was sentenced under S. 384 read with S. 114, Penal Code, and S. 385 read with S. 114, Penal Code, each to six months' rigorous imprisonment, the sentences to run concurrently.

The offences of which the appellants were convicted were alleged to have been committed by the Sub-Inspector on the night of 27th May 1939, when he wrongfully confined three Khojas, Bundehali, Kamarudin and Husseini, on charges of gambling in futures, put them in fear of being challaned to the Court upon offences which he knew to be fictitious and extorted from them sums of money in their possession, namely, Rs. 55, Rs. 86, Rs. 2 and a further sum of Rs. 200 through his go-between and confederate Shanker Kashiram. The charges, as set out at p. 103 of the paper-book, referred to an offence under S. 409, Penal Code, but of this offence the appellants were acquitted. The charge also refers to Ss. 384 and 385, Penal Code. But, as Mr. P. S. Shahani points out, extortion as defined in S. 383, Penal Code, includes putting any person in fear of injury and covers S. 385, Penal Code, which is a less serious offence punishable only with two years imprisonment as against three years imprisonment for an offence under S. 384, Penal Code. Mr. Shahani also points out that the offence under S. 342, Penal Code, is included in the offence under S. 347, Penal Code, for S. 347, Penal Code, refers to wrongful confinement for the purpose of extortion. Section 342, Penal Code, refers to wrongful confinement simply and is punishable with imprisonment only for one year as against three years which may be imposed under S. 347, Penal Code.

But Mr. Shahani at the outset of the proceedings raised a much more important point. This was that so far as the charge of wrongful confinement was concerned, the appropriate section was not S. 342 or S. 347, Penal Code, at all, but S. 220, Penal Code, for if the Sub-Inspector was charged as a Sub-Inspector, as he was alleged, with wrongfully keeping these three Khojas in confinement corruptly for the purpose of extortion, he knew well, if the evidence is to be believed and the inferences are correctly drawn, that he was acting contrary to law when he so exercised authority. His offence then is an offence under S. 220, Penal Code, and is triable solely by the Court of Session; the Magistrate cannot therefore usurp a jurisdiction to himself he did not possess by placing an offence, which rightly falls under S. 220, Penal Code, under S. 342 or S. 347, Penal Code, so as to give himself jurisdiction and trying it himself. It is true that in the complaint S. 220, Penal Code, is specified and the learned Public Prosecutor tells me that process was issued with respect to this offence also. The learned Public Prosecutor agrees that the case should be committed

to the Court of Session. Mr. Shahani has referred me to three cases which deal with this question of usurpation by Magistrates of jurisdiction vested in Sessions Courts, namely 37 Cr L J 80,[1] 12 Cr L J 20[2] and 21 Cr L J 10.[3] But I do not think myself it is necessary to refer to any authority in respect of the argument that where the Legislature has provided that an offence because of its gravity or because of the special knowledge required in its trial, shall be tried by a Sessions Court, a first class Magistrate, however proper be his motives, should not himself remove that case, as it were from its proper Court, the Court of Session, and try it himself by merely altering the numbers of the sections, for after all the numbers of the sections are mere labels, and what is to be looked at is the allegation of facts. But even in this case the complaint, as I have said, refers to an offence under S. 220, Penal Code.

There is again, I think, another aspect to this matter. It is a matter merely of personal opinion, and I may be wrong, but where serious offences, such as are alleged in this case against the Sub-Inspector, are to be tried, it appears to me that it is desirable from all points of view, from the point of view of the public, from the point of view of the police force, from the point of view of the officer concerned, from the point of view of justice, that these most serious cases, and they are most serious cases, should, so far as the law permits, be committed to the Court of Session even if a first class Magistrate had power to try them, for it appears to me that for an offence of this nature, even though it involves the loss of appointment and of pension, a sentence of five years' rigorous imprisonment in the case of one man would be far more effective than six months or a year in the case of more than one, in the cases, say of five or six Sub-Inspectors, who might be convicted and sentenced to six months' imprisonment each. Corrupt men in the office of Sub-Inspector may still think it worth the risk, if the penalty is only six months' imprisonment, but they would not think it worth the risk if they saw before them on detection for such an offence a sentence of five years' rigorous imprisonment. But in a case under S. 220, I. P. C., if it is properly to be applied, any doubt as to the Court by which such an offender should be tried, is removed by the provisions of the Criminal Procedure Code itself which requires an offence under S. 220, I. P. C., to be tried by the Court of Session. It might, of course, be argued that an offence under S. 347, I. P. C., is rather different from an offence under S. 220, I. P. C., that the words "corruptly or maliciously" mean something less than confinement for a specific purpose, such as extortion with which S. 347, I. P. C., deals. I think myself that these words "corruptly and maliciously" are wide enough to cover confinement for the purpose of extortion, and, in any case, if I should be wrong, the learned Sessions Judge who tries this case, can, if he thinks proper, amend the charge. In any case, I should think it desirable that an offence of this gravity—and it is a very grave offence indeed—should be tried by the Court of Session.

I have power under S. 423 (1) (b), Criminal P. C., to commit the accused for trial to the Court of Session, though it is not necessary for me to repeat the inquiry or write a long committal order. The alleged facts are set out clearly in the judgment of the City Magistrate and the evidence is very fully upon the record.

But it has been suggested to me that I should consider that the Sub-Inspector has been sufficiently punished by the period of imprisonment, namely three and half months which he has already undergone, while his confederate or alleged confederate Shanker has also suffered three and half months' imprisonment, and he has been acquitted of the offence of abetting wrongful confinement and convicted only of the offence of abetment of extortion. But it appears to me very difficult indeed to separate the case of one accused from another without prejudicing the whole trial. I need not, and do not, commit the accused for offences under S. 409, Penal Code, nor for an attempt to commit an offence under S. 511, Penal Code, while the offence under S. 384, Penal Code, itself remains in the charge. Nor is it necessary for me to commit the accused for trial for an offence under S. 385, Penal Code, S. 384, Penal Code, covering also the offence under S. 385, Penal Code. Nor, in view of the fact that an offence under S. 220, Penal Code, is to be charged, is it necessary for me to refer in the charge to offences under Ss. 342 and 347, Penal Code. So far as Shan-

1. ('35) 22 A I R 1935 Sind 221 : 159 I C 271 : 37 CrLJ 80 : 29 SLR 428, Shambooram v. Emperor.
2. ('10) 12 Cr L J 20 : 8 I C 1103 : 1910 M W N 852, Jamal Mahomed v. Moideen Sa.
3. ('20) 7 A I R 1920 Cal 40 : 54 IC 58 : 21 Cr L J 10 : 30 C L J 132 : 23 C W N 1031, Moze Ali v. Emperor.

ker is concerned, he has to be charged only with an offence under S. 384 read with S. 114, Penal Code, with respect to the four sums of money, *viz.*, Rs. 55, Rs. 86, Rs. 2 and Rs. 200, alleged to have been extorted from the three Khojas, Bundehali, Kamarudin and Husseini, severally as regards the smaller sums and jointly as regards the larger sum. But I do not think that because he has already suffered three and half months' rigorous imprisonment, I can, while quashing the proceedings, order no further proceeding to be taken against him. It appears to me in the interests of all concerned that he and the Sub-Inspector should be tried together for offences which are all part of the same transaction.

Nor do I think it can be said that the exercise by the City Magistrate, Karachi, of jurisdiction which he did not possess with regard to the offence under S. 220, Penal Code, in view of the facts upon the record, does not vitiate the trial, that it is a mere irregularity which would not vitiate the trial. It seems to me we are dealing here with a question of jurisdiction which goes to the root of the trial, with something more than an irregularity within the meaning, say, of S. 531, Criminal P. C., or even S. 537 of the Code. It is, of course, unfortunate that this question with regard to S. 220, Penal Code, was not raised before but a Court does not get a jurisdiction it does not possess merely because objection to it is taken by the accused at a late stage. The offence or one of the offences for which the Sub-Inspector should have been tried was under S. 220, Penal Code. The Magistrate had no jurisdiction to try this offence. We have not here a case of irregularity such as is referred to in S. 531, Criminal P. C. We have rather an illegality comparable to those irregularities under S. 530, Criminal P. C., which make proceedings void. It appears to me therefore that I should quash the proceedings, set aside the conviction and order the committal under S. 423(1)(b), Criminal P. C., to the Court of Session for the trial of offences, so far as the Sub-Inspector is concerned under Ss. 220 and 384, Penal Code, and so far as Shanker, his confederate, is concerned, for an offence under S. 384, Penal Code, read with S. 114, Penal Code, and I order accordingly. The charge will now read as under:

"*Charge.*—You (1) Mansharam, son of Gianchand, and (2) Shanker, son of Kashiram, are charged as follows:

That you Mansharam on or about the 27th day of May 1939, at Karachi, in your capacity as the Sub-Inspector of Police, Soldier Bazar Police Station, did, in virtue of your office, corruptly or maliciously keep in confinement, in the exercise of your authority, knowing that in so doing you were acting contrary to law, Bundehali, Kamarudin, and Husseini, and further that you committed an offence of extortion against each of the aforesaid persons with respect to the sums of Rs. 55, Rs. 86 and Rs. 2, respectively, and with respect to a further sum of Rs. 200, against the aforesaid persons jointly, and you thereby committed offences under Ss. 220 and 384, Penal Code, triable by the Court of Session:

And that you Shanker, on or about the aforesaid date and at the aforesaid place intentionally abetted the commission of the aforesaid offences under S. 384, Penal Code, and thereby committed offences under the aforesaid S. 384 read with S. 114, Penal Code, and triable by the Court of Session:

And I, the undersigned, do hereby direct that you both be committed to and tried by the aforesaid Court on the said charges."

G.N./R.K. *Proceedings quashed.*

A. I. R. 1941 Sind 39

DAVIS C. J.

Haji Imamdino Haji Osman
Applicant
v.
Emperor.

Criminal Transfer Appln. No. 107 of 1940, Decided on 30th July 1940.

(a) Criminal P. C. (1898), S. 526—Zamindar, M.L.A., or prominent person has no special privilege under Criminal Procedure Code—Such person can be prosecuted for making false complaint or giving false evidence as any other person—Consequently fact that such person is figuring in case is no ground for transfer.

Magistrates will not be deterred from doing their duty merely because a person concerned is a zamindar, an M. L. A., or a prominent person. All men are equal before the law, and a zamindar, an M.L.A., or a prominent person has no special privilege under the Criminal Procedure Code, and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way as against any other person. Consequently the fact that such a person is figuring in a case is no ground for transferring it. [P 40 C 2; P 41 C 1]

(b) Criminal P. C. (1898), Ss. 476 and 197—Prosecution of M. L. A. under S. 476—No sanction under S. 197 is necessary.

No sanction under S. 197 is required for the prosecution of a Member of Legislative Assembly under Section 476. [P 41 C 1]

K. H. Nayrani — for Applicant.

Hashmatrai G. Chainani — for Opponent.

Parlabrai D. Punwani, Advocate General — for the Crown.

Order. — I have here before me what are in effect two applications for transfer of cases against the same accused Haji Imamdino, one under S. 498, Penal Code, before the first class Magistrate, Sujawal, and another, a case before the second class Magistrate at Dokri under S. 406, Penal Code, which relates to the criminal breach of trust of a horse under somewhat rather unusual circumstances. But the broad ground on which these applications for transfers are based is that these cases are part of a campaign conducted by one Mr. Muhammad Usman Sumro, a Member of the Legislative Assembly who, it is said in this application for transfer, is a person of some notoriety and of such influence that a Magistrate before whom he appears as a witness would find it difficult to reject his evidence. I have a distinct recollection that this Court itself has on one occasion rejected this gentleman's evidence and that the gentleman concerned was prosecuted for perjury with results which are not precisely known to us. I should think myself therefore that the Magistrate should have no difficulty whatever in rejecting this gentleman's evidence as false or incorrect, if from the evidence itself and the evidence of the other witnesses the Magistrate came to the conclusion that on this occasion this gentleman had not or had been unable to testify with truth and accuracy, and though from the statement of the case in the application for transfer it does appear at first sight that there is some support for the case that this Mr. Muhammad Usman Sumro is the person behind three separate complaints made in three separate Courts in two separate districts for the purpose of harassing the applicant, on inquiry the case for the applicant is by no means so pathetic as his advocate suggests. For instance, it is said that as the result of the trouble with the woman not only has the applicant, and others been the subject of a complaint under S. 498, Penal Code, before the first class Magistrate at Sujawal, but in order further to harass, the accused has been the subject of another complaint under S. 406, Penal Code, before the Sub-divisional Magistrate at Shahbunder. This relates to a criminal breach of trust in respect of a gold ornament (dhurri); but he has also been made the subject of a complaint under S. 406, Penal Code, relating to a horse before the second class Magistrate of Dokri.

Now so far as the case under S. 406, Penal Code, regarding the gold ornament is concerned, it appears that that case was withdrawn. The complaint is dated 31st March 1939, while the complaint under S. 498, Penal Code, relating to the woman is dated 22nd May 1939: so that the complaint under S. 406 relating to the ornament is prior in time to the complaint under S. 498, Penal Code, relating to the woman; not very much prior in point of time, and the two cases, of course, may be connected. But it does appear that permission to withdraw the case under S. 406, Penal Code, relating to the gold ornaments was made as a result of a compromise between the parties. That compromise has been read out to me, and one cannot say from the way it is worded that it is not what it purports to be—a real compromise between the parties relating to the offence involving this gold ornament. So that I cannot say that this complaint relating to the gold ornament has anything to do with the complaint relating to the woman or that it is subsequent in time. But the complaint before the second class Magistrate at Dokri relating to the horse is subsequent in time; it is dated 17th November 1939. It is said that that case is false on the face of it, and the Magistrate should have dismissed it and that in any case the Magistrate should not have issued warrants. But the Advocate-General has read out the diary of that case to me, and it does not appear that the Magistrate issued warrants until he had tried other means to secure the presence of the accused. The warrants issued by the Dokri Court were bailable warrants, and so far as this Dokri case is concerned, I cannot say that there is any action on the part of the Magistrate which would justify the transfer of the case.

The Magistrate however, when he tries this case under S. 406, Penal Code, should be alert to see that his Court is not used for the purpose of oppression by introducing the evidence of any zamindar or any Member of the Legislative Assembly who as such has no special position or privilege at all in any Court of law, and the Magistrate of Dokri, though a second class Magistrate, must deal with the case as it comes before him strictly upon its merits. If for instance he believes the case is a false case inspired

by some prominent person, which, I believe, is a phrase now much in vogue, he will, if he thinks that that prominent person has aided or abetted the making of a false complaint or has given false evidence in Court, not hesitate to take such action under S. 476, Cr. P. C., as the interest of justice requires. It must be made known that Magistrates will not be deterred from doing their duty merely because a person concerned is a zamindar, an M. L. A., or a prominent person. It is, as I have said before, a truism that wherever British concepts prevail, all men are equal before the law, and a zamindar, an M. L. A., or a prominent person has no special privilege under the Criminal Procedure Code, and should any such person make or aid in making a false complaint or give false evidence on oath, then the law must be put in motion against him in the same way as against any other person. But, once the attention of the Magistrate has been directly drawn to this aspect of the case—and I do not even say that it was necessary to draw his attention to this aspect of the case — he will, I have no doubt, do his duty. I see therefore no reason to transfer this case from the second class Magistrate at Dokri, and I wish to make it clear that nothing that I have said should be taken to mean that I have formed any opinion in any way as to the truth or falsity of this case relating to this horse. The Magistrate will deal with the case upon its merits.

Similarly with regard to the case under S. 498, Penal Code, before the first class Magistrate at Sujawal. The case may be true or false; I say nothing whatever about its merits at this stage. And even if this Mr. Muhammad Usman Sumro, an M. L. A., should be a witness in this case and his name appears as witness 16 on the list in the complaint, in view of what I have said the Magistrate should have no difficulty in forming an unbiased opinion as to the truth or falsity of the evidence given by this Mr. Muhammad Usman Sumro; if he should give evidence, and if the Magistrate should find that his evidence is false, then he knows his duty under S. 476, Criminal P. C. No sanction by Government, no reference to Government, no consultation with Government, is in any way required under the provisions of the Criminal Procedure Code by which this Magistrate, as all other Magistrates are bound, for the prosecution of this Mr. Muhammad Usman Sumro, if within the provisions of S. 476, Criminal P. C., this Magistrate should think that the interests of justice so require. Again I do not wish it to be inferred in any way that I think this Mr. Muhammad Usman Sumro will give false evidence. The Magistrate must deal with his evidence without any bias and impartially consider and weigh it in relation to the other evidence on the record, direct or circumstantial. It may very well be that the influence of this Mr. Muhammad Usman Sumro has been exaggerated because in one of the cases referred to in the application as an instance of his influence and power, the accused was discharged by the Magistrate.

Lastly, I have before me on the record what purports to be a letter from one Mr. Khushaldas Moolram, advocate, to the first class Magistrate at Sujawal (Ex. F, p. 22 of the paper-book), written, it is said, to this Magistrate to postpone the case under S. 498, Penal Code, which appears to be a most improper letter to be written by an advocate to a Magistrate trying a case in which he is appearing. But I do not even know that that letter was written by Mr. Khushaldas because I have not yet asked him, and I will make no further remark upon this letter until the Registrar shall have, under my direction, written to Mr. Khushaldas in this matter and I shall have had his reply. It seems to me therefore that there is no reason whatever to transfer either one or the other of these cases from the first class Magistrate, Sujawal, and the second class Magistrate at Dokri, and I dismiss these transfer applications accordingly.

G.N./R.K. *Applications dismissed.*

A. I. R. 1941 Sind 41

DAVIS C. J. AND LOBO J.

Vasumal Valiram — Appellant

v.

Karamchand Manghanmal and others — Respondents.

First Appeal No. 22 of 1938, Decided on 5th August 1940, against judgment and decree of First Class Sub-Judge, Hyderabad, D/- 7th February 1938.

(a) Civil P. C. (1908), O. 17, R. 1—Defendant summoning no evidence and applying for adjournment on pretext of illness—Court rejecting application on ground that defendant was shamming — Trial Court's discretion in refusing adjournment held properly exercised.

Where the defendant who was present in Court summoned no evidence and applied for adjournment on the pretext of being ill and the Court

rejected the application on the ground that the defendant was shamming:

Held that the discretion in refusing adjournment was properly exercised and could not be interfered with. [P 44 C 2]

(b) Civil P. C. (1908), O. 10, Rr. 1 and 2—Suit for declaration that mortgagor had no interest in property mortgaged and that plaintiff was absolutely entitled to same—Issues framed—Court examining mortgagee's pleader and recording his statement that he did not know how mortgagor acquired title — Statement falls under O. 10, R. 1 and not under O. 10, R. 2—But even under O. 10, R. 1 it cannot be recorded.

In a suit against the mortgagor and the mortgagee for a declaration that the mortgagor had no interest in the mortgaged property and that the plaintiff was absolutely entitled to the same, the Court framed the issues and on the same date examined the mortgagee's counsel and recorded his statement to the effect that he did not know how the mortgagor acquired title to the mortgaged property:

Held that the statement by the counsel fell under O. 10, R. 1 and not under O. 10, R. 2 and that the same could not be recorded even under O. 10, R. 1. [P 45 C 1]

(c) Civil P. C. (1908), O. 10, R. 2 and O. 18—O. 10, R. 2 ought not to be employed to supersede procedure for trial prescribed by O. 18—Death of widow of last male-holder—Suit by plaintiffs for declaration that they were entitled to last male holder's estate as next reversioners—On date fixed for hearing, Court at once examining defendant and recording his admission as to plaintiffs' relation with last male holder — Both parties closing case thereafter—Court granting declaration asked for—Procedure held illegal—Plaintiffs held not entitled to decree unless they established by evidence their reversionary title.

The power given by O. 10, R. 2, to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. 18. [P 45 C 2]

On the death of the widow of last male holder the plaintiff sued for a declaration that he was entitled to the last male holder's estate as next reversioner. On the date fixed for hearing the Court in supersession of the provisions of O. 18 adopted the extraordinary procedure of examining the defendant and recording his admission as to the plaintiff's relation with the last male holder with a view to obviate the recording of evidence and thereby expedite the disposal of the suit. After the record of aforesaid admission both parties closed their case without adducing any evidence and the Court decreed the suit:

Held that the procedure was illegal and amounted to a misuse of the provisions of O. 10, R. 2, since the examination of defendant could not be said to be necessary in order to obtain information on any material question relating to the suit. The burden was on the plaintiff to establish by evidence that the estate of the last male holder had vested in him, that he was the reversioner after the widow's death entitled to sue, and this burden could not be said to have been discharged by the defendant's statement admitting the plaintiff's relation with the last male holder. The fact that it was nobody's case that there existed any reversioners nearer than the plaintiff was immaterial and the plaintiff was bound to go into the witness box and prove his title as next reversioner: A I R 1931 P C 175 and A I R 1927 All 767, *Rel. on.* [P 45 C 2; P 46 C 1]

(d) Injunction — Suit against mortgagor and mortgagee — Prayer for perpetual injunction restraining mortgagor from dealing with mortgaged property — On basis of aforesaid prayer interim injunction issued to mortgagor — Order allowing relief for injunction to be dropped at hearing held not justified.

In a suit against the mortgagor and the mortgagee the Court on the basis of the prayer in the plaint for a perpetual injunction restraining the mortgagor from dealing with the mortgaged property issued an interim injunction against the mortgagor and permitted the relief for injunction to be dropped at the hearing:

Held that the order permitting relief for injunction to be dropped at the hearing was not justified. [P 46 C 2]

(c) Civil P. C. (1908), O. 8, Rr. 3 and 5; O. 9, R. 6 and O. 37, R. 2 — Even against ex parte defendant claim must be proved.

Even when a defendant is ex parte the claim against him must be proved before there can be a decree: A I R 1917 Cal 269, *Rel. on.* [P 47 C 1]

Khanchand Gopaldas — for Appellant (Defendant 2).

Javhermal Vilaitrai and Fatehchand Asudomal — for Respondents 3, and 1 and 2 (Defendant 1 and Plaintiffs 1 and 2), respectively.

Lobo J. — This is a first appeal against the judgment and decree of the first class subordinate Judge of Hyderabad who decreed suit No. 76 of 1937 of that Court filed by respondents 1 and 2 against the appellant and respondent 3. The facts giving rise to this litigation and the course of proceedings in the suit need to be set out in some detail for a proper understanding of the points involved. Manghanmal and Rochiram, sons of Sajanmal, were separated Hindu brothers. Rochiram died in 1903, leaving no issue but two widows, Pabulbai and Manghulbai. He left a considerable amount of property moveable and immovable and a business. All this property came into the hands of the widows. Pabulbai died in 1913. On 25th October 1926 Manghulbai executed a document, Ex. 53, in the case headed "anjamnama" wherein inter alia it was provided:

> After I die whatever property remains at that time shall be inherited by Bhai Karamchand and Bhai Naraindas sons of Manghanmal, and their children (except Harchandrai, son of Karamchand half to half).

Manghulbai died in February 1937. The two plaintiffs in the suit are the sons of Manghanmal, brother of Rochiram, referred to in Ex. 53; defendant 1 Narsingdas is the son of plaintiff Karamchand. It appears that

in June 1937, some months after the death of Manghulbai, mutation of names in respect of some immovable properties belonging to Rochiram was effected in the revenue records. Exs. 2, 3, and 4 in the case are extracts from the revenue records of the Shahdadpur taluka of the Nawabshah District and show that six city survey numbers were transferred to the names of "Karamchand Manghanmal, manager, joint family and Naraindas Manghanmal, manager, joint family." In the column "Nature and origin of title" are inserted the words "By inheritance from Manghulbai deceased." In the "Remarks" column the mutation is shown to have been the result of a statement made to the city survey officer on 4th June 1937. By a document dated 12th August 1937, Ex. 52, in the case Naraindas, defendant 1, mortgaged with defendant 2 for a sum of Rs. 1000 a As. 2-8 share in five immovable properties belonging originally to Rochiram deceased. His title to this As. 2-8 share and his right to mortgage it is thus set out in Ex. 52 :

> According to the will dated 25th October 1926 made by the deceased Manghulbai, widow of Seth Rochiram, resident of Tando Adam, and registered in the office of the Sub-Registrar Shahdadpur on 16th November 1926 in Book No. . . . . Karamchand, son of Manghanmal, and his heirs have eight annas share in the entire property. In accordance with that, my share is As. 2-8 (two annas eight pies).

It appears again from Ex. 2 to 4, extracts from the record of rights of the Shahdadpur taluka, that this mortgage was noted in the "Remarks" column on 1st October 1937. In October 1937 plaintiffs filed the present suit for declaration and injunction. The plaint recites the death of Rochiram and of his two widows, refers to and specifies a fairly large estate moveable and immovable as being left by Rochiram to which the plaintiffs state they are entitled after the death of Pabulbai and Manghulbai as next reversioners; it refers to the mortgage effected by defendant 1 on the basis of the document, Ex. 53, executed by Manghulbai which document it states "does not create any rights in favour of defendant 1 and is not in any way binding on the plaintiffs." The prayer clause in the suit includes a prayer for a declaration (a) that the plaintiffs are full and exclusive owners of the properties mentioned in Schs. A and B attached to the plaint and that defendant 1 has no right or interest in the same; (b) a prayer for a declaration that "the mortgage executed by defendant 1 in favour of defendant 2 is illegal and not binding upon the plaintiffs in any way" and (c) a prayer for "a perpetual injunction to defendant 1 restraining him from alienating, dealing with or in any way interfering or intermeddling with the properties in suit."

The learned advocate for the appellant stated from the bar that the plaintiffs also applied under O. 39, Rr. 1 and 2 for an interim injunction against defendant 1 that their prayer was granted and defendant 1 was restrained by a temporary injunction during the pendency of the suit from alienating, dealing with or in any way interfering or intermeddling with the properties in suit. We do not find anything in the paper book relating to this interim injunction, but the statement of the learned advocate for the appellant has not been controverted and we have every reason to believe therefore that the plaintiff did obtain during the pendency of the suit an interim injunction against defendant 1. Defendant 1 put in no appearance and no written statement; defendant 2 the mortgagee, however, filed a written statement wherein he denied almost every allegation put forward by the plaintiffs. Some paragraphs of this written statement must be set out in extenso. Para. 5 of the written statement reads thus :

> As regards paras. 2 and 3 it is submitted that this defendant has no knowledge of the statements contained therein and the same are accordingly denied and plaintiffs put to the proof thereof.

In paras. 2 and 3 of the plaint the connexion between the deceased Rochiram and the plaintiffs in the suit is set out. Para. 6 of the written statement reads :

> As regards para. 4 it is submitted that so far as this defendant is aware and (has) learnt on enquiries, the property mortgaged with this defendant had been allotted exclusively to defendant 1, in pursuance of some family arrangement between the plaintiffs and defendant 1's brother; and it was with the knowledge and acquiescence of the plaintiffs and the brother of defendant 1 that the defendant took mortgage of a share in the property from defendant 1. . . .

Paragraph 7 of the written statement states :

> The defendant is not aware of the property left by Manghulbai and the plaintiffs are therefore put to proof of it. The defendant further repudiates the plaintiffs' alleged claim regarding the property mortgaged with this defendant by defendant 1. It is further submitted that this defendant is a bona fide mortgagee for value without notice of any defect in the title to it of defendant 1. The plaintiffs never objected to the mortgage by defendant 1 and it was due to their conduct and representations that the defendant was induced to take the property in mortgage; the plaintiffs therefore are estopped from questioning the defendant's mortgage.

Paragraph 9 of the written statement is important and reads :

As regards para. 8 it is submitted that this defendant is not aware that the plaintiffs are the reversioners or that they are the only reversioners; the plaintiffs' claim as such is therefore denied. In any event, it is submitted that the plaintiffs have no reversionary or other right or interest in the property mortgaged with this defendant. It is further denied that the plaintiffs are entitled to any declaration or any other relief in respect of the property mortgaged with the defendant.

Paragraph 8 of the plaint to which para. 9 above is a reply sets out the plaintiffs' title to the property in suit which is the foundation of their prayer for a declaration. In para. 10 of the written statement, defendant 2 states: "All other paragraphs are denied..." The following issues were framed on 17th December 1937:

1. Is defendant 2 a bona fide mortgagee for value without notice as alleged in para. 7 of the written statement?
2. Are plaintiffs estopped from questioning the defendants' mortgage as alleged in para. 7 of the written statement?
3. Is the mortgage deed binding upon the plaintiffs?
4. Whether plaintiffs are reversionary heirs of Manghulbai's husband?
5. Whether defendant 1 has any legal title to the property?
6. What should the decree be?

On the same date the learned Judge examined Mr. Tilokchand, advocate for defendant 2, and the following statement was recorded: "I cannot say how defendant 1 acquired title to the property mortgaged by him with defendant 2." The suit came on for hearing on 19th January 1938. It does not appear from the record whether the plaintiffs were present. But defendant 1 was absent and defendant 2 though in Court presented an application for adjournment signed by his advocate which reads thus:

It is submitted on behalf of the defendant, Vassumal that since the last hearing the defendant was lying ill and was under the treatment of Dr. Parmanand at Tando Adam, for the last fortnight. He was therefore unable to summon evidence. He is feeling feverish even now. Accordingly, it is prayed that this Hon'ble Court will be pleased to adjourn the hearing of the case to some other date to enable the defendant to summon evidence through the Court and proceed with the case.

With the following order the learned Judge rejected the application: "The defendant has summoned no evidence. Mr. Santdas objects, and rightly too. The defendant is probably shamming." It would appear that the next thing that the learned Judge did was to examine defendant 2, for it appears the following statement was recorded: "Statement of Vassumal: Karamchand and Naraindas are sons of Manghanmal. Manghanmal and Rochiram are brothers." This statement has been signed by Vassumal, defendant 2. The diary of the case shows that the plaintiffs' advocate offered no evidence and closed his case. Defendant 2 did not go into the witness box and his advocate also stated that he closed his case. The matter was adjourned for arguments to 24th January 1938. On that date an advocate filed a vakalatnama for defendant 1. The learned Judge however refused to hear him. He heard arguments of the advocates for the plaintiffs and defendant 2 and on 7th February 1938 delivered judgment granting the plaintiffs "the declaration prayed for" with costs. In the judgment it is stated that at the trial of the case the advocate for the plaintiffs gave up the relief of injunction which he had sought against defendant 1.

The learned advocate who appears for the appellants before us has urged several points. He has contended that the learned Judge erred in refusing the application, Ex. 44 for adjournment presented on behalf of defendant 2 on 19th January 1938, the date of trial. The refusal of this application, argued the learned advocate, was arbitrary and harsh and resulted in a denial of justice to defendant 2, the only contesting defendant. He has argued further that the procedure adopted by the learned Judge in recording the statement of defendant 2 and in failing to record any evidence on behalf of the plaintiffs was not only extraordinary but unwarranted by law. He argued, thirdly, that an examination of the record as it stood made it manifest that the plaintiffs had failed to prove their case; that there was an entire want of evidence; that there was no proof that the plaintiffs were the next reversioners after the death of Manghulbai entitled to the estate left by the deceased Rochiram; there was no proof that the plaintiffs were in possession of that estate and in absence of proof on these points the learned Judge could not in law grant the plaintiffs the declaration decreed in their favour.

The learned advocate for respondent 3, the original defendant 1, further argued that as against respondent 3 the decree was ex parte and that this ex parte decree had been passed against respondent 3 without any proof of the plaintiffs' claim. We do not think that there is any substance whatever in the first contention raised by the learned advocate for the appellant and our experience of the artifices adopted by defendants in the mofussil to obtain adjournments of cases which they are not in a position to proceed with is sufficient to deter us from interfering in this case with the discretion exercised by

the learned Judge; for we feel no doubt that if the learned Judge who had all the facts before him felt that there was any good faith in the application EX. 44, he would not have failed to grant a short adjournment to the learned advocate for the appellant. But it appears to us that the remaining contentions of the learned advocate for the appellant are sound and that the procedure adopted by the learned Judge was unusual and unwarranted by law and has resulted in a miscarriage of justice which calls for interference on our part. Order 10, Civil P. C., provides for the examination of the parties by the Court; R. 1 provides :

> At the first hearing of the suit the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

Rule 2 of O. 10, Civil P. C., provides :

> At the first hearing of the suit, or at any subsequent hearing, any party appearing in person or present in Court or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

The statement, Ex. 35, of the learned advocate for defendant 2 recorded by the learned Judge on 17th December 1937 obviously does not fall under R. 2; it can only fall under R. 1 and it appears to us that even under R. 1 that statement should not have been recorded. The learned advocate for defendant 2 was asked the nature of the title of defendant 1 who had executed a mortgage in favour of defendant 2. The rule however refers only to admissions or denials of allegations of fact made in the plaint or written statement of the opposite party which have not expressly or by necessary implication been admitted or denied by the party against whom they are made. We cannot therefore see what justification the learned Judge had for recording EX. 35. The procedure adopted by the learned Judge on 19th January 1938 in recording the statement EX. 48 was in our opinion even more objectionable and a procedure which has been condemned by their Lordships of the Privy Council. 19th January 1938 was the date fixed for the trial of the suit and in the ordinary course the learned advocate for the plaintiffs would open his case and lead his evidence. In the present case defendant 2 had denied almost every allegation made by the plaintiffs in their plaint and the issues in the suit clearly indicate that the burden of proof in the case was primarily at least upon the plaintiffs, for issue 4 which reads "whether plaintiffs are reversioners of Manghulbai's husband?" goes to the very root of the plaintiffs' case.

In the case in 35 C W N 925,[1] their Lordships of the Privy Council have held that the power given by O. 10, R. 2, Civil P. C., to examine any party present in Court is to be used by the Judge only when he finds it necessary to obtain from such party information on any material questions relating to the suit. It ought not to be employed so as to supersede the ordinary procedure at a trial as prescribed in O. 18, Civil P. C. In the case before their Lordships the proceedings at the trial had been opened by the Court calling upon one of the defendants to give evidence not on any specific points but on the whole case, and the witness was then cross-examined by the parties. The ground put forward by the learned Judge for adopting this procedure was that the defendant knew "most of the affair" which the Court had to investigate. Nevertheless, their Lordships held that this deviation from the normal and proper procedure was not justified in the absence of more cogent reasons.

It may be that in the case before us the learned Judge has not departed quite to the same extent from the normal and proper procedure, but we have no doubt whatever that he has misused the provisions of O. 10, R. 2, Civil P. C., and for this there is no justification. It was not a case where the examination of defendant 2 was necessary in order to obtain information on any material question relating to the suit. It would appear that the learned Judge adopted this extraordinary procedure to obviate the recording of evidence thus to expedite the disposal of the suit. As we have said before, the suit was set down for trial on the 19th January. The learned advocate for the plaintiffs was present. There is no reason to believe that the plaintiffs themselves were not present; the learned advocate for defendant 2 was present and so was defendant 2 and we can see no reason why the learned Judge should not have followed the ordinary procedure laid down for the hearing of a suit and examination of witnesses in O. 18, Civil P. C. The learned Judge in his judgment states :

1. ('31) 18 A I R 1931 P C 175 : 134 I C 669 : 35 C W N 925 (P C), Manmohandas v. Mt. Ramdei.

The statement recorded by me Ex. 48 is not a statement under O. 12, R. 5, nor have I on that basis decreed the suit.

That may be so, but whether the statement Ex. 48 is or is not excluded from consideration, it cannot in our opinion be said that the plaintiffs have proved their case. The learned Judge states :

Relationship being admitted the question who the preferential heir is or is not, is a matter to be decided on legal authority. Therefore in my opinion there is no necessity that the plaintiffs should have proved effectively by coming into the box that they were the preferential heirs.

We cannot agree. The burden of proving issue 4 lay on the plaintiffs. It was for them to establish by evidence that the estate of Rochiram, their uncle, had vested in them, that they were the reversioners after Manghulbai's death entitled to sue, and this burden cannot be said to have been discharged by the statement Ex. 48, by a reference to the document Ex. 53 and by reference to Mulla's Hindu Law, S. 43. In the case in 49 ALL 779,[2] it was held by a Bench of the Allahabad High Court that

it is incumbent on a plaintiff seeking to succeed to property as reversioners to establish affirmatively the particular relationship which he puts forward. He is also bound to satisfy the Court that to the best of his knowledge there are no nearer heirs.

The learned Judge states that it was nobody's case that there existed any reversioners nearer than the plaintiffs, but this is no answer. The plaintiffs were bound to go into the witness box and prove their title as next reversioners after the death of Manghulbai, Rochiram's widow. We think that in these circumstances there is much to say for the argument of the learned advocate for the appellant that this unusual procedure adopted by the learned Judge has not only deprived defendant 2 of the right of cross-examining the plaintiffs, a right which he would have had and of which he would have effectively availed himself had the plaintiffs or either of them stepped into the witness box, but that as a consequence the case of the plaintiffs remains unproved.

We do not feel that the plaintiffs kept out of the witness-box merely because on the recording of Ex. 48 their learned advocate felt that no evidence was called for on behalf of the plaintiffs. We are far more inclined to think that the plaintiffs had other reasons for not entering the witness-box. The learned advocate for the appellant has taken us through the document Ex. 53 and the extracts from the record of rights Exs. 2, 3 and 4 and we think that there is some substance in his argument that these documents read in combination indicate some family arrangement as a result of which Ex. 53 was executed by Manghulbai and that the plaintiffs apprehending that defendant 2 might be able in his cross-examination of the plaintiffs on the documents Exs. 2 to 4 and Ex. 53 to establish a legal title in defendant 1 on the basis of which the mortgage to defendant 2 could be upheld, adopted the ruse of keeping themselves out of the witness box. It is true no issue had been framed as to any family arrangement, but some reference to a family arrangement is to be found in para. 6 of the written statement of defendant 2. But whether our suspicions in this matter are well founded or not, the fact remains that on the record as it stands, the plaintiffs have failed to prove the necessary title to obtain the declaration which has been decreed in their favour.

They have equally failed to prove that they were in possession of the property in suit so as to entitle them to the declaration prayed for under S. 42, Specific Relief Act. This is clearly covered by issue 6 "What should the decree be?" In the plaint the plaintiffs have alleged that they were in possession. The allegation has been denied in the written statement both specifically and generally and it was for the plaintiffs to prove that they were in possession and on their failing to do so, they were clearly not entitled to a declaration such as has been decreed in their favour. Lastly, in regard to the arguments placed before us by the learned advocate for the appellant it appears to us that the learned Judge failed to exercise a judicial discretion in permitting the learned advocate for the plaintiffs at the hearing of the suit, to give up the relief of injunction which had been sought against defendant 1. On the basis of the prayer for a perpetual injunction in the plaint, an interim injunction had been issued to defendant 1 and we can see no justification in these circumstances for the action of the learned Judge in permitting this relief to be dropped at the hearing of the suit, and we have every reason to believe that this was yet another means adopted by the learned Judge to expedite disposal of this suit and avoid troublesome questions of court-fees which might have necessitated an adjournment of the case. With reference to defendant 1 the learned Judge states in his judgment :

2. ('27) 14 A I R 1927 All 767 : 102 I C 167 : 49 All 779 : 25 A L J 500, Javitri v. Gendan Singh.

Before I close I must touch one point and that is the appearance of defendant 1 through a pleader on the date of arguments. He has, I have already shown, not filed any written statement and not appeared on the date on which the case was fixed for final hearing, but on the day of arguments, his counsel appeared and wanted to argue the case. I cannot understand that an ex parte defendant, who filed no written statement and who did not appear on the date of final hearing, could argue in the case. The counsel for defendant 1 has cited various rulings to show that he could appear and take up and argue the case at the stage he chose to appear. No attempt was made to get the ex parte order set aside . . . . . In this case, I have not fixed any case for ex parte hearing. All that I have done is that I have not allowed the counsel for the defendants to argue the case. In my opinion, arguments can only be based on facts or on legal points raised in the defence or brought out in evidence. In this case, there has been no evidence recorded and the counsel for defendant 2 has already argued the case both for himself and defendant 1 because the interests of the two are identical.

The learned advocate for defendant 1, respondent 3, has referred us to O. 9, R. 7, Civil P. C., and has cited several rulings in support of his argument that the learned Judge was bound in law to permit the advocate for defendant 1 to argue the case on the date fixed for arguments, although there had been no appearance by defendant 1 prior to that date. He has cited before us the cases referred to in 51 Mad 597,[3] A I R 1926 Sind 181,[4] A I R 1925 Mad 1274[5] and A I R 1924 Cal 806[6] and the learned advocate for respondents 1 and 2 has pointed out that the decision of a single Judge of this Court in A I R 1926 Sind 181,[4] has been dissented from by another single Judge of this Court in the case A I R 1929 Sind 46.[7] But, however interesting this argument may be, it is quite unnecessary for the purposes of this appeal to pursue it, because it appears to us that as in the case of defendant 2, so in the case of defendant 1 who was ex parte the plaintiffs have been given a decree without any proof of their claim. Even when a defendant is ex parte the claim against him must be proved before there can be a decree. The case reported in 43 Cal 1001[8] is very much in point. In that case the plaintiffs sued the defendants on a contract for damages for failure on the part of the defendants to take delivery of certain goods, the damages being claimed on the basis of the difference between the contract price of the goods and the market price thereof. The defendants did not appear or file any written statement. On the date of hearing the defendants appeared and applied for leave to defend the suit on the ground that there had been some misunderstanding. The Court refused the application and without hearing any evidence whatever decreed the plaintiffs suit ex parte. It was held that the procedure adopted was illegal and that the decree must be reversed and the case remanded to the lower Court for retrial. The learned Judges held that a verification of the plaint was not evidence on which the suit could be decreed whether the adversary did or did not appear. It was further held that there was no legal evidence on the record on which the decree made in favour of the plaintiffs might be supported and that the plaintiffs were not entitled to succeed on the basis of an implied admission of their claim by the defendants. Sir Lancelot Sanderson C. J. held that

> the fundamental principle is that the plaintiff when he comes to Court must prove his case and must prove it to the satisfaction of the Court.

Woodroffe J. held that

> no decree can be legally made in any case without any evidence except in cases of suits governed by the provisions of O. 37, Civil P. C.

Speaking of the procedure in the Calcutta High Court this learned Judge added:

> In this Court it has always been the practice in undefended cases to take evidence as defined in the Evidence Act, namely oral statements of witnesses and documents proved before the Court

and Mukerjee J., the third Judge in this case, has said: "Great caution should be exercised when suits are heard ex parte." This observation, he said, was a universal application, but applied with special force to cases where unliquidated damages were claimed. For these reasons we think that the judgment and decree of the learned first class subordinate Judge must be reversed. Ordinarily, we should have allowed this appeal with costs and made no further order thus dismissing the plaintiffs' suit. But as we feel that the conduct of the plaintiff-respondents and of their advocate might to some extent have been influenced in this case by the attitude of the learned Judge who was trying, we think the proper order will be to allow this appeal with costs, reverse the decree and direct that the record

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3. ('27) 14 AIR 1927 Mad 1197 : 108 I C 297 : 51 Mad 597, Pattanna v. Neli Chetty.
4. ('26) 13 AIR 1926 Sind 181 : 92 I C 493, Kala Gella & Co. v. Shivji.
5. ('25) 12 AIR 1925 Mad 1274 : 91 I C 545 : 49 M L J 273, Venkata Subbiah v. Lakshminarasimham.
6. ('24) 11 AIR 1924 Cal 806, Satyendra Nath v. Narendra Nath.
7. ('29) 16 AIR 1929 Sind 46: 115 IC 310, Gangaram Samandas v. Firm Deumal Nihalchand.
8. ('17) 4 A I R 1917 Cal 269 : 34 I C 235 : 43 Cal 1001 : 20 C W N 1192, J. B. Ross & Co. v. C. R. Scriven.

of this suit be returned to the Court of the first class subordinate Judge of Hyderabad in order that the suit be proceeded with and disposed of according to law. We order accordingly.

G.N./R.K. *Order accordingly.*

A. I. R. 1941 Sind 48

DAVIS J. C. AND LOBO J.

Emperor

v.

Achar Hamzo Kumbhar.

Criminal Ref. No. 82 of 1940, Decided on 11th April 1940, made by Dist. Magistrate, Nawabshah, D/- 26th March 1940.

(a) Criminal P. C. (1898), S. 562 — First offence — Short sentence deprecated.

The passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime. The young convict when he comes out of prison has the stigma of prison upon him and yet his imprisonment has not been sufficiently long for its disciplinary influence to have effect, while he has been brought into the company of hardened offenders who may further guide him to a life of crime. Consequently, it is wrong to pass a short sentence for a first offence: A I R 1939 Sind 260, *Foll.* [P 48 C 2]

(b) Whipping Act (1909), Ss. 3 and 5—Offence punishable with imprisonment under Penal Code —Whipping in lieu of punishment for aforesaid offence—There is no age limit — Ss. 3 and 5 should be read together with provisions of Criminal P. C., relating to whipping.

Section 3 permits whipping in lieu of any punishment for which the offender is liable under the Penal Code to imprisonment, irrespective of age. Consequently, for whipping for an offence of theft there is no limit of age. Ss. 3 and 5 should be read together along with S. 393, Criminal P. C., and other provisions contained in the aforesaid Code which relate to whipping. [P 48 C 2]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis J. C.—This is a reference by the learned District Magistrate of Nawabshah who recommends that a sentence of three months' rigorous imprisonment for theft passed by the Resident Magistrate of Nawabshah upon a young offender, in the opinion of the Superintendent of the Hyderabad Central Prison more likely to be 18 years of age than 20, should be reduced to that already suffered, as, in the learned District Magistrate's opinion, he cannot be whipped, nor is it worth while now taking action under S. 562, Criminal P. C.

We have constantly stressed the harm that short sentences for first offences can cause and have drawn the attention of Magistrates to this particular aspect of punishment, for it is now generally agreed that the passing of a short sentence of imprisonment upon a first offender is very often an introduction to a life of crime. The young convict when he comes out of prison has the stigma of prison upon him and yet his imprisonment has not been sufficiently long for its disciplinary influence to have effect, while he has been brought into the company of hardened offenders who may further guide him to a life of crime: *see* I L R (1939) Kar 749[1] at p. 750. Therefore, we think the learned Magistrate was obviously wrong when he passed upon the accused, whether he was 18 or 20 years of age, a short sentence for this first offence.

The District Magistrate thinks that as the convict is over 16 years of age he could not be whipped, but if he would refer to S. 3, Whipping Act, he will notice that for whipping for an offence of theft there is no limit of age. The limit of age is prescribed generally by the Criminal Procedure Code under S. 393, which in the case of males is over 45 years of age, while in the Whipping Act itself S. 5 refers to juvenile offenders who, according to the explanation to that section, is an offender under 16 years of age. But S. 3, Whipping Act, permits whipping in lieu of any punishment for which the offender is liable under the Code to imprisonment, irrespective of age. Under S. 393, Criminal P. C., on the other hand, a female cannot be whipped. All these sections of the Whipping Act should be read together and these sections must be read with the sections of the Criminal Procedure Code which relate to whipping. But under the circumstances of this case we do not think it is necessary to order whipping. We agree with the District Magistrate that it is now not worth while taking action under S. 562, Criminal P. C., and we accept his recommendation that the sentence of this Achar should be reduced to that already suffered which is already nearly two months. The District Magistrate should invite the attention of the subordinate Magistrates to the ruling of this Court referred to above, I L R (1939) Kar 749[1] at p. 750, in which the harmful effects of short sentences are pointed out.

G.N./R.K. *Order accordingly.*

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1. ('39) 26 A I R 1939 Sind 260 : 184 I C 311 : I L R (1939) Kar 749 : 41 Cr L J 14, Emperor v. Nur Muhammad Kalu Khan.

A. I. R. 1941 Sind 49

DAVIS C. J. AND LOBO J.

Sobhomal Thaoomal — Appellant

v.

Dulahdinomal Tilusing — Respondent.

First Appeal No. 27 of 1938, Decided on 24th July 1940, against judgment and decree of First Class Sub-Judge, Hyderabad, D/- 21st February 1938.

Civil P. C. (1908), O. 21, R. 19 and S. 50 — Suit by plaintiff against father and son — Plaintiff obtaining money decree against father — Son awarded decree for costs against plaintiff — Son's execution application dismissed on ground that sum due against him as legal representative of his deceased father was larger — No enquiry as to extent of assets in hand's of son made — Dismissal is illegal — Proper procedure stated — O. 21, R. 19 held applicable to case.

Order 21, Rule 19 applies even to a case of a claim by a defendant against a plaintiff personally and a claim by the plaintiff against the defendant as legal representative of another deceased defendant. And the mere fact that there has to be some inquiry under S. 50 as to the extent of the property of the deceased in the hands of his legal representative or that the sum may be limited by the provisions of S. 50 does not take the case out of the scope of O. 21, R. 19. [P 49 C 2; P 50 C 1]

In his suit against a father and son the plaintiff obtained a money decree against the father while the son was awarded a decree for his costs. The execution applications by the son were dismissed on the ground that the amount due to the plaintiff from the son as legal representative of his deceased father was larger. No enquiry however under S. 50 was made as to the extent of the deceased father's assets in the hands of the son :

Held that the order of dismissal was illegal. The Court should have ordered an inquiry as to the extent of the property of the deceased father in the hands of the son within the meaning of S. 50, against which the plaintiff could execute his decree. Then the sum recoverable by the plaintiff from the son would be set off against the sum recoverable by the son from the plaintiff within the meaning of O 21, R. 19 which applied to the case : A I R 1938 Sind 31 and A I R 1938 Bom 253, *Rel. on.* [P 49 C 2]

Held further that the plaintiff was entitled to demand a set-off and need not have filed his own execution application against the son as a legal representative of his deceased father of the money decree which the plaintiff held against the father inasmuch as the object of O. 21, R. 19 was to avoid multiplicity of proceedings. [P 50 C 1]

Dingomal Narainsing — for Appellant.

Manghanmal Bhojraj — for Respondent.

Davis C. J. — This is an appeal against an order passed in execution by the first class subordinate Judge of Hyderabad dated 21st February 1938 in which he dismissed two applications made by defendant 2 in the suit in which defendant 1 was the father of defendant 2 and which resulted in defendant 2 obtaining an order for his costs in the trial Court and an order for his costs in the appellate Court against the plaintiff. The plaintiff on the other hand, got a money decree against defendant 1, whose legal representative defendant 2 now is, and, indeed, defendant 2 is on the record as the legal representative of defendant 1. The decree which the plaintiff obtained against defendant 1 was for a sum of money, that is to say, his decree was a money decree and within the terms of S. 50, Civil P. C., he is entitled to execute that decree against defendant 2 as the legal representative of defendant 1 to the extent of the property of defendant 1 which has come to his hands and has not been duly disposed of. But the learned Judge seemed to assume that because the sum of money to be recovered by the plaintiff under the decree was greater than the sum of money to be recovered by defendant 2 on account of the costs, the application of defendant 2 on account of his costs should be dismissed. But we do not think that this would be the case until there had been an inquiry as to the extent of the property of the deceased defendant 1 in the hands of defendant 2 within the meaning of S. 50, Civil P. C., and if the value of that property did exceed the sum which defendant 2 was entitled to recover by way of costs from the plaintiffs, then, rightly, the applications of defendant 2 would be dismissed. But no inquiry was held and we do not think it is a matter of presumption that merely because a plaintiff seeks to execute a decree against the legal representatives of a defendant, that legal representative has sufficient property of the deceased in his hands to satisfy the decree. Therefore, it would appear that the Judge, instead of dismissing the applications of defendant 2 for costs, should have ordered an inquiry as to the extent of the property of the deceased, defendant 1, in the hands of defendant 2 within the meaning of S. 50, Civil P. C., against which the plaintiff could execute his decree. Then the sum recoverable by the plaintiff from defendant 2 would be set off against the sum recoverable by defendant 2 from the plaintiff within the meaning of O. 21, R. 19, Civil P. C.

It was argued that O. 21, R. 19 could not apply to a case such as this, to a claim by a defendant against a plaintiff personally and a claim by a plaintiff against the defendant as legal representative of another deceased defendant; but there is nothing, we think, in R. 19 of O. 21 to exclude its application in a case of this nature. Cases cited to us, for

instance, that in 32 S L R 162[1] and in I L R (1938) Bom 263,[2] relating to Rr. 18 and 19, show that this rule is not to be interpreted in a narrow and restricted manner; that it is not exhaustive and must be applied on equitable principles, and we do not think that it would not apply, for instance, in a case such as this, merely because there has to be some inquiry under the provisions of S. 50, Civil P. C., as to the extent of the property of the deceased in the hands of his legal representative. Rule 19 of O. 21, Civil P. C., refers to sums of money and it is said, therefore, that there is no room for inquiry under S. 50, Civil P. C., for the sum of money must be a certain sum ascertainable at once from the decree. But in this case the plaintiff is entitled to recover a sum of money under the decree from the legal representative of defendant 1, that is to say, from defendant 2, and prima facie he is entitled to recover from defendant 2 the sum decreed to be recovered by the plaintiff from defendant 1. The fact that the sum may be limited by the provisions of S. 50, Civil P. C., does not appear to us to remove a case such as this out of the scope of R. 19 of O. 21, Civil P. C.

It has been suggested to us that the plaintiff, instead of demanding a set-off should have filed his own execution application against defendant 2 as a legal representative of defendant 1 of the money decree which the plaintiff held against defendant 1, but to accept this suggestion would be to encourage multiplicity of proceedings which we think, R. 19 of O. 21 is, among other things, intended to avoid. We think the Judge is wrong when he dismissed the execution applications of defendant 2 on the assumption that he had in his hands sufficient property of the deceased to meet a claim of the plaintiff. He should, we think, have held an inquiry as to the extent of the property of the deceased in the hands of defendant 2 within the meaning of S. 50, Civil P. C., and if he had then found that the extent of that property and its value was greater than the sum claimed by defendant 2 in execution, he would have dismissed the execution applications of defendant 2, because the plaintiff was entitled to recover a larger sum from defendant 2 as legal representative than defendant 2 was entitled to recover from the plaintiff. But if on enquiry it was found that the extent of the property of defendant 1 in the hands of defendant 2 was less than the sum which defendant 2 was entitled to recover under the decree, then clearly there would be a balance in favour of defendant 2 which he would be entitled to recover from the plaintiff.

We think, therefore, that the order of the learned Judge must be set aside and that before he can pass an order dismissing the defendant's execution applications, he must hold an inquiry as to the extent of the property of the deceased in the hands of defendant 2 within the meaning of S. 50, Civil P. C., and dispose of these execution applications including any other objections already raised by the decree-holder in these execution applications according to law. We think in the circumstances of the case there should be no order as to costs. Order accordingly.

G.N./R.K. *Order accordingly.*

1. ('38) 25 AIR 1938 Sind 31 : 173 I C 574 : 32 S L R 162, Nonibai v: Jethanand.
2. ('38) 25 AIR 1938 Bom 253 : 175 I C 427 : I L R (1938) Bom 263 : 40 Bom L R 188, Gurushantappa Shankerappa v. Nangappa Bandappa.

A. I. R. 1941 Sind 50

LOBO J.

Khemchand Dayaram — Plaintiff

v.

Dayaram Jessomal and others — Defendants.

Suit No. 164 of 1936, Decided on 14th March 1940.

(a) Hindu law—Partition—Mother's share.

The mother is on partition entitled to a share equal to that of the son. [P 53 C 1]

(b) Hindu law — Partition—Suit for partition of joint family property — Claim by member for certain property belonging to him and said to have been entrusted by him to plaintiff personally cannot be made in such suit.

In a suit for partition of joint family property a claim by a member for certain property belonging to him and said to have been entrusted by him to the plaintiff personally is a separate and distinct matter and it can find no room in a suit for partition. [P 53 C 2]

(c) Hindu law — Maintenance — Claim for future maintenance and residence — There can be no question of limitation as claim arises from day to day.

A claim by widows for future and present maintenance and residence arises from day to day and there can be no question of limitation. [P 54 C 1; P 63 C 1]

(d) Cosharers — Adverse possession — Manager representing joint family denying rights of co-owner — Possession of junior member does not enure for benefit of co-owner in repelling plea of adverse possession by manager.

Possession by one of the junior members of the joint family is the possession of the manager of the family and can give manager's co-owner no ad-

vantage when the manager or karta of the family denied, or in any case is not proved to have admitted that co-owner's rights. [P 56 C 2]

(e) Cosharers — Adverse possession—Possession of one co-sharer when adverse to another stated.

Possession of a co-owner is in law the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster can bring about the result. It is not necessary to show that adverse possession was brought to the knowledge of the person against whom it was claimed. It is sufficient that the possession was adverse and without any attempt at concealment. Non-participation by one of two co-owners in the possession and enjoyment of the property belonging to them as co-owners for an extended period, coupled with the absence of any claim or demand for participation, may amount to ouster of such co-owner; whether it does or not depends upon the facts and circumstances of each individual case. If in the circumstances of any particular case such non-participation and absence of demand cannot be interpreted by themselves as exclusion or ouster, it is necessary for the party claiming title by adverse possession to prove some further specific act or specific acts of ouster. Such ouster must in its nature be an open assertion of a hostile title, such that actual or constructive knowledge thereof is clearly attributable to the party intended and sought to be excluded. Adverse possession will then start from the date of such act or acts: *Case law discussed.* [P 57 C 1; P 58 C 1; P 61 C 2]

(f) Trusts Act (1882), Ss. 94 and 95—Co-owner in possession of entire estate held in co-ownership is constructive trustee of minor co-owner in respect of his share.

A co-owner in possession of the entire estate held in co-ownership is constructive trustee of the minor co-owner in respect of his share. Section 94 and S. 95, Trusts Act, are clearly applicable to such a case. [P 61 C 2]

(g) Adverse possession—Title by adverse possession cannot originate during minority of person sought to be defeated by adverse possession.

Title by adverse possession cannot originate during the minority of the person sought to be defeated by adverse possession. To acquire adverse possession there must be acts of exclusion or ouster amounting to open assertion of hostile title, knowledge of which must be attributable to the person sought to be excluded so as to enable him to resist the acts. A minor is not in a position to know or to resist acts of ouster and consequently there could not be overt acts amounting to open assertion of a hostile title against a minor: A I R 1922 Mad 12, *Dissent.* [P 62 C 2]

(h) Minor—Only father and mother are natural guardians.

It is only the father and the mother who are the natural guardians of a minor. [P 62 C 2]

(i) Hindu law — Partition — Plaint claiming partition even if withdrawn would, unless explained, afford evidence of intention to separate.

The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate and there consequently is a severance of his joint status from the date when it was instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. A plaint claiming a partition even if withdrawn would, unless explained, afford evidence that an intention to separate had been entertained: *Case law referred.* [P 63 C 2]

(j) Religious endowment — Temple — Public or private — To establish that private temple has become dedicated as public temple, dedication should be proved.

While it is possible that a private temple should be so dealt with that in the course of years it becomes dedicated to the public as a public temple dedication requires to be proved: A I R 1940 P C 7, *Rel. on.* [P 65 C 1]

(k) Hindu law — Joint family property—There is no presumption that any particular property in hands of one coparcener is joint family property.

There is no presumption that any particular property in the hands of one of the coparceners is joint family property, and the burden therefore is upon the person who alleges that these properties are joint family properties liable to partition to prove it. [P 65 C 2]

(l) Hindu law — Joint family property — Co-owner after partition mixing up his separate moveable property with property held in co-ownership—Burden is on him to prove that immovable property acquired after partition is from his own separate funds.

Where after the partition a co-owner has chosen to mix his separate moveable property with property held in co-ownership, the burden lies heavily upon him to prove that the immovable properties acquired after the partition are acquired from his own separate funds and not out of the income of the property held by him in co-ownership. [P 67 C 1]

(m) Hindu law—Partition—Suit for partition—Defendant can claim his share without paying ad valorem court-fee on his share.

A defendant in a partition suit can claim his share in the suit properties without paying ad valorem court-fee on his share. [P 67 C 2]

(n) Hindu law — Partition—Partition suit — Every person interested in property is plaintiff.

In a partition suit every person interested in the property to be partitioned whether ranged as plaintiff or defendant is a plaintiff. [P 67 C 2]

(o) Limitation Act (1908), Art. 120—Suit for accounts by one co-owner against another—Art. 120 applies — Right to sue accrues when there is demand and refusal.

A suit for accounts by one co-owner against another co-owner in sole possession of property belonging to the co-owners is governed by Art. 120 and right to sue accrues only when there is a demand for accounts and a refusal to render them. Hence, where there has been no demand and refusal the plaintiff is entitled to an account from the defendant for the entire period during which the defendant was in sole possession of the property: A I R 1922 Mad 150 (F B); A I R 1933 Mad 200; 30 Bom L R 917 and A I R 1937 Bom 217, *Foll.* [P 68 C 2]

(p) Hindu law — Partition — Manager cannot be called upon to render general account of his dealings—He is however bound to satisfy Court what property is available for partition.

In a suit for partition the karta or manager of a joint family as such cannot be called upon to render a general account of his dealings with the joint family property. He is however bound to

satisfy the Court what property is available for partition, and on this point his *ipse dixit* is not to be accepted especially when it is alleged that he has secreted and done away with much property : *Case law referred.* [P 69 C 1]

Jamiatrai Lalchand — for Plaintiff.

Kodumal Lekhraj, Srikishindas H. Lulla, Sunderdas Jethanand, A. P. Fonseca, Suganlal Hassanand, and Dingomal Narainsing — for Respondents 1 and 3, 2, 4, 5, 6, and 7, respectively.

Judgment. — The judgment in this case really begins with an order made by me on 20th December 1938 in which I decided in the affirmative the preliminary issue : "Whether there was a separation between the two branches of Dayaram and Wadhuram." In that order, Ex. 49, I have set out in great detail the history of the family involved in this litigation and the facts leading up to the present suit, and have generally cleared the ground for the reception of evidence on and the determination of the other issues in the suit. Issues 15 in number, were originally framed on 13th August 1937, as under :

(1) Was the joint status of the parties severed in 1934 by the filing of suit No. 179 of 1934 ?

(2) What is the family property liable to be partitioned and in whose possession is the said property ?

(3) Is defendant 3 entitled to a share as claimed by her or to maintenance only as alleged in para. 5 of the plaint ? If to the latter, to what maintenance is she entitled ?

(4) Are defendants 4 to 6 or any of them entitled to any share in the properties in suit ? If not are they entitled to maintenance ? If so, at what rate ?

(5) Are the claims, if any, of defendants 4 to 6 or any of them barred by limitation ?

(6) Are defendants 4 to 6 or any of them estopped from claiming their shares and / or maintenance ?

(7) Can the claim, if any, of defendants 4 to 6 or any of them be determined in this suit ?

(8) Had defendant 5 deposited cash, ornaments and gold with the plaintiff ? If so, of what value ?

(9) To what relief, if any, is defendant 5 entitled on this account ?

(10) Can defendant 5 claim the things mentioned in issue 8 from the plaintiff in this suit ? If so, can she do so without first paying court-fee on the amount claimed by her ?

(11) Is the suit properly framed ?

(12) Is the plaint sufficiently stamped ?

(13) To what shares are the various parties entitled in the joint family property ?

(14) To what relief are the parties entitled ?

(15) General.

To these I added the preliminary issue referred to above by an order Ex. 30 dated 30th November 1938. After the decision of this preliminary issue another order Ex. 50 was passed by me on 19th January 1939 in which, after hearing the learned advocates for the parties, I laid down the procedure I proposed to adopt in the further hearing of the suit. This hearing however was resumed only on 24th November 1939; between February and May 1939 no progress could be made because of holidays and more urgent work, and from July to October I was officiating as Judicial Commissioner. It soon became apparent that the decision on the preliminary issue which at one stroke threatened to deprive Dayaram's branch of the family of one-half of the family property had fallen upon defendants 1 to 3 as an unexpected blow, and the cross-examination of Khemchand, the plaintiff, and the evidence of Dayaram quite clearly betrayed a desire on the part of Dayaram to minimize the loss his branch of the family appeared likely to sustain. A distinction began to be made between those immovable properties set out in the schedule to the plaint which were with the family prior to the partition held to have taken place on 30th July 1905, and those subsequently acquired, and the learned advocates for defendants 1 to 3 made no secret of the fact that they proposed to contend that in any case Kesarbai, defendant 4, could claim no share in or benefit from those of the 31 properties set out in the schedule to the plaint which had been acquired subsequent to 30th July 1905. To meet this situation defendant 4 filed an application to amend her written statement so as specifically to embrace in her claim partition, accounts and mesne profits of all the properties mentioned in the schedule to the plaint at whatever time they had been acquired. The application was of course strenuously opposed on behalf of defendants 1 to 3 but was allowed by me in an order, Ex. 57, recorded on 4th December 1939. The operative part of that order reads :

I am therefore of opinion that the amendment should be allowed. An amended written statement to be filed within 3 days and a copy thereof supplied to the plaintiff and each of the other defendants. Further written statement or rejoinder by the other parties to be filed within 10 days thereafter. Further issues, if any, to be framed on 21st December next.

Defendants 1, 2 and 5 filed further written statements and on 6th February 1940 the following additional issues were framed :

(1) Is defendant 4 entitled to a share in any of the immovable properties shown in the schedule annexed to the plaint ? If so, what properties ?

(2) Can she claim a share in the suit properties without paying ad valorem court-fees on her share?

(3) Were the various immovable properties shown in para. 1 of the further written statement of defendant 1 dated 19th December 1939 or any of them acquired and built upon by defendant 1 after the alleged partition with Hiranand in 1905 from his own monies or from the alleged joint funds comprising of the rents of other joint immovable properties ?

(3A) Is defendant 4 entitled to a share in any of the said properties ?

(4) What amounts if any were spent by defendant 1 on the development, improvement and repairs of the various immovable properties mentioned in para. 2 of the said further written statement of defendant 1 ?

(5) Can defendant 4 get her share in the said properties without paying her share of the monies so spent by defendant 1 ?

(6) Is defendant 4 entitled to an account of the rents and profits of the immovable properties shown in the schedule annexed to plaint or any of them ?

(7) Is her claim for such accounts for more than 3 years prior to November 1936 barred by limitation ?

(8) Is her claim for accounts of the sale proceeds of the Hyderabad property and Malir garden referred to in para 2 of her amended written statement barred by limitation ?

Of the 23 issues which now appear on the record, original issues 6, 11 and 12 have been abandoned. Issues 3, 8, 9 and 10 of the original set are easily disposed of and I proceed to do so. Issues 13 to 15 are general and will be dealt with at the conclusion of this judgment. The additional issues will most of them be capable of simple answers once issues 4 and 5 are disposed of :

Issue 3. Is defendant 3 entitled to a share as claimed by her or to maintenance only as alleged in para. 5 of the plaint ? If to the latter, to what maintenance is she entitled ?

In the course of final arguments, it was conceded by the learned advocates for all the parties that Gomibai defendant 3 was on partition entitled to a share equal to that of the plaintiff or of each of defendants 1 and 2. This is clearly the law and there is no evidence on the record to support the plaintiff's contention in para. 5 of the plaint "according to the customs of the community to which the parties belong the mother is entitled to a reasonable allowance for maintenance only out of the family property but not to any share." I hold accordingly.

Issue 8. "Had defendant 5 deposited cash, ornaments and gold with the plaintiff ? If so, of what value" ?

Issue 9. "To what relief, if any, is defendant 5 entitled on this account ? "

Issue 10. "Can defendant 5 claim the things mentioned in issue 8 from the plaintiff in this suit? If so, can she do so without first paying court-fees on the amount claimed by her" ?

Paragraph 5 of the written statement of defendant 5 Hetibai, widow of Tikamdas, reads thus :

This defendant further submits that she had with her large cash, ornaments and gold all of the value of Rs. 60,000 which she deposited with the plaintiff and has been lying with him in trust. She is entitled to the account of the said claim and payment thereof.

Now this is a suit for partition of joint family property and though by holding that there was a partition on 30th July 1905 Kesarbai becomes entitled to a share therein, and defendant 1 representing the joint family consisting of himself and plaintiff and defendants 2, 3, 7 and 8 must be held to be co-owners with Hiranand and after his death with Kesarbai, the suit still remains in substance a suit for partition of family property. The claim in para. 5 of the written statement of defendant 5 is a claim for certain property belonging to her and said to have been entrusted by her to the plaintiff personally. Such a claim is a separate and distinct matter, a matter between defendant 5 and the plaintiff only, and it can find no room in a suit for partition such as this is. It is open to defendant 5 to institute a separate suit against the plaintiff on this alleged cause of action if she so chooses. I therefore hold that defendant 5 cannot make such a claim in this suit even if she were to pay court-fees thereon. I decline to enquire into the merits of her claim embodied in para. 5 of the written statement. This disposes of issues 8 to 10.

Issue 4. Are defendants 4 to 6 or any of them entitled to any share in the properties in suit ? If not, are they entitled to maintenance ? If so, at what rate ?

On 30th July 1905, there was a partition between the branches of Wadhuram and Dayaram of the properties moveable and immovable belonging to them jointly. Wadhuram himself had died in 1902 or 1903 and his son Tikamdas had died in April 1905 ; it was Hiranand who actually effected partition with Dayaram. Hiranand himself and his two sons Nenumal and Sugnomal died on 3 successive days in 1908. Sugnomal was the last of these three to die, and on his death the share of Wadhuram branch passed to Padmabai the mother of Sugnomal as the heir of the sole surviving member of one branch of a joint Hindu family. Padmabai died a few months later and the estate passed to Kesarbai, sister of the last male owner Sugnomal. The facts recited above are deposed to by the plaintiff Khemchand and the legal position is clear and has not been disputed. In these circumstances Kesarbai, defendant 4, who is alive is alone entitled to the estate which came to the Wadhuram branch as a result of the partition on 30th July 1905. Hetibai, defendant 5, widow of Tikamdas, and Thakribai, defendant 6, widow of Nenumal, are, under the Hindu law, entitled to maintenance and provision for residence from Kesarbai only. This again is not seriously disputed. Defendants 5 and 6

have not gone into the witness box and have led no evidence as to their position and circumstances. No arguments on their behalf were advanced by their learned advocates at the close of the case. I hold therefore on this issue that defendant 4 Kesarbai is entitled to a share in the properties in suit, subject to the decision on other issues in the case, and that defendants 5 and 6, Hetibai and Thakribai, are entitled in law to claim maintenance and residence from defendant 4. Such a claim on their part arises from day to day and there can be no question of limitation; no past maintenance has been claimed by these defendants.

But I do not think that the further questions which arise in this connexion can be conveniently or effectively dealt with in this suit. Even if I hold hereafter that Kesarbai's claim is not time-barred the quantum and nature of the property which will come to her share will not be ascertainable till the time of the final decree, and even then there will be no material on the record to determine whether the claims for maintenance and residence should in fact be allowed, or what rate of maintenance would be proper in the case of these defendants, or what provisions, if any, should be made for the residence of each. Defendants 5 and 6, as already stated, have not gone into the witness box; they have led no evidence. There is no evidence on the record that either of these defendants at any time prior to the suit claimed maintenance and provision for residence from Kesarbai or from Dayaram. In these circumstances it will be proper only to make the declaration referred to above and to leave defendants 5 and 6 to enforce their claims for maintenance and residence in separate suits declining to determine these questions in this suit. Issue 5. "Are the claims, if any, of defendants 4 to 6 or any of them barred by limitation?" The question whether Kesarbai's claim to a share in the properties in suit is or is not barred by limitation has been by far the most debated question in the entire hearing of this suit. In order to understand and fully appreciate this matter and to determine the true legal position, it is necessary to set out the facts established on the record even though some repetition is inevitable. When in 1908 the tragedy occurred which left Kesarbai, defendant 4, the sole heiress of the large share in property moveable and immovable which came to the Wadhuram branch of Jessomal's family in 1905, Kesarbai was an infant about a year old. The entire estate came under the management of Dayaram, defendant 1: he collected the rents of the immovable properties and managed them, he was in charge of the money-lending business. The evidence shows that Kesarbai, after the death in 1908 of her own mother Padmabai, found a mother in Thakribai, defendant 6, with whom she lived and by whom she was brought up in Shikarpur.

At an early age, between 12 and 15, she was married to one Gopaldas with whom she went to live at Jacobabad. Dayaram appears to have evinced no interest whatever in Kesarbai; he did not maintain her, he spent nothing on her marriage, he took no part in it. Khemchand, the plaintiff who at a remarkably early age had in 1902 or 1903 been sent by his father Dayaram to start a hundi business in Shikarpur, and who had settled there, alleges that he got Kesarbai married and incurred all the expense connected with the marriage. Khemchand admits he had in his hand considerable moveable property inherited by Kesarbai from her father Hiranand. Gopaldas whom Kesarbai married was a man in a humble walk of life. About 1929 or 1930 he came to Karachi to take up employment in the firm of Lilaram Radhakishen, having secured the post of a Munim probably through the good offices of the plaintiff Khemchand himself, a partner in the firm. Kesarbai alleges that Khemchand was then living in Sadar Bazar in a part of property No. 8 in the schedule attached to the plaint, and that for 5 or 6 months she, her husband and their three children occupied an adjoining tenement in the same property. Thereafter as her husband Gopaldas was working in the town, and living in town was more convenient, the family shifted to the town, but she retained possession of the tenement in Sadar Bazar by placing her lock on the door thereof and leaving therein some household goods. Kesarbai deposes that after she came to Karachi Khemchand, the plaintiff, for the first time revealed to her that she was in fact a cosharer with Dayaram in the property in suit in a half share, that she went to Dayaram and demanded her share, that Dayaram did not deny her claim but merely put her off; that on about four occasions she has participated in the income of the property in suit by receiving from Dayaram sums of Rs. 100 each. Dayaram has denied that he gave any moneys to Kesarbai or ever admitted she had a share in the property in suit, and in the absence of any other evidence on these two points I cannot accept

the uncorroborated testimony of Kesarbai interested as it is. In July 1934 Dayaram filed suit No. 179 of 1934 for partition impleading at first only his wife Gomibai and his two sons and their sons as defendants. In November 1935, however, he amended his plaint by joining the present defendants 4 to 6 as defendants 4 to 6. The amended plaint is Ex. 64, and para. 9 thereof reads :

That defendants 4, 5 and 6 are joined on their own application as per Court's orders dated 12th July 1935, 23rd August 1935 and 25th October 1935 respectively. The plaintiff denies that defendants 4, 5 and 6 have any interest in the property subject matter of this suit.

It is clear therefore that it was in 1934 or 1935 during the pendency of Suit No. 179 of 1934 that Kesarbai for the first time definitely and openly claimed a share in the family property. It is equally clear, excluding at the moment Kesarbai's allegation that she is in possession of a portion of one of the family properties since 1929 or 1930, that from the time of the death of Hiranand in 1908 till Kesarbai put forward her claim in Suit No. 179 of 1934, Dayaram was in sole possession and enjoyment of the property in which Kesarbai was a co-owner with a half-share, that Kesarbai did not in any way participate in that possession or enjoyment, and that she never at any time during a period of over 26 years demanded her share or participation in the enjoyment thereof. It is to be remembered however that Kesarbai was a minor till somewhere in 1924 or 1925, and that on her own showing she was entirely ignorant of her rights till Khemchand enlightened her after she came to Karachi in 1929 or 1930. According to Khemchand she came to Karachi in 1931 or 1932. In August 1908 Dayaram filed in this Court Suit No. 279 of 1908 against one Dipomal Pokarmal for the recovery of Rs. 4300 on a mortgage. The plaint in the suit is Ex. 36. In the heading of the plaint Dayaram and his three sons Khemchand, Taroomal and Nevandmal (since deceased) are shown as plaintiffs; the plaint is signed and verified by Dayaram as manager and para. 6 of the plaint reads :

That the said Jessomal Valiram died in February 1899 leaving him surviving his two sons named Wadhumal and Dayaram who were joint with him in business and estate. Thereafter, the said Wadhumal died leaving him surviving his two sons Hariomal and Tikamdas who were joint with the said Dayaram. The said Hariomal and Tikamdas having since died leaving the plaintiffs alone as the survivors of the joint Hindu family.

Again in August 1910 Dayaram filed a similar suit in this Court against one Tharo walad Haji, Suit No. 255 of 1910. The plaint in this suit is Ex. 37. Dayaram's son Nevandmal appears to have died between 1908 and 1910 for his name is not mentioned as a plaintiff in the heading of the plaint which is signed and verified by Dayaram. Paragraph 5 of this plaint reads :

That Jessomal walad Valiram died in February 1899 and being a member of Hindu joint family with the plaintiffs, they by survivorship are entitled to the benefit of the aforesaid mortgage.

Defendants 1 to 3 place much reliance on Exs. 36 and 37 as evidencing clear and definite and overt acts of ouster against Kesarbai even apart from her exclusion from the possession or enjoyment of any share in the property in suit for a period of over 26 years. In 1921 or 1922 there was a re-survey of the city of Karachi and mutation in the Record of Rights after investigation by an enquiry officer. Exhibit 38 is an extract from the Record of Rights relating to one of the properties included in the schedule to the plaint. Column 8 of the extract showing the name of the holder reads:

Dayaram wd. Jessomal, manager, Hindu joint family consisting of Dayaram Jessomal, Hiranand Wadhumal, Tikamdas Wadhumal, Khiomal wd. Dayaram.

The "Remarks" column which purports to have been filled in on 12th December 1922 reads :

Two of the members Hiromal and Tekoomal died without male issue. Khiomal continues to be joint with his father and does not wish his name to be recorded.

Exhibit 38 is strongly relied on by defendants 1 to 3 as a further overt act of ouster of Kesarbai. Suit No. 179 of 1934 came to an abrupt end in this way. The present plaintiff, defendant 1 in that suit, applied under O. 11, R. 12, Civil P. C., for discovery of documents by the plaintiff Dayaram and an order for discovery was made. Plaintiff Dayaram failed to comply with the order, and persisted in such failure. Defendant 1 on 6th July 1936 filed an application under O. 11, R. 21, for the dismissal of plaintiff's suit for want of prosecution. On 7th July the plaintiff's advocate stated in Court: "I do not oppose the application under O. 11, R. 21, Civil P. C., and let the suit be dismissed..." The Court's order on that date which is Ex. 65 in this case reads: "Suit dismissed under O. 11, R. 21, Civil P. C." On 28th July 1936, just three weeks after, Khemchand filed the present suit impleading Kesarbai as defendant 4. In para. 5 of the plaint Khemchand explains why Kesarbai has been impleaded in these words :

Defendant 4 is joined as a party as she claims to be entitled to a share in the property as the

daughter and heir of Hiranand Wadhuram, Seth Wadhuram being an uncle of the plaintiff and a co-owner in properties with defendant 1 and his family.

For defendants 1 to 3 it has been argued that though on this Court's finding on the preliminary issue Kesarbai became in 1908 a co-owner with Dayaram and his branch of the family in the immovable properties belonging to the two branches of Jessomal's family and held by them till the partition as joint family property, at the date of this suit she had no existing title, that long before 1936 Dayaram representing the joint family consisting of himself, his sons and grandsons, plaintiff and defendants 2, 7 and 8 had acquired ownership of Kesarbai's share by adverse possession. The case for these defendants on the facts recited above is that exclusion from participation in possession and enjoyment of one co-owner by another for an extended period of time is strong evidence of ouster and may by itself amount to adverse possession, and that in the circumstances of this case it does. But even if the Court holds that it does not, Dayaram in 1908 and again in 1910 and again in 1921 or 1922 openly asserted a title adverse to Kesarbai by acts which clearly amounted to ouster, and Dayaram's adverse possession of Kesarbai's share in the property had ripened into ownership long before she had in 1935 put forward a claim in suit No. 179 of 1934. It has been contended that ignorance of her rights on the part of Kesarbai is irrelevant and of no consequence. It has been urged that Kesarbai's minority might have availed against the plea of adverse possession had Kesarbai filed a suit within three years after she attained majority in 1924 or 1925, but it cannot be of any assistance to her in respect of a claim put forward for the first time in 1935. With the law that has been quoted in support of these various contentions I shall deal when examining Kesarbai's case on this point.

Mr. Sunderdas for Kesarbai has contended that no case of adverse possession against Kesarbai can arise. He has placed his arguments under four heads thus : (a) Kesarbai was at the time of the filing of this suit and for some years before in actual physical possession of part of the property in suit; she was therefore in joint possession and no question of adverse possession can arise. (b) Even otherwise Khemchand was admittedly in joint possession with defendant Dayaram and as he does not deny and never has denied Kesarbai's title as co-owner, his possession enures for the benefit of Kesarbai. There can be no ouster of one co-owner unless all the remaining co-owners deny his title. (c) Mere exclusion of a co-owner from participation in possession and enjoyment even for a long period cannot in the circumstances of this case amount to ouster; there must necessarily be other overt acts of ouster to the knowledge, actual or constructive, of Kesarbai, and such as she was in a position to resist. Kesarbai was a minor till 1924 or 1925, the overt acts relied on for ouster were acts done during Kesarbai's minority and cannot avail defendants 1 to 3, for Kesarbai could have had no knowledge of these acts and was unable owing to her minority to resist them. (d) Dayaram was the nearest male agnate of Kesarbai, he was her agent and de facto guardian; in this fiduciary position he could not by any acts whatever acquire a title adverse to Kesarbai. (After considering the evidence as to joint possession by Kesarbai, his Lordship concluded.) I hold on this point that Kesarbai has not proved actual physical possession of any part of the property in suit at any time whatever.

I cannot agree that Khemchand's admitted possession of a portion of the property in suit can enure for the benefit of Kesarbai. The co-owners in this case were Kesarbai on the one hand and Dayaram on the other, representing the joint Hindu family of which he was the manager or karta. Possession by one of the junior members of the joint family was the possession of the manager of the family and can in my opinion give Kesarbai no advantage when the manager or karta of the family denied or in any case is not proved to have admitted Kesarbai's rights. Besides, as has been pointed out by the learned advocate for defendant 2, Khemchand has never at any time definitely admitted Kesarbai's rights as a co-owner in the property in suit. In para. 6 of his plaint he does not state that Kesarbai has a one-half share in the property in suit as co-owner. All he says is that Kesarbai is impleaded in the suit because "she claims" to be a co-owner. There is no evidence that Khemchand at any time before the filing of this suit admitted Kesarbai's rights as co-owner. He has not even done so definitely in his deposition in this case. I think therefore that the second ground on which Mr. Sunderdas contended that there was no case of adverse possession against Kesarbai is without substance and cannot be accepted.

The third ground put forward by the learned advocate for Kesarbai is a legal one. A large number of cases has been cited by the learned advocate for defendant 4, Kesarbai, and by the learned advocates for defendants 1 and 2 on this point, and it is necessary for me to examine all these cases and to record what in my opinion is the true legal position on this point to be gathered from the various authorities quoted. As to the facts, these have been set out in great detail above and are really not in dispute. What is in dispute is the nature of the legal inference to be drawn from these facts. The question is whether on the facts established in this case Dayaram, who was a co-owner with Hiranand till his death, and who became a co-owner with Kesarbai on the death of Hiranand and his sons in 1908, has thereafter acquired a title adverse to Kesarbai in consequence of which Kesarbai's claim to any part of the property in suit has been extinguished. The case of *Corea* v. *Appuhamy*, a decision of the House of Lords reported in (1912) A C 230,[1] is an authoritative decision on the rights of co-owners and adverse possession between co-owners. At p. 236 of the report in this case their Lordships state :

> The principle recognized by Wood V.C. in (1855) 2 Kay & J 79[2] holds good : 'Possession is never considered adverse if it can be referred to a lawful title'.

Their Lordships proceed to state :

> The two learned Judges in the Court of appeal did not adopt in its entirety the suggestion of the trial Judge. They both held that Iser is entered as "sole heir," and that his title has been adverse ever since he entered. They held that he entered as "sole-heir," apparently because he had it in his mind from the first to cheat his sisters. But is such a conclusion possible in law? His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about the result.

In the present case Dayaram who was a party to the partition in 1905 could not but have been aware that after the death of Hiranand and his sons on successive days in 1908, and the death of Padmabai a few months later, Kesarbai had by inheritance become a co-owner with him in the family property. He may have intended and probably did secretly intend to cheat his co-owner who was an infant entirely ignorant of her position, but in the words of their Lordships it was not possible for him to put an end to his possession as co-owner by any secret intention in his mind and nothing short of ouster or something equivalent to ouster could bring about that result. Mr. Lulla, on behalf of defendant 2, has contended that this decision of the House of Lords turned largely on the provisions of an ordinance applicable to Ceylon and cannot be regarded as an authority in the present case. No doubt the actual decision in the case turned to some extent on the wording of S. 3 of an Ordinance of 1871, part of the law of Ceylon, but in the passage which has been cited above their Lordships are discussing the general law of acquisition of title by adverse possession as between co-owners. The case in (1912) A C 230[1] was referred to by their Lordships of the Privy Council in 20 Bom L R 1064.[3] The judgment of the Board was delivered by Lord Buckmaster who states :

> If by exclusive possession of joint estate is meant that one member of the joint family alone occupies it that by itself affords no evidence of exclusion of other interested members of the family. Uninterrupted sole possession of such property without more must be referred to the lawful title possessed by the joint holder to use the joint estate and cannot be regarded as an assertion of a right to hold it as separate so as to assert an adverse claim against other interested members.
>
> If possession may be either lawful or unlawful, in the absence of evidence it must be assumed to be the former. The fact therefore that this village of Bhagsar has been occupied for many years by defendants and their predecessors is insufficient to prove exclusion of the plaintiffs without further evidence.

Their Lordships were dealing with a case of joint family property in the Punjab; but I do not think that that makes any material difference. The case of *Govindrao* v. *Rajabai*, a decision of their Lordships of the Privy Council reported in 35 C W N 438,[4] was a case of tenants-in-common. Citing with approval the case in (1912) A C 230[1] their Lordships held in this case that the rule that possession by one tenant-in-common cannot be adverse to another meant that it cannot be so until ouster. Their Lordships held in that case that adverse possession had been established in the following circumstances : The plaintiff and the defendant belonged to two branches of the same family which were not joint. It appeared that plaintiffs' title to the property in question had never been expressly denied till

1. ('14) 1 A I R 1914 P C 243 : 1912 A C 230 : 81 L J P C 151 : 105 L T 836.
2. (1855) 2 Kay & J 79 : 25 L J Ch 159 : 1 Jur (NS) 1160 : 4 W R 135 : 110 R R 107, Thomas v. Thomas.
3. ('18) 5 A I R 1918 P C 1 : 47 I C 626 : 64 P R 1918 : 20 Bom L R 1064 (P C), Hardit Singh v. Gurmukh Singh.
4. ('31) 18 AIR 1931 P C 48 : 130 I C 673 : 27 N L R 131 : 58 I A 106 : 35 C W N 438 (P C).

1912, but the two branches had separated long before and the plaintiff had never had possession or participation of profits since 1880, and when a predecessor of the defendant who had been managing the properties of the plaintiff during his minority handed them over on his coming of age more than 20 years before the suit this property was not included. In these circumstances it was held that in regard to the property in suit the action brought by the plaintiff in 1917 was barred by limitation, because the plaintiff must have known more than twelve years before the suit that his title was not admitted and the possession of the defendant had been adverse for more than the statutory period.

The case in 16 S L R 25[5] lays down the same principle as that enunciated by the House of Lords in (1912) A C 230.[1] It was held in this case that possession or occupation of property by one cosharer does not constitute adverse possession against any other cosharer until there has been a disclaimer of the latter's title by open assertion of hostile title on the part of the former. Where a cosharer deals with property in which some women are interested, there is a presumption that acts done by him are as manager and agent of the latter. In order to constitute adverse possession the possession must be actual, visible, exclusive, hostile and continued for the time necessary to create the bar of limitation. The same question of the acquisition of title by adverse possession by one cosharer against another was again discussed by a Bench of our own Court in I L R (1939) Kar 597.[6] It was there held that to constitute a title by adverse possession in one co-owner as against another there must be a disclaimer by the one of the other's title by open assertion of a hostile title. It was not sufficient to show acts of possession. It was also held in this case that it was not necessary to show that adverse possession was brought to the knowledge of the person against whom it was claimed. It was sufficient that the possession was adverse and without any attempt at concealment, so that the person against whom time was running ought, if he exercised due vigilance, to have been aware of what was happening. This decision is of special importance in the present case, because every act of ouster set up by the learned advocate for defendant 1 was an act done at a time when Kesarbai was a minor. In 47 Cal 274,[7] it was held that:

> In order to establish adverse possession by one tenant in common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period . . . . . What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to adverse possession but such non-participation or non-possession may, in the circumstances of a particular case, amount to adverse possession. Regard must be had to all the circumstances and a most important element is the length of time.

The learned Judges who decided the case in 34 C W N 246[8] perhaps go too far when they state:

> Merely to find overt acts of a notorious character unequivocally referable to an assertion of hostile title and that whether the co-sharer sought to be ousted knew of it or not, he would have known if he were diligent, would not therefore suffice. It is essential to find further his knowledge.

I am however bound by the decision of our own High Court reported in I L R (1939) Kar 597,[6] where it has been held that actual knowledge need not be proved. It is sufficient if the acts of ouster relied on are overt acts so visible and publicly hostile to a co-sharer that he must have had knowledge of them. In 61 Cal 377,[9] a Bench of the Calcutta High Court held that there can be no adverse possession by one co-sharer as against others until there is ouster or exclusion. The possession of a co-sharer becomes adverse to another co-sharer from the moment when there is an ouster, that is, after there is an assertion of a hostile title by one co-sharer against the other and to the knowledge of the latter, and the burden of proving the adverse possession or ouster was on the party who claims to defeat the title of his co-sharer by adverse possession. To the same effect is the decision of the Bombay High Court in 46 Bom 213,[10] where it was held by the Chief Justice and Shah J. that:

> The sole possession by one of two joint owners itself is no evidence of his denial of the right of the other joint owner, and time does not run against the joint owner out of possession until

5. ('21) 8 AIR 1921 Sind 177 : 80 I C 118 : 16 S L R 25, Mt. Bhagbhari v. Mt. Khatun.
6. ('39) 26 AIR 1939 Sind 315 : 185 I C 11 : I L R (1939) Kar 597, Mangalmal Aganmal v. Muhamad Usif Bhoro.
7. ('20) 7 A I R 1920 Cal 473 : 56 I C 141 : 47 Cal 274 : 30 C L J 512 : 23 C W N 977, Gobinda Chandra v. Upendra Chandra.
8. ('30) 17 A I R 1930 Cal 466 : 128 I C 103 : 34 C W N 246, Abdul Wahed v. Mohan Bashi Saha.
9. ('34) 21 A I R 1934 Cal 644 : 151 I C 464 : 61 Cal 377, Jagadeeshchandra Banerji v. Taiyab Sardar.
10. ('22) 9 A I R 1922 Bom 150 : 64 I C 205 : 46 Bom 213 : 23 Bom L R 1033, Chandbhai Mahamadbhai v. Hasanbhai Rahimtoola.

the joint owner in possession has done some act to the knowledge of the other which amounts to a denial of the latter's right.

The decisions cited above and reported in 47 Cal 274[7] and 46 Bom 213[10] were referred to with approval in 31 Bom L R 640,[11] which is a decision of a single Judge of the Bombay High Court. In 32 ALL 389,[12] it was held that cosharers who collect profits for other cosharers are in a position similar to that of a lambardar. Where no adverse title has been set up, the mere fact that a cosharer plaintiff has not received profits for more than twelve years before suit will not bar his claim. Again in 12 Lah 101,[13] it was held by a Bench of the Lahore High Court that in the case of co-owners in the absence of an open assertion of a hostile title by one to the knowledge of the others there can be no ouster, and that non-participation in the profits by one and exclusive occupation by the other do not establish adverse possession. In support of their decision, their Lordships have referred to the case in (1912) A C 230[1] and to a decision of their Lordships of the Privy Council in 19 Cal 253.[14] In 18 Lah 618[15] it was held that the possession of one cosharer must be deemed to be the possession of all the other cosharers, and in order to defeat the title of absentee cosharers it is for the cosharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of other cosharers. The case in A I R 1921 Cal 647[16] is a judgment of Mookerjee and Buckland JJ., and is of special importance because it deals with a case of adverse possession against a minor cosharer. In the judgment of Mookerjee J. at p. 651 the following passage occurs:

> The fundamental rule is that in order to establish adverse possession as between cosharers there must be evidence of an open assertion of a hostile title by one of them to the knowledge of others. Mere non-participation in the profits by one party and exclusive occupation by the other is not conclusive. Apart from this we have the important circumstance that in this case the rightful owner, the second plaintiff Ramnibas who when a child a few months old was taken in adoption in 1892, was a minor till at least 1910; it is thus difficult to appreciate how the contesting defendants began to hold adversely to the knowledge of the infant in 1901.

The learned Judge has relied on the cases in 1912 A C 230,[1] 20 Bom L R 1064[3] referred to before, (1918) A C 895[17] and 43 Mad 244,[18] which, he says, emphasize the principle that if possession may be either lawful or unlawful, in the absence of evidence, it must be assumed to be the former, or in the language of Wood V. C. in (1855) 2 Kay & J 79[2] possession is never considered adverse if it can be referred to a lawful title. On the other hand a number of authorities have been cited and relied on by the learned advocates for defendants 1 to 3. But if these are closely examined, it will be apparent that they lay down no principle contrary to those to be found in the authorities I have referred to above which were quoted and relied on by the learned advocate for defendant Kesarbai. In the case in 29 Bom 300[19] it was held by Sir Lawrence Jenkins and Batty J. that

> to constitute an adverse possession as between tenants-in-common there must be an exclusion or an ouster. Sole possession by one tenant-in-common continuously for a long period without any claim or demand by any person claiming under the other tenant-in-common is evidence from which an actual ouster of the other tenants-in-common may be presumed.

Reliance has been placed in the judgment of Sir Lawrence Jenkins in this case on the case reported in (1774) 98 E R 1052,[20] in which Lord Mansfield left it to the jury to presume an actual ouster from the fact that for about forty years one tenant-in-common had been in sole possession of lands without any claim or demand by any person claiming under the other tenant-in-common, though no actual ouster was proved. The facts in this Bombay case however were entirely different. Not only was there no evidence to show that the plaintiffs or their fathers ever received their share of the property in question, but they had taken no steps to have their names entered as co-defendants in a redemption suit filed in 1892 by Vishnubhat Godbole against Ganesh, the party who claimed adversely to them. None of the plaintiffs in that suit besides were minors. The decision of our own High Court re-

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11. ('29) 16 AIR 1929 Bom 323 : 119 I C 779 : 31 Bom L R 640, Malhari Vaman v. Vinayak Ravji.
12. ('10) 32 All 389 : 5 I C 559 : 7 A L J 298, Harcharan v. Bindu.
13. ('31) 18 AIR 1931 Lah 339 : 132 I C 177 : 12 Lah 101 : 32 P L R 316, Narsingh Das v. Gokul Chand.
14. ('92) 19 Cal 253 : 19 I A 48 : 6 Sar 133 (P C), Lachmeswar Singh v. Manowar Hossein.
15. ('37) 24 AIR 1937 Lah 578 : 174 I C 942: ILR (1937) 18 Lah 618 : 40 PLR 427, Munshi v. Beli Ram.
16. ('21) 8 AIR 1921 Cal 647 : 67 I C 31 : 34 CLJ 432 : 26 C W N 65, Jagannath Marwari v. Mt. Chandni Bibi.
17. ('18) 5 AIR 1918 P C 277 : 1918 A C 895 : 87 L J P C 146, Muttu Nayagam v. Brito.
18. ('19) 6 AIR 1919 P C 44 : 53 I C 901 : 43 Mad 244 : 46 I A 285 (P C), Varada Pillai v. Jivaratnammal.
19. ('05) 29 Bom 300 : 7 Bom L R 252, Gangadhar Balvant v. Parashram Bhalchandra.
20. (1774) 98 E R 1052, Fisher and Taylor v. Prosser.

ported in 5 S L R 49,[21] is not of much assistance. It was a second appeal and as the two lower Courts had found on the facts exclusion by adverse possession, the High Court refused to interfere. *Sardar Amarsingh* v. *Sardarni Shiv Datt Kaur* is a decision of a single Judge of the Lahore High Court reported in AIR 1937 Lah 890.[22] The learned Judge held that "non-participation in rents and profits by a cosharer for a very long time may justify an inference of ouster. The fact was also evidence of abandoument, that is, of intentional quitting of possession by a proprietor coupled with an intention not to resume it." At page 891 of the judgment the learned Judge states :

The crucial point which seems to me to require decision in the case is whether the removal of plaintiff's name from the revenue records can or cannot be considered to be an overt act on the part of other cosharers amounting to ouster . . . . . I do not see why the removal of the name of Narainsingh should not be considered to be an overt act amounting to ouster. It was done openly and if the plaintiff had taken any interest at all in the land he could not have failed to learn about it for the records of right are attested every four years and there was also a settlement of the Lahore District about the year 1912-13.

A little further the learned Judge states :

It is true that no notice is proved to have been given to the plaintiff or his father, but for reasons given above it seems to me that the removal of the plaintiff's name from a public record was bound to come to plaintiff's notice in the ordinary course if he took any interest in the land, and hence his knowledge of the adverse claim set up by the defendants may be reasonably presumed. It may be noted in this connexion that though plaintiff was a minor in 1907 he appears to have become a major in 1912 when his property was released from the Court of Wards. Plaintiff however took no action to assert his claim till 1930. The defendant's title therefore became perfected by adverse possession for over 12 years in the meantime.

The passages quoted sufficiently distinguish this decision from the present case. In the circumstances of that case the learned Judge held that the removal of Narainsingh's name was an overt act which must have come to his knowledge when he attained majority in 1912. The suit was not filed till 1930, eighteen years after Narainsingh attained majority. The decision of their Lordships of the Privy Council in the case in 61 Cal 262[23] is of no assistance, as it was not a case of adverse possession as between co-owners. Besides, their Lordships held that the person against whom adverse possession was being claimed had constructive knowledge of an act which constituted an open assertion of a hostile title. The case in AIR 1934 Bom 273[24] is a decision of a single Judge who held that where a special relationship exists between persons, such as tenants-in-common or members of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family. It does not follow that because a tenant-in-common is out of possession time immediately begins to run against him. The possession of one co-owner is in itself rightful and does not imply hostility as would the possesssion of a stranger. To constitute adverse possession as between tenants-in-common there must be an ouster, and exclusive receipt of profits continuously for a long period may point to an ouster if the Court is satisfied that such taking of profits is an indication of denial of right in the other co-tenant to receive them. It was also a single Judge of the Madras High Court who decided the case in A I R 1927 Mad 170.[25] It is there stated that

if one co-tenant is in possession of property which belongs to him as well as to other tenants-in-common his possession should not be considered to be adverse unless there be circumstances from which the Court could come to the conclusion that the possession is adverse; but the question is not one of pure law but it is a question of fact. If from the circumstances the Court should come to the conclusion that the possession of one tenant-in-common was not on behalf of other tenants-in-common, the Court is entitled to do so notwithstanding the fact that the possession of one co-tenant is not necessarily adverse to the others. An undisturbed and quiet possession for a long time is a sufficient ground to presume actual ouster.

The case in A I R 1928 Oudh 481[26] was quoted in support of the contention that adverse possession may be acquired against a minor. It is the decision of a single Judge who states :

It cannot be said that there can be no adverse possession during the continuance of minority. Section 6 does not prevent the possession being adverse or the running of limitation against a minor. It only gives an extension of limitation in favour of the minor after the cessation of disability on the death of the person subject to it.

This was not a case between co-owners, and the possession of Mt. Ram Dulari was not on behalf of the minor Inderjitsingh as

21. ('11) 5 S L R 49 : 10 I C 554, Aludomal Jhangimal v. Ali.
22. ('37) 24 A I R 1937 Lah 890 : 175 I C 605 : ILR (1938) Lah 367 : 39 P L R 695.
23. ('34) 21 AIR 1934 P C 23: 147 I C 545: 61 Cal 262: 61 I A 78 (P C), Secretary of State v. Devendra Lalkhan.
24. ('34) 21 A I R 1934 Bom 273 : 154 I C 824: 58 Bom 410 : 36 Bom L R 284, Anant Ganpati v. Vishnu Rambhau.
25. ('27) 14 AIR 1927 Mad 170: 98 I C 278, Mariammal v. Augustine Roy.
26. ('28) 15 A I R 1928 Oudh 481 : 113 I C 258 : 5 O W N 832, Mt. Ram Dulari v. Sher Bahadur Singh.

it would have been if Ram Dulari and Inderjitsingh had been co-owners. The learned Judge has relied on the decision of the Madras High Court in 45 Mad 361;[27] but as I will show later this decision of a Bench of the Madras High Court is strongly in favour of the defendant Kesarbai in the present case. The case in 33 Bom L R 603[28] is the judgment of a single Judge of the Bombay High Court. It is not of any assistance, as it was not a case of adverse possession between co-owners. This brings me to the last of the cases cited by the learned advocates for defendants 1 to 3 which is of special importance, namely, the case in 45 Mad 361.[27] In the judgment in this case the question of acquisition of title by adverse possession against a minor has been discussed at great length. After referring to the case in (1914) 1 Ir Rep 53[29] and the case in (1903) 2 Ch 40[30] and the case in (1855) 2 Kay & J 79,[3] the learned Judges state:

> We do not think it can be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or a minor during the continuance of the lunacy or minority of the owner. The question has in each case to be decided with reference to the anterior relationship between the person taking possession and the minor or lunatic, and to whether any circumstances exist which would entitle the Court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. The scheme of the Limitation Act shows that though time begins to run against minors and lunatics an extended period of limitation is given. Section 6 provides that where a person entitled to institute a suit or make an application for the execution of a decree is at the time from which the period of limitation is to be reckoned, a minor, or insane or an idiot, he may institute the suit or make the application within the same period after the disability has ceased as would otherwise have been allowed from the time prescribed therefor in Col. 3 of Sch. 1 to the Act, and that where the disability continued up to the death of such person his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed; and where the legal representative is also under disability at the date of the death he will have the same privileges as are conferred by Cls. 1 and 2 to S. 6. Section 8 provides that the period within which any suit must be instituted or application made will not be extended to more than three years from the cessation of the disability or the death of the person affected thereby. Section 9 provides that when once time has begun to run no subsequent disability or inability to sue stops it. Article 144 provides a period of 12 years from the date when the possession becomes adverse to the plaintiff. It seems to us from the provisions of the Limitation Act that lunacy or minority would not by itself prevent limitation from running as against a lunatic or minor and that in cases where it is clear that the person entering into possession was under no duty to the lunatic or minor and entered into possession for his own benefit and in assertion of a title hostile to that of the lunatic or minor, limitation would begin to run from the date when he so took possession though the lunatic would be entitled to file a suit within three years from the date when his disability ceases.

The learned advocate for defendant Kesarbai should feel himself indebted to Mr. Lulla the learned advocate for defendant 2 for referring me to this case; because it helped me to overcome the one great difficulty I had in my mind on the point I am discussing. Unlike the alienees in this Madras case Dayaram in the present case did not enter into possession without any anterior relations with the defendant Kesarbai against whom he claims adverse possession. He was a co-owner with the infant Kesarbai's father, and he entered into possession and continued in possession of the entire estate held in co-ownership under circumstances which would in law make him the constructive trustee of the minor Kesarbai in respect of her share. Sections 94 and 95, Trusts Act, are clearly applicable to the position of Dayaram in these circumstances. It appears to me from a careful consideration of all the authorities cited above that the following propositions of law are clearly deducible:
(a) Non-participation by one of two co-owners in the possession and enjoyment of the property belonging to them as co-owners for an extended period, coupled with the absence of any claim or demand for participation, may amount to ouster of such co-owner; whether it does or not depends upon the facts and circumstances of each individual case; (b) if in the circumstances of any particular case such non-participation and absence of demand cannot be interpreted by themselves as exclusion or ouster, it is necessary for the party claiming title by adverse possession to prove some further specific act or specific acts of ouster; (c) such ouster must in its nature be an open assertion of a hostile title, such that actual or constructive knowledge thereof is clearly attributable to the party intended and sought to be excluded; (d) adverse possession will then start from the date of such act or acts; (e) minority is no bar to acquisition of title by adverse possession if the person claiming such adverse possession does not bear to the person

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27. ('22) 9 AIR 1922 Mad 12: 70 I C 678: 45 Mad 361: 42 M L J 262, Seetaramaraju v. Subbaraju.
28. ('32) 19 A I R 1932 Bom 23: 134 I C 366: 33 Bom L R 603, Shidlingava Sadeppa v. Rajava Tanesaheb.
29. (1914) 1 Ir Rep 53, Smyth v. Byrne.
30. (1903) 2 Ch 40: 72 L J Ch 473: 88 L T 403: 51 W R 504, In re Biss; Biss v. Biss.

against whom he claims it any anterior relationship such as that of agent, bailiff, trustee, etc.

Applying these principles to the established facts of the case before me I have no hesitation in holding that Kesarbai's non-participation in the possession and enjoyment of the property in suit from 1908 to 1934 and her failure to claim or demand such participation did not in the circumstances of this case amount to ouster or exclusion. Dayaram's position was that of a co-sharer in respect of Kesarbai's share of the property and the rents and profits collected in respect thereof ; he was in law a constructive trustee. Kesarbai was a minor till 1925 and the 12 years' period for acquisition of title by adverse possession had not elapsed between the date of Kesarbai's attaining majority and her definitely claiming her share in suit No. 179 of 1934. Besides it is clear on the evidence on the record that Kesarbai was entirely ignorant of her rights up to the time of the filing of suit No. 179 of 1934. If Dayaram then is to succeed in his plea of adverse possession against Kesarbai, he must necessarily prove some further act or acts of ouster of the nature stated above. Exhibits 36 and 37 are undoubtedly not such acts of ouster. Suits Nos. 279 of 1908 and 255 of 1910 were filed against certain mortgagors, strangers to the family. Kesarbai, even if she had been a major could not have had knowledge and cannot be expected to have had knowledge of statement made in the plaints by Dayaram as plaintiff in those suits. Even as a major she could not be fixed with knowledge actual or constructive of the statements relied upon as overt acts asserting a hostile title ; but in fact Kesarbai was an infant and Exs. 36 and 37 cannot, in these circumstances, be held to amount to acts of ouster or an open assertion of a hostile title.

There is no evidence on record as to the circumstances in which the entry relied upon in Ex. 38 came to be made. The earliest date which can be attached to this entry is 12th December 1922 and Kesarbai was on that date still a minor. Exhibit 38 therefore is of no greater value than Exs. 36 and 37 as an act of ouster. Further, though it is not clear on the record, it would appear that within twelve years of 12th December 1922, Kesarbai had asserted her title and claim in suit No. 179 of 1934, for, she was added as a party in that suit by reason of an order dated 12th July 1935 and there is good reason for believing that the application on which that order was made must have been filed before December 1934. Indeed speaking for myself, and with all respect to the learned Judges who decided the case in 45 Mad 361,[27] I cannot see how title by adverse possession can originate during the minority of the person sought to be defeated by adverse possession. To acquire adverse possession there must be acts of exclusion or ouster amounting to open assertion of hostile title, knowledge of which must be attributable to the person sought to be excluded so as to enable him to resist the acts. A minor is not in a position to know of or to resist acts of ouster and I cannot therefore understand how there could be overt acts amounting to open assertion of a hostile title against a minor.

I hold therefore that at the time of the filing of this suit Kesarbai had a subsisting title to the share of the family property which came to her by inheritance from her father Hiranand and in which she became a cosharer with Dayaram, and that Dayaram and his branch of the family had not acquired title by adverse possession against Kesarbai in respect of that share. It is unnecessary in view of this to discuss at any length the fourth head under which Mr. Sunderdas for defendant Kesarbai placed his arguments on the question of adverse possession. I do not think, however, there is much substance in this fourth line of argument. Dayaram was indeed the nearest male agnate of Kesarbai but he was not her guardian in law or de facto. He was not her guardian in law for under the Hindu law it is only the father and the mother who are the natural guardians of a minor. He was not a de facto guardian because he had never placed himself in the position of one or evinced any concern whatever in the minor Kesarbai. It is not therefore necessary for me to refer to the cases relied on by the learned advocate for Kesarbai on this point, namely the decisions reported in 30 Mad 145,[31] 35 Bom 79,[32] 57 Bom 488[33] and 51 Mad 977.[34] I hold on issue 5 that the claim of Kesarbai is not barred by limitation. I have already held that defendants 5

31. ('07) 30 Mad 145 : 17 M L J 14, Sreeramulu Naidu v. Andalammal.
32. ('11) 35 Bom 79 : 8 I C 639 : 12 Bom L R 956, Vasudeo v. Eknath.
33. ('33) 20 AIR 1933 Bom 287 : 145 I C 262 : 57 Bom 488 : 35 Bom L R 418, Fakir Gowda v. Dyamawa Gowdappagowda.
34. ('28) 15 AIR 1928 Mad 1113 : 117 I C 113 : 51 Mad 977 : 55 M L J 733, Mahalakshmamma v. Suryanarayana.

and 6 are only entitled to maintenance, that they have not claimed past maintenance and that a claim for present and future maintenance is one which arises from day to day and is not barred by limitation.

Issue 7.—"Can the claim, if any, of defendants 4 to 6 or any of them be determined in this suit?" I have already held that defendants 5 and 6 in respect of their claim to maintenance and suitable residence can in this suit have merely a declaration which I have given them. They have not chosen to place any material on record to enable the Court to determine whether they should be granted maintenance and a provision for residence, or the amount that should be allowed, or the nature of residence that should be determined; and therefore they will have to enforce their claim by separate suits against Kesarbai if they so desire. The claim of Kesarbai, defendant 4, must undoubtedly be determined in this suit for there cannot be a partition between the plaintiff and defendants 1 to 3 without its being determined whether Kesarbai is entitled to one-half of the property of which partition is sought by the plaintiff against defendants 1 to 3. In respect of defendant 4 therefore I hold on issue 7 in the affirmative. I come now to issue 1 of the original issues.

Issue 1.—"Was the joint status of the parties severed in 1934 by the filing of suit No. 179 of 1934?" Before dealing with the authorities on this point which are mainly decisions of their Lordships of the Privy Council, it is necessary to be clear about the facts. Suit No. 179 of 1934 filed by Dayaram in July 1934 was a suit for partition of joint family property. The suit did not ripen into a decree. It was not withdrawn with the common consent of the parties thereto. What actually happened has been set out by me in an earlier part of this judgment and is to be found in Ex. 65, the proceedings in Court on 7th July 1936 when the suit was dismissed with costs. The plaintiff in that suit, Dayaram, had contumaciously refused to comply with the order of the Court to file an affidavit of documents, and in answer to an application by Khemchand, defendant 1, under O. 11, R. 21, Civil P. C. Dayaram's advocate stated in Court "let the suit be dismissed." The learned advocate who appeared for Khemchand, defendant 1 in that suit, strenuously opposed the dismissal of the suit for non-prosecution under O. 11, R. 21. He stated :

> My submission is that the suit should not be dismissed on this ground. I should be permitted to withdraw this application.

The advocate who appeared for the added defendant Kesarbai claimed his costs. It is clear in these circumstances that the dismissal of the suit by the order of the Court on 7th July 1936 was not with the concurrence of, but in spite of the wishes of, the defendants in the suit. The Court was entitled to pass the order which it did and the defendants in the suit had no power to prevent it from doing so. But that they did not assent is clear not only from Ex. 65 but from the fact that within three weeks Khemchand, defendant 1 in that suit, filed the present suit for partition. Reliance has been placed by the learned advocate for defendant 1 upon a statement of Khemchand in his deposition to the effect :

> In 1934 Dayaram filed suit No. 179 of 1934 for partition. I did not desire partition, but in the written statement I filed I did claim a share.

I prefer however to rely upon Ex. 65 as indicating Khemchand's state of mind in connexion with suit No. 179 of 1934 and the dismissal thereof. Dayaram's intentions in permitting the suit to be dismissed may well be gauged from the following passage in his evidence :

> In 1934 I filed a suit for partition against Khemchand and Tarachand. The suit was dismissed. I did not mind the dismissal as there was going to be great trouble (rola); since Khemchand and Kesarbai put forward a claim by Kesarbai, I did not mind the suit being dismissed.

In Mulla's Hindu Law at p. 391 the learned author states :

> The institution of a suit for partition by a member of a joint family is an unequivocal intimation of his intention to separate and there consequently is a severance of his joint status from the date when it was instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not. But if the suit is withdrawn before trial the plaintiff not desiring separation there is no severance of the joint status.

In a note below this paragraph the learned author states :

> In *Palani Ammal's case*[35] the Judicial Committee observed that a plaint claiming a partition even if withdrawn would unless explained afford evidence that an intention to separate had been entertained.

In the present case though the plaint was not withdrawn the plaintiff Dayaram deliberately allowed the suit to be dismissed. His explanation is not that he did not desire partition, or that the other members of

35. ('25) 12 A I R 1925 P C 49 : 87 I C 333 : 52 I A 83 : 48 Mad 254 (P C), Palani Ammal v. Muthuvenkatachala Moniagar.

the joint family agreed to the withdrawal of the suit, he states that he withdrew the suit because he apprehended trouble. Kesarbai had appeared on the scene and he was in no mood to allow the claim of Kesarbai to be investigated. There is therefore no such explanation as would lead to an inference that the parties did not desire separation. The case of *Palani Ammal* v. *Muthuvenkatachala Moniagar* is reported in 48 Mad 254.[35] It was referred to in *Shagun Chand* v. *Data Ram* decided by a Bench of the Allahabad High Court and reported in 49 ALL 664.[36] Ashworth J. who refers to *Palani Ammal's case*[35] states:

> The bringing of a suit for partition is only presumptive evidence of separation and that evidence may be rebutted by other evidence such as the fact of the withdrawal of the plaint on the ground that separation had not taken place or was not desired, but not by evidence merely of withdrawal of the plaint.

In 20 S L R 295[37] it was held by a Bench of this Court that

> it is open to a member of a joint Hindu family to effect a division of status by a clear and unequivocal expression of intention to do so without the necessity of any concurrence on the part of the other coparceners, and the filing of a plaint in a suit for partition is such an unambiguous and unequivocal manifestation of intention.

and again,

> When an adult Hindu files a partition suit, it effects severance of the joint status from the date when the suit was instituted . . . .

I am clearly of the opinion that in the circumstances of this case there was a severance of the joint tie in July 1934 when suit No. 179 of 1934 was filed and it is unnecessary for me therefore to refer to the other authorities which have been cited at the bar. The entire law on this subject has already been discussed by me at great length in the order dated 20th December 1938 by which I have disposed of the preliminary issue. I accordingly answer issue 1 in the affirmative.

> Issue 2:—What is the family property liable to be partitioned and in whose possession is the said property?

I deal with this issue in its application to plaintiff and defendants 1 to 3. As regards defendant 4 Kesarbai, I will deal with it when I come to the additional issues which have special reference to this defendant. With regard to immovable property there is little dispute. The plaintiff has set out in the schedule annexed to the plaint thirty-one immovable properties. Defendant 1 claims that of the properties shown in this Schs. 11 and 15 are charitable, dedicated to public charitable purposes and therefore not liable to partition. As regards moveable property the position is this: The plaintiff in the schedule attached to his plaint says that there is available for partition a sum of Rs. 4,00,000 (four lakhs) in the hands of defendant 1 and in his own hands Rs. 6000. Defendant 1 denies the possession of Rupees 4,00,000 admitting only a sum of Rs. 35,000 invested in hundis. He alleges on his part that the plaintiff is in possession of Rs. 45,000 in cash, and ornaments, sovereigns, gold, silver, etc. of the value of Rs. 55,000, and claims that these are liable to partition. Defendant 2 alleges that plaintiff is in possession of cash to the extent of rupees one lakh and this amount is liable to partition. His learned advocate has further contended that partition is to be effected also of two immovable properties purchased by the plaintiff at Shikarpur in the name of his wife, and of the plaintiff Khemchand's share in the business of Lilaram Radhakishen in which he was a partner. In regard to properties Nos. 11 and 15 in the schedule attached to the plaint alleged to be charitable properties Dayaram Ex. 36 states:

> Two of the properties shown in the schedule to the plaint are dedicated to charity. They are survey Nos. 186 and 206 Sadar Bazar. There are shrines of Lord Shiva in each of these properties. The shrines are open to the public. Rents are realized from portions of these properties; about Rs. 180 from both a month. These rents are used for the purposes of the shrine. They were so used till the receiver took possession. No other use was made of these rents. The expenses of the shrines are pay of the pujari, his clothing and food, the cost of feeding Brahmins and other miscellaneous matters including articles for the ritual of worship. The shrine on property No. 206 existed in my father's time.

In cross-examination Dayaram has stated:

> The rents of properties Nos. 186 and 206 Sadar bazar used to be entered in the same books as the rents of other properties.

This is all the evidence that Dayaram has led on the point. On the other hand Khemchand, the plaintiff Ex. 20, states:

> In two properties there is an image of Shiva in one of the rooms in a space as large as this witness-box. These are private chapels. Rents are realized from the rest of each of these properties. These are utilized like the rents of all the other properties.

Again in another part of his evidence he states:

> The other property shown as charitable bears No. 206. So far as I know the temples in both these properties are for the use of the members of the family only.

Tarachand, Ex. 69, defendant 2, has apparently not been asked anything about these

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36. ('27) 14 A I R 1927 All 465 : 101 I C 868 : 49 All 664 : 25 A L J 369.

37. ('26) 13 A I R 1926 Sind 216 : 97 I C 505 : 20 SL R 295, Jethanand Udhandas v. Kewalram.

shrines. Dayaram has not produced any books of account. He has not called in evidence the pujari who he alleges is in charge of these shrines. He has not called any member of the public to depose that the shrines are places of public worship. I cannot, in these circumstances, accept his bare statements and hold that properties NOS. 11 and 15 in the schedule attached to the plaint are properties dedicated to public charity. As was held by their Lordships of the Privy Council in the recently reported case in 44 C W N 294,[38]

> while it is possible that a private temple should be so dealt with that in the course of years it becomes dedicated to the public as a public temple dedication requires to be proved.

So far as immovable property is concerned therefore, all the thirty-one immovable properties specified in the schedule attached to the plaint are liable to partition. They are admittedly in the possession of defendant 1. If defendant 1 desires to maintain the shrines referred to, it is for him to arrange at the time of actual partition that properties Nos. 11 and 15 should be allotted to him as part of his share. The plaintiff has led no evidence to prove the possession by defendant 1 of a sum of rupees four lakhs as liable to partition. All that has been argued on his behalf is that defendant 1 was alone in receipt of the rents and profits of the immovable properties and of the money-lending business from the very start up to date and he has to render an account in respect of his management in the sense that the burden is on him to prove what moveable property there now exists liable for partition in this suit. The plaintiff admits that an item of property liable to partition in this suit is the hundi business carried on by him in Shikarpur in connexion with which he admits he received a sum of RS. 35,000 from his father, defendant 1. Defendant 2 has led no evidence that plaintiff is in possession of a sum of rupees one lakh which is liable to partition in this suit. As regards the two immovable properties, admittedly purchased by Khemchand in the name of his wife now deceased, Khemchand has deposed thus :

> In the schedule of immovable properties attached to the plaint I have not shown one property in Shikarpur which stands in the name of my wife. I had purchased it in her name therefore it belongs to her. I purchased it in 1981 or 1982. I had invested the money I got from my maternal grandmother with the firm of Lilaram Radhakishen in 1984. It was that money with which I purchased the property. I received the money from my maternal grandmother in 1961 or 1962. Between then and 1984 I invested the money in hundis. I have kept no account of this money received from my maternal grandmother . . . . I paid about Rs. 4200 for this property.

Again Khemchand states :

> I purchased two properties in the name of my wife not one, for Rs. 1800 and Rs. 2350. They are one in Dadwai quarter, the other in Jumakhan Mandi. The latter is an open plot. The former has a shop on it . . . . The property costing Rs. 1800 I purchased in 1985. The one costing Rs. 2350 I purchased in 1988. What I have stated before as to the date of purchase is wrong. The wife whom I have referred to and who is dead was named Lilawati.

Now neither Dayaram nor Tarachand had in Suit No. 179 of 1934 claimed these properties as being liable to partition. Dayaram has not mentioned them in the schedule attached to the plaint, EX. 64. Tarachand has not referred to them in his written statement, EX. 67. In his written statement and evidence in the present suit, Dayaram has not referred to these properties at all and the claim that these properties are liable to partition in this suit is made by Tarachand alone. Now, these properties admittedly purchased by Khemchand, the plaintiff, were either purchased out of family property in his hands in connexion with the hundi business carried on by him at Shikarpur, or out of his own private funds as he alleges. There is no presumption that any particular property in the hands of one of the coparceners is joint family property and the burden therefore is upon Tarachand, defendant 2, who alleges that these properties are joint family properties liable to partition to prove it. He has offered no evidence on the point. It seems to me, however, that at the present stage it is premature to decide whether the two properties in question at Shikarpur are liable to partition in this suit. Khemchand is liable and will be directed to render an account of his hundi business. If on an examination of that account it is found hereafter that Khemchand has accounted for all moneys that came into his hands in connexion with this business, there is no ground for holding that the two properties which he purchased in the name of his wife were purchased from joint family funds. If he fails to account for the moneys in his hands the evidence he has given with regard to the purchase of these two properties from his private funds will have to be assessed in the light of his failure to account to that extent for joint family funds. This point will therefore have to be left open for the pre-

38. ('40) 27 A I R 1940 P C 7 : 185 I C 305 : ILR (1940) Kar P C 25 : 15 Luck 1 : 67 I A 1 : 44 C W N 294 (P C), Bhagwandin v. Gir Har Sarup.

sent. In the same way the question whether Khemchand, the plaintiff's investment and share in the firm of Lilaram Radhakishen is or is not liable to partition in this suit, will have to be left over till Khemchand has rendered an account of the joint family funds in his hands in connexion with his hundi business at Shikarpur. Khemchand has stated that Rs. 8800 which he invested in 1984 in the firm of Lilaram Radhakishen was his own private money inherited by him from his maternal grandmother. There is no evidence to the contrary and it is only upon an examination of the account which the plaintiff will hereafter furnish that it can be decided whether his evidence on this point is or is not to be accepted.

I hold therefore for the present on issue 2 that the family property liable to partition in this suit so far as plaintiff and defendants 1 to 3 are concerned is the immovable property specified in the schedule attached to the plaint. What other moveable and immovable property there is liable to partition in this suit will depend upon the accounts which the plaintiff and defendant 1 will hereafter be directed to render. It may be that on a taking of those accounts moveable property may be found in the possession of defendant 1 liable to partition in this suit; it may be that moveable and immovable property is found in the possession of plaintiff liable to partition in this suit. These matters must however be determined later. (After examining evidence regarding certain safe his Lordship concluded) I entirely discard the whole of this evidence and hold it not proved that there exists any safe with valuable contents liable to partition as part of the property in this suit. I now come to the additional issues framed on 6th February 1940 after defendant Kesarbai had been permitted to amend her written statement and the other parties had been given an opportunity to file, and filed rejoinders.

Additional Issue 1 — Is defendant 4 entitled to a share in any of the immovable properties shown in the schedule annexed to the plaint. If so, what properties ?

It is common ground that out of the 31 properties set out in the schedule attached to the plaint, all were acquired by the family before the partition of July 1905 except Nos. 11, 30, 31 and half of property No. 24. These were acquired after the partition. It is not contested that if Kesarbai's claim is held to be within time she is entitled to a partition of immovable properties acquired before the partition. It is contended however that she is not entitled to any share in the properties acquired after the partition. The argument of the learned advocate for defendants 1 and 2 is that after the partition Dayaram was in possession of separate moveable property and a thriving money-lending business of his own. He could well have acquired properties Nos. 11, 24, 30 and 31 out of his separate funds. It is argued that there is no presumption that any item of property in possession of any one member in a coparcenary is joint family property and that similarly there is no presumption that any particular item of property in possession of one cosharer is the joint property of himself and his cosharers. It appears to me however that in the circumstances of this case these arguments cannot prevail. Dayaram's own case is that after the death of Hiranand his (Dayaram's) branch of the family were the sole survivors of a joint Hindu family and that he managed the family property upon that basis. He has stated in his evidence :

The household expenses were entered in the books of the money-lending business. New rent account books were not started after Hiranand's death. Account books were continued till they were finished and then new books were started. The money spent on repairs, re-building of properties, for taxes etc., were entered in the books of the money-lending business. The rents collected and entered in the rent account books were carried over into the books of the money-lending business periodically.

It is clear therefore that Dayaram kept no separate sets of accounts, that there was one account in respect of the entire property of the family and all the income of the family was thrown into one fund. By the partition of 30th July 1905, Dayaram became a co-owner with Hiranand and thereafter with defendant 4 Kesarbai, but nevertheless he has throughout the years treated the entire property as belonging to himself and the members of the joint family consisting of himself, his sons and grandsons. I am of opinion that the case falls under Ss. 94 and 95, Trusts Act, which provides :

In any case not coming within the scope of any of the preceding sections where there is no trust but the person having possession of property has not the whole beneficial interest therein, he must hold the property for the benefit of the persons having such interest or the residue thereof, as the case may be, to the extent necessary to satisfy their just demands;

and S. 95 proceeds to state :

The person holding property in accordance with any of the preceding sections of this chapter must so far as may be perform the same duties and be subject so far as may be to the same liabilities and disabilities as if he were a trustee of the property for the persons for whose benefit he holds it.

I feel no doubt that Dayaram was a constructive trustee for the defendant Kesarbai of her share of the property held in co-ownership and of the income of that property. If Dayaram had any separate moveable property of his own after the partition he has chosen to mix it up with property held in co-ownership. There has been on his part a deliberate mingling of funds, and in these circumstances the burden lies heavily upon him to prove that the immovable properties acquired after the partition were acquired from his own separate funds and not out of the income of the property held by him in co-ownership with defendant Kesarbai. His evidence on the point is not worth the paper on which it is recorded. I refuse to accept it uncorroborated as it stands. Reference has been made to the case in (1897) A C 180[39] in which it has been held by the House of Lords that

there is no fiduciary relationship between tenants-in-common of real estate as such. Nor can one tenant-in-common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

I have read this case very carefully and it is entirely distinguishable. Besides, in India we are governed by the provisions of Indian Trusts Act and the provisions of Ss. 94 and 95 thereof which I have set out above are clearly applicable. Reference has also been made to the case in 23 S L R 461,[40] where it was also held by a Bench of our Court that

no presumption can be drawn from the fact that the head of a family has acquired property that it is joint family property as understood in Hindu law.

This case, again, is entirely distinguishable. It was held as a fact that Haji Umer who after the death of the propositus had acquired agricultural lands had no joint funds in his hands and was in a position to purchase the agricultural land for himself. Reference has also been made to the case in A I R 1932 ALL 512.[41] A perusal of the case however shows that it is of no assistance. I therefore hold that in the circumstances of this case defendant 4 is entitled to partition of the immovable properties belonging to the family before the partition of 1905 as well as of the properties acquired after that date, and of the entire income of those properties.

Additional issue 2. — Can she claim a share in the suit properties without paying ad valorem court-fees on her share ?

My answer is in the affirmative. The defendant Kesarbai is a defendant in a partition suit and I can see no reason why she should pay court-fees on the share she claims in such a suit. She will have to pay her share of stamp duty on the decree in respect of the property allotted to her at partition. It is argued that though defendant 4 is ranged as a defendant, in respect of her claim she is for all practical purposes a plaintiff. There is no substance in the argument ; in a partition suit every person interested in the property to be partitioned whether ranged as plaintiff or defendant is a plaintiff.

Additional issue 3. — Were the various immovable properties shown in para. 1 of further written statement of defendant 1 dated 19th December 1939 or any of them acquired and built upon by defendant 1 after the alleged partition with Hiranand in 1905 from his own moneys or from the alleged joint funds comprising of the rents of other joint immovable properties ?

I have for all practical purposes already answered this issue. There is no evidence whatever that can be accepted to show that the properties acquired after 1905 were acquired or rebuilt out of the separate funds of Dayaram and his family. The burden of proof on this issue was on Dayaram, defendant 1, and he has failed to discharge it. No further finding is necessary on this issue in view of my finding on issue 1 above :

Additional issue 3.—Is defendant 4 entitled to a share in any of the said properties ?

My answer is in the affirmative for reasons stated above.

Additional issue 4.—What amounts, if any, were spent by defendant 1 on the development, improvement and repairs of the various immovable properties mentioned in para. 2 of the further written statement of defendant 1 ?

This is a matter of accounting and will be covered by the directions to be given hereafter in regard to accounting to be done by the plaintiff and defendant 1 :

Additional issue 5. — Can defendant 4 get her share in the said properties without paying her share of the moneys so spent by defendant 1 ?

As I have held that there is no proof that the income of the property held in co-ownership by Dayaram and Kesarbai was not utilized in whole or in part for the acquisition and development of properties after the partition of 1905, there is no reason why defendant 4 should have to pay her share of the moneys expended in acquisition

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39. (1897) 1897 A C 180, John Kennedy v. Mary Annette de Trafford.

40. ('29) 16 AIR 1929 Sind 212 : 118 I C 207 : 23 S L R 461, Abdul Rahman v. Haji Mahomed Idris.

41. ('32) 19 A I R 1932 All 512 : 143 I C 280 : 54 All 916: 1932 A L J 1039, Shakrulla v. Mt. Zohra Bibi.

and development, etc. I answer this issue in the affirmative.

Additional issue 6. — Is defendant 4 entitled to an account of rents and profits of the immovable properties shown in the schedule annexed to the plaint or any of them ?

Additional issue 7. — Is her claim for such accounts for more than three years prior to November 1936 barred by Limitation ?

Additional issue 8.—Is her claim for accounts of the sale proceeds of the Hyderabad property and Malir Garden referred to in para. 2 of her amended written statement barred by limitation ?

These three issues must be dealt with together. It is not disputed that defendant 4 in the view that I have taken of her case is entitled to claim accounts of the property held in co-ownership from defendant 1 or that Dayaram is only accountable to her as the karta or manager of a joint Hindu family. In the view that I have taken of the case, Dayaram, defendant 1, is accountable to defendant Kesarbai in regard to her share of the rents and profits of the property held in co-ownership as a constructive trustee. The point really in dispute in connexion with this accounting is the period for which defendant 1 is liable to account to defendant Kesarbai. It is common ground that the article of limitation applicable is Art. 120 of Sch. 1 to the Limitation Act. But whereas on the one hand it is contended for defendants 1 to 3 that Kesarbai is entitled to accounts only for a period of six years prior to the date when she first put forward her claim in this suit, it is contended for defendant 4 that the right to sue in such cases accrues only when there has been a demand and refusal thereof. In this case Dayaram has stated :

I have never at any time paid anything to Kesarbai out of the rents and other moneys received by me. She has never at any time made any demand on me. I have always considered myself the owner of the entire income.

The learned advocate for defendant 4 in these circumstances contends that no question of limitation arises and defendant 4 is entitled to an account from defendant 1 for the entire period during which he was in sole possession of the property belonging to the co-owners and in sole receipt of the rents and profits thereof. As pointed out in B. B. Mitra's Commentary on the Limitation Act, there is a great conflict of decisions of the various High Courts as to what article of Sch. 1, Limitation Act, applies in a case such as this, where one co-owner is demanding an account from another. The applicability of Arts. 62, 89, 109 and 120 has been debated in innumerable rulings of the various High Courts. I feel however that I will be on safe ground if I follow the view taken by a Full Bench of the Madras High Court in 45 Mad 648.[42] That was a case between co-owners or tenants-in-common and it was held by the learned Judge who decided that case that Art. 120 of Sch. 1, Limitation Act, was applicable and the right to sue accrued only when there was a demand for accounts and a refusal to render them. This decision of the Full Bench of the Madras High Court has been followed in 1933 by Madhavan Nair J., who decided the case in A I R 1933 Mad 200.[43] It has also been followed in two decisions of the Bombay High Court in 30 Bom L R 917[44] and 39 Bom L R 277.[45] The learned advocates for defendants 1 to 3 have referred me to the decision of their Lordships of the Privy Council in 29 C W N 34[46] and the same case at p. 270 of the same report,[47] where their Lordships allowed mesne profits for 6 years only prior to the date of suit. That was however an entirely peculiar case not between co-owners or tenants-in-common and it must be taken that their Lordships in so holding in that case were not laying down any general principle but were merely determining the rights of the parties in the special circumstances of that case.

I have been referred also to the case in 68 M L J 487,[48] but that case lays down no different principle. Article 120 of Sch. 1, Limitation Act, was held to apply and the case in 45 Mad 648[42] was cited with approval. I hold therefore that Art. 120 applies in this case. There has been no demand for accounts and refusal to render the same, and defendant 4 is therefore entitled to an account of the nature I have specified before for the entire period referred to from defendant 1. I accordingly answer issue 6 in the affirmative and issue 7 in the negative. As regards issue 8 it follows from what I have decided on issues 6 and 7 that defendant 4 is

42. ('22) 9 AIR 1922 Mad 150 : 71 I C 177 : 45 Mad 648 : 42 M L J 507 (F B), Yerukola v. Yerukola.
43. ('33) 20 AIR 1933 Mad 200 : 142 I C 708, Levvai Rowther v. Syed Ammal.
44. ('28) 113 I C 254 : 30 Bom L R 917, Babasaheb Bhairojirao v. Gopal Hanmant.
45. ('37) 24 AIR 1937 Bom 217 : 169 I C 232 : 39 Bom L R 277, Jaffar el Edrus v. Mahomed el Edrus.
46. ('24) 11 AIR 1924 P C 144 : 80 I C 827 : 51 Cal 631 : 51 I A 293 : 29 C W N 34 (P C), Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy.
47. ('25) 12 AIR 1925 P C 93 : 29 C W N 270 (P C), Midnapur Zamindari Co. Ltd. v. Naresh Narayan Roy.
48. ('35) 22 AIR 1935 Mad 731 : 156 I C 640 : 68 M L J 487, Siddalingana Gowd v. Bhimana Gowd.

entitled to an account of the sale proceeds of the Hyderabad property and Malir Garden which were sold by defendant 1 after the partition of 30th July 1905 and I hold accordingly. There remains the question of the accountability of the plaintiff and defendant 1, and of the nature of the accounts that they should be required to render. In this connection I would first deal with the question of the books of account. I have already in my order Ex. 49 on the preliminary issue expressed the opinion that the account books relating to the money-lending business carried on by defendant 1 and the rents and profits of immovable properties belonging to the family have been deliberately suppressed by defendant 1. The evidence recorded after the date of that order and the documents which have been exhibited merely confirm my view in this matter. (After considering evidence his Lordship proceeded further.) There is no dispute as to the accounts which the plaintiff has to render. He carried on hundi business in Shikarpur from 1902 or 1903 up to 1936; he has filed his books of account in Court. No suggestion has been made by any of the parties to the suit that he has not filed all the account books in connexion with the business. The plaintiff has declared his willingness to render an account in respect of his entire business.

It is only in the case of Dayaram that the question of the nature of accounts to be filed needs special consideration. In regard to Kesarbai, defendant 4, he was, I have held, a constructive trustee, and therefore from the date of Hiranand's death in 1908 up to the date in 1936 when the official assignee as receiver took charge of the properties in suit he must file a full and true account of all incomings and outgoings in connexion with the immovable properties. In regard to plaintiff and defendants 2 and 3 however Dayaram's position is somewhat different, at least in the abstract, for he was the karta or manager of a joint family. As such, in a suit for partition, he cannot be called upon to render a general account of his dealings with the joint family property. He is however bound to satisfy the Court what property is available for partition, and on this point his *ipse dixit* is not to be accepted, especially when it is alleged that he has secreted and done away with much property. The law on this point presents no difficulty. In Mulla's Hindu Law, Eighth Edition, at p. 267, the law is stated thus :

> 238 (1). In the absence of proof of misappropriation or fraudulent and improper conversion by the manager of a joint family estate, he is liable to account on partition only for assets which he has received, not for what he ought or might have received if the family money had been profitably dealt with. Further, in the absence of any such proof, a coparcener seeking partition is not entitled to require the manager to account for his past dealings with the family property. All that he is entitled to is an account of the family property as it exists at the time he demands a partition. But it is open to him to show that the expenditure which the manager alleges he has incurred has not in fact been incurred, or that more properties are available for partition than those disclosed by him. (2) Since the institution of a suit for partition amounts to a severance of joint status, the manager is, from and after the date of such a suit, strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deducting such expenses is to be divided among the coparceners according to their shares.

In 50 Mad 866[49] it was held that :

> In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the kartha or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief against past inequality of enjoyment or other matters; but it is open to the plaintiff to prove specifically fraud, misrepresentation or other improper conduct on the part of the manager with respect to such management; . . . . but subsequent to the date of suit, the plaintiff and the defendant (the manager) are only tenants-in-common or co-sharers, and therefore the manager is strictly bound to account for all receipts and expenses. . . .

The dictum of Jwala Prasad J. in 8 Pat 818[50] was clearly not intended to enunciate the law on this point. The question in that case was one of court-fees, and the learned Judge decided, there could be no suit for accounts against the karta of a joint Hindu family; such a suit was essentially a suit for partition and court-fees were payable on this basis. In A I R 1935 ALL 594,[51] a Bench of that High Court decided that :

> In the absence of proof of misappropriation or fraudulent or improper conversion by the manager of a joint family a coparcener seeking partition is not entitled to call upon the manager to account for his past dealings with the family property. The coparcener is entitled only to an account of the joint family as it exists on the date he demands partition.

The case in 22 Mad 398,[52] a judgment of their Lordships of Privy Council, was also

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49. ('27) 14 AIR 1927 Mad 801 : 104 I C 472 : 50 Mad 866 : 53 M L J 189, Sri Ranga Thathachariar v. Srinivasa Thathachariar.

50. ('30) 17 A I R 1930 Pat 1: 120 I C 770: 8 Pat 818: 10 P L T 491, Jyotibati Chaudhurain v. Lakshmeshwar Prasad.

51. ('35) 22 A I R 1935 All 594: 157 I C 1013: 1935 A L J 582: 57 All 949, Sukhdeo v. Basdeo.

52. ('99) 22 Mad 398: 21 All 460: 26 I A 113: 7 Sar 330: 9 M L J 67 (P C), Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma.

referred to in argument by the learned advocate for defendant 1, but that judgment, a very long one indeed, deals with the question of the validity of an adoption and I have been unable to find in it any passage relevant to the point under discussion. In 17 Bom 271[53] a very strong Bench of the Bombay High Court held that:

> A manager of a Hindu family cannot refuse to render any account whatever of his management on the occasion of a partition, or require the other members of the family to accept his ipse dixit as to the property subject to partition. What that account should be so as to discharge him from his liability to account as manager, and what objection the other members of the family can take to it, must depend upon the conduct of the manager and the other members of the family, and cannot be stated in definite terms.

I think it would be hard to find a clearer statement of the law on this point and it is therefore unnecessary for me to refer to the other cases cited, e.g., those reported in 44 Mad 656,[54] 45 Mad 281[55] and 44 Bom 179.[56] In the present case, considering the fact that defendant 1 has suppressed the books of account, and the fact that he has for a period of over 30 years been in sole management of a vast estate and of a thriving money-lending business, there is no question of accepting his ipse dixit as to the property available for partition. From the date of the filing of suit No. 179 of 1934 Dayaram has to file a regular and complete account. For the period prior to that he must file an account showing the income of the immovable property and business and how he has disposed of it.

(Original) issue 13.—"To what shares are the various parties entitled in the joint family property?" On my findings on the issues in the suit defendant 4 is entitled to a one-half share in the immovable properties in the schedule to the plaint. She is also entitled to one-half share in the net rents and profits of these immovable properties and a half share in the net sale proceeds of the Hyderabad and Malir properties. Of the remaining one-half share of the immovable properties the plaintiff and defendants 1, 2 and 3 are each entitled to a one-fourth share. They are also each entitled to a one-fourth share in half the net rents and profits of the immovable properties and the sale proceeds of the Hyderabad and Malir properties. In the money-lending business carried on by defendant 1, Kesarbai has no interest. The plaintiff and defendants 1 to 3 therefore will be entitled each to a one-fourth share therein, on the accounts of the said business being taken. Similarly the plaintiff and defendants 1 to 3 are each entitled to a one-fourth share of the hundi business carried on by the plaintiff in Shikarpur on the accounts thereof being rendered by the plaintiff. Two matters will, for the present, stand over: (1) the two immovable properties in Shikarpur purchased by the plaintiff in the name of his deceased's wife Lilavati, and (2) Khemchand's investment of Rs. 8800 in the firm of Lilaram Radhakishen. The shares in moveable properties, which I have held above the parties to be entitled to, are of course all dependent upon the accounts which defendant 1 will furnish in accordance with directions given hereafter in this judgment.

(Original) issue 14. — "To what relief are the parties entitled?"

Defendant 4 is entitled to a partition and separate possession of one-half share in the immovable property in suit set out in the schedule attached to the plaint. She is also subject to the accounts to be rendered by defendant 1, entitled to a one-half share of the net rents and profits of those immovable properties on the same being ascertained after accounts have been rendered by defendant 1, and to a one-half share in the net sale proceeds of the Hyderabad and Malir properties. Plaintiff and each of defendants 1 to 3 are entitled to partition and separate possession of one-eighth share in the immovable properties in suit and in the nett rents and profits thereof after the same have been accounted for by defendant 1, and of a one-eighth share in the sale proceeds of the Hyderabad and Malir properties. They are also each entitled to one-fourth share in the money-lending business carried on by defendant 1 on behalf of the joint family and of the hundi business similarly carried on at Shikarpur by the plaintiff on the accounts of these businesses being rendered by defendant 1 and the plaintiff respectively. Defendants 5 and 6 are in law entitled to claim maintenance and suitable provision for residence from defendant 4; but they will have to do so in separate suits. Defendants 7 and 8 have filed their own separate suit for partition against the plaintiff, their

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53. ('93) 17 Bom 271, Damodardas Maneklal v. Uttamram Maneklal.

54. ('22) 9 A I R 1922 P C 71: 61 I C 690: 48 I A 280: 44 Mad 656 (P C), A. Perrazu v. A. Subbarayadu.

55. ('22) 9 A I R 1922 Mad 236: 70 I C 337: 45 Mad 281: 42 M L J 570, Tammireddi v. Gangi Reddi.

56. ('20) 7 A I R 1920 Bom 236: 54 I C 115: 44 Bom 179: 21 Bom L R 1179, Ramnath Chhoturam v. Goturam Radhakisan.

father, and are not entitled to any relief in this suit.

The plaintiff is directed within two months from the date of this judgment to file in Court a detailed account of the hundi business carried on by him at Shikarpur from its very inception in 1902 or 1903 till the closing of that business in 1936 and in respect of properties Nos. 30 and 31 in the schedule to the plaint and the rents and profits thereof and to supply a copy of that account to each of defendants 1 to 3. Defendants 1 to 3 are directed to file objections to that account if they so desire within a month thereafter. Defendant 1 is directed to file the following accounts within two months of this date : (a) an account showing the moveable property in his hands liable to partition on the date of the filing of this suit and thereafter till the date of this judgment. This account must show the amount received by him at the partition of 30th July 1905 and the income received by him from 1st August 1905, and on the other side expenditure incurred by him during the same period ; (b) a separate account from 1st August 1905 relating to the immovable properties shown in the schedule attached to the plaint and the property in Hyderabad disposed of by him and the Malir garden sold by him. This account must show on one side all receipts of rents and profits till the receiver took possession and on the other all items of expenditure connected with the immovable properties.

Copies of these accounts of defendant 1 to be supplied to plaintiff and defendants 2 to 4 and objections by them, if any, to be filed in a month thereafter. A preliminary decree to be drawn up in terms of this judgment. The question of costs is for the present reserved. I have made no reference in this judgment to a point raised by the learned advocate for defendant 2 in his final arguments. He contended that as by the document, Ex. 72 Kesarbai, defendant 4, had assigned 10/16ths of her share in the property in suit to an alienee, she could not get a decree in this suit for more than 6/16ths of her half share. This point was not taken in the written statement filed by defendant 2 even in February 1940. No issue was sought on the point and I have not permitted the learned advocate to press this point in his final arguments. One other remark requires to be made. I have held that defendant 3 is entitled to a share on partition equal to that of the plaintiff or each of defendants 1 and 2. The nature of her estate in that share is a matter of law with which I am not concerned at this stage. I have held defendant 4 entitled to a half share. How this claim to a half share is to be satisfied and by which of the parties to the suit is a matter which will have to be determined before the final decree is prepared. This point is therefore not referred to in this judgment.

D.S./R.K. *Preliminary decree ordered.*

A. I. R. 1941 Sind 71

DAVIS J. C. AND WESTON J.

Commissioner of Income-tax — Petitioner

v.

Chhotalal Mohanlal and others — Respondents.

Reference No. 94 of 1937, Decided on 20th November 1939, by Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan.

Income-tax Act (1922), Ss. 3 and 9—Association of individuals resembling Hindu undivided family falls under S. 3 — Whether assessees form association within meaning of S. 3 depends upon facts of case — Assessees' father, sons and their wives forming Hindu undivided family — Father in 1928 separating from sons by partition deed which was modified in 1930 — In 1933 property still held jointly by members sold and plot of land purchased in names of all — Building constructed on plot managed jointly for earning income — No evidence of division of income amongst assessees— Assessees held formed association within meaning of S. 3 and were owners of property under S. 9 and hence rightly assessed under S. 9 (1).

An association of individuals resembling a Hindu undivided family is an association of individuals contemplated by S. 3. The question whether the assessees form an association of individuals within the meaning of S. 3 depends upon the particular facts and circumstances of each case. [P 72 C 1, 2]

The seven assessees, a father, four sons two of whom were minors, and the wives of two of the sons formed a Hindu undivided family. In the year 1928 the father separated from his sons by a partition deed, which was modified later by another deed executed in the year 1930. In the year 1933 the property which was still jointly held by the members was sold and a plot of land was purchased in the names of the seven assessees. A building was constructed thereon and managed jointly for the purpose of earning an income which, the assessees alleged, they divided among themselves, but for the division of which the Income-tax Officer found no evidence in the accounts produced :

Held that the seven assessees did form an association within the meaning of S. 3 and that the association of individuals was the owner of the property within the meaning of S. 9 and therefore was rightly assessed under S. 9 (1) : A I R 1938 Bom 41; A I R 1938 Bom 353 and 63 Cal 538, *Rel. on*; *Obiter in* A I R 1937 Cal 583 and A I R 1936 All 817, *Not approved.* [P 72 C 2; P 73 C 1]

Partabrai D. Punwani, Advocate-General — for Commissioner of Income-tax.

Suganlal — for Respondents.

Weston J.—Three questions have been referred to us under S. 66 (2), Income-tax Act, by the learned Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan and these are as follows: (1) Whether in the circumstances of the case, the assessees constituted an association of individuals within the meaning of S. 3, Income-tax Act? (2) Whether the said association can be said to be the owner of the properties within the meaning of S. 9, Income-tax Act, and was rightly assessed as such? (3) Whether the assessees were in any event rightly assessed as owners of the said property under S. 9 (1)? The facts which it is necessary to state briefly are that the seven assessees are a father, four sons, two of whom are minors, and the wives of two of the sons. In the year 1928 the father separated from his sons by a partition deed, which partition was modified later by another deed executed in the year 1930. In the year 1933 the property which, was still jointly held by the members of this Hindu family, was sold and a plot of land was purchased in the names of the seven assessees. A building was constructed thereon and this building was managed jointly for the purpose of earning an income which, the assessees allege, they divided among themselves, but for the division of which the Income-tax Officer found no evidence in the accounts produced. The seven assessees made a return of income declaring their income as Rs. 6058 from the property mentioned. The Income-tax Officer accepted this figure of income but assessed the assessees thereon as an association of individuals under S. 3, Income-tax Act. The assessees appealed to the Assistant Commissioner who upheld the order of the Income-tax Officer and the assessees then petitioned to the Commissioner of Income-tax to refer the case to this Court under S. 66 (2) and this is the reference which has been made.

We think there can be no doubt on the facts of the case that the Income-tax Officer and the Assistant Commissioner of Income-tax were justified in holding that the assessees constituted an association of individuals within the meaning of S. 3, Income-tax Act. We are in agreement with the view taken by the Bombay High Court in I L R (1937) Bom 830[1] and also in 40 Bom L R 455,[2] where it has been held that the words "association of individuals" appearing in S. 3 if construed on the ejusdem generis principle are to be construed with reference not merely to the word 'firm' immediately preceding them, but with reference to the other associations of individuals, namely a Hindu undivided family and company which appear in the section. The same view has been taken by the Calcutta High Court in 63 Cal 538[3] and although Panckridge J. in I L R (1937) 2 Cal 358[4] has made a reference to the point expressing a contrary opinion, he has not referred to the earlier reported decision of the Calcutta High Court and it appears that the point was not material to the case which was then before him. The view expressed by Panckridge J. has also been expressed by the Allahabad High Court in A I R 1936 ALL 817,[5] which was discussed by the learned Chief Justice in I L R (1937) Bom 830[1] and with his remarks we are in agreement. We think therefore that an association of individuals resembling a Hindu undivided family is an association of individuals contemplated by S. 3 and in the present case the association of the seven assessees was clearly very akin to a Hindu undivided family, for they had formed a Hindu undivided family. Even after partition their property had remained undivided and in the year 1933 they had associated themselves, some of them being minors, in the purchase and management of the property upon which they have been assessed.

The question whether the assessees formed an association of individuals within the meaning of S. 3 is a question which must depend upon the particular facts and circumstances of each case and we have no hesitation in holding in the present case that there was material from which the Income-tax Officer and Assistant Commissioner of Income-tax were justified in holding that the present seven assessees did form an association within the meaning of S. 3 of the Act. The two other questions referred are subsidiary to the first question and require little notice. On the facts the Income-tax Officer and the Assistant Commissioner of Income-tax also had material to hold that the association of individuals, formed by the seven assessees were the owners of the pro-

1. ('38) 25 A I R 1938 Bom 41 : 173 I C 482 : ILR (1937) Bom 830 : 39 Bom L R 910, Commissioner of Income-tax, Bombay v. Laxmidas Devidas.
2. ('38) 25 A I R 1938 Bom 353 : 177 I C 447 : 40 Bom L R 455, Commissioner of Income-tax, Bombay v. Dwarkanath Harischandra.
3. ('35) 63 Cal 538 : 40 C W N 476, In re B. N. Elias.
4. ('37) 24 A I R 1937 Cal 583 : 172 I C 807 : ILR (1937) 2 Cal 358, In the matter of Keshar Deo Chamaria.
5. ('36) 23 A I R 1936 All 817 : 169 I C 969 : ILR (1937) All 108 : 1936 A L J 1109, Mufti Mahammad v. Commissioner of Income-tax.

perty within the meaning of S. 9 and there can be no doubt that as owners they were rightly assessed under S. 9, part 1. We therefore answer the questions referred to us accordingly and we direct that a copy of this judgment be sent to the Commissioner under S. 66 (5) of the Act. As to costs, we do not order the return of the Rs. 100 deposited under S. 66 (2) but we make no further order as to costs.

G.N./R.K. *Answer accordingly.*

A. I. R. 1941 Sind 73

DAVIS C. J. AND LOBO J.

Mulchand Tagiomal and another — *Plaintiffs* — Appellants

v.

Shamdas Jethanand and others — *Defendants* — Respondents.

Second Appeals Nos. 14 and 15 of 1938, Decided on 24th May 1940, against judgment and decree of First Class Sub-Judge, Shikarpur, exercising appellate powers.

(a) Partnership Act (1932), S. 9—Construction —Sections in Act subsequent to section 9 are mere amplifications and illustrations of principles embodied in S. 9.

All the sections subsequent to S. 9 of the Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in S. 9. [P 75 C 2]

(b) Partnership Act (1932), S. 29—Assignment by ex-partner in firm after dissolution — Suit by transferee for accounts of dissolved partnership as a whole and not for accounts after dissolution only — Assignors are necessary parties to suit — T. P. Act S. 130 (2) does not obviate necessity of impleading assignor.

In a suit, by a transferee or an assignee from an ex-partner in a firm after the dissolution of the partnership, for accounts of the dissolved partnership as a whole and not for accounts after the date of the dissolution only the assignors are necessary parties. Consequently, when they are not joined either as plaintiffs or defendants till more than three years after the dissolution of the partnership the entire suit must stand dismissed. Section 130 (2), T. P. Act, does not obviate the necessity of impleading the assignor in such a suit : (1926) 1 Ch 266, *Foll.* [P 78 C 1]

(c) Transfer of Property Act (1882), S. 130 (2) — Partnership — Partner's position, rights and obligations in relation to other partners are not chose in action and cannot be assigned — Right to recover share in partnership property is chose in action and assignable.

The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned. But the share of a partner in a partnership is property and the right to recover it is a chose in action assignable under the Transfer of Property Act : (1878) 8 Ch D 218; (1881) 6 A C 64; A I R 1924 Nag 145 and A I R 1925 Sind 18, *Expl.* [P 78 C 1]

(d) Practice—Appeal—New plea — Legality of partnership as regards its constitution is mixed question of law and fact — Court cannot raise question for first time in appeal.

The question as to the legality of the constitution of a partnership is clearly a mixed question of law and fact and the appellate Court cannot for the first time raise such a question and decide. [P 78 C 2]

Fatechand Asudamal — for Appellants.

Srikishindas H. Lulla — for Respondents.

Lobo J. — The facts which have led up to these two second appeals are somewhat involved and need to be set out in considerable detail for a proper understanding of this judgment. Suit No. 7 of 1926 in the subordinate civil Court of Jacobabad was filed by the firm of Mulchand Tagiomal of Shikarpur, the appellants in these appeals, for the settlement of accounts of the partnership firm of Chellaram Tharumal which had been dissolved on 31st October 1923. The constitution of this firm of Chellaram Tharumal was peculiar, for the firm consisted of five individuals: Tharumal, Shamdas, Hotumal, Gunomal, Gellomal, defendants 1 to 5 in the suit, and two firms : Chellaram Bhojraj and Mulchand Tagiomal of Jacobabad, the latter being defendant 6 in the suit. The firm of Chellaram Bhojraj again, was composed of an individual Mathuradas Lekhraj and two firms : Kishindas Kimatram and Nandumal Mulchand. The partners in the firm of Kishindas Kimatram were Sobhraj, Kishindas, Rijharam and Kimatram, defendants 7 to 10 in the suit. Nandumal Mulchand, again, consisted of two firms, Nandumal Tarachand, the partners in which were Tarachand and Jethanand, defendants 11-a and 11-b in the suit ; Mulchand Shambumal, the partners in which were Tagiomal, Kachumal, Khanchand, Parmanand, Lilomal and Chuharmal, defendants 12 to 17 in the suit, and two individuals, Chellaram and Hundraj, defendants 18 and 19 in the suit. Defendant 20 in the suit is the son of Mathradas Lekhraj, deceased. Defendants 11 to 20 were not originally impleaded in the suit ; they were brought on the record only in 1931, a great deal more than three years after the dissolution of the firm of Chellaram Tharumal.

The plaintiffs in the suit, the firm of Mulchand Tagiomal of Shikarpur, were thus not originally partners in the firm of Chellaram Tharumal, but under certain documents which are Exs. 100, 215 and 228 in the case, they became the assignees of the firm of Nandumal Mulchand and of Mathradas Lekhraj, two of the partners in the dissolved firm of Chellaram Tharumal. In the trial Court the suit was contested by defendant 2

Shamdas, respondent 1 in these appeals and by defendants 7 to 10, the partners in the firm of Kishindas Kimatram, respondents 2 to 5 in these appeals. Defendants 1, 4, 5 and 6 and 11 to 20 raised no contest; defendant 3 Hotumal denied he was a partner.

The suit was in the first instance dismissed by the trial Court, the learned Judge holding that the plaintiffs' assignors were necessary parties to a suit for settlement of accounts of the partnership carried on in the name and style of Chellaram Tharumal, and as these assignors had not been joined as parties for much more than three years after the dissolution of the firm, the accounts of which were sought to be settled, the entire suit was barred by limitation. The plaintiffs went on appeal, and the appellate Court ordered that the assignors referred to should be joined as parties to the suit and the trial Court should decide the question of limitation after such joinder had been effected. If the plaintiffs, however, refused to join the assignors the suit should stand dismissed. This order of the appellate Court is not on the paper books of these appeals but is referred to in the judgment of the learned Judge of the trial Court. In the trial Court after this appeal the plaintiffs joined the assignors in the suit as defendants 11 to 20. The suit then proceeded to trial and the learned subordinate Judge, Mr. Hardasmal Banasing, decreed the plaintiffs' suit holding that the assignments in favour of plaintiffs were valid and legal, that defendants 11 to 20 were proper but not necessary parties to the suit, and that therefore the suit for settlement of partnership accounts was not barred by limitation; the learned Judge then disposed of certain minor issues in the case and ordered that a preliminary decree be framed on the basis of his findings. Against this preliminary decree, an appeal was preferred to the Court of the first class subordinate Judge of Shikarpur with appellate powers being Civil Appeal No. 98 of 1932.

The learned first class subordinate Judge reversed the judgment and decree of the trial Court and allowed the appeal. He agreed with the learned Judge of the trial Court that defendants 11 to 20, the assignors of the plaintiffs, were not necessary parties to the suit and that their non-joinder in the first instance therefore did not result in the suit being barred by limitation. He held, however, that the assignments in favour of the plaintiffs were illegal and invalid, and he further held that the entire proceedings were bad as the firm of Chellaram Tharumal consisted of more than 20 members and not having been registered under the provisions of the Companies Act the partnership was invalid according to law and the suit should have been dismissed. During the pendency of the appeal Hundraj and Bhojraj, defendants 19 and 20, had died and their legal representatives had not been brought on the record. The learned Judge of the appellate Court held that the appeal had not abated by reason of the non-joinder of these legal representatives. Another respondent, Tharumal, original defendant 1, also died during the pendency of the appeal and his legal representatives had also not been brought on the record. The learned Judge rejected the contention that the non-joinder of the legal representatives of Tharumal resulted in the abatement of the appeal as a whole.

This judgment of the learned appellate Judge was delivered on 26th March 1938. In the meanwhile a final decree in the suit had been passed by the learned Judge of the trial Court on 30th September 1932 and an appeal had been presented against that final decree being Civil Appeal No. 17 of 1932 of the Court of the first class subordinate Judge of Shikarpur with appellate powers. While dismissing the suit in appeal from the preliminary decree the learned Judge also dismissed this appeal from the final decree by a judgment dated 31st March 1938. It is against these two judgments of the learned appellate Judge that these Second Appeals Nos. 14 and 15 of 1938 have been preferred to this Court. The learned advocate who appeared for the appellants to argue these matters before us took four points. He contended : (1) that the appeal had abated by reason of the non-joinder of the legal representatives of Hundraj and Bhojraj and should therefore have been dismissed; (2) that the appeal had also abated because of the non-joinder of the legal representatives of Tharumal and should on this ground as well have been dismissed; (3) that the learned Judge had erred in raising on appeal for the first time the question of the legality of the constitution of the firm of Chellaram Tharumal and in deciding this issue against the appellant; (4) that the learned Judge erred in holding that the assignments in favour of the plaintiffs, the appellants in these appeals, were invalid and illegal.

We have heard long and interesting arguments in support of and against these contentions of the learned advocate for the appellants, but it appears to us unnecessary

to decide the points debated, because we feel that these appeals can well be disposed of on one single point of law which both the lower Courts decided in favour of the appellants, but which has been reagitated before us by the learned advocate for the respondent Shamdas, the only respondent represented before us in these appeals, and on which the learned advocate contended he was entitled to support the judgment of the lower Court dismissing the suit of the appellants with costs, although the learned Judge of the appellate Court had decided the point against him. That the learned advocate for respondent Shamdas was entitled to do this is perfectly clear from R. 22 of O. 41, Civil P. C., which provides that

> any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal.

The learned Judge of the trial Court held that the assignors of the plaintiffs, the present appellants, were not necessary parties to the suit and that their non-joinder, till more than three years after the dissolution of the firm of Chellaram Tharumal, did not result in the entire suit being barred by limitation. The learned Judge of the appellate Court upheld this finding of the trial Court. The learned advocate for respondent Shamdas before us has contended that both the learned Judges were in error in arriving at this conclusion, that defendants 11 to 20, the assignors of the plaintiffs, the present appellants, were necessary parties to a suit for the taking of accounts of the partnership of Chellaram Tharumal, and they admittedly not having been joined either as plaintiffs or as defendants till more than three years had elapsed after the dissolution of the firm of Chellaram Tharumal, the entire suit was liable to be dismissed. After having heard the learned advocate for respondent, Shamdas and the learned advocate for the appellants on this point at very great length, we are of the opinion that this contention is sound and must succeed and that these second appeals must be dismissed. The contract of partnership is a contract *uberrimæ fidei;* S. 9, Partnership Act, which materially reproduces S. 257, Contract Act, thus defines the relations between the partners in a partnership:

> Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representatives.

All the subsequent sections of the Partnership Act dealing with the relations of partners to one another are no more than amplifications and illustrations of the principles contained in S. 9. The assignment of his rights in a partnership by a partner is clearly contemplated in the Partnership Act. Section 29 of the Act provides:

> (1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.
>
> (2) If the firm is dissolved or if the transferring partner ceases to be a partner, the transferee is entitled as against the remaining partners, to receive the share of the assets of the firm to which the transferring partner is entitled, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.

It would appear then that where a partner transfers or assigns his share in a partnership to a third party, that third party has no right to call for an account of the partnership business from the other partners, and even when the transfer results in or is followed by a dissolution of the partnership such transferee or assignee can claim an account only from the date of dissolution. The Partnership Act does not deal with the case of a transfer or assignment by an ex-partner in a firm after the dissolution of the partnership, but we can see no reason why the right of such a transferee or assignee to claim an account of the partnership from the other ex-partners should be any larger than the right of a transferee or assignee under S. 29.

In the case before us the firm of Chellaram Tharumal was dissolved on 31st October 1923 and the plaintiffs in the suit, the present appellants, became transferees or assignees of two of the late partners after dissolution. They filed a suit for accounts of the dissolved partnership as a whole and not for accounts after the date of dissolution only. The question is could they do so in their own right or were the late partners necessary parties to such a suit by the plaintiffs.

The answer to this question is furnished by a consideration of the general law of partnership and the relations between partners and their mutual obligations to which we have referred above, and in the provisions of the Civil Procedure Code relating to necessary and proper parties to a suit. But, in our opinion, a clear exposition of the

law on this point can be found in (1926) 1 Ch 266,[1] a decision of Eve J. in the Chancery Division of the High Court of England which was affirmed by the Court of appeal in separate judgments delivered by Lord Hanworth, Master of the Rolls, Warrington and Sargant L. JJ. The facts in that case were these : At the outbreak of war on 4th August 1914 three German subjects were carrying on in partnership with an English partner F, the business of merchants in London under the style of Arnold Otto Meyer & Co. F was the managing partner in London and on the dissolution by the declaration of war he carried on the business and collected assets with a view to liquidation. No accounts had been taken between partners since 31st December 1913, F died in 1920 and the defendant was his legal personal representative. By an order of the Board of Trade dated 1st April 1924 it was ordered that all the property rights and interests of the three German partners in the assets of the firm in respect of any claim against the English partner or his estate should vest in the plaintiff who should take all necessary proceedings to collect what would be due to the German partners. In an action by the plaintiff as custodian of enemy property with the object of winding up the partnership he claimed an account against the defendant of all dealings between the German partners and the English partners including all dealings with the partnership assets since its dissolution, payment of what should be found due and inquiry of what the partnership property consisted. The German partners were not added as plaintiffs in the action. It was held by Eve J. that in the absence of the German partners as parties to the action no such relief as was asked could be granted and that the action failed. The learned Judge stated :

> The plaintiff in my opinion is in no better position than any other assignee of the interests of the Germans and his claim to be treated as a creditor of the defendant's testator is a misconception. I conceive the following to be a correct summary of the legal relations of partners in a dissolved partnership. Where assets are collected and got in, no partner has any definite share or interest therein, his right is merely to have the assets so collected applied in discharging the liability of the partnership firm and to receive his share of any surplus there may be when the liquidation has been completed; and further there can be no relationship of debtor and creditor between partners unless and until the accounts have been finally taken and a balance has been ascertained to be due from each one to the others. Nor is any partner entitled to an account from his co-partners except upon the footing that in accordance with the implied obligation arising under the contract of partnership he will himself account and submit to be charged with any balance found to be due from him.
>
> Such being the legal position of the parties, the defendant, subject to the determination of certain other defences with which I do not propose to deal, would not resist—indeed, having regard to the fact that his interest in the whole matter is that of a trustee only, would welcome an order for the usual partnership decree on the terms that the plaintiff is willing to submit to be charged with all sums properly chargeable against the assignors, or, alternatively, to amend the record by adding the German partners as co-plaintiffs. But the plaintiff declines to accept either alternative, and insists on his right to have the accounts taken in circumstances calculated to inflict grievous injustice upon the defendant. I do not think he has any such right, and therefore I cannot give him the relief claimed in the action. At the trial the plaintiff asked, as an alternative, for an account under subs. (2) of S. 31, Partnership Act. I am not prepared to hold that in no case, and more particularly in a case where some of the partners are out of the jurisdiction, can the Court make an order for such account of the partnership dealings and transactions prior to the dissolution, I think the Court would be slow to make the order until all the accounting partners were parties.

Sub-section (2) of S. 31, English Partnership Act, is substantially reproduced in S. 29 (2), Indian Partnership Act, and relates to a claim for accounts after the date of the dissolution of a partnership. The plaintiffs in the matter before use were in the position of the public trustee in this Chancery case. Defendants 11 to 20 who were joined only in 1931 were in the position of the German partners in the Chancery case. As in the Chancery case the assignment had taken place after the dissolution of the partnership between the English partner and his German colleagues, so in the case before us the firm of Chellaram Tharumal had been dissolved before the assignments in favour of the plaintiffs. As in the Chancery case, so in the case before us, the account claimed by the plaintiff was not an account merely after the dissolution of the firm but an account of the entire period of the partnership. The decision of Eve J. in (1926) 1 Ch 266[1] and in the same volume at p. 776[2] is the decision of the appellate Court. The head note to the decision of the appeal Court reads thus :

> *Held* that it was necessary for the proper liquidation of the firm's affairs and the ascertainment of the amounts divisible or payable by the partners inter se, that each partner should personally account to the others for his receipts and transactions in the winding up ; that reciprocity of personal obligation for that purpose was as complete

1. (1926) 1 Ch 266, Public Trustee v. Elder.

2. (1926) 1 Ch 776 : 95 L J Ch 519 : 135 L T 589, Public Trustee v. Elder.

as it was under Ss. 28 and 29, Partnership Act, 1890, during the continuance of the partnership; that, that being so the assignee of the share of a partner in a dissolved partnership, when requiring an account, as from the date of dissolution, could not substitute for the reciprocal personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations:

Held therefore that the German partners were necessary parties to the action, and accordingly that the action was defective for want of parties and must be dismissed.

The question involved has been dealt with in greatest detail in the judgment of Sargant L. J., thus:

The whole difference between the parties is as to the results of an absolute assignment after the dissolution of a partnership of the shares of some of the partners. But for that assignment the shares of the assigning partners would obviously have been ascertainable only in proceedings to which those partners were parties, and in which they would have been under reciprocal personal obligations to the other partners to render full and just accounts. What then is the effect of these obligations on the assignment? Is it to substitute for the personal obligations of the assigning partners to account, a corresponding personal obligation of the assignee to account, so that on performing this obligation to the best of his personal ability he can call on the other partner for the full benefit of his personal accountability? Or is it merely to substitute the assignee as the ultimate recipient of the value of the share, as ultimately ascertained in the same manner as it would have been ascertained apart from the assignment, that is to say after the assigning partners had themselves performed their reciprocal personal obligations to account? . . . .

The contract of partnership is essentially one involving in the highest degree reciprocity of personal obligation and trust. In the words of James L.J. in *Baird's case*, (1870) 5 Ch 725[3] at p. 733 'ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner.' And under Ss. 28 and 29, Partnership Act, 1890, partners are under mutual personal liability to render true accounts and full information of all things affecting the partnership, and to account for any benefits derived from any transaction concerning the partnership or from any use by any of them of the partnership property, name or business connexion. And the position and rights of a partner as towards the other partners are recognized by the law as being so personal and individual that, under S. 31, sub-s. 1, Partnership Act, 1890, an assignment by a partner of his share in a partnership does not entitle the assignee to interfere in the partnership or to require accounts or to inspect the books, but entitles him solely to receive the shares of the profits as ascertained by the partners to which the assigning partners would otherwise be entitled. It would hardly be possible to express more clearly the essential non-assignability in a subsisting partnership of the position and rights of one partner in relation to the other partners.

On the dissolution of a partnership however there is no occasion to limit quite so strictly the right of an assignee as regards transactions occurring after the dissolution. And accordingly under sub-s. 2 of S. 31 it is provided that the assignee is not only entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, but is also entitled for the purpose of ascertaining that share to an account as from the date of dissolution. The result seems to be that down to the date of dissolution the accounts have to be agreed to personally by the partners and the assignee is bound to accept the accounts as so agreed; and that the sole account the assignee is entitled to have taken in his presence or to question is an account from the date of dissolution.

. . . . . .

What then are the rights of the original partners as regards the taking of the accounts on a dissolution? Are there rights still reciprocal, personal rights involving mutual, personal trust and confidence? In my judgment, the only possible answer to this question is an affirmative one. The dissolution of the bond between them is as to new enterprises and transactions only. For the winding up of affairs of the partnership, the authority of each partner to bind the firm and the other rights and obligations of the partners continue, as expressly recognized and enacted by S. 38 of the Act of 1890. It is accordingly necessary for the proper liquidation of the firm's affairs and the ascertainment of the amounts divisible amongst or payable by the partners inter se, that each partner should personally account to the others for his receipts and transactions in the winding up. The reciprocity of personal obligation for this purpose is as complete as it was under Ss. 28 and 29 during the continuance of the partnership. This being so, can an assignee of the share of a partner in a dissolved partnership, when requiring an account as from the date of dissolution, substitute for the reciprocal personal obligation of the assigning partner to account to the other partners a mere personal obligation of the assignee himself to account, while still requiring the other partners to discharge as towards him their personal obligations? Such a claim in my judgment involves a violation of the fundamental conditions of reciprocity and personal confidence involved in the partnership contract and it is directly negatived by the reasoning in the unanimous judgment of the Court of appeal, as delivered by the then Master of the Rolls, in (1902) 2 K B 660.[4]

It must be remembered that S. 31 of the English Partnership Act of 1890 finds its counterpart in S. 29 of the Indian Partnership Act of 1932 and the provisions of Ss. 28 and 29 of the English Partnership Act, relating to the duty of partners to render accounts and to the accountability of partners for private profit are to be found in Ss. 9, 13, 15 and 16 of the Indian Partnership Act of 1932. We can see no material point of distinction between the case before us and this case in (1926) 1 Ch 776[2] and we can therefore have no hesitation in following it. It has been argued that the share of a partner in a partnership concern is his own private property, that it is assignable under the pro-

3. (1870) 5 Ch 725 : 23 L T 424: 18 W R 1094, Agriculturist Cattle Insurance Co., In re.

4. (1902) 2 K B 660, Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd.

visions of the Transfer of Property Act and that S. 130 (2), T. P. Act, gives the transferee of such a share a statutory right to sue or institute proceedings for the same in his own name without obtaining the transferor's consent to such suit or proceedings, and without making him a party hereto.

We have no quarrel with this line of argument; but a suit by an assignee for recovery of the share of one partner in a partnership is one thing and a suit for rendering of accounts of a partnership as a preliminary to ascertaining the value of that share is quite another thing; and while S. 130 (2), T. P. Act, confers on an assignee the right to sue for such a share without impleading his assignor, it cannot in reason be read as conferring on him the right to sue for the accounts of a partnership without his assignor being a party to the suit so as to enable all the partners in the partnership to fulfil their mutual and personal obligations to account. Section 130 (2), T. P. Act, neither expressly nor impliedly abrogates the provisions of the Partnership Act. The position and rights and obligations of one partner in a partnership in relation to the other partners is clearly not a chose in action and cannot be assigned; the share of a partner in a partnership is equally clearly property and may be assigned. Reliance has been placed by the learned advocate for the appellants on the case in (1878) 8 Ch D 218,[5] on the case in (1881) 6 A C 64,[6] on the case in 75 I C 817,[7] the judgment of a single Judge of the Nagpur Judicial Commissioner's Court and on the case in 17 S L R 334.[8] But none of these cases goes further than laying down a proposition we admit, that the share of a partner in a partnership is property and the right to recover it is a chose in action assignable under the Transfer of Property Act.

In our view therefore the assignors of the plaintiffs in Suit No. 7 of 1926, the present appellants were necessary parties to the suit and not having been joined till a suit for taking partnership accounts as against them was time-barred the entire suit was barred by limitation and should have been dismissed. These second appeals therefore fail and must be dismissed with costs and we order accordingly. We have in the course of this judgment made reference to the peculiar constitution of the firm of Chellaram Tharumal, a peculiarity which attracted the attention of the learned Judge of the lower appellate Court and induced him to raise and decide in appeal for the first time an issue as to the legality of such a partnership in view of the provisions of the Companies Act. We are informed however that such firms are quite common in Sind and are by no means peculiar. While we think that this learned Judge could not in appeal for the first time raise such a point, clearly a mixed question of law and fact, we would invite the attention of subordinate Judges to the necessity of raising the point which could no doubt with advantage be raised and decided in other cases by a civil Court at the appropriate time.

G.N./R.K. *Appeals dismissed.*

5. (1878) 8 Ch D 218 : 47 L J Bk 70 : 38 L T 229 : 26 W R 439, In re Bainbridge; Ex parte Fletcher.
6. (1881) 6 A C 64 : 29 W R 636, Cassels v. Stewart.
7. ('24) 11 A I R 1924 Nag 145 : 75 I C 817, Shrinath v. Kanhaiyalal.
8. ('25) 12 A I R 1925 Sind 18 : 80 I C 642 : 17 S L R 334, Vishindas Nihalchand v. Thawerdas.

A. I. R. 1941 Sind 78

DAVIS C. J. AND LOBO J.

Hukumatrai Arjandas, a firm — Appellants

v.

Nandu Virumal and another — Respondents.

Second Appeal No. 52 of 1938, Decided on 24th May 1940, against judgment and decree of Asst. Judge, Sukkur, D/- 10th September 1938.

Contract — Sukkur Pass Godown Delivery contract—Delivery chit received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of price of goods is not document of title — First seller is entitled to refuse delivery to last buyer in exercise of his right of lien as unpaid vendor.

Apart from any established trade custom a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. A delivery chit which is part and parcel of a contract on Sukkur Pass Godown delivery terms and which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of the price of the goods is not a document of title within the meaning of S. 2 (4), Sale of Goods Act. The delivery chit does not represent the goods or transfer possession thereof or entitle the holder to receive delivery from the original seller. Irrespective of whether he had received the purchase price of the goods the original seller is entitled to refuse delivery to the holder of the chit in the exercise of his right of lien as unpaid vendor. The delivery chit therefore does not fall within the purview of S. 53 (1), Sale of Goods Act : *English and Indian case law referred;* 38 Cal 127, *Disting.* [P 80 C 2; P 81 C 1, 2]

Fatehchand Assudamal — for Appellants.

Srikrishendas H. Lulla and Kimatrai Bhojraj — for Respondents 1 and 2, respectively.

Lobo J. — This is a second appeal against the judgment and decree of the learned Assistant Judge of Sukkur who in appeal

upheld the judgment and decree of the subordinate Judge of Sukkur in Suit No. 91 of 1934, decreeing the suit of the plaintiff against defendants 1 for Rs. 800 interest and costs and against defendants 2 for Rs. 31-8-0, the price of a hundred empty gunny-bags. In the present appeal the appellants are defendants 1 in that suit, respondent 1 is the plaintiff and respondents 2 are original defendants 2. It may be mentioned that the judgment of the first appeal Court really covers two suits of a similar nature: Suits 91 and 95 of 1934 and two appeals therefrom, Nos. 158 and 163 of 1935. In this second appeal however we are only concerned with suit No. 91 of 1934 and First Appeal No. 158 of 1935, and the point involved is one of some importance arising out of and affecting the large wheat business done in Sukkur under what is called "Sukkur Pass Godown Delivery" terms.

The plaintiff Nandumal, proprietor of the firm of Virumal Kishendas, agreed to purchase from defendants 1, the firm of Hukumatmal Arjandas on 6th October 1932=5th Asu 1989, 100 bags of wheat November vaida, at Rs. 3-4-3 per maund on Sukkur Pass terms. Delivery was due between 1st and 30th November. On 20th November plaintiff received from defendants 1 a "delivery chit" issued originally by defendants 2 the original sellers of these 100 bags wheat, and passed on through a chain of intermediate sellers by endorsement. Plaintiff presented the delivery chit to defendants 2 at their godown on or about the 23rd when the wheat was weighed and put into bags furnished by the plaintiff. After this the plaintiff paid Rs. 800 to his seller defendants 1 according to the usage of the trade. The plaintiff had in his turn sold these 100 bags of wheat along with other wheat to the Dembla Flour Mills and to them he handed the delivery chit. When however the representative of the Dembla Flour Mills went to defendants 2 for delivery, it was refused. The plaintiff thereon filed suit No. 91 of 1934 in the Court of the subordinate Judge, Sukkur, claiming Rs. 800 interest and costs alternatively from defendants 1 and 2 both of whom he impleaded. The learned subordinate Judge decreed the plaintiff's claim against defendants 1, the present appellants, for Rs. 800 interest and costs and against defendants 2, the present respondents 2, for Rs. 31-8-0, the cost of the 100 empty bags provided by the plaintiff. Defendants 1 appealed against this decision and defendants 2 filed cross-objections, but the appeal and cross-objections were dismissed and the decree passed by the subordinate Judge was upheld.

The pleadings in the suit are not on the paper book and it is not easy therefore to ascertain what case the appellants before us put forward in the trial Court. Before us the main argument made by the learned advocate for the appellants was that the delivery chit—or delivery order as he called it—was a document of title, that, like a bill of lading, it represented the goods covered thereby and that defendants 2 were therefore bound to give delivery to the party presenting the delivery chit. As in this case defendants 2 failed to give delivery the plaintiff was entitled to recover damages for breach of contract from defendants 2 and not from defendants 1. The custom of the trade in connexion with Sukkur Pass Godown Delivery contracts is apparent from the record and may be put thus: A sells to B 100 maunds of wheat, November vaida, at a fixed rate per maund, and B executes a kabala in the form Ex. 63. B sells the same quantity to C, C to D, D to E, etc., Z being the last purchaser. For every such sale a kabala in the form Ex. 63 is executed by the purchaser in favour of his seller. In the vaida month between 1st and 27th, A tenders the goods to B by issuing to him a delivery chit in the form Ex. 108. The chit reads thus:

"May God Ram help"

To

Bahi . . . . . .

Written from New Sukkur, puj . . . . says that 100 bags wheat of November Waida have been sold to you. You will take delivery of the same from our godown.

Date . . . . . .

Sd/- . . . . . .

Z being the last purchaser who is to take delivery from A, the delivery chit is passed on by a series of endorsements from B to Z. Z pays 90 per cent. of the price of the goods to his seller Y and this process is repeated by each purchaser along the chain, A the original seller receiving the money from B, the first purchaser. On Z presenting his delivery chit at A's godown he obtains delivery of 100 maunds of wheat. Thereafter the goods are analyzed and the balance, 10 per cent. of the price, is adjusted thereto and settled. This is clearly borne out by paras. 7 to 9 of the kabala Ex. 63 and the finding of both the lower Courts on the evidence, especially that of the principal between Mukhi Dwarkadas which is referred to in the judgment of the first appellate Court. The learned Judge of the appellate Court states:

One of these printed forms is Ex. 63. The relevant clause in our case is cl. 9. Cl. 9 states that

the purchaser taking delivery has to pay 90 per cent. of the price at the time of taking the delivery. It is however not clear from the agreement itself which purchaser—the first or the ultimate has to pay to the original seller. As remarked by the learned Sub-Judge it is to the interest of all the parties concerned that delivery should be made to the ultimate buyer and cls. 7, 8 and 9 obviously refer to the delivery to the ultimate buyer. However cl. 9 cannot be understood to be that the ultimate buyer had to pay to the original seller. In fact we have the evidence of Mukhi Dwarkadas (Ex. 91), a respectable merchant according to whom the seller had to be paid by the first buyer. In fact each purchaser had to pay his own vendor and so the money passed on till it reached the original seller. As remarked by the learned Sub-Judge, evidence to explain ambiguous words in agreement is admissible. I have no reason to doubt the evidence of Mukhi Dwarkadas and thus I too hold with the learned Sub-Judge that the price to the original seller had to be paid by the original buyer and not by the last man in the chain. In fact that proposition is not denied by any of the parties. Defendant 2 admits that he was to receive the money from the person to whom it was originally sold. In fact his notice (Ex. 88) is to that very effect. He has held the original firm of Chhatomal Godhumal to be responsible for these payments and not the plaintiff. Thus cl. 9 is clear in this respect that at the time of taking delivery the original purchaser Chhatomal Godhumal in our case had to pay defendant 2 and then only would the delivery be given. There is a further clause saying that the intermediary buyers and sellers have to pay each other and the only meaning that can be attached to this clause is that all these intermediary transactions would take place at the same time when the delivery of wheat was given.

The delivery chit in this case does not stand by itself; it is part and parcel of the contract on Sukkur Pass Godown delivery terms and its nature and purpose are clearly set out in the kabala in form Ex. 63, which is executed by every purchaser in a contract on Sukkur Pass Godown delivery terms. The nature and purpose of the delivery chit is thus set out in paras. 7 to 9 of the kabala:

> The seller will make delivery of goods between 1st and 27th of the month of Waida; and he will issue delivery chit by 10 A. M.; and that chit will be circulated by merchants in the town, from one hand to another up to 5 P. M. Other merchants will keep the chit with themselves for one hour and not more. If the goods be not sold by any party, he will sell the same by 4 P. M. and transfer the chit by 5 P. M. The party by whom the goods may have been purchased and sold will not keep the chit with him for more than one hour. If he keeps it for more time, he will be charged interest and godown rent.

Paragraph 8 provides:

> The seller will make delivery of goods within three days from the day on which delivery chit is issued and the purchaser will receive it. . . .

and paragraph 9 provides:

> The purchaser taking delivery of goods will pay to the seller 90 per cent. of the price at the very time. The remaining 10 per cent. will be paid by him as per account after such is taken. The intermediary parties will pay and receive from one another.

Any ambiguity in the wording of para. 9 of the kabala is explained by the evidence on the record. "The purchaser" referred to in para. 9 is the ultimate purchaser taking delivery of the goods, and "the seller" referred to in para. 9 is the ultimate seller. As it is clear that the delivery chit is obtained without payment and that delivery cannot be obtained on presentation of the delivery chit unless the purchaser presenting the same has paid 90 per cent. of the price of the goods to his seller and the original seller who has to give delivery has received 90 per cent. of his money, this delivery chit can scarcely be called a document of title to goods. Reliance has been placed by the learned advocate for the appellants on the definition of "document of title to goods" contained in S. 2, cl. (4), Sale of Goods Act, which defines "document of title to goods" thus:

> 'Document of title to goods' includes a bill of lading, dock-warrant, warehouse-keeper's certificate, wharfingers' certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

But this definition is of no assistance to the appellants because, as held by their Lordships of the Privy Council in 43 I A 164,[1] the words "used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize either by endorsement or by delivery the possessor of the document to transfer or receive goods thereto represented" are all-important and govern the whole definition, with the result that all the documents mentioned in S. 2 (4), Sale of Goods Act, must be such as in the ordinary course of business represent the goods. A delivery chit which is received without payment and which cannot be effectively used for obtaining delivery without payment of 90 per cent. of the price of the goods is not a document which, in the ordinary course of business, represents the goods mentioned therein. Reliance has also been placed by the learned advocate for the appellants on the case in 38 Cal 127,[2] but this decision does not support the appellants, because it was found in that

1. ('16) 3 A I R 1916 P C 7 : 35 I C 954 : 40 Bom 630 : 43 I A 164 (P C), Ramdas Vithaldas v. Amerchand & Co.
2. ('11) 38 Cal 127 : 10 I C 859, Anglo-India Jute Mills Co. v. Omademull.

case that by the usage of the jute trade in Calcutta pucca delivery orders were issued only on cash payment and were passed from hand to hand by endorsement and were sold and dealt with in the market as absolutely representing the goods to which they related. On the other hand, there can be no doubt whatever that apart from any established trade custom, a delivery chit or a delivery order is nothing more than a token of authority to receive possession of the goods which it covers. In Halsbury's Laws of England, Vol. 29, Hailsham Edition at p. 143 it is stated :

Delivery orders, warrants, written engagements to deliver goods, and similar documents do not, like bills of lading, transfer possession. They are mere promises by the seller, being the issuer or transferor, to deliver, or authorities to the buyer to receive possession. Such documents, although they may purport to be, or may commonly be treated as transferable, are not negotiable instruments, unless there be a trade usage to that effect.

In 8 Bom 501[3] it was held in connexion with the cotton trade in Bombay that a delivery order was to be regarded as a mere token of authority to delivery and that independently of statute or custom it did not enable a purchaser to confer a title upon a vendee or a sub-vendee free from the vendor's lien for the price. In 25 Bom L R 1063[4] Mulla J., at page 1069 remarked :

The common law drew a distinction between bills of lading and other documents of title, for while a transfer of a bill of lading was always held to operate as a delivery of goods, a transfer of the delivery order or a dock warrant operates only as a token of authority to take possession and not as a transfer of possession.

The learned Judge relied on the case in (1849) 2 H L C 309[5] and Blackburn on Sale, p. 302. In (1877) 5 Ch D 195,[6] Jessel, M. R., who delivered the judgment of the Court states :

Again, I take this to be settled law, that, as long as the vendor of goods remains in possession as vendor of those goods and is unpaid, he has a lien as vendor for the unpaid purchase money. I take it that it is quite immaterial that the vendor has parted with the document, which does or does not, according to law, transfer a title to the goods. He may have given a bill of lading which passes the legal property in the goods, or he may have given a delivery order, which though it does not pass the legal title or property in the goods, enables the person receiving it to acquire possession of the goods and acquire a title in that way, but whatever he has done in that respect does not destroy his right of lien as long as he keeps possession of the goods as vendor and in no other character.

In the present case respondents 2, the original vendors of the goods, were unpaid vendors and their right of lien over the goods which were in their possession entitled them to refuse to give delivery to the holder of the delivery chit.

In A I R 1924 Sind 137,[7] Kennedy J. dealing with a contract on terms similar to the Sukkur Pass Godown delivery contracts, states :

The contract in the suit is one of the usual type of forward transactions which are made on the terms contained in a printed form of contract, where *A* buys a certain quantity from *B*, and sells it to *C* who in turn sells it to *D* before the vaida day and so on, and the same quantity of goods becomes the subject-matter of a chain of transactions. Actual delivery of the goods purchased is made by the first seller to the ultimate purchaser. A delivery chit is issued to the first buyer by the first seller, and passes hands by endorsement. The ultimate buyer passes it to the first seller and obtains delivery of the relative goods on the authority of this chit.

It is to the interests of all the parties concerned that delivery should be made to the ultimate buyer. Appropriate clauses have been introduced in the contract form to provide for such delivery. The fact that delivery is so given does not however create any privity of contract between the first seller and the ultimate buyer, and ordinarily each buyer would be bound to account to his seller for the payment of the purchase money at the rate at which he had agreed to purchase the goods.

We have no doubt whatever that in the present case the delivery chit was nothing more than a token of authority to receive possession. It did not represent the goods or transfer possession thereof or entitle the plaintiffs to receive delivery from the defendants 2 irrespective of whether the defendants 2 had received the purchase price of the goods, and defendants 2 were entitled to refuse delivery to the plaintiffs in the exercise of their right of lien as unpaid vendors. The only other point urged by the learned advocate for the appellants before us was that in this case the goods had actually been appropriated to the plaintiffs by the defendants 2 and that the property in the goods had thus passed to the plaintiffs, and reliance was placed by the learned advocate on the proviso to S. 53, Sale of Goods Act. But the section can afford the learned advocate for the appellants no assistance because the proviso to S. 53, cl. (1) relates to a document of title to goods such as a bill of lading and not to a delivery chit such as we have in the present case. We

3. ('84) 8 Bom 501, LeGeyt v. Harvey.
4. ('24) 11 AIR 1924 Bom 247 : 87 I C 67 : 47 Bom 924 : 25 Bom L R 1063, Steel Bros. & Co., Ltd. v. Dayal Khatav & Co.
5. (1849) 2 H L C 309 : 13 Jur 265, McEwan v. Smith.
6. (1877) 5 Ch D 195:46 L J Ch 335 : 36 L T 233, Imperial Bank v. London and St. Katharine Docks Co.
7. ('24) 11 A I R 1924 Sind 137 : 84 I C 672, Firm of Budhuram v. Kimatrai Bhojraj.

are of opinion therefore that there is no substance in the points of law which have been raised by the learned advocate for the appellant, and that this case was properly decided by the trial Court and the appeal therefrom was rightly dismissed by the learned Judge of the first appellate Court. We accordingly dismiss this second appeal with costs.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Sind 82

DAVIS C. J. AND TYABJI J.

Criminal Revn. Appln. No. 238 of 1940, Decided on 3rd October 1940, to revise judgment of Addl. Sess. Judge, Sukkur, D/- 29th June 1940.

Bhairo Murid Jagirani — Accused Applicant

v.

Emperor.

(a) Penal Code (1860), S. 99 — Scope of — Constable not having power to arrest trying to arrest person meeting with resistance by third person—S. 99 does not apply.

While the protection of S. 99 extends to acts that are not strictly justifiable by law, it does not extend to acts which are ultra vires and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned. Hence where a police constable could not have rightly exercised the authority he did in arresting a person unless he had promoted himself to be an officer in charge of a police station or to the rank of a Sub-Inspector, there is no legal basis to his action and if the constable is met with resistance in the arrest, S. 99 cannot protect his actions. [P 83 C 1]

(b) Criminal trial — Revision — Interference by High Court.

Where there has been a clear error in law resulting in a sentence of six months rigorous imprisonment upon the applicant, the High Court should interfere in revision. [P 83 C 2]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J.—This is an application from jail by one Bhairo, son of Murid Jagirani, who has been sentenced for an offence under S. 323, Penal Code, to six months rigorous imprisonment, and prays to this Court that either his sentence should be quashed or that it should be ordered to run concurrently with the sentence imposed upon him for an offence under S. 19E, Arms Act. The two offences of which he has been convicted are part of the same transaction. We think that the conviction under S. 323, Penal Code, cannot be sustained, for the learned Additional Sessions Judge has not sufficiently considered the provisions of S. 99, Penal Code. He states that the appellant had no right of private defence against the police constable Ghulam Hussain who had apparently acted in good faith under colour of his office in apprehending one Amil Jagirani, to whose assistance the appellant had gone and in whose defence simple hurt was caused to the police constable Ghulam Hussain who, the learned Judge found, had without lawful authority arrested him.

It appears that while head constable Dodo Khan and the police constable Ghulam Hussain and police constable Hamidali were returning from the village of Jagiranis where they had gone to investigate a case they heard a gunshot not far from the road. They went to investigate and found the appellant Bhairo, one Amil Jagirani and another person. Bhairo had a gun in his hand; Amil Jagirani was in the act of killing a partridge which it appeared Bhairo had shot. Amil Jagirani, it is said, was absconding after committing an offence under the Criminal Tribes Act. Police constable Ghulam Hussain caught hold of him, while Dodo Khan and police constable Hamidali went in pursuit of the appellant Bhairo and his other companion. In the meantime Amil Jagirani raised cries for help, and the appellant Bhairo returned and came to release Amil Jagirani from arrest at the hands of Ghulam Hussain, and he struck Ghulam Hussain with the butt of his gun and rescued Amil Jagirani who ran away; but the appellant was pursued and overtaken by head constable Dodo Khan and police constable Hamidali.

The appellant was convicted of an offence under S. 19-E, Arms Act, and also of offences under Ss. 225 and 332, Penal Code, and sentenced to three months rigorous imprisonment for the offence under S. 225, Penal Code, and 8 months rigorous imprisonment for the offence under S. 332, Penal Code, and he appealed to the Sessions Court against these convictions and the learned Additional Sessions Judge set aside the conviction under S. 225, Penal Code, altered the conviction under S. 332, I. P. C., to one under S. 323, I. P. C., finding, we think rightly, that Ghulam Hussain had no right to arrest Amil Jagirani and therefore the appellant was entitled to free Amil Jagirani from the wrongful confinement in which a police constable was holding him. The learned Judge came to this conclusion because section 22 (3), Criminal Tribes Act, only authorizes an officer in charge of a police station

or a police officer not below the rank of a Sub-Inspector to arrest any person who is reasonably suspected of having committed an offence made punishable under the section. Ghulam Hussain police constable was not an officer in charge of a police station nor was he a Sub-Inspecter of police; he had therefore no jurisdiction at all to arrest Amil Jagirani. Therefore, when Ghulam Hussain arrested Amil Jagirani he was not acting in the exercise of a lawful authority. Resistance in which hurt was caused to him by the appellant was resistance to the exercise by him of an unlawful authority and was not an offence under S. 332, I. P. C.; neither was an offence under S. 225, I. P. C., committed, for the resistance offered to the apprehension of Amil Jagirani by the appellant was not resistance to a lawful apprehension but to an unlawful apprehension.

Nevertheless while the learned Additional Sessions Judge held that the police constable was not entitled to the protection of these two particular sections, he held he was entitled to the protection of S. 99, I.P.C., though the learned Judge has not referred to this section nor has he quoted it, stating merely that the police constable was acting in good faith under colour of his office. But that statement does not correctly represent the section. The section contains at the end of its first paragraph certain significant words and they are these; ". . . . . though that act may not be strictly justifiable by law." The inference from these words is that while the protection of the section extends to acts that are not strictly justifiable by law, it does not extend to acts which are ultra vires and have no legal basis. The section applies indeed to a case where an official has done wrongly what he might have done rightly but not to cases where the act could not have been done rightly at all by the official concerned.

In this case the police constable Ghulam Hussain could not have rightly exercised the authority he did in arresting Amil Jagirani unless he had promoted himself to be an officer in charge of a police station or to the rank of a Sub-Inspector. There was therefore no legal basis to his action. We do not think therefore it can be said that his act was nothing more than an act not strictly justifiable by law within the meaning of S. 99, I. P. C. If for instance, Ghulam Hussain had been an officer in charge of a police station or had been a Sub-Inspector of police and some mistake had occurred as to the offence under the Criminal Tribes Act which Amil Jagirani had committed, so that it could not fall within the provisions of S. 22, Criminal Tribes Act, it might be said that S. 99, I. P. C., applied, for a police officer in charge of a police station or a Sub-Inspector may arrest without warrant under the section for an offence made punishable under the section even though that offence is not a cognizable offence. But this police constable had no power to arrest under that section at all. Whether an act does or does not fall within the provisions of S. 99, I. P. C., is a question of fact to be decided in each case.

We think therefore that S. 99, I. P. C., does not apply to this case. We think therefore the appellant had a right of private defence on behalf of Amil Jagirani when he released him from what was an unlawful confinement or restraint, a confinement or restraint which had no basis in law at all, and as he did not cause more hurt than was necessary, we do not see how the conviction under S. 323, I. P. C., can be sustained. We appreciate the fact that we are dealing with this case in revision. But where there has been, as we think in this case, a clear error in law resulting in a sentence of six months' rigorous imprisonment upon the applicant, we think we should interfere. We therefore allow this revision application from jail and set aside the conviction and sentence under S. 323, I. P. C. The applicant will then be left to serve his sentence under S. 19E of the Arms Act.

W.N./R.K. *Application allowed.*

A. I. R. 1941 Sind 83

DAVIS C. J. AND TYABJI J.

Criminal Revn. Appln. No. 286 of 1940, Decided on 14th October 1940.

Emperor

v.

Abubakar Muhammad Baksh Sheikh.

(a) Criminal P. C. (1898), S. 497 — Criminal Procedure Code does not permit everything that it does not forbid —Provisions of law must be closely followed — S. 497 does not authorize grant of bail in anticipation to persons not arrested or detained.

The Criminal Procedure Code does not permit everything to be done that it does not forbid. It requires that in matters relating to the administration of law such as the arrest of the accused, the granting of bail to the accused, or in any other matters for which the law provides the provisions of the law should be closely followed : A I R 1936 P C 253, *Rel. on.* [P 85 C 1, 2]

Section 497 does not authorize and was not intended to authorize the grant of bail by anticipation to persons who are not arrested or detained. [P 85 C 2]

(b) Criminal P. C. (1898), S. 497 —Discretion under S. 497 is judicial to be exercised according to law — Application for bail —District Magistrate forwarding application to subordinate Magistrate should not express by endorsing on application his inclination or disinclination to grant bail —Such method condemned.

The discretion to be exercised under S. 497 by Magistrates is a judicial discretion according to law. Consequently, a District Magistrate while forwarding an application for bail to his subordinate Magistrate having jurisdiction should not express by endorsing on the application his inclination or disinclination to grant bail as such an endorsement may amount to a hint to his subordinate and may interfere with the discretion to be exercised by him and may improperly influence him in the discharge of his judicial duties. [P 86 C 2]

(c) Criminal P. C. (1898), S. 497—Magistrate discovering bail granted by him to be without jurisdiction—He must forthwith commit accused to custody.

Where a Magistrate finds that an order granting bail passed by him was without jurisdiction he must commit the accused forthwith to custody and should not allow him to remain on bail pending the passing of a final order cancelling the bail bond and remanding him to custody inasmuch as there is no room for an interim order in such a matter. [P 87 C 1, 2]

(d) Criminal P. C. (1898), S. 497 — Accused challaned for conspiracy to murder man with whose wife he had been intriguing — Accused as Magistrate recording dying declaration of deceased — Accused granted bail owing to discrepant evidence of approvers — Grant of bail held not justified in circumstances of case.

An accused in a case of criminal conspiracy for the murder of a man with whose wife he was alleged to have been carrying on an intrigue, also recorded as a Magistrate a dying declaration of the deceased, the husband of the woman. The Magistrate granted bail to the accused on the ground that there was a discrepancy in the evidence of the approvers but there was nothing to suggest that the discrepancy was incapable of explanation and would be fatal to the prosecution case :

Held that the grant of bail in the unusual circumstances of the case was not justified. [P 88 C 1]

Partabrai D. Punwani, Advocate-General — for the Crown.

Kazi Khuda Baksh and Hardasmal V. Tahilramani — for Opponent.

Davis C. J. — We called for the papers in a case where bail had been granted by the Additional Sessions Judge of Sukkur on 28th August 1940, to one Abubakar, who was head munshi at Shikarpur and who was challaned on a charge of conspiracy to murder one Tolaram at Shikarpur. We took action in this matter because the learned Sessions Judge, we think quite properly, sent to us a statement of facts relating to the proceedings in this matter before the District Magistrate, Sukkur, before the Subdivisional Magistrate, Shikarpur and before the Additional Sessions Judge, Sukkur, and he was careful with great propriety to make no comments upon the order of the Additional Sessions Judge who in this matter exercised a jurisdiction equal to his own. But the learned Sessions Judge did point out that it appeared that in this matter of bail to this Government servant on this very serious charge of conspiracy to murder the District Magistrate, Sukkur, and the Sub-divisional Magistrate, Shikarpur, had shown complete indifference to the law and the learned Sessions Judge, Sukkur, drew an inference which none acquainted with the circumstances of life in the mofussil would say was wholly unreasonable that this complete indifference had been shown because the suspect was a revenue officer, a subordinate of the District Magistrate himself, the chief revenue officer of the district. Therefore, it appeared to us that this was a case in which of our own motion we should call for the papers and we did so and we informed the District Magistrate, Sukkur, of what we had done and asked him whether he wished to be heard as it appeared to us that the propriety or illegality of his order might be called in question as it might be read as a direction by him as an executive officer to a subordinate of his to make as a judicial officer a particular order which on the face of it appeared to be unlawful and the District Magistrate, Sukkur, has been good enough to send us an explanation of his action which we shall consider in due course.

It appears that on 2nd August 1940 an application was presented to the District Magistrate, Sukkur, by one Abubakar who described himself as head munshi, Rohri, in which he stated that he was taluka head munshi at Shikarpur from where he had been transferred to Rohri that some time back one Mulibai of Shikarpur had been challaned for the murder of her husband, that enemies of his had been trying to implicate him in the case, that he had learnt that the police were challaning him on mere suspicion, that there was no evidence connecting the applicant with the offence that the applicant was a Government official and a respectable man and that he prayed that in the event of the police challaning him, he should be allowed to remain on bail. It was stated that there was no danger of his tampering with the evidence, that he was prepared to bind himself not to go to Shikarpur except if he was called by the Court, and that he was prepared to give surety for that purpose, and he asked that instructions

might be sent to the City Magistrate, Shikarpur, and the Public Prosecutor, Sukkur in accordance with his application. This application was presented apparently on 2nd August 1940, and did successfully anticipate the action of the police because he was not challaned until 5th August. Now it is obvious to us that the District Magistrate, Sukkur, in proper obedience to the provisions of the Criminal Procedure Code, by which he, like any other subject of the Crown, is bound, should have returned this application at once to the advocate who presented it, as a most improper application; he should have done nothing which in any way could be construed as supporting the proposals contained in this application, nor should he have made any endorsement upon the application except one expressing his disapproval of it and drawing the attention of the applicant to the provisions of S. 497 (1), Criminal P. C. But the District Magistrate, however high may have been his motives, did not act, as he was bound to do, in accordance with the provisions of the Criminal Procedure Code, but he made the following improper endorsement upon the application :

Forwarded with compliments to Sub-divisional Magistrate, Shikarpur. The bail is to be granted by him but if there is any necessity to take the further precaution of binding him over from going to Shikarpur, that can be done.

And it is clear from the order passed by the Sub-divisional Magistrate, Mr. Manghasing Gulabsing, that same day namely 2nd August 1940, that the Sub-divisional Magistrate took what he thought was a hint from his superior officer—perhaps, we should say, not so much the Sub-divisional Magistrate, Shikarpur, but the Deputy Collector, Shikarpur, or whatever be his correct description as a revenue officer—took the hint, or what he believed to be the hint of his official superior, the Collector of the Sukkur district, and at once granted bail to this Abubakar in the following order :

Mr. Abubakar appeared in Court for giving bail under S. 497, Criminal P. C. Interim bail in the sum of Rs. 5000 to be taken for appearance in this Court or the Court to which the case may be challaned. The applicant to be bound down not to tamper with the evidence or go without permission to Shikarpur. Formal date of appearance fixed for 13th August 1940.

This order clearly can be justified by no provisions of the Criminal Procedure Code and learned Magistrates, who are revenue officers, would be wise to remember in future that the Criminal Procedure Code, does not permit everything to be done that it does not forbid. It requires that in matters relating to the administration of law, such as the arrest of the accused, the granting of bail to the accused, or in any other matters for which the law provides, the provisions of the law should be closely followed. This is no new doctrine promulgated by this Chief Court, but has the authority of the Privy Council : *see* 17 Lah 629.[1] Reference to S. 497, Criminal P. C., will show quite clearly that the section does not authorise and was not intended to authorise the grant by anticipation of bail to persons who are not arrested or detained; and it would appear that, as it might be thought the District Magistrate attempted to bind the judicial discretion of the Sub-divisional Magistrate, before the Sub-divisional Magistrate had the material before him on which his judicial discretion could be exercised, so the Sub-divisional Magistrate attempted to bind by anticipation the judicial discretion of some other Court, if necessity should arise, for, in his order he uses the words " . . . . or the Court to which the case may be challaned."

Now the learned District Magistrate assures us that he had no intention whatever to do what the learned Sessions Judge thought he intended to do, and that his order does not properly bear the meaning which it is clear the Sub-divisional Magistrate by his hasty and obedient order gave to it. While we accept the learned District Magistrate's assurances as to his intentions, we must point out that if he had himself strictly abided by the law which it was his duty to enforce, and of which he should by his own scrupulous observance be an example, if he had returned the application to this Abubakar and his advocate, as he should have done, this misunderstanding could never have taken place. His endorsement can be justified under no provision of the Criminal Procedure Code, and we must point out very clearly to the District Magistrate, that he has as a Magistrate no powers in this and other matters within the scope of the Criminal Procedure Code which the Criminal Procedure Code does not confer on him as on other District Magistrates. On the other hand, had this mistake not occurred, it might be said the subservient mind of this Sub-divisional Magistrate as Deputy Collector to the District Magistrate as Collector would not have

1. ('36) 23 AIR 1936 P C 253 : 163 I C 881 : 17 Lah 629 : 37 Cr L J 897 : 63 I A 372 (P C), Nazir Ahmed v. King-Emperor.

been made so manifest. So it may be said that out of these improper proceedings this much good has come, if good it can be called. But the District Magistrate in his explanation explains to us the circumstances under which this endorsement was made. He did not, he says, intend in any way, by the use of the words "the bail is to be granted to him . . . ." to convey thereby an order to a subordinate : what he meant to say was that if bail was to be granted at all, the bail was to be granted by the Sub-divisional Magistrate, and that he suggested that if bail were to be granted, there might be the necessity to take the further precaution of binding the appellant down from going to Shikarpur. Perhaps it will be as well to set out at length part of the explanation given us by the learned District Magistrate. He says :

I remember dealing with this matter and when the advocate for the accused applied to me for bail I said that as the case was not before me I had no jurisdiction and he should approach the Magistrate before whom the case was pending. The learned advocate then said that on account of my order suspending the applicant, the Magistrate would not entertain the application and I said that it was open to any Magistrate to consider the case on merits and I would not interfere, but in this particular case if additional precautions were necessary in view of the peculiar position of the accused they also should be taken. It was after these discussions that the endorsement was written.

Though my endorsement is capable of the interpretation put by the learned Sessions Judge, the above explanation will make it clear that what hastily written endorsement had meant was that it is for the Magistrate concerned to grant bail or not, but even if he does so he should take additional precautions. If there was any interference on my part it was the latter half of the endorsement which suggested my anxiety to consider extra precautions in case the Magistrate did consider the case fit for bail, and perhaps the hesitation noticed by the Sessions Judge was due to this hint which indicated my disinclination. Even the learned pleader understood this to be my meaning and agreed to approach the Magistrate concerned.

All we can say is that the learned District Magistrate failed entirely to convey to his subordinate by the words he used his real purpose and intention, and we think that the learned District Magistrate's own explanation of his endorsement and the order of the Sub-divisional Magistrate, who so quickly followed it, shows how necessary it is that District Magistrates should abide strictly by the provisions of the Criminal Procedure Code, and that endorsements of this sort should not be written even hastily. Then the learned District Magistrate goes on to say :

That I had no intention to interfere in the matter and certainly not to grant him bail could be gathered from the following: (1) The applicant had asked me in para. 9 of his application to instruct the City Magistrate and the Police Prosecutor to grant him bail and had I been even inclined to do so I could easily have manifested my inclination by the non-committal statement, '. . . . The District Magistrate has no objection.'

With all respect to the learned District Magistrate, we think again that this shows a misapprehension of the provisions of S. 497, Criminal P. C., and of his judicial relation as District Magistrate and not as Collector to his magisterial officers acting as judicial officers and not as revenue officers in proceedings under S. 497, Criminal P. C. The discretion to be exercised under this section by Magistrates is a judicial discretion according to law. It was not for the District Magistrate to indicate his inclination or his disinclination to the granting of bail to the applicant. As he himself says, he had no jurisdiction in the matter. Therefore when the learned District Magistrate writes :

Had I been even inclined to do so (that is, to instruct the City Magistrate and the Police Prosecutor to grant the applicant bail), I could easily have manifested my inclination by the non-committal statement, '. . . The District Magistrate has no objection,'

the District Magistrate himself reveals how by a few words subordinate Magistrates, who are also the subordinates of the executive Government, might be improperly influenced in the discharge of their judicial duties. Had the learned District Magistrate made this non-committal statement he would again have done what was wrong, for he would have offended against the provisions of S. 497, Criminal P. C., and offended also against the judicial independence of his subordinate Magistrates and have expressed by implication an opinion which at that stage of the case he had no lawful power and no lawful right to express. But the learned District Magistrate says :

Instead of doing so, I clearly pointed out (or tried to point out) to the Magistrate his responsibility in the matter by stating he was responsible for granting bail and that in this particular case even if he did so additional precautions would be necessary.

Again we say that if that was the learned District Magistrate's intention, he failed by want of the use of appropriate words to convey his intention to the Sub-divisional Magistrate. Then the learned District Magistrate goes on to say :

(2) Referring the accused and his case to the Sub-divisional Magistrate who is in the grade of a Deputy Collector and so is less amenable to pressure or influence in such cases, than to the City Magistrate, within whose ordinary jurisdiction the case lay, who is of the grade of a mukhtyarkar,

shows my anxiety to select a more dependable tribunal.

But if the Sub-divisional Magistrate is less amenable to pressure or influence than a City Magistrate—and the possibility that an officer in the position of a City Magistrate should be amenable to pressure or influence in such cases, fills us with apprehension and alarm — it appears that while the Sub-divisional Magistrate might be less amenable to pressure or influences from persons other than the District Magistrate, he himself at least considered that so far as his official superior, the District Magistrate and Collector himself was concerned, he was not judicially free. We accept, however, the assurance of the District Magistrate that he acted in good faith and had no intention to offend against the law; and therefore we do not intend, as we might otherwise have done, to transfer this case from his district. To return, however, to the learned Sub-divisional Magistrate of Shikarpur : after he had passed an order, clearly unlawful, on 2nd August, he passed another order on 22nd August; and here apparently he appreciated the difficulty of his position, for his order is as follows :

> While hearing the bail applications on behalf of accused Dharmu and Muli on 21st August 1940, it was brought to the notice of this Court by the public prosecutor that the Court was not competent to order the bail of the accused Mr. Abubakar as he had not been challaned on the date on which order for his bail was passed. Such being the position I have no option but to cancel his bail. Notice to be sent to him to appear in this Court on 28th August 1940, when final orders cancelling his bail and remanding him to custody, will be passed.

It appears so far as we can see from the record that the order of 2nd August was taken by the interested parties as an order granting bail, and from the order of the same learned Magistrate dated 22nd August, this order was manifestly without jurisdiction and illegal. We see no reason why the accused should have been granted six days for this most illegal and improper order further to remain in force, for it appears to us that the proper thing for the Sub-divisional Magistrate to have done, when it was quite clear that the order of bail he had passed was without jurisdiction, was to commit the accused forthwith to custody. But he did not do so and a further favour was shown to the accused now challaned in a lawful way in the Court of the Sub-divisional Magistrate by allowing him still to remain on bail so that he might apply to the Sessions Court. This is not clearly stated in the order of the Sub-divisional Magistrate himself, but clearly it is implied by the fact that time was unlawfully given and an application was made to the Additional Sessions Judge, Sukkur, and an order was passed by him on this very same day, 28th August, on which this accused had to appear in the Court of the Sub-divisional Magistrate, Shikarpur, when, in the words of the order of the Magistrate, "final orders cancelling his bail and remanding him to custody will be passed." What room there was for an interim order as against a final order in this matter we do not know. So far as the order of the learned Additional Sessions Judge, Sukkur, is concerned, we have no desire to comment on it at length, because we intend setting it aside, and to cancel the bail of the accused, so that he may apply, if he is so advised, to the Sub-divisional Magistrate of Shikarpur for bail when the Sub-divisional Magistrate, Shikarpur, will, we hope, exercise in this matter a free and independent judicial discretion, as in all other matters brought before him as a Magistrate, and such as S. 497, Criminal P. C., contemplates.

We think that when the bail application was made to the Additional Sessions Judge on which the order of 28th August was passed, and when enquiry was made, the Additional Sessions Judge should clearly have found that the Sub-divisional Magistrate had acted without jurisdiction, had not exercised a proper discretion, should have cancelled the unlawful and improper order of bail dated 2nd August, and sent the matter back to the Sub-divisional Magistrate to deal with it according to law. Instead the learned Additional Sessions Judge entertained apparently the application from this Abubakar, heard Mr. A. S. Pirzada for the applicant, and Mr. A. M. Pirzada for the Crown, and passed an order which appears to us on the face of it not easy to understand; and, indeed, it appears to us to be an incomplete and premature appreciation of some of the evidence only. For instance, the learned Judge appears to have based his order upon the fact that there was a discrepancy in the evidence of the two approvers. But it does not appear that this is a discrepancy incapable of explanation or that when the case came to be tried before a proper Court and this and other evidence was brought on the record, this discrepancy would be fatal to the prosecution case. Clearly the case cannot turn upon this one discrepancy referred to by the Judge in the evidence of Sital and Dharmu.

The learned Public Prosecutor for Sind,

who appeared as a defence counsel to support the case of the opponent as against the Advocate-General who appeared for the Crown, and who could not support the order of the Magistrate or the Additional Sessions Judge, mentioned to us, for instance, that there was a dying declaration by the deceased Tolaram in this case, who, it is the case of the prosecution, was murdered because of the intrigue of this Abubakar with his wife. But in the course of the inquiry before us it appeared that the first dying declaration was in fact recorded by this very Abubakar, this very accused person, in his capacity as the head munshi and second class Magistrate, Shikarpur. It is, we think, an unusual situation, where an accused in a case of criminal conspiracy for the murder of a man with whose wife it is alleged he was carrying on an intrigue, also records as a Magistrate a dying declaration of this man, the husband of the woman. But all this appears to us to show how undesirable it was in a case of this nature where these complications exist, that the Additional Sessions Judge should at that stage of the case have decided in this incomplete and, we think, premature manner the case in favour of the accused, and should have granted bail. The order of the Additional Sessions Judge does not on the face of it satisfy us that this was a proper case in which bail should have been granted by him.

It may be that when the case comes before the Sub-divisional Magistrate and he sets out more carefully and at greater length the case for the prosecution, it will appear to him proper in the exercise of a free and judicial discretion, that this is a case where according to the terms of S. 497, Criminal P. C., bail should be granted. We make it clear that we do not wish by anything we have said in this order to influence in any way the exercise by him of his free and judicial discretion, and the fact that we cannot accept as satisfactory in the circumstances the order of the Additional Sessions Judge, does not mean that the Sub-divisional Magistrate in the exercise of his free and judicial discretion on the material before him should not grant bail if a further application is made to him. We only say that in the circumstances of this case we consider the order of the Additional Sessions Judge, Sukkur, an improper order and should be set aside. For the reasons we have given, we also consider that both the orders of the Sub-divisional Magistrate, Shikarpur, in this matter were also improper orders and should be set aside. We therefore cancel the bail granted by the Additional Sessions Judge, Sukkur, and remand the accused to custody. It is open to him now, in proper form, to make his bail application to Sub-divisional Magistrate, Shikarpur, if so advised.

G.N./R.K. *Order accordingly.*

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* A. I. R. 1941 Sind 88

DAVIS C. J. AND TYABJI J.

First Appeal No. 40 of 1938, Decided on 18th October 1940, against judgment and decree of First Class Sub-Judge, Hyderabad, D/- 7th July 1938.

Mulchand Chandumal and another — Defendants 1 and 2—Appellants

v.

Harkishindas Parmanand and others— Plaintiffs 1-4 and Defendant 3 — Respondents.

(a) Practice — Pleadings — Plaint returned to plaintiff for presentation to another Court but subsequently represented to former Court and re-admitted without giving same number—True copies of defendant's written statement in first proceeding put on record in subsequent proceeding without any objection by plaintiff or defendant — They held must be taken to have accepted these true copies as pleadings of defendant.

In a suit the plaint which was at first returned to the plaintiffs for presentation to another Court was subsequently represented to the same Court when it was readmitted without giving to the suit on re-admission the same number as was given to the proceedings in the old suit. However, true copies of the defendants' written statement in first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected :

Held that it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case.

[P 89 C 1, 2]

(b) Civil P. C. (1908), S. 92 — Point that suit instituted under S. 92 was not validly instituted as it was not instituted by all those to whom consent was given raised for first time in appeal —Facts not in dispute—Point can be allowed to be raised for first time in appeal.

If the facts are in dispute, the point that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under S. 92 read with S. 93, Civil P. C., and therefore was not validly instituted should not be allowed to be raised for the first time in appeal. But where there is no dispute about the facts, the point can be allowed to be raised for the first time in appeal.

[P 89 C 2]

(c) Civil P. C. (1908), S. 92—Applicability of S. 92 does not depend upon whether defendants had or had not objected to form of suit.

The applicability of S. 92 does not depend upon whether the defendants had or had not taken objection to the form of the suit. The Legislature re-

quires that if a suit of this kind is to be instituted it must be instituted in a particular way, and it is not open either to the plaintiffs or to the defendants as it were, to contract themselves out of this section. [P 90 C 2]

* (d) Civil P. C. (1908), S. 92 — Consent to institute suit given to certain individuals—Suit instituted by some of them only is not validly instituted.

Where consent has been given to two or more persons, only some of those persons, even if they are more than two cannot institute the suit. A condition precedent to the valid institution of the suit is the fulfilment of the conditions of the consent which has been given. The section does not contemplate that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants: A I R 1938 P C 184, *Expl.*; A I R 1930 Mad 129, *Rel. on.* [P 90 C 2]

(e) Civil P. C. (1908), S. 92—Phrase "two or more persons"—Meaning explained.

The phrase in S. 92 "two or more persons" means two or more individuals who are named or so described in the consent that they can be identified. [P 91 C 1]

Kimatrai Bhojraj — for Appellants.

Fatehchand Assudomal — for Respondents.

Davis C. J. — This is an appeal against the judgment of the first class subordinate Judge at Hyderabad who decreed the plaintiffs' suit under S. 92, Civil P. C., praying for the removal of the two defendants by name Mulchand and Hassomal from the position of trustees of a public charitable trust for the benefit of the panchayat of the Hindu Punjabis of the Darya caste of Hyderabad, and certain others, beneficiaries in the trust, and for an injunction restraining the defendants from alienating, interfering or damaging the trust property. It appears from the outset that there was some doubt as to the Court in which this suit should be instituted. For instance, the learned Judge points out that there was on the record no written statement of the defendants, for the plaint was at first returned to the plaintiffs for presentation to the proper Court and was then represented to the same Court when it was re-admitted without giving to the suit on re-admission the same number as was given to the proceedings in the old suit when the written statement already filed by the defendants in the first suit would automatically have become part of the record of the proceedings in the second. However, true copies of the defendants' written statement in the first proceedings were put upon the record in these proceedings, and neither plaintiff nor the defendant objected. Therefore it must be taken that they accepted these true copies of these written statements as the pleadings of the defendants in the case.

There appears however to have been a more serious irregularity in the institution of the suit to which objection was taken in the memorandum of appeal but to which no objection was taken by the defendants in the suit in the trial Court, and it is urged before us by the learned advocate for the respondents that the defendants should not be allowed in appeal to take this point for the first time, this point being, that the suit was not instituted by all those to whom consent was given to institute the suit by the Collector under S. 92 read with S. 93, Civil P. C. Were the facts in any way in dispute, we might have said that though S. 92 is clearly to be strictly construed, we have before us, raised for the first time in an appeal, a mixed question of law and fact, that this was a case on facts of which the other side should have had due notice and time to meet, and that we would not allow such a case to be raised in appeal for the first time. But there is no dispute about the facts in this case. It is not disputed that a petition to the Collector to give his consent under S. 92, Civil P. C., to the institution of this suit was made by five persons, and that as, after consent was given, one of the five persons was unwilling to be a party to the institution of the suit, he was joined as a party as defendant 3. But we do not think that when S. 92, Civil P. C., permits consent to be given to certain individuals, to institute a suit relating to a matter of public concern, that the section contemplates that some of those persons should institute a suit as plaintiffs while others who, after consent is given, have changed their minds, should be joined as defendants.

Reference has been made in arguments before us to a case of the Privy Council reported in 32 S L R 749,[1] and it was urged on behalf of the respondents, who are the plaintiffs, that according to this judgment, the absence of one plaintiff from the record as a plaintiff does not matter if he is upon the record as a defendant. It is true that in the Privy Council case one of the persons to whom consent was given for the institution of the suit, and who was joined as a plaintiff in the institution of the suit, was in the appeal joined as a respondent. But the meaning and effect of their Lordships' judgment, as we read it, is not that the plain-

1. ('38) 25 AIR 1938 P C 184 : 174 I C 870 : 65 I A 198 : 32 S L R 749 : I L R (1938) Lah 383 (P C), Ali Begam v. Badra-ul-Islam Alikhan.

tiff to whom consent among others was given to institute a suit and who changed his mind thereafter should be joined as a defendant, but only that provided the suit was properly instituted, what happened thereafter was not affected by the provisions of S. 92, Civil P. C. Their Lordships say (page 754):

> Where the consent in writing of the Advocate-General or Collector has been given to a suit by three persons as plaintiffs the suit cannot validly be instituted by two only. The suit as instituted must conform to the consent. On the other hand, if the three persons join as plaintiffs and two of them die pending suit, the suit does not become defective or incompetent: 48 I A 12.[2] There is no provision whatever in the Code for recourse being had to the Advocate-General or Collector during the course of a suit or of any proceedings in appeal. As sub-s. (2) of S. 92 sufficiently shows, the consent in writing is a condition of the valid institution of a suit and has no reference to any other stage. When once validly instituted it is a representative suit subject to all the incidents affecting suits in general and representative suits in particular.

We do not think that the judgment can be read as an authority for the argument that S. 92, Civil P. C., should not be strictly construed, conferring as it does upon certain individuals certain rights which they would not otherwise possess. We may also refer to a case reported in 53 Mad 223[3] where it is laid down that

> a suit under S. 92, Civil P. C., must be instituted by all those who obtain sanction; if not, it is invalid and the defect cannot be cured by impleading such of those who have not joined as plaintiffs, as defendants to the cause.

The Judges in that case referred to two other Madras cases, 29 M L J 231[4] and 38 Mad 1192.[5] The learned Judges in that case refer to "sanction," but reference to S. 92, Civil P. C., itself will show that what is to be given is not sanction but consent, the word "sanction" being used in a different sense in S. 93, Civil P. C. But this makes no difference to the judgment in that case. In that case the learned Judges pointed out how necessary it is that S. 92, Civil P. C., should be strictly interpreted, for the consent given by the Advocate-General or by the Collector is a consent given after a consideration of the many factors involved in the proper granting of a consent, and one most important factor must be the character and position of those who apply for the consent to institute what is really a representative suit relating to a matter of public interest and importance. The object of requiring consent for the institution of the suit is, as the learned Judges pointed out, not only to safeguard the rights of the public, but also to safeguard the rights of the institution and the trustees. The suit being a representative one, it is necessary to see that persons who come forward are persons having an interest in the trust properties and persons who can safely be trusted with the conduct of the suit. Even though the public are technically parties, still the plaintiffs who file the suit have very large powers in the shaping and the conduct of the suit. As a matter of general experience such suits will be left by those whom the plaintiffs represent to the plaintiffs themselves. Further, the consent required by S. 92, Civil P. C., is a protection to the trustees and the institution. It prevents the trustees being involved in litigation and expense for reasons of enmity or by persons of no substance. If, as the learned Judges pointed out, two out of three persons, to whom consent was given, could file a suit, the third person may well be just that substantial person whose presence induced the Advocate-General or the Collector to give the necessary consent.

It is true that in this case the defendants themselves did not object to the fact that one of those to whom consent was given would not join as a plaintiff to the suit, for this fact was stated in the plaint, and to the paragraph in which this fact was stated the defendants took no objection. We do not think the applicability of S. 92, Civil P. C., depends upon whether the defendants had or had not taken objection to the form of the suit. The form of the suit is laid down by law. The Legislature requires that if a suit of this kind is to be instituted it must be instituted in a particular way, and we do not think it is open either to the plaintiffs or to the defendants, as it were, to contract themselves out of this section and to say in effect "we do not mind if the law in this matter is or is not observed." While it is true that the purpose of the section is to protect the trustees from vexatious suits, it is also to protect the interests of the public. The interests of the public are quite as important as the interests of the trustees, and the interests of the public should be protected in the manner the Legislature has by S. 92, Civil P. C., provided. We do not think

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2. ('21) 8 A I R 1921 P C 123 : 62 I C 737 : 48 I A 12 : 48 Cal 493 : 17 N L R 37 (P C), Anand Rao v. Ramdas Daduram.
3. ('30) 17 A I R 1930 Mad 129 : 124 I C 220 : 53 Mad 223 : 58 M L J 39, Pitchayya v. Venkatakrishnamacharlu.
4. ('16) 3 AIR 1916 Mad 762 : 31 I C 236 : 29 M L J 231, Bagavannarayana v. Perumallacharyulu.
5. ('15) 2 AIR 1915 Mad 127 : 26 I C 202 : 38 Mad 1192 : 27 MLJ 241, Venkatesha Malia v. Ramayya Hegade.

therefore that S. 92, Civil P. C., can be construed loosely that where consent has been given to two or more persons, only some of those persons, even if they are more than two, may institute this suit. A condition precedent to the valid institution of the suits is the fulfilment of the conditions of the consent which has been given.

In this case the consent given by the Collector, as it stands, might be construed loosely as consent given to Bhai Harkishindas Parmanand, mukhi of the Punjabi Panchayat and others who should join with him as plaintiffs. But the order of the Collector makes it clear that when he gave his consent to the institution of the suit by Bhai Harkishindas Parmanand and others in the form of an endorsement upon the petition, those others must be the other petitioners who were joined with Harkishindas Parmanand in asking for consent. The order of the Collector cannot be construed to mean that consent is granted to Bhai Harkishindas Parmanand and any others whom he might like to join with him; and the phrase in S. 92, Civil P. C., "two or more persons" means, we think, two or more individuals who are named or so described in the consent that they can be identified. We do not suppose that the Collector ever contemplated that the words of his order should be read apart from the petition to which it relates and in response to which it was made. That petition was made by Bhai Harkishindas Parmanand and four others, who signed the petition as parties to it, one of whom was defendant 3, and Bhai Harkishindas Parmanand and those others should have instituted the suit. They did not do so, but one of them Bhai Khiomal Motumal desired to take no part in the institution of the suit after consent was given by the Collector to him, among others, and he was therefore joined as defendant. We do not think therefore that this suit was validly instituted, and we think that the appeal must be allowed on this ground, and the suit of the plaintiffs should be dismissed. We think that as the point comes before us as a point of law, it is open to us in first appeal to consider it. It is the duty of Courts to conform strictly with the provisions of S. 92, Civil P. C. As however the point was raised for the first time in appeal, we think we should make no orders as to costs. We accordingly allow the appeal but make no order as to costs.

D.S./R.K. *Appeal allowed.*

A. I. R. 1941 Sind 91

DAVIS C. J. AND WESTON J.

Criminal Revn. Appln. No. 169 of 1940, Decided on 3rd September 1940, to revise conviction and sentence passed by Resident Magistrate, Larkana, D/- 31st October 1939.

Lilomal Manumal — *Applicant*

v.

Emperor.

Penal Code (1860), S. 294-A, second part—Large number of lottery tickets found in accused's shop—On certain tickets accused's name entered in counterfoils in space for name of seller of ticket to ultimate purchaser—Printed document headed by accused's name in large capitals containing proposal to purchasers to buy shares in lots also found — Proposal and sale under S. 294-A held established—Publication held established by reason of proposal document having been printed in press.

On certain of the large number of lottery tickets found in the accused's shop the name of the accused had been entered in the counterfoils, in the space provided by the persons issuing the tickets for the name not of the purchaser of the ticket but for the seller of the ticket to the ultimate purchaser. A printed document headed by the name of the accused in large capitals containing a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and reciting that the holder of the document was entitled to 1/73rd share of any prize won by any one of the twelve tickets was also found:

Held that proposal and sale had been established within meaning of S. 294-A. [P 92 C 1]

Held further that publication was established by the very fact that the proposal forms had been printed in a press: (1920) 89 L J K B 1166, *Rel. on.* [P 92 C 1]

Kishinchand J. Bijlani — for Applicant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Weston J.—This is a revision application and the applicant was tried by the Resident Magistrate, Larkana, on a charge under both parts of S. 294-A, Penal Code, that is to say, both for keeping a place for the purpose of drawing a lottery and for publication of a proposal to pay in respect of a lottery. He was convicted under both parts of the section and sentenced to pay a fine of Rs. 200 under the first part and to a fine of Rs. 100 under the second part. He appealed to the Sessions Court, Larkana, and the learned Sessions Judge set aside the conviction under the first part, holding that there was no evidence that the accused, who was a petty shopkeeper, kept his shop for the purpose of drawing a lottery. But in view of the large number of tickets of various lotteries and other documents which were found in the shop, he held that the

conviction under the second part was correct and dismissed the appeal, and it is against the second part of the order of the learned Sessions Judge that the applicant now comes to us in revision.

When this matter was being argued for admission it was stated that there was no evidence of any publication by the accused of any proposal or sale, and it is also now argued that the learned Sessions Judge has conceded that there is no direct evidence that the accused ever sold lottery tickets. But in view of the documents seized from his shop, we think there is direct evidence of both the proposal and of the sale of tickets. It is impossible to believe that the accused had the large number of tickets found for any purpose other than that of sale. We find that on certain of the tickets exhibited, the name of the accused has been entered in the counterfoils, in the space provided by the persons issuing the tickets for the name not of the purchaser of the ticket but for the seller of the ticket to the ultimate purchaser. Exhibit 8 in the case is a printed document headed by the name of the accused in large capitals and it contains a proposal to purchasers to buy shares each amounting to 1/72nd in lots of twelve tickets of the Irish Free State Hospital Sweepstake, and it recites that the holder of the coupon Ex. 8 is entitled to 1/73rd share of any prize won by any one of the twelve tickets. A compositor of the Sind News Press at Larkana was examined as a witness and he stated that the coupon Ex. 8 had been printed in the press at which he works, and on the question of publication, in the words of the Chief Justice of England in (1920) 89 L J K B 1166[1]:

> Once it is established . . . . that the appellant was responsible for sending the circular to the printing company to be printed, and that it was printed, there is an end to his appeal, for it is inconceivable that none of the printers read the circular.

We can see therefore no reason to interfere in revision. We do not accept the argument that the sentence is excessive and on the contrary we are inclined to hold that it is lenient.

G.N./R.K. *Application dismissed.*

1. (1920) 89 L J K B 1166: 37 T L R 22, Dew v. Director of Public Prosecutions.

A. I. R. 1941 Sind 92

DAVIS C. J.

Criminal Appeal No. 57 of 1940, Decided on 21st October 1940, against conviction and sentence passed by Additional City Magistrate, Karachi, D/- 30th May 1940.

M. U. Abbasi — Appellant

v.

Emperor.

(a) Penal Code (1860), S. 499, Exceptions — Person relying on exception must prove his case and bring it within relevant exception — It does not help his case to change from one exception to another and finally throw upon Court burden of placing his case under appropriate exception.

A person who relies upon an exception to the general rule must prove his case and must bring it within the relevant section. It does not help his case to change from one exception to another and finally to throw upon the Court the burden, which by law is his, of placing the case for him under the exception which it thought appropriate.

[P 93 C 1]

(b) Penal Code (1860), S. 499, Exceptions 3 and 9 — On question of "good faith" there is no difference between Exceptions 3 and 9 — S. 499, Exception 3 does not protect writer repeating in any circumstances defamatory mis-statements of another based on mis-statements of facts.

There is no difference in principle on the question of "good faith" between Exception 3 and Exception 9. Exception 3 cannot be used so as to justify a writer repeating in any circumstances with impunity the highly defamatory mis-statements of another based upon mis-statements of facts: AIR 1929 Sind 90; 1 Bom H C R App 85; 31 Bom 293; AIR 1923 Cal 470 and 4 Cal 124, *Rel. on.*

[P 95 C 2; P 96 C 1]

Amarlal W. Hingorani — for Appellant.

Balkrishna H. Lulla, Assistant Public Prosecutor — for the Crown.

Judgment. — The appellant in this case is one M. U. Abbasi, and he is the editor of a paper called "New Sind," and he has been convicted of an offence under S. 500, Penal Code, for publishing in his paper a defamatory article concerning one Hatim A. Alavi, for some time Mayor of Karachi, and has been sentenced by an Additional City Magistrate of Karachi to a fine of Rs. 200, or in default to suffer simple imprisonment for three months. The appeal was argued before me on the ground that the Magistrate was in error when he has proceeded in his judgment on the basis that the defence of the appellant was that his article was true, and in considering that the appellant relied on Exception 1 to S. 499, Penal Code. He, in fact, relied on Exception 3, though in his reply at the end of lengthy arguments, the learned advocate appeared to rely upon Exception 9 to which the learned Assistant Public Prosecutor had referred, arguing that it is for

the Court to place the case for the appellant under the exception which it thought appropriate. An appellant however who relies upon an exception to the general rule must prove his case, must bring it within the relevant section, and it does not help his case to change from one exception to another and finally to place upon the Court the burden, which by law is his. I will take then the case of the appellant as it was argued before me. To avoid misrepresentation, I would refer to a specific passage in the memorandum of appeal which is as follows :

That it is respectfully submitted that there is a confusion in the mind of the learned Magistrate and he has failed to demarcate distinction between Exception 1 and Exception 3. Under Exception 1, truth of imputation is to be established and under Exception 3 the only thing that is required is the reasonable belief in the imputation made; in other words, imputation not necessarily truly made but expressed in good faith and good faith as defined in S. 52, Penal Code, means nothing is said to be done or believed in good faith which is done or believed without due care and attention. This aspect of the question the learned Magistrate has altogether missed though the decision of this Court reported in 8 S L R 143[1] was relied upon by the lower Court.

The article complained of is, on the face of it, highly defamatory, and reading the article through, I should have read it to mean that Mr. Hatim Alavi, once the Mayor of Karachi, and Mr. Bhojwani, the chief officer, had, to advantage some persons called Sheikha Brothers, conspired together in breach of all honour and duty to deprive the Municipal Corporation of Karachi of a very large sum of money; indeed, at the least, Rs. 46,731, and at the most Rs. 2,82,000. They and the members of the standing committee are described as robbers. The article itself is full of misstatements: for instance, it is stated that the Sheikha Brothers had to pay Rs. 46,731 as land tax to the Corporation, and it was from this payment that Hatim, the Mayor and Bhojwani, the chief officer tried corruptly to relieve them. Firstly, the tax payable by the Sheikha Brothers was not Rs. 46,731, which sum was payable by a number of occupiers of municipal land among which the Sheikha Brothers are included, their share being Rs. 11,500. The learned advocate describes this merely as an exaggeration. This is, however, a misuse of words. Compared, however, with other mis-statements, this mis-statement is comparatively venial.

Under the heading "Influence," it is stated, or clearly implied, that when Dr. Shroff went on leave Mr. Bhojwani changed his note on this matter of remissions; Dr. Shroff, the standing committee, and the legal adviser, had all advised against the remission of taxes to the Sheikha Brothers, but Mr. Bhojwani changed the note of Dr. Shroff, said that the Sheikha Brothers should not be charged the tax and that Rs. 24,424, should be refunded to them; the standing committee was "managed" and the legal adviser was "managed" so that an opinion favourable to the Sheikha Brothers should be given. This was all done when Hatim was the Mayor and Bhojwani was the chief officer." Clearly the suggestion is that Mr. Hatim Alavi and Mr. Bhojwani were responsible for the resolution of 5th May 1938, whereby the standing committee changed their resolution of 4th April 1938, to the advantage of the Sheikha Brothers, conceding the demands of the Sheikha Brothers and other landlords which a month proviously they had refused. It is demonstrably false, however, to say that Mr. Bhojwani was responsible for this decision. He did not as is suggested, bring the matter before the standing committee at all. This was done by Dr. Shroff on a representation by an Association called the Landowners' Defence Association asking that sympathetic consideration be given to a memorial relating to the recovery of the arrears of land tax, Ex. 7, and the preamble in the proceedings, recording the standing committee's resolution of 5th May 1938, whereby the standing committee superseded their resolution of 4th April, refers to the letter of Dr. Shroff. To charge Mr. Bhojwani with having changed corruptly and against the public interest the note of his predecessor is false. Further, it is stated that the legal adviser too was won over, and it is suggested that a clerk Tikamdas was sent by Mr. Bhojwani to suggest to the legal adviser what advice he was to give. This was the suggestion of the learned advocate before me. This again is false. Exhibit 10 shows that the legal adviser was not won over, but that he advised that the matter be brought before the Corporation because the resolution involved a large amount of money and a matter of policy : furthermore, the standing committee had in its resolution recommended the matter to the notice of the Corporation. This opinion of the legal adviser was given in reply to a letter from Mr. Bhojwani dated 6th June, bringing this very question before the legal adviser.

1. ('14) 1 AIR 1914 Sind 85: 27 I C 205: 16 Cr L J 141 : 8 S L R 143, Murlidhar v. Naraindas.

It was suggested by the learned advocate for the appellant in argument before me that this letter of Mr. Bhojwani was all part of his plan to conclude this matter favourably to the Shiekha Brothers, the friends of Mr. Hatim Alavi, and that he as a B.A., L.L.B. was quite competent to decide this question himself. Whether Mr. Bhojwani is or is not a B.A., LL.B., I do not know but the argument that Mr. Bhojwani should himself, on the ground that he had certain university degrees, take upon himself the decision of a contested question of this kind, would appear to any reasonable man unworthy of serious consideration. Mr. Bhojwani in referring this question to the legal adviser acted, in my opinion, as an honourable and prudent man. The only question in this matter which, in my opinion, calls for criticism is that R. 54, and, indeed, all other rules of the Corporation should be strictly followed. Rule 54 requires that grounds should be given when the standing committee within a certain limited time alters or rescinds a previous resolution. The Assistant Public Prosecutor explains that there was attached to the resolution the note of the chief officer and the two memorials relating to the recovery of this tax. This may be so, but the feeling aroused over this question itself shows how necessary it is that the Corporation should strictly follow its own rules which, experience has shown, are in the public interest. The last point I would refer to in this article is the item of 2 lacs and 82 thousand rupees. It is explained to me that this figure was obtained by including the occupancy price of the lands which would be available should the landlords refuse to pay the arrears of enhanced land tax and the Corporation succeed in their suits to eject them. This, however, was not explained in the article which appeared to attribute to the Mayor, Hatim Alavi and the chief officer, Bhojwani and the standing committee the loss of Rupees 2,82,000, but for the action of another Mayor Mr. Sidhva.

It may be remarked that one of the reasons on which Mr. Sidhva Mayor could and did rely to rule the question out of order when it came before the meeting over which he presided, namely that the question was before the Courts, would have been equally available and indeed compelling during the period of office of Mr. Hatim Alavi and could have been invoked to excuse delay. Whether Mr. Hatim Alavi, embarrassed by the claim of friends postponed a contentious question as the best way of dealing with it and to this extent failed in his duty, I do not know. There were others in the municipal body besides himself, but even if he endeavoured by inaction to avoid the decision of a contentious and embarrassing question, that would in no way justify this attack upon him, based upon a series of misstatements. Any defence based upon truth on which the appellant relied must clearly fail. The article itself criticizing the conduct of Mr. Hatim Alavi is as defamatory as an article could be. But the appellant in this Court did not rely upon the truth of the article as a defence, though in his statements in the Magistrate's Court, Exs. 43-A and 43-B, he seems to persist in his charges. In Ex. 43-B, Mr. Bhojwani and Mr. Hatim Alavi are described as "the chips of the same block," but in this Court his learned advocate took his stand upon Exception 3 to S. 499, Penal Code. He argued that all Mr. Abbasi had done was to reproduce substantially correctly a speech given by one Mr. Ghulam Hussain Kassim, an old and respected member of the Corporation at the meeting of 9th June 1939, when this question was discussed and when the Mayor, Mr. Sidhva, ruled the question out of order, and that though Mr. Ghulam Hussain Kassim cannot claim absolute privilege, for the debates of the municipal corporators are not privileged as are debates in the Legislative Assembly, yet he, Mr. Abbasi, was present at the meeting where Mr. Ghulam Hussain Kassim made these charges against Mr. Hatim Alavi, the Mayor and the chief officer, and that he heard them pass without protest or contradiction that he acted in good faith within the meaning of Exception 3 to S. 499, Penal Code, and that if he mistook 'jobbery, for 'robbery,' that was a small matter and in the circumstances to be easily understood.

Apart however from the question whether one person is protected from the consequences of defaming another because he repeats in good faith the misstatements of another, it is clear the writer of the article has gone far beyond anything that Mr. Ghulam Hussain Kassim has said. It may be accepted, as it is not otherwise proved to be false, that Mr. Ghulam Hussain Kassim made a long speech the substance of which Mr. Abbasi gives in his article, that he was not inaudible as the shorthand-writer says, and that Mr. Abbasi was there to hear him and did hear him, yet, Mr. Ghulam Hussain Kassim on his

own evidence did not finally charge Mr. Hatim Alavi as Mayor with any corrupt influences and with robbery. Mr. Ghulam Hussain Kassim said in his evidence that he could not say if Mr. Hatim Alavi directly or indirectly influenced the standing committee or the legal adviser of the chief officer. So far as Ghulam Hussain says that Mr. Bhojwani made recommendations on this question contrary to Dr. Shroff and that the legal adviser's opinion was also changed. Mr. Ghulam Hussain is not supported by the evidence, and I do not accept his statement as correct. Reading through the evidence of Mr. Ghulam Hussain and the article, one would infer that there was only one side to this question and the landowners had no case and that the action of the Municipal Corporation in demanding arrears of the enhanced tax and obtaining by means of threatened suits of ejection the consent of the landowners to the payment of arrears which might be time-barred was, beyond all criticism, right. The fair thing would have been, I think, to say that there was on this question ample room for an honest difference of opinion. But in any case, Mr. Ghulam Hussain Kassim in his evidence did not charge Mr. Hatim Alavi with corrupt influences and with robbery, and he was not even prepared to endorse certain paragraphs in the article as a substantially correct representation of what he said at the meeting, without qualification, for he said :

> Except certain things pointed out by me above, what is written in these two paragraphs, Exs. 23-A and 23-B, is a substantially correct reproduction of my speech.

But the exceptions are important. Even Mr. Ghulam Hussain, unreliable as he appears to be did not charge the complainant with robbery or describe him as a robber. But on a fair reading of the article this is the burden of Mr. Abbasi's accusation, that Mr. Hatim Alavi as the Mayor, is the chief of robbers. Paragraph 1 of his article is headed "Robbers as City Fathers." This alone would appear to me to deprive him even on his own interpretation of the protection of Exception 3 to S. 499, Penal Code, that he in good faith merely reported Mr. Ghulam Hussain's speech, apart from the fact that I do not think Exception 3 is to be used so as to justify a writer repeating in any circumstances with impunity the highly defamatory misstatements of another, based upon misstatements of facts. I will take in this case a statement of the law accepted as correct in 23 S L R 216,[2] though that case relates to Exception 9, on which in his reply, the learned advocate suggested the Court should rely and not Exception 3, but the principle is the same. That statement cited from 1 Bom H C R App 85[3] at p. 91 is as follows :

> And where a person makes the public conduct of a public man the subject of comment and it is for the public good, he is not liable for an action if the comments are made honestly, and he honestly believes the facts to be as he states them, and there is no wilful misrepresentation of fact or any misstatement which he must have known to be a misstatement if he had exercised ordinary care.

And the learned Judges in 23 S L R 216[2] said with reference to this passage :

> This pasage lays down no different rule of law; as it enjoins the defendant to make no wilful misrepresentation of fact or any misstatement which he could have discovered to be a misstatement if he had made proper enquiries.

Reference may also be made to the case in 31 Bom 293,[4] in which the learned Judges said :

> Good faith under Excep. 9 requires not logical infallibility but due care and attention. But how far erroneous actions or statements are to be imputed to want of due care and caution must in each case be considered with reference to the general circumstance and the capacity and intelligence of the person whose conduct is in question. It is only to be expected that the honest conclusions of a calm and philosophical mind may differ very largely from the honest conclusions of a person excited by sectarian zeal and untrained to habits of precise reasoning.

In A I R 1923 Cal 470,[5] the principle as laid down in 4 Cal 124,[6] was accepted by both sides as correct, namely :

> In dealing with the questions of good faith, the proper point to be decided is not whether the allegations put forward by the accused in support of the defamation are in substance true but whether he was informed and had good reason after due care and attention to believe that such allegations were true.

I can see no difference in principle on this question of "good faith" between Excep. 3 and Excep. 9. It is, however, to be noted that Excep. 3 protects, in certain circumstances, an expression of opinion concerning the conduct of any person touching any public question and respecting his character so far as his character appears in that

2. ('29) 16 AIR 1929 Sind 90 : 116 I C 99 : 30 Cr L J 548 : 23 S L R 216, Mir Allahbux v. Emperor.
3. ('66) 1 Bom H C R App 85, E.I. Howard v. M. Mull.
4. ('07) 31 Bom 293 : 9 Bom L R 230 : 5 Cr L J 237, Emperor v. Abdool Wadood Ahmed.
5. ('23) 10 A I R 1923 Cal 470 : 71 I C 792 : 24 Cr L J 248 : 50 Cal 518 : 27 C W N 389, Promotha Nath Mukhopadhya v. Emperor.
6. ('78) 4 Cal 124 : 3 C L R 122, In the matter of Shibo Prosad.

conduct. Exception 9 protects under certain circumstances imputations concerning the character of another. But, applying this principle and this test, it appears to me the appellant must fail, for, even assuming that he acted in good faith in accepting as correct the statements of fact of Mr. Ghulam Hussain Kassim, he went far beyond anything Mr. Ghulam Hussain Kassim said when he charged the complainant with the exercise of corrupt influences to advantage friends and described him as a robber, and he went far beyond mere expressions in good faith of opinion concerning conduct or character. His statements and his comments went far beyond anything even Mr. Ghulam Hussain Kassim's misstatements justified. It may be that he did not act maliciously in the sense that he acted spitefully. Indeed, he has shown that in one matter requiring courage he stoutly championed the cause of Mr. Hatim Alavi, even if he were a self appointed champion. But whatever be the cause, it appears clear that on this occasion he clearly overstepped the boundaries not only of truth but of due care and attention and that his grave charges against the complainant cannot be justified on facts or on the misstatements of Mr. Ghulam Hussain Kassim and cannot be protected in good faith within the meaning of Excep. 3 or Excep. 9 to S. 499, I. P. C. In my opinion, the appellant fails to bring himself within either of these two exceptions. I see therefore no reason to interfere with the conviction and sentence and dismiss the appeal.

G.N./R.K. *Appeal dismissed.*

A. I. R. 1941 Sind 96

WESTON J.

Exn. Darkhast No. 1248 of 1936, Decided on 25th October 1940.

Marutreerao Krishnaji —
Judgment-creditor

v.

Thakurdas Isardas — *Judgment-debtor.*

Civil P. C. (1908, as amended by Act 9 of 1937), Ss. 60 and 73—Attachment of salary before 1st June 1937 by creditor saved by S. 3 of Amending Act is avilable for rateable distribution to other creditor not so saved.

An attachment of salary under S. 60 before 1st June 1937, made by a judgment-creditor saved by S. 3 of the amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by aforesaid S. 3: Exn. Darkhast No. 280 of 1937, *Affirmed;* A I R 1938 Sind 144, *Approved;* A I R 1938 Bom 90, *Dist.* [P 96 C 2]

Santdas Idanmal and Hakumatrai M. Eidnani — for Judgment-creditor.

Order.—This is a reference by the learned acting second Registrar not made under the proviso to R. 2 (A), Part II, Chap. V at page 73 of the Rules of the Court but of his own motion and his reason for the reference is that he does not agree with a decision which I gave, in Execution Darkhast No. 280 of 1937 on 30th August 1940,[1] which the learned second Registrar in his reference tells me is in accordance with a decision of Lobo J., reported in A I R 1938 Sind 144.[2]

The point involved is whether an attachment, made under S. 60, Civil P. C., of salary now exempted by the amending Act of 1937, but made by a judgment-creditor saved by the proviso to that amending Act, is available by way of rateable distribution to another judgment-creditor who is not covered by this proviso. In my order in Execution Darkhast No. 280 of 1937 dated 30th August 1940[1] I held that such a judgment-creditor is entitled to rateable distribution and although the point was slightly different in the matter before Lobo J., in Exn. Darkhast No. 1056 of 1936[2] my decision receives support from the view taken in that case. The learned second Registrar refers to a Bombay case, I L R (1938) Bom 98,[3] but in that case the facts were not the same and the question was one of allowing execution against immovable property of an agriculturist which was not liable in satisfaction of that particular decree. I do not, in the light of this authority, consider, as the learned second Registrar has considered, that my decision in Judicial Misc. No. 280 of 1937[1] is wrong and the order in this matter and the companion matters Exn. Darkhasts Nos. 972/36 Krishnasahai, 1173/36 The Mercantile Co-operative Bank, 1264/36 Thakurdas Mangharam, 16/37 Lekhraj, 96/37 Menghraj, 912/37 The Hindu Co-operative Bank, 914/37 Krishnasahai, 572/38 Sitabai, 864/38 Jagatsing and 1060/38 Mangaldas v. Thakurdas, will be that the judgment-creditors seeking rateable distribution are entitled to it.

G.N./R.K. *Order accordingly.*

1. Exn. Darkhast No. 280 of 1937, decided on 30th August 1940, Mangaldas Nanchand v. Ghulam Dastagir.
2. ('38) 25 A I R 1938 Sind 144 : 176 I C 682, Kewalmal v. Rodrigues.
3. ('38) 25 A I R 1938 Bom 90 : 173 I C 561 : I L R (1938) Bom 98 : 39 Bom L R 1212, Krishnaji v. Vishnu.

(28) A. I. R. 1941 Sind 97

DAVIS C. J. AND TYABJI J.

Emperor

v.

Sheroo and others — Accused.

Criminal Revn. Appln. No. 226 of 1940, Decided on 6th November 1940, made by Government of Sind, against order of Sess. Judge, Larkana, D/- 26th September 1939.

(a) Sind Frontier Regulations (3 of 1892), Ss. 8, 12 and 13—Ss. 12 and 13 are governed by S. 8.

Offence of any kind cannot be withdrawn from a Court of Session and referred to a Council of Elders. Section 8 governs Ss. 12 and 13 : ('38) 25 A I R 1938 Sind 9, *Ref.* [P 98 C 2]

(b) Criminal P. C. (1898), S. 439 — Sessions Judge passing order under S. 13 (2), Sind Frontier Regulation—Order found without jurisdiction—It can be set aside in revision under S. 439.

A Sessions Judge passed an order under S. 13 (2), Sind Frontier Regulation, staying proceedings so that the case may be referred to Council of Elders. It was subsequently found that the offence committed not being one under S. 8 of the Regulation, the case could not be so referred :

Held that the order could be set aside in revision under S. 439, Criminal P. C. : ('20) 7 A I R 1920 Sind 51, *Ref.* [P 98 C 2]

(c) Criminal P. C. (1898), S. 439 — Delay in application for revision for good cause — Order of lower Court allowing accused to escape trial —Delay should be excused.

Where improper order of the lower Court allows the accused to escape trial, it will not be allowed to stand on the mere ground of delay in application for revision when the delay was for good and sufficient cause. [P 99 C 1]

Advocate-General — for the Crown.

Shewakram Ramchand — for Accused.

Davis C. J. — This is an application in revision made by the Government of Sind against an order of the Sessions Judge, Larkana, staying proceedings under S. 13 (2) of the Sind Frontier Regulations on the ground that the order was passed without jurisdiction and that if this Court does not revise the order, a serious miscarriage of justice will occur; because the Commissioner in Sind has not power under the Regulations to revise the order and it is doubtful if, while the order made by the Sessions Judge under S. 13 (2) of the Regulations, staying proceedings stands, any Sessions Court will exercise jurisdiction in the case; the accused persons concerned will then escape any trial at all. It appears that one Sheroo and six others were committed to the Court of Session at Larkana to stand their trial for an offence under S. 366, I. P. C. The trial commenced in the Court of Session on 25th September 1939. After the trial had commenced the Assistant Public Prosecutor moved the District Magistrate, Larkana, to permit him to withdraw the prosecution under S. 13 of the Sind Frontier Regulations in order that the case might be referred to a Council of Elders and the District Magistrate by his order dated 25th September 1939 granted the permission. The Assistant Public Prosecutor accordingly withdrew, or we should say, purported to withdraw the prosecution under S. 13 (1) of the Regulations and the Sessions Judge stayed proceedings accordingly under S. 13 (2) of the Regulations. When however the record came before the District Magistrate, it appeared to him the offence was not triable by a Council of Elders at all, because S. 8 of the Frontier Regulations is a defining section for the purpose of providing what offences can be referred to a Council of Elders and S. 8 (1) relates only to offences punishable under the Penal Code with death or transportation for life. An offence under S. 366, I. P. C., does not fall within S. 8 (1) of the Frontier Regulations.

It was however argued before us by the learned advocate for the accused that this Court had no jurisdiction to deal with the order of the Sessions Judge passed under S. 13 (1) ; that the order was passed by the Sessions Judge under the Regulations and it was not an order passed within the provisions of the Criminal Procedure Code and must be revised or otherwise dealt with by the Commissioner under the provisions of the Regulations ; and if S. 17 of the Regulations should not apply because it applies only in terms of a decree or sentence, it does not follow that because under the Regulations the Commissioner has no power to revise an improper order, this power is vested in this Court and the learned advocate relied particularly on the case in 13 S L R 215.[1] On the other hand, the learned Advocate-General argued that the restrictive provisions of S. 13 of the Regulations apply to orders which fall properly within the section itself ; but the section does not apply to a case such as this where the Sessions Judge exercised a jurisdiction the Regulations do not confer. Further, if the Regulations did not apply to the proceedings the Sessions Judge had before him proceedings under the Criminal Procedure Code; he was trying in the ordinary way an offence under S. 366, Penal Code, and therefore any order unlawfully passed by him in the course of these proceedings could be revised by us under S. 439, Criminal P. C., within the terms of this same ruling in 13 S L R 215.[1] It is true

1. ('20) 7 AIR 1920 Sind 51 : 56 I C 769 : 21 Cr L J 513 : 13 S L R 215, Bhawal Khan v. Emperor.

that there are to be found in this cited case words which support the arguments both of the learned advocate for the accused and the learned Advocate-General; for instance, in the judgment in that case it is stated

the powers conferred by S. 439, Criminal P. C., to revise 'any proceedings' are very wide but they must be confined to proceedings within the Code.

On the other hand in that very judgment it is also stated that

the Codes, so far as they are in pari materia apply unless their provisions are inconsistent with the Regulations. In matters outside the scope of the Regulations, the Codes are plainly applicable.

The case in 13 S L R 215[1] related to security proceedings for which special provision is made in the Regulations and we do not think it is authority for the statement that an order staying proceedings under S. 13 of the Regulations is an order which by necessary implication falls within the provisions of S. 17 of the Regulations. It may perhaps be said that an order binding a person over to be of good behaviour or committing him to a prison for default is an order in the nature of a sentence and so falls within the provisions of S. 17 of the Regulations, but this cannot be said of an order passed under S. 13. It was then argued on behalf of the opponent that the order of the Sessions Judge staying proceedings in this trial for an offence under S. 366, Penal Code, fell strictly within the terms of S. 13 of the Regulations, which does not limit or restrict in any way the class of cases which may be withdrawn. Section 13, for instance, it is argued, is not limited to offences punishable with death or transportation for life and the learned advocate pointed out that under S. 20 of the Regulations a conviction of an offence under S. 308 is contemplated, but an offence under S. 308 is not an offence punishable with death or transportation. The learned advocate relied upon certain words used in 32 S L R 129.[2] It is true that there occur in that judgment certain words which support his argument that S. 13 of the Regulations must be interpreted in a liberal fashion so as to include all offences within the Penal Code; for instance in 32 S L R 129[2] it is said :

There is also nothing in S. 12 or any other section which cuts down the meaning of the very wide words intentionally used by the Legislature in section 13.

But after all those words have to be read in relation to the facts of the case to which the judgment relates and that case related purely to the question as to the stage at which a case could be withdrawn. It was in no way concerned with the interpretation of S. 13, as it is to be interpreted by us in the case now before us, in relation to the class of cases to which S. 13 relates. And indeed in that same judgment appear words which are against the learned advocate's contention, for at another place in that judgment it is stated :

Sections 12 and 13 must be read along with and in the light of S. 8 which is the general section empowering the Commissioner in Sind and the District Magistrate to refer cases to a Council of Elders.

It is clear, then, that according to that judgment S. 13 of the Regulations must be read in the light of S. 8 and indeed it is a commonplace in the construction of statutes that one section must be read with another and clearly S. 8 is a governing section so far as Ss. 12 and 13 are concerned. The purpose of withdrawing a prosecution under S. 13 is that the case may be referred to a Council of Elders. This is provided in S. 13 (1) itself and it is clear that the only class of cases which may be referred to a Council of Elders is the class of cases referred to in S. 8, that is to say offences punishable under the Penal Code with death or transportation for life and S. 8 refers to persons accused, not convicted, of any offence and the reference in S. 20 to a conviction under S. 308, I. P. C., is to be explained by the fact that a person could be accused of an offence punishable under S. 307, I. P. C.; his case could be referred under the provisions of S. 8 or S. 12 and he could be convicted of an offence under S. 308, I. P. C. We do not think therefore that the reference in sub-s. (3) of S. 308, I. P. C., means that under S. 13 any offence of any kind can be withdrawn from a Court of Session and referred to a Council of Elders. Section 13 of the Regulations, in short, is governed by S. 8. Clearly then the Sessions Judge had no jurisdiction at all to pass the order he has done under S. 13, and his order, therefore, falls clearly outside the Regulations. The order passed by him, it is true, is an unlawful and improper order, but it is still an order passed by him in a trial held under the Criminal Procedure Code and his order therefore falls within the scope of our revisional powers under S. 439, Criminal P. C., read with S. 423 (1) (c) of that same Code. It therefore appears to us that we have jurisdiction in revision to set aside the order of the Sessions Judge purporting to be passed under S. 13 (2) of the Regulations, but which was in law not

2. ('38) 25 AIR 1938 Sind 9 : 173 I C 325 : 39 Cr L J 294 : 32 S L R 129, Minho Mohano v. Emperor.

passed under that section at all. It was however argued that we should not now interfere on the ground of limitation. There has in this case been great and regrettable delay, but it will suffice if we set out without comment the words in the application itself made by Government relating to the delay and which are as follows :

The order of the Sessions Court, Larkana, permitting withdrawal of the case was passed on 26th September 1939. The District Magistrate, Larkana, appears to have moved Government for a revision application on 6th December 1939 but his letter does not appear to have been received in the Home Department of Government. The District Magistrate expedited Government on 8th February 1940, and on receipt of his letter the Home Department enquired about the original reference and obtained a copy of it on 14th March 1940. From 14th March 1940 to 24th June 1940, the Home Department could not attend to the matter. On 25th June 1940 the Home Department sought the Legal Department's consent to transfer of the papers to them, and on receiving it they transferred the papers on 12th July 1940. The orders sanctioning the filing of the revision application were passed on 22nd July 1940.

It is clear that the Legal Department was not responsible for the delay. We do not know what serious matters of State monopolised the attention of the Home Department at this time, so that this delay in this matter occurred. But we think we are justified in assuming that important matters of State did so monopolise the attention of the Home Department and that it would be wrong for us to allow this improper order to stand and to allow the accused to escape trial and to take advantage of the position that would arise if we passed no order merely because of this delay which we should assume arose from good and sufficient cause. According to the rules of the Court, ordinarily, so far as the Government is concerned, the time limit for revision applications is six months, but we do not think this is an ordinary case. We will therefore not reject this application on the ground of delay. We therefore set aside the order of the learned Sessions Judge and direct the case to be sent back to the Sessions Judge, Larkana, for disposal according to law.

W.N./R.K. *Application allowed.*

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(28) A. I. R. 1941 Sind 99

LOBO J.

M. Sukhdev & Co. — Plaintiffs

v.

Firm of Ayaram Atamprakash — Defendants.

Suit No. 23 of 1940, Decided on 12th November 1940.

Arbitration Act (1899), S. 19 — Contract of sale—Arbitration clause — Suit by plaintiff for damages for non-delivery of goods agreed to be supplied by defendant — Points of dispute whether plaintiff agreed specifically for goods of particular manufacture and whether contract became impossible of performance by outbreak of war held fell within arbitration clause — Case held involved intricate question of law and hence discretion in refusing stay of suit justified.

The plaintiff sued the defendant for his failure to deliver the goods agreed to be supplied by him under a contract. The arbitration clause in the contract provided that any dispute including short and/or non-payment by the purchaser, or any dispute arising out of the contract should be referred to arbitration. The main disputes in the case between the parties were whether the plaintiff agreed specifically for goods of the manufacture of Dobbertin & Co., of Hamburg, and whether by reason of the war which broke out in September 1939 the contract became impossible of performance :

Held that the points in dispute fell within the arbitration clause in the contract. [P 100 C 1]

Held further that the main dispute between the parties whether in the circumstances of the case the contract became impossible of performance involved an important and intricate question of law and therefore the Court was entitled to exercise its discretion conferred by S. 19 and was justified in refusing stay of suit : ('26) 13 A I R 1926 Sind 286; ('41) 28 A I R 1941 Cal 39 and (1914) 31 T L R 137, *Rel. on.* [P 100 C 2]

Srikishindas H. Lulla — for Plaintiffs.

Fatehchand Assudomal — for Defendants.

Order. — The plaintiffs have filed this suit for recovery of a sum of Rs. 18,798-15-0 from the defendants as damages for failure on the part of the defendants to give delivery to the plaintiffs of 50,000 feet galvanized gas tubes in respect of which the parties had entered into a contract on 9th June 1939. The main defence of the defendants is that the contract though in general terms for continental galvanised gas tubes, involved an implied term which had been agreed upon between the parties, that the goods should be of the manufacture of Dobbertin & Co., of Hamburg; that owing to the outbreak of war between England and Germany in September 1939 the contract became impossible of performance and the plaintiffs are not entitled to claim damages for breach of the contract from the defendants.

What I have before me today for disposal is an application under S. 19, Arbitration Act, filed by the defendants for stay of the suit so as to enable the parties to go to arbitration as provided for in the contract between them. The application under S. 19, Arbitration Act, is opposed by the learned advocate for the plaintiffs on two grounds, (1) that the dispute between the parties is really one outside the arbitration clause, which is

cl. 24 of the contract, and (2) that in any event the Court has a discretion in such matters, and in the present case where the disputes between the parties involve questions of law which a Court of justice should decide rather than arbitrators, the Court should exercise its discretion and refuse a stay. I do not think there is any substance in the first of the points urged by the learned advocate for the plaintiffs. Clause 24 of the contract provides that any dispute including short and/or non-payment by the purchaser, or any dispute arising out of this contract is to be referred to arbitration. The main disputes in the case between the plaintiffs and the defendants are whether the plaintiffs agreed specifically for goods of the manufacture of Dobbertin & Co., of Hamburg, and whether by reason of the war which broke out in September 1939 the contract became impossible of performance. It appears to me both these points are covered by cl. 24 of the contract between the parties.

But I do think that the second contention raised by the learned advocate for the plaintiffs is of substance and must prevail. No doubt there are innumerable cases in which it has been held that where parties deliberately have chosen arbitration as their forum they should be kept to their contract, but if that were an absolute rule there would be no discretion left to a Judge under S. 19, Arbitration Act. But there is such a discretion involved in the wording of the section and the only inference possible is that there are cases in which the Court is entitled to exercise a discretion and not hold parties literally to their contracts. One of these cases is where the point involved for decision is an important and intricate question of law which a Court of law is in a better position to decide than laymen; and it appears to me that in such a case the Court is entitled to exercise its discretion and refuse stay for more reasons than one. On the decision on an intricate point of law a large sum of money may become payable by one party to another. Against the decision of an arbitrator or arbitrators under the Arbitration Act there is ordinarily no appeal or in any case a very restricted right of appeal, and if therefore the arbitrator or arbitrators in all good faith decide an intricate point of law wrongly irreparable injury may be caused to one party or the other. On the other hand, a Court of justice may equally well decide in good faith a point of law wrongly, but the party prejudiced by the decision has ordinarily a right of appeal, and in such a case as this for instance would have even from the decision of the appellate Court a right of appeal to the Privy Council.

It appears to me that in the present case I should exercise my discretion and refuse stay because the main dispute between the parties which will fall to be decided by the arbitrators is the important and intricate question of law whether in the circumstances of this case the contract became impossible of performance so as to excuse performance on the part of the defendants. In more cases than one it has been held that where such an intricate question of law is involved a Court would rightly exercise its discretion in refusing stay. In 19 S L R 168,[1] an eminent Judge of the Judicial Commissioner's Court held that the question whether an original contract existed or had been altered by subsequent acts of the parties was not a simple question but an intricate question of law which a Court should decide rather than arbitrators. The learned Judge in that case refused an application for stay under S. 19, Arbitration Act. In I L R (1940) 2 Cal 26,[2] Panckridge J. following the decision in (1914) 31 T L R 137,[3] held that the question whether China and Japan were 'in a state of war' within the meaning of that expression in the contract between the parties was an intricate question of law to be decided rather by a Court of justice than by arbitrators. The learned Judge in that case similarly rejected an application for stay under S. 19, Arbitration Act. The case relied upon by Panckridge J. and reported in (1914) 31 T L R 137[3] is closely analogous to the case before me. I therefore reject the application for stay but make no order as to costs.

G.N./R.K. *Application rejected.*

1. ('26) 13 A I R 1926 Sind 286 : 98 I C 151 : 19 S L R 168, Holland Bombay Trading Co. v. Essardas Dharamchand.
2. ('41) 28 A I R 1941 Cal 39 : I L R (1940) 2 Cal 26, Tolaram Champalal v. Jewanram Gangaram.
3. (1914) 31 T L R 137 : 59 S J 218, Grey & Co. v. Tolme (No. 1).

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(28) A. I. R. 1941 Sind 100

DAVIS C. J. AND LOBO J.

Mangatram Gagandas — Appellant

v.

Hundomal Hassomal — Respondent.

First Appeal No. 31 of 1938, Decided on 24th July 1940, against judgment of Asst. Judge, Larkana, D/- 8th March 1938.

Land Acquisition Act (1894), Ss. 30 and 54 — Order apportioning compensation passed by Assistant Judge—Appeal lies to District Judge.

It is true that an order apportioning compensation among disputing claimants is not an award or part of an award within the meaning of S. 54 of the Act, but from this it does not follow that no appeal lies. [P 101 C 1]

Where an order of apportionment is passed by the Assistant Judge in land acquisition proceedings relating to a dispute as to compensation deposited by the Collector under S. 30 and the dispute is referred by the Collector to the Court for its decision, the appeal, if the subject-matter of the order did not exceed Rs. 5000 lies to the District Court and not to the High Court : ('39) 26 A I R 1939 Sind 66 and ('33) 20 A I R 1933 Bom 187, *Rel. on.* [P 101 C 1, 2]

Kimatrai Bhojraj — for Appellant.

Fatehchand Assudomal — for Respondent.

Davis C. J. — This is an appeal from an order of apportionment by the Assistant Judge, Larkana, in land acquisition proceedings relating to a dispute as to compensation deposited by the Collector under S. 30, Land Acquisition Act, and the dispute referred by the Collector to the Court for its decision. A preliminary objection was taken that the appeal does not lie to this Court as a High Court because under S. 54, Land Acquisition Act an appeal lies to the High Court only against an award or part of the award, and there is the authority of the Privy Council in 26 C W N 713[1] at p. 720 that the award within the meaning of S. 54, Land Acquisition Act, does not extend to an order apportioning compensation among disputing claimants. Their Lordships say :

> The award as constituted by statute is nothing but an award which states the area of the land, the compensation to be allowed and the apportionment among the persons interested in the land of whose claims the Collector has information, meaning thereby people whose interests are not in dispute, but from the moment when the sum has been deposited in Court under S. 31 (2) the functions of the award have ceased: and all that is left is a dispute between interested people as to the extent of their interest. Such dispute forms no part of the award, and it would indeed be strange if a controversy between two people as to the nature of their respective interests in a piece of land should enjoy certain rights of appeal which would be wholly taken away when the piece of land was represented by a sum of money paid into Court.

And there is, we think, no difference in the application of this principle to money which has been deposited under S. 30 or money deposited under S. 31 (2), Land Acquisition Act. But, it does not follow because an order apportioning compensation among disputing claimants is not an award or part of an award within the meaning of S. 54 of the Act, no appeal lies. According to that section, as interpreted by this Court in I L R (1939) Kar 152,[2] an appeal does lie though not necessarily to the High Court. The decision of this Court followed a decision of the Bombay High Court in 35 Bom L R 276,[3] which is to the same effect. Therefore the order passed by the Assistant Judge is clearly an order against which an appeal to some Court will lie. It is argued on behalf of the respondent that an appeal lies to the District Court and not to the High Court for the order was passed by an Assistant Judge and the subject-matter of his order did not exceed Rs. 5000. Under the Sind Courts Act, an Assistant Judge has jurisdiction to try original suits in which the subject-matter does not amount to Rs. 10,000 in value, applications or references under Special Acts which the District Judge may refer to him under S. 16, and it was under this provision that the District Judge transferred this reference to the Assistant Judge. The order of the Assistant Judge would be an order in the nature of a decree, *see* 35 Bom L R 276,[3] to which reference has already been made. This Court has therefore no jurisdiction to deal with this appeal which should be returned to the appellant for presentation to the proper Court. The respondent is entitled to his costs.

D.S./R.K. *Order accordingly.*

1. ('22) 9 A I R 1922 P C 80: 67 I C 408: 45 Mad 320: 26 C W N 713: 49 I A 129 (P C), Ramachandra Rao v. Ramachandra Rao.

2. ('39) 26 A I R 1939 Sind 66: 180 I C 681: I L R (1939) Kar 152, Fateh Muhammad Idan v. Thariomal Jethomal.

3. ('33) 20 A I R 1933 Bom 187 : 144 I C 710 : 57 Bom 314: 35 Bom L R 276, Raghunathdas Harjivandas v. District Superintendent of Police, Nasik.

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(28) A. I. R. 1941 Sind 101

DAVIS C. J. AND TYABJI J.

Ghanshamdas Gopaldas — Defendant 2 — Appellant

v.

Khudabadi Amil Co-operative Credit Bank Ltd., Hyderabad (Sind) and another — Plaintiffs — Respondents.

First Appeal No. 38 of 1938, Decided on 17th October 1940, against order of First Class, Sub-Judge, Hyderabad, D/- 9th May 1938.

(a) Civil P. C. (1908), O. 21, R. 66 — Judge proceeding under O. 21, R. 66 after summary inquiry and purporting to decide disputed rights between parties — Decision would be merely interlocutory and not final.

Even if the Judge should proceed under O. 21, R. 66 after a summary inquiry and purport to decide disputed rights between the parties, that deci-

sion would be an interlocutory decision; it would be an interim decision and would not be final and binding upon the parties : ('25) 12 A I R 1925 Pat 500 (S B), *Rel. on.* [P 103 C 1]

(b) Civil P. C. (1908), O. 21, R. 66 — Order under R. 66 for notification of liens made on application by third parties moving on behalf of those for whose benefits liens were to accrue — Appeal does not lie.

An order under O. 21, R. 66 for notification of liens made on the application not by the judgment-debtor, or by the judgment-creditors, but by third parties moving on behalf of those for whose benefits the liens were to accrue is an administrative and not a judicial order and no appeal would lie against such order : ('26) 13 A I R 1926 All 268, *Rel. on.* [P 103 C 2]

Khanchand Gopaldas — for Appellant.

Hukumatrai M. Eidnani — for Respondent 1.

Fatehchand Assudomal — for Intervenors.

Davis C. J.—This purports to be a first appeal against an order of the first class subordinate Judge of Hyderabad dated 9th May 1938, amending a sale proclamation giving certain particulars under O. 21, R. 66, Civil P. C. A preliminary point was taken that no appeal lies against this order because there was no judicial determination of any rights between the parties within the meaning of S. 2 (2), Civil P. C., and that it was an administrative order only containing directions of the Court as to the intimation which should be given to intending purchasers of incumbrances or alleged incumbrances upon the property to be sold. Reliance was placed by Mr. Fatehchand in support of his argument, that no appeal lay against this order, upon a judgment of the Allahabad High Court in 48 ALL 260[1] and upon the decision of the Patna High Court in 4 Pat 731.[2] Now, it is clear that all orders passed under O. 21, R. 66, Civil P. C., are not appealable; for instance, reference to O. 43, Civil P. C., will show that an appeal lies against certain orders made under certain rules of O. 21, Civil P. C. But an order under R. 66 is not mentioned among them. But in the course of arguments on the question whether an appeal would or would not lie, it became clear that the principal objection of the judgment-debtor and the judgment-creditor to this order of the subordinate Judge was not that he had directed notice of these alleged incumbrances or liens to be given in the proclamation of sale, but he had said that :

It is admitted that the property sought to be sold along with other property is subject to a lien under the decree of the Court of the Judicial Commissioner of Sind, namely, No. 1128 of 1922.

Further it appeared that he had proceeded in that same order to decide that the decree need not be considered time-barred because certain liens related to the marriage expenses of daughters of the family who were not yet married. And the learned advocates for the judgment-debtor and the judgment-creditor argued that so far as these statements in the order could be taken as a judicial determination of the rights between the parties, there was here something more than a mere administrative order and which would therefore be appealable, or, in any circumstances, if the Judge had exceeded his jurisdiction under O. 21, R. 66, Civil P. C., an application in revision would lie. The learned advocates for the judgment-debtor particularly complained that whereas it was said that he had admitted that this property was subject to a lien, although he had notice of the proceedings relating to the sale proclamation, he had no notice of the further proceedings relating to the amendment of the sale proclamation in which the order of the learned Judge now complained against was made. And it does appear from the record that neither the judgment-debtor nor the judgment-creditor made any such admission as the learned Judge states and it does appear that the judgment-debtor did not have notice of these further proceedings in which this amendment of the sale proclamation was ordered.

But both the learned advocates say that so long as it is made clear that this order is an administrative order only, that it gives no judicial finding or determination as to the rights between the parties, as for instance on the question of the existence of any lien, or on the question whether the decree was or was not time-barred, they have no objection to urge to this order regarded only as an administrative order, which will not bind them or their legal representatives as a judicial determination of rights, which may be the subject of further proceedings. The fact that we do not think an appeal will lie from an order of this nature under O. 21, R. 66, Civil P. C., appears to us to make it clear that we regard the order as an administrative order only and not as an order containing a judicial determination of the rights of the parties; for instance, in 48 ALL 260,[1] Mukerji J. referring to the fact that in the case before him the Judge gave directions that notice

1. ('26) 13 A I R 1926 All 268 : 92 I C 644 : 48 All 260, Mahomed Zakaria v. Kishun Narain.
2. ('25) 12 A I R 1925 Pat 500 : 88 I C 332 : 4 Pat 731 : 6 P L T 843 (S B), Mohit Narain Jha v. Thakan Jha.

of an alleged claim should be entered in the sale proclamation, and referring to the question as to whether an application in revision would lie against the order of the Judge said (p. 263) :

> The Judge was bound, in the interest of intending purchasers, to give them as much information as possible about the property which he was going to sell. If Muhammad Hafiz and others had a bona fide claim, it did not matter whether it was going to succeed or going to fail, The Judge could not enter into that intricate question. He was, in my opinion, bound to tell the intending purchasers that there was such a claim and that they might beware of it. The order, therefore, was perfectly correct and it is not open to question by way of revision.

It is in the light of these words that the order of this learned subordinate Judge dated 9th May 1938, should be regarded. In 4 Pat 731[2] a distinction was drawn between a mere intimation to be given in proceedings under O. 21, R. 66, Civil P. C., of incumbrances upon the property and the decision as to whether such incumbrances did or did not exist. It was pointed out in that judgment that under O. 21, R. 66, Civil P. C., after notice to the decree-holder and the judgment-debtor both parties are entitled to apply to the Court asking it to state in the sale proclamation such particulars as they think proper, but when there is a difference between the decree-holder and the judgment-debtor as regards any of the particulars to be stated in the sale proclamation, the Court is to make a summary inquiry and pass orders after such inquiry. One item of the particulars that to be stated in the sale proclamation is as regards incumbrances to which the property sought to be sold is liable. Again, another particular to be stated as provided by cl. (e), sub-r. (2) of R. 66 of O. 21, Civil P. C., is "every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property" ; and the learned Judge came to the conclusion that in such a summary inquiry there was no final determination, no final order as to the rights in dispute ; there was merely an interlocutory order after a summary inquiry which would not operate as res judicata in a subsequent proceeding.

Therefore, even if the Judge should proceed under O. 21, R. 66, Civil P. C., after a summary inquiry and purport to decide disputed rights between the parties, that decision would be an interlocutory decision, it would be an interim decision and would not be final and binding upon the parties. Furthermore in the case before us the application for notification of these liens was made not by the judgment-debtor, or by the judgment-creditors, but by third parties moving on behalf of those for whose benefits the liens were to accrue. This, we think, emphasises the administrative and not the judicial nature of this order passed by the Judge under O. 21, R. 66, Civil P. C. We think, therefore, no appeal would lie against this order. So far as the costs are concerned, however, we think, in view of the fact that there are words in this order which might hereafter have been the subject of dispute and litigation among the parties, that while we dismiss the appeal, we should make no order as to costs.

D.S./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Sind 103

DAVIS C. J. AND WESTON J.

Rama Brothers, Firm — Defendants — Appellants

v.

Forbes Forbes Campbell & Co. Ltd. — Plaintiffs — Respondents.

First Appeal No. 30 of 1938, Decided on 19th September 1940, against judgment and decree of Dadiba C. Mehta J., D/- 4th April 1938.

Civil P. C. (1908), S. 47—Suit for accounts—Plaintiff applying for attachment before judgment—Amicable settlement embodied in Court's consent order, reached by defendant handing over to plaintiff certain goods to be sold by plaintiff — Plaintiff to keep sale proceeds to be appropriated towards decree in suit in his favour pending suit and final orders with regard to same — Agreement held implied that defendant was to get fair price for goods delivered by him and credit for that price — Question of fair price held though could not be gone into in suit could certainly be decided in execution — Separate suit held not necessary for deciding aforesaid question.

In a suit for accounts by the plaintiff an agreement was made between the parties whereby applications made by the plaintiffs for attachment before judgment were for the time being amicably settled. This agreement which was recorded by the Court in a consent order ran as follows :

"Without prejudice to the contentions of the parties in this suit or in any other proceedings between the parties, the defendants have handed over to the plaintiffs the Philco goods as shown in two sheets attached. These will be sold by the plaintiffs and the net sale proceeds kept by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same, which will be appropriated towards the decree, if any, passed in their favour" :

Held that because the parties agreed that certain things should be done in a suit and the Court embodied the agreement in a consent order, and a consent issue was raised, the Court was not bound

in its final decree to give effect to the agreement or to find upon the issue when the issue did not arise on the pleadings. The sum admittedly received by the plaintiffs by the sale of the goods delivered to them was to be appropriated in satisfaction of the decree and therefore the agreement presumed a decree and a credit in execution. The terms of the agreement implied that the defendant was to get a fair price for the goods and to get credit for this price in execution proceedings, if not in the suit itself. The question of a fair sale price and a corresponding credit to the defendant could and indeed ought to be decided by the executing Court and therefore the Court was wrong in relegating the defendant to a separate suit for the decision of the question : ('16) 3 A I R 1916 Pat 308, *Ref.*

[P 104 C 1; P 106 C 2; P 107 C 1]

D. N. O'Sullivan — for Appellants.

Dipchand Chandumal — for Respondents.

Davis C. J. — This is an appeal against the final decree for Rs. 15,414-0-4 with interest in a suit filed by the plaintiffs, Messrs. Forbes Forbes Campbell & Co. Ltd., for the sum of Rs. 18,605-13-0, with interest from date of suit, against Messrs. Rama Brothers, on account of wireless sets supplied by the plaintiffs to the defendants from the manufacturers, the American Steel Export Company of New York, which the plaintiffs ordered and stored and supplied to the defendants according to agreement, and which the defendants admitted to have received. The plaintiffs reserved the right to bring another suit against the defendants for losses incurred by them on account of goods of which the defendants had refused to take delivery. The defendants contended that the plaintiffs had rendered no true account, had made secret profits, and in other matters committed breaches of the agreement, and they also reserved the right to bring another suit for damages for breach of contract, and they contended that on accounts being taken a large sum would be found due to them. In appeal before us, however, the question in dispute was limited to the interpretation and effect of an agreement made between the parties whereby applications made by the plaintiffs for attachment before judgment were for the time being amicably settled. This agreement is as follows :

> Without prejudice to the contentions of the parties in this suit or in any other proceedings between the parties, the defendants have handed over to the plaintiffs the Philco goods as shown in two sheets attached. These will be sold by the plaintiffs and the net sale proceeds kept by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same; which will be appropriated towards the decree, if any, passed in their favour,

and a certain ambiguity in its wording has been followed by a certain ambiguity in the judgment, so that while it is contended by the defendants, who are the appellants, that under this agreement the Court was to enquire and decide in the suit itself the true value of the goods handed over under this agreement by the defendants to the plaintiffs, and the price the plaintiffs should have received, which price would be credited to the defendants in the accounts in the suit between the parties, it is the contention of the plaintiffs, now the respondents, that under the agreement only the price received by the plaintiffs on the sale of the goods was to be taken into account, and that not in the suit, but in execution while any further claim the defendants might have under the agreement should be left to a separate suit. It is to be noted that when the defendants raised in execution of the decree the case that the executing Court should decide what was the real value of the goods handed over by the defendants to the plaintiffs, and what price the plaintiffs should have received in the sale, which should be credited to the defendants the Judge in execution proceedings found that the question could not on his interpretation of the judgment and decree be enquired into and decided in execution. It is to be noted that no appeal was made against this order in execution as an appeal could have been made against an order under S. 47, Civil P. C., and that the defendants on advice or by oversight preferred to rely on an appeal against the final decree itself. The order dismissing the application to have satisfaction of the decree recorded was dated 12th May 1938, and it would appear that by far the simplest method of deciding the question in dispute between the parties was by an appeal against this order.

We, however, have an appeal against the final decree, and we have to decide whether the learned Judge was wrong in deciding despite the consent order : (1) that the defendants should not be given credit in the suit for the sum the plaintiffs admitted they have received on the sale of the goods handed over by the defendants to the plaintiffs under the consent order, and which, we are informed, amounts to Rs. 2994-10-0 and Rs. 500, and (2) that the Court should not in the suit enquire further and decide what sum the plaintiffs should have received for the goods upon a proper sale and give credit to the defendants for this sum in the suit. In our view, the learned Judge was not wrong in so deciding. In their further written statement the defendants claimed

Rs. 12,000 for goods delivered to the plaintiffs in the following words :

7. These defendants claim a sum of Rs. 12,000 in respect of the goods given to the plaintiffs by the consent order of the Court,

and it is contended that an issue was raised to cover this particular point in the following words :

13. What is the total amount due to the plaintiffs on the whole account after giving credit for all the goods sold including the goods given after suit. Particulars of sale after suit to be given in a month.

But in his final order dated 4th April 1938, the learned Judge in effect struck out this issue in the following words :

Issue 13.—What is the total amount due to the plaintiffs on the whole account after giving credit for all the goods sold including the goods given after suit? Particulars of sale after suit to be given in a month. This issue as correctly understood, so far as the requirements of this suit are concerned, would be : What is the total amount due to the plaintiffs? All that follows thereafter is surplusage and should not form part of the issue in this suit,

and we are informed that the learned Judge meant by this to exclude even the sum the plaintiffs admitted to have received on account of the goods sold under the consent order, for the final decree is for Rs. 15,414-0-4 only, though in the final decree itself this matter is referred to in the following terms:

Whereas by the preliminary decree dated 29th day of April 1937, the matter was referred to the Official Commissioner for taking accounts with directions to the Commissioner to find out what was due by each party in respect of the goods taken delivery of by the defendants considering under separate heads the various charges debited by the plaintiffs and also the amounts received by the plaintiffs for the credit of the defendants; . . . . . and also to find on proper account-taking what is the amount of the sale proceeds of the goods handed over to the plaintiffs by the defendants under consent order of this Court dated 31st October 1935,

and that at one time the learned Judge did consider giving the defendants credit for what the plaintiffs admitted to have received by sale of the goods handed over as appears from the following extract in his judgment dated 8th March 1938 :

Objection 21.—This objection relates to the accounts in respect of certain goods delivered by the defendant to the plaintiff after the suit as security for the suit claim, and which goods the plaintiff was at liberty to sell for and on account of the defendant. It is contended that the Official Commissioner has not found what the plaintiff actually ought to have realized reasonably by the sale of these goods. All that the Commissioner has done is to proceed on the account as given by the plaintiff. The subject is dealt with in the Commissioner's report from line 485 to line 641. It is pointed out by Mr. Fatehchand that with regard to the 16 sets sold the plaintiff has produced bills showing to whom they were sold. He also relies on Ex. E/2, the defendant's objections dated 21st December 1936 with regard to the account-sales. Mr. Fatehchand's contention in short is that a proper account has not been taken either of the quantity or of the market prices of the goods delivered to the plaintiff after the suit, although directed by the Court to do so. Now, in this connexion I might refer to the consent order dated 31st October 1935 passed by Havelivala J. It reads thus: 'Without prejudice to the contentions of the parties in this suit or in any other proceedings between the parties, the defendants handed over to the plaintiff the Philco goods as shown in two sheets attached. These will be sold by the plaintiffs and the net sale proceeds kept by the plaintiffs pending the disposal of the suit and pending final orders with regard to the same which will be appropriated towards the decree, if any, passed in their favour.'

It is perfectly clear to me that the question whether the plaintiff has or has not realized a reasonable price with regard to these security goods cannot be determined now. When the plaintiff gets a decree, and the decree is sought to be executed against the defendant, it will be open to the defendant to contend that a much larger satisfaction should be entered up than what is shown in the account sales produced by the plaintiff. Mr. Dipchand consents that whatever amount has been received by the plaintiff in respect of these goods as appearing in their books the plaintiff is prepared to give a credit for to the defendant in this suit. With regard to defendant's claim for more Mr. Dipchand's contention is that at the worst the plaintiff can be regarded as an agent of the defendant or a receiver appointed to sell these goods; that therefore if the plaintiff is guilty of any malfeasance or misfeasance the defendant has a separate cause of action, and that it has nothing to do with the cause of action as shown in the plaint. I think that this argument is sound, and I must refrain from going into the question as to what amount ought to have been realized. With regard to the amount realized as shown in the plaintiff's account, the plaintiff is prepared to give credit in the suit to the defendant: and I do not see how I can help the defendant any more than that at present.

But in his judgment dated 4th April 1938 appears the following passage :

It must be remembered that the suit is for settlement of accounts as the accounts between the parties stood at the time of the institution of the suit. The plaintiffs ordered out goods for the defendants, and paid for them as and when the goods arrived in Karachi. For the first two or three months the defendants were given delivery of whatever goods had arrived and bills were submitted which were partly paid. When a disagreement arose between the parties and the defendants refused to pay for and take delivery of goods ordered on their behalf, contending that they were not bound to pay unless and until they had sold them and had realised the price of the goods so sold, the plaintiffs considered the arrangement between them and the defendants as termination by such conduct of the defendants, and came to Court to seek relief in respect of what they had already earned by way of commission and in respect of all the goods taken delivery of and not paid for. It was during the pendency of the suit that when the plaintiffs applied for attachment before judgment that by mutual agreement certain goods from the possession of the defendants were made over to the possession of the plaintiffs with the distinct understanding that the plaintiffs were at liberty to sell these goods, and the proceeds thereof were to be considered as so much satisfaction in exe-

cution of any decree that might to passed in favour of the plaintiffs. In pursuance of the agreement the plaintiffs have sold certain goods the account of which the Official Commissioner was required to take according to the books of the plaintiffs. The Official Commissioner was not asked to determine—he could not properly be asked to determine—what was the real value or the price of the goods so sold. Under the circumstances the insistent demand of the learned advocate for the defendants that the Court should determine whether this is a suit on partial accounts is not tenable. The account of the goods sold after the breach, whether the breach made by the plaintiffs or by the defendants, of the arrangement under which the business between the two had started, has nothing to do with the original agency account; because these goods that were sold after the suit were sold not in pursuance of the original agency arrangement but because of the breach of it. With these preliminary observations I shall now take up the issues raised in the case one by one and record my findings thereon.

And, as we have said, the learned Judge, struck out issue 13, so far as it related to the sale of goods handed over under the consent order dated 31st October 1933. The question which then arises is, was the learned Judge right in doing this? Under O. 14, R. 5, Civil P. C., the Court may at any time before passing a decree strike out any issue that appears to it to be wrongly framed or introduced, and the Judge clearly, from his order which we have quoted, considered that so far as issue 13 related to the sale of goods under the consent order, made as it was in the course of the suit, after its institution, was improperly introduced. Mr. Dipchand for the plaintiffs-respondents argued before us that the only remedy open to the defendants under the consent order was a separate suit, and so far as the defendants claim more than the plaintiffs admit, the learned Judge appears to have accepted this contention of Mr. Dipchand. Earlier, in the same judgment, however, he suggests that the defendants can raise this question in execution, but later in the same judgment the learned Judge appears to find that the defendants may be given credit in the suit for the sum admitted by the plaintiffs in their accounts under this head, though in his final order no such credit is given. The plaintiffs, however, in the execution application gave credit under this head for Rs. 2994-10-0. Therefore, there appears some ground for the defendants' confusion. At one place in the judgment he is told he will be given credit in the suit for the amount admitted by the plaintiffs and that for the balance he may claim in execution though the appropriate remedy would be a separate suit. No credit however is given in the suit though a certain credit is given in execution proceedings; and when the defendants in execution proceedings raised their claim for the balance of the value of the goods sold, the executing Judge dismissed the defendants' claim finding that the trial Judge had not reserved this question for decision in execution, having held that the question was irrelevant to the suit. As we have said, no appeal was filed against his order which might well have been the simplest means of unravelling this tangle.

Now, we do not think, as the learned advocate for the appellant argues, that because the parties agreed that certain things should be done in a suit and the Court embodied this agreement in an order, and what is called a consent issue was raised, the Court is bound in its final decree to give effect to this agreement or to find upon the issue. An issue must arise upon the pleadings. The suit concerned the sale of certain goods by the plaintiffs to the defendants, and if the defendants in the course of the suit by consent agreed to hand over certain of those same goods to the plaintiffs in lieu of security for sale and appropriation in satisfaction of the decree, we do not see how such a matter can be properly excluded from execution of the decree in view of the wide terms of S. 47, Civil P. C.; and apart from the question whether any credit for the sale of the goods should be given in the suit itself, we think it clear, in spite of the somewhat ambiguous wording of the consent order, that if the defendants had been told that they would not be given credit for the sale price of these goods in the proceedings arising out of the suit at all but would be forced to institute a separate suit, they would have been no party to the agreement. But it does not follow that credit was to be given under this head in the suit itself before the decree was passed. Furthermore, we think it clear that if the defendants had been told that they would be compelled to accept whatever price the plaintiffs chose to accept for the goods, and that they would not be entitled in these proceedings to credit for a fair price but would have to institute a separate suit, they would not have been a party to this agreement. It appears to us implicit in the terms of this agreement that the defendants were to get a fair price for the goods and to get credit for this price in these proceedings, if not in the suit itself, then in the execution of the decree. And we think that as far as the learned trial Judge held that an inquiry as to the price that should have been re-

ceived for the goods handed over could not be ordered in execution and should have been made the subject of a separate suit, he was wrong.

Regarding the wide terms of S. 47, Civil P. C., the dispute between the parties was a dispute arising in the execution or satisfaction of the decree, and could be inquired into and decided in execution. There is little authority on this point of inquiry and settlement of disputes relating to the attached property in execution proceedings. One case however relating to the misappropriation of the attached property by judgment-creditor and an inquiry and settlement of the dispute in execution is 36 I C 280.[1] Furthermore, under S. 47, Civil P. C., the executing Court could have treated these particular proceedings as a suit though there seems no reason why it should have done so. Therefore, our view on this case as argued before us is that this question of a fair sale-price and a corresponding credit to the defendants could and indeed should be decided by an executing Court. How far this can avail the defendants in view of the order of the executing Judge dismissing the defendants' claim on 12th May 1938, we are not now concerned to inquire. We observe that while the defendants in para. 7 of their further written statement claimed Rs. 12,000 under this head, in their application under O. 21, R. 2, Civil P. C., they place the invoice value of the goods at Rs. 10,355 and the market value at Rs. 20,716, and state that they are being allowed credit for only Rs. 4194-10-0. We presume that this latter sum refers to some credit item in the account in excess of Rs. 2999-14-0 for which the plaintiffs give credit in their execution application. But this decision leaves the decree untouched and gives little satisfaction to the appellants. The appellants wish us to modify the decree and decide that in the suit itself credit should be given to them for the sums admittedly received or which should have been received by the plaintiffs on the sale of the goods handed over as security.

But we do not think we have a case here where a claim is admitted in part and money is paid into Court. A proper interpretation of the consent order is, we think, that the sum admittedly received by the plaintiffs was to be appropriated in satisfaction of the decree and this presumed a decree. It presumes a credit in execution as the plaintiffs gave credit in execution and not a credit in the suit itself. Moreover the defendants refused to accept this sum admitted in any way in satisfaction of their claim. On accounts they claimed a large sum due to them. Besides we do not think this is in accordance with the proper construction of the agreement Ex. 3. We think this agreement was properly interpreted by the respondents when they gave credit for nearly Rs. 3000 in the execution application, apart from the question whether the respondents had to account for what they should have received as proper price, as distinct from what they did receive. We do not think therefore we should interfere with the judgment of the trial Judge. It will be for another Court, if the appellants apply, to decide whether time can be saved by this appeal or should be extended so as to enable them to appeal against the order of the Judge in execution. We think therefore it follows the appeal must be dismissed with costs and we order accordingly.

G.N./R.K. *Appeal dismissed.*

1. ('16) 3 AIR 1916 Pat 308 : 36 I C 280 : 1 P L J 558, Gajadhar v. Arjun Das.

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(28) A. I. R. 1941 Sind 107

DAVIS C. J. AND TYABJI J.

Emperor

v.

Shivbux Amro — Accused.

Criminal Ref. No. 294 of 1940, Decided on 11th November 1940, made by Addl. Sess. Judge, Nawabshah, D/- 27th September 1940.

Penal Code (1860), S. 75—Case falling under S. 75, Penal Code—Trial under S. 260, Criminal P. C., is not necessarily bad—S. 75, Penal Code, is enabling and does not create separate offence —Question whether S. 260, Criminal P. C., applies or not to offence falling under S. 75, Penal Code, does not arise—But in cases to which S. 75, Penal Code, is to be applied and also in which it is not to be applied but previous convictions are to be taken into account summary trial is not appropriate — Magistrate can, independently of S. 75, Penal Code, take into account previous convictions.

While the circumstances of a case where S. 75, Penal Code, can be applied, make it desirable that the offence should not be tried in a summary way, and that, in such cases, if the trial has started in a summary way, the provisions of S. 260 (2), Criminal P. C., should be followed, nevertheless a trial in which a charge under S. 75, Penal Code, could be framed is not necessarily bad in law because the offence is tried summarily. Although it may almost always be inexpedient in the interests of justice to do so, but S. 75, Penal Code, is an enabling provision and merely applies a principle, and since it does not create a separate offence

or an offence at all the question whether S. 260, Criminal P. C., applies to offences under S. 75, Penal Code, does not arise. [P 108 C 1, 2]

But a trial in a summary way is not an appropriate procedure when S. 75, Penal Code, is to be applied. Nor, indeed, would it be appropriate when S. 75, Penal Code, is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under S. 262, Criminal P. C. [P 108 C 2]

Previous convictions however can be taken into account under S. 14, Evidence Act, even when S. 75, Penal Code, is not to be applied. After an accused has been convicted and before sentence is passed, a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of S. 75, Penal Code, apart: ('14) 1 A I R 1914 Bom 216, *Expl.* [P 108 C 2]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J.—This is a reference by the Additional Sessions Judge of Nawabshah, recommending that the conviction of one Shivbux for theft of silver head-dresses from idols in a temple and a sentence of three months' rigorous imprisonment and a fine of Rs. 50 passed by the Resident Magistrate of Tando Adam, should be set aside and a retrial ordered, on the ground that the accused had one previous conviction and sentence of one month's rigorous imprisonment, that this was a case in which S. 75, Penal Code, should be applied, and that the Magistrate could not try this case as he did, in a summary way, for S. 260, Criminal P. C., would not apply, and the trial was therefore void under S. 530 (q), Criminal P. C.

Now, so far as the application of S. 260, Criminal P. C., is concerned, we are of the opinion that while the circumstances of a case where S. 75, Penal Code, can be applied make it desirable that the offence should not be tried in a summary way and that in such cases if the trial has started in a summary way the provisions of sub-s. (2) of S. 260, Criminal P. C., should be followed, nevertheless we do not think it can be said that a trial in which a charge under S. 75, Penal Code, could be framed is necessarily bad in law because the offence is tried summarily. It may, indeed, almost always be inexpedient in the interests of justice to do so, but S. 75, Penal Code, merely applies a principle; it does not create a separate offence. It is an enabling section and provides that when accused persons are convicted of certain offences and have previous convictions they can be sentenced to enhanced punishment by the application of S. 75, Penal Code. As S. 75, Penal Code, does not create a separate offence or indeed, an offence at all, it matters not that S. 260, Criminal P. C., is limited to certain offences. There is no offence under S. 75, Penal Code. There is no question then of S. 260, Criminal P. C., applying or not applying to offences under S. 75, Penal Code. On the other hand, there may always be other considerations which prevent the trial in a summary way of offences to which S. 75, Penal Code, is to be applied. The Criminal Procedure Code provides a special procedure for the trial of offences when S. 75 is to be applied. Sections 221 and 255A, Criminal P. C., regulate the procedure at a trial by a Magistrate when S. 75, Penal Code, is to be applied. Section 310, Criminal P. C., regulates the procedure in a trial by a Sessions Court when previous convictions are to be proved for the purpose of enhancing sentence whether under S. 75, Penal Code, or any other special law, such for instance, as the Criminal Tribes Act.

It is therefore clear that trial in a summary way is not an appropriate procedure when S. 75, Penal Code, is to be applied. Nor, indeed, would it appear an appropriate procedure when S. 75, Penal Code, is not to be applied, but previous convictions are to be taken into account in determining what punishment within his ordinary powers a Magistrate should impose because of the limited nature of the sentence which may be passed under S. 262, Criminal P. C. It is to be remembered that previous convictions can be taken into account even when S. 75, Penal Code, is not to be applied. After an accused has been convicted and before sentence is passed a Court can for the purpose of deciding what sentence should be passed, take into consideration previous convictions, any question of S. 75, Penal Code, apart. In the Bombay case in 39 Bom 326,[1] there is some discussion as to the section of the Evidence Act, if any, which applies to a case where previous convictions are to be taken into account for the purpose of deciding the punishment to be imposed, the punishment being within the ordinary powers of the Magistrate. Shah J. points out the distinction between bad character within the meaning of S. 54, Evidence Act, and a previous conviction. Heaton J. was of the opinion that S. 54, Evidence Act, did not apply to such a case and that previous

1. ('14) 1 A I R 1914 Bom 216 : 26 I C 995 : 16 Cr L J 83:39 Bom 326:16 Bom L R 934, Emperor v. Ismail Ali.

convictions in such a case were within the sphere of penology rather than of law. Neither of the learned Judges referred to S. 14, Evidence Act, which would appear to be the appropriate section.

While therefore it would appear to us that in this case it was unnecessary to apply the provisions of S. 75, Penal Code, we consider that in view of the accused's previous conviction, and the circumstances of this case the Magistrate could not adequately punish the accused in a trial held in a summary way and that he should have tried the case in a long trial and before sentence have taken into consideration the previous conviction of the accused when deciding what sentence should be imposed. It would appear that the Magistrate within his ordinary powers of a first class Magistrate without the assistance of S. 75, Penal Code, could have adequately punished the accused. We therefore accept the reference, set aside the conviction and sentence and order the accused to be retried according to law.

G.N./R.K. *Reference accepted.*

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(28) A. I. R. 1941 Sind 109

DAVIS C. J. AND TYABJI J.

Emperor

v.

Ahmed Haji Sidik — Accused.

Criminal Ref. No. 210 of 1940, Decided on 1st October 1940, made by Dist. Magistrate, Karachi, D/- 12th July 1940.

Criminal P. C. (1898), S. 562 — Cattle-lifting by youth acting in manner of practised thief — Fact that he is prepared to give sureties combined with his small age and fact that he had no previous conviction are not sufficient for application of S. 562.

Section 562 must be applied with discretion, for otherwise, rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity.

[P 109 C 2]

Where the accused convicted of cattle-lifting had acted in the manner of a practised thief the facts that he was prepared to give sureties combined with his small age and the fact that he had no previous conviction are not sufficient to justify the application of S. 562. **[P 109 C 2]**

Partabrai D. Punwani, Advocate-General — for the Crown.

A. I. Kazi — for Accused.

Davis C. J. — Notice was issued upon one Ahmed, son of Haji Sidik, to show cause why a sentence of substantive imprisonment should not be passed upon him for an offence of cattle-lifting of which he has been convicted and for which he was bound over by the Subordinate Judge and first class Magistrate, Tatta, (Mr. Dinalshah) under S. 562, Criminal P. C., on the ground of his age and antecedents. Presumably, by "antecedents" the Magistrate referred to the fact that this accused has had no previous conviction, because we can find nothing else in his favour, and we do not think that this Magistrate has dealt with this aspect of the matter with sufficient care or has put upon the record the special circumstances which in a case of cattle-lifting, we think, should exist, before section 562, Criminal P. C., is applied. Section 562, Criminal P. C., must be applied with discretion, for otherwise, rather than preventing the manufacture of criminals, it may assist in their manufacture, for it may become known that first offences even of cattle-lifting can be committed with impunity. The accused has only got to plead youth, produce sureties, show that he has no previous conviction for the sureties to be accepted, and the fact that in this case the accused in his statement so promptly offered sureties seems to suggest that he was given a hint that if he pleaded guilty he would be bound over.

The evidence, however, on the record clearly shows the guilt of the accused and would seem to show the hand of a practised thief rather than the apprentice hand of a first offender. A bullock was stolen while the owner was away for his morning prayers, and the bullock was traced to a hiding place in the jungle. The accused, however, could not be traced and so the tracking party lay in wait in ambush until the accused returned to lead the bullock away which he did at about sunset. Even then he escaped though the bullock was recovered and restored to its owner. We should have thought that upon these circumstances of the case, the Magistrate would have enquired more carefully into what he describes as the "antecedents" of the accused: he would have ascertained from the accused why he committed this offence, what work he was engaged upon, what temptation was placed in his way, who was his father, what chance there was, if leniency was shown, for his leading a life free from crime. Nothing of this sort was done, and the plea of the accused and the statement that he was prepared to give sureties combined with his age and the fact that he had no previous conviction were sufficient in the opinion of the Magistrate to justify the application of S. 562, Criminal P. C.

We do not think that these circumstances were sufficient to justify the application of S. 562, Criminal P. C. We consider that the accused acted in the manner of a practised thief, and that the Magistrate should not have dealt with this serious offence of cattle lifting in this particular fashion. The learned advocate for the accused argues that he has already been in prison for a certain period of time. It is true he was imprisoned on 3rd September, but that is not long enough for prison to exercise its disciplinary and deterrent effect. We have not only to think of the accused himself in this case, and the effect of the sentence upon him, but the necessity of a deterrent effect upon him and upon others as well. We do not think the fact that he was bound over would deter him or others from committing such a serious offence in future. With a certain amount of hesitation however we are prepared to limit the sentence of imprisonment which we consider necessary to pass upon him to six months. We therefore set aside the order of the Magistrate under S. 562, Criminal P. C., and sentence the accused for this offence of which he has been rightly convicted to six months' rigorous imprisonment.

D.S./R.K. *Order set aside.*

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(28) A. I. R. 1941 Sind 110

DAVIS C. J. AND LOBO J.

Commissioner of Income-tax, Bombay Presidency, Sind and Baluchistan — Applicant

v.

Sind Hindu Provident Funds Society, Hyderabad Sind — Assessee — Opponents.

Civil Ref. No. 69 of 1938, Decided on 9th May 1940, made by Commissioner of Income-tax, D/- 13th September 1938.

Income-tax—Assessment to tax or exemption therefrom—Law in force in year of assessment must be applied even if quantum of income is income of year preceding year of assessment.

For determining the rate of assessment to income-tax or exemption therefrom the law and statutory rules in force for the year of assessment must be applied even though the quantum of income for assessment is the income of the year preceding the year of assessment: ('32) 19 A I R 1932 Lah 575, *Rel. on.* [P 111 C 1]

Partabrai D. Punwani, Advocate-General — for Applicant.

Hukumatrai M. Eidnani — for Opponents.

Davis C. J. — This is a reference by the learned Commissioner of Income-tax, Bombay Presidency and Sind, under S.66(2), Income-tax Act, made at the instance of the Sind Hindu Provident Funds Society, Hyderabad Sind, now in liquidation, and the question of law referred to us is as follows:

Whether the Assistant Commissioner correctly held that the Government Notification No. 11 of 4th April 1936 was applicable to the assessment of the assessees levied on 28th October 1937, even though the income assessed was for the year ended 31st March 1936.

The facts of the case appear to be that the assessees submitted the return of income declaring their total income for the year ended 31st March 1936, which was of the previous year as defined in S.2 (11) of the Act, as Rs. 71,710. This income included Rs. 67,040 on account of interest and Government securities purchased through the Post Office and held in the custody of the Accountant-General, Posts and Telegraphs, and the assessee contended that all this income was exempt from tax under para. 18 (1), Income-tax Manual, Edn. 6, p. 161, which exempted, without limit, income of this nature, by a Government Notification No. 878-F of 21st March 1922. This exemption was made under the powers conferred under S. 60 (1) of the Act as it then stood.

It appears however that this notification was amended in 1935 under Notification No. 41 of 2nd November 1935, which limited the exemption of income of this nature to Rs. 22,500. But while it is now clear to us that there was a notification to this effect in November 1935, it appears that in the order of the Income-tax Officer reference is made to the notification only of 1936, and in the order of the Assistant Commissioner on appeal from the assessment of the Income-tax Officer, reference again is made to this notification of 1936, which is dated 4th April of that year; and the learned advocate for the assessees now argues before us that his clients were misled by this reference to a notification of 1936 for if they had known of this notification of 1935, they would not have asked for a reference to this Court, because their case was based upon the fact that though the assessment was for the year 1936-37, the income assessed was the income for the year 1935-36, and in the assessment of that income the law and statutory rules governing the exemption would be the law and statutory rules applicable not for the year 1936-37, but for the year of income 1935-36, so that they would get the benefit of this exemption without limit which was restricted only by the notification of 1936.

But we do not think that if there had been no notification of 1935, but only the

notification of 1936, that would have helped the assessees at all, because while it is true that the quantum of income for the assessment of the year 1936-37 was the income of the year 1935-36, the assessment was not for the year 1935-36, but for the year 1936-37, and it appears to us that the law and statutory rules applicable for determining the assessment must be the statutory laws and rules in force for the year of the assessment, i. e., in 1936-37, when the assessees would clearly be entitled only to the limited exemption of Rs. 22,500. For instance, we put it to the learned advocate that if his argument was to be accepted, an assessment in 1936-37 based upon the income of 1935-36 would be determined not upon rates in force in 1936-37 but the rates in force in 1935-36, and he admitted that this could not be the case. But he distinguished between rates at which income-tax was assessed and exemptions from liability to assessment. But we do not think any such distinction can be drawn, and though the learned advocate now admits that in view of the fact that there was a notification in force in 1935 exempting income of the kind now in question before us only to the extent of Rs. 22,500, and therefore on the argument which he placed before us and on which he relied, the assessees, his clients, would be liable to be assessed in accordance with the notification of 1935 limiting the exemption. Nevertheless he says that we should show to him a certain consideration in the matter of costs because had he known of this notification of 1935 he would not have been encouraged to ask for this reference. That may be so, but in our view even if there had been no notification of 1935, the question raised in the reference would have been decided against him.

The learned advocate said that he could find no case to support his argument. There is however a case against him referred to in A I R 1932 Lah 575.[1] We think therefore it is clear that the question referred to us must be answered in the affirmative. We do not think however that the assessees are entitled to any special consideration in the matter of costs in this reference, and we think that the ordinary rule that costs follow the event should apply in this case, and that the costs of the reference be borne by the assessees. We think the Commissioner of Income-tax is entitled to his costs including the fee of Rs. 100. Order accordingly.

G.N./R.K. *Order accordingly.*

1. ('32) 19 AIR 1932 Lah 575 : 138 I C 187 : 14 Lah 134 : 33 P L R 947, Jattushah Nathu Shah v. Commissioner of Income-tax, Lahore.

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(28) A. I. R. 1941 Sind 111

LOBO J.

Messrs. Gosho Kabushiki Kaisha Ltd. — *Respondents 1*

v.

Seth Mulchand Harichand — *Respondent 2.*

J. Misc. No. 396 of 1939, Decided on 11th October 1940.

Arbitration Act (1899), S. 11 — Award — Invalidity—Award by arbitrators filed in Court — Original appointment of arbitrators constituting tribunal bad—Subsequent realization of mistake by one party—Attempt to rectify matter—Party cannot clothe tribunal, in its inception illegal and without jurisdiction, with jurisdiction — Award is invalid and must be removed from file of Court.

If the original appointment of arbitrators is bad the tribunal constituted is without jurisdiction and no subsequent realization of a mistake or an attempt to rectify matters by one party can clothe with jurisdiction a tribunal which is in its inception illegal and without jurisdiction, and the award by such tribunal is invalid and if filed in Court should be removed from the file. [P 112 C 2]

Dipchand Chandoomal & Co. — for Respondents 1.

Srikishindas H. Lulla — for Respondent 2.

Lobo J. — An award made under the Arbitration Act has been filed by the arbitrators, two Japanese gentlemen, in this Court. On a notice issued to the respondent 2, namely, Mulchand Harichand, objections were filed on his behalf setting out various reasons for which the award should be ordered to be removed from the file. The award relates to certain disputes between the firm of Gosho Kabushiki Kaisha Ltd., on the one hand and Mulchand Harichand on the other arising out of various contracts made by Mulchand Harichand with the firm of Gosho Kabushiki Kaisha Ltd., for the purchase of Japanese piece-goods. These contracts were primarily of two kinds, contracts for the sale and purchase of forward goods and contracts for the sale and purchase of ready goods. It is also alleged on behalf of Mulchand Harichand that certain contracts which were originally for forward goods were subsequently substituted by contracts for ready goods. While the contracts for ready and forward goods both contain an arbitration clause, there is an essential difference between the arbitration clause contained in the contract for ready goods and that contained in the con-

tract for forward goods; for whereas in the contracts for ready goods the clause provides for a reference to arbitration to two European merchants, members of the Karachi Chamber of Commerce, one to be chosen by each party, the arbitration clause in the contracts for forward goods requires arbitration by two Japanese and/or European merchants, members of the Karachi Chamber of Commerce, one to be chosen by each party. The learned advocate for the respondent 2 has raised a number of points both of law and of fact on which he has contended that this award should be removed from the file. His main ground has been that the arbitrators who have made the award in this case had no jurisdiction whatsoever, that their original appointment was bad. This argument the learned advocate has based not only on one but several grounds. After much argument and after all the documents relied on by respondent 2 had been filed, specially the correspondence between the parties, the learned advocate for the respondents 1 was constrained to admit that the contention of the learned advocate for the respondent 2 that the original appointment of the arbitrators in this case was bad had to be accepted as well founded and that therefore there was no necessity for the Court to go further into the matter because as he conceded that the appointment of the arbitrators was bad the award must be removed from the file.

Apart however from the admission of the learned advocate for the respondents 1, I feel no doubt whatever that the contention of the learned advocate for respondent 2 is sound and that in this case the appointment of two Japanese gentlemen as arbitrators was bad, that the arbitrators had no jurisdiction in the matter and that this award must be removed from the file. As I have stated before there were two kinds of contracts between the parties and whereas in the contracts for forward goods the parties could appoint Japanese or European gentlemen as arbitrators, under the arbitration clause in the contracts for ready goods European arbitrators only could be appointed by the parties. The reference and the award in this case cover both contracts for ready goods and contracts for forward goods. Apparently without realizing the difference between the two arbitration clauses in these two classes of contracts the respondents 1 appointed a Japanese gentleman as arbitrator and called upon the respondent 2 to appoint his arbitrator and on his failure to do so appointed another Japanese arbitrator to act for respondent 2.

It is true that at a later stage the respondents 1 discovered their mistake and attempted to rectify matters by getting the arbitrators to exclude from the award the contracts for ready goods so as to legalise the appointment of two Japanese gentlemen as arbitrators. But surely this cannot affect the question. If the original appointment of arbitrators was bad, the tribunal constituted was without jurisdiction and no subsequent realization of a mistake or an attempt to rectify matters by one party could clothe with jurisdiction a tribunal which was in its inception illegal and without jurisdiction. In these circumstances it is quite unnecessary for me to discuss the various other grounds upon which the learned advocate for respondent 2 has urged that the award should be removed from the file. There only remains the matter of costs. Ordinarily as respondent 2 succeeds he should have the costs of these proceedings. But it appears to me that in this case I should make no order as to costs as I am not satisfied either from the correspondence which has been exhibited in this case or from the attitude adopted by respondent 2 at the hearing of this matter that he should be awarded costs. The award will therefore be removed from the file but there will be no order as to costs.

N.K./R.K. *Award removed.*

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(28) A. I. R. 1941 Sind 112

LOBO J.

Aishabai w/o Ahmed and another — Plaintiffs

v.

Mahomed Ismail s/o Haji Dada — Defendant.

Suit No. 50 of 1941, Decided on 25th February 1941.

Civil P. C. (1908), O. 40, R. 1—Defendant's brother carrying on bakery business in name of "Adam Sumar & Co." dying leaving widow and infant son—Few days before his brother's death defendant taking possession of business premises, removing board bearing name of business and putting up board bearing his name—Suit by widow and infant for mandatory injunction restraining defendant from interfering with business, for removal of defendant and for accounts — Application for appointment of receiver to carry on bakery business also filed—Appointment of receiver held impracticable and highly undesirable in circumstances of case — Status quo held could not be interfered with.

Defendant's brother who died leaving as his heirs a widow and an infant son carried on a bakery business in the name of "Adam Sumar & Co." A few days before the death of his brother the defendant entered upon the business premises, took possession, removed the board which described the business as "Adam Soomar & Co., Bakers and Confectioners," and put his own board "Ismail, D. Adam Soomar, Bakers and Confectioners." The widow and her infant son therefore filed a suit for a mandatory injunction directing the defendant to desist from interfering with the business and to remove himself from the business premises of Adam Sumar & Co., and for an account. Along with the suit the plaintiffs filed an application for the appointment of a receiver to carry on the bakery under O. 40, R. 1:

Held that it was impracticable and highly undesirable in the circumstances of the case to interfere with the status quo though ordinarily it would have been proper to appoint a receiver.

[P 114 C 1]

Order. — This is a suit for an injunction and accounts which arises in the following circumstances. In 1937 in connexion with a bakery business carried on in the name of "Adam Sumar & Co.," a suit was filed in this Court by the present defendant against Ahmed, the husband of the present plaintiff 1, for partition and accounts. There was a consent decree in that suit under which the present defendant was to receive Rupees 47-8-0 per month in lieu of his 4 annas share in the business carried on in the name of "Adam Sumar & Co.," the husband of plaintiff 1 was to carry on the business and discharge the debts, etc., and after the debts had been discharged the husband of plaintiff 1 was to continue to carry on the business and to pay 4 annas share in the profit thereof to the present defendant. The compromise decree contained other terms as well which are not relevant at present. The husband of plaintiff 1 died on 2nd December 1940 leaving as his heirs a widow, plaintiff 1 and an infant son, plaintiff 2. It is alleged that a few days before the death of Ahmed the husband of plaintiff 1, his brother the present defendant entered upon the business premises, took possession, removed the board which described the business as "Adam Soomar & Co., Bakers and Confectioners" and put his own board "Ismail, D. Adam Soomar, Bakers and Confectioners." The plaintiff, therefore, filed the present suit on 10th February 1941 for a mandatory injunction directing the defendant to desist from interfering with the business and to remove himself from the business premises of Adam Sumar & Co., and for an account.

Along with the suit the plaintiffs filed an application for the appointment of a receiver under O. 40, R. 1, Civil P. C. Notice of this application was issued to the defendant, and it is this matter which has come before me for disposal. I have heard the learned advocates for the plaintiffs and the defendant at very considerable length both today and on the 21st instant when the matter was first taken up.

Though ordinarily in a matter of this kind it would be proper to appoint a receiver, I think it is impracticable and highly undesirable in the present case to interfere with the status quo. The plaintiffs ask for appointment of a receiver to carry on a bakery, and plaintiff 1 is a woman and plaintiff 2 is an infant. The plaintiffs certainly cannot act as receivers. The learned advocate for the plaintiffs has suggested that there is plaintiff 1's father who can carry on the business and there is plaintiff 1's brother who can also do the same. But it is clear from the arguments of the learned advocates that plaintiff 1's father is a tally clerk and plaintiff 1's brother has no previous experience whatever in carrying on a bakery. To appoint an officer of this Court as receiver in this case is both impracticable and undesirable for neither the Nazir nor the official assignee, if he were appointed receiver, would be able to carry on a bakery business without the assistance of one of the parties who understand the carrying on of a bakery business. As I have pointed out above, the plaintiffs can offer no suitable person for the purpose and the defendant is not prepared to carry on the business under the supervision of an officer of this Court.

Apart from these considerations, there is also the further consideration that the material at present on the record before me reveals that the condition of the business is so desperate that it is utterly impossible for an officer of this Court to act as receiver and carry on the business. There may be some outstandings due to the business, but there is not a pie of capital. There are heavy liabilities amounting to Rs. 30,000 or Rs. 40,000 and the very rent of the premises in which the business is carried on has not been paid for several months. It would be impossible in these circumstances for any officer of the Court without necessary finance to act as receiver and carry on this business. Seeing these difficulties, I offered the learned advocate for the defendant to appoint his client as receiver, but the learned advocate declined the offer, and it appears to me on very good grounds. The defendant, he urged, had entered upon these business premises

and taken charge of the business on an express arrangement between him and his deceased brother. The defendant had been carrying on the business from December 1940 with his own money and he was not prepared to act as receiver of this business on the terms which I suggested to him, namely that he should pay Rs. 50 to the plaintiffs for their maintenance, that he should incur the expenses of ceremonies relating to the death of his deceased brother, that he should maintain monthly accounts, that he should appropriate to himself only Rs. 100 per month from the business and that he should carry on the business in the name of Adam Soomar & Co.

It appears to me that the attitude adopted by the learned advocate on behalf of the defendant is not unreasonable. There are grounds for believing that the defendant has resuscitated this bakery business by his own efforts and by means which he has been able to find, and it is not reasonable to ask him to utilize his own efforts and the means which he has been able to find in order to carry on the business saddled with liability to the extent of Rs. 30,000 to Rs. 40,000 on a remuneration of Rs. 100 per month. I can therefore well understand that the defendant declines the offer of acting as receiver in this case on these terms. What the learned advocate for the defendant proposes is that the status quo be not disturbed and the defendant be allowed to carry on this business pending disposal of this suit, on his undertaking to file in Court the accounts from December 1940 up to the end of February 1941 and thereafter accounts every month, and that after the account from December to February has been filed by him and been scrutinized by the other party the Court may determine whether the defendant should either furnish security or deposit the surplus earnings of the business in Court. In the circumstances of this case, I think that is all that can be done at present. I decline to appoint a receiver because though it may be just, it is not convenient, and hold that the status quo must continue. The learned advocate for the defendant on his behalf further undertakes to file full and complete accounts of the carrying on this business from December 1940 till the end of February 1941 within two weeks from this date, and thereafter to file in the first week of the following month the accounts of the previous months. He also undertakes to pay to the plaintiffs as interim maintenance a sum of Rs. 40 per month beginning with the month of February 1941. The matter to be called up again on 20th March 1941.

G.N./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Sind 114

LOBO J.

Sh. Manibai w/o Lalji Anandji and another — Plaintiffs

v.

Bhimji Lalji — Defendant.

Suit No. 207 of 1937, Decided on 20th December 1940.

* Hindu Women's Right to Property Act (1937)—Act is validly passed.

The language of S. 317, Government of India Act, 1935, is particularly clear and not open to any doubt and the Parliament in enacting S. 317 and Sch. 9, Government of India Act, 1935, could not have used language that could be more clear and definite. [P 115 C 2]

Hence Hindu Women's Right to Property Act (18 of 1937), which was passed as a bill by the Indian Legislature while the Government of India Act of 1919 was in force and to which assent of the Governor-General was given after 1st April 1937 is validly passed: ('39) 26 A I R 1939 All 706, *Foll.* [P 115 C 2; P 116 C 1]

Srikishindas H. Lulla — for Plaintiffs.

Kimatrai Bhojraj — for Defendant.

Judgment. — One Lalji Anandji died at Karachi on 13th July 1937. He left a son, a daughter and a widow who was his second wife. He was possessed of a valuable immovable property in Karachi and was running a grain shop in the name of Bhimji Lalji in partnership with one Andarji. In September 1937 Lalji Anandji's widow filed the present suit for a declaration, partition and accounts. She claimed in the plaint her rights as a Hindu widow under Act 18 of 1937 as amended by Act 9 of 1938. The defendant in the suit is the son of the deceased Lalji Anandji. Various defences were raised by the defendant and the contentions of the parties are covered by issues which were framed on 20th October 1938. In October 1940 the defendant applied for amendment of his written statement by the addition of the following plea:

With regard to para. 6 of the plaint, it is submitted that Act 18 of 1937 was not validly passed and has therefore no application. The said Act as a bill had been passed by both the Houses of the Indian Legislature while the Government of India Act, 1915, as amended in 1919 was in operation, but the Governor-General's assent to the measure was given only on 14th April 1937, after the coming into force of the Government of India Act, 1935, which repealed the earlier Act from 1st April 1937. The suit as brought is not therefore maintainable.

On 17th October the following additional issue was framed:

Was Act 18 of 1937 not validly passed? If so, what is the result? (Covers para. 5 of the amended written statement.)

I am asked to decide this additional issue as a preliminary issue because the parties being related are inclined to compromise; but the attitude of plaintiff 1 and the defendant in the matter of compromise must necessarily be affected and coloured by the decision of the Court on this additional issue. I have acceded to this request and propose to dispose of this additional issue as a preliminary issue. Fortunately for me the matter is not res integra, for the identical point which I have to decide was raised and decided by a Bench of the Allahabad High Court in I L R (1939) ALL 912,[1] and the entire argument on this issue before me has turned on whether this decision of a Bench of the Allahabad High Court is or is not correct. It is necessary therefore to set out in some detail the facts of the case in I L R (1939) ALL 912[1] and the ratio decidendi in that case. Mt. Janak Dulari's husband died on 26th July 1937 and in the suit in the trial Court she claimed to be entitled to a one-fourth share of the family property of her deceased husband, alternatively, either on the ground that her husband died possessed of this one-fourth share as his separate property, or that if the family had not been proved to have divided the plaintiff was under Act 18 of 1937 entitled to have this one-quarter share. In the written statement it was pleaded that:

Act 18 of 1937 was in no way valid and enforceable. It had not been validly passed by the Legislature. The Government or the Legislature had no power to enforce such an Act.

An issue was framed:

Whether Act 18 of 1937 was not validly passed by the Legislature and is unenforceable and not binding upon defendants 1, 2 and 4.

In the trial Court the plaintiff had relied upon S. 292, Government of India Act, 1935, as applying to this Act, the Hindu Women's Right to Property Act, 18 of 1937, but it was contended on behalf of the defendant that Act 18 of 1937 was passed by the Indian Legislature before 1st April 1937, the date on which part III, Government of India Act of 1935 came into force, and that the assent of the Governor-General was given to this bill on 14th April 1937, after 1st April 1937. It was therefore argued for the defence that this Act was not a law in force immediately before the commencement of Part III, Government of India Act, and therefore that S. 292 did not apply to Act 18 of 1937. The trial Court accepted this argument and held that Act 18 of 1937 was not valid and therefore dismissed the plaintiff's suit. In the first appellate Court the learned advocate for the appellant, original plaintiff, took another line. He based his argument not on S. 292, Government of India Act, but on the provisions of S. 317 of that Act and Sch. 9 to the Act. The appeal was however dismissed and the only reference to the argument of the learned advocate for the appellant on the point on which he based his appeal is to be found in the words "nor does S. 317, too of the Government of India Act, 1935, help her in any way." On second appeal before the High Court the same argument was advanced on behalf of the appellant, the original plaintiff, and is thus dealt with in the judgment of the High Court Bench:

Under the Government of India Act of 1919, Part 6, S. 63 onwards dealt with Indian legislation and the powers of the Indian Legislature. It is for the defence to show that those powers have terminated and that the Legislature did not have power to pass this Act 18 of 1937. It is true that S. 321, Government of India Act, 1935, states that the Government of India Act shall be repealed to the extent specified in col. 3 of Sch. 10 and that Sch. 10 does provide for the repeal of the Act including Part 6. But there is another section of the Government of India Act of 1935, S. 317, which provides as follows: '(1) The provisions of the Government of India Act set out, with amendments consequential on the provisions of this Act, in Sch. 9 to this Act (being certain of the provisions of that Act relating to the Governor-General, the Commander-in-Chief, Governor-General's Executive Council and the Indian legislature and provisions supplemental to those provisions) shall subject to those amendments, continue to have effect notwithstanding the repeal of that Act by this Act. Provided that nothing in the said provisions shall affect the provisions of the last but one preceding section.'

Schedule 9 to which reference is made in S. 317 (1) sets out the provisions for the Indian Legislature contained in S. 63 onwards of the Government of India Act of 1919. Apparently the section and Sch. 9 provide that the provisions of Part 6, Government of India Act of 1919 in regard to the Indian Legislature should continue to have effect notwithstanding the repeal of that Act by the Government of India Act of 1935. We are unable to read any other meaning into these provisions. The language is particularly clear and not open to any doubt whatever in our opinion, and we cannot conceive that Parliament in enacting S. 317 and Sch. 9, Government of India Act of 1935 could have used language that could be more clear and definite.

Dr. Sen for the respondents has, however, advanced the argument that Act 18 of 1937 was passed as a bill by the Legislature before 1st April 1937, when the new Government of India Act, Part 3 came into force, and the assent of the Governor-General was given on 14th April 1937 after the new Government of India Act came into force. He argues therefore that S. 317 of Sch. 9 cannot

1. ('39) 26 AIR 1939 All 706 : 185 I C 420 : I L R (1939) All 912 : 1939 A L J 875, Mt. Janak Dulari v. Sri Gopal.

apply to Act 18 of 1937 and he was quite unable to specify any wording in S. 317 or Sch. 9 which would not apply. We may note that the provisions in regard to Federal Legislature are contained in Part 2, Government of India Act, 1935, and those provisions have not yet come into force as there has not yet been any proclamation bringing them into force under S. 320, sub-s. (1). Therefore no Federal legislation has as yet been brought into force as part of the law of India and under the provisions of the Government of India Act, S. 317 and Sch. 9, the law in regard to the Indian Legislature contained in the Government of India Act of 1919 has all along continued to be the law for British India. It was natural that the framers of the Act should provide for such a course as it was not intended to bring Part 2 of the Act into force until a proclamation was made under S. 320. It appears to us that the provision made in S. 317 and Sch. 9 is intended to continue the validity of the functions of the Indian Legislature. Dr. Sen has not been able to show that there is any defect in the wording of S. 317 or in Sch. 9 which fails to carry out that obvious intention.

* * * *

For these reasons we hold that Act 18 of 1937 is a perfectly valid Act and that the plaintiff is entitled to rely on it in the present case as a perfectly valid Act. We therefore allow this first appeal and we reverse the finding of the Court below on issue 1, and as the Court below has not disposed of the remaining issues we remand this suit for disposal by the Court below on the remaining issues.

I have considered with great care the arguments advanced by the learned advocate for the plaintiffs and defendant, and I really cannot see how I can go beyond the plain language of S. 317, Government of India Act, 1935. As the learned Judges in the Allahabad case say :

> The language is particularly clear and not open to any doubt whatever in our opinion, and we cannot conceive that Parliament in enacting S. 317 and Sch. 9, Government of India Act, 1935, could have used language that could be more clear and definite.

The learned advocate for the defendant argued that the learned Judges in deciding this case were influenced by the fact that Dr. Sen, the advocate for the respondents, was not able to explain what there was in the wording of S. 317 and Sch. 9 which would not apply to Act 18 of 1937 and that he was unable to specify any wording in S. 317 or Sch. 9 which would not apply. The learned advocate argued that there was a simple answer to this point and it was that S. 317 merely kept alive in Sch. 9, Government of India Act, 1935, the previously existing procedure relating to the business of the two Chambers of the Indian Legislature and the Governor-General in relation to legislation. But this argument, as contended by the learned advocate for the plaintiffs, does not bear examination or scrutiny, for there are innumerable provisions contained in Sch. 9, Government of India Act, 1935, which relate to substantive rights and not merely to procedure. The judgment of the Allahabad High Court in I L R (1939) ALL 912[1] was given in August 1939 and though we are now in December 1940 it does not appear that the point has been raised again in any other High Court in India. It does not appear to have come before the Federal Court; it certainly has not in I L R (1939) ALL 912,[1] because the High Court of Allahabad refused a certificate under S. 205, cl. (1), Government of India Act, 1935. In fact the origin of the amendment of the written statement in this case and raising of the plea embodied in this issue which I am deciding is nothing more or less than an anonymous article which appeared in the journal part of the Madras Law Journal, 1940, Part II at p. 63. It is entitled "A Critical Note on I L R (1939) ALL 912,[1]" and the gist of the argument of the anonymous writer of this article is to be found in the following passage :

> It is true that by virtue of the provisions of Ss. 316 and 317 of that Act the former Indian Legislature is to exercise the functions of the Federal Legislature during the transitory period. This however cannot imply that the Indian Legislature functioning under Part 13 of the Act of 1935 is the same juristic body as that which functioned under the Act of 1919. On the commencement of Part 3 of the Act of 1935 the members of the Council of State and Legislative Assembly who had been elected or nominated to represent Burma or Burma constituencies dropped out. Again the Indian Legislature after that date can exercise its powers freely only as regards the items constituting the Federal list and in a restrictive degree over the subjects specified in the concurrent list and not at all in the case of the items forming the Provincial list, whereas formerly its powers were far wider in range and operation. Do not these facts suggest that on the coming into operation of the Government of India Act 1935 there has been a notional dissolution, in any event in the first instance, of the Indian Legislature that functioned under the Act of 1919 and a subsequent resurrection of it with reduced powers and altered composition by virtue of part. 13 of the Act of 1935? If there was then a dissolution even if it be only notional, will not the bills pending the assent of the Governor-General at that time lapse?

This argument of a 'notional dissolution' and a 'notional resurrection' does not at all appeal to me and I prefer to base my decision on this issue on the plain words of S. 317 read with Sch. 9, Government of India Act, 1935, and the judgment of their Lordships of the Allahabad High Court in I L R (1939) ALL 912.[1] My answer to this issue therefore is that Act 18 of 1937 was validly passed.

D.S./R.K. *Order accordingly.*

(28) A. I. R. 1941 Sind 117

DAVIS C. J. AND TYABJI J.

Motiram Chandiram — Appellant

v.

Emperor.

Confirmation Case No. 33 of 1940 and Criminal Appeal No. 206 of 1940, Decided on 8th October 1940, against conviction and sentence of death passed by First Addl. Sess. Judge, Hyderabad, D/- 29th July 1940.

(a) Criminal trial—Murder—Accused's intentions can be inferred from his acts.

There is no reason why in a murder case as in other cases, a man's intention should not be inferred from his acts. [P 119 C 1]

(b) Penal Code (1860), S. 300, Illus. (c) — Illustration (c) applies also to revolver.

Illustration (c) to S. 300 applies as much to a revolver as to a sword or club. [P 119 C 1]

(c) Criminal trial —Private defence —Burden of proving such defence is on accused.

If a person accused of murder pleads right of private defence the burden of proving any such defence rests, of course, on him. [P 119 C 2]

(d) Penal Code (1860), S. 300, Exceptions — Evidence showing that murderer is entitled to benefit of any exception—Falsity of his defence or mistake of Court will not deprive him of that benefit.

If upon the evidence it appears that the murderer is entitled to the benefit of any one of the Exceptions of the Code neither the ignorance of the accused nor the falsity of his defence nor any mistake or omission of the lower Courts or advocates should deprive him of the benefit of it. [P 119 C 2]

(e) Railways Act (1890), S. 3 (7) — Cabinman is railway servant.

A cabinman is a railway servant within the meaning of S. 3 (7). [P 119 C 2]

(f) Railways Act (1890), S. 132 — Name or address need not be in fact incorrect.

Section 132 does not require that either the name or the address should be in fact incorrect. [P 120 C 2]

(g) Railways Act (1890), S. 132 —S. 132 does not require that both name and address should be incorrect.

Section 132 does not require that both the name and address should be believed to be incorrect but either the name or address. [P 120 C 2]

(h) Penal Code (1860), S. 302 — Murder by man armed with deadly weapon against unarmed person — Death sentence is proper.

In case of murder by a bully, a man armed with a deadly weapon against a man who was unarmed, death sentence is proper. [P 120 C 2; P 121 C 1]

Tikamdas Wadhumal — for Appellant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — In this case one who is described in the charge as Motiram alias Ghulam Rasul, son of Chandiram alias Ghulam Muhammad alias Fazli Saikh, has been convicted by the Additional Sessions Judge of Hyderabad of the murder of one Hiro, cabinman, on the night of 15th August 1939 at Kotri railway station and sentenced to death. The accused has appealed and the case comes before us for confirmation of the death sentence. The case of the prosecution was that a police constable named Karimdad was on special duty at Kotri railway police station at about 11 P. M. on 15th August 1939. He saw a man standing under a nim tree near the Muslim tea-stall and was suspicious and told the police jamadar, Nabi Ahmad, and Nabi Ahmad in his turn told Karimdad to keep an eye upon the suspected person, while he himself went and informed the Assistant Station Master and brought one Daniel who is ticket-collector to question the suspected person about his ticket. The replies of this person being unsatisfactory he was taken to the ticket collector's office. On inquiry it appeared that he had come from Karachi to Kotri without a ticket and as he said that he had no money to pay for one, the ticket collector prepared a complaint under S. 112, Railways Act, against him. This complaint had to be approved and signed by the Assistant Station Master, and while Jethanand, the ticket collector, was waiting in the Assistant Station Master's office, the appellant who was the suspected man escaped through one of the doors. The man was pursued by Karimdad, police constable, and others crying "thief, thief," and as he ran towards the bridge he fired at a man who was coming from the opposite direction but he missed his mark. He then continued to run along the railway line pursued by Karimdad, some policemen and some railway employees until he found his way barred near the railway cabin by one Hiro, a cabinman. He fired at Hiro thrice and Hiro fell, while he made good his escape through a cluster of trees near the graveyard of Nathoshah. This man, who it is alleged by the prosecution was the appellant, was arrested some ten days after on 26th August 1939 at Sukkur railway station at about 5 in the morning. On his arrest a revolver with five cartridges in the chamber and nine loose cartridges were taken from his possession.

On the day when the appellant made good his escape, a formal complaint made by Karimdad, police constable, was recorded by Nur Illahi, Sub-Inspector of Police in charge of the railway police. In the complaint Karimdad stated that when he was on special duty at the time of the 6 up-train

he saw a man whom he suspected : he informed the railway Baboo and then the ticket collector, Mr. Daniel, inquired about his ticket; a complaint for travelling without a ticket was made against him and he was taken to the Assistant Station Master's room, but he suddenly escaped through a door and ran. He, Karimdad, Nabi Ahmed and some railway employees gave chase, and this man whom they described as a "thief" ran towards Gidu side; near the guard's room a man came out at whom the thief fired and the thief continued to run; then Hiro, cabinman, came down from his cabin and was about to catch the thief when he fired three shots at him and wounded him and Hiro fell down and the thief made good his escape in the khabar trees. A description of his appearance was given in this complaint which is as follows :

His colour is black, thin in body, his height is about 5 feet 6 inches, age 25 years, bare-headed, hair vertical, beard shaved, small moustaches, wearing white canvas boot and having long coloured socks and nicker and colour coat.

The arrest of this appellant was made by Umerkhan, now Inspector of Police at Karachi, then at Sukkur, who arrested him because when questioned he took to his heels. Umerkhan had already the description of the wanted man concerned in the murder at Kotri railway station and this description tallied with the man he had arrested. In the evening the Sub-Inspector of Police came from Kotri and took the appellant into his custody. The case of the appellant is that this case is of a completely mistaken identity, that he was not at Kotri railway station, he was not found without a ticket and though he was arrested at Sukkur he had no revolver in his possession. He said the case was brought against him as a result of the enmity of the police. He had eloped with a niece of the Police Sub-Inspector Xavier. He was tried and acquitted and he has thus been involved out of enmity. He says his name is not Motiram but Ghulam Rasul, son of Gulam Muhammad, by caste a Shaikh, and by religion a Mussalman. Now, there can be no doubt in this case that Hiro, cabinman, was killed by violence. Udharam, the Assistant Station Master, states that five minutes after the appellant had escaped from his office he got a telephone message from the cabin saying that Hiro, cabinman, had been shot; he went to the spot and saw Hiro lying injured and crying out in pain. He told him that he had been shot in trying to catch a man whom he saw running away and who he thought had looted the office cash. Udharam took Hiro to the railway hospital at Kotri and gave him into the charge of the doctor. Half an hour after, however, the doctor told him that the condition of the patient was serious and that he should be sent to the Civil Hospital at Hyderabad ; he sent him, therefore, to the Civil Hospital by a special train.

The Medical Officer who examined Hiro at the hospital at Hyderabad states that his condition was serious when he was first received ; he could make no statement ; his body was cold and his pulse was imperceptible, but they gave him an injection and appropriate treatment, and he was able to make and he made a dying declaration which was recorded by a policeman in the presence of Dr. Deumal and Dr. Ramchand. At 6 A.M. the man died. According to this dying declaration, the stranger's first shot missed the unfortunate cabinman and he continued in his pursuit and he was hit twice thereafter. He says the revolver was about the size of the hand. He said he did not know who the thief was. He said it was dark and he could not recognize him. The dying declaration then is of no value as to the identity of the appellant but shows precisely the circumstances under which this brave man Hiro met his death. This dying declaration is corroborated by the evidence of constable Karimdad and Nabi Ahmed, head constable. The post mortem showed that Hiro, as he said, was shot twice. The first injury had caused perforation in the right lung at four places: the other injury had fractured the collar bone ; death was due to shock and hæmorrhage ; the first injury, that in the chest, was sufficient to cause death. The two injuries were caused by two separate revolver shots and two pieces of lead were extracted by Dr. Deumal from the body of Hiro ; one broke into two pieces as it was removed. There can then be no doubt that this cabinman Hiro was murdered.

The question then to be considered is whether he was murdered by the appellant. The learned advocate for the appellant has argued that this is a case of mistaken identity, and he has referred us to two cases to show how dangerous it is to base a conviction upon identity alone. But we have not here a case of dacoits breaking into a house at night when it was dark or there was little light and of one of the assaulted persons in his terror having merely glimpses of the assailants ; but we have here a case of a man who was suspected, who was watched, who

was brought into bright light—the electric light, first in the Ticket Collectors' office, then in the Assistant Station Master's office, and he was actually recognized by one Muhammad Din, a telegraph man, who came that night into the Ticket Collectors' office when the appellant and the railway officials were there. Further the man gave his name to the Ticket Collector, while filling in the form relating to a complaint under S. 112, Railways Act, as Motiram, son of Chhediram, though he now protests that he is not Motiram, son of Chhediram. There is evidence which appears reliable, for instance, of John Philips Xavier, the Sub-Inspector of Police, and Vazirchand, a railway guard at Kotri, and of Ali Bakhsh, another railway guard at Kotri, that this man was in employment at Sukkur and was known as Moti, while Muhammad Din, the telegraph man, knew him as one who had come to him with a letter from one Fazul Rahman and who had given his name to this Muhammad Din as Ghulam Rasul.

So this is not a case of an accused person whose identity and appearance were unknown previously to this offence to all the witnesses, nor is it a case of one who was seen by witnesses for the first time but briefly and in the dark, and if the evidence of the prosecution witnesses is substantially true, the appellant, despite all his cunning and his evasions, is clearly proved to be the murderer of Hiro, the cabinman. (After considering evidence his Lordship proceeded.) We think beyond a shadow of doubt that the identity of the appellant as one who had shot and killed the cabinman Hiro on the night of 15th August at Kotri is proved. We also think that there is no doubt that this killing was murder. This unfortunate man Hiro was shot at short range in a vital part of the body by the appellant with a deadly weapon. There is no reason why in a murder case, as in other cases, a man's intentions should not be inferred from his acts. This unfortunate Hiro was shot deliberately in a vital part of his body. Illustration (c) to S. 300, I. P. C., applies as much to a revolver as to a sword or club. The act of the appellant then comes clearly under the clause "thirdly" in S. 300, I. P. C. It can also come well within "fourthly" of the same section, that is, when firing with this deadly weapon at this close range, the appellant must have known that his act was so imminently dangerous that it must in all probability cause death. But it is quite unnecessary to rely on this part of S. 300, I.P.C.

We have considered the question, though it was not raised or argued throughout the proceedings in the lower Courts or in this Court, whether the appellant's offence was reduced from murder to manslaughter by reason of the right of private defence, in that the attempt made to arrest him by the police and railway servants was unlawful, so that he would be entitled to resist arrest, and though he would not be entitled to kill, having used more force than necessary, his offence might be culpable homicide not amounting to murder and not murder. The burden of proving any such defence rests, of course, on the accused himself, and neither the appellant nor his advocate has raised this defence. Nevertheless, if upon the evidence it appears that the appellant is entitled to the benefit of any one of the Exceptions of the Code, neither the ignorance of the appellant nor the falsity of his defence nor any mistake or omission of the lower Courts or advocates should deprive him of the benefit of it. In this case all the efforts of the appellant and his advocate were devoted to proving a false defence, but on consideration of the evidence on the record and the law, we think it is clear that the appellant is not entitled to the benefit of any Exception in the Penal Code. Section 101, I. P. C., would not apply to the facts of this case nor would Excep. 2 to S. 300, I. P. C. Section 101, I. P. C., is as follows:

101.—If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in S. 99 to the voluntary causing to the assailant of any harm other than death.

Exception 2 to S. 300, Penal Code, is as follows:

Culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence.

Here it could not be said, even if the appellant had the right of private defence, that he acted in good faith within the meaning of that term in the Penal Code or that he caused no more harm than was necessary when he shot this cabinman fatally. And we think it is clear that the arrest of the appellant by police officers or railway servants or by any person called to their aid by the police officers or railway servants was lawful. Hiro, the cabinman, was moreover a railway servant within the meaning

of S. 3 (7), Railways Act, and he was obviously called to their aid by the police officers and other railway servants under the provisions of S. 132, Railways Act. The material portion of S. 132, Railways Act, is as follows :

Arrest of persons likely to abscond, or unknown.

132. (1).—If a person commits any offence under this Act other than an offence mentioned in the last foregoing section, or fails or refuses to pay any excess charge or other sum demanded under S. 113, and there is reason to believe that he will abscond, or his name and address are unknown, and he refuses on demand to give his name and address, or there is reason to believe that the name or address given by him is incorrect, any railway servant or police officer, or any other person whom such railway servant or police officer may call to his aid, may, without warrant or other written authority, arrest him.

In this case a complaint under S. 112, Railways Act, was under preparation against the appellant and awaited the necessary approval and signature of the Assistant Station Master when the appellant escaped. The offence mentioned in the complaint under preparation against him was under S. 112, Railways Act, that of entering a railway carriage in contravention of S. 68 of the Act, that is travelling without a ticket in a first class carriage from Karachi to Kotri with intent to defraud and is included in the term "any other offence" in S. 132 of the Act. Furthermore, the Ticket Collector Jethanand had asked the appellant to pay the fare and the excess charge and the appellant replied he had no money. He, therefore, failed or refused to pay the excess charge properly demanded under S. 113, within the provisions of S. 132, Railways Act. But a still further condition was required to be fulfilled under S. 132 of the Act before police officers or railway servants could arrest the appellant without a warrant or written authority under S. 132, and that was, that the person concerned should have refused on demand to give his name and address, or that there should be reason to believe that the name or address given by him was incorrect.

Now the appellant gave a name but no address, and though the police or the railway servants may have had no definite reason to believe that the name given was incorrect when it was first given, they had every reason to believe that the name was incorrect when, while the complaint was before the Assistant Station Master for approval and signature, the appellant escaped through the door; also no address whatever had been given. They had also in addition every reason to believe that he would abscond when, in fact, he did escape in the manner described. The section does not require that either the name or the address should be in fact incorrect. The words of the section are: "there is reason to believe that the name or address given by him is incorrect," but in fact the name when it was given was the incorrect name of the appellant in the sense that he had abandoned it. While he gave his name as Motiram, son of Chhediram, he was known to the telegraph peon Muhammad Din as Ghulam Rasul, who at that very time asked the appellant why he gave the name of Motiram. At the trial the appellant contended that his name had always been Ghulam Rasul. In the complaint first made under S. 326, Penal Code, against him, his name is shown as Motiram Chandiram alias Ghulam Rasul. In his statement in the committing Magistrate's Court his name is given as Motiram alias Ghulam Rasul, father's name Chandiram alias Ghulam Muhammad.

It might be said then that his name was Motiram Chhediram as entered in the form by the Ticket Collector, but whether his name was Motiram Chhediram at the time or that he had in fact changed his name and religion, so that in the Sessions Court he could rightly claim to be Ghulam Rasul Sheikh, by religion Mussulman, is not clear. We do not, however, think it matters. He gave no address and the police and railway servants had every reason to believe when he escaped that the name given was incorrect. Section 132, Railways Act, does not require that both the name and address should be believed to be incorrect but either the name or address. The police officers and railway servants had therefore the right under S. 132, Railways Act, to arrest the appellant, so that all other questions apart, he had no right of private defence. Though the appellant did not raise this question of arrest and did not plead or rely upon any Exception in the Penal Code, in view of the serious nature of the case, we have in bounden duty considered it. We find, however, he is not entitled in any way to the benefit of any Exception in the Penal Code. There remains then only the question of sentence. We do not think in this case there is any mitigating circumstance of any kind. The murder was that by a bully, a man armed with this deadly weapon against a man who was unarmed. We think it is necessary, in order to safeguard innocent men like Hiro in the future, that guilty men like the present appellant should be

hanged. We therefore confirm the conviction and the sentence of death passed on the appellant and dismiss the appeal.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Sind 121

LOBO AND WESTON JJ.

Moujali s/o Baksho and others
Appellants
v.
Emperor.

Criminal Appeals Nos. 218 to 220 of 1939, and 210 and 211 of 1940, Decided on 8th October 1940.

(a) Criminal P. C. (1898), Ss. 239 (d) and 235 (1) — Principle applicable to trial of single person under S. 235 (1) is extended by S. 239 (d) to trial of several persons jointly—Five persons charged under S. 366, Penal Code, kidnapping girl in order that she should submit to illicit intercourse—After being kidnapped girl forced to illicit intercourse with accused who was one of aforesaid five persons — Accused charged under S. 376, Penal Code, also—Offences under Ss. 366 and 376, Penal Code, held committed in course of same transaction — Joint trial of all five accused persons held justified under S. 239 (d).

The principle contained in S. 235 (1) which applies to the trial of a single person is extended by S. 239 (d) to the trial of several persons jointly. Just as one person can under S. 235 (1) be tried for several distinct offences if they are committed in one series of acts so connected together as to form the same transaction, under S. 239 (d), several persons can be tried for different offences provided the different offences are committed in the course of the same transaction. [P 126 C 2]

Five persons who were charged under S. 366, Penal Code, kidnapped a girl with the object that she should be submitted to illicit intercourse. After being thus kidnapped, the girl was forced to illicit intercourse with the accused who was one of the five persons aforesaid. The accused was charged under S. 376, Penal Code, as well. All the five accused persons were tried jointly :

Held that the two offences under Ss. 366 and 376, Penal Code, were committed in the course of the same transaction, and therefore the joint trial of the five accused persons was justified under Sec. 239 (d) : ('26) 13 A I R 1926 Sind 151 and ('27) 14 A I R 1927 Sind 39, *Rel. on*; ('29) 16 A I R 1929 Lah 496 and ('33) 20 A I R 1933 Cal 563, *Disting.*; ('28) 15 A I R 1928 Lah 751, *Ref.* [P 127 C 1]

(b) Penal Code (1860), S. 376 — Conviction should not be based on victim's evidence alone.

In a case of rape a conviction should not be based on the evidence of the victim alone. [P 127 C 2]

Asafali (from Delhi) — for Appellants (Sardarkhan and others).

Partabrai D. Punwani, Advocate-General — for the Crown.

Lobo J. — In these appeals we have before us the case of 8 men, Maujali, Ghulam Nabi, Allahrakhio, Sardarkhan, Shahzado, Rahmat, Danglo and Jhangal, who have been convicted in two separate trials of various offences relating to and connected with an incident which took place in the village of Mouladad Lolai in the Sukkur District as far back as October or November 1937. The three appellants in Criminal Appeals Nos. 218 to 220 of 1939, Maujali, Ghulamnabi and Allahrakhio were convicted by the Additional Sessions Judge of Sukkur on 14th October 1939 of an offence punishable under S. 366, Penal Code, and were sentenced each to rigorous imprisonment for 4 years in Sessions Case No. 45 of 1939. In the committal proceedings in the Court of the first class Magistrate of Ghotki preceding this sessions trial the learned Magistrate, while committing for trial these men Maujali Ghulam Nabi and Allahrakhio, had simultaneously discharged the five other appellants now before us.

Moujali, Ghulam Nabi and Allahrakhio appealed to this Court from jail; their appeals were admitted to regular hearing, and at this hearing by a Division Bench of this Court the attention of the learned Judges was drawn to the order of discharge in regard to the other five appellants before us, and the learned Judges ordered the arrest of these five appellants and notice to issue to them to show cause why they should not be committed for trial to the Court of Session for an offence under S. 366, Penal Code, and appellant Sardar Khan also for an offence under S. 376, Penal Code. The matter was heard on 17th April 1940 and the learned Judges "in exercise of the powers under S. 439 read with S. 423 (1) (c) and (d), Criminal P. C.," set aside the order of discharge and committed these five appellants before us to the Court of Session "to be tried for the offence of abduction for which they had been wrongly discharged." The order proceeds :

In addition Sardarkhan will be tried for an offence of rape following the abduction for the purpose of illicit intercourse.

The five appellants in Appeals Nos. 210 and 211 of 1940 were thereafter tried by the learned Sessions Judge of Sukkur on charges of offences under Ss. 148 and 366, or in the alternative under S. 366 read with S. 149, Penal Code, and appellant Sardar Khan also on a charge under S. 376, Penal Code, and were convicted. Under S. 148, Penal Code, these appellants were sentenced each to rigorous imprisonment for three years; under S. 366 or S. 366 read with S. 149, Penal Code, appellants Shahzado, Rahmat, Danglo and Jhangal were sentenced each to three years rigorous imprisonment and appellant Sardarkhan as the ringleader to five years

rigorous imprisonment. Sardarkhan was further sentenced under S. 376, Penal Code, to five years rigorous imprisonment. In addition to the substantive sentences of imprisonment imposed on Sardarkhan he was also sentenced to pay a fine of Rs. 15,000 or in default to undergo rigorous imprisonment for five years. In the case of each appellant the sentences of imprisonment were directed to be concurrent. Before us the appeals of these five appellants were argued by Mr. Asafali, and Appeals Nos. 218 to 220 of 1939 were dealt with as jail appeals as they originally were. This judgment, however, though it deals primarily with Appeals Nos. 210 and 211 of 1940, covers and disposes of all these appeals.

The facts in these appeals are quite simple but need to be set out in some detail. Mt. Sonan, daughter of Gamno, resided with her father in the hamlet of Mouladad Lolai in the Sukkur District. The appellant, Sardarkhan, a zamindar of Daraho in the Kandhkot Taluka of the Jacobabad District and head of the Sundrani tribe, had asked for the hand of this girl, Mt. Sonan, some three or four years before the incident in this case. Gamno had refused the offer and had persisted in his refusal even when his headman Muradkhan and one Khanmahomed Lolai had tried to influence him in favour of Sardarkhan. Gamno appears to hold conservative views; Sardarkhan did not belong to his tribe and was therefore not eligible. A year or two after he married his daughter Mt. Sonan to his first cousin, Muhammad Baksh Lolai. At the time of the incident in October or November 1937, (the date is not definitely known) Muhammad Baksh was working as a muccadam on the Dangro Canal and for this reason Mt. Sonan lived with her father Gamno. One evening about sunset, while Gamno was smoking his huka in his house and Mt. Sonan was engaged in cooking the evening meal in the open in front of the house, a body of eight armed men appeared on the scene. They were Sardarkhan, Shahzado Rahmat, Moujali, Allahrakhio, Danglo, Jhangal and Ghulam Nabi. Sardarkhan and Shahzado were armed with guns; the others had hatchets, lathis and lorhs. Three of these men including Sardarkhan were on horseback and the rest on foot. Sardarkhan ordered his men to seize the girl, Mt. Sonan. She was seized and forcibly placed on one of the horses, Sardarkhan mounting the same horse with her. Gamno who made some feeble attempt to rescue her was pushed aside and Mt. Sonan was carried off by these raiders. It is alleged that Hussain Baksh and Jumo Lolai who were in the village heard and saw what happened; but they were afraid to interfere with an armed body of Sundranis. After Mt. Sonan had thus been carried off, Hasul and Moghul Lolai came to the scene and were told by Gamno what had happened. It was decided that they should follow up Sardarkhan and his party. They were doing this and had gone some distance when they met Jatoi Mahar and Khanmahomed Gunjo who said they had seen the girl being carried away, but the raiders had gone a considerable distance and Gamno and his party had no chance of coming up to them as it was already late. Gamno and his friends then returned home. On the following morning Gamno went to his Wadero Khanmahomed Lolai. He was advised that he should approach Sardarkhan to restore his daughter to him. On the following day Gamno accompanied by Khanmahomed, Muradkhan and one Jumo went to Daraho, the village of Sardarkhan in the Jacobabad district. Sardarkhan is alleged to have offered money compensation for the girl, but this was declined by Gamno and his companions who threatened to file a complaint. Ultimately Sardarkhan is alleged to have promised to return the girl within eight days and on this promise Gamno and his party returned home. On the expiration of the stipulated period the complainant, Khan Mahomed and Muradkhan again went to Sardarkhan, but now he definitely refused to return the girl.

Now Khanmahomed is the Wadero of Gamno and Muradkhan is the Nekmari of the Lolai tribe. But one Mir Zaindikhan was the overlord of the Lolais, Sundranis, Jagranis and Urbanis. As obviously Mir Zaindikhan would have influence over Sardarkhan the head of the Sundrani tribe, Gamno and his friends went to Mir Zaindikhan and complained to him about what had happened. Mir Zaindikhan promised to look into the matter and asked the complainant's party to come to him after some 12 or 13 days. The party accordingly returned to their village. After 12 or 13 days they again went to Mir Zaindikhan who said he had written to Sardarkhan and would write to him again and that they should come back on 12th or 14th December. They returned with Mir Zaindikhan's letter addressed to Muradkhan who had not accompanied the party on this second visit to Mir Zaindikhan. On the appointed date Gamno and his friends again went to Mir Zaindikhan. But

this time he informed them that he was helpless and could do nothing in the matter. Gamno returned disappointed to his village and after a few days went to lodge a report with the police at Sarhad police station. He was directed to the police station at Ghotki, and his first information report was recorded at Ghotki by head constable Ahmed Yarkhan at 4 P. M. on 28th December 1937. In this first information report Gamno named the 8 appellants before us as accused; he set out Sardarkhan's attempts to get the hand of his daughter Mt. Sonan; he described the raid on his house and the kidnapping of Mt. Sonan; he named all the persons who knew or had been informed about the kidnapping of Mt. Sonan; he referred to his visits to Sardarkhan and Mir Zaindikhan and the letters written by the latter, and explained how after the failure of every attempt to recover his daughter, he in the last resort, had come to lodge a first information report.

The police investigation which followed the lodging of this first information report makes a strange and extraordinary story. On the day following the recording of the report, head constable Ahmed Yarkhan went to the village of the complainant and there prepared a mashirnama and recorded the statements of most of the witnesses mentioned in the first information report. Thereafter, accompanied by the complainant, the head constable proceeded to the village of Sardarkhan; but here the activity displayed by the head constable suddenly ceased. It is alleged that he left the complainant in the village and himself went to record the statement of Mir Zaindikhan. When he returned the complainant urged him to proceed with the investigation, to arrest Sardarkhan and the other accused and to search their houses. The head constable is said to have excused himself from taking any further steps on the ground that Sardarkhan had promised to return the girl within eight days. Gamno then returned to his village. After eight days he went to the head constable again at Ghotki. He said he had heard nothing about his daughter. He again urged the head constable to proceed with the investigation, but the head constable told him that he could do nothing as the Inspector of Police at Sukkur had sent for the papers of the case and that in fact he was personally proceeding with the papers that day to Sukkur. Gamno on learning this on the quiet took the same train for Sukkur. According to Ahmed Yarkhan on 29th December 1937 he recorded the statements of Muradkhan, Jatoi, Jumo, Khan Mahomed Ghunjo, Khan Mahomed Lolai, Moghul and Hasul at the complainant's village. He then proceeded to Sardar Khan's village, to find the accused and secure the girl. Only Sardar Khan was in the village and he did not arrest him as he wanted to secure the girl in the first instance and was afraid that if he made the arrest before she was secured she might not be forthcoming. He says on 30th December he went to Mir Zaindikhan and requested him to arrange for the production of the girl. On 31st December he returned to his headquarters at Ghotki; and on 1st January 1938 handed over the papers to Sub-Inspector Khubchand who was the officer in charge of the police station. On 8th January on orders having been received from the Inspector of Police at Sukkur, he was given the papers of the case to take them to Sukkur. It does not appear that Sub-Inspector Khubchand took any active steps in the investigation of this case between 1st and 8th January 1938 when the papers were called for by the Inspector of Police at Sukkur.

Ahmed Yarkhan on his way to Sukkur with the papers in this case is alleged to have met at Rohri Station the Sub-Inspector of Police of Sukkur, Rasulbaksh, who was on his way to Hyderabad to give evidence in a Sessions trial. According to the complainant, along with Inspector Rasulbaksh at Rohri Station was appellant Sardarkhan and other Sundrani friends of his, and he expostulated with the Inspector that he should be associated with the very man whom he was charging with having kidnapped his daughter and when he had sent for the papers relating to the investigation of the case. Nothing appears to have been done by the police till Inspector Rasulbaksh returned to Sukkur from Hyderabad on or about 13th January 1938 when he found the investigation papers lying in his office awaiting his return. He did not however do anything further till 17th January when it appears that he went to a place called Kadirpur and there examined appellants Sardarkhan and Shahzado and two witnesses Hasul and Kambirkhan, who appear to have been men whose names Inspector Rasulbaksh got from the appellants. No further progress can be traced in the investigation of this case during the rest of the month of January and the month of February. The papers appear to have gone backward and forward between Inspector Rasul Baksh and Sub-Inspector

Khubchand; but neither Inspector Rasul Baksh nor Sub-Inspector Khubchand who were both examined as witnesses in the case are able to give an intelligent and coherent account of what investigation was being done during this period. On the contrary, there is every reason to believe that this period of apparent inactivity on the part of the police officers concerned in the investigation of this case was taken up by negotiations between the police and appellant Sardarkhan for the production or return of the girl, Mt. Sonan, in such manner as to exonerate Sardarkhan from all responsibility for what had happened. The complainant Gamno appears to have made every effort to get the police do something but without result. By the beginning of March Gamno despaired of accomplishing anything with these police officers and on 4th March he filed a private complaint in the Court of the District Magistrate of Sukkur against all the eight appellants before us reiterating the facts set out by him in his first information report recorded on 28th December 1937. This complaint was forwarded by the District Magistrate on 5th March to the mukhtiarkar and first class Magistrate, Ghotki, to be proceeded with according to law.

A few days after however something entirely unlooked for happened. One Jhangal who had lost some buffaloes was in search of them and passed by a village not far from Tangwani railway station. Feeling thirsty he asked two or three women whom he saw there for a drink. One of them brought him water to drink. She happened to be Sonan whom he knew and she told him to inform her father of her whereabouts. Jhangal appears to have continued his search for his buffaloes and ultimately returned to his village near that of the complainant Gamno only about 10th March. He informed Gamno of the whereabouts of Sonan. A search party set out consisting of Gamno, Mehar, Jhangal Jatoi, Muradkhan and Dhani Baksh. When they got near the village of Roshan Bangulani where Jhangal had seen the girl, Mt. Sonan, Mt. Sonan herself came running to them and was brought away by her father and his party without resistance by anyone.

There can be no doubt that the complainant Gamno having by good fortune thus recovered possession of his daughter thought he now held in his hand a trump-card: if he produced Mt. Sonan before the police there could not possibly be any further delay in the investigation of the case. On 11th March accordingly Gamno produced his daughter before Sub-Inspector Khubchand at Ghotki police station. But Gamno was doomed to disappointment. Even the production of Mt. Sonan and the recording of her statement did not make the police officers concerned bestir themselves. Delay followed upon delay. Every sort of excuse seems to have been resorted to to justify delay: the witnesses could not be found; the witnesses when found refused to come to Sukkur to have their statements recorded under S. 164, Criminal P. C., the girl Sonan was first alleged to be ill and then said to have gone to the Bahawalpur State and no identification test could be held, and so on and so forth. In fact it was only on 8th August 1938 that Mt. Sonan was put through an identification test in regard to appellants Sardarkhan, Shahdazo, Rahmat, Danglo and Jhangal. And of all places the village of Sardarkhan was selected for holding this identification test, and a mashirnama was prepared of an identification parade at which it is alleged that Mt. Sonan failed to identify these five appellants as having been among the raiders who had carried her off in October or November 1937, and the same mashirnama recorded the fact that Mt. Sonan was unable to show the house of Sardarkhan where according to her she had been confined for no less than two months. This identification test was followed on 29th september 1938 by an identification test in respect to appellants Moujali, Ghulam Nabi and Allahrakhio. A mashirnama in respect thereof was prepared in which it is alleged that Mt. Sonan picked out these three appellants as being among the party of raiders who had kidnapped her. At last on 1st October 1938 Moujali, Ghulam Nabi and Allahrakhio, appellants, were challaned for an offence under S. 366, Penal Code.

If the history of the police investigation in this case is strange and extraordinary, almost equally strange is the history of the complaint filed by Gamno on 4th March 1938 which had been transferred by the District Magistrate of Sukkur on 5th March for disposal by the Mukhtiarkar and first class Magistrate of Ghotki. This learned Magistrate began by returning the papers to the District Magistrate of Sukkur stating that he had no power to hold committal proceedings in a case exclusively triable by a Court of Session. The District Magistrate had to send back the papers to this Magistrate of Ghotki and inform him that he did have such powers. Next a question was

raised about the entire matter being referred to a Jirga and this question was debated till about the end of April 1938 when the first class Magistrate of Ghotki wrote to the District Magistrate that the papers be returned to him to enable him to proceed with the case. But from the diary of the learned Magistrate it appears that the papers were still in the office of the District Magistrate of Sukkur on 23rd May 1938.

The next hearing before the learned Magistrate was on 22.6.1938 and the diary shows that though the complainant was present, none of the accused were present, and fresh process was issued against them. Throughout July no progress was made in the case by the learned Magistrate. Most of the accused remained unserved and Jhangal who had been served submitted a medical certificate that he was ill. Nothing appears to have been done during the months of August and September 1938. On 1st October 1938 the police challan in the case which originated with Gamno's first information report of 28th December 1937, was sent up to the Court of the Sub-Divisional Magistrate of Rohri and in that learned Magistrate's Court on 13th October 1938 the Public Prosecutor moved that the case pending in the Court of the first class Magistrate of Ghotki on the same facts and circumstances should be sent for so that "both the cases may be tried together as one in the Court of the Sub-Divisional Magistrate of Rohri." This was done. But on 27th October 1938 the Sub-Divisional Magistrate, Rohri, transferred both the cases to the Court of the first class Magistrate of Ghotki "to be tried as one case" and the accused were released on bail. Nothing was done in the month of November by the first class Magistrate of Ghotki. But, on 19th December 1938, for the first time some progress was made and the depositions of three prosecution witnesses were recorded. Thereafter the proceedings in the Court of the first class Magistrate of Ghotki dragged on till June 1939. Probably the learned Magistrate is not entirely to blame for this because the diary shows that somewhere in March 1939 the proceedings were removed from his Court and transferred to the Court of the first class Magistrate, Mirpur Mathelo, and again transferred back to him in the middle of April 1939. Ultimately, on 20th June 1939 the learned first class Magistrate of Ghotki committed the present appellants Moujali, Ghulam Nabi and Allahrakhio for trial to the Court of Session on a charge under S. 366, Penal Code, and by a separate order discharged the other appellants Sardarkhan, Shahzado, Rahmat Danglo and Jhangal.

So much then for the facts connected with these appeals, the investigation by the police and the history of the cases till they came ultimately to be tried in the Sessions Court. Towards the end of his arguments before us Mr. Asafali, the learned advocate for the appellants in Criminal Appeals Nos. 210 and 211 of 1940 contended that the trial of these five appellants jointly was in contravention of the provisions of S. 239, Criminal P. C., that the trial was therefore illegal, that the convictions recorded were bad and the appellants were entitled to be acquitted. His contention was that the offence under S. 376, Penal Code, with which appellant Sardarkhan had been charged was an offence distinct from the offences under Ss. 148 and 366, Penal Code, with which all the five appellants were charged; that these distinct offences were not committed in the course of the same transaction. The kidnapping of the girl Sonan ended when according to the prosecution she entered the kote of appellant Sardar Khan. Thereafter Sardarkhan, committed a distinct offence of concealment of a kidnapped girl and it was while he was committing this latter offence, that he is alleged to have committed an offence of rape on the girl Sonan. It cannot therefore, the learned advocate urged, be said that the offence under S. 376, I. P. C., alleged to have been committed by Sardarkhan was committed in the course of the transaction of kidnapping. The learned advocate further contended that even if the purpose for which the girl was kidnapped was illicit intercourse, and the appellant Sardarkhan had illicit intercourse with the girl after the kidnapping which was the object and purpose for which the girl had been kidnapped by all the five appellants, still rape was an offence distinct from mere illict intercourse and for that reason as well cannot be regarded as an offence committed by appellant Sardarkhan in the course of the transaction of kidnapping. Mr. Asafali in the first instance relied in support of this argument on the case in A I R 1929 Lah 496;[1] there it is said that S. 368, I. P. C., only applies where abduction or kidnapping has been completed and the wrongful concealment follows upon such completed abduction.

1. ('29) 16 A I R 1929 Lah 496, Nawab Khan v. Emperor.

Joint trial therefore of different persons under Ss. 358 and 366, I. P. C., is bad, the two acts not forming part of the same transaction. But the case is really of no assistance whatever because in that case only four out of the five accused were charged with the offence under S. 366 and the fifth accused was only charged with an offence under S. 368, I. P. C., and in the body of the judgment the learned Judge distinctly states :

Had all the present five men been charged under S. 366, there would have been no difficulty in holding that there was at most only one act of abduction.

The judgment besides is of a single Judge of the Lahore High Court and it is to be noted that in AIR 1928 Lah 751,[2] the Lahore High Court had taken a different view in a case where three persons had been jointly tried, two being charged under S. 366, I.P.C., and one under S. 368, I. P. C. Mr. Asafali next relied in support of his argument on the case in A I R 1933 Cal 563.[3] It was held there by a Bench of the Calcutta High Court that the joint trial of an accused charged with an offence under S. 366, I.P.C., and an accused charged with commission of both abduction and kidnapping is irregular and prejudicial to the accused, and consequently a conviction based on such a trial should be set aside. But it appears from the judgment in this case that of the appellants six in number, five had been charged under S. 366, I. P. C., and one under S. 368, I. P. C., and against the person charged under S. 368, I. P. C., there was no charge under S. 366, I. P. C., and it further appears that even of the five appellants convicted under S. 366, I. P. C., one had been charged with kidnapping and abduction and others had been charged with abduction only. For the learned Judges say :

In the case before us, there can be no doubt that the charges as framed, which four of the accused persons were to answer, were entirely defective in law and were not in accordance with the proposition clearly laid down by this Court in the cases referred to above. The charges against these accused were not legally framed, and they were, in our judgment, prejudiced at the trial, on account of that.

On the other hand our attention had been drawn by the learned Advocate General to the case in 20 S L R 74,[4] where an accused was charged with offences under Ss. 366 and 420, I. P. C., for having kidnapped a minor girl 9 years old, with intent that she might be compelled to marry against her will and shortly thereafter for having cheated another person by falsely representing to him that the kidnapped girl was her daughter and thereby having dishonestly induced him to part with a sum of money as consideration for his marriage with that girl. It was held that the trial of the accused on both these charges was legal as the two offences though separate were so connected together as to form one and the same transaction within the meaning of S. 235 (1), Criminal P. C., and the joinder of the two charges was therefore permissible in law. As to the interpretation of the words "in the course of the same transaction" the learned Judges in this case say :

The real and substantial test in determining whether several offences are so connected together as to form one transaction depends upon whether they are related together in point of purpose or as cause and effect or as principal and subsidiary acts so as to constitute one continuous act.

Now it is true that this was the case of one accused person tried for two different offences under the provisions of S. 235 (1), Criminal P. C., but Cl. (d) of S. 239, Criminal P. C., provides that persons accused of different offences committed in the course of the same transaction may be tried together, and there can be no doubt that the principle contained in S. 235 (1), Criminal P. C., which applies to the trial of a single person is extended by Cl. (d) of S. 239, Criminal P. C., to the trial of several persons jointly. Just as one person can under S. 235 (1), Criminal P. C., be tried for several distinct offences if they are committed in one series of acts so connected together as to form the same transaction, under S. 239 (d), Criminal P. C., several persons can be tried for different offences provided these different offences are committed in the course of the same transaction. As in 20 S L R 74,[4] so in the present case the very purpose for which the prosecution alleged that Mt. Sonan was kidnapped by, inter alia, these five appellants was that she should be submitted to illicit intercourse, and if after she was thus kidnapped, Mt. Sonan was forced to illicit intercourse with appellant Sardarkhan, it is idle to contend that the two offences under Ss. 366 and 376, Penal Code, were not committed in the course of the same transaction. The learned Advocate-General also drew our attention to the case

2. ('28) 15 A I R 1928 Lah 751 : 109 I C 224 : 29 Cr L J 496, Dosa v. Emperor.
3. ('33) 20 A I R 1933 Cal 563 : 144 I C 93 : 34 Cr L J 682, Mozam Dafadar v. Emperor.
4. ('26) 13 A I R 1926 Sind 151 : 93 I C 248 : 27 Cr L J 456 : 20 S L R 74, Mt. Hussain Bibi v. Emperor.

in 21 S L R 107,[5] and to the remarks in this case at p. 113 where the learned Judges say:

The joint trial of the accused depends upon the question whether the offences committed by them formed part of the same transaction or not. This was a question of fact pure and simple.

We do not think that there is any substance in this legal point raised by the learned advocate for the appellants and we are quite satisfied that on the facts of this case the joint trial of these five appellants was justified under cl. (d) of S. 239, Criminal P. C. We next proceed to examine the case of the appellants on its merits. (His Lordship discussed the evidence and proceeded.) Our conclusion therefore is that all the appellants before us have been rightly convicted of the offence under S. 366, Penal Code, and the appellants in appeals Nos. 210 and 211 of 1940 have also been rightly convicted of the offence under S. 148, Penal Code. There remains the charge of rape against the appellant Sardarkhan. Dealing with this part of the case the learned Sessions Judge has stated :

To substantiate the charge of rape one has to look at Mt. Sonan's evidence. Now Mt. Sonan has undoubtedly been got at, and she has, in consequence, made some statements which are not believable. That means that if the evidence of rape consisted only of her oral assurance without any other circumstances to support it that evidence would be insufficient.

But there are other circumstances which I think show that she is speaking the truth. That she was carried off for the purpose of sexual intercourse by Sardarkhan there can be no doubt whatever. That is proved by the evidence of her father to the effect that she was carried off by force and the fact that Sardarkhan tried to buy her from her father. She was kept hidden for several months by Sardarkhan and there can therefore be no doubt that when she says that Sardarkhan had intercourse with her she is speaking the truth.

The question is was this intercourse voluntary or not. I think not. She was forcibly seized, and carried off by Sardarkhan. It has never been suggested by the defence that she was a willing party and even Jhangal, a hostile witness, says that when he went to Roshan Bangulani's village, she came up to him and asked him to let her family know where she was.

Now the rescue party did not arrive until the following day. Has she been a willing prisoner, she both could and would have warned the people in the Bangulani's house to remove her so that should a rescue party arrive, they would draw a blank. But she did not do this, and when the party came to rescue her, she was eager to be taken away. That is not the conduct of person who is willing to submit to sexual intercourse.

I hold these circumstances corroborate Sonan's statement that intercourse was had with her by accused 1 and that it was had without her consent and I find accused 1 guilty of rape.

Now no doubt such an inference as the learned Judge has drawn from the circumstances of the case is not unreasonable, but we do not think that in this case it would be safe to draw such an inference in order to convict the appellant Sardarkhan of the offence of rape. The evidence of Sonan, the alleged victim, is not entirely reliable. She has undoubtedly lied when she stated that during all the period that she was away from her father's house she neither washed nor changed her clothes. Whether this was mere exaggeration on her part or whether she intended by such statement to defend her virtue, we are not much concerned; but she has not told the truth in this matter and in a case of rape it has been repeatedly held that a conviction should not be based on the evidence of the victim alone. No doubt the circumstances referred to by the learned Judge corroborate Sonan's evidence to some extent on this point, but the clothes that Sonan was wearing during her captivity have not been produced and there is no medical evidence to support the charge of rape. It is true that Sonan was a married woman, but she was less than 16 years of age and she was living away from her husband and with her father, and in these circumstances it appears to us medical evidence would have been of considerable help. In the absence of such corroborative evidence we do not think we should uphold the conviction of appellant Sardarkhan on the charge of rape. We have already remarked that the learned Sessions Judge has recorded a great deal of evidence concerning, and has devoted a great portion of his judgment to, the police investigation in this case and the conduct of the police officers concerned, and has expressed his conclusions in no uncertain terms. He has stated :

Accused 1 is a zamindar and has money. Throughout the case, the police officers concerned, namely the Deputy Superintendent, the Inspector and the Sub-Inspector of Police and indeed the head constable, did their utmost to prevent Sardarkhan being brought to justice, and the complainant vainly tried to get justice from the police and so made a direct complaint to the District Magistrate himself.

And again :

The circumstances surrounding the case are peculiar and it is to be hoped unique. From beginning to end corruption has been rampant and every effort has been made to defeat the ends of justice.

And again :

Such then is the lengthy history of this investigation. This history shows clearly enough that the police had every intention of bringing Gamno's case to naught, and that they did so, prompted and aided at every turn by the accused.

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5. ('27) 14 A I R 1927 Sind 39: 98 I C 49: 27 Cr L J 1233; 21 S L R 107, Emperor v. Lukman.

And at the end of his judgment the learned Judge states :

Lastly, it is clear from the evidence that the conduct of the police officers concerned, Khan Sahib Moulabaksh, Inspector Rasulbaksh, the Sub-Inspector Khubchand and also the head constable Ahmed Yarkhan has been in the highest degree dishonest and indeed criminal, and in my view the strongest action requires to be taken against them.

Having gone through the entire evidence in this case we cannot but feel that there is much in the police investigation in this case and in the conduct of the police officers concerned which calls for inquiry. But we do not think it necessary or desirable to go any deeper into this matter because we feel no doubt that a copy of the learned Sessions Judge's judgment has been forwarded to Government and that the police officers referred to by the learned Sessions Judge will be called upon to account for their conduct in the investigation of this case and we do not wish to embarrass these police officers in any proceedings that may be taken against them or in any inquiry that may be instituted. We, however, cannot refrain from remarking that it is indeed lamentable that an entire body of police officers from a head constable to a Deputy Superintendent of Police whose bounden duty it was to investigate with expedition and bring to justice the perpetrators of such a crime as has been revealed in this case should not only have failed to do but should be alleged to have aided and abetted the perpetrators of that crime to evade the arm of the law. The police officers who have dealt with the investigation of this case would appear to have many things to explain ; as the learned Judge states :

the case diaries and all miscellaneous applications concerning the case including Gamno's various petitions for justice to the District Superintendent of Police have been destroyed, both the originals at the police stations and the copies in the Deputy's office, although admittedly under the rules all these papers should now be in existence.

One cannot understand why the head constable Ahmed Yarkhan did not arrest the appellants in these appeals on 29th December 1937 after he had recorded the first information report of Gamno and the statements of his witnesses. It is very difficult to understand the indifference and apathy of Ahmed Yarkhan and Sub-Inspector Khubchand between the 29th December 1937 and 8th January 1938. It is very difficult to understand why the Deputy Superintendent of Police at Sukkur should on 7th January 1938 have called for the investigation papers from the Sub-Inspector with so much urgency following up a letter on the subject with a telegram. If the police officers even at this early stage of the investigation were not acting in concert with the appellant Sardarkhan it is difficult to understand how Inspector Rasulbaksh should have been found in the company of Sardarkhan at the railway junction at Rohri on 8th January 1938 when head constable Ahmed Yarkhan and the complainant Gamno arrived at that station on their way to Sukkur. There is no explanation as to what the police officers were doing between 8th January and 11th March 1938 when Gamno confronted the Sub-Inspector at Ghotki with his daughter Sonan. It is difficult to understand why the clothes that Sonan was wearing were not taken possession of and sent to the Chemical Analyser for examination and why the girl Sonan was not herself submitted to medical examination. There is nothing on the record that we can find to explain the entire apathy of the police officers concerned from March to October 1938. It passes one's comprehension that the Deputy Superintendent of Police should have directed the holding of an identification by Sonan of appellant Sardarkhan and his companions in the very village of Sardarkhan.

But as we have said before these police officers will no doubt have an opportunity of explaining their conduct in a calmer atmosphere than that in which they gave their evidence in the Sessions trial and we do not wish to embarrass them in any way or to prejudge their case. We have not as a matter of fact used the evidence with regard to the police investigation in this case or the evidence relating to the association of the police officers with the appellant Sardarkhan for any purpose other than as a background for the proper appreciation of the evidence of the prosecution witnesses and specially the evidence of the complainant Gamno. The appeals of Moujali, Ghulam Nabi and Allah Rakhio have not been separately argued before us, but the conclusions that we have arrived at cover the cases of these appellants as well as that of Sardarkhan and the other appellants in Criminal Appeals Nos. 210 and 211 of 1940.

We accordingly confirm the convictions of Moujali, Ghulam Nabi and Allaharakhio for the offence under S. 366, I. P. C., and the sentences of four years rigorous imprisonment imposed upon them ; and we also confirm the convictions of the appellants Sardarkhan, Shahzado, Rahmat, Danglo and Jhangal for the offences under Ss. 148 and 366, I. P. C.

and the sentences imposed upon them by the learned Sessions Judge. We however reverse the conviction of appellant Sardarkhan for the offence under S. 376, I. P. C., and the sentence imposed upon him with regard to that conviction. We see no reason to interfere with the sentence of fine imposed upon appellant Sardarkhan by the learned Sessions Judge. No doubt, the fine is heavy, but, as the learned Sessions Judge has remarked, Sardarkhan has been guilty of an outrageous offence and has exhibited an entire and absolute disregard for law and order, and in our estimation he fully merits the sentence imposed upon him by the learned Sessions Judge in the exercise of his discretion. Except therefore that we reverse the conviction and sentence of appellant Sardarkhan on the charge of rape, we confirm the convictions and sentences of all these appellants and dismiss these appeals.

G.N./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Sind 129

DAVIS C. J. AND WESTON J.

Muhamad Bakhsh — Appellant

v.

Emperor.

Confirmation Case No. 22 of 1940 in Criminal Appeal No. 147 of 1940, Decided on 20th September 1940, against conviction and sentence of death passed by Sess. Judge, Sukkur, D/- 12th June 1940.

(a) Criminal trial — Confession — What is confession explained.

No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence or at any rate substantially all the facts which constitute the offence. An admission of gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession: ('39) 26 AIR 1939 P C 47, *Rel. on.* [P 131 C 1]

• (b) Evidence Act (1872), Ss. 18 to 21—Ss. 18 to 21 apply also to admissions in criminal cases — Incriminating statements not admissible as confessions are admissible under Ss. 18 to 21.

There is nothing in Ss. 18 to 21 to suggest that they apply to civil cases and civil cases only. Sections 18 to 21 apply also to admissions in criminal cases. Hence, incriminating statements not admissible as confessions in evidence will not necessarily be excluded. They may be admissible as admissions against interest under Ss. 18 to 21 : ('40) 27 A I R 1940 Sind 53, *Ref.* [P 132 C 1]

(c) Criminal trial —Evidence— Extra-judicial confessions — Evidentiary value.

It is true, extra-judicial confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to leave no reasonable doubt as to their truth. [P 132 C 2; P 133 C 1]

(d) Penal Code (1860), S. 302 — Cruel and wanton murder—Fact that it was committed by ignorant men excited by communal feelings is no ground for reducing death sentence.

Death sentence awarded in the case of a cruel and wanton murder cannot be reduced on the ground that the murder was one committed by ignorant men disturbed and excited by the events of those days when communal feeling wasextreme. [P 133 C 1]

(e) Evidence Act (1872), Ss. 24 to 26 — Admission should be rejected when made in such circumstances that if admission amounted to confession it would be excluded by Ss. 24 to 26.

It is an ordinary rule of prudence that a Court should reject an admission made by an accused under such circumstances that, if the admission amounted to a confession, it would be excluded by any of Ss. 24 to 26. [P 134 C 1]

D. N. O'Sullivan — for Appellant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — The appellant in this case is one Muhammad Bakhsh, and he has been convicted by the Sessions Judge of Sukkur of the murder of one Rangalmal and sentenced to death. The case also comes before us for confirmation of the death sentence. The case for the prosecution briefly is that Rangalmal, a Hindu hawker, used to go out daily in the morning on his rounds and return late in the afternoon and that on the late afternoon of 25th January 1940 he did not return. Rangalmal used to live with his brother Gelomal, but when Rangalmal did not return, Gelomal became anxious, for, in those days, Hindus were being murdered, so he and his cousin Lomomal went outside the village and called out the name of Rangalmal, but they got no answer. Gelomal being afraid to venture out further alone went to a Mahomedan fellow villager called Khanwand Bakhsh and asked him to go with him in search of his brother. They went first to Tahar village but Rangalmal had left and they were leaving the village when they met one Allahdino who told them that he had seen the body of a man lying on the track in what was called the Black Block. Gelomal and Khanwand Bakhsh went there and found the dead body to be that of Rangalmal and returned to their village and told their Mukhi Taromal. They then informed the Wadero of the village Maluk Khan, and he sent a man to fetch the other Waderos Nawabhan and Dur Muhammad Khan and the pagi Khanwand Bakhsh. All these men then went to the scene of the offence and at midnight Gelomal was sent to make a complaint at Pano

Akil police station. Gelomal, however, first went to his village to fetch a Mahomedan companion and made his complaint at Pano Akil at 8 A. M. In the meantime the others remained near the body guarding the footprints and at 1 A. M. Sardar Khan Bahadur Ali Murad Khan arrived.

In the morning Khanwand Bakhsh, the pagi, started to track the footprints. He found a shoe and some baked gram, three sets of footprints, two of which were of naked feet, he recognized to be of the appellant and Khanwand Bakhsh, the son of Lal Bakhsh. These footprints were round the body and by following them the pagi came to the donkey of the deceased tied to a tree with an axe wound on its forehead. The pagi accompanied by Maluk Khan and Nawab Khan traced the footprints to the appellants's village while Khan Bahadur Sardar Ali Murad Khan remained at the scene of the offence. When Maluk Khan and his companions got to the appellant's village they saw the appellant standing outside his house and they noticed blood stains on his clothes. They taxed him with this offence and after some hesitation he admitted that he had committed it. They took him back to the scene of the offence where Khan Bahadur Sardar Ali Murad Khan was waiting. The Sub-Inspector who had set out for the scene of the offence met the party who were bringing the appellant with them and he made a mashirnama of the appellant's clothes, attached them, recorded the statements of Maluk Khan, Nawab Khan and Khanwand Bakhsh tracker. He then went to the scene of the offence, made a mashirnama of the tracks and Khan Bahadur Sardar Ali Murad Khan was one of the mashirs. The Sub-Inspector had sent for the medical officer who arrived and held a post mortem on the spot, and the Mukhtiarkar and first class Magistrate, Pano Akil, also came. A bloodstained axe was found near the donkey.

The appellant made what is characterized as a confession of a self-exculpatory nature before the Mukhtiarkar and first class Magistrate, Pano Akil. In this statement the appellant said that he and Khanwand Bakhsh were standing with their cattle on the forest track when Rangalmal came along. They asked him for a pice worth of dates but he abused them and attacked the appellant with a stick whereupon Khanwand Bakhsh threw Rangalmal to the ground and he, the appellant, struck him on the head with an axe. Khanwand Bakhsh then took the axe which the appellant had relinquished and struck Rangalmal with it. Khanwand Bakhsh left the village in the morning to go to the State where he lives. The prosecution, however, contend that the statement of the appellant, so far as it exculpates him, is untrue, for the circumstantial evidence shows that the donkey was first struck, that Rangalmal ran for his life, was overtaken by the two accused and killed. The appellant retracted his confession and in Court said that it had been extorted from him. He said that Nawab Khan, Maluk Khan and Khanwand Bakhsh were his enemies because of a broken betrothal and he denied the blood-stained clothes were his or that he went that day near the scene of the offence.

There can be no doubt that Rangalmal was killed. The medical evidence shows that there were nine injuries : eight of these were incised wounds and each of the first three injuries was sufficient in the ordinary course of nature to cause death. The mashirnama and the evidence of the mashir Khan Bahadur Sardar Ali Murad Khan shows that the body was lying between the forest boundaries on the track badly cut about the head. Gelomal identified the body as that of his brother. There can be no doubt that Rangalmal was murdered, and there is no reason to doubt the account given by Gelomal of his brother's movements. The question then to be considered is whether the appellant took part in this murder. The most important evidence against the appellant is that of footprints, the extra judicial confession to the Waderos and the statement, described by the learned Judge to be of an exculpatory nature, made by the appellant before the first class Magistrate on 26th January at Pano Akil, and the blood stains on his clothes.

We think it better to deal first with the confession, because the learned Judge relied on this so far as it implicated the appellant and rejected it so far as it exculpated him, and it is argued before us that since the judgment of the Privy Council in I L R (1939) Kar (PC) 123,[1] a confession must be accepted or rejected as a whole, and it is not now possible for a Court to read a confession with other evidence on the record and accept that part of it which it believes to be true and reject that part of it which it believes to be false. That judgment of the Privy Council has already been much dis-

1. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : I L R (1939) Kar (P C) 123 : 66 I A 66 : 18 Pat 234 (P C), Narayana Swami v. Emperor.

cussed from the point of view whether S. 27, Evidence Act, is repealed pro tanto by S. 162, Criminal P. C., which the Privy Council now hold applies to accused or at least witnesses who subsequently become accused, as to witnesses at the trial, and already there are differing decisions of the High Courts on the point. The Madras and Nagpur High Courts hold that S. 27, Evidence Act, is quite independent of S. 162, Criminal P. C.: ILR (1939) Mad 947;[2] A I R 1940 Nag 66;[3] but the Lahore High Court takes a different view: A I R (1940) Lah 129.[4] In the course of that judgment however the question whether a statement which contains self-exculpatory matter can amount to a confession was considered. Their Lordships of the Privy Council said in this connexion in I L R (1939) Kar (P C) 123[1]:

In view of their Lordships' decision that the alleged statement was inadmissible by reason of S. 162, the appellants' contention that it was inadmissible as a confession under S. 25, Evidence Act, becomes unnecessary. As the point was argued however and as there seems to have been some discussion in the Indian Courts on the matter it may be useful to state that in their Lordships' view no statement that contains self exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of gravely incriminating fact, even a conclusively incriminating fact is not of itself a confession, e. g., an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in Art. 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions; in order to have a general term for use in the three following articles confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused 'suggesting the inference that he committed' the crime.

Now the retracted confession made by the appellant in its material parts is as follows:

I and my cousin Khanwand Bakhsh were both standing with our cattle in the forest track. One Hindu Rangal was coming on donkey from the village of Tahir Chachar. We were purchasing dates of one pice from him. He then abused our sister saying that we owed him some money. My companion was giving him one pice but the bania said that we should pay him previous debt first before he could give anything else. Then the bania got down from the donkey and broke a stick and raised it against us and struck me on my turban. My companion then caught hold of him and felled him on the ground. I had a hatchet with which I struck him on the head with sharp side. I gave him only one blow and the bania fell down face downwards. I then went away. My companion Khanwand Bakhsh then took up that hatchet which I left there and gave blows to the bania with it. I do not know how many. Khanwand Bakhsh again did not meet me. He was in the village at night. In the morning he went away to the State where he earns. There were slight marks of blood on my clothes and they have been attached by the police. The clothes that I am wearing now have been given to me by my relations on the road.

Now, clearly, this statement is something less than a confession to murder with which offence the appellant has been charged and of which he has been convicted. It may be a confession to culpable homicide not amounting to murder, but the statement does not admit the offence of murder in terms or substantially all the facts which constitute the offence, for, although, the appellant admits the use of the hatchet, he says it was used in self-defence. But we do not see how his statement can be excluded either from evidence or from consideration merely because it is not a full confession or is what we might call a partial confession. We think the statements made by the appellant in his retracted confession against his interests are admissible under Ss. 18 to 21, Evidence Act. This question was considered, though not at length, in the case in I L R (1939) Kar 800.[5] It was suggested to us that the provisions of the Evidence Act relating to admissions were intended to apply to civil cases only, for instance, the reference to an "agent" in S. 18 of the Act would be quite inapplicable to an accused in a criminal case where personal responsibility—*mens rea* the guilty mind—is an essential element in an offence and it may be that the compilers of the Evidence Act had in mind the definition of "confession" in Art. 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed

2. ('39) 26 AIR 1939 Mad 856 : 184 I C 593 : 41 Cr L J 41 : I L R (1939) Mad 947 : (1939) 2 M L J 455, In re Subbiah Tevar.
3. ('40) 27 AIR 1940 Nag 66: 185 I C 310: 41 Cr L J 158, Motilal Puransao v. Emperor.
4. ('40) 27 AIR 1940 Lah 129 : 188 I C 498 : 41 Cr L J 591 : I L R (1940) Lah 242 (F B), Hakam Khuda Yar v. Emperor.
5. ('40) 27 A I R 1940 Sind 53 : 187 I C 576 : 41 Cr L J 477 : I L R (1939) Kar 800, Allahwarayo Daryakhan v. Emperor.

the crime. This definition of "confession" is no longer to be accepted in view of the Privy Council judgment referred to, and many decisions based upon that principle must now be deemed overruled, though the effect will be to make a statement which is something less than a confession free of those restrictions which relate to confessions proper under the Evidence Act. On the other hand, incriminating statements not admissible as confessions in evidence will not necessarily be excluded. They may be admissible as admissions against interest under Ss. 18 to 21, Evidence Act.

We do not think it can be said that Ss. 18 to 21, Evidence Act, do not apply to admissions in criminal cases. The illustrations given apply to criminal cases, though, it is true, some of these admissions are in favour of the person making them, and are therefore admissible otherwise than as confessions, but there is nothing in the sections to suggest that they apply to civil cases and civil cases only. Rather it appears to the contrary. It is therefore as admissions against his interest and as something less than a confession that we consider the partial confession of the appellant. The definition of "confession" as given by the Privy Council appears, as the learned advocate for the appellant points out, in some of the older cases. For instance, in 7 ALL 646,[6] Straight J. referring to this question said (p. 648):

> It is conceded by Mr. Hill, and even by Mr. Strachey, that the word 'confession' must be understood in the same sense in all the sections of the Evidence Act which relate to confessions. It must be construed as meaning the same in S. 30 as in Ss. 24, 25 and 26. Now, it appears to me that to accept Mr. Strachey's interpretation would lead to this result, and I put it as a *reductio ad absurdum*, that if *A* and *B* were jointly tried for the murder of *C* and it was proved that *A* said he was passing along a road, the scene of the murder, about the time *C* was murdered, upon the strength of such statement anything else he might have said implicating *B* might be taken into consideration against *B* as a confession made by *A*. I cannot think that this was ever intended by the Legislature. What was intended was, that where a prisoner—to use a popular phrase—'makes a clean breast of it,' and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in S. 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

In 11 Bom L R 633,[7] the distinction between a statement giving rise to an inference of guilt and a confession to a crime was pointed ont. Now, these admissions made by the appellant in what is said to be a confessional statement, now retracted, go far to prove his guilt, for he admits that he struck the bania with a hatchet. It is not clear from his statement whether he struck the bania after he had been felled to the ground by his companion and was helpless, or whether he struck the bania with the axe to defend himself against the bania's assault upon him with a stick, but not only is the allegation that the bania first attacked these two Mahomedans with a stick improbable in the extreme in view of all the circumstances of the case, but, as the learned Judge points out, it is proved by the evidence of the footprints to be false. We can see no reason to reject the evidence of the footprints. It would appear that it was as the result of the tracking of the footprints that the search party were led to the appellant's village. It is true that the pagi recognized the footprints of the appellant when he saw them—there is nothing improbable in this — and it might be said that it was as the result of this recognition and not as the result of tracking that the party went to the appellant's village. There is reason to suppose that this was the case, for, as the learned Judge points out, the footprints showed that the bania got off his donkey and was chased 37 paces before he was overtaken and killed. The map does not appear to us particularly helpful, but the evidence of the mashir and the mashirnama and the pagi makes this position clear. The wound on the donkey's forehead is also significant. This injury was in all probability given to the donkey when the bania riding on his donkey was stopped by the appellant. The pagi's evidence shows the footprints of the appellant and another running beside the bania as he sought to escape. Those footprints then returned to the place where the donkey was found tied in the forest. This evidence of footprints appears to us reliable and very strongly corroborates the retracted admissions made by the appellant.

There is then the question of the extra-judicial confession. It is true, extra-judicial

6. ('85) 7 All 646 : 1885 A W N 131, Queen-Empress v. Jagrup.

7. ('09) 11 Bom L R 633 : 3 I C 742, Emperor v. Santya Bandu.

confessions are to be regarded with caution, but it does not follow that they are always to be rejected. They may be made in such circumstances as to leave no reasonable doubt as to their truth. The two witnesses Maluk Khan and Nawab Khan are both responsible Waderos and one of them is the Wadero of the appellant. They are men of some 60 years of age. No enmity between them and the appellant was in fact proved. The allegations of enmity are too remote, even if proved, to affect this case. Both Maluk Khan and Nawab Khan say that when they tracked the footprints of the appellant and came upon him and taxed him with the murder he admitted the murder. There is nothing improbable in this, regarding all the circumstances. The mere presence of the pagi or tracker does not make this statement inadmissible as a confession made to a police officer nor was it made under any threat or inducement to the Waderos. Moreover, the clothes of the appellant were bloodstained and he has attempted no explanation of this. He can only explain his incriminating admissions before the Magistrate by the allegation of threats of violence to himself and of dishonour to his womenfolk at the hands of the police and by allegations of enmity against the Waderos which appears to us both unsubstantial and unsubstantiated. We must therefore confirm the conviction. The murder, undoubtedly, was one committed by ignorant men disturbed and excited by the events of those days when communal feeling was extreme. But we cannot on that account reduce the sentence for this cruel and wanton murder to one of transportation for life. We must therefore confirm the conviction and sentence of death and dismiss the appeal.

Weston J.—In view of the judgment of the Privy Council in I L R (1939) Kar (P C) 123,[1] a statement of the accused person containing exculpatory matter cannot be termed a confession. But except so far as the application of S. 30, Evidence Act, may arise in relation to a co-accused, it seems to me only a matter of degree, not involving of itself any question of admissibility, whether a statement recorded under S. 164, Criminal P. C., amounts to a confession in relation to the charge eventually preferred, to a confession of some lesser offence, or only to an incriminating admission. Section 21, Evidence Act, which makes admissions relevant against the person who made them, or his representative in interest, is unqualified in this respect, and I can see no reason for holding that admissions are a class of statements relating to civil suits, while nothing short of a confession can be relevant in criminal proceedings. A suggestion was made before us that the grouping of the sections which deal with admissions and of those which deal with confessions indicates that they are entirely different matters. If any inference is permissible from the grouping of sections, it seems to me to be against the theory put forward, for, while Ss. 17 to 23 deal with admissions, and Ss. 24 to 30 with confessions, S. 31 again deals generally with admissions. Also S. 27 makes relevant statements leading to discovery whether those statements amount to confessions or not, and even if S. 27 is to be regarded as repealed pro tanto by S. 162, Criminal P. C., as the Lahore High Court has held, the fact that in the group of sections dealing with confessions, statements not amounting to confessions find place, has some significance to show that a confession is a species of the more general admission. Admissions are defined in Ss. 17 to 20. Of these Ss. 19 and 20 and part of S. 18 deal with certain statements which amount to admissions in suits, and we are concerned with S. 17 and part of S. 18. Section 17 is as follows :

An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

And the first part of S. 18 reads :

Statements made by a party to the proceeding, or by any agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

That the word 'proceeding' in these sections should be given its ordinary general meaning as including all proceedings, civil and criminal, seems very clearly indicated by the use of the word 'suit' in the latter part of S. 18 and in Ss. 19 and 20 when defining particular forms of admissions, and of the words 'civil cases' in S. 23. Section 21 makes admissions relevant against persons who made them, or against his representative-in-interest. It is true that in criminal proceedings admissions made by an agent of an accused are not ordinarily relevant; but, having regard to the words of S. 21, which must be read with the first part of S. 18, even if this means any qualification of S. 21 in its application to criminal proceedings, it appears no reason for denying all application of S. 21 to criminal proceedings. It is in fact by reason of S. 21 that

confessions are relevant, for there is no other general section under which they fall. Sections 24 to 26 are excluding sections. Section 27 is only a proviso to S. 26 and possibly also to Ss. 24 and 25. Section 28 removes under certain circumstances the ban of S. 24. Section 29 provides that if a confession is otherwise relevant, it does not become irrelevant because it was made under certain circumstances, and lastly S. 30 only makes relevant against a co-accused a confession already relevant against the accused who made it.

If then we have to look to S. 21 for the relevancy of confessions, there is no room for the argument that S. 21 applies only to suits, and that admissions cannot be proved against an accused in criminal proceedings. I see no difficulty in the fact that stringent provisions exist in Ss. 24 to 26 in regard to confessions, which have not been applied expressly to admissions. It is an ordinary rule of prudence that a Court should reject an admission made by an accused under such circumstances that, if the admission amounted to a confession, it would be excluded by any of these sections. I agree therefore that the admissions made by the appellant in the statement recorded under S. 164, Criminal P. C., are relevant. I also agree that if these admissions are considered together with the other evidence, there can be no doubt as to the guilt of the appellant, and that the appeal must fail.

D.S./R.K. *Appeal dismissed.*

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* (28) A. I. R. 1941 Sind 134

DAVIS C. J. AND TYABJI J.

Ali Gohar Mahi Machi — Appellant

v.

Emperor.

Confirmation Case No. 36 and Criminal Appeal No. 214 of 1940, Decided on 25th October 1940, against conviction and sentence of death passed by Addl. Sessions Judge, Nawabshah, D/- 6th August 1940.

* (a) Evidence Act (1872), S. 25—Applicability of S. 25 is not limited only to confessions of offences with which accused was charged.

The prohibition contained in S. 25 is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of any offence made by the accused to a police officer, and it makes no difference whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to a police officer. In other words, the terms of S. 25 do not limit its applicability only to confessions of offences with which the accused was charged. [P 137 C 1]

Hence the confession made by the accused to the police of an offence of culpable homicide not amounting to murder is not admissible in his trial for murder upon the same facts: ('39) 26 A I R 1939 P C 47, *Expl.* [P 137 C 1]

(b) Criminal P. C. (1898), S. 164—Statements under S. 164 are also governed by Evidence Act *(Obiter).*

Statements under S. 164, Criminal P. C., are as much governed and controlled by the Evidence Act as are other statements which are to be proved or are recorded in Court. [P 137 C 1]

Khemchand Sukhramdas — for Appellant.

Partabrai D. Punwani —

Advocate-General — For the Crown.

Davis C. J.—In this case the appellant Ali Gohar son of Mahi Machi, who gives his age in his statement in the Sessions Court as twenty-five years, has been convicted by the Additional Sessions Judge of Nawabshah of a double murder, the murder of one Wadero Abdul Hak and one Mt. Rahiman, a young girl of sixteen or seventeen years of age, and has been sentenced to death. The accused has appealed and the case comes before us for confirmation of the death sentence. The case for the prosecution was that the appellant was a son of Mt. Satbhai by her previous husband Malhi, that he lived with Mt. Satbhai and her second husband Bacho, and Mt. Satbhai had a daughter by this second husband Bacho, named Rahiman. The appellant Ali Gohar wanted a wife and he was therefore anxious that Mt. Rahiman should be given in marriage to the son of Yousif, his maternal-uncle, so that he might marry Yousif's daughter, but instead of this, the parents of the girl decided to give her in marriage to Wadero Abdul Hak whose land Bacho cultivated. Bacho had built his hut or shed upon the land of Abdul Hak and Abdul Hak had built his shed some few paces away from that of Bacho. On the afternoon of 22nd November 1939, Bacho had left his field to go to Halani and Mt. Satbhai and her son Karimdino had gone for grazing cattle in the jungle. Mt. Rahiman and her little sister aged about five years remained in Bacho's hut. One Ali Murad was ploughing his land in the survey number opposite Bacho's land and used to store his grain in Bacho's hut. A watercourse divided the land of Bacho and the land of Ali Murad, and on that afternoon Ali Murad, having used up the seed which he had with him for sowing, called out to Mt. Rahiman to bring him more seed from Bacho's hut. At the same time Wadero Abdul Hak had gone to the watercourse to bathe. He had left most of his clothes in the hut and had on a loin

cloth, leaving his slippers at the incline which led down to the bathing place.

One Kamil Fakir, a physician who was returning to his own village, had stopped by Abdul Hak's *nar* a little before noon to have a smoke and he was sitting in Abdul Hak's hut when Abdul Hak told him that he was going to take his bath, and in his presence Abdul Hak removed most of his clothes and asked Kamil Fakir to prepare a hukka. At that time the appellant came from his field with a chanjoor—a spade with a long blade—and an axe. Leaving the chanjoor at his house he followed Abdul Hak to the watercourse and killed him with blows of his axe and after killing Abdul Hak he pursued Mt. Rahiman and killed her. Ali Murad and Kamil Fakir both saw what happened and raised cries, but the appellant threatened them with death if they came there and he made good his escape with his bloodstained axe. Leaving Kamil at the scene, Ali Murad went to inform Abdul Hak's cousin Abdul Wahid, and on the way happened to meet Mt. Satbai and told her what had happened. After Ali Murad left, some neighbours, Jurio and Sanjar, came upon the scene. Mt. Satbhai also came there, and Kamil Fakir told them what had happened. Abdul Wahid then came and he was told in his turn.

In the meanwhile, the appellant with his bloodstained axe and clothes stained with blood came to Kandiaro station. On the way, it is said, he met one Lal Bakbsh, and told Lal Bakhsh that he had killed Abdul Hak and Mt. Rahiman because Bacho would not give Mt. Rahiman's hand to Yousif's son in return for his marriage with Yousif's daughter. Lal Bakhsh in his turn told his zamindar Yousif Ghanghro. The Sub-Inspector, Ghanghro police station, recorded as a first report, the statement of the appellant, and secured his bloodstained axe and bloodstained clothes, while there was blood on the arm and stomach of the appellant. A mashirnama was prepared and the appellant was arrested and the Sub-Inspector left for the scene of offence arriving at the scene of offence at 5.30 in the evening, the scene of offence being about seven miles from Kandiaro police station. He found the dead body of Abdul Hak lying in the watercourse below the steps. He saw blood on the ground. He saw the loin cloth on the person of Abdul Haq and his slippers at the place of the incline. He saw also blood on the plank kept, as is the custom at bathing places, near the steps. Abdul Hak's clothes were found in his hut. Kamil Fakir pointed out the ashes where he was preparing the hukka. It was found that Ali Murad was ploughing his field. The dead body of Mt. Rahiman was found fully clothed. Blood was found at the place where she had fallen. A mashirnama of the scene of offence was prepared and the dead bodies of Abdul Hak and Mt. Rahiman were sent to the medical officer at Tharushah. The Sub-Inspector wrote to the medical officer to examine the bodies with a view to find if there was any evidence of recent sexual intercourse. The reply was in the negative. Statements of witnesses were recorded, and on the next day the Superintendent of Police came and verified the investigation. The appellant was sent before a Magistrate for his confession to be recorded, and it was recorded by the first class Magistrate of Kandiaro on 23rd November. The clothes of Mt. Rahiman and the loin cloth of Abdul Hak and the loin cloth of the appellant and the axe of the appellant were sent to the Chemical Analyser for examination, and the appellant was challaned for an offence under S. 302, Penal Code.

The appellant admits that he killed Abdul Hak and Mt. Rahiman, admits that the police secured the axe, the loin cloth and the chanjoor, but he states that he acted under grave and sudden provocation; when he was returning from his field to his house he saw Mt. Rahiman and Abdul Hak going towards the watercourse: he ran after them; he could not see them; he suspected them and when he came near the watercourse, he saw Mt. Rahiman and Abdul Hak in the act of sexual intercourse. He killed Abdul Hak with his axe. Mt. Rahiman clothed herself and ran towards the watercourse and he killed her. Now, there can be no doubt that the appellant killed both Abdul Hak and Mt. Rahiman in the bed of the watercourse, and in the field of Ali Murad respectively. There is the direct testimony on this point of Ali Murad and Kamil Fakir. The evidence of Nabi Bakhsh, the mashir, and the mashirnama show blood at both places at the scene of offence where Abdul Hak and Mt. Rahiman were killed by blows of an axe. The medical evidence shows that Abdul Hak had deep injuries on the neck and shoulder. The injury on the neck was sufficient in the ordinary course of nature to cause death and death resulted from shock and hæmorrhage. Mt. Rahiman had four injuries on the head and other parts of the body and the injuries on the head were sufficient in the ordinary

course of nature to cause death and death was due to shock and hæmorrhage resulting from the injuries on the head. The fatal injuries were all incised wounds caused by some sharp cutting instrument like an axe and it is clear they were caused with great violence.

The appellant himself in his judicial confession before the Magistrate, and to which he adhered in his statement before the Sessions Court though not before the Committing Magistrate, admits that he killed Abdul Hak and Mt. Rahiman but stated that he did so under grave and sudden provocation. The question then to be considered is whether the appellant speaks the truth when he states that he killed Abdul Hak and Mt. Rahiman because he suddenly came upon them in the act of illicit intercourse in the bed of the watercourse between the fields of Bacho and Ali Murad that afternoon. The learned advocate for the appellant wishes us to rely on a statement made by the appellant to the police when he came and gave himself up on the afternoon of 22nd November, which was not admitted by the learned Sessions Judge, and he wished particularly to rely on the statement made by the appellant to the effect that on his way to the police station he met one Yousif Ghanghro, a Mirbar, whose name he did not remember, but whom he knew he told the story of his finding Abdul Hak and Mt. Rahiman in the act of illicit intercourse, the story which he told just after to the police.

The learned advocate relying upon this statement of the appellant to the police had not in mind the judgment of the Privy Council in I L R (1939) Kar P C 123,[1] but relied apparently on the general principle that anything in favour of the appellant was admissible in evidence. It might now be argued that as the statement made by the appellant was not a confession of murder at all but a confession of a lesser offence, that is, of culpable homicide not amounting to murder, it did not come within the prohibition contained in S. 25, Evidence Act, which is in general words. This is: "*25.* No confession made to a police officer shall be proved as against a person accused of an offence." The offence of which the appellant is accused, for which he has been tried, and of which he has been convicted, is the offence of murder and it may be argued that according to the judgment of the Privy Council a confession, to be within the meaning of those sections of the Evidence Act which relate to confessions, must be a full and complete confession to the offence alleged against the accused, that is to say, where an accused is accused of murder, a statement by him which amounts to something less than a full confession of the offence of murder, is not a confession within the meaning of S. 25, Evidence Act, at all; for instance, their Lordships say in a passage which is referred to in a judgment of this Court, ILR (1939) Kar 800,[2] and which is referred to again in a subsequent judgment of this Court in Confirmation Case No. 22 of 1940,[3] decided on 20th September 1940, as follows (page 133):

> In view of their Lordships' decision that the alleged statement was inadmissible by reason of S. 162, the appellant's contention that it was inadmissible as a confession under S. 25, Evidence Act, becomes unnecessary. As the point was argued, however and as there seems to have been some discussion in the Indian Courts on the matter, it may be useful to state that in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or, at any rate, substantially all the facts which constitute the offence.
>
> But we think that the statement of their Lordships must be limited to the facts of the particular case before them where, though the accused made an incriminating statement from which an inference of guilt might be drawn, he did not in that statement confess to any offence of any kind at all. But here the appellant did in his statement confess to an offence. It is true he did not confess to murder, but he confessed to culpable homicide not amounting to murder, an offence under S. 304, Penal Code. We cannot believe that the admissibility of a confession depends upon the offence which the accused is charged with at his trial, that for instance, if in this case the appellant had been charged with and tried for culpable homicide not amounting to murder, his statement to the police as a confession to that offence would be inadmissible under S. 25, Evidence Act; but that if the accused were charged with and tried for an offence under S. 302, Penal Code, the confession would be admissible, though at the same

1. ('39) 26 A I R 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : 66 I A 66 : 18 Pat 234 : I L R (1939) Kar P C 123 (P C), Pakala Narayana Swamy v. Emperor.

2. ('40) 27 A I R 1940 Sind 53 : 187 I C 576 : 41 Cr L J 477 : I L R (1939) Kar 800, Allahwarayo Daryakhan v. Emperor.

3. *Reported in* ('41) 28 A I R 1941 Sind 129, Muhammad Baksh Bagho v. Emperor.

time the accused could be convicted of an offence of culpable homicide not amounting to murder.

We think that the prohibition contained in S. 25, Evidence Act, is of a general nature. It forbids the proof at a trial of a criminal offence of any admission of an offence made by the accused to a police officer, and it appears to us that it makes no difference whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to a police officer. This interpretation of the section in no way affects the judgment of their Lordships of the Privy Council. That judgment refers not to confession of offences but to confessions of incriminating facts, from which inferences of guilt can be drawn. Reference to the facts of the case before their Lordships will show that the accused there did not confess to any offence; he confessed only to certain incriminating facts from which inferences of his guilt might be drawn. We do not think that there is anything in the judgment of this Court in Confirmation Case No. 22 of 1940,[3] which conflicts with this view, for that case related to a statement made before a Magistrate under S. 164, Criminal P. C., and it is of course clear that statements under S. 164, Criminal P. C., are as much governed and controlled by the Evidence Act as are other statements which are to be proved or are recorded in Court. We think therefore that the confession made by the appellant to the police of an offence of culpable homicide not amounting to murder was not admissible in this trial for murder upon the same facts.

We hold therefore that the first information lodged by the appellant with the police is inadmissible in evidence, as being a confession to an offence within the meaning of S. 25, Evidence Act. (His Lordship then discussed evidence and proceeded further.) We do not therefore believe the defence of the appellant that he killed Abdul Hak and Mt. Rahiman because he found them in the act of illicit intercourse. This is merely another of these murders still so common, when a man thwarted in his plans for marriage revenges himself upon those whom he thinks the cause of his frustrated desires or are associated in his mind with his own grievance. Mt. Rahiman was not to be his bride, but she was to be the means of his obtaining one. She was present when he killed Abdul Hak. He had therefore no hesitation in killing her. We see no reason why the appellant should not suffer the extreme penalty of the law, for this brutal double murder. We therefore confirm the convictions and sentence of death and dismiss the appeal.

Tyabji J. — I concur and only wish to add a few remarks with regard to the contention of the learned advocate for the appellant that he was entitled to rely on certain portions of a statement which had been made by the appellant to the police at the time when he first surrendered himself, which the learned trial Judge had excluded from the evidence as a confession made to the police. It was argued that this statement was an exculpatory statement, that in view of the decision in I L R (1939) Kar (P C) 123[1] this statement containing exculpatory matter was not a confession, and that therefore S. 25, Evidence Act, did not render it inadmissible. The learned advocate did not succeed in showing us that the admission of this statement would have helped the appellant in any way, nevertheless we had to consider whether the contention, that this statement was admissible and had been wrongly excluded, was correct. As this statement was the first information of the crime given to the police and had been recorded as such, S. 162, Criminal P. C., was no bar to its admission, and the only question was whether it was or was not excluded as a confession by the operation of s. 25.

Now, so far as this question is concerned, the Privy Council decision relied upon does no more than provide a definition of the term confession, applicable wherever that term is used in the Evidence Act. It decides that a confession is a statement which either admits in terms the offence alleged to be confessed or at any rate admits substantially all the facts which constitute that offence. It lays down that a statement by an accused person which merely suggested an inference that he had committed a crime, or a statement which contained admissions of gravely incriminating facts, even admissions of facts which in the particular circumstances of the case were admissions of conclusively incriminating facts, was not, merely on that account, a confession. The statement of their Lordships that

> no statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some facts which if true would negative the offence alleged to be confessed

necessarily follows from and is an application of the definition. We are not in the

present instance concerned with any statement of facts which merely suggested inferences. In the statement in question, the appellant had in the clearest manner stated that he had seen Abdul Haq having sexual intercourse with Mt. Rahiman and that he had killed them both. This statement was therefore clearly a confession, as defined by their Lordships, of culpable homicide. The exculpatory matter negatived the offence of murder, and so of course the statement was not a confession of murder. The fact that the appellant was being tried for murder while the statement was a confession not of murder but only of culpable homicide does not affect the applicability of S. 25 to the statement. The terms of S. 25, "No confession made to a police officer shall be proved as against a person accused of an offence" do not limit its applicability only to confessions of offences with which the accused was charged. In this particular case it might even be said that the accused was charged with culpable homicide, as the greater includes the less. But apart from that, all that is necessary in order that a statement made to the police should be excluded is that it should be a statement which, having regard to the circumstances of the case, the Court ought in reason and substantially to regard as a confession, and that the proof of the statement would be proof as against the accused. It is clear that not all statements containing admissions of facts which, adopting the Privy Council definition, amounted to confessions of some offence or the other, could in reason and substantially be regarded as confessions operating against the accused by a Court trying a case. For instance, there might be a statement made to the police by a person being tried for murder which though otherwise relevant and a valuable piece of evidence, incidentally contained such statements as for instance, that the accused had driven in a car leaving his license behind, or that he had used highly defamatory words to somebody, or had insulted and pushed somebody. The fact that each of these incidental statements would technically amount to confessions of certain trivial offences would not prevent a Court from dealing with such a statement as one which on the whole and substantially was not in the circumstances of the case to be regarded as a confession.

In this case it is clear that the statement in question was a confession the admission of which would inevitably have operated very materially against the appellant. It contained admissions of facts which were a very material part of the facts alleged by the Crown against him, admissions on which he could have been convicted of culpable homicide. The confession was therefore inadmissible and rightly excluded by the learned Judge. As has been stated before, the learned advocate for the appellant did not succeed in showing us that the statements which he desired to rely upon were statements which could have materially helped the appellant. It may be pointed out that while excluding the confession, the learned Judge did admit a portion of the statement, which did not amount to a confession. It is therefore not unlikely that if an application to that effect had been made on behalf of the appellant, the learned Judge would have admitted certain other portions also. But no such application was made, and in any case, there was nothing in the statement excluded which so far as we can see could have been of any material use to the appellant.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Sind 138

LOBO J.

Thakurdas Narumal — Plaintiff

v.

Governor-General of India-in-Council — Defendant.

Suits Nos. 239 of 1939 and 145 of 1940, Decided on 8th November 1940; Reference made by Second Registrar D/- 9th and 12th September 1940, respectively.

(a) Sind Courts Act (7 of 1926 as amended by the Government of India (Adaptation of Indian laws) Order, 1937, S. 37 (1)—Suit against Governor-General of India in Council for recovery of certain sum alleged to have been overcharged by Government railway is excepted from jurisdiction of Small Cause Court.

A suit filed against the Governor-General of India in Council for the recovery of certain sum alleged to have been overcharged by the North Western Railway authorities on a consignment and a suit filed against the Governor-General of India in Council for the recovery of certain sum alleged to be certain expenses incurred by the plaintiffs in clearing and forwarding certain crates containing transformers imported by the Director General, Indian Stores Department, for the North Western Railway are suits of the description falling under cl. (1) of S. 32, Bombay Civil Courts Act of 1869 and S. 37, Sind Courts Act of 1926, and are therefore, excepted from the jurisdiction of the Small Cause Court. [P 141 C 2]

(b) Sind Courts Act (7 of 1926 as amended by Government of India (Adaptation of Indian laws)

Order, 1937, S. 37 (1) — S. 37 (1) does not indicate that inquiry should be made into real substance of plaintiff's claim.

There is no indication in the wording of cl. (1) of S. 32 and S. 37 that any inquiry should be made into the real substance of a plaintiff's claim. [P 141 C 2]

(c) Karachi Small Cause Courts Act (4 of 1929), S. 14 (b) as amended by Government of India (Adaptation of Indian laws) Order, 1937— Suit against Governor-General in Council for recovery of certain sum alleged to have been overcharged by Government railway on certain consignment is excluded from jurisdiction of Small Cause Court.

A Government railway is carried on and administered under the authority of the Government of India, and every act done in the working of such a railway is an act done by the authority of the Government of India. There is no distinction between suits against a Government railway arising out of ordinary contractual relations and suits relating to acts done by railway official under the authority of the Governor-General of India in Council. Hence a suit against Governor-General-in Council for recovery of certain sum overcharged by Government railway on certain consignment is excluded from the jurisdiction of the Karachi Small Causes Court by S. 14, Karachi Small Cause Courts Act of 1929 as amended. [P 141 C 2; P 142 C 1]

Kimatrai Bhojraj and Dingomal Narainsingh — for Plaintiff.

Choithram Dewandas — for N. W. Railway.

Parlabrai D. Punwani, Advocate-General — for Government.

Order. — A reference has been made by the Second Registrar in these two suits in which he contends that they have been wrongly filed in this Court and wrongly admitted, that under the provisions of S. 37, cl. (3), Sind Courts Act (Bom. 7) of 1926, the suits should have been filed in the Court of Small Causes, Karachi, which has jurisdiction to try them. Suit No. 239 of 1939 is a suit filed against the Governor-General of India in Council for the recovery of Rs. 214-13-0 alleged to have been overcharged by the North Western Railway authorities on a consignment of 444 bags red chillies consigned to the plaintiff from Ferozepur City. Suit No. 145 of 1940 is similarly a suit filed against the Governor-General of India in Council for the recovery of Rs. 712-10-0 alleged to be certain expenses incurred by the plaintiffs in clearing and forwarding two crates containing transformers imported by the Director General, Indian Stores Department, for the North Western Railway. The contention of the Second Registrar is thus stated in the reference :

This suit . . . has ostensibly been instituted in this Court under the provisions of S. 37, cl. (1), Sind Courts Act, 1926. However, it is a suit against the Administration of a Government railway, and under the provisions of S. 37, cl. (3), the provisions of S. 37, cl. (1) do not apply. It would therefore appear that this suit is triable by the Court of Small Causes, Karachi.

For years past, suits for claims against the North Western Railway which is a State Railway have invariably been filed in the Court of the Judicial Commissioner of Sind irrespective of the amount of the claim, and no such suit has ever been entertained by the Small Cause Court of Karachi either before 1929 when that Court was constituted under the Provincial Small Cause Courts Act, 9 of 1887, or after 1929 when it received a separate constitution under the Karachi Small Cause Courts Act, Bombay Act 4 of 1929. In these circumstances the point involved in the reference being both novel and of considerable importance I made an order on 3rd October fixing the hearing of this reference for 25th October and directing notice to issue to the learned Advocate-General. I have now had the advantage of the various views expressed in argument by the learned Advocate-General, the legal adviser of the North Westrn Railway and of the learned advocates for the plaintiffs in the two suits. These are, however, dissentient views, for while the learned advocates for the plaintiffs in the two suits contend that the suits have been rightly instituted in this Court and that the Small Cause Court has no jurisdiction to entertain them, the learned Advocate-General contends that the conclusion arrived at by the Second Registrar is correct not on the ground put forward by him in the reference but because the jurisdiction of the Karachi Small Cause Court is conferred by and is to be looked for in the Karachi Small Cause Courts Act of 1929, and there is nothing in that Act which excludes suits such as these from the jurisdiction of the Karachi Small Cause Court. The Sind Courts Act of 1926, he contends, does not confer any jurisdiction on the Karachi Small Cause Court and being prior in date to the Karachi Small Cause Courts Act cannot be construed as controlling a subsequent enactment of the same Legislature.

On the other hand Mr. Choithram for the North Western Railway appeared to me to favour the view that the present suits fall within the jurisdiction of the Small Cause Court as they are not suits "concerning any act ordered or done by, or by the authority of any Government in British India. . . . ." within the meaning of S. 14 (b), Karachi Small Cause Courts Act, as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, and for his contention he

relied on the case in 17 Cal 290[1] and the case in 37 Mad 533.[2] According to Mr. Choithram suits arising out of ordinary contractual relations entered into with a Government railway are not excluded from the jurisdiction of the Karachi Small Cause Court. Now clearly the constitution of the Court of the Judicial Commissioner of Sind and its jurisdiction to entertain civil suits was conferred on it by the Sind Courts Act, Bombay Act, 12 of 1866 and by certain sections of the Bombay Civil Courts Act, 14 of 1869 extended to Sind, and the constitution of the present Chief Court, and its jurisdiction to entertain civil suits is to be found in the Sind Courts Act, Bombay Act 7 of 1926. As suit No. 239 of 1939 was instituted in the Court of the Judicial Commissioner of Sind and suit No. 145 of 1940 in the Chief Court it is in the first place proper to examine these Acts to ascertain the matter of jurisdiction, because it is the jurisdiction of these Courts to entertain these suits which is being questioned. As regards the Court of the Judicial Commissioner of Sind, S. 32, Bombay Civil Courts Act, 14 of 1869, extended to Sind provided as follows :

(1) No subordinate Court other than the Court of a Subordinate Judge of the first class and no Court of Small Causes shall receive or register any suit in which the Secretary of State for India in Council or any officer of Government in his official capacity is a party.

(2) In every such case the plaintiff shall be referred to the Court of the Subordinate Judge of the first class and such suit shall be instituted only in the Court of the Subordinate Judge of the first class and shall be heard by such Subordinate Judge, subject to the provisions of S. 24, Civil P. C., 1908.

(3) Nothing in this section shall be deemed to apply to a suit against the administration of a Government railway: or to apply to any suit merely because an officer of Government is a party thereto in his capacity of—(a) member of a local authority, etc. . .

As regards the Chief Court S. 37, Sind Courts Act, Bombay Act 7, of 1926, as amended by the Government of India (Adaptation of Indian Laws) Order, 1937, provides thus:

(1) No subordinate Court other than the Court of a Subordinate Judge of the first class and no Court of Small Causes shall receive or register any suit in which the Crown or a servant of the Crown in his official capacity is a party.

(2) In every such case, the plaintiff shall be referred to the Court of the Subordinate Judge of the first class. . . .

(3) Nothing in this section shall be deemed to apply to a suit against the administration of a Government railway, or to apply to any suit merely because an officer of Government is a party thereto, in his capacity of (a) member of a local authority, etc.

1. ('90) 17 Cal 290, Bunwari Lal v. Secy. of State.
2. ('14) 1 AIR 1914 Mad 578: 16 I C 400 : 37 Mad 533: 27 MLJ 732, Secy. of State. v. Ramabrahmam.

Save for the amendments in nomenclature introduced by the Government of India (Adaptation of Indian Laws) Order, 1937, it will be noticed that S. 32, Bombay Civil Courts Act, 14 of 1869, and S. 37, Sind Courts Act, 7 of 1926, are identical. Now, both these suits are suits filed against the Governor-General of India in Council in his official capacity and therefore both under S. 32, cl. (1), Bombay Civil Courts Act, 14 of 1869, and under S. 37, cl. (1), Sind Courts Act, 1926, these suits are excluded from the jurisdiction of the Small Cause Court. But it is argued that clause (3) of S. 32, Bombay Civil Courts Act, 1869, and cl. (3) of S. 37, Sind Courts Act, 1926, except from the application of cl. (1) of those sections suits against the administration of a Government railway and therefore it is argued that the present suits are not excluded from the jurisdiction of the Court of Small Causes, Karachi, and as the amounts in these suits are within the pecuniary jurisdiction of the Court of Small Causes, Karachi, these suits should have been instituted in that Court.

Now no doubt cl. (3) lends colour to such an argument and no doubt too it is very difficult to understand what the Legislature intended by this cl. (3); but nevertheless it appears to me the answer to the question before me is simple. These are suits filed against the Governor-General of India in Council and in the very words of S. 32, Bombay Civil Courts Act of 1869, cl. (1) and of cl. (1) of S. 37, Sind Courts Act of 1926 as amended by the Government of India (Adaptation of Indian Laws) Order of 1937 such suits are excluded from the jurisdiction of the Small Cause Court. These suits are filed against the Governor-General of India in Council and not against the administration of a Government railway; and therefore whatever may be the interpretation to be placed upon cl. (3) of these two sections it does not in my opinion affect a suit in which the Governor-General of India in Council or the Crown is a party.

I must confess that I am unable to understand the import of cl. (3) of S. 32, Bombay Civil Courts Act of 1869 which is reproduced in cl. (3) of S. 37, Sind Courts Act of 1926, and I am unable to understand to what class of suits this clause applies when it states: "Nothing in this section shall be deemed to apply to a suit against the administration of a Government railway." In the first place it is difficult to understand why an exception should have been made in respect of a suit against the administration of a Government

railway and no corresponding exception should have been made in respect of a suit by the administration of a Government railway. Secondly, it is difficult to understand how a suit can be brought against the administration of a Government railway. One should have thought that the only way of suing a Government or State railway is to sue the Governor-General of India in Council or now the Crown. Such a suit is against the Government and under S. 79, Civil P. C., suits by or against the Government shall be instituted by or against the Secretary of State for India in Council, and under the Government of India (Adaptation of Indian Laws) Order of 1937 the word "Crown" will now be substituted for the words "Secretary of State for India in Council."

Again, in 48 Bom 297,[3] it was held by Fawcett J. of the Bombay High Court that a suit against a State railway must be brought against the Secretary of State for India in Council. The suit had been brought against the administration of the Oudh and Rohilkhand Railway. With the leave of the Court the title in the plaint was amended to read: "The Oudh and Rohilkhand Railway administration by its manager and agent." In the body of the judgment the learned Judge states :

> In my opinion the Railways Act of 1890 contains no clear indication that a suit against a State railway can be brought against the manager, and on the contrary the definition of 'railway administration,' in the case of a railway administered by the Government, as including the Government, suggests that a suit like this should be brought against the Government. On this point I entirely agree with the view taken in the Oudh case relating to this same railway: *E. B., E. I. & O. & R. Railways* v. *Hafiz Abdul Rahman.*[4] I adopt the arguments given in the report of the Court's judgment at pp. 814, 815.

The point has been discussed by the learned Judge in his judgment from every aspect. It may be argued that the mere description of the defendant in these suits should not conclude the question of jurisdiction; that a litigant should not be permitted to evade the jurisdiction of the Small Cause Court by the simple device of inserting 'the Crown' or 'The Governor-General of India in Council' as the description of the defendant sued; if, in substance, a suit brought against the Crown or the Governor-General of India in Council is a suit against a State railway cl. 3 of Ss. 32 and 37 referred to should be held to apply. But this line of argument is surely not available, for the plaintiffs in these suits are entitled to sue the Governor-General of India in Council in respect of their causes of action. There is no question, therefore, of their description of the defendants being a 'device' to evade the jurisdiction of any particular Court. Nor is there any indication in the wording of cl. (1) of Ss. 32 and 37 referred to that any inquiry should be made into the real substance of the plaintiff's claim.

I am, therefore, of opinion that these suits are of the description falling under cl. (1) of S. 32, Bombay Civil Courts Act of 1869 and S. 37, Sind Courts Act of 1926, and are, therefore, excepted from the jurisdiction of the Small Cause Court. It seems to me that the same result is arrived at if the matter be considered from the point of view of the jurisdiction of the Karachi Small Cause Court to entertain these suits. In the course of arguments the learned Advocate-General referred me to the Provincial Small Cause Courts Act 9 of 1887, to S. 15 thereof and to sch. 2 attached thereto. But I do not at all see the necessity of referring to the Provincial Small Cause Courts Act which does not apply to the Karachi Small Cause Court which is constituted under the Karachi Small Cause Courts Act, Bombay Act 4 of 1929. Section 14 of this Act provides inter alia that the Court shall have no jurisdiction in

> (b) suits concerning any act ordered or done by the Governor-General in Council or the Local Government or by any member of the Council of the Governor General or of the Governor of Bombay, or by any Minister in his official capacity, or by any person by order of the Governor-General in Council or the Local Government.

For this sub-clause of S. 14 the Government of India (Adaptation of Indian Laws) Order of 1937 has substituted the following :

> (b) Suits concerning any act ordered or done by or by authority of, any Government in British India or the Crown Representative, or by, or by authority of, any member of the Council of the Governor-General or of the Governor of Bombay, or any Minister of the Governor-General or of the Governor of Bombay or of the Governor of Sind in his official capacity.

The terms of the section are very wide. It covers suits "concerning any act ordered or done by, or by authority of . . . . . ." Now clearly a Government railway is carried on and administered under the authority of the Government of India. In chap. 6, Railways Act, which deals with the working of a railway, S. 47 provides that in the case of a railway administered by the Government, an officer to be appointed by the general controlling authority in this behalf shall make general rules consistent with the Act for a variety of purposes specified

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3. ('24) 11 A I R 1924 Bom 306 : 80 I C 531 : 48 Bom 297: 26 Bom L R 71, Sukhanand Shamlal v. Oudh and Rohilkhand Railway.

4. ('01) Ind Rly Cas 812 (Edn. 2).

in the section. Rules made under S. 47 are statutory rules to cover the entire working of a state railway and every act done in the working of such a railway is an act done by the authority of the Government of India.

The present suits, therefore, appear to me to be clearly excluded from the jurisdiction of the Karachi Small Cause Court by section 14, Karachi Small Cause Courts Act of 1929 as amended. As regards the distinction sought to be drawn by Mr. Choithram between suits against a Government railway arising out of ordinary contractual relations and suits relating to acts done by railway official under the authority of the Governor-General of India in Council, I cannot see how any such line of distinction can be drawn. The case in 17 Cal 290[1] is of very little assistance. It contains no judgment of the Calcutta High Court, but merely an expression of opinion of two Judges of that Court stated with the utmost brevity in two lines of the report. Nor is the case in 37 Mad 533[2] of much assistance. The decision turned on the wording of Art. 3 of Sch. 2, Provincial Small Cause Courts Act, which was in these terms :

A suit concerning an act or order purporting to be done or made by any other officer of Government in his official capacity or by a Court of Wards, or by an officer of a Court of Wards in the execution of his office.

It was held that the article applied to a suit relating to some distinct act done by an officer of Government and that a mere failure to carry out a contract could not be regarded as such an act. Considering the difference between the wording of Art. 3 of Sch. 2, Provincial Small Cause Courts Act, and that of S. 14, Karachi Small Cause Courts Act, as amended, the decision of the Madras High Court is of little assistance. My conclusion, therefore, is that these suits have been rightly instituted in the Court of the Judicial Commissioner of Sind and in the Chief Court of Sind, and no further order is necessary.

D.S./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Sind 142

DAVIS C. J. AND TYABJI J.

Harbhagwandas Ruchomal —
Defendant 1 — Appellant

v.

Rughnath Hiranand —
Plaintiff —Respondent.

First appeal No 41 of 1938, Decided on 18th October 1940, against order of First Class, Sub-Judge, Shikarpur, D/- 4th July 1938.

Civil P. C. (1908), S. 47—Legal representative of judgment-debtor contending that property attached was not property of judgment-debtor in his hands as legal representative but was his personal property—Matter is to be decided in execution proceedings—Appeal lies from such decision.

Where in reply to the execution application made against him by name the legal representative of the judgment-debtor appears and contends that the property which was attached and which was proposed to be sold was not the property of the judgment-debtor and did not come into his hands as legal representative but was his own property in his personal or individual capacity, the matter can be decided in execution proceedings and an appeal lies from such decision: ('32) 19 A I R 1932 All 263, *Disting*; 28 All 51 ; 12 All 313 (FB) and 17 Cal 711 (FB), *Rel. on.* [P 144 C 1]

Kimatrai Bhojraj — for Appellant.

Kundanmal Dayaram — for Respondent.

Davis C. J. — This is an appeal against an order made by the first class Subordinate Judge of Shikarpur in execution dismissing objections made by the legal representative of the judgment-debtor to the sale of certain immovable property on the ground that this immovable property was not in the hands of the legal representative of the judgment-debtor as such but was in his hands in his individual capacity. Preliminary objection was taken to this appeal on the ground that no appeal lay at all, that we had here what was properly an order made on an application under O. 21, R. 58, Civil P. C., that is, by a person who was not a party to the suit or a legal representative, and though the matter may be one relating to the execution of the decree, it was between the judgment-creditor and a stranger or third party; and it was said that the appellant who undoubtedly is the legal representative of the judgment-debtor, one named Ruchomal, must be treated as a stranger to these proceedings because he had waived any objections to a notice under O. 21, R. 66, Civil P. C., which was served on him. It appears that the property was attached on an application of the judgment-creditor without notice to the legal representative of the judgment-debtor, so that the first opportunity he had of objecting to these proceedings was when the notice under O. 21, R. 36, Civil P. C., was served on him. Now when we referred to the record of the proceedings we could not find that the appellant had waived any objection to the order proposed to be made under O. 21, R. 66, Civil P. C., at all. It was thought by the learned advocate for the respondent, that is, the judgment-creditor, that there was a consent order in these proceedings

whereby it was agreed by both the judgment-creditor and the judgment-debtor that this property was the property of a charitable trust. But reference to the record showed that this statement was made under a misapprehension. There was no such consent order at all, and when the learned Judge states that the appellant failed to object to the notice under O. 21, R. 66, Civil P. C., and must be deemed to have waived any objections to such order, he is mistaken.

It must be taken then that in reply to the execution application made against him by name Harbhagwandas Ruchomal, and to the notice under O. 21, R. 66, Civil P. C., the appellant, the legal representative of Ruchomal did appear and contend that the property which was attached and which was proposed to be sold was not the property of his father and did not come into his hands as legal representative and was his own property in his personal or individual capacity; and objection was taken by the respondent, that is by the judgment-creditor, that these contentions at once took the proceedings out of the provisions of S. 47, Civil P. C., made the legal representative a stranger to these proceedings, and brought his case under O. 21, R. 58, Civil P. C. We were referred to a case, A I R 1932 ALL 263,[1] in support of this contention. On the facts of that case the learned Judges held that the objection taken by the daughter Mt. Jamunabai was an objection taken by a third party. The suit in that case was not against the daughter Mt. Jamunabai but against her son. The facts of that case were different. Moreover we have two judgments of the Allahabad High Court, the same High Court as decided the case in A I R 1932 ALL 263,[1] reported in the authorized law report, which take the view that where a legal representative contends that certain property is in his hands not as assets of the judgment-debtor but in his own personal and individual capacity, that is a question to be decided in execution proceedings.

In 28 ALL 51,[2] the learned Judges decided that where a judgment-debtor dies after the passing of the decree and his legal representatives are brought on the record in execution proceedings to represent his estate in respect of the decree, the questions which they raise as to property which, they say, does not belong to his assets in their hands and as such is not capable of being taken in execution, are questions which must be determined in execution and not by a separate suit. It is true that the learned Judges referred there to S. 244, Civil P. C., but on this point there is no difference between the old s. 244 and the present S. 47, Civil P. C. In the previous case of that same High Court, 12 ALL 313,[3] it was decided by a majority of the Full Bench, that where a legal representative asserts that the property is his own and has not come to him from the deceased judgment-debtor, he cannot set up a *jus tertii* and claim to come in as a stranger and contest the matter in a separate suit; he must raise the question and get it decided in execution proceedings.

The Calcutta High Court have also taken the view that the question as to whether property has or has not come to a legal representative from the judgment-debtor, whether this property is or is not assets of the judgment-debtor in the hands of his legal representative, is essentially a matter to be decided in execution proceedings, even if the legal representative contends that the property in his hands is his own personal property and has not come to him from the judgment-debtor. In 17 Cal 711,[4] a Full Bench held that an objection taken by a person who has become the representative of a judgment-debtor in the course of execution proceedings to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative was a matter cognizable only under S. 244, Civil P. C., that is, the present S. 47, Civil P. C., and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under Ss. 280 and 281, but was provided for by S. 283, Civil P. C., that is, present O. 21, Rr. 60, 61 and 63. The question there referred to the Full Bench was :

> Whether an objection taken by one who has become the representative of the original judgment-debtor in the course of execution of a decree, to the effect that the property attached in satisfaction thereof is his own private property, and not held by him as such representative, is a matter cognizable only under S. 244, Civil P. C., and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under Ss. 280 and 281, as provided by Section 283.

1. ('32) 19 A I R 1932 All 263 : 139 I C 785 : 1932 A L J 125, Jagannath Prasad v. Mt. Jamuna Bai.
2. ('06) 28 All 51 : 1905 A W N 180, Kali Charan v. Jewat Dube.
3. ('90) 12 All 313 : 1890 A W N 137 (FB), Seth Chand Mal v. Durga De.
4. ('90) 17 Cal 711 (FB), Punchanun Bundopadhya v. Rabia Bibi.

And the answer of the learned Chief Justice and of the Full Bench to that question was in the affirmative, and the learned Chief Justice in the course of his judgment said :

In the present case, although the question takes the form of an enquiry whether certain property, which is admittedly in the hands of the person against whom an order has been made under S. 234, came to her as the heiress of the deceased or by some other title, it is in fact the very question contemplated by S. 234, whether the legal representative has or has had assets of the deceased, and so is liable to satisfy the claim of the decree-holder.

It is to be noted the leared Judges were not dealing with the question of the right of *jus tertii*, where a legal representative was objecting that he held certain property as a trustee for some one else. But they were dealing with a case such as the one before us in which the legal representative claims that the property in question did not come to him as heir of his father, the judgment-debtor but is his own private property held by him in his personal or individual capacity, in this case, in virtue of the terms of a decree. We think, therefore, that it is clear that the appellant, the legal representative of the judgment-debtor was entitled in these execution proceedings to contend that the property sought to be sold in execution was his own property held by him in his personal individual capacity, and was not property coming to him as legal representative of the judgment-debtor and was not assets of the judgment-debtor in his hands. Now the decree on which the appellant relied to show that the property in dispute, the property which had to be sold in execution, was not the property of his father in his hands and the assets of his father, was the decree in Suit No. 13 of 1913, and it was argued by the learned advocate for the appellant that this decree gave Ruchomal, the father of the appellant, merely a life interest in this property, and that after his death the property passed under the terms of his decree to the appellant, his son, as his own property, in his personal or individual capacity, though only for his life. But we cannot see that this decree can be read in any such way at all.

The property in dispute is the upper storey of a building beneath which is a well, which is apparently dedicated to public use; there is a right of way through the grounds of the building to this well, and was to be maintained at the joint expense of the two brothers Pribhdas and Ruchomal, but the decree says perfectly clearly that the building or structure over the well is the property of Ruchomal; that neither the plaintiff in that suit, Ruchomal's brother Pribhdas, nor his heirs and representatives, shall have any right over this upper building or structure. It shall be the property of Ruchomal, his heirs and representatives, and relying upon this phrase, that the property shall be the property of his heirs and his representatives and that Ruchomal shall always remain in possession, it is contended that this was not the private property of Ruchomal but that he had in it a life interest only. This, of course was not the meaning of the words used at all. As the plaintiff in that suit, Pribhdas, was to have as his own absolute property certain part of the estate which was then to be partitioned, so Ruchomal was to have as his own absolute property and as his share, another part of the estate which was to be partitioned, which included this very building or structure over the well. Therefore, it appears to us quite clear that when on the death of Ruchomal this property passed into the hands and possession of the appellant in whose hands and possession it still is, it passed into his hands and possession as assets of Ruchomal judgment-debtor and was liable to be attached and sold in execution of the decree against Ruchomal. We think, therefore, that this appeal must be dismissed with costs and we order accordingly.

D.S./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Sind 144

DAVIS C. J. AND LOBO J.

Virumal Seoomal — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 67 of 1940, Decided on 4th July 1940, to revise order of Sub-Divisional Magistrate, Sehwan, D/- 22nd December 1939.

(a) Criminal P. C. (1898), S. 423 (1) (b)—Retrial can be ordered from stage at which error was committed in trial.

The words in S. 423 (1) (b) authorizing a Court to order a retrial are sufficiently wide to authorize a retrial from the point at which the error in the trial has been committed, provided that the accused was not otherwise prejudiced: ('27) 14 A I R 1927 Sind 175; ('25) 12 A I R 1925 Bom 170 and ('23) 10 A I R 1923 Cal 727, *Rel. on.* [P 145 C 2]

(b) Criminal P. C. (1898), S. 350 (3) — Case sent from one Magistrate to another for retrial from a particular point as result of order of Sessions Judge—S. 350 (3) will be applicable.

Where a case has been sent from one Magistrate to another for retrial, even, if it is only from a particular point in the trial and as a result of the

order of the Sessions Court, S. 350 (3) will be applicable. A case sent back by the Sessions Court to the District Magistrate for the retrial of the accused and which is to proceed from a particular point may be tried by the same or another Magistrate, but if the case is transferred by District Magistrate to another Magistrate, S. 350 (3) would be applicable. [P 145 C 2; P 146 C 1]

Amarlal W. Hingorani — for Applicant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is an application in revision against the judgment of the Sub-Divisional Magistrate, Sehwan, who dismissed an appeal against the judgment of the second class Magistrate, Kotri, convicting the applicant under S. 43 (i), Bombay Abkari Act, and sentencing him to pay a fine of Rs. 150 or in default to suffer rigorous imprisonment for six weeks. This revision application has been argued before us on the question of jurisdiction which we think should have been taken before the Sub-Divisional Magistrate, Sehwan, who heard the appeal because it is the jurisdiction of the second class Magistrate at Kotri to hear the case which was challaned. But, so far as this question of jurisdiction can be dealt with as one of law and not a mixed question of law and fact, we will deal with it in revision now. Now, it appears that the case was tried by the second class Magistrate at Kotri only from the stage at which the examination of the accused was taken because the applicant had first been tried by the first class Magistrate at Kotri and convicted, but he had gone in appeal to the Sessions Court which had ordered his retrial from the stage at which an illegality had crept in, that illegality being a common one, the failure of the Magistrate to question the accused on the evidence of the prosecution witnesses. Now it is said that the Sessions Court had no power to order what has been described as a partial retrial. The Sessions Court could as an appellate Court under S. 423, Criminal P. C., set aside the applicant's conviction and order a retrial de novo, but the Sessions Court could not order a retrial from any particular stage. The learned advocate, however, has not been able to cite to us any authority of any weight in support of his argument that an order of retrial from the stage at which an illegality has occurred in a trial is illegal; but, on the contrary, there are cases in the authorized law reports which proceed upon the basis that such an order can be made. One case, for instance, is the case of this Court in 21 S L R 331,[1] where owing to the failure of the Court to examine the accused under S. 342, Criminal P. C., a retrial from the stage at which illegality had crept in was ordered.

There is another case, 50 Bom 42,[2] where again as the Magistrate had failed to comply with the provisions of S. 342, Criminal P. C., though no retrial was ordered, Macleod C. J., was of the opinion that a retrial could have been ordered from the stage at which the error in the trial had been committed. The learned Chief Justice referred to the case in 50 Cal 939.[3] Now, that again is a case where, because of the failure to comply with the provisions of S. 342, Criminal P. C., a retrial from the point at which the error had been committed was ordered by the Court, and we think that the words in S. 423 (1) (b), Criminal P. C., authorizing a Court to order a retrial are sufficiently wide to authorize a retrial from the point at which the error in the trial has been committed, provided that the accused was not otherwise prejudiced. For instance, if it were argued in this case that the accused must be prejudiced in his retrial before the second class Magistrate, Kotri, because the second class Magistrate only heard the witnesses from the stage at which retrial had been ordered, that is when the error under S. 342 of the Criminal Procedure Code, had been committed and had not himself recorded the evidence of the prosecution witnesses, that might be a ground for interference; and it does appear that the evidence recorded by the first class Magistrate, Kotri, was a mere summary of the evidence recorded in the case heard as a summons case, so the second class Magistrate at Kotri could not have a full record of the witnesses before him. But the accused took no objection to the retrial on this ground in the lower Courts.

We think in a case such as this, where a case has been sent from one Magistrate to another for retrial, even, if it is only from a particular point in the trial and as a result of the order of the Sessions Court, S. 350 (3), Criminal P. C., will be applicable. A case sent back by the Sessions Court to

1. ('27) 14 A I R 1927 Sind 175 : 101 I C 449 : 28 Cr L J 417 : 21 S L R 331, Motan Khan v. Emperor.
2. ('25) 12 A I R 1925 Bom 170 : 86 I C 66 : 26 Cr L J 690 : 50 Bom 42 : 27 Bom L R 105, Emperor v. Nathu Kasturchand.
3. ('23) 10 A I R 1923 Cal 727 : 75 I C 715 : 25 Cr L J 27 : 50 Cal 939 : 27 C W N 743, Dibakanta Chatterjee v. Gour Gopal Mukherjee.

the District Magistrate for the retrial of the accused and which is to proceed from a particular point may be tried by the same or another Magistrate, but if the case is transferred by District Magistrate to another Magistrate, as is the case here, S. 350 (3) would be applicable. So, we think the transfer from the first class Magistrate, Kotri, to the second class Magistrate at Kotri would be deemed to be a transfer under S. 350 (3) of the Criminal Procedure Code. This is not one of the class of cases referred to in 55 Mad 795,[4] where a case was transferred from a Bench of first class Magistrates who had started the trial of the case as a summary trial to a second class Magistrate who had no jurisdiction to try the case summarily.

It was then open to the accused in the proceedings now before us to ask for what is generally described as a "de novo" trial. He could under the proviso to S. 350 (1), Criminal P. C., have asked for all witnesses to be resummoned and reheard. He did not do so. We cannot see, therefore, any illegality in the retrial by the second class Magistrate, Kotri, and we see no reason to interfere in this case in revision. The application is dismissed accordingly.

D.S./R.K. *Application dismissed.*

4. ('32) 19 A I R 1932 Mad 505 : 138 I C 581 : 33 Cr L J 653 : 55 Mad 795: 62 M L J 738, Nannier v. Dasalier.

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(28) A. I. R. 1941 Sind 146

WESTON J.

Messrs. B. R. Herman & Mohatta — *Plaintiffs*

v.

Asiatic Steam Navigation Co., Ltd., and another — *Defendants.*

Suit No. 244 of 1937, Decided on 3rd March 1941.

(a) Contract Act (1872), S. 39 — Contract of affreightment—Demand by shipper for space as per terms of contract—Fact that shipper had no goods to ship and attempted to take advantage of rise in freight does not entitle shipowner to repudiate contract though it can be taken into account in considering question of damages.

Where as per terms of the contract of affreightment a demand for space is made by the shipper, the fact that the shipper had no goods to ship and was attempting to obtain an advantage due to the rise in freight does not entitle the shipowner to refuse to consider the demand and repudiate the contract though the aforesaid fact can be taken into account when considering the question of damages. [P 150 C 1]

(b) Contract Act (1872), S. 73 — Theory of damages explained—Amount as damages should as nearly as possible be sum which will put injured party in same position which he would have been in but for wrong sustained.

The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages. [P 150 C 2]

(c) Contract Act (1872), S. 73—Words "which naturally arose in the usual course of things from such breach" only impose limitation that damages should not be remote — Contract of affreightment at lower rate of freight than market rate broken by shipowner — Loss or damage will be presumed—But presumption can be rebutted — Refusal by shipowner to convey goods as per terms of contract — Shipper can recover additional costs incurred in shipping goods by other means — But if shipper had no goods nor had intention of obtaining them and contract is non-transferable shipper cannot recover damages.

The words "which naturally arose in the usual course of things from such breach" in S. 73 do not mean that general rules such as those given in the illustrations to the section must be followed irrespective of the facts, but only impose a limitation upon the damages which can be allowed, that the damages must not be remote. No doubt, ordinarily, loss or damage will be presumed when a contract at a lower rate of freight than the market rate is broken by the shipowner, but there is nothing in the wording of S. 73 which precludes the rebuttal of such a presumption. [P 150 C 2; P 151 C 1]

In the ordinary case of a refusal by a shipowner to convey goods in accordance with a contract of affreightment, the shipper is entitled to recover the necessary additional cost incurred by him or which would be incurred by him in shipping his goods by other means. But if the shipper had no goods and is proved to have had no intention of obtaining goods, and his contract is non-transferable, the shipper is not entitled to recover damages. [P 150 C 2]

(d) Contract Act (1872), S. 73, Illustrations—Illustrations are no more than general rules.

The illustrations to S. 73 are not more than general rules. [P 150 C 2]

Dingomal Narainsing — for Plaintiffs.

Hakumatrai M. Eidnani—for Defendants.

Judgment.—This is a somewhat unusual suit for damages on a contract of affreightment entered into by plaintiffs, a Karachi firm, with defendant 1, the Asiatic Steam Navigation Co., which has its registered office at Calcutta and which owns a number of steamers engaged in the coasting trade, and trading between Calcutta, together with neighbouring ports, and ports on the West Coast of India, including Karachi. Defendant 2, the Graham Trading Co., are the Karachi agents of defendant 1 and according to the plaint, have been joined in the suit as they were the party who made the

agreement with the plaintiffs on behalf of defendant 1 and their authority to make them may be disputed. The original contract upon which the suit is based was made on 14th August 1934, and its terms were set down in a writing signed by Mr. Gow of the firm of defendant 2. This writing is Ex. 9. Its terms are simple and are that defendant 1 will ship on behalf of plaintiffs from Chittagong to Karachi a total of 5000 tons of steel rails and/or girders, of maximum length 50 feet, in loads of approximately equal quantity, in two steamers, the first to be in September 1934 and the second to be in the first half of October 1934 or alternatively in one steamer in September 1934 as may be arranged 'at owner's option.' The rate of freight agreed upon and stated in Ex. 9 is Rs. 3 per ton.

Except for a difference of opinion as to the meaning of 'owner's option' which is of no significance in any of the questions arising for decision in the suit, there is no dispute as to the execution and as to the interpretation of this contract. Certain other facts which are either admitted or are no longer disputed may also be set out here. The contract Ex. 9 was taken out by plaintiffs in furtherance of a contract they had obtained from the Jodhpur Railway to transport a quantity, 5000 tons of steel rails, which that railway had purchased from the Assam Bengal Railway, and of which delivery was to be given by the Assam Bengal Railway at Chittagong. The rate of freight agreed upon in Ex. 9 was very much less than the normal rate between Chittagong and Karachi, and this was due to what is described as a freight war then going on between defendant 1 and rival shipping companies. This freight war ended on 17th November 1934, whereupon freights reverted to their normal rates, and the normal rate for steel rails from Bengal ports to Karachi was about Rs. 10 per ton. In pursuance of the contract Ex 9, about 2664 tons of steel rails were shipped from Chittagong in defendant 1's steamer S.S. Dogra in last week of September 1934. It is common ground that thereafter there was variation of the contract between plaintiffs and defendant 1, and that in accordance with this variation, about 1290 tons of rails were shipped not from Chittagong but from Calcutta in two steamers on about 13th October and 7th November 1934, so that a balance of about 1000 tons remained unshipped.

I now turn to the pleadings. Plaintiffs assert that after the Dogra shipment it was agreed between them and defendant 1 at Calcutta that 1300 tons were to be shipped from Calcutta, and for the balance of 1000 tons plaintiffs were given the option of cancelling the freight or of completing the agreed tonnage of 5000 tons by shipping steel materials not exceeding 40 feet long during the month of November 1934. Plaintiffs assert that on their inquiry for space for these 1000 tons they were informed on 23rd November that no space was available in November, and on 5th January 1935 they were informed by defendant 2 that defendant 1 would not accept further cargo at the rate agreed upon in Ex. 9. Plaintiffs claim that defendant 1 thus committed breach of the contract and that they are entitled to recover damages consequent on the breach which are assessed at Rupees 7000 being the difference between the freight for 1000 tons at Rs. 3 per ton, the contract rate, and the freight at Rs. 10 per ton, the normal or as it is called schedule rate which operated after the conclusion of the freight war. Defendant 2 by their written statement claimed that they had been wrongly impleaded, but without prejudice relied upon the defence of defendant 1. As, according to the plaint itself, plaintiffs base their claim not on the original contract but on a variation of it made directly at Calcutta with defendant 1, it is plain that they can have no cause of action against defendant 2, and that the suit as against defendant 2 must be dismissed. This position has not been disputed by the learned advocate for plaintiffs.

Defendant 1 by written statement denied that at all times plaintiffs had goods available and ready for shipment during the period stipulated by the contract, that at the end of August defendant 1 was informed that plaintiffs would be able to ship not more than 2600 tons in early October and the balance not before February 1935. It is said that defendant 1 refused to ship the goods beyond the stipulated time. The version given of the variation of the original contract is that about 25th September plaintiffs intimatedthat they would ship about 2600 tons per S. S. Dogra from Chittagong and requested to be allowed to ship a further consignment of about 1300 tons from Calcutta, and the balance of 1000 tons of the contract goods also from Calcutta in October 1934, or failing that to be allowed to ship gunny bags and/or hessians from Calcutta for any portion of the balance of the 5000 tons which might remain unshipped at a rate of Rs. 4 per ton, representing a discount

of 75 per cent. on the normal freight of Rs. 16 per ton. To this defendant 1 agreed and 1300 tons were carried as stated in the plaint. As regards the balance of 1000 tons, it is said that plaintiffs never offered for carriage either goods in accordance with the original contract or gunny bags and/or hessians. The variation alleged by plaintiffs is denied, and even if such agreement is proved, it is claimed that plaintiffs were bound to exercise their option under it and/or to make a declaration in advance and within a reasonable time as to whether they wanted to ship the balance at all and if they so wished, when they wanted shipping space. It is claimed that any requisition for shipping space under the variation alleged by plaintiffs should have been made before the 20th November, that the actual requisition was made after the freight war had ended, and was made solely with the object of obtaining an undue advantage of the situation. It is said that plaintiffs were not in a position to supply goods for carriage from Calcutta or even from Chittagong, although defendant 1 maintains that in the variation of the contract agreed to by them carriage from Chittagong was excluded. It is denied that plaintiffs suffered any loss, that defendant 1 was justified in the position they took up, and that there was no breach of the contract on their part.

I may set out here certain facts appearing from the evidence which narrow considerably the compass within which the questions to be decided can be contained. The varied or new contract upon which the suit is based is alleged by plaintiffs to be described in a letter Ex. 10 dated 4th October 1934 said to have been handed in at the Calcutta office of defendant 1 on that day by the manager of plaintiffs' firm, Mr. Ram Prasad, immediately after he had obtained the verbal assent of defendant 1 to the variation of the contract. Receipt of Ex. 10 is denied by defendant 1, and its correctness is also disputed. It reads as follows:

Dear Sirs,

Re : 5000 Tons Steel Rails etc. to be shipped from Chittagong/Calcutta to Karachi.

As our client has instructed the Eastern Bengal Railway to deliver the 1300 tons rails with fastenings to be shipped per s. s. Rajput and Nurjahan to our sister concern Messrs. Mohatta Brothers, 29, Strand Road, Calcutta, we would request you to please issue the necessary shipping orders in favour of Messrs. Mohatta Brothers out of the 5000 tons of freight booked by us with your Karachi office.

With regard to the balance of 1000 tons, we thank you for your giving us the option of cancelling this balance or completing the agreed tonnage of 5000 tons by shipping steel materials not exceeding 40 feet long during the month of November 1934.

This letter makes no mention of the port from which the balance was to be shipped, and the plaint is equally silent on the point. According to Mr. Ram Prasad's evidence shipment was to be either from Calcutta or Chittagong, and it is strange that he should have omitted this term from what he considered to be an important memorandum of the agreement. Exhibit 10 was not produced with the plaint, for, only a copy of it was attached, and it was only in the cross-examination of defendant 1's witnesses examined on commission that defendant 1 was made aware that an initial of one of their clerks was said to exist on it in token of receipt. Mr. Ram Prasad's evidence that he took Ex. 10 personally to defendant 1's office instead of sending it by post or employing the agency of plaintiff's 'sister concern' Messrs. Mohatta Brothers, but yet did not attempt to see Mr. Glover of defendants firm with whom he had concluded the agreement he was confirming is very unconvincing. Mr. Ram Prasad also admits that it was also agreed that plaintiffs could ship gunnies instead of steel if necessary at a freight rate of Rs. 4 per ton, and this also does not find mention in Ex. 10. I shall have to refer later to defendant 1's evidence of the Calcutta agreement.

Mr. Ram Prasad's evidence on the demand for space made in November in accordance with the agreement is that he saw Mr. Gow of the firm of defendant 2 at Karachi on 20th November and asked for shipping space for 1000 tons of steel rails or girders from Calcutta. Mr. Gow communicated the request by telegram to defendant 1, and received on 22nd November the following telegraphic reply (Ex. 7/18) 'Rails refer to your telegram of 20th regret no November space await our letter.' This was communicated to plaintiffs by letter (Ex. 6/13) dated 23rd November. By letter of the same date (Ex. 6/14) plaintiffs asked to be informed as early as possible when space for the remaining 1000 tons would be available. Plaintiffs sent a reminder (Ex. 6/15) on 12th December, and on 5th January defendant 2 communicated the contents of a letter received from defendant 1 (Ex. 5/17). In this letter defendant 1 regretted the delay in replying to defendant 2's letter of 13th December, pointed out concessions allowed to plaintiffs, and stated that as far as defendant 1 knew, plaintiffs were unable to do the gunny business, and they therefore considered the contract as completed. They stated that they were unable to accept any cargo

at the cut rate. Plaintiffs replied on 5th January (Ex. 6/18) asserting that there was a misunderstanding as the 1000 tons were to be shipped not from Calcutta but from Chittagong, and they asked to be informed when space would be given for 1000 tons of rails from Chittagong. On 19th January 1935, defendant 2 communicated to plaintiffs a letter dated 15th idem received from defendant 1 the material part of which is as follows (Exs. 6/22 and 6/23):

> You will remember that when making arrangements for the shipment of 5000 tons it was definitely agreed that we should send vessels to Chittagong for parcels not less than 2500 tons each, and again when extending the contract period we stated that we were not agreeable to allow time beyond November and definitely refused to transfer any balance to February as desired by the shippers. The shippers were given the opportunity of completing the 5000 tons by either shipping the entire balance in rails from Calcutta or by forwarding a shipment of 1000 tons gunnies, neither of which they were able to do. We consider this matter as closed and regret cannot reopen the question.

By letter of 21st January plaintiffs stated that in default of favourable reply they would take legal action. There was no further correspondence between the parties but the present suit was not filed until November 1937. As already stated, the plaint is silent as to the port from which the shipment of 1000 tons was to be made. Plaintiffs letter of 5th January 1935 is at variance with Mr. Ram Prasad's admission that the demand made by him on 20th November was for shipping space from Calcutta. Whatever may have been the agreement as to alternative shipment of gunnies or hessians, it is clear that plaintiffs at no time asked for space for gunnies or hessians, which according to the evidence is a very different cargo to steel rails. The plaint makes no mention of gunnies or hessians, nor does Ex. 10 a copy of which was attached to the plaint. Paragraph 4 of the plaint in fact excludes by implication any goods but steel materials. Damages are claimed on the basis of the difference between contract and normal rates of freight of steel materials, not on the basis of the difference between Rs. 4 and the normal rates for gunnies or hessians. Questions relating to gunnies or hessians therefore cease to have any bearing on the decision of this suit. Also any claim of plaintiffs to an option of shipment of the 1000 tons from Chittagong, although according to the letter of 5th January there was no question of option, is concluded by Mr. Ram Prasad's admission that the demand made on 20th November was for space for the full 1000 tons from Calcutta, and the fact that the demand for space from Chittagong was not made until January, while plaintiffs admit the contract did not extend beyond November. We are concerned only therefore with an alleged contract to ship 1000 tons of steel materials from Calcutta to Karachi during the month of November 1934, and the questions for determination may be stated as follows: (1) Whether defendant 1 contracted to ship 1000 tons of steel materials from Calcutta to Karachi during the month of November? (2) Whether defendant 1 committed breach of that contract? (3) Whether plaintiffs are entitled to damages, and if so to what amount? My findings on these questions are in the affirmative on the first two, and in the negative on the third.

The first question is really answered by the passage in the letter of defendant 1 of 15th January, Ex. 6/22, already set out, in which it is said "We were not agreeable to allow time beyond November." I may also refer to the evidence of Mr. Morshead, a director of Messrs. Turner Morrison & Co., the managing agents of defendant 1 from whom Mr. Glover took instructions when Mr. Ram Prasad approached him at Calcutta for variation of the original contract. Mr. Morshead says:

> The proposal put up to me through Mr. Glover was to the effect that the shippers should be allowed a further extension of time up to November 1934 in which to complete shipment. At the same time instead of shipping 1000 tons rails, the plaintiffs should be allowed option of substituting 1000 tons gunnies at a higher rate of freight in order to enable them to complete the contract. I agreed that the cheap rate of freight might be extended to the end of November, and that he might ship gunnies instead of steel rails from Calcutta or alternatively that we would agree to regard the balance of his contract amounting to 1000 tons as cancelled without penalty of dead weight.

In view of this evidence, I cannot give weight to Mr. Glover's assertion that the extension to November was in respect of gunnies only, and I decide the first question as stated above. On the second question it has been urged for defendant 1 that they were entitled to repudiate the contract as the notice given by the telegram of 20th November was inadequate to enable them to find shipping space. This was not the reason given by defendant 1 in their letter communicated to plaintiffs by defendant 2's letter of 5th January (Ex. 6/17). Evidence has been led that it is the practice for steamship companies to advertise the times of arrivals of their vessels, and for shippers then to communicate their requirements. This, no doubt,

is so when no contracts for forward freight have been entered into, and it may be common in the case of forward contracts for shippers to communicate their requirements having regard to the known dates of arrival of vessels. But I have not been able to find anything in the evidence to establish a fixed custom that notice for so many days before the expiry of the period, during which shipment has been contracted for, must be given by the shipper to the steamship company. Mr. Morshead says :

The shipment is to be completed by a certain date and shipping company declares a name of the steamer and her ready date to the shipper who is then bound to place his cargo alongside the steamer ready for shipment by the date declared.

There is no suggestion that defendant 1 had declared the name of any steamer to plaintiffs for the shipment of the 1000 tons in November, and if there was this obligation on the part of defendant 1, as Mr. Morshead's evidence suggests, I cannot see that it makes the slightest difference that plaintiffs had an option to ship or not to ship, or had an option to ship goods other than steel materials. Defendant 1 did not assert that there was no available steamer. Although Mr. Glover has maintained that the extension to November was not in respect of steel rails, he admits that part of the 1300 tons was carried in November, and states that what is known as the straddle steamer commences loading at Calcutta at the end of a month and sails early the following month. The refusal of defendant 1 to consider the demand made for space on 20th November may have been due to a feeling that the demand was not genuine, that in fact plaintiffs had no goods to ship, but were attempting to obtain an advantage due to the rise in freight. But while this may be a matter to be considered on the question of damages, it is no answer to the charge that breach of the contract was on their part. Defendant 1 was not entitled to anticipate a probable nonfulfilment of the contract on the part of plaintiffs. It is true that Mr. Ram Prasad admits that on 20th November plaintiffs had no rails or girders at Calcutta, nor had any arrangements been made to obtain them. Whether if their demand had been accepted plaintiffs would have attempted to obtain them is a matter which I shall consider later, but it cannot be said that on 20th November plaintiffs had disabled themselves from performing their part of the contract, and that under S. 39, Contract Act, defendant 1 was entitled to put an end to it. I hold therefore that the breach of contract was on the part of defendant 1. In respect of plaintiffs' claim to damages reliance is placed upon S. 73, Contract Act, and illus. (g) to that section. The material part of S. 73 is as follows :

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew when they made the contract to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustration (g) reads thus :

(g) *A* contracts to let his ship to *B* for a year, from 1st January for a certain price. Freights rise, and on 1st January the hire obtainable for the ship is higher than the contract price. *A* breaks his promise. He must pay to *B*, by way of compensation, a sum equal to the difference between the contract price and the price for which *B* could hire a similar ship for a year on and from 1st January.

The theory of damages is that they are a compensation and satisfaction for the injury sustained, that is, that the sum of money to be given for reparation of the damages suffered should as nearly as possible, be the sum which will put the injured party in the same position as he would have been if he had not sustained the wrong for which he is getting damages (Mayne on Damages, Edn. 10, p. 9). In the ordinary case of a refusal by a shipowner to convey goods in accordance with a contract of affreightment, the shipper is entitled to recover the necessary additional costs incurred by him or which would be incurred by him in shipping his goods by other means. But if the shipper had no goods and is proved to have had no intention of obtaining goods, and his contract is non-transferable, as is admitted in the present case, is the shipper still entitled to recover damages? I do not think so. Illustration (g) and other illustrations are not more than general rules, and it is necessary to look to the words of the section itself. Section 73 lays down that compensation is to be given 'for any loss or damage caused to him thereby.' In my view, the words following "which naturally arose in the usual course of things from such breach" do not mean that general rules such as those given in the illustrations must be followed irrespective of the facts, but only impose a limitation upon the damages which can be

allowed, that the damages must not be remote. No doubt, ordinarily, loss or damage will be presumed when a contract at a lower rate of freight than the market rate is broken by the shipowner, but I can see nothing in the wording of S. 73 which precludes the rebuttal of such a presumption. It is to be remembered that present plaintiffs had an option to enforce or not to enforce the contract for the conveyance of 1000 tons. It is admitted that this contract existed at least primarily for the shipment of the balance of steel rails to be supplied by the Eastern Bengal Railway. That plaintiffs had difficulty in obtaining delivery of these rails is shown by correspondence between defendant 2 and plaintiffs. Exhibit 6/4 is a letter dated 31st August 1934 from defendant 2 to plaintiffs which is as follows :

We have received the following telegram from the Managing Agents, Calcutta, which we beg to pass on to you for your information : 5000 tons steel rails and girders. Re: your telegram of yesterday Chittagong Agents advice Railway unable to arrange first parcel 2600 tons before early October, balance February. Inform consignees rate agreed will not hold good unless full quantity shipped September-October as arranged.

Plaintiffs' reply dated 6th September reads (Ex. 6/5) :

As advised verbally about one thousand tons of rails will be available for shipment by S.S. Dogra touching Chittagong about the middle of this month. The balance of about 1600 tons will be available for shipment by the first week of October and we shall thank you to please let us know the steamer's name for this lot at your earliest convenience. As regards the balance, there is no prospect of its being available for shipment before the end of this year, and we shall thank you to please let us know if the freight booked with you will hold good or not.

As already described plaintiffs were able to obtain delivery of a further amount of about 1300 tons. It is clearly admitted by Mr. Ram Prasad that when he asked for space on 20th November the balance of 1000 tons was not available to plaintiffs and would not be available in the month of November, that on 20th November plaintiffs had no rails or girders at Calcutta, and that they had made no arrangements to obtain any. He says :

1000 tons of rails were not available to us in November. At my interview of 20th November, I asked for 1000 tons space for rails or girders from Calcutta. At the time I asked for them I had no rails or girders at Calcutta, nor had I arranged to get them. I had received no advice from Jodhpur or the agents that they were there. I did not bring any rails or girders from Calcutta or Chittagong during November or December 1934. I knew about the freight war. It ended some time in November. I do not remember if it was over on 20th November. In November 1934 I had not arranged for 1000 tons of gunnies or hessians.

It has been represented for plaintiffs that they are dealers in iron and steel materials, that they import such materials regularly from Calcutta, and that they would not have failed to take advantage of the reduced rate of freight allowed, by shipping rails or girders other than those of the Eastern Bengal Railway. Plaintiffs have not produced their contract books or any documents to show that about November 1934 they were making regular or in fact any shipments or iron or steel materials from Calcutta. It is pointed out for defendant 1 that 1000 tons is a large quantity not likely to be available immediately. According to plaintiffs such a quantity could be arranged for from Jamshedpur, said to be a night's journey from Calcutta, although goods certainly would take longer to arrive. There is no suggestion that even inquiry was made by or on behalf of plaintiffs from Jamshedpur prior to 22nd or 23rd November when plaintiffs were informed by defendants that no November space was available. If the position contained in plaintiff's letter of 5th January 1935 is accepted, then plaintiffs' absence of intention to make any shipment in November becomes even clearer, for, R. B. Mohatta, partner of plaintiffs' firm admits that it is very expensive to convey steel materials from Jamshedpur to Chittagong.

The facts in my opinion are plain. Plaintiffs had no prospect of shipping the 1000 tons of rails in the month of November, and had no intention of substituting other steel or iron goods of their own. They must have exercised their option of cancelling their contract with defendant 1, but on 20th November they found that freights had increased, and they made a formal demand, which as it was made at a late stage they hoped would not be complied with. If it was, they would immediately withdraw under their option. If it was not, then some advantage or concession might be obtained. I think plaintiffs letter of 5th January shows to what end they were working, namely to obtain, if possible, a later shipment from Chittagong at the reduced rate. R. B. Mohatta states that a shipment of rails was made from Chittagong in January 1935. I find therefore that plaintiffs incurred no loss or damage. I can see no reason to award them nominal damages, and I dismiss the suit with costs. As there has been a common defence there will be only one set of costs.

G.N./R.K. *Suit dismissed.*

(28) A. I. R. 1941 Sind 152

DAVIS C. J.

Land Acquisition Officer, Karachi — *Applicant*

v.

Hiranand Lilaram — *Opponent.*

Judicial Misc. No. 392 of 1939, Decided on 29th October 1940; reference made by Special Land Acquisition Officer, Karachi, D/- 1st December 1939.

(a) Land Acquisition Act (1894), S. 49 (2)— Scope.

Sub-section (2) of S. 49 does not apply only to houses or buildings. [P 153 C 2]

(b) Land Acquisition Act (1894), S. 18—Claim for compensation for injurious affection cannot be allowed to be raised for first time in reference under S. 18.

The proceedings before the Court, on which reference has been made under S. 18 of the Act, are of the nature of an enquiry into objections taken to the Collector's award, and not a judicial inquiry independently undertaken into such question as the claimant may raise. It is not open to the claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise, in proceedings before the Court. Hence the claim for compensation on the ground of injurious affection cannot be allowed to be raised for the first time in reference under S. 18 : ('36) 23 A I R 1936 Lah 733 and ('30) 17 A I R 1930 Mad 576, *Rel. on.* [P 153 C 2]

Dipchand Chandumal — for Applicant.

Kundanmal Dayaram — for Opponent.

Order. — This is a reference under S. 18, Land Acquisition Act, by the special Land Acquisition Officer, Karachi, regarding acquisition of a part of survey No. 80, an open plot, situated partly in Kharadar Lane and partly in Pahlaj Kara Street in the City of Karachi. The plot is a large plot of a regular shape and the part acquired was wanted by the Municipal Corporation for the purpose of making a through road from Kharadar Lane to Pahlaj Kara Street. The Land Acquisition Officer awarded a sum of Rs. 8979 to the owner, the present claimant Hiranand Lilaram, and there is no dispute as to the area of the land or as to the owner. It did appear that at one time there was some dispute about the area, but the claimant now accepts the measurements of the surveyors that the land acquired is 120.15 square yards, and this has now been accepted by both parties. In this reference, the objections to the award of the Land Acquisition Officer are said to pertain (1) to the value of the land which is inadequate, (2) disputes as to the area, and (3) the claim regarding injurious affection. As I have said, there is now no dispute as to the area and the objections pressed before me are as to the adequacy of the price and the claim as to injurious affection. But I think the objection of Mr. Dipchand, who appears for the Municipal Corporation, that the claim as to injurious affection could not be considered at this time, must be upheld. For instance, in this case Mr. Durgadas, the surveyor, came with a carefully prepared scheme for the exploitation of this land showing how greatly the exploitation of this land would be effected by the acquisition by the Municipality of only part of it. But I do not see, if an owner were at this late stage allowed to raise for the first time the question of injurious affection, S. 49 (2), Land Acquisition Act, could have any operation at all.

Mr. Dipchand and Mr. Kundanmal both relied upon a ruling of this Court in 27 S L R 84,[1] supporting their conflicting contentions that a claim for injurious affection could not and could be put forward for the first time in a reference to the Court. But that judgment, when read through, is merely authority for the statement that it is not necessary in reply to a notice under S. 9 of the Act to put a particular sum against any particular item for which compensation is claimed and which are set out in S. 23 (1), Land Acquisition Act. But that case is not authority for the statement that if in reply to a notice under S. 9 of the Act, no claim at all has been made, for instance, under the item thirdly in S. 23, such a claim can be made for the first time on a reference to the Court. Section 9 (2) provides that

> such notice shall state the particulars of the land to be acquired and shall require all persons interested in the land to state the nature of their respective interests in the land and the amount and particulars of their claims to compensation for such interests,

and these particulars would relate to the matters set out in S. 23 of the Act. Furthermore, S. 15 of the Act requires that in determining the amount of compensation, the Collector shall be guided by the provisions of Ss. 23 and 24 of the Act. Section 25 merely lays down the circumstances under which the amount of compensation awarded shall be more or less than the sum awarded by the Collector. For instance, under S. 25 (1) when an applicant makes a claim for compensation, pursuant to a notice under S. 9, the amount awarded to him shall not be less than the amount awarded to him by the Collector under S. 11; also the Court may not award him more than he has

1. ('33) 20 A I R 1933 Sind 21 : 146 I C 1040 : 27 S L R 84, Secretary of State v. F. E. Dinshaw.

claimed. Under sub-s. (2) when the applicant has refused to make a claim or has omitted without sufficient reason to make such a claim, the Court shall not award an amount exceeding that amount awarded by the Collector; and under sub section (3), when the applicant has omitted for a sufficient reason to make such a claim and the Judge has allowed the reason to be sufficient, the amount awarded by the Court shall not be less than the amount awarded by the Collector.

There is no question in this case of sub-s. (3) or sub-s. (2) applying. Sub-section (1) applies, and the claimant claimed Rs. 200 per square yard, so that there would be room for compensation for injurious affection within this figure if the claim for injurious affection had been made in time. We have not here, however, a question of changing the award under any of the sub-heads in S. 23 (1) of the Act, giving more under one sub-head or less under another. We have not here a case where a question for compensation for injurious affection was raised by the claimant in pursuance to a notice under S. 9, or was raised before it was considered by the Collector, and though it may be that a sentence may be taken from its context in the judgment of this Court reported in 27 S L R 84[1] at p. 91, to support the contention of the claimant, that compensation for injurious affection can and should be awarded to him, though the point was raised for the first time before the Court that is not the sense or the meaning of the judgment at all. The learned Judge there said :

> As I interpret this section, all that it requires is that a person claiming an interest in the land under acquisition should (1) specify the interest he claims, (2) specify the amount he claims for such interest, and (3) give particulars of his claim to compensation. It does not go further than that, and does not, in my opinion, require him to specify the amount of compensation he claims in respect of each of the six sub-heads referred to in S. 23 of the Act. A failure, therefore, to specify the amount claimed in respect of any particular sub-head of S. 23 is no bar to the Judge reviewing the award of the Land Acquisition Officer in respect of such sub-head. If there was any doubt upon that point, it is amply removed by the sections which follow S. 9.

It may be that even this statement as it reads makes it difficult to see how S. 49 could have the full force the Legislature intended, for the local Government could not know whether a claim for compensation for severance was unreasonable or excessive unless the sum claimed was stated. I suppose, however, that in practice, if a claim under this sub-head was raised and no particular sum was stated, the Land Acquisition Officer would require a sum to be stated in the proceedings before him, and then presumably, so that S. 49 could operate, he would adjourn proceedings so that the local Government could have time to consider whether they would acquire the whole of the land of which the land acquired forms part. I do not agree with the contention of Mr. Kundanmal that sub-s. (2) of S. 49, Land Acquisition Act, only applies to houses or buildings. Sub-section (1) of S. 49 applies to acquiring a part of a house, manufactory or other building, and which compels the local Government to acquire the whole of the house, manufactory or building if the owner desires it. It does not give them the option which under sub s. (2) they possess in the case of an open plot of land. And I do not think the view I take on this point is unreasonable. There is, for instance, the judgment of the Lahore High Court reported in A I R 1936 Lah 733,[2] in which the Court held that where no mention is made of the claim for severance before the Collector, it cannot be raised for the first time in the proceedings in Court even though it might be brought within the sum claimed as compensation by the owner of the land in the first instance. The Judges there considered this Sind case in 27 S L R 84[1] and distinguished it from the case such as the one before me.

In the case reported in A I R 1930 Mad 576[3] the learned Judge pointed out that S. 25 is only concerned with the maximum and minimum amounts which the Court may award in any one of the three cases and that it did not confer upon the Court jurisdiction to deal with claims or compensations under particular sub-heads of which no mention was made in reply to the notice under S. 9, Land Acquisition Act. The Judge there held that the proceedings before the Court, on which reference had been made under S. 18 of the Act, were of the nature of an inquiry into objections taken to the Collector's award, and not a judicial inquiry independently undertaken into such question as the claimant may raise. On this view it is not open to the claimant to make out a fresh case, whether by way of supplementary claims to compensation or otherwise, in proceedings be-

2. ('36) 23 AIR 1936 Lah 733: 168 I C 622, Secretary of State v. Tikka Jagtar Singh.
3. ('30) 17 A I R 1930 Mad 576 : 127 I C 298 : 59 M L J 30, Secretary of State v. Subramania Ayyer.

fore the Court. The learned Judge there remarked that the point was practically bare of authority. In this case, therefore, the claim for compensation on the ground of injurious affection is a new case put forward by the owner after the proceedings before the Collector have terminated. I do not think, therefore, I have jurisdiction to inquire into the aspect of the matter further, or further to consider the very interesting scheme of development of this site which Mr. Durgadas brought to the Court, but which, judging from the number of years this land has remained vacant and the financial position of the owner, would in any case probably be a matter of academic or professional interest only.

I therefore now proceed to consider that part of the claimant's objections relating to the value of the land. (His Lordship then considered the situation and other circumstances and concluded). Taking then these sales and acquisitions into consideration, taking into consideration the situation, size, shape and frontage of Survey No. 80, I consider, except for the modification I have suggested in the award of the Land Acquisition Officer, that the order is not open to objection, that the price awarded is a fair price, and that with the substitution of 30 feet depth for 20 feet in the valuation in item (2) and the corresponding alteration of item (3), the award should stand. The order of valuation, therefore, will be as follows :

	Rs.	a.	p.
(1) Front strip of Kharadar Lane, 7 feet wide up to a depth of 20 feet, which is the average depth of a shop on this street, area 140 square feet, or say 16 square yards at Rs. 120 per square yard.	1920	0	0
(2) Frontage on Pahlaj Kara Lane 15.15′ × 30′ deep=50.5 square yards at Rs. 70 per square yard.	3535	0	0
(3) Remaining portion of interior land 53.65 square yards at Rs. 50 per square yard.	2682	8	0
	8137	8	0
15 per cent., for compulsory acquisition.	1220	10	0
Rupees nine thousand three hundred and fifty eight and annas two only.	9358	2	0

As the claimant has failed in his main contention, that of severance, I think he should pay the costs of these proceedings. Order accordingly.

D.S./R.K. *Order accordingly.*

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(28) A. I. R. 1941 Sind 154

DAVIS C. J. AND LOBO J.

Mt. Fazilat Khatun — Appellant

v.

Haji Rahimbux Gulmahomed and others — Respondents.

First Appeal No. 6 of 1938, Decided on 26th July 1940, from judgment and decree of the first class Magistrate, Shikarpur.

(a) Court-fees Act (1870), S. 7 (iv) (c)—Plaintiff not in joint possession—Suit for declaration of previous partition decrees as void and for repartition of entire property falls under S. 7 (iv) (c)—Plaintiff has no absolute right to value relief at any sum—Court can enquire into matter and raise valuation if claim found undervalued.

A suit for setting aside previous partition decrees and for declaring them as void coupled with a claim for a repartition of the entire property by a plaintiff who is not in joint possession is a suit for a declaration with a consequential relief and falls within the purview of S. 7 (iv)(c): 5 I C 582 (Cal), *Rel. on*; ('38) 25 A I R 1938 Sind 189; 6 S L R 72 and 20 Cal 762, *Disting*. [P 157 C 2]

In suits coming within the purview of S. 7 (iv) (c), the plaintiff has not an absolute right to value the relief at any sum he pleases but the Court can inquire into the matter and raise the valuation if it finds that the relief claimed is undervalued : ('39) 26 A I R 1939 Cal 627; ('37) 24 A I R 1937 Sind 241 (F B) and ('32) 19 A I R 1932 Lah 132, *Rel. on*. [P 157 C 2]

(b) Court-fee — Partition suit — Plaintiff claiming repartition of entire property and abandoning claim to portion of property in his possession—Plaintiff is not entitled to credit for court-fee payable on portion of which he is already in possession.

Where the plaintiff abandons the claim to the portion of the property in his possession and seeks a re-partition of the entire estate throwing into hotchpot that portion of it of which he had been in exclusive possession, he is not entitled to credit for the court-fees payable in respect of that part of the property of which he was already in possession. [P 158 C 1]

(c) Civil P. C. (1908), O. 7, R. 11—Necessary Court-fee not paid within time fixed by Court—Correct order to be passed is one rejecting plaint and not one dismissing suit.

Although in substance there is very little difference between an order rejecting a plaint under O. 7, R. 11 and an order dismissing the suit, still the former and not the latter is the correct order to be passed where the plaintiff within the time fixed by the Court fails to pay the necessary court-fee. [P 158 C 2]

Fatehchand Assudomal — for Appellant.

Srikishindas H. Lulla — for Respondents.

Lobo J. — This is a first appeal against the judgment and decree of the first class Subordinate Judge of Shikarpur who dismissed suit No. 17 of 1934 of that Court, because the plaintiff failed to pay the court-fees determined by the learned Judge to be pay-

able on the plaint in that suit under S. 7 (iv) (c), Court fees Act. The suit related to the estate of one Kalanderbux who died many years ago leaving him surviving a daughter, Allahdini and three sons, Daim, Kaim, and Idan all of whom were dead at the date of the suit. The plaintiff in the suit, Mt. Fazilat Khatun, was a minor daughter of Jiwan one of the three wives of Idan. Defendant 1 in the suit Rahimbux was the son of Allahdini and defendant 6 Ismat was his daughter. Defendant 2 in the suit Muhammad Akram was the son of Kaim deceased by his wife Halima. Defendants 3 to 5 were the mother of the plaintiff Jiwan, and Bhana and Sabul, two other wives of deceased Idan. The suit was instituted by the minor plaintiff through her next friend and official guardian the Nazir of the District Court of Sukkur. The plaint alleged that the plaintiff's mother Mt. Jiwan had filed suit No. 74 of 1925 in the Court of the first class Subordinate Judge of Shikarpur for partition of the property left by deceased Kalandarbux and for separate possession of her share and that of the present plaintiff therein; that there had been a reference of the subject-matter of that suit to the arbitration of Kalanderbux, Allahwarayo and Wahidbux that these arbitrators had made an award and a decree in terms thereof was passed on 15th February 1926 awarding, inter alia, to the present plaintiff and her mother an 8 anna share and an 8 pie share respectively out of Rs. 3. The plaint further alleged that on 2nd June 1927, defendant 1 in the suit Rahimbux the son of Allahdini applied to be appointed guardian of the property of the present plaintiff in the District Court of Sukkur and obtained a certificate of guardianship in Jud. Misc. No. 73 of 1927. It was further alleged in the plaint that in 1930, defendant 4 Bhana one of the wives of Idan deceased filed suit No. 63 of 1930 in the Court of the first class Subordinate Judge of Shikarpur for partition and separate possession of her 8 pie share in the property in suit which had been determined as her share by the decree in suit No. 74 of 1925. In this suit the present plaintiff was impleaded and defendant 1 had acted as her guardian ad litem.

This suit again was referred to the arbitration of Muhammad Azim and Abdul Rasul who made an award in terms of which a decree was passed on 1st June 1931 effecting a partition of the property by metes and bounds. The plaintiff alleged that the aforesaid decrees in suit Nos. 74 of 1925 and 63 of 1930 "were collusive, fraudulent and void." She claimed that the said decrees be set aside and it be declared that the same were void and not binding on the plaintiff and she further prayed that the entire estate left by the deceased Kalanderbux should be re-partitioned, the properties comprising that estate being set out in Schs. A, B, C and D attached to the plaint. Defendants 7 to 26 had been impleaded in the suit, the plaint said, because they were either the vendees or the mortgagees of all the property in suit, save that minor part of it which had been awarded to the plaintiff in the partition suits referred to. Various defences were raised to the action by the various defendants and issues, eleven in number, were framed by the Court covering the contentions of the parties, issue 1 being : "Whether the suit is not properly stamped?" The learned Judge heard the entire case and all the evidence offered but did not record his findings on any of the issues other than issue 1. He states :

> My finding on issue 1 is that the plaint is insufficiently stamped. In view thereof it is unnecessary to give findings on the other issues until the required deficit court fee is paid.

The learned Judge further states :

> The trend of decisions of almost all the High Courts in matters like these is that a suit in which the main relief is possession by way of re-partition and in order to succeed in this relief the plaintiff asks that the obstacles, namely prior partition, alienations under the decrees or otherwise be declared as not binding on him is one for declaration with consequential relief and that in such a case the valuation should be under S. 7 (iv) (c), i. e., according to the amount at which the relief sought is valued, but that the same should neither be improper nor arbitrary, and that the Court has power to revise such a valuation. As observed above, the plaintiff herself in para 24 of the plaint has valued her share in the properties in suit at Rs. 30,000. She must therefore pay ad valorem fee on Rupees 30,000. The fixed fee of Rs. 15 for partition and also for setting aside each of the decree, i.e., Rs. 45 in all is improper, capricious and not warranted by law. I direct, therefore, that the plaintiff do pay the deficit court-fee within ten days, before decision on each of the other issues is given.

After this order an application was filed by the plaintiff under Ss. 151 and 152, Civil P. C., in which the plaintiff contended that even accepting the finding of the learned Judge the amount of court-fees payable by her under the provisions of the Court-fees Act would be Rs. 620. There was a rejoinder to this application on behalf of some of the defendants in which while conceding the plaintiff's contentions in principle it was pointed out that the court fee payable was not Rs. 620 but Rs. 735. Ad valorem court-fees on Rs. 30,000 amount to Rs. 995. On 18th

December 1937 the learned Judge disposed of the application referred to above stating:

I decline to review my previous order and dismiss the application with costs. The required court-fee should be paid on or before the 21st.

On 21st December 1937 as the court-fees had not been paid the learned Judge dismissed the suit with costs.

In appeal before us two points have been taken by the learned advocate for the plaintiff-appellant; (1) that the learned Judge has entirely misunderstood the law on this question of court-fees, and has wrongly held that the suit is virtually one under S. 7, cl. (iv) (c), Court-fees Act; that in fact the suit was one to set aside a decree under Sch. 2, Art. 17, cl. (v), Court-fees Act, as amended by Bombay Act, 2 of 1932, and for partition by a cosharer in possession of part of the property sought to be partitioned which would fall under Sch. 2, Art. 17, cl. (vii), Court-fees Act. In both cases the law prescribed a fixed fee of Rs. 15. The plaintiff had paid Rupees 15 for each of the prayers for setting aside a decree and had further paid Rs. 15 for the relief of partition as she was in joint possession. The requisite court-fees had therefore been paid on the plaint; (2) that even if this Court held that the learned Judge was right in holding that court-fees were payable on the plaint in this suit under S. 7 (iv) (c), Court-fees Act, the amount payable by the plaintiff would be not Rs. 995 ad valorem fees on Rs. 30,000 but considerably less, as the plaintiff was already in possession of part of the property sought to be partitioned, and further a portion of the property sought to be partitioned being arable land, Court fees in respect of that portion of the property were payable under S. 7, cl. (v) (b), Court fees Act. The learned advocate for the appellant relied on the case in 32 S L R 124[1] in which it was held that

in a suit for partition of property court-fee is to be determined solely on a consideration of the cause of action as stated in the plaint. A denial by the defendant of the plaintiff's joint possession at the date of the suit does not alter the character of the suit. In such a case if the defendant is able to establish his defence that the plaintiff was not in joint possession, the plaintiff's cause of action as laid fails and his suit is liable to be dismissed unless he is permitted to amend the plaint and pay the additional court fee.

The learned advocate for the appellants also relied on the case in 6 S L R 72[2] which formed the basis of the decision of the learned Judges in 32 S L R 124.[1] The learned advocate also referred us to the case in 20 Cal 762[3] in which it was held that in determining the court-fees payable on a plaint the Court should have regard to the cause of action as stated in the plaint and that the defendant's denial of the plaintiff's joint possession at the date of the suit did not alter the character of the suit. We do not dispute the correctness of the decisions referred to by the learned advocate for the appellant, but it appears to us that from a consideration of the plaint alone it is obvious that the plaintiff's suit is not one for setting aside a decree falling under Sch. 2, Art, 17, cl. (v), Court-fees Act, and that the plaintiff was clearly not in possession at the date of the suit so as to bring her claim for partition under Sch. 2, Art. 17, cl. (vii), Court-fees Act, which would enable her to claim partition on payment of a fixed fee of Rs. 15. In the prayer clause, para. 26 of the plaint the plaintiff has prayed as follows:

This Honourable Court will be pleased to set aside decrees in Suits Nos. 74 of 1925 and 63 of 1930 of the first class Court, Shikarpur, and declare that the same are void and not binding on the plaintiff.

This is clearly a prayer for a declaration falling under S. 7, cl. (iv) (c), Court-fees Act. The second prayer reads:

Partition the property shown in Schs. A, B and C hereof and award Re. 0-11-0 share out of Rs. 3 or whatever larger share to which plaintiff may be entitled as shown in para. 18 (21) hereof, to the plaintiff by giving separate possession thereof to the plaintiff by dispossession of the defendants therefrom.

This is clearly a prayer for consequential relief, and it appears to us, therefore, plain that in substance the plaintiff's suit is one for a declaratory decree or order and consequential relief, a suit which is specifically covered by S. 7 cl. (iv) (c) of the Court-fees Act. It is idle for the learned advocate for the plaintiff-appellant to contend that the plaint alleges that the plaintiff is in joint possession. It is no doubt true that in para. 9 of the plaint the plaintiff states:

Plaintiff is in joint possession of the property in suit but as the intentions of defendants 1 and 2 are not bona fide and they are trying to deprive her of her legitimate share in the said property she no longer wishes her property to remain joint and undivided;

and it is also true that in para. 24 of the plaint the plaintiff has stated: "Plaintiff is in joint possession of the property in suit ...." But these paras must be read with

1. ('38) 25 A I R 1938 Sind 189 : 177 I C 498 : 32 S L R 124, Hussein Baksh v. Muhammad Musa.
2. ('12) 6 S L R 72 : 16 I C 773, Manghanmal v. Tolaram.
3. ('93) 20 Cal 762, Mohendro Chandra Ganguli v. Ashutosh Ganguli.

other paras in the plaint ; the plaint must be read as a whole. In para. 17 of the plaint it is stated :

> According to this decree, No. 63 of 1930 the property in suit has been fraudulently and dishonestly partitioned by metes and bounds and out of the total share of Rs. 3 defendant 1 has awarded share of . . . .

Here is a clear admission of partition by metes and bounds which can only mean that the plaintiff received in that suit exclusive possession of a specific share, and each of the defendants in that suit similarly received exclusive possession of the share of property awarded to him or her. There having been a complete partition by metes and bounds, it is idle for the learned advocate to contend that plaintiff-appellant was in joint possession with the other defendants in the previous partition suits. Again, in para. 20 of the plaint, the plaintiff states:

> Defendants 7 to 26 have been joined in the suit as they are the purchasers and mortgagees of some of the property in suit from defendants 1 and 2. The property sold and mortgaged by defendants 1 and 2 to them is shown in Sch. E hereof with a full statement as to the mortgages and sales. The plaintiff is not bound with such sales and mortgages and the sales are illegal and void so far as the plaintiff is concerned; the plaintiff is therefore entitled to have her share out of the property in suit including those shown in Sch. E hereof.

Not only then was there a partition by metes and bounds in Suit No. 63 of 1930 by which specific portions of the estate left by the deceased Kalanderbux came into the exclusive possession of the parties to that suit, but the parties to that suit other than the plaintiff have sold and mortgaged what they received at that partition, so that the whole of what they then received is now in the hands of alienees defendants 7 to 26 in the suit. It is idle for the learned advocate for the plaintiff-appellant to contend that the plaintiff-appellant was in joint possession with the alienees of the respondents 1 to 6. The learned Judge on this point finds:

> In the present case, since the passing of the decrees in question, except the plaintiff, all the other former cosharers in the properties in suit, who were allotted separate and exclusive possession of the properties towards their respective shares have alienated them to the strangers who have effected improvements over them at great expense. There is no question, therefore, of the plaintiff being in joint possession with any of them. She is not now a cosharer with any of them at all. She is the exclusive owner of the property allotted to her under the partition decree in question. The fixed fee of Rs. 15 for the consequential relief by way of partition is under the circumstances improper and grossly inadequate and arbitrary.

We entirely agree with the view taken by the learned Judge on this point and hold that even on the allegations in the plaint the plaintiff is not in joint possession so as to entitle her to claim consequential relief, namely, a re-partition of the entire property on payment of a fixed fee under Sch. 2, Art. 17, cl. (vii). The learned Judge rightly held that the suit was one for a declaration with consequential relief. The consequential relief was re-partition of the entire estate left by Kalandarbux and the plaintiff not being in joint possession was obliged to value her consequential relief, that she had in fact valued it at Rs. 30,000, that this appeared reasonable and proper and that the plaintiff had, therefore, to pay ad valorem court fees on Rs. 30,000. There is considerable authority in support of this view. In 5 I C 582[4] a Bench of the Calcutta High Court held that where a plaint prayed to have an arrangement carried out under the terms of a previous decree reversed and to bring into hotchpot, for the purpose of making a partition, the properties which since the arrangement had been in the exclusive possession of one or other of the defendants and also to have certain additional properties brought into partition, the suit was for a declaratory decree and for consequential relief and that an advalorem court-fee was payable on the plaint under S. 7, cl. (iv) (c), Court-fees Act.

The learned Judge has relied upon this decision and rightly so. The learned advocate for the plaintiff-appellant has attempted to distinguish it on the ground that the Court fees Act did not then contain cl. (v) of Art. 17, Sch. 2 of the Act. That however in our opinion makes no difference whatever. In 43 C W N 1116,[5] it was held that in suits coming within S. 7, clause (iv) (c), Court-fees Act, that is suits to obtain a declaratory decree where consequential relief is prayed for, the plaintiff has not an absolute right to value the relief at any sum he pleases but the Court may inquire into the matter and raise the valuation if it finds that the relief claimed is undervalued. To the same effect is the decision of our own Court in the Full Bench case in 31 S L R 442.[6] In 13 Lah 391,[7] it was held that the substance

4. ('10) 5 I C 582 (Cal), Hara Gowri Saha v. Dukhi Saha.
5. ('39) 26 A I R 1939 Cal 627 : 185 I C 648 : 43 C W N 1116 : 70 C L J 158, Star Trading and Investment Ltd. v. Ashutosh Mukherjee.
6. ('37) 24 A I R 1937 Sind 241 : 171 I C 420 : 31 S L R 442 (F B), Lakhomal Deepchand v. Deepchand Tolaram.
7. ('32) 19 A I R 1932 Lah 132 : 135 I C 499 : 13 Lah 391 : 32 P L R 729, Sri Kishandas v. Sat Narain.

and not the language of the plaint is to be looked at when deciding whether a case falls within the ambit of S. 7 (iv) (c), Court-fees Act, that a suit by a plaintiff for a declaration that he was not bound by two mortgages made by his father and his two major brothers and further that he was not bound by the decree passed on the two mortgage deeds which should be declared null and void and ineffectual so far as his rights were concerned, was one for declaration and consequential relief falling within S. 7 (iv) (c), Court-fees Act. We must hold, therefore, that the learned Judge who tried this suit rightly held that the plaintiff's suit was one for a declaration and consequential relief falling under S. 7 (iv) (c), Court-fees Act, and that the plaintiff had to pay ad valorem fees on the consequential relief she sought. On the second point raised before us by the learned advocate for the plaintiff-appellant he has put forward two contentions (a) that the plaintiff being already in possession of a portion of the entire estate of which she sought re-partition, in calculating the court-fees payable by her on her prayer for consequential relief, that is re partition, she is entitled to credit for the court-fees payable in respect of that part of the property of which she was already in possession, (b) that a part of the estate being arable land court-fees were payable not on the market value of that land but on $7\frac{1}{2}$ times the annual assessment thereof.

Both these contentions, it appears to us, are without substance. There can be no question of the plaintiff-appellant being given credit for any part of the court-fees payable by her on the ground that she is in possession of a portion of the estate of which she seeks partition. The very nature of her suit was such that she abandoned the claim to the portion of the property in her possession and sought a re-partition of the entire estate throwing into hotchpot that portion of it of which she had been in exclusive possession. Section 7, cl. (v) (b), Court-fees Act, is clearly not applicable in respect of the arable land. The share which the plaintiff-appellant claimed was not land which formed an entire estate or a definite share of an estate paying annual revenue to Government. The case clearly fell under cl. (v) (d) of S. 7 as the share of agricultural land plaintiff-appellant claimed formed part of an estate paying revenue of Government but was not a definite share of such an estate and was not separately assessed. For such a claim court-fees are payable on the market value of the land. As the learned Judge points out the plaintiff had herself valued the entire estate of which partition was sought at Rs. 1,29,000 odd and her 11/48th share therein at Rs. 30,000 and there was no reason whatever why the plaintiff should not have been ordered to pay ad valorem court-fees on Rs. 30,000. The learned Judge on the plaintiff's failure to pay the necessary court-fees dismissed the suit. The more correct order would have been one under O. 7, R. 11, Civil P. C, which provides that the plaint shall be rejected,

when the relief claimed is undervalued and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so.

But in substance there is very little difference between an order rejecting a plaint under O. 7, R. 11 and an order dismissing the suit. We accordingly dismiss this appeal with costs.

G.N./R.K. *Appeal dismissed.*

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(28) A. I. R. 1941 Sind 158

DAVIS C. J. AND LOBO J.

Rupomal Kodumal and another — Plaintiffs — Appellants

v.

Mt. Janat w/o Abdulla and others — Defendants — Respondents.

First Appeal No. 13 of 1938, Decided on 26th July 1940, against judgment and decree passed by the First Class Sub-Judge, Shikarpur, D/- 23rd December 1937.

(a) Practice—New plea—Limitation—Plea of, founded on undisputed facts can be taken in appeal.

Limitation when founded on facts which are not disputed is a question of law and may be taken in appeal for the first time. [P 159 C 2]

(b) Limitation Act (1908), Art. 132 — Penal clause which mortgagee may or may not enforce —Time runs on expiry of full term of bond *(Obiter)*.

In the case of a mortgage bond with a penal clause which the mortgagee may or may not enforce time for the enforcement of the mortgage runs on the expiry of the full term of the bond : ('32) 19 A I R 1932 P C 207, *Rel. on.* [P 160 C 1]

(c) Limitation Act (1908), Arts. 132, 57 and 59 —Mortgage by conditional sale silent as to date of repayment—Date of execution of deed is date of repayment — Time under Art. 132 runs from date of execution of deed and not from date on which demand is made—There is no distinction between money lent and payable on demand governed by Art. 57 or Art. 59 and money lent and charged upon land in which no time is fixed, governed by Art. 132 — In both cases money is payable forthwith.

In the case of a mortgage by a conditional sale when no time for payment is fixed, time under

Art. 132 runs from the date of the execution of the mortgage deed which must be deemed to be the date of repayment. There is no reason to distinguish between money lent and payable on demand governed by Art. 57 or Art. 59 and money lent and charged upon land and governed by Art. 132. As under Art. 57 when no time is fixed a loan is payable on demand that is, forthwith, so when money is lent and charged upon land and no time is fixed it is payable on demand—that is forthwith—as the words "on demand" used in this sense mean forthwith and without demand" : 21 Mad 139 and 20 Cal 269, *Rel. on*; ('30) 17 A I R 1930 P C 188, *Disting* ; ('26) 13 A I R 1926 All 493 and (1859) Johns 397, *Ref.* [P 160 C 1, 2]

Fatehchand Assudomal — for Appellants.

G. Raymond — for Respondents.

Davis C. J. — This is an appeal against a judgment of the first class Subordinate Judge at Shikarpur dismissing the plaintiffs' suit for Rupees 1770, Rs. 900, principal and Rs. 870 interest, upon two deeds dated 10th March 1920, and 8th June 1920, relating to four survey numbers, 31, 219, 224 and 89, in Deh Kumbraoti, Taluka Shikarpur. These deeds had been made the basis of a previous suit No. 882 of 1931, in the Subordinate Court at Shikarpur on the basis that these deeds were sale deeds; that the plaintiffs had been forcibly dispossessed and the plaintiffs sued the defendants for possession of the lands. The trial Court and the appellate Court both held that the sales were mortgages by conditional sale. The plaintiffs being forced back by these judgments to their true character as mortgagees have brought this further suit. The mortgagor was one Abdullah the father of defendants 2 to 5 and the husband of defendant 1.

Now the learned Judge dismissed this suit principally upon the ground that as the deeds were to be treated as mortgage deeds and contained no date for re-payment, the date of re-payment must be deemed the date of the execution of the deeds. Applying Art. 132, Limitation Act, and the 12 years' rule, the suit was obviously out of time, and before us it was argued that time ran from the date of demand, that is, the date of the suit, and in the alternative from the date of alleged payment in 1926. But this was not the case taken in the plaint. The causes of action as given in the plaint are when the District Court, the appellate Court, dismissed the appeal in the previous suit on 15th November 1935, or when the trial Court dismissed the suit on 8th October 1932, or when the deceased Abdullah took forcible possession in 1926.

The learned advocate for the appellant did not waste his time and ours by arguing that Abdullah took forcible possession from the plaintiffs. Clearly, from the evidence, this case is as false as the case that the transactions were out and out sales; and so far as the two other causes of action are concerned, the date of the dismissal of the appeal or the date of the dismissal of the previous suit, the learned advocate abandoned these two causes of action stating that he thought they were ill-advisedly taken, and basing his arguments on the judgment of the appellate Court he endeavoured to show that the Subordinate Judge was wrong when he took the dates of the execution of the deeds, namely, dates in 1920, as the starting point of limitation. He should have taken the date when this suit was filed for this was the demand which when refused started limitation. Limitation when founded on facts which are not disputed is a question of law and may be taken in appeal, and therefore, despite the fact that the plaintiffs had failed to make this case their own in the plaint, we heard and we decided this appeal upon this new basis.

The learned advocate did not take the further ground taken before the trial Court that time in any case was saved under S. 14, Limitation Act, because of the time taken in prosecuting litigation in good faith in Suit No. 882 of 1931 and Civil Appeal No. 122 of 1932, and we have no doubt that this point was not taken because it would not have been successful. It is true that the learned Judge dealt but briefly with the case that is now made the foundation of the appeal, that the money became due under the mortgage deeds when the deeds were executed, and there are curiously few reported cases on the point. Reference was made to 20 Cal 269,[1] but it is said that this case gives two alternatives : firstly, the date of the execution of the deed, and, secondly, the dates of the alleged payments. The sufficiency of this latter alternative, the dates of the alleged payments, is not explained in the judgment, and must, we presume, be based upon the inference that if a debtor alleges a payment under a mortgage deed which is silent as to the date of repayment, that date is presumed to be the date on which repayment is alleged. We are not dealing here with any question of an acknowledgment of a debt in writing or extension of time. On the other hand, if, as here, the plaintiff denies any repayment or offer of repayment, while the allegation of repayment by the debtor is not found proved, it is difficult to see how from these facts the general infe-

1. ('91) 20 Cal 269, Nilcomal v. Kamini Kumar.

rence that where no date for repayment of a loan is fixed that loan is deemed to be repayable forthwith or on demand, which means the same thing, can be rebutted.

This Calcutta case in 20 Cal 269[1] supports the finding of the Judge that in a simple mortgage Art. 132, Limitation Act, applies, and that where no date for repayment is given in the mortgage deed, the date is the date of execution of the deed. Article 132, Limitation Act, also applies to the case of a mortgage by conditional sale : 48 ALL 302.[2] To hold otherwise would be to allow the mortgagee to wait for a 100 years before he brought his suit, though it would be obvious that the mortgagor would not have acceded to a mortgage on these terms. The learned advocate for the appellants relies on the Privy Council case in A I R 1930 P C 188[3] in support of his argument that in cases such as this, a mortgage by way of conditional sale, where no date is mentioned, the date for the purpose of limitation is the date when demand is made by the mortgagee and refused by the mortgagor, but that decision was upon its own special facts in a case under a Bombay Regulation (No 5 of 1827); nor do we think that the Privy Council decision relating to penal clauses in mortgage bonds, which the mortgagee may or may not enforce as he wishes affect this case, because even in those cases there is some date from which the period of 12 years can be calculated, namely on the expiry of the full term of the bond : *see* 7 Luck 442.[4] The principle on which these simple mortgages are to be governed, so far as the date of payment is concerned, is contained in the Madras case in 21 Mad 139.[5] The Court in giving judgment said :

There can be no doubt but that, under the general law, money lent, payable on demand, is due from the date of the loan; in other words, there is a cause of action on the date of the loan. This being so, we must hold that, in a suit brought to enforce payment of money so lent, the money must be taken to have become due, within the meaning of the col. 3 of Art. 132 of Sch. 2, Limitation Act, on the date of the loan. To hold otherwise would lead to an anomaly for which there is no justification. If it was intended that money lent on the security of immovable property, though payable on demand, should not be subject to the general rule as to money lent and payable on demand (Art. 59), the language of col. 3 Art. 132 would have been so framed as to make this clear.

This case is an old case, but there is nothing new in the idea of a simple mortgage of the repayment of money charged upon land, and there seems no reason to distinguish between money lent and payable on demand governed by Art. 57 or Art. 59, Limitation Act, and money lent and charged upon land and governed by Art. 132, Limitation Act. As under Art. 57 when no time is fixed a loan is payable on demand — that is, forthwith — so when money is lent and charged upon land, and no time is fixed, it is payable on demand—that is forthwith — if the words "on demand" used in this sense mean "forthwith and without demand", as they do; (1859) Johns 397,[6] see Mitra's Limitation Act, Edn. 12, p. 434. We think therefore that the Judge was right when he took the date of the execution of the deeds as the dates from which to calculate limitation, and we dismiss the appeal with costs accordingly.

G.N./R.K. *Appeal dismissed.*

2. ('26) 13 A I R 1926 All 493 : 94 I C 849 : 48 All 302 : 24 A L J 295, Sheoram Singh v. Babu Singh.
3. ('30) 17 AIR 1930 P C 188 : 126 I C 417 : 57 I A 194 : 54 Bom 495 (P C), Nilkanth Balwant v. Vidya Narasinh Bharathi.
4. ('32) 19 AIR 1932 P C 207 : 138 I C 779 : 59 I A 376 : 7 Luck 442 (P C), Lasa Din v. Mt. Gulab Kunwar.
5. ('97) 21 Mad 139 : 7 M L J 315, Perianna Goundan v. Muthuvira Goundan.
6. (1859) Johns 397 : 5 Jur (N S) 976 : 7 W R 730 : 123 R R 165, Jackson v. Ogg.

* (28) A. I. R. 1941 Sind 160

DAVIS C. J. AND LOBO J.

Pir Moosajan Pir Aka Muhammad Alijan — Applicant

v.

Bachayo Silu and others—Opponents.

Criminal Revn. Appln. No. 71 of 1940, Decided on 19th July 1940, to revise order of Addl. Sess. Judge, Hyderabad, D/- 29th November 1939.

• (a) Criminal P. C. (1898), S. 350 (1), Proviso (a) and S. 350 (1)—Distinction between and effect of S. 350 (1) Proviso (a) and S. 350 (1) explained—Magistrate recommencing trial under S. 350 (1) leaves everything in previous trial behind—But when he proceeds under S. 350 (1) Proviso (a) and accused demands all or some of witnesses to be re-summoned or re-heard he does not recommence trial but continues trial begun by his predecessor—Accused demanding witnesses to be re-summoned and re-heard under S. 350 (1), Proviso (a) — Charge already framed in previous proceedings is not annulled but subsists—Accused cannot be discharged but he may be acquitted—No distinction can be drawn between case where accused wants all and case where he wants only some of witnesses re-summoned and re-heard.

The effect of an accused person demanding the re-summoning and re-hearing of witnesses under S. 350 (1), proviso (a) is not the same as where a Magistrate himself recommences a trial under S 350 (1). When a Magistrate "re-commences" a trial under S. 350 (1) he leaves everything in the previous trial behind, but when he commences

proceedings under S. 350 (1) Proviso (a) and the accused demands all or some of the witnesses to be re-summoned or re-heard, he does not do so. He does not recommence the trial. He continues the trial begun by his predecessor. The effect of an accused demanding that the witnesses should be re-summoned and re-heard under S. 350 (1) Proviso (a) is not to annul a charge already framed in previous proceedings; the charge subsists and the accused may be acquitted; they cannot be discharged. No distinction can be drawn between a case where an accused wants all the witnesses re-summoned and re-heard and a case where an accused wants only some witnesses re-summoned and re-heard : ('33) 20 A I R 1933 Oudh 86, *Rel. on;* ('26) 13 A I R 1926 Sind 158 ; ('34) 21 A I R 1934 Sind 106 and ('37) 24 A I R 1937 Bom 55, *Expl., and Disting.; Case law referred.* [P 161 C 2 ; P 162 C 1]

(b) Criminal P. C. (1898) — Interpretation — Interpretation of sections should be first sought in their wording (Per *Lobo J.*).

Where the language of a statute is plain and unambiguous, it is idle to seek for a construction outside the limits of the statute and by reference to the intention of the Legislature. Hence, where a section of the Criminal Procedure Code calls for interpretation it is far more satisfactory to seek that interpretation first in the wording of the section itself rather than to base it on general considerations of the intention of the Legislature: ('37) 24 A I R 1937 Sind 129 (FB), *Rel. on.* [P 164 C 2 ; P 165 C 1]

Parmanand Kundanmal — for Applicant.
Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is a revision application against an order of the Additional Sessions Judge, Hyderabad, refusing to order further enquiry into a case against the five opponents under Ss. 323, 324 and other sections of the Penal Code on the ground that they have been acquitted by the last of a series of Magistrates before whom the case had come. It was argued before the Additional Sessions Judge, as it was argued before us, that the effect of an accused demanding, as he has the right to demand under proviso (a) to S. 350 (1), Criminal P. C., that all the witnesses should be re-summoned and re-heard by the Magistrate to whom a part-heard case has been transferred, is to annul all the previous proceedings in the case. Therefore, if a charge has been framed in the previous proceedings that charge is deemed to be annulled so soon as the Magistrate agrees to the accused's request and resummons the witnesses, in the later proceedings, and, as in this case, in the later proceedings no charge was framed, the accused should have been discharged and not acquitted. Curiously enough, there is little authority directly on the point, and we have been referred to a number of decisions in unauthorised reports for and against the view that the effect of the re-summoning of witnesses under proviso (a) to S. 350 (1), Criminal P. C., is to annul previous proceedings before other Magistrates including a charge, if one has been framed. Hence the Magistrate in the later proceedings tries the case, as the common phrase is "de novo" and he may discharge the accused. He need not acquit them, as he must do, if the charge framed in the earlier proceedings is deemed to subsist for the purpose of the later proceedings. Briefly, it is argued, the effect of an accused person demanding the re-summoning and re-hearing of witnesses under proviso (a) is the same as where a Magistrate himself recommences a trial under sub-s. (1) of S. 350, Criminal P. C.

We have also had cited to us cases from unauthorised reports to support the contrary view, namely that the effect of an accused demanding that the witnesses should be re-summoned and re-heard under proviso (a) is not to annul a charge already framed in previous proceedings; the charge subsists and the accused may be acquitted; they cannot be discharged. The majority of these rulings proceed for the most part on the general principle that the purpose of S. 350, Criminal P. C., is that a case should be decided by a Magistrate who has recorded the evidence and he must be left free, irrespective of the action of his predecessor, to deal with the case as he thinks proper. The contrary view however is supported by a stricter reference to the words of the section itself.

I do not however think it necessary to refer to more than two Sind cases, one Madras case, one Bombay case and one case from Oudh, for, it appears to me that the difference in the wording of sub-s. (1) of S. 350 and proviso (a) coupled with the fact that no distinction is made in proviso (a) itself between a case where all the witnesses have been re-summoned and re-heard or only some, leads to the conclusion that when a Magistrate "recommences" a trial in the words of the section, under sub-s. (1) he leaves everything in the previous trial behind, but when he commences proceedings under proviso (a) and the accused demands all or some of the witnesses to be re-summoned or re-heard, he does not do so. He does not recommence the trial. He continues the trial begun by his predecessor. Merely the witnesses are to be re-summoned and re-heard as the accused demands, so that the Magistrate can himself see and hear the witnesses and record their evidence,

but all this evidence is related to the charge already framed by his predecessor if a charge has been framed. Indeed, the learned advocate for the applicant conceded that if the accused demanded that some only of the witnesses should be re-summoned and re-heard, the charge if framed in the previous proceedings would subsist for the purpose of the second trial, as clearly it must, for, upon the evidence of some only of the witnesses it might be that a charge could not be framed. He argued however that if all the witnesses were to be re-summoned and re-heard, the charge would not subsist; and when asked how it would be if an accused asked for seven out of eight witnesses, he was compelled to say that either an accused would not be so foolish or the charge in the previous proceedings would subsist.

It is, in my opinion, upon a proper reading of the section, quite unnecessary to draw this arbitrary distinction between seven or eight witnesses or some or all. Proviso (a) draws no such distinction, and I see no reason why I should do so. So far as the two Sind cases are concerned, there is a case, 20 S L R 50,[1] and though that case may be used in support of the argument that the position is the same where a Magistrate suo motu re-commences a trial under sub-s. (1) of S. 350, Criminal P. C., or re-summons and re-hears all the witnesses under proviso (a), this question as to whether a charge framed in the previous proceedings is annulled when proceedings are taken under sub-s. (1) and subsists when proceedings are taken under proviso (a) was not considered and decided. All that was decided was that an accused is entitled to demand that all the witnesses shall be re-summoned and re-heard in any case and not only in a case where a charge has been framed.

The second Sind case, 28 S L R 239,[2] follows the line of cases differing from the Madras case in 38 Mad 585[3] which took the view that "trial" in proviso (a) in S. 350 (1), Criminal P. C., meant the proceedings after the charge has been framed and that before a charge had been framed there was no "trial" within the meaning of the proviso. Therefore, if a case was transferred from one Magistrate to another or was the subject of the succession of one Magistrate to another before a charge had been framed, the accused had no right to demand that the witnesses should be re-summoned or re-heard. From that position it was not difficult to argue that as the right under proviso (a) could be exercised only after a charge had been framed, the charge in the first trial subsisted for the purpose of the second trial. The Bombay case, I L R (1937) Bom 211,[4] refers to and differs from the Madras case on the point that proviso (a) can only apply to a case where a charge has been framed, but though the learned Judge referred to the fact that though a charge had been framed in the first proceedings the Magistrate discharged the accused as opposed to acquitting them in the second proceedings, a decision on this point was not necessary to the case because it was a case of awarding compensation under S. 250, Criminal P. C., and this could be done if accused were discharged or acquitted.

Lastly, I refer to 8 Luck 286,[5] where the learned Judge distinguishes between a case where a Magistrate decides to re-commence the trial suo motu under sub-s. (1) and the accused asks for witnesses to be re-summoned and re-heard under proviso (a) in which case the charge framed in the previous proceedings stands. The learned Judge refers in his judgment to the fact that the accused did not want to re-summon all the witnesses but only some and appears to distinguish between this case and a case where the accused wants all the witnesses re-summoned which would amount to a trial de novo, but, in a later passage in his judgment, the learned Judge appears to draw no distinction between a case where an accused wants all the witnesses re-summoned and re-heard under proviso (a) and a case where an accused wants only some witnesses re-summoned and re-heard and with respect, I agree with that view because the words in the proviso themselves make no difference but put both cases on the same footing. Indeed, I should not use the words "de novo trial" with respect to a case under proviso (a) at all. I should use the words used in the proviso.

Coming then to the facts of the case before us, I find the case was first tried by the Resident Magistrate, Hala, Mr. Bijlani.

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1. ('26) 13 AIR 1926 Sind 158 : 92 I C 748 : 27 Cr L J 332 : 20 S L R 50, Sidik Khairmahomed v. Ahmedali.
2. ('34) 21 AIR 1934 Sind 106 : 151 I C 213 : 35 Cr L J 1261 : 28 S L R 239, Labhsing v. Emperor.
3. ('15) 2 AIR 1915 Mad 23 : 25 I C 1001 : 15 Cr L J 673 : 38 Mad 585 : 27 M L J 589, T. Sriramulu v. Krishna Row.
4. ('37) 24 AIR 1937 Bom 55 : 166 I C 598 : 38 Cr L J 259 : ILR (1937) Bom 211 : 38 Bom L R 1189, Dagdu Govindshet v. Punja Vedu.
5. ('33) 20 AIR 1933 Oudh 86 : 141 I C 192 : 34 Cr L J 124 : 8 Luck 286 : 9 O W N 1136, Kunwar Sen v. Emperor.

He heard the case and framed a charge, and the case then came before his successor Mr. Shewaram. The accused then exercised their right under proviso (a) and all the witnesses were re-summoned and re-heard. The case was then transferred from Mr. Shewaram to Mr. Agha, Sub-Divisional Magistrate, Hala; but he was transferred and was succeeded by Mr. Nabi Baksh who succeeded also to this case. The opponents did not claim what is called a "de novo trial," that is to say, they did not ask that all the witnesses should be re-summoned and re-heard, and on the finding of the Additional Sessions Judge made on the admissions of the advocates concerned, Mr. Nabi Baksh did not recommence the trial within the meaning of sub-s. (1) as he was entitled to do. He acted partly on the evidence of the complainant recorded by his predecessor and resummoned and re-heard the other witnesses. He did not therefore "re-commence" the trial within the meaning of sub-s. (1) when it could be argued that as the trial re-commenced, so the charge in the previous trial was part of proceedings that had been lawfully discarded and was to be ignored. The proceedings before Mr. Nabi Baksh were in effect merely a continuation of the proceedings before Mr. Bijlani by whom a charge had been framed, so that Mr. Nabi Baksh, when he took notice of this charge and related the evidence before him or recorded by him to this charge, acted quite properly when finding that the charge could not be sustained upon the evidence, he acquitted and did not discharge the accused. I think, therefore, the learned Judge was quite right when he found that the accused had been acquitted and not discharged and refused therefore to order further inquiry as he might have done had the accused been discharged and not acquitted. I think, therefore, this revision application should be dismissed.

Lobo J.—I concur. This is an application to revise an order of the Additional Sessions Judge of Hyderabad whereby he rejected an application under section 436, Criminal P. C., and declined to order further inquiry into the case of *Crown (Pir Moosajan)* v. *Bachayo and four others*, in which the Sub-Divisional Magistrate of Hala had made an order purporting to be under S. 258, Criminal P. C., acquitting the accused. The learned Additional Sessions Judge states :

> Accordingly I hold that the order of acquittal in the present case did not amount to an order of discharge and that no further enquiry can be ordered under S. 436, Criminal P. C. The application stands dismissed.

For a proper understanding of the important legal point involved in this revision application, the circumstances leading up to it need to be set out. The applicant, Pir Moosajan laid information before the police upon which after investigation the police challaned the opponents before the Resident Magistrate of Hala under Ss. 323, 324, 148, 341, 342 and 149, Penal Code. The Resident Magistrate was then one Mr. Bijlani. The case proceeded before Mr. Bijlani for several months and a charge was framed by him under S. 254, Criminal P. C. Before any further progress could be made Mr. Bijlani was transferred and succeeded as Resident Magistrate by one Mr. Shewaram. When this Magistrate commenced the proceedings in this case the opponents under proviso (a) to S. 350 (1), Criminal P. C., demanded that the witnesses be re-summoned and re-heard and the demand was complied with. The complainant was examined and cross-examined afresh but at this stage the case was transferred to the Sub-Divisional Magistrate of Hala, Mr. Agha. Very shortly thereafter and before Mr. Agha even took up the case he was transferred and succeeded as Sub-Divisional Magistrate, Hala, by Mr. Nabibux. Before Mr. Nabibux the opponents did not repeat their prayer under proviso (a) to S. 350 (1), Criminal P. C., and Mr. Nabibaksh proceeded with the case from where it had been left by Mr. Shewaram. He examined the complainant further and completed his evidence, he re-heard the remaining witnesses and ultimately passed an order acquitting the opponents under S. 258, Criminal P. C. Against this order the applicant applied in revision to the Sessions Court of Hyderabad contending that the order of the learned Sub-Divisional Magistrate, Hala, was really one of discharge under S. 253, Criminal P. C., that the order was wrong and that further inquiry should be ordered. It is the dismissal of this application that the applicant seeks to have revised in the matter before us.

The contention of the learned advocate for the applicant is this: under S. 350 (1), Criminal P. C., the succeeding Magistrate "may re-summon the witnesses and recommence the inquiry or trial;" proviso (a) to S. 350 (1) enables an accused person to demand the adoption of this procedure should the succeeding Magistrate not adopt it suo motu. The right of an accused person in

this matter under the proviso is co-extensive with the power conferred on the Magistrate by sub-s. (1) of S. 350, Criminal P.C. When, on demand by the accused, the witnesses are re-summoned the previous proceedings, even including a charge if one has been framed, are wiped out and the Magistrate starts with a clean slate, he recommences the trial. In the present case when Mr. Shewaram on demand by the accused (opponents) resummoned and started re-hearing the prosecution witnesses, the entire proceedings held by Mr. Bijlani including the charge framed by him were wiped out. Mr. Nabibux merely continued the proceedings started by Mr. Shewaram and the order of Mr. Nabibux terminating these proceedings must therefore be deemed to be an order of discharge under S. 253, Criminal P. C., for no charge was framed by him under S. 254, Criminal P. C. In support of his contention the learned advocate for the applicant relied first on the Bench decision of this Court before it became a Chief Court in 20 S L R 50.[1] But the point decided in that case was entirely different as will appear from the following passage in the judgment :

> Before the Resident Magistrate, the accused in the case exercising the option given to them by proviso to S. 350, Criminal P. C., claimed what is usually known as a de novo trial. The learned Resident Magistrate has acceded to their request and proposes to hold a de novo trial. Against this order the applicant, who is the complainant in the case, applies in revision to this Court and the point made by his counsel before us is that the learned Resident Magistrate has no right to re-examine and re-cross-examine the prosecution witnesses in the case; that under S. 350 all he can legally do is to allow further cross-examination of the complainant and the other prosecution witnesses and generally to proceed with the case from the stage where the charge was framed.

This contention was held to be incorrect and the application for revision was on that ground alone dismissed. The judgment in this case in 20 S L R 50[1] is mine and it may be said that there are certain passages in that judgment which to some extent justify the reliance the learned advocate for the applicant places upon them in supporting his contention. For instance I have said :

> Section 350, Criminal P. C., appears to us to be perfectly clear as to what the duties of a Magistrate are to whom a case has been transferred by another Magistrate who has heard it in part. Under sub-s. (1) of that section, the Magistrate has a discretion to resummon the witnesses and recommence the enquiry or trial. If, however, he does not do so suo motu he is bound to do so if asked by the accused under proviso (a) to S. 350 which states: "In any trial the accused may when the second Magistrate commences his proceedings, demand that the witnesses or any of them to be resummoned and reheard."

The case in 28 S L R 239[2] which was referred to by the learned advocate for the applicant is again of no assistance to his argument. All that that case decided was that the contention, that in a warrant case proviso (a) to S. 350 (1), Criminal P. C., had no application and could not be availed of by an accused person unless a charge had been framed as till then there was no 'trial' of the accused person, was unsound and that the expression "any trial" in the proviso was wide enough to include proceedings taken against an accused person in a warrant case prior to the framing of a charge against him and an accused person has an unfettered right even before the charge is framed against him to demand that the witnesses examined by a Magistrate who has been transferred should be re-summoned and re-examined before his successor.

The learned advocate for the applicant has also referred us to a series of cases reported in unauthorized law reports in which certain Judges of various Courts in India appear to have taken a view of S. 350, Criminal P. C., similar to that contended for by the learned advocate : A I R 1933 Pesh 78,[6] 20 Cr L J 638,[7] 20 Cr L J 820,[8] A I R 1925 Mad 174,[9] A I R 1925 Mad 1280,[10] A I R 1927 Mad 81[11] and A I R 1931 Nag 39[12] are some of these cases; but with all respect to these learned Judges, the plain language of S. 350, Criminal P. C., appears to me to be against that interpretation and their decisions appear to be based more on general considerations of the intention of the Legislature than on a consideration of the wording of the section itself. I think it far more satisfactory in a matter such as this where a section of the Criminal Procedure Code calls for interpretation to seek that interpretation first in the wording of the section itself. It has been held by their Lordships of the Privy Council that where the language of a statute is plain and unambiguous it is idle to seek for a con-

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6. ('33) 20 A I R 1933 Pesh 78 : 146 I C 443 : 35 Cr L J 170, Abdul Hakim v. Haji Abdul Aziz.
7. ('19) 6 A I R 1919 Pat 578 : 52 I C 398 : 20 Cr L J 638, Daroga Chowdhury v. Emperor.
8. ('19) 6 A I R 1919 Pat 311 : 53 I C 820 : 20 Cr L J 820, Jago Singh v. Emperor.
9. ('25) 12 A I R 1925 Mad 174 : 85 I C 254 : 26 Cr L J 510: 47 M L J 926, Sardar Khan Sahib v. Athanulla.
10. ('25) 12 A I R 1925 Mad 1280 : 90 I C 668 : 26 Cr L J 1596 : 49 M L J 423, Narayana Reddi v. Bojanna.
11. ('27) 14 A I R 1927 Mad 81 : 99 I C 55 : 28 Cr L J 23, Sriranga Chettiar v. Subramania Asari.
12. ('31) 18 A I R 1931 Nag 39 : 130 I C 825 : 32 Cr L J 603 : 27 N L R 13, Sheoraisai v. Dani.

struction outside the limits of the statute and by reference to the intention of the Legislature. In 32 S L R 567,[13] the learned Chief Judge, then the Judicial Commissioner of Sind, stated:

> In my opinion therefore to read into sub-s. (2) the words "good faith" is to read into the sub-section words which the Legislature purposely omitted. If subsequent events show that the protection afforded by the Act as now amended is too wide, the Legislature may amend the Act, but it is our duty to respect the intention of the Legislature as expressed in its enactments. It is our duty to interpret and apply the laws but it is not our duty to amend them. It is not our duty to vary the words of the statute in an endeavour to meet a particular case.

Section 350, Criminal P. C., deals with the procedure to be adopted whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who exercises such jurisdiction. It provides first that the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself or that he may re-summon the witnesses and re-commence the inquiry or trial. Nothing can be more plain than the language employed in this sub-s. (1) of S. 350, Criminal P. C. The succeeding Magistrate may merely continue the case from the stage where it has been left by the Magistrate whom he succeeds or he may recommence the inquiry or trial by re-summoning the witnesses. Proviso (a) to S. 350 (1), Criminal P. C., provides that:

> In any trial the accused may when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard.

Obviously the proviso is intended to give an accused person the right to insist that the Magistrate who tries him should himself hear all the witnesses who depose against him and have the advantage of marking their demeanour. If, therefore, the Magistrate under sub-s. (1) of S. 350, Criminal P. C., should desire to act on evidence partly recorded by his predecessor, under the proviso, the accused in the case has the right to demand that he should not do so, but that he should re-summon and re-hear all or any of the witnesses. Where under sub-s. (1) of S. 350, Criminal P. C., the Magistrate re-summons the witnesses who have already been examined by his predecessor the Legislature states in so many words that he recommences the inquiry or trial, but no such words are used in proviso (a) if on the demand of an accused person the Magistrate re-summons and re-hears all or any of the witnesses. The omission cannot be said to be accidental; it is clearly intentional, and to my mind it is clear on a comparison of the wording of sub-s. (1) of S. 350, Criminal P. C., and the wording of proviso (a) that whereas it was intended by the Legislature that the succeeding Magistrate should have the power to recommence an inquiry or trial, the accused should have no such corresponding right to compel the Magistrate to recommence the trial, but that he should have a right only to insist that the succeeding Magistrate should himself hear all the evidence that has been led against him by the prosecution. To my mind, it is idle to contend that under the proviso when an accused person demands that the witnesses be re-summoned and re-heard the entire proceedings of his predecessor are wiped out and the Magistrate must begin with a clean slate. The proviso states that the accused may demand that the witnesses or any of them be re-summoned and re-heard. Suppose, in any case where six witnesses have been examined by the prosecution and the accused under proviso (a) demands of the succeeding Magistrate that only one of them or two of them be re-summoned and re-heard, how can it be said that the entire proceedings of the predecessor of the Magistrate are wiped out? And surely it cannot be contended that these proceedings are wiped out in the case when an accused person demands that all the witnesses be re-summoned and re-heard and the proceedings are not wiped out when the accused demands that only some of the witnesses be re-summoned and re-heard. I think it clear therefore that in interpreting proviso (a) to S. 350 (1), Criminal P. C., it is not permissible to go beyond the language of that proviso, language which is clear and unambiguous. The entire right of an accused person in the circumstances contemplated and provided for in S. 350, Criminal P. C., is to demand that the Magistrate who is to try him and pronounce judgment in his case should himself have seen and heard all the witnesses who depose against him.

Nor does such an interpretation involve any practical difficulty. If some of the witnesses have already been examined by a preceding Magistrate and the accused has demanded that those witnesses be re-sum-

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13. ('37) 24 A I R 1937 Sind 129: 169 I C 274: 38 Cr L J 723: 32 S L R 567 (F B), Nuralhaqshah v. Emperor.

moned and re-heard their depositions when re-summoned and re-heard are to be substituted for their original depositions, but apart from this, the proceedings of the preceding Magistrate form part and parcel of the record, and if these proceedings include a charge, the charge is unaffected by the fact that the Court complies with the demand of an accused person under proviso (a) to S. 350 (1), Criminal P. C. If by reason of the evidence recorded by the succeeding Magistrate he considers that that charge needs amendment he has the power of amending the charge under S. 227, Criminal P. C. If on the evidence which he records he is of opinion that the charge cannot be sustained he will acquit the accused under S. 258, Criminal P. C. I can therefore see no difficulty whatever in construing S. 350, Criminal P. C., in accordance with the plain meaning of its unambiguous language. In the present case therefore the order passed by the Sub-Divisional Magistrate of Hala, Mr. Nabibux, clearly amounts to an order of acquittal under S. 258, Criminal P. C., and the learned Additional Sessions Judge of Hyderabad was therefore right in refusing to order further inquiry into the case under S. 436, Criminal P. C. I accordingly agree that this revision application must be dismissed.

G.N./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Sind 166

DAVIS C. J. AND LOBO J.

Topanmal Rajomal and another — *Plaintiffs — Appellants*

v.

Gordhandas Ranwalmal and others — *Defendants — Respondents.*

Second Appeal No. 40 of 1938, Decided on 20th May 1940, against judgment passed by Assistant Judge, Sukkur, D/- 4th June 1938.

(a) Limitation Act (1908), S. 7 — Suit by father as manager of joint family to recover debt due to joint family — Minor son unnecessarily joined as co-plaintiff — S. 7 does not apply.

Section 7 is not intended to apply to a case where a suit is brought by the father as manager of a joint Hindu family to recover a debt due to the joint Hindu family, and where the father and manager quite unnecessarily joins his minor son as co-plaintiff and appoints himself as next friend, for the section is intended to apply to a case where each of the several persons is jointly entitled to file a suit : 36 Mad 295 (P C) and ('25) 12 A I R 1925 Mad 78, *Disting.* [P 167 C 1; P 168 C 1]

But it does not necessarily follow that every suit which a Hindu father brings for himself and as next friend for his minor son is a suit by a father as manager of a joint Hindu family to recover a debt due to the joint Hindu family and that his minor son, if joined, is joined unnecessarily and the father's appointment as next friend is unnecessary. Court is not justified in such a matter in acting merely on the ground of a presumption of jointness. [P 168 C 1]

(b) Decree — Binding — Executing Court should not go behind decree.

The executing Court should not go behind a decree to ascertain the facts to find out whether decree is nullity. [P 168 C 2]

Ramchand N. Sadarangani — for Appellants.

Srikrishindas H. Lulla — for Respondents.

Davis C. J. — This is an appeal against the judgment of the Assistant Judge at Sukkur who set aside an order of the Subordinate Judge at Jacobabad, dismissing an execution application on the ground that it was time-barred. The decree sought to be executed was a consent decree passed as long ago as 16th November 1927, and it was sought to be executed for the first time on 14th October 1936. On the face of it, it was time-barred, but the decree-holder claimed to be able to execute it because he was a minor when it was made; his father represented him as next friend and could not, of his own right, by reason of O. 32, R. 7, Civil P. C., have given a valid discharge. The Subordinate Judge relied on 52 Bom 441[1] and 41 ALL 435,[2] and was of the opinion that where a suit is brought by a Hindu father, the manager of a Hindu joint family, for himself and by his minor son whom he represents as next friend, the father can at all times as manager of the joint Hindu family give a valid discharge for himself and his minor son, and it matters not that he could not as next friend consent to a compromise without the leave of the Court under O. 32, R. 7, Civil P. C., or that he could not under O. 32, R. 7, Civil P. C., as next friend receive money without the leave of the Court for he had all the time the capacity as manager of a joint Hindu family to do so.

The appellate Judge, however, took another view relying on the Privy Council case in 36 Mad 295[3] and 47 Mad 920.[4] In neither 36 Mad 295[3] nor in 47 Mad 920[4] was the wider aspect of this question of this dual capacity considered or discussed at any

1. ('29) 16 A I R 1929 Bom 13 : 110 I C 276 : 52 Bom 441 : 30 Bom L R 537, Supdu Daulatsing v. Sakharam Ramji.
2. ('19) 6 A I R 1919 All 209 : 49 I C 990 : 41 All 435 : 17 A L J 649, Rati Ram v. Niadar.
3. ('09) 36 Mad 295 : 19 I C 515 : 40 I A 132 : 25 M L J 150 (P C), Ganesha Row v. Tuljaram Row.
4. ('25) 12 A I R 1925 Mad 78 : 82 I C 785 : 47 Mad 920 : 47 M L J 389, Lakshmanan Chetty v. Subbiah Chetty.

length, for, if we accepted the argument of the learned advocate for the appellant, it would only be necessary for a manager of a joint Hindu family to join his infant son with him as plaintiff in a suit, and to appoint himself as next friend for the law of limitation to be extended in his favour for many years. Our view is that S. 7, Limitation Act, is not intended to apply to a case where a suit is brought by the father as manager of a joint Hindu family to recover a debt due to the joint Hindu family, and where the father and manager quite unnecessarily joins his minor son as co-plaintiff and appoints himself as next friend, for, we think that section is intended to apply to a case where each of the several persons is jointly entitled to file a suit; but the father as manager of the joint Hindu family is alone entitled to institute a suit. The minor has no right to interfere in the management of the joint family affairs including the institution of a suit, so that if it were clear that this suit was a suit brought by the father as manager of the joint Hindu family for a debt due to the joint Hindu family, we do not think the fact that he quite unnecessarily chose to join his minor son as co-plaintiff and to appoint himself as next friend would make any difference to the law of limitation, and time would not be extended under the provisions of S. 7, Limitation Act. It is true that there are words used in 36 Mad 295[3] at p. 303, which are wide enough to cover any case where the father and manager of a joint Hindu family joins his minor son as co-plaintiff, appoints himself as next friend and thus assumes in the suit a second or dual capacity subject to the restriction of the appropriate provisions of O. 32, Civil P. C. In the course of that judgment their Lordships of the Privy Council said (page 303):

> The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian ad litem for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and as it was a bona fide settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. How far the acts of a father or managing member may affect a minor, who is a party to the suit represented by another person as next friend or guardian ad litem is a question which does not arise in the case, and their Lordships are not called upon to express an opinion on it. But they consider it to be clear that when he himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.

But those words must be limited to the facts of the case before their Lordships, and the case before their Lordships was a case of partition. Any coparcener of a joint family can sue for partition as any coparcener cannot usurp the authority of the manager and sue for a debt, so we think this case in 36 Mad 295[3] is to be distinguished from a case where a father and manager of a joint Hindu family quite unnecessarily joins his infant son as co-plaintiff and assumes as next friend a dual capacity. The case in 47 Mad 920[4] follows the ruling in 36 Mad 295.[3] We think therefore that the learned appellate Judge wrongly relied on these two Madras cases, and we think assuming that this execution application was of a decree in a suit brought by a father and manager of a joint Hindu family with his minor son as co-plaintiff and himself as next friend, the Subordinate Judge was right when he relied on 52 Bom 441[1] and 41 ALL 435.[2]

In the Bombay case in 52 Bom 441,[1] the learned Judges held that in the execution of a decree in a suit brought by appellants 1, 2 and 3, minors, represented by their next friend, appellant 4, Mansing, who was also the manager of the joint Hindu family and himself a plaintiff time ran from the date of the decree against the manager and the minors because the manager represented the joint family and could give a valid discharge without the concurrence of the minors. The case in 36 Mad 295[3] was not mentioned nor considered in that judgment. Similarly in the Allahabad case in 41 ALL 435[2] the decree-holder, the father, died during execution proceedings leaving two sons, one a major and one a minor. The son who was a major applied to be brought upon the record as legal representative in his own right and as next friend of his minor brother, but before his application was granted, the son who was a major died, and when some seven years after the son who was a minor, having attained majority, sought to execute the decree, it was held that his application was time-barred, his brother who was a major and head of the joint family was competent to give a valid discharge without the concurrence of the minor. It is true that in this case the elder brother had died before his application was

granted, but the learned Judge on page 441 said :

I do not think any purpose would be served by my discussing the various cases to which we were referred in the course of argument. All cases anterior in date to the passing of Act No. 9 of 1908 require to be reconsidered in the light of the words then inserted in S. 7 of the said Act. The Madras case on which the lower appellate Court has relied is directly in point and supports the decision arrived at. I do not think there is any case of this Court to the contrary; the learned Munsif relied on a case the facts of which were materially different, in that the period of limitation for a fresh application for execution began to run against decree-holders all of whom were minors. This Court has never held, and I think would be most reluctant to hold, that in all cases in which a fresh period of limitation opens as against a number of decree-holders, members of one and the same family, one of whom happens to be a minor, it is open to the remaining decree-holders to remain quiescent for a period which might well extend to 18 or 20 years, and then to put forward the said minor, after he had attained majority, to execute the whole decree for their benefit as well as his own. I do not see how we could hold the present application to be within time without, in effect, committing ourselves to some such proposition as the above. The ingenious argument addressed to us on behalf of the appellant seemed to me to be based, in the last resort, on the contention that the provisions of Ss. 6 and 7, Limitation Act (No. 9 of 1908) must be read so as to be mutually exclusive. I do not think they are mutually exclusive; the latter section supplements the former.

Therefore if we were satisfied from the record that this was a case where a father suing as manager of a joint Hindu family for a debt due to the joint Hindu family unnecessarily joined his minor son as co-plaintiff and appointed himself as next friend, we would, agreeing with the reasoning of the case in 52 Bom 441,[1] have restored the judgment of the Subordinate Judge. But there is yet another aspect of this matter, and that is, that it is not open to the executing Court to go behind the decree. It does not necessarily follow that every suit which a Hindu father brings for himself and as next friend for his minor son is a suit by a father as manager of a joint Hindu family to recover a debt due to the joint family and that his minor son, if joined, is joined unnecessarily and the father's appointment as next friend is unnecessary. We do not think that we are justified in such a matter in acting merely on the ground of a presumption of jointness. Indeed, it might be said that the fact that the minor son was joined and the father was next friend negatives the presumption that the suit is a suit brought by a father as manager of a joint Hindu family to recover a debt due to that family. The lower appellate Court has not found that this was the case. There is nothing to suggest that the decree sought to be executed is a nullity, nor should the executing Court, go behind a decree to ascertain the facts. We cannot, therefore, hold that upon the record as it stands before us, the judgment-debtors have failed on the facts of this case to prove that the father was not in a position to give a valid discharge for himself and for the minor whom he represented as next friend: 63 Cal 92.[5] For these reasons we think that the order of the lower appellate Court was right and the appeal must be dismissed with costs, and we order accordingly.

D.S./R.K. *Appeal dismissed.*

5. ('35) 22 A I R 1935 Cal 631 : 158 I C 567: 63 Cal 92, Abed Hosain v. Abdur Rahman.

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(28) A. I. R. 1941 Sind 168

DAVIS C. J. AND WESTON J.

Ali Murad s/o Ganjuro — Appellant

v.

Emperor.

Confirmation Case No. 24 and Criminal Appeal No. 170 of 1940, Decided on 27th September 1940, against conviction and sentence of death passed by Addl. Sess. Judge, Larkana, D/- 4th July 1940.

(a) Criminal P. C. (1898), Ss. 208, 347 and 540 — Prosecution should call and examine before committing Magistrate all witnesses they intend to call and examine in Sessions Court — But failure to do so does not vitiate trial unless accused is prejudiced thereby.

While as a general rule the prosecution should call and examine before the committing Magistrate's Court all the witnesses they intend to call and examine before the Sessions Court, failure to do so does not necessarily vitiate a trial. The final consideration is that of prejudice to the accused : ('34) 21 AIR 1934 Lah 667, *Expl., and Approved* ; 6 L B R 129 (FB) and ('38) 25 AIR 1938 Sind 97, *Ref.* [P 172 C 1]

(b) Criminal trial—Evidence — Police prosecutor taking advantage of his official position to question accused—Calling of Police Prosecutor as witness deprecated — His evidence capable of being dissociated from other evidence and ignored—Trial is not bad.

The calling as a witness of a Police Prosecutor who had taken advantage of his official position to question an accused person must be deprecated. But a trial cannot be held to be bad on this ground where the Police Prosecutor's evidence can be dissociated from other evidence and ignored. [P 172 C 1]

(c) Penal Code (1860), S. 302 — Sentence — Transportation held proper.

In the case of a murder which is not premeditated and is committed rather in panic than in defiance transportation for life is a proper sentence. [P 172 C 2]

Motiram L. Lalwani — for Appellant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J.—The appellant in this case is one Ali Murad, and he has been convicted by the Additional Sessions Judge of Larkana of the murder of a police sowar Muhammad Hassan by stabbing him in the neck, and sentenced to death. He was also convicted of offences under Ss. 224, 332 and 333, Penal Code, and sentenced to six months, 12 months and two years rigorous imprisonment respectively for these offences; though the printed record mentions Chutto, the co-accused of the appellant, twice convicted of offence under Ss. 224 and 353 and offences under Ss. 224, 332 and 333, Penal Code, (*see* lines 303 et seq.), but this appears a mistake. In addition to the killing of Muhammad Hassan, Muhammad Bakhsh, a head constable, was grievously hurt, Ibrahim, a police pagi, was hurt. The actual offences of which the accused were convicted, in view of the confusion in the printed record, are best set out in the points for determination and findings of the lower Court which are as follows:

Points for determination are: (1) Whether Muhammad Hassan died of injury he received? (2) Whether Ali Murad caused this injury? (3) Whether grievous hurt with sharp weapon was caused to Muhammad Bakhsh? (4) Whether Ali Murad voluntarily caused the above said grievous hurt to Muhammad Bakhsh, Head Constable, Police, a public servant in the discharge of his duty as public servant? (5) Whether hurt with sharp weapon was caused to Ibrahim? (6) Whether Ali Murad voluntarily caused the above-said hurt to Ibrahim pagi, a public servant, in the discharge of his duty as a public servant? (7) Whether Ali Murad and Chutto accused intentionally offered resistance or illegal obstruction to the lawful apprehension for any offence with which they were charged? (8) Whether Chutto accused assaulted Sub-Inspector in the execution of his duty as such public servant or with intent to prevent or deter him from discharging his duty as such public servant? (9) What offences have been committed by the accused?

FINDINGS.

Point No. 1.—In the affirmative.

Point Nos. 2 to 8.—In the affirmative.

Point No. 9.—Accused Ali Murad is guilty of offences under Ss. 302, 333, 332, 224 and accused Chutto of offences under Ss. 353 and 224, Penal Code.

The case for the prosecution was that a theft was committed in the house of one Sher Khan Khushik, a resident of Chakar Khushik village, taluka Dadu, on the night of 16th september 1939. This was discovered in the morning and the matter was reported to the Nekmard Ghulam Rasul Khushik. Ghulam Rasul collected a party to track the footprints and they tracked them to the house of the accused Ali Murad and Chutto brothers. This was three miles from Sher Khan's house, and he went and reported the matter to the Nekmard who sent him to Phaka police outpost to report. Sher Khan was sent on, according to custom, to the police thana proper at Bhan where he lodged a first report at 10 P. M. The next morning, 17th September, the head constable Muhammad Baksh, the sowar Muhammad Hassan and the pagi Ibrahim went to the vardat at Sher Khan's village and awaited authority from the Sadar Thana at Bhan to investigate. This authority was sent through the complainant. Muhammad Bakhsh, the head constable, prepared the mashirnama of the vardat and went with the complainant to the village of the accused. Both the accused, the appellant Ali Murad and his brother Chutto were there. It is the case of the prosecution that the accused agreed to produce the property but wanted to do so in the presence of their Murshids Dinal Shah and Wadal Shah. Dinal Shah was sent for but refused to interfere; Wadal Shah was then sent for but he was equally unsuccessful. This was about 7 P. M., and the Sub-Inspector of Police, Mr. Kewalram, had by then arrived. On Wadal Shah's failure the Sub-Inspector asked Muhammad Bakhsh the head constable, Muhammad Hassan sowar, and Ibrahim pagi, to arrest the accused. Muhammad Bakhsh caught hold of the appellant Ali Murad who took out a knife and struck him on the left arm. He released his hold, and Muhammad Hassan then caught hold of Ali Murad but Ali Murad stabbed him on the neck. Muhammad Hassan fell down, and Ibrahim pagi, then went to arrest Ali Murad but he too was stabbed on the neck. After all this the Sub-Inspector picked up a gun when Chutto, the brother of Ali Murad, assaulted him and was seized by Gul Muhammad. Ali Murad in the meantime escaped and was unsuccessfully pursued by the Sub-Inspector and his men. The Sub-Inspector then dressed the wounds of the injured men but Muhammad Hassan died within a short time. The Sub-Inspector sent his first report to the thana and the injured to the Dadu hospital. Mashirnamas were prepared, an inquest on the dead body of the sowar held, and the body was also sent to the hospital. The next day about noon the Sub-Inspector of Police arrived and at 3 P. M. Ali Murad, the appellant, was arrested.

The case for the defence is that the case against him is false. Ghulam Rasul, the Nekmard, has disputes with them over water. The appellant stated in the Sessions Court that he and his brother returned home from their fields to find their house surrounded by men who said that they

were suspected of theft and had been directed by Ghulam Rasul to keep watch. The next day the police came and he was beaten with fists and kicks and abused, and then Wadal Shah and Dinal Shah came who asked him to confess. He refused to do. He went away fearing maltreatment by the police. He explains an injury on his hand by saying that it was a cut by a scythe while cutting grass. Chutto, who has not appealed, states that he was seized by the police and beaten by Ghulam Rasul's men. He fell down senseless. He does not know who caused injuries to the police.

There can be no doubt that this unfortunate police sowar Muhammad Hassan was killed. The medical evidence shows one wound $4\frac{1}{2}'' \times 3''$ deep which could be caused by a big knife cutting deep to the cervicle vertebrae below the left-ear to the side and back of the neck cutting the blood vessels and nerves. The injury was sufficient in the ordinary course of nature to cause death. Muhammad Bakhsh, head constable, was injured on the left forearm, the injury being $3'' \times 1\frac{1}{2}''$ muscle deep and could have been caused by a knife. He was treated as an indoor patient from 18th September to 8th October 1939, when he was discharged at his own request not completely cured. For a complete cure ten days more were necessary. Ibrahim pagi had three injuries which could have been caused by a knife on the neck. These injuries were, however, trivial injuries, though the pagi was in the hospital for five days. The appellant himself had a slight incised wound on the left hand and a scratch on the forehead. The co-accused Chutto, his brother, who has not appealed, had on 19th September one septic contused wound on the forearm and a simple fracture of the right ulna. The injuries could have been caused by a lathi or by a fall. There can be no doubt that the injuries of the police sowar who died, of the head constable and of the pagi were caused by the appellant Ali Murad with a knife. In fact, this was not seriously disputed before us.

Reliance was placed upon a plea of self-defence, that the appellant was ill-treated or apprehended ill-treatment or torture at the hands of the police, and he struck in self-defence. This was not the case of the accused who reserved his defence in the committing Magistrate's Court and while it may be that the appellant struck in panic, we cannot see how the plea of self-defence is in any way to be found proved from the record. There is the evidence of eye-witnesses to the infliction of the injuries by the appellant on the sowar, head constable and pagi which cannot be disputed. There is the evidence of the head constable Muhammad Bakhsh himself, the evidence of the pagi Ibrahim and the evidence of the Sub-Inspector Mr. Kewalram who does not appear to have distinguished himself on this occasion. There is also the evidence of Gul Muhammad, another police sowar, the Nekmard Ghulam Rasul and Sher Khan, the complainant. The appellant himself admits the presence of Muhammad Bakhsh, Ibrahim, Ghulam Rasul, the Sub-Inspector and Sher Khan, the complainant. The evidence of the complainant Sher Khan is corroborated by his first report which was made without undue delay. The presence of the Sub-Inspector is supported by the first report of these offences including that of the murder of Muhammad Hassan which he made at the scene and sent to the thana. It is Ex. 19, and the time at which it was made is shown as 8 P. M., 17th September. Mashirnamas were made and Ghulam Rasul and Bachal were the mashirs. Ghulam Rasul gives a detailed account of the affair from first to last. He states that the accused first agreed to restore the property if their murshids also came, but when their murshids Dinal Shah and Wadal Shah came they refused. According to Wadal Shah, Ali Murad said he had the property but would restore it to Sher Khan after certain claims he had against Sher Khan were satisfied. This Wadal Shah was not examined in the committing Magistrate's Court. There is also the evidence of one Hashim, a jalbani, a member of the tracking party. He corroborates the evidence of the police officers as also the evidence of the Nekmard Ghulam Rasul against whom the appellant's charge of enmity about a dispute over a karia is in no way proved, and is vague and unsubstantiated.

The evidence of the two injured police officers, of the uninjured police officers and of Ghulam Rasul and Hashim prove clearly that it was the appellant who struck with his knife Muhammad Hassan and killed him, grievously hurt with his knife Muhammad Bakhsh, head constable, and hurt with his knife the pagi Ibrahim. The appellant had himself a slight incised wound on the right thumb. There is no reason to suppose that this was caused by a scythe while cutting grass, but there is reason to suppose that it was caused by his own knife while

inflicting injuries upon others. There were no signs of ill-treatment by the police, and the defence of Ali Murad that the police threatened to maltreat his womenfolk appears to have been abandoned when it was shown that he was unmarried and there were in his house his aged mother and a child of five.

The case, therefore, against Ali Murad would appear fully proved without what the Judge describes as an extra judicial confession to Mr. Vishindas, the police prosecutor, and the evidence of Wadal Shah, to the admission of whose evidence objection was taken by the learned advocate for the appellant before us on the ground of a ruling in 32 S L R 709[1] and 15 Lah 331.[2] He took, what he called a preliminary objection, arguing that the trial was bad and should be quashed, because all the prosecution witnesses had not been examined in the committing Magistrate's Court. We may say at once that the proof of the prosecution case is not materially affected by the exclusion of the evidence of Mr. Vishindas and Wadal Shah. So far as the evidence of Wadal Shah is concerned, the appellant cannot say that he was taken by surprise because in his own statement he refers to Wadal Shah and the part he played in this affair. The evidence of Mr. Vishindas, we think, can well be ignored. Mr. Vishindas, who was Police Prosecutor, stated that he was standing in the verandah of the office of the mukhtiarkar at Dadu in september when some one brought to his notice that the appellant was an accused in the Phaka policeman murder case and he went up to the accused to get information from him. The appellant then told him that he had injured a policeman in a quarrel and that he had probably died and that he had come to give himself up lest his brother be maltreated and that he would surrender himself to the Superintendent of Police or District Magistrate, and that he then took the appellant to the bungalow of the District Superintendent of Police.

Apart from the fact that the appellant was not questioned by the Court about this confession, we think, in view of the evidence of the injured policeman and other eye-witnesses, the evidence of the police prosecutor is quite unnecessary to support a conviction. As a general rule, we would say that it is the duty of the prosecution to put before the Committing Magistrate the case that is put before the Sessions Court and through the same witnesses. Not only may the accused person desire to cross-examine all the witnesses and show that there is no case against him, but it is also only fair that he should have notice of the evidence to be led against him and of the witnesses through whom it is to be adduced; but, we cannot say we can accept the argument that in every case where this is not done, the committal and the subsequent trial are bad and the proceedings should be quashed.

In the Lahore case cited to us, 15 Lah 331,[2] there were sixteen witnesses for the prosecution but the prosecution stated that they would produce only eight of them in the committing Magistrate's Court, whose evidence was sufficient to establish a prima facie case and that the other eight witnesses would be reserved for the Sessions trial. We use the word "reserved", though it was not used in the case itself, because it appears to us accurately to describe the facts. And it appears to us undoubted that S. 208, Criminal P. C., does not contemplate any reservation or holding back of witnesses in this fashion. Section 208, Criminal P. C., appears to us to contemplate that the prosecution shall place before the committing Magistrate, through the same witnesses, the case they intend to place before the Sessions Court. The one proceeding is not merely a preliminary or introduction to the proceedings which follow. It is an enquiry to ascertain and record the case which is to be put before the Sessions Court. Clearly, there can be no invariable rule that all witnesses in the Sessions Court must be examined in the committing Magistrate's Court. Section 540, Criminal P. C., enables a Court to summon a witness in the interest of justice, and clearly such a witness is not one who has been examined in the committing Magistrate's Court. In any such case, however, the Sessions Judge would give the accused a reasonable opportunity of meeting the evidence thus suddenly adduced, but this section alone shows how it is not possible to accept as a correct statement of the law the assertion that a trial before the Sessions Court in which witnesses other than those examined in the committing Magistrate's Court have been called and examined is bad. Indeed, in 15 Lah 331[2] on which the advocate for the appellant strongly relies, the Court did not

1. ('38) 25 A I R 1938 Sind 97 : 175 I C 324 : 39 Cr L J 618 : 32 S L R 709, Raban Lalu Shaikh v. Emperor.
2. ('34) 21 A I R 1934 Lah 667 : 152 I C 673 : 36 Cr L J 169 : 15 Lah 331 : 36 P L R 469, Sher Bahadur v. Emperor.

exclude the consideration of prejudice to the accused. On this point one of the learned Judges says (p. 344) :

As regards the question of prejudice, it is a question of fact in every case, and I have no doubt that in the present case, at least five witnesses, not examined before the committing Magistrate, were witnesses on important and material points and the accused was prejudiced by their non-production at the proper stage, and by want of notice as to the nature of their evidence.

And, again, on the question of S. 347, Criminal P. C., overruling the provisions of Ch. 18 the learned Judge referred with approval to the remarks of the Chief Judge of the Lower Burma Chief Court in 17 I C 813,[3] as follows (p. 337) :

Perhaps the strongest reason for holding that S. 347 in no way overrides and in no way dispenses with the obligation of following Ch. 18 is that in that chapter the Legislature has laid down provisions for procedure before commitment, some of which were obviously intended and rightly intended for the benefit of accused persons.

We think, therefore, that while it should be the general rule that the prosecution should call and examine before the committing Magistrate's Court all the witnesses they intend to call and examine before the Sessions Court, failure to do so will not necessarily vitiate a trial. The final consideration is that of prejudice to the accused. Furthermore, the question of the examination of an accused under S. 342, Criminal P. C., referred to in the case of this Court in 32 S L R 709,[1] has also to be considered. So far as the evidence of Wadal Shah is concerned, it does not appear to us vital to the case, and the accused himself referred to Wadal Shah and what passed between them in his statement. Any questioning of the accused on this point was, therefore, superfluous. So far as the evidence of Mr. Vishindas is concerned, the appellant was not questioned about him, but we consider the evidence entirely unnecessary to the present case, and, indeed, we would deprecate the calling at all as a witness of a Police Prosecutor who had taken advantage of his official position to question an accused person. His evidence in this case, however, is not so connected with other evidence that it cannot be dissociated from that evidence and ignored. We do not think, therefore, the trial can be held bad on this ground. We must find, therefore, that the appellant has been properly convicted of the offences of murder, of causing grievous hurt and hurt to police officers and the pagi in the discharge of their duty and of resisting lawful arrest; clearly under S. 54, Criminal P.C., the appellant could be lawfully arrested without a warrant.

The only question which remains for us to consider is the question of the death sentence. We must reject the case that the appellant acted in exercise of the right of private defence: yet the circumstances under which this fatal blow was struck at this sowar appear to us unusual. The charge of theft against the appellant was not serious; only one blow was struck and the killing was in no way premeditated. There is nothing on the record to show that the appellant was a man of violent temperament apart from this case, and we observe that the police, after the murshids had failed to influence the appellant, proposed to arrest him without even having searched the appellant's house. The argument of the public prosecutor, which we observe in the notes of arguments, that as the accused confessed there was no need to search his house, does not impress us. The accused may have confessed but the property was not recovered. May it have been that the murshids having failed by their methods, the police were about to try their own ! Our view after consideration is that though this killing was murder it was done more in panic than in defiance. The appellant gave himself up to save, as he says, his brother from maltreatment. His brother has not appealed, and we cannot on the evidence find that he was maltreated by the police. The fractured ulna may have been caused in the struggle accompanying his arrest. We think nevertheless that as this was not a premeditated murder, that as it was committed rather in panic than in defiance, we should not confirm the sentence of death but we should change it to transportation for life, and we order accordingly. The conviction of offences under Ss. 224, 332 and 333 and the sentences of six months, twelve months and two years rigorous imprisonment, respectively, we also confirm, and dismiss the appeal against these convictions and sentences accordingly. The appeal against the conviction under S. 302, I. P. C., is also dismissed, but the sentence of death is changed to that of transportation for life for the reasons given. Order accordingly.

G.N./R.K. *Order accordingly.*

3. ('13) 6 L B R 129 : 17 I C 813 : 13 Cr L J 877 (FB), Emperor v. Channing Arnold.

(28) A. I. R. 1941 Sind 173

DAVIS C. J. AND TYABJI J.

Pokar Chuharmal — Accused — Appellant

v.

Emperor.

Criminal Appeal No. 201 of 1940, Decided on 2nd December 1940, against conviction and sentence passed by Sess. Judge, Sukkur, D/- 29th July 1940.

(a) Criminal P. C. (1898), S. 511 — Record of previous convictions destroyed—Secondary evidence is admissible under S. 65 (c), Evidence Act — Conviction slip is no proof of previous conviction — Mode of proving previous convictions and identity of accused stated.

The provisions of S. 511, Criminal P. C., are extremely wide. In addition to the simple ways in which previous convictions can be proved coupled with proof of identity, S. 511 permits them to be proved by any other mode provided by any law for the time being in force. [P 174 C 1, 2]

Where the records of the previous convictions of an accused have been destroyed they can be proved by secondary evidence under S. 65 (c), Evidence Act : ('39) 26 A I R 1939 Sind 203, *Expl.* [P 174 C 1]

But the previous convictions or the identity of the accused cannot be proved by the mere production of a conviction slip which is nothing but the criminal record of the convicts kept by the authorities : ('16) 3 A I R 1916 Cal 344, *Rel. on.* [P 174 C 2]

The fact of the previous convictions can be proved in the very simple way provided by S. 511, Criminal P. C., or in any other way provided by any other law, if there be any such, while the identity of the accused can be proved by a comparison by an expert of the thumb-impressions of the accused taken in Court and the thumb-impressions on the record. But, all this is necessary only if the accused denies the previous convictions. If, on the question of the Court, he admits the previous convictions, nothing else is necessary. He can be forthwith convicted under S. 271, Criminal P. C. [P 174 C 2; P 175 C 1]

(b) Criminal P. C. (1898), Ss. 511 and 221 (7) as amended in 1923 — S. 221 (7) does not affect mode of proving previous convictions — Committal of accused to Sessions Court on charges under S. 75, Penal Code—Principles governing committal on charges other than those under S. 75, Penal Code, must be applied — Accused can neither be committed nor convicted on basis of mere conviction slip.

The amendment of S. 221 (7), Criminal P. C., in 1923 was not intended to affect the mode of proof of previous convictions. The amendment was designed merely to remove doubts as to the competence of certain Courts to impose enhanced sentences. Under S. 221 (7), Criminal P. C., "the fact, date and place of the previous conviction shall be stated in the charge," but it was not thereby intended that the principles governing a trial of an accused person on a charge under S. 75, Penal Code, should differ from the principles governing the trial of an accused person on another charge. Rather the contrary is the case. Consequently, as a prima facie case should be made out before an accused person can be committed to the Court of Session on a charge of an offence under a section other than on a charge under S. 75, Penal Code, there should be on the record evidence of the offence, on which, if unrebutted, the accused could be properly convicted: So before an accused is committed on a charge under S. 75, Penal Code, there should be on the record, before committal, evidence on which, if unrebutted, he could be convicted. He cannot properly be convicted on a mere conviction slip or a mere record of his previous crimes kept by the authorities on a mere history sheet, as it may be called. Such a conviction slip greatly facilitates proof, but is not proof itself of previous convictions, nor, can an accused be convicted on this without further proof. Consequently, the prosecution must call all relevant witnesses and produce all material evidence in the committing Magistrate's Court, so that the accused should know what evidence he has to meet : ('30) 17 A I R 1930 Sind 99; ('35) 22 A I R 1935 Sind 31 and ('38) 25 A I R 1938 Sind 97, *Ref.*; ('41) 28 A I R 1941 Sind 168; ('34) 21 A I R 1934 Lah 667, *Rel. on*; ('34) 21 A I R 1934 Lah 667 and ('36) 23 A I R 1936 Lah 533 (F B), *Expl.*; ('39) 26 A I R 1939 Sind 203, *Expl.*, *and Affirmed.* [P 175 C 1, 2]

The omission to produce the proper evidence in the committing Magistrate's Court, assumes that the accused will plead guilty or that the Court will adjourn the trial, so that the prosecution may have time to produce evidence, which should be either on the record or immediately available. A Court should not under such circumstances, grant any such adjournment. Whether in the case of omission to produce proper evidence in the committing Magistrate's Court the conviction will or will not be set aside depends upon whether the accused was or was not prejudiced : ('41) 28 A I R 1941 Sind 168 and ('16) 3 A I R 1916 Cal 344, *Rel. on.* [P 175 C 2; P 176 C 2]

(c) Criminal P. C. (1898), S. 255A — Object of S. 255A stated.

Section 255A is intended to regulate procedure and to prevent bias, so that an accused should be tried first for the principal offence and then, if convicted, he should be tried on the charge of previous convictions, which makes him liable to enhanced punishment. The purpose of S. 255A is to approximate a trial in a case of previous convictions in a Magistrate's Court, so far as this can be done, to the procedure in a Court of Session, when such further charge is to be tried, — to S. 310. Section 255A refers back to S. 221 (7) of the Code, which requires that "the fact, date and place of the previous conviction shall be stated in the charge." It does not mean that this fact, date and place can be found by the Magistrate from anywhere, that he can go out in the street and ask a passer-by or use his own private knowledge or his imagination. [P 176 C 1]

(d) Evidence Act (1872), S. 54—Previous convictions — S. 54 does not relate to manner of proof but only to proof in certain cases.

Section 54 does not relate to the manner of proof of previous convictions, but relates only to the proof of previous convictions in certain cases. [P 176 C 2]

(e) Criminal P. C. (1898), S. 221 (7)—Previous convictions—Enhanced sentence — Distinction must be made in cases under S. 75, Penal Code, and those in which previous convictions are to be considered only for necessary punishment by

Magistrate within limits of maximum punishment.

A distinction must be drawn in a case of previous convictions where under S. 75, Penal Code, enhanced punishment is to be imposed and a case where previous convictions are only to be taken into account for the purpose of necessary punishment imposed by a Magistrate within the limits of the maximum punishment with which the offence is ordinarily punishable : 4 Bom L R 177, *Rel. on.* [P 176 C 2]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is an appeal by one Pokar, son of Chuharmal, who has been convicted by the Sessions Judge of Sukkur of an offence under S. 379 read with S. 75, Penal Code and sentenced to ten years' rigorous imprisonment. The appeal was principally admitted so that the interpretation by the learned Judge of a ruling of this Court in the reported case in I L R (1939) Kar 677[1] could be examined, and, if need be, corrected, for that judgment on the face of it appeared to read into that ruling more than was intended. That case relates principally to S. 310, Criminal P. C., and the remarks relating to S. 511, Criminal P. C., are obiter, but that is no reason why they should be allowed to lead to wrong conclusions. The difficulties which the learned Judge found in applying the provisions of S. 511, Criminal P. C., in the case of previous convictions before him, arise principally from the fact that in the Court in which the accused had been three times convicted the records of the Court appear to have been indiscriminately destroyed contrary to the rules of this Court (R. 53 at pp. 35-46 of S. C. Cr. Circulars). For instance, in the three cases of theft in the Shikarpur Court, to which the accused, when questioned by the Court, pleaded guilty, the judgment was available in only one case; incidental papers not containing a judgment in the second; while in the third case the whole record had been destroyed. But there is nothing in the case in I L R (1939) Kar 677,[1] which suggests that in such a case S. 65 (c), Evidence Act, does not apply, and that secondary evidence would not be admissible. Indeed, that judgment would appear to stress the fact that the Evidence Act applies as much to a case of previous convictions as to any other. Furthermore, the provisions of S. 511, Criminal P. C., are extremely wide. In addition to the simple ways in which previous convictions can be proved coupled with proof of identity, S. 511, Criminal P. C., contains the words ".....in addition to any other mode provided by any law for the time being in force....." But no authority has been cited to us to show that one of these other modes is the mere production of a conviction slip.

But the real difficulty of the learned Judge appears to us to arise from the local custom or practice or belief that not only can an accused person be committed to the Court of Session under S. 75, Penal Code, on the mere production of what is known as a conviction slip, but that he can be convicted on the evidence of this conviction slip alone, even if the accused does not admit his previous convictions. Now there is not, as far as we know, any law which provides that what is commonly called a conviction slip is proof of previous convictions at all. This question was considered in 43 Cal 1128.[2] It was pointed out in that case that it was not sufficient for an expert in fingerprints to produce a record of fingerprints alleged to be those of the accused from the Central Bureau or for a clerk in the common prison at Bombay to produce extracts from the jail register signed by the Superintendent showing previous convictions and certified copies of the judgments in the cases when the accused was previously convicted, when it was not proved that the man convicted in Bombay was the man before the Court or was the man convicted in the Howrah Court in which, in that case, it was alleged the accused had been convicted. What in fact this conviction slip appears to be is merely the criminal record of convicts kept by the authorities, and though it must be of great value in enabling the authorities to trace the previous convictions of the accused, it does not appear that it was intended to be, without anything further, proof of the previous convictions or of the identity of the accused. The fact of the previous convictions can be proved in the very simple way S. 511, Criminal P. C., provides or in any other way any other law provides, if there be any such, while the identity of the accused can be proved by a comparison by an expert of the thumb-impressions of the accused taken in Court and the thumb-impressions on the record. But, it may be said, all this is necessary only if the accused denies the previous convictions. If, on the question of the Court, he admits the previous convictions,

1. ('39) 26 A I R 1939 Sind 203 : 183 I C 219 : 40 Cr L J 770 : I L R (1939) Kar 677, Ghous Bakhsh v. Emperor.

2. ('16) 3 A I R 1916 Cal 344 : 33 I C 825 : 17 Cr L J 185 : 43 Cal 1128 : 20 C W N 725, Emperor v. Sheikh Abdul.

nothing else is necessary. He can be forthwith convicted under S. 271, Criminal P. C. But we do not think that the matter is as simple as all that, and we must regard as a serious matter a case such as the one before us, in which an accused has been sentenced for an offence of theft by picking a pocket in the fish market at Sukkur to ten years' rigorous imprisonment. But it may be argued that all such particulars as the proof of previous convictions or identity become unnecessary when an accused admits his previous convictions, that S. 511, Criminal P. C., refers to the proving of previous convictions and not to their admission by the convict, but we can see no reason why the principles which govern the committal of accused persons to the Court of Session on charges other than those under S. 75, Penal Code, should not apply to the committal on charges under S. 75, Penal Code. This aspect of the matter was discussed in 28 Cal 689,[3] referred to in I L R (1939) Kar 677.[1] In that case the accused admitted his previous conviction when questioned, but the learned Judges pointed out that when he was questioned, there was on the record no copy of any judgment or extract from a judgment or any other documentary evidence of the fact of such previous convictions as is required by S. 91, Evidence Act or S. 511, Criminal P. C., and they held "There was thus no legal evidence to support the charge in respect of such previous convictions." The examination of the appellant in the lower Court in respect of those convictions in this case was also without legal document or justification.;

It is true that 28 Cal 689[3] was decided in 1901, but the amendment of S. 221 (7), Criminal P. C., in 1923 was not intended to affect the mode of proof of previous convictions. The amendment was designed merely to remove doubts as to the competence of certain Courts to impose enhanced sentences. Under S. 221 (7), "the fact, date and place of the previous conviction shall be stated in the charge", but it was not, we think, thereby intended that the principles governing a trial of an accused person on a charge under S. 75, Penal Code, should differ from the principles governing the trial of an accused person on another charge. Rather the contrary is the case: and, this being so, it would appear that as a prima facie case should be made out before an accused person can be committed to the Court of Session on a charge of an offence under a section other than on a charge under S. 75, Penal Code; there should be on the record evidence of the offence, on which, if unrebutted, the accused could be properly convicted: so we think that before an accused is committed on a charge under S. 75, Penal Code, there should be on the record, before committal, evidence on which, if unrebutted, he could be convicted. He could not properly be convicted on a mere conviction slip or a mere record of his previous crimes kept by the authorities, on a mere history sheet, as it may be called. Such a conviction slip greatly facilitates proof, but is not proof itself of previous convictions, nor, in our opinion, could an accused be convicted on this without further proof. The identity of the accused with that of the convict of the conviction slip, the accused moving, it may well be, under different aliases, is in no way established, nor the fact of his conviction. It may be considered by the prosecution a troublesome matter to put upon the record, before committal, evidence of identity and of the previous convictions to establish a prima facie case such as would be required if the charge were under a section other than S. 75, Penal Code, but this Court has held that the prosecution should call all relevant witnesses and produce all material evidence in the committing Magistrate's Court, so that the accused should know what evidence he has to meet: 24 S L R 96,[4] 28 S L R 317,[5] 32 S L R 709.[6] If the accused pleads guilty, the evidence need not be again recorded in the Sessions Court; if he does not plead guilty, the evidence must be again recorded: that is the law, and we see no reason why the same principle should not apply to a charge under whatever section of the Penal Code it may be related.

Furthermore, the omission to produce the proper evidence in the committing Magistrate's Court, assumes that the accused will plead guilty, or that the Court will adjourn the trial, so that the prosecution may have time to produce evidence, which should be either on the record or immediately available. We do not think a Court should, under these circumstances, grant

3. ('01) 28 Cal 689 : 5 C W N 670, Yasin v. Emperor.

4. ('30) 17 A I R 1930 Sind 99 : 120 I C 520 : 31 Cr L J 117 : 24 S L R 96, Emperor v. Khan Sahju.

5. ('35) 22 A I R 1935 Sind 31 : 154 I C 455 : 36 Cr L J 563: 28 S L R 317, Nandram Bhimbahadur v. Emperor.

6. ('38) 25 A I R 1938 Sind 97 : 175 I C 324 : 39 Cr L J 618 : 32 S L R 709, Raban Lalu v. Emperor.

any such adjournment. The learned Advocate-General referred us to S. 255A, Criminal P. C., which relates to the procedure in previous convictions in a Magistrate's Court. This section suggests that evidence of previous convictions should be recorded after the plea and not before. The purpose of S. 255A, Criminal P. C., was to regulate procedure and to prevent bias so that an accused should be tried first for the principal offence and then, if convicted, he should be tried on the charge of previous convictions which makes him liable to enhanced punishment. The purpose of S. 255A, Criminal P. C., would appear to be to approximate a trial in a case of previous convictions in a Magistrate's Court so far as this can be done to the procedure in a Court of Session when such further charge is to be tried—to S. 310, Criminal P. C. Section 255A, Criminal P. C., refers back to S. 221 (7) of the Code and this S. 221 (7) requires that "the fact, date and place of the previous conviction shall be stated in the charge." It does not, we think, mean that this fact, date and place can be found by the Magistrate from anywhere, that he can go out in the street and ask a passer-by or use his own private knowledge or his imagination. It may be that in the Magistrate's Court different considerations apply to a case committed to the Court of Session as was the case in I L R (1939) Kar 677[1] and the case now before us.

It may be that a proper interpretation of S. 255A, Criminal P. C., will be that a conviction slip is a sufficient basis for the framing of a charge under S. 75, Penal Code, but the cases in which a Magistrate acts under S. 255A, Criminal P. C., must be rare. It would ordinarily be limited to cases heard by Special Magistrates empowered under S. 30, Criminal P. C. We will, however, deal with such cases when they arise. In the meantime, we see no reason to apply to the case of an accused person committed to the Court of Session two different principles, one to govern his committal on the principal offence and another to govern the commital on the charge under S. 75, Penal Code. In both cases the evidence on which the prosecution relies to convict the accused should be upon the record of the committing Magistrate's Court. Witnesses, whether they be fingerprint experts or others, documents, whether they be extracts from judgments or otherwise, are not to be kept back and reserved for the Court of Session. This point has already been decided by this Court in Criminal Appeal No. 170 of 1940,[7] decided on 27th September 1940 to be reported in due course. It is true that the case in 15 Lah 331[8] referred to in that judgment has been since overruled by a Full Bench of the same High Court in 17 Lah 176,[9] but that judgment should not materially affect the point decided in Appeal No. 170 of 1940[7] or in this case Whether, in such a case, the conviction will or will not be set aside depends upon whether the accused was or was not prejudiced. This is the view taken by this Court in Criminal Appeal No. 170 of 1940[7] and by the Calcutta High Court in 43 Cal 1128.[3]

We see, therefore, no reason to differ from the conclusions arrived at on this point in I L R (1939) Kar 677.[1] The only remark we would wish to make is that the reference to S. 54, Evidence Act, in that ruling must be read in the light of the ruling in 29 S L R 121[10] referred to in that case. Section 54, Evidence Act, does not relate to the manner of proof of previous convictions, and relates only to the proof of previous convictions in certain cases. Further, the difference should be noted in a case of previous convictions where under S. 75, Penal Code, enhanced punishment is to be imposed and a case where previous convictions are only to be taken into account for the purpose of necessary punishment imposed by a Magistrate within the limits of the maximum punishment with which the offence is ordinarily punishable. This aspect of the matter is dealt with in the Bombay case in 4 Bom L R 177.[11]

Turning then to the facts of this case, the learned Judge found that there was, apart from the conviction slip, evidence only of one previous conviction. How evidence of this conviction itself came upon the record is not clear. There is no reference to it in the evidence of the Police Sub-Inspector or in the evidence of any other witness and there is no doubt in our minds that this question of previous convictions is often dealt with by the Courts in the most casual manner. It is presumed that

7. *Since reported in* ('41) 28 AIR 1941 Sind 168 : I L R (1941) Kar 270, Ali Murad Ganjuro v. Emperor.
8. ('34) 21 AIR 1934 Lah 667 : 152 I C 673 : 36 CrLJ 169:15 Lah 331, Sher Bahadur v. Emperor.
9. ('36) 23 AIR 1936 Lah 533 : 162 I C 976 : 37 Cr L J 742 : 17 Lah 176 : 38 P L R 421 (FB), Mt. Niamat v. Emperor.
10. ('35) 22 AIR 1935 Sind 115 : 158 I C 282 : 36 CrLJ 1310:29 SLR 121, Bhurasingh v. Emperor.
11. ('03) 4 Bom L R 177, King-Emperor v. Govind Sakharam.

with the production of the conviction slip the prosecution have done their duty, that it proves all that is required for a conviction. The only previous conviction of which there is proper evidence on the record is one previous conviction for theft for which on 11th September 1935 the appellant was given 18 months' rigorous imprisonment. No attempt seems to have been made to produce evidence, beyond the previous conviction slip, of the previous convictions in Karachi shown in the slip. There is no reason to suppose that the records of this Court have also been destroyed. Though this case appears an exceptionally bad case, for the appellant appears to be a man who leads small boys into crime —he is described by the Judge as a kind of Fagin — nevertheless we think a sentence of five years rigorous imprisonment is a sufficient deterrent. We reduce the sentence of ten years' rigorous imprisonment accordingly. With this modification the appeal is dismissed.

G.N./R.K. *Sentence reduced.*

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(28) A. I. R. 1941 Sind 177

DAVIS C. J. AND LOBO J.

Jumo Lal Bakhsh — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 62 of 1940, Decided on 1st May 1940, to revise order of Sub-Divisional Magistrate, Dadu, D/- 4th January 1940.

Criminal P. C. (1898), S. 257 — Under S. 257 Magistrate cannot refuse to summon defence witnesses because their number is large or result would be to delay case or because enough witnesses have been examined — Magistrate should deal with question of each witness separately and then decide whether witness is called for vexation, delay or defeating ends of justice.

A Magistrate under S. 257 cannot refuse to call witnesses whom an accused desires to be summoned in his defence because their number is large or the result would be to delay the case or because enough witnesses have been examined. It is not the fact that the case would be delayed which is the decisive ground under S. 257. It is that a witness is called for that purpose. The Magistrate should deal with the question of each witness separately, and decide within the provisions of S. 257 whether the witness is called for the purpose of "vexation or delay or for defeating the ends of justice", and should then state in his order the ground for his refusal : ('35) 22 A I R 1935 Sind 69, *Rel. on.*

[P 177 C 2; P 178 C 1]

Javhermal Villaitrai — for Applicant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is an application against an order of the learned Sub-Divisional Magistrate, Dadu, who refused the accused's request to call certain witnesses in his defence. The order of the learned Magistrate is as follows :

> In this case so many witnesses have already been examined. The case has already prolonged for long and accused wants to delay the hearing. I therefore reject the application as enough witnesses have been examined.

We do not think this order is a sufficient compliance with S. 257 (1), Criminal P. C., which is the relevant section. In that section it is provided that :

> If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination, or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing.

This section does not, we think, mean that the Magistrate is entitled to refuse to call witnesses whom an accused desires to be summoned in his defence because their number is large or the result would be to delay the case. It is not the fact that the case would be delayed which is the decisive ground under S. 257, Criminal P. C. It is that a witness is called for this purpose, and we think before a Magistrate refused to summon a witness, he should ascertain from the accused briefly the substance of the witness's evidence or the point which the witness is to be summoned to prove, and then if he comes to the conclusion that this witness is to be summoned for the purpose of vexation or delay or for defeating the ends of justice he is entitled, after giving his grounds in writing to refuse to issue process. But in this case it appears the Magistrate in the first instance accepted the application to summon all the witnesses and the accused paid the necessary court-fees and deposited Rs. 50 towards bhatta. The Magistrate then did not decide that these witnesses should not be summoned, but only that they should be summoned in batches at separate different hearings because they were too many to be called all at one hearing. There is, of course, nothing wrong in this. It is what a Magistrate should do in a case where a large number of witnesses are to be summoned. It appears, however, that after twenty-six witnesses had been examined the case was adjourned for settlement which was not successful. The applicant then applied for a further batch of ten witnesses, out of the original list, to be called.

It was then that the Magistrate rejected this application.

We think he should have dealt with the question of each witness separately, and have decided within the provisions of S. 257, Criminal P. C., whether the witness was called for the purpose of "vexation or delay or for defeating the ends of justice", and should then have stated in his order the ground for his refusal. But to reject an application to call witnesses on behalf of an accused merely because enough witnesses have been examined is not in itself a sufficient compliance with S. 257, Criminal P. C., and although a case may have already prolonged, the accused is not always responsible for the prolongation of a case; and from what is stated in the application, the prosecution was filed in May 1938, and the prosecution case was not closed till May 1939, but during the period only eleven witnesses were examined, and it would appear that the defence has been conducted with at least a like expedition because between 7th June 1939 and October 1939, twenty-six witnesses had been examined. We can understand naturally the Magistrate's desire that cases should not be unduly prolonged, but that is not in itself sufficient reason to reject or to refuse the application of an accused to call witnesses. The attention of the learned Magistrate is drawn to the case in 29 S L R 64,[1] which though it relates to a sessions case is still of assistance in a case in which S. 257, Criminal P.C., applies. We think therefore that the order of the Magistrate rejecting the application of the accused to summon these ten witnesses should be set aside and the Magistrate should deal with the case of each witness separately under S. 257, Criminal P. C., in the manner we have indicated. Order accordingly.

G.N./R.K. *Order accordingly.*

1. ('35) 22 A I R 1935 Sind 69 : 156 I C 258 : 36 Cr L J 889 : 29 S L R 64, Kundanlal Surajmal v. Emperor.

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(28) A. I. R. 1941 Sind 178

DAVIS C. J. AND WESTON J.

Bishamberdas & Co., a firm — *Appellants.*

v.

Sachoomal Kotoomal, a firm and others — *Respondents.*

Misc. Appeals Nos. 8, 9, 13 and 14 and 15 of 1940, Decided on 15th January 1941, against the orders by Lobo J., on 8th December 1939, 4th March 1940 and 14th March 1940.

(a) Civil P. C. (1908), O. 38, Rr. 5 and 6— R. 5 contemplates order to furnish security and not deposit in Court of property itself or its equivalent in money—Order held fell under R. 6 and not R. 5 and was therefore appealable.

Reference to forms 4, 5 and 6 in Appendix F Civil P. C. indicates that R. 5 contemplates an order to furnish security. It does not contemplate the deposit in Court of the property itself or its equivalent in money. [P 180 C 1]

The defendants to the suit did not furnish security, but brought into Court what was the equivalent of attachment by depositing the value of the goods whose attachment was sought. The final order passed by the Court was as follows: "I confirm the order of attachment. Money deposited in Court to remain as security. No order as to costs. Written statement in a week."

Held* that the final order passed by the Court was an order of attachment of amounts deposited and that for the convenience of the defendants what was attached was not the goods themselves but their value in money. Consequently the order fell under R. 6 and not R. 5 and therefore was appealable : ('23) 10 A I R 1923 Cal 639, *Disting. [P 180 C 1]

(b) Civil P. C. (1908), O. 38, Rr. 5 and 6— Transaction subsequent to institution of suit is not condition precedent for application of Rr. 5 and 6—Transfers before suit may be evidence of intention after suit—Mode of proving defendant's intention to dispose of property stated— Defendant's intention to obstruct or delay satisfaction of decree can be inferred from attending circumstances—Transfer by defendant prior to suit held fell within Rr. 5 and 6.

There is nothing in the plain words of Rr. 5 and 6 which makes a transaction subsequent to the institution of the suit a condition precedent to their application. Rule 5 refers not to the past but to the future, and to a defendant who with a particular intent is about to dispose of the whole or part of his property. The fact that he has done so after the institution of the suit may be strong evidence of the future intention provided he has any property left. But transfers before the institution of a suit may, as evidence of conduct, be evidence of intention after the institution of the suit. That a defendant is about to dispose of his property may be established to the satisfaction of the Court not only by completed transactions of disposal prior to the application but by such evidence as evidence of intention expressed by the defendant, by evidence of disposals not completed but only negotiated or by evidence of unsuccessful attempts at disposal. That the intention of defendant is to obstruct or delay the satisfaction of any decree which may be passed against him is in general necessarily a matter to be inferred from attending circumstances : 5 I C 181 (Cal), *Rel. on* ; ('38) 25 A I R 1938 Pat 161, *Disapproved.* [P 182 C 2 ; P 184 C 1]

In the first week of September 1939, defendants had large stocks of baling hoops in their godowns, and were under contract to supply to the plaintiffs and to other merchants quantities of baling hoops on forward contracts, deliveries in the case of plaintiffs being from October 1939 to February 1940. On the outbreak of the war, the market price of baling hoops rose very considerably, and defendants, in order to obtain large profits from their stock, avoided giving delivery on their contracts, and disposed of their stock in a clandestine manner

through closely associated firm by ready sales, prior to the institution of the suit by plaintiff for damages for breach of contract :

Held that the case fell within the purview of Rr. 5 and 6. [P 182 C 2]

(c) Practice—Appeal—Deliberate exercise by lower Court of discretion entrusted to it by law —Court correctly stating and appreciating facts and neither misunderstanding nor misapplying law—Appellate Court will not interfere.

Where the lower Court has correctly stated and appreciated the most material facts in the case, and has not misunderstood or misapplied the law, and has deliberately exercised a discretion entrusted to it by law, the appellate Court will not interfere: 26 All 238 (PC), *Rel. on.* [P 183 C 1]

Muhammadali A. Jinnah, Dipchand Chandumal and Suganlal Hassanand (in all appeals) — for Appellants.

Fatehchand Assudomal (in No. 8), Kimatrai Bhojraj (in Nos. 9 and 15) and W. B. L. Vellani (in Nos. 13 and 14)—for Respondents.

Davis C. J. — We have before us five appeals against orders passed by Lobo J., in suits Nos. 284, 266, 273, 296 and 310 of 1939. The defendant in each of these suits is the same Bishamberdas and Company, a firm. Bishamberdas is the managing partner and proprietor of the defendant firm. The plaintiffs in the five suits are firms suing for damages for breach of contract by the defendant to deliver steel baling hoops used for baling raw cotton. In suits Nos. 266 and 284 damages claimed were Rs. 7815-10-0 and Rs. 10,875-0-0, respectively, and the order of the learned Judge appealed against is dated 8th December 1939, (Misc. Appeals Nos. 8 & 9 of 1940). In suits Nos. 273 and 296 of 1939, Rs. 16,368-12-0 and Rs. 3750 respectively, were claimed as damages and the order of the learned Judge is dated 4th March 1940: (Misc. Appeals Nos. 13 and 14.) In suit No. 310 of 1939 (Misc. Appeal No. 15 of 1940) Rupees 55,368-12-0 was claimed as damages, the order of the learned Judge being dated 5th March 1940. This order is as follows :

Mr. Dipchand states that in view of my orders in suits 266, 284, 296 and one other he feels no useful purpose will be served by re-arguing this matter. I confirm the order of attachment. Money deposited in Court to remain as security. No order as to costs. Written statement in a week. For issues to 14-3.

Mr. Kimatrai appeared in Appeals Nos. 9 and 15 and at first objected to all the appeals being argued together as he said that he had not copies of the paper books in appeals other than those in which he appeared, but as he thereafter referred to the record in Appeal No. 13 in support of his own case, we inferred he had waived his objection. The suits are against the same defendants by firms claiming damages for breach of contracts for failure to deliver steel bailing hoops, and though the contracts may differ in detail, the questions to be decided in these appeals are substantially the same: in consequence we heard Mr. Jinnah argue the appeals together, and we propose to deal with the appeals together in one judgment. A preliminary objection was taken by Mr. Kimatrai that no appeal lay against the orders of the learned Judge at all, for the orders were orders passed under O. 38, R. 5, Civil P. C., and that while an appeal lay against an order under O. 38, R. 6, Civil P. C., under O. 43, R. 1 (q), Civil P. C., no appeal lay against an order under R. 5 of O. 38, the intention of the Legislature being that no appeal should lie where there was no attachment, but merely an order directing security to be furnished, as no great harm was done. In this case Mr. Kimatrai argued that there was no attachment but the money was brought into Court and deposited as security. He refers to the order of Lobo, J. dated 8th December which concludes :

On these grounds the rule issued in these two suits is made absolute. The sums of money deposited by the defendants in Court will remain as security against any decree that may be passed against the defendants in these two suits.

(See page 79 in Appeal No. 9) : but the interim order made absolute by the learned Judge on 8th December was in the following terms. "Interim attachment as prayed and notice," and was dated 1st November. Further in his order dated 5th March 1940, in Appeal No. 15, in which Mr. Kimatrai appeared, the learned Judge said :

I confirm the order of attachment. Money deposited in Court to remain as security. No order as to costs. Written statement in a week. For issues to 14/3.

It may be said that the language used by the learned Judge leads itself to the argument that we have here not a case of attachment before judgment but a case where security has been furnished and an interim attachment has been raised; but looking at the facts of this case and the real meaning of the words, it does appear to me that the final order passed by the Judge was an order of attachment, but that for the convenience of the defendants what was attached was not the goods themselves but their value in money. It is convenient here to set out the words of Rr. 5 and 6 themselves, for at times arguments tend to move away from the words of the statute :

R. 5 *(1)*. Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the de-

fendant, with intent to obstruct or delay the execution of any decree that may be passed against him, (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

R. 6.—*(1)* Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

It appears that R. 5 contemplates that the defendant shall "furnish security, in such sum as may be specified in the order to produce and place at the disposal of the Court, when required, the said property or the value of the same," but R. 5 does not contemplate the deposit in Court of the property itself or its equivalent in money. Reference to forms 4, 5 and 6 in Appx. F will show that what R. 5 contemplates is an order to furnish security. No such order was made in these proceedings before the learned Judge. The defendant did not show cause why security should not be furnished. He did not give security. What in effect he did was to bring the property into Court, in effect to submit to its attachment if the Court so ordered, and the final orders passed by the learned Judge were, I think, orders passed under R. 6, and not R. 5. But this makes no difference to my decision for, in my view, the appeals must fail on their merits.

Now, we have heard arguments at great length in these appeals, and, in my view, the appeals finally fall to be decided upon this question, whether there is reason to believe that the defendant firm did in fact intend to strip itself of its assets through the agency of the firm Padam Prasad Jain & Co., whether the initial was L or J, I think matters not. Whether this firm be or be not a bogus firm created for the purpose, I think also in the particular circumstances of the case, matters not. For the answer to this question, I think, we must consider particularly the question of the shipment of 9000 bundles of these steel hoops to Bombay through the agency of this firm, for it appears to me that if it is proved that the defendant firm did clandestinely through another firm, this closely connected firm of Padam Prasad Jain & Co., send away from Karachi to Bombay at this time 9000 bundles of hoops, it did thereby disclose such an intention to dispose of its property with such intent to obstruct or delay as would bring its acts within the provisions of R. 5 and justify the order of the learned Judge. In my opinion, it is so proved, and the orders of the learned Judge appealed against are proper orders and the appeals must be dismissed.

Mr. Jinnah first took the point that no order in the nature of an injunction should have been issued because the suit on the face of it was bound to fail. The plaintiff was entitled only to goods shipped on ships which had started on their voyage but had either returned to port or failed to complete their voyages on account of the war, and he stressed the fact that these contracts were for forward delivery and not for ready delivery, and on that account the contract price was less than if the goods had been from stock. But for instance, in Suit No. 266 of 1939, the contract made orally was confirmed in the briefest of terms, there being no reference to delivery for goods consigned in specific ships, the goods being Belgian goods and the price Rs. 10-12-0 per cwt. in the one contract for 600 bundles and Rs. 10-11-0 per cwt. for 3100 bundles. It is true that in the contract in Suit No. 284 the buyers bind themselves to terms which include a *force majeure* clause, and it may be that the defendant relies on this or some other term and condition of the contract or on the plea that the contracts are frustrated by the war, but we do not see how these questions can be decided before this suit is heard, nor can we say that the plaintiffs' case must so clearly fail as to make the passing of an interim order in the nature of an injunction without justification. I do not think, therefore, that this argument can be accepted.

But Mr. Jinnah's principal argument was that we have here merely the case of ordinary business contracts, and that the learned Judge has without justification interfered with the ordinary straightforward course of business of a reputable firm, that the

defendant firm has been straightforward in its defence as it has been straightforward in its course of business, that when it was, for instance, alleged in an affidavit in Suit No. 266 that two of the partners of the firm of J. Padam Prasad Jain & Co., through whom it was alleged defendants were clandestinely disposing of their goods, were nephews of the defendant Bishamberdas, it was sufficient if defendant denied this allegation and did not go on to state that they were his cousins. Further the bona fide nature of the dealings between the defendant firm and the firm of J. Padam Prasad Jain & Co., could have been proved from books of the company for which the plaintiffs called but which they did not ask to be produced. Further, Mr. Jinnah argued that O. 38, R. 5, Civil P. C., required that the intent referred to had relation to something done or to be done after the institution of the suit and that in this case the sale of 9000 bundles of steel hoops by the defendant firm to J. Padam Prasad Jain & Co. was before the institution of the suit and not after. He explained the fact that this hardware firm for the first time did business in these steel hoops by the fact that the defendant firm had previous relations with the firm of J. Padam Prasad Jain & Co. and wished merely to facilitate, what might be for them, a profitable business. He also explained the fact that a firm of much the same name and constitution as J. Padam Prasad & Co. shared for a time the same telephone, as due also to this friendliness. I find it, however, difficult to believe that the defendant firm would have abandoned the large profits accruing on 9000 bundles of these steel hoops in a rapidly rising market out of friendliness to another firm or that the use of a common telephone was also due to friendliness alone.

I think that other things apart, these two admitted facts show a very close business relationship and association between these two firms, and that indeed for the purpose of the disposal of these 9000 bundles the two firms acted as one, entries in books and alleged or admitted cash payments notwithstanding. The statement, therefore, made by Bishamberdas in his affidavit in reply to the plaintiffs' allegations in Suits Nos. 266 and 284 of 1939, that he has nothing to do with the firm of J. Padam Prasad Jain & Co., and that the allegations made regarding his so-called connexions with the firm of J. Padam Prasad Jain & Co. are absolutely false and unfounded can in no way be justified, and, in my opinion, are themselves false and made to deceive the Court and conceal the true nature of his actions. For instance, in the affidavit in Suit No. 266 plaintiff alleges that the defendants have shipped 4000 bundles of steel hoops to Bombay in the name of Padam Prasad Jain & Co. but Bishamberdas does not in his counter-affidavits either on 8th November or 20th November admit any sale to the firm of Padam Prasad Jain & Co. or explain this transaction. It is only later in an affidavit dated 11th December in Suits Nos. 296 and 273 (Appeals Nos. 13 and 14 of 1940) that the transaction relating to the sale of these 9000 bales to L. Padam Prasad Jain & Co., and J. Padam Prasad Jain & Co., is admitted or explained. His affidavits in fact evade or falsely deny the main allegations against him including the allegation made in the affidavits of Jagatram and Gokalchand, the two brokers, that the defendant firm insisted on doing business in these steel hoops through other firms, for instance, Messrs. Kishan Prasad and J. Padam Prasad Jain & Co. The allegation of enmity against Gokalchand is too trivial to affect this case. Nor do I think the learned Judge is wrong when he finds that the defendant firm and the firm of J. Padam Prasad Jain & Co. are closely associated.

It is argued on behalf of the appellants that the firm of J. Padam Prasad Jain & Co. was an independent firm carrying on business since 1938 and that the subsequent change of partners means nothing. The confused though short existence of this firm of J. Padam Prasad Jain & Co. is referred to briefly in Naharsingh's affidavit in Suit No. 266 and at much greater length in his affidavit in Suit No. 273. Naharsingh explains how he came to Karachi and started the firm of N. Padam Prasad Jain & Co. as dealers in ply wood, glass, tiles, varnish, paints, iron hardware, G. I. sheets, pipes and building materials, a business which in England would be described as builders merchants. The "N" in N. Padam Prasad Jain & Co. stood for Naharsingh. It is significant that another firm in the premises occupied by this firm and the defendant firm was the firm Kishan Prasad & Co. Ltd., the firm given by one of the brokers as a firm in whose name the defendant firm was trying to do business and sell steel hoops. Naharsingh gives no satisfactory explanation as to why the defendant firm should have allowed his firm to use their telephone and their telegraphic address. In May 1938 Naharsingh states he took up Lakhmichand

and so the firm became L. Padam Prasad Jain & Co. It is this same Lakhmichand, son of Sumerchand, who was registered as a partner in the defendant firm with the Indian Merchants Association, Karachi, on 2nd September 1939, and this Lakhmichand is the son of Lala Sumerchand, whose two other sons Lalchand and Chanderbhan were registered as partners in the firm of J. Padam Prasad Jain & Co., on 14th October. Bishamberdas admits that this Lala Sumerchand is his father's brother's son, that is, his cousin, and Lakhmichand is the son of this Lala Sumerchand as are Lalchand and Chanderbhan. Thus members of the two firms are related and Naharsingh's affidavit shows from the beginning that they were associated together. According to Naharsing Lakhmichand, son of Lala Sumerchand, left N. Padam Prasad Jain & Co. in May 1939, and six persons whom he names, two of whom are sons of Lala Sumerchand, Lalchand, and Chanderbhan, did business in the name of L. Padam Prasad Jain & Co. till 19th September 1939, when the name of the firm was changed to J. Padam Prasad Jain & Co. I do not myself think this change of initial means any thing at all, and if the firm of Padam Prasad Jain & Co. with its different initials was an independent firm, it is clear it was closely associated with the defendant firm using the same telephone and the same telegraphic address even when the office was moved into another building near by.

I am not impressed by the fact Naharsingh alleges or even shows that perfumery merchants deal in hardware nor by the argument that the learned Judge has wrongly described the firm of J. Padam Prasad Jain & Co. as furniture-dealers when they deal in plywood chair-seats, sofa-springs, hardware and building materials. They may deal in furniture accessories or materials but it is not disputed that until these two shipments of 9000 bundles of steel hoops to Bombay, they did not deal in steel hoops. Indeed, Naharsingh says that because they did not do so, there could be no confusion between the two firms, even if they used the same telephone and the same telegraphic address. There is not a shadow of doubt in my mind that the affidavits of the two brokers are substantially true and that the defendant firm was disposing or endeavouring to dispose of part of its stock of steel hoops clandestinely through other closely associated firms, more conveniently to obtain the higher profits sales on a rising market would provide. But it may be argued that this may be indiscreet or unwise or imprudent and may give rise to suspicion as to the good faith and upright dealing of a firm which so behaves, but that does not of itself show that the defendant firm with intent to obstruct or delay the execution of any decree against it was about to dispose of the whole or any part of its property or to remove it from the local limits of the jurisdiction of the Court within the meaning of R. 5 of O. 38, Civil P. C. This sale through a broker to Padam Prasad Jain & Co. of 9000 bundles was in any case before the institution of the suit, and Mr. Jinnah referred us particularly to a case of the Patna High Court in 17 Pat 89,[1] where in the learned Judges held that in order that Rr. 5 and 6 should apply "there must be a transaction subsequent to the filing of the suit." With the greatest respect to the learned Judges we can find nothing in the plain words of the rules which makes a transaction subsequent to the institution of the suit a condition precedent to the application of Rr. 5 and 6. Indeed, R. 5 refers not to the past but to the future. Rule 5 refers to a defendant who with a particular intent is about to dispose of the whole or part of his property. The fact that he has done so after the institution of the suit may be strong evidence of the future intention provided he has any property left. But, in my opinion, transfers before the institution of a suit may as evidence of conduct be evidence of intention after the institution of the suit. In 11 C L J 19,[2] a case before the Calcutta High Court, the learned Judges said :

> It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention.

After considering all the circumstances of this case, looking to the conduct of the defendant shortly before the suit in the matter of these 9000 bundles, there is no doubt in my mind that the learned Judge was justified in holding that the intention of the defendant firm was to dispose clandestinely through others of part of its stock in trade so that it might not only reap the higher profits but also obstruct or delay the execution of decrees, for though it was ar-

1. ('38) 25 A I R 1938 Pat 161 : 173 I C 928 : 17 Pat 89 : 19 P L T 372, Bedanand Rai v. Nabo Kumar Singh.
2. ('10) 11 C L J 19 : 5 I C 181, Macgregor v. Cawnpore Sugar Works, Limited.

gued that the decree could be satisfied from the moneys deposited in Court, those moneys would not be there after the appeals succeed. There is no doubt in my mind, despite the affidavits of fellow merchants testifying to the good repute of the defendant firm and the evidence that the defendant firm has fulfilled certain contracts in accordance with their terms, thus depriving itself of the excessive profits the war profiters, that the purpose of this clandestine dealing of the defendant firm was to strip itself of its assets, conceal them in the names of closely associated firms and thus delay or obstruct the execution of the decrees which might be obtained in these suits against it. In my opinion the learned Judge has correctly stated and appreciated the most material facts in these cases, that he has not misunderstood or misapplied the law, and it would not be right in the circumstances for us to interfere in the deliberate exercise of a discretion entrusted to him by law: 26 ALL 238.[3] In my opinion, then, the appeals should be dismissed with costs. Mr. Kimatrai states that he does not press the cross-objections in Misc. Appeal No. 15 of 1940. They are dismissed with costs accordingly.

Weston J. — With regard to the objection that no appeals lie from the orders passed in these five suits, it seems to me that, even if an order under R. 5 of O. 38, Civil P. C., can be more than an *order nisi*, yet the orders with which we are concerned were orders not under R. 5 but under R. 6. The circumstance that in the memoranda of appeal the orders are described as orders under R. 5 is of no importance. Rule 5 provides for an order to furnish security to produce property in specie or its value, and such order may be accompanied by a conditional order of attachment. Any final order of attachment is made under the first part of R. 6 on failure by defendant to show cause why he should not furnish security, or on failure to furnish the security required. Defendants in no one of the five suits furnished security, but they brought about what was the equivalent of attachment by depositing the value of the goods whose attachment was sought. The final orders passed were clearly orders of attachment of the amounts deposited, and in fact some of the orders directed in terms that attachment was confirmed. These orders must be taken to be orders passed under the first part of R. 6. In the Calcutta case referred to, 50 Cal 215,[4] all that was held was that no appeal lay against such part of an order under R. 6 as required security to be furnished. Under O. 43, R. 1 (q) an appeal lies against an order made under R. 6, and even if the Calcutta case represents correct law, it would not apply to the present facts. In my opinion, appeals lie from the final orders made, and the preliminary objection raised for respondents fails.

Rule 5 of O. 38 which lays down the conditions under which the Court may take action by attachment before judgment shows that such action is preventive to provide against future attempts of the defendant to place his assets beyond the reach of the potential decree-holder, and is not punitive in order to punish such acts of the defendant committed, either before the suit was filed, or after suit but before presentation of the application under the rule. This does not mean that disposals shown to have been made prior to the application cannot be considered as evidence of intention to make further disposals. Of course if the defendant has made a complete disposal of his property before the application is presented, there is no room for any action under the rule. Also a part disposal of property is not necessarily conclusive of further intention to dispose of all or part of the remainder, and it is evidence of the intention required by R. 5 only if it is shown to have been made with that same intention. In 11 C L J 19,[2] quoted in a Patna case, 17 Pat 89,[1] it was remarked :

> It is open to the Court to look to the conduct of the parties immediately before the suit, and to examine also the surrounding circumstances, and from these to draw an inference as to whether the defendant is about to dispose of his property and if so, with what intention.

Mr. Jinnah has relied upon a remark of Varma J., in the Patna case where, after setting out the above passage he went on to say that this Calcutta decision shows that there must be a transaction subsequent to the filing of the suit. It is urged that in the present cases no disposal by defendants subsequent to the filing of the suits has been alleged. But with all respect to the learned Judge, I can find nothing in R. 5 of O. 38 to support his dictum. An application under R. 5 may be made at any stage in the suit, and if a defendant, having knowledge that a suit will be filed against him, begins

3. ('04) 26 All 238: 31 I A 67: 8 Sar 625: 7 O C 239 C), Jaipal Kunwar v. Indar Bahadur Singh.

4. ('23) 10 A I R 1923 Cal 639 : 79 I C 242 : 50 Cal 215, Haji Mohammuddin & Co. v. Eastern Japan Trading Co.

disposal of his property with the intention of obstructing or delaying the execution of a decree likely to be passed against him, there is nothing in R. 5 which debars the plaintiff from applying under that rule at the time he files his suit, and from relying in support of his application not on disposals made subsequent to the filing of suit or subsequent to service of suit on the defendant, but on disposals made before the suit has been filed. That a defendant is about to dispose of his property may be established to the satisfaction of the Court not only by completed transactions of disposal prior to the application, but by such evidence as evidence of intention expressed by the defendant, by evidence of disposals not completed but only negotiated or by evidence of unsuccessful attempts at disposal. That the intention of defendant is to obstruct or delay the satisfaction of any decree which may be passed against him is in general necessarily a matter to be inferred from attending circumstances.

The affidavits attached to the applications under R. 5 made in suits Nos. 284 and 266 (Appeals Nos. 8 and 9) upon which on 8th December 1939 the learned Judge passed the first two of the five orders against which these appeals have been made, are similar in terms and the two orders passed are almost identical. Of the two affidavits, that filed in suit No. 284 is the more precise, and it omits certain irrelevancies which appear in the other. The substance of the assertions made may be stated as follows: In the first week of September 1939, defendants had large stock of baling hoops in their godowns, and were under contract to supply to the plaintiffs and to other merchants quantities of baling hoops on forward contracts, deliveries in the case of plaintiffs being apparently from October 1939 to February 1940. On the outbreak of the war, the market price of baling hoops rose very considerably, and defendants, in order to obtain large profits from their stock, avoided giving delivery on their contracts, and disposed of their stock by ready sales. They are said to have avoided a number of contracts by offering to their clients 10 per cent. of the contract quantities, and if this was not accepted, to have refused to deliver any quantity at all; and it has been suggested before us that as baling hoops are seasonable goods, in many cases merchants were compelled to accept these terms. Defendants are said to have set up or to have utilized a firm of the name J. Padam Prasad Jain & Co., and when selling hoops ready, to have had bills made out in the name of this firm; and plaintiffs in suit No. 284 assert that they themselves were given bills in this manner for hoops bought by them. Defendants are also said to have consigned a considerable quantity, 4000 bundles of hoops to Bombay, in the name of J. Padam Prasad Jain & Co. It is said that all this conduct of defendants is dishonest, and the argument based on these allegations is that in order to reap the advantages of the large increase in prices, and in order to avoid giving delivery from stock to which plaintiffs claimed to be entitled, defendants have been transferring their assets to the name of J. Padam Prasad Jain & Co. In the affidavit in Suit No. 266 it is alleged that the firm J. Padam Prasad Jain & Co. was registered under the Partnership Act only on 14th October 1939, about two weeks before the application under R. 5 was made, and it is stated that the partners of this firm are relations of Bishambardas, the principal partner in the defendant firm.

In reply to the affidavits in these two suits lengthy affidavits were filed by Bishamberdas, and he also filed a number of affidavits of merchants of Karachi, European and Indian, testifying to his commercial integrity. In his affidavits Bishamberdas asserts that the contracts of plaintiffs were forward contracts contingent upon the arrival of the goods from abroad, that plaintiffs had no right to have their contracts fulfilled from the stock in defendants' godowns, which defendants were at liberty to sell on such terms and at such profit as they pleased. The allegation that defendants were taking advantage of the shortage of stocks and increase in prices by compromising with merchants on a basis of 10 per cent. deliveries is answered only by the assertion that the allegation is very vague, and it is not specifically denied, while the assertions relating to the firm of J. Padam Prasad Jain & Co., are answered by the statement that neither Bishamberdas nor anyone in his firm has anything to do with this firm, and that all the allegations made as to his connexion with that firm are absolutely false and unfounded. The statement that 4000 bundles of hoops have been sent to Bombay is answered by the statement that defendants have not sent a single bundle to Bombay. Bishamberdas also produced statements showing that during the months of August, September, October and part of November 1939, he had made 63 deliveries totalling 16,279 bundles to merchants against future delivery contracts, and that

between 24th November and 1st December he had delivered 10,497 more bundles, but these statements do not show the total quantities which defendants were under contract to deliver to these merchants.

There can be no doubt, as the learned Judge held, that the replies of Bishamberdas made in these affidavits were not honest replies. The learned Judge after hearing the arguments advanced on the affidavits, considered it proper to examine Bishamberdas who was in Court. In his statement then made Bishambardas had to admit that the firm L. Padam Prasad Jain & Co., the predecessor of J. Padam Prasad Jain & Co., used the same telegraphic address, namely, 'Hoops' and the same telephone number as the defendant firm. The offices of the two firms are said to be in different roads. Bishamberdas also admitted that two of the partners of J. Padam Prasad Jain & Co. are brothers of Lakhmichand, one of his own partners in the defendant firm, who is his first cousin. This Lakhmichand is mentioned in a partnership deed, purporting to be dated 19th September 1939, creating the firm of J. Padam Prasad Jain & Co., as one of the partners of L. Padam Prasad Jain & Co., whose assets were taken over.

The assertion by Bishemberdas that defendants had no connexion with the firm of J. Padam Prasad & Co., therefore, was not a complete disclosure of facts within his knowledge, and the explanation given by him for the use by this firm, said to be hardware merchants, of defendants' telegraphic address 'Hoops' and of their telephone number on the ground that they formerly occupied the same building, is certainly very unconvincing. Again, the allegation that defendants had sent 4000 bundles of baling hoops to Bombay in the name of this firm was only denied without explanation, and it was only after orders were passed by the learned Judge on 8th December 1939 in Suits Nos. 284 and 266 that, in the proceedings of the other three suits, on the applications made therein under Rule 5, disclosure was made that defendants had sold a large quantity, 9000 bundles, to J. Padam Prasad Jain & Co., and despatch by this firm of 4000 bundles to Bombay was not denied. This firm, according to the partnership deed of 19th September 1939, has a capital of Rupees 6000 only, but the transaction of purchase of 9000 bundles involved an amount of some Rs. 60,000. This sale according to para. 24 of Bishamberdas' affidavit in suit No. 310 was a sale of 1000 bundles on 14th August 1939 to L. Padam Prasad Jain & Co., and a sale of 8000 bundles on 5th September to J. Padam Prasad & Co., and it has been pointed out by the learned advocate for the respondents that the partnership deed creating the latter firm was not executed until 15th September 1939. Although in para. 25 of his affidavit Bishamberdas states that the price of these 9000 bundles has since been received by defendants, this assertion is not supported by evidence. It is claimed before us that this payment will appear in defendants' books and also in the books of J. Padam Prasad Jain & Co., and it is urged that plaintiffs in Suits Nos. 284 and 266 had called for the books of the latter firm but did not attempt to have them brought on record. But it is to be remembered that the plaintiffs in these two suits had no knowledge of this alleged sale, which was disclosed only in January 1940 after the orders in those suits had been passed. When considering this very large transaction with a firm which did not deal in these goods and which possessed a capital amounting to only one-tenth of the price of these goods, which was reconstituted about the time of this transaction, and of which an outgoing partner is a partner in defendants' firm, while his brothers continued, it is worthy of note that the sale is said to have been effected through a broker Tarachand. It seems very strange that a genuine sale to a firm having such close connexions should have been made through a broker, and although in suit No. 266 there appears an affidavit of this broker, I do not think in the circumstances it is entitled to much weight.

Mr. Jinnah for the appellants has urged that we should consider the merits of the claims made by the plaintiffs in the five suits, and he suggests that if they do not appear to have prima facie cases, then this circumstance should be taken into consideration when deciding these appeals. The defence of defendants, I understand, rests mainly on a plea of *force majeure*, and looking, for example, to what is said to be the contract in Suit No. 266, it seems to me that the burden lies heavily upon defendants to prove that if a particular ship or ships did not arrive in India, they are absolved from all liability under this contract. I do not wish to express any decided opinion on the merits of the suits, but if in fact the contracts were such as to throw upon the defendants an obligation to deliver, if not from shipments received, yet from stocks available with them, then the fact that large

quantities of hoops in the possession of defendants were not utilized towards fulfilling those contracts, but were disposed of in a clandestine manner through a closely connected firm, established at the material time in the matter, assumes special significance. It is true that the affidavits filed by Bishamberdas speak in the highest terms of his commercial reputation, but I think the effect of those affidavits is largely, if not completely, discounted by the allegation, which has not been denied, that defendants have been compounding their contracts, although, as the transfer to J. Padam Prasad Jain & Co., now shows that they had considerable surplus stocks.

It appears to me that the conduct of defendants both in their transactions, and in the proceedings before the trial Court, particularly in the first two suits, was in the highest degree suspicious and suggests that they have been led away from the path of commercial integrity by the sudden and unexpected opportunity afforded to them at the outbreak of war of making large profits from their stocks by evading giving delivery on their contracts; and I do not see how we can hold that the learned Judge exercised his discretion arbitrarily when holding that the creation or reconstitution of the firm J. Padam Prasad Jain & Co. was a device in order to facilitate the transfer of property from the defendants' firm in order to avoid the satisfaction of any decrees which may be passed in these suits. The learned Judge in his later orders relied upon his first orders passed in Suits Nos. 266 and 284, and he says he is unable to find anything in the later affidavits of Bishamberdas to induce him to arrive at a different conclusion. He remarks that it is most significant that nowhere in the later affidavits of Bishamberdas has it been stated that no baling hoops have been sold by the defendant firm to J. Padam Prasad Jain & Co., after 5th September 1939. Here also, I see nothing to justify a finding by us that discretion has been exercised arbitrarily. I agree therefore that the appeals should be dismissed with costs.

G.N./R.K. *Appeals dismissed.*

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(28) A. I. R. 1941 Sind 186

DAVIS C. J. AND WESTON J.

Agha Nazarali Sultan Muhammed

v.

Emperor.

Criminal Revn. Appl. No. 327 of 1940, Decided on 9th December 1940.

(a) Criminal trial — Adjournment — Criminal P. C. does not contemplate adjournments sine die.

The Criminal Procedure Code does not contemplate adjournments of criminal cases sine die; on the contrary, what the law contemplates is due diligence and impartiality in the prosecution of criminal cases. It is not the law that a criminal case should linger long. [P 187 C 2]

(b) Penal Code (1860), Ss. 117 and 143 — Offence under S. 117 does not necessarily involve offence under S. 143.

An offence of abetment under S. 117 does not necessarily involve an offence under S. 143, the offence of unlawful assembly. [P 188 C 1]

Because while S. 117 does contemplate the abetment of the commission of an offence by the public generally, or by any number or class of persons exceeding ten, it does not necessarily follow that the offence is to be committed by all the ten or more persons at one and the same time or that there should be an unlawful assembly. [P 188 C 1]

(c) Penal Code (1860), S. 143 — Offence under S. 143 is not compoundable.

Offences under S. 143 are not compoundable. This is presumably because offences under S. 143 were regarded by the Legislature as concerning persons other than those immediately involved; these offences are offences which directly affect the public peace and the conclusion of criminal cases relating to them is therefore something more than a matter for agreement between individuals: ('23) 10 A I R 1923 Mad 592, *Rel. on.* [P 188 C 2]

(d) Criminal trial — It is for Magistrate, and not for complainant, to decide, upon facts alleged, what offence is committed.

It is for the Magistrate to decide upon the facts alleged what is the offence alleged, what section of the Penal Code is the appropriate section. It is not for the first informant or, indeed, the complainant, if a complaint is made, to determine the offence or the jurisdiction of the Court: ('37) 24 A I R 1937 Sind 81 and ('40) 27 A I R 1940 Sind 97, *Rel. on.* [P 188 C 2]

(e) Criminal trial — Several offences named in complaint as part of one transaction — Magistrate framing charge of one offence — He is presumed to have discharged accused in respect of other offences.

It is to be assumed that when a Magistrate frames a charge of one of several offences named in the complaint as all part of one transaction, he has by necessary implication discharged the accused with respect to the other offences. [P 189 C 2]

W. B. L. Vellani for Permanand Kundanmal — for Applicant.

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J.—This is an application in revision against an order of the Special Magistrate, Sukkur, Mr. B. W. Budd, allowing an offence under Ss. 117 and 448, Penal Code, to be compounded but refusing to allow an offence under S. 143 read with S. 117, Penal Code, which was found from the statement of facts in the complaint to

be disclosed, to be compounded. This application in revision is made against the order of the Special Magistrate, Sukkur, but it should properly be made against the order of the District Magistrate, Sukkur, to whom a revision application in this same matter had been made. It is true that the learned District Magistrate felt that he could pass no orders upon this application, as the alleged offences were, in his own language,

> connected with incidents which took place on and after 18th October 1939, and with which I am personally cognizant both as a Magistrate and in my executive capacity. It is, therefore, improper on my part to pronounce any judgment in a matter which is so intimately connected with my own orders and actions. The accused have a remedy in the concurrent jurisdiction of the Sessions Judge, and it is, therefore, suggested that perhaps a better course for them would be that they approach that Court for adjudication of this matter. No orders are, therefore, passed on this application except the suggestion that if considered proper they should approach another tribunal.

While the learned District Magistrate's scruples do him credit, I do not think these proceedings on the revision application before him were properly terminated by a suggestion. Once he had taken cognizance of this revision application relating to matters with which he was so intimately connected that he could not give a decision on the points raised, the learned District Magistrate should, I think, have referred the application at once to this Court for transfer to some other Court or for disposal according to law. The learned District Magistrate in his order dated 28th September 1940, dealt with certain other application relating to this complaint made by the City Magistrate, Sukkur, against the applicant, one Agha Nazarali and nine others for offences under Ss. 117 and 448, Penal Code. The police report bears the date 25th January 1940; the offences are alleged to have been committed between 1st October 1939 to 19th November 1939. We are informed that up to the date of the revision application to the District Magistrate, Sukkur, no evidence had been recorded. I think, therefore, that the District Magistrate should in his order have dealt more fully with the reasons for the delay in this case. The phrase that the case "has lingered for a long time" appears to show an inadequate appreciation of the gravity of the delay which appears to have occurred in this case and the necessary implications. The learned District Magistrate in referring to a transfer application with which he dealt in this same order writes as follows :

> The second application deals with the refusal of the learned Special Magistrate to give an indefinite adjournment. On behalf of the applicant Mr. Aslam urges that the Crown itself had asked for an adjournment of this case till the tribunal decides whether the Manzilgah building was a mosque or not. It is a fact that Government in the wider interests of the province had suggested that it would be in the interest of the peace of the district and the province if the case were held up till the question whether the Manzilgah was a mosque or not is decided. Apparently two considerations had moved Government: (a) preservation of peace, and (b) the influence of the decision in the inquiry on the guilt of the accused in this case.
>
> As regards the peace of the province, though the request was made in July and the case has not been heard since then, there are no indications that holding up of the trial has made for the peace of the province. On the other hand, communal murders still unfortunately are being committed and there has been a spate of them within the last week. So this argument, so far as this district is concerned, loses force.

I think the learned District Magistrate in rejecting this application should have pointed out that the Criminal Procedure Code does not contemplate adjournments of criminal cases sine die, and that, on the contrary, what the law contemplates is due diligence and impartiality in the prosecution of criminal cases. It is not the law that a criminal case should linger long. Indeed, the wisdom of the Legislature as embodied in the great Code of Criminal Procedure is illustrated by the very words of the learned District Magistrate which I have quoted. Now, so far as the present application is concerned, and the refusal of the learned Special Magistrate, Sukkur, upon the complaint to allow the compounding of offences under Ss. 143 and 117, Penal Code, it is urged on behalf of the applicant that the offence of criminal trespass under S. 448, Penal Code, may be compounded by the person in possession of the property trespassed upon according to the provisions of S. 345 (1), Criminal P. C., and under sub-s. (3) of that section the abetment of such an offence is likewise compoundable; and, indeed reference to Sch. 2 to the Criminal Procedure Code, will show that in col. 6, the offence of house-trespass is shown as compoundable, and that an offence under S. 117, Penal Code, is shown as compoundable if the offence abetted is compoundable ; and, clearly, an offence under S. 117, Penal Code, is an offence of abetment, though it is an aggravated form of abetment.

Now, if the mere mention of certain sections in a police report or in a complaint was conclusive of the matter, it would appear clear that the order of the learned Special Magistrate, Sukkur, was wrong and

should be set aside, and, indeed, until the case is considered carefully, and from the record, it might well be thought that the learned Magistrate has erred, as we all err at times, in the interpretation of the law. Indeed, I think he is in error when he finds that an offence of abetment under S. 117, Penal Code, necessarily involves an offence under S. 143, Penal Code, the offence of unlawful assembly. The learned Magistrate says : "It follows that where S. 117 is used, S. 143 follows automatically." It does not necessarily follow. Section 117, Penal Code, is as follows :

> Whoever abets the commission of an offence by the public generally or by any number or class of persons exceeding ten, shall be punished with imprisonment . . . .

If it did necessarily follow, there would appear some doubt or conflict in the law as an offence under S. 117, Penal Code, could never be compounded as Sch. 2 to the Criminal P.C., shows; but while S. 117, Penal Code, does contemplate the abetment of the commission of an offence by the public generally, or by any number or class of persons exceeding ten, it does not necessarily follow that the offence is to be committed by all the ten or more persons at one and the same time or that there should be an unlawful assembly. For instance, if it could be supposed that in this case a jatha consisted of one person at a time and each was to commit the offence of criminal trespass as a protest and then pass on, giving way to another, so that there was never an assembly of five or more persons, S. 141, Penal Code, would not apply, S. 143, Penal Code, would not apply, but S. 117, Penal Code, might apply. Therefore, I do not think it correct to say that because S. 117, Penal Code, applies to the abetment of an offence, an offence under S. 143, Penal Code, necessarily follows. It may be that from the facts alleged in this case it is so, but as a general proposition of law I do not think it is correct. Now coming to the facts of this case, the first information was lodged by the City Magistrate, Sukkur. The police report, or the challan, as it is called, refers only to S. 117, and S. 448, Penal Code, but the police report must be read with the first information on which it is based, and that first information is contained in a letter written by the City Magistrate, Sukkur, presumably on the instructions of Government, conveyed, it is presumed, through the proper officer, the District Magistrate of Sukkur. This complaint in the form of a letter is as follows :

> I have the honour to report that with a view to take unlawful possession of Manzilgah buildings, and grounds which are Government property a Committee under the name and style of Restoration Committee has been formed at Sukkur. This Committee appointed Mr. Wajidali as first Dictator who made Idd Gah grounds as his headquarters and from there he sent jathas to the Manzilgah grounds to make unlawful and unauthorized entry. Legal steps may therefore be taken against Mr. Wajidali and those members of the Restoration Committee under S. 117, read with S. 448, Penal Code, or under any other appropriate section.

It is true that Ss. 117 and 448, Penal Code, only are mentioned, and the learned advocate, Mr. Vellani stated that S. 117, Penal Code, was chosen instead of S. 143, Penal Code, because an offence under S. 117, Penal Code, is punishable with three years' rigorous imprisonment, while an offence under S. 143, Penal Code, is punishable only with six months imprisonment, and that it follows that as an offence under S. 117, Penal Code, is compoundable, so must the lesser offence under S. 143, Penal Code, be compoundable. But this does not follow at all. The law provides that in certain cases offences under S. 117, Penal Code, are compoundable, and that offences under S. 143, Penal Code, are not compoundable. This is presumably because offences under S. 143, Penal Code, were regarded by the Legislature as concerning persons other than those immediately involved; these offences are offences which directly affect the public peace and the conclusion of criminal cases relating to them is, therefore, something more than a matter for agreement between individuals. Therefore, if, upon the facts alleged in the first information, a Magistrate has reason to believe that an offence under S. 143, Penal Code, has been committed, it appears to us it matters not what figures or what labels the first informant attaches to the alleged facts : it is for the Magistrate to decide upon the facts alleged what is the offence alleged, what section of the Penal Code is the appropriate section. It is not for the first informant or, indeed, the complainant, if a complaint is made, to determine the offence or the jurisdiction of the Court. To take an absurd example, and an error in argument is often most clearly shown by an absurd example, suppose a police officer challaned a zamindar for an offence under S. 323, Penal Code, simple hurt, where the facts alleged in the first information or in the evidence showed a prima facie case of murder, would either the police officer or the accused be heard to say that it is not open to a Magistrate to commit the accused to the Court of Session, that the

police challaned the accused for an offence under S. 323, Penal Code, and that concluded the matter? Obviously, neither the police officer nor the accused could be so heard, and it is to us plain that it is the duty of a Magistrate upon the facts alleged, whether in a police report or a complaint, to decide what offence the stated facts allege and act accordingly.

In this case, the allegation in the first information is that jathas were sent by one Wajidali, who is described as the first dictator, whatever that may mean, to the Manzilgah grounds to make unlawful and unauthorized entry. It may be that the evidence will show that there was in this case no abetment of an offence under S. 143 Penal Code, read with S. 117, Penal Code, in accordance with the interpretation of the law in this matter which we have set out, when it will, of course, be open to the complainant, who, we observe, was the City Magistrate, Sukkur, and not Government, to compound the offence, but until such time as the Magistrate, has found that the evidence does not support a case under S. 143, Penal Code, the offence alleged in the words of the complaint is an offence under S. 143, Penal Code, read with S. 117, Penal Code, and is not compoundable. I observe that Government addressed the Special Magistrate, Sukkur, direct on this question of the compounding of this case. This I think was an error and liable to embarrass the Magistrate. The complainant was the City Magistrate, Sukkur. A letter from Government in this matter should have been addressed to the City Magistrate through the District Magistrate, and any information for the Court in this matter should have been conveyed by the Public Prosecutor in the ordinary course. This is not merely a matter of form. It has important implications.

That a Magistrate must use his own judgment and discretion in the interpretation of complaints or police reports placed before him finds support from the two cases of this Court: I L R (1940) Kar 275[1] and I L R (1940) Kar 287.[2] On the point that an offence under S. 143, Penal Code, is a distinct and separate offence in itself, distinct and separate from an offence which it is the common object of the unlawful assembly to commit, and that although this latter offence may by itself be compounded, the offence under S. 143, Penal Code, is not compoundable as a matter of public policy, being an offence in the fullest sense of the term against the public peace, there is the authority of the Madras High Court, 46 Mad 257.[3] The words of Wallace J. are apposite to the case before us and are as follows:

> The common object charged against the accused as members of the unlawful assembly is the criminal trespass aforesaid. Petitioner contends that since the parties had a legal right to compound that trespass, such a composition has the effect of annulling the common object charged, and therefore the charge under S. 143, Penal Code, falls to the ground.
>
> I am not prepared to support this contention. The essence of the offence under S. 143, Penal Code, is the combination of several persons, united in the purpose of committing a crimimal trespass, and that consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit. The compounding of one offence does not mean that the offence has not been committed, but that it has been committed, though the victim is willing either to forgive it or to accept some form of solatium as sufficient compensation for what he has suffered. The law allows prosecuting witness to so deal with the offence of criminal trespass but not with the offence of five or more persons combining to effect that criminal trespass.
>
> Petitioner refers me to the ruling quoted in 17 C W N 948,[4] but that ruling does not say that the composition of the offence of house-trespass and grievous hurt in that case had the effect in law of compounding the offence of being members of an unlawful assembly, whose common object was the commission of those offences. It rather implies the opposite.

Mr. Vellani relied upon this very Calcutta case mentioned in the Madras judgment, 17 C W N 948,[4] but in that case the Magistrate had treated the complaint as a complaint under S. 325, Penal Code. He had not accepted the case of the complainant that there was an offence of unlawful assembly or rioting. The Magistrate in that case simply used his judicial discretion as he was bound to do. In the other case on which the learned advocate relied—A I R 1914 Lah 561,[5] a judgment of the Punjab Chief Court, — a charge had been framed, and it is to be assumed that when a Magistrate frames a charge of one of several offences named in the complaint as all part of one transaction, he has by necessary implication discharged the accused with respect to the other offences. The learned Advocate-General ap-

1. ('37) 24 A I R 1937 Sind 81 : 169 I C 112 : 38 Cr L J 742 : I L R (1940) Kar 275, Sadhuram Chimandas v. Chimandas Budhuram.
2. ('40) 27 A I R 1940 Sind 97 : 189 I C 586 : 41 Cr L J 750 : ILR (1940) Kar 287, Fateh Muhammad v. Emperor.
3. ('23) 10 A I R 1923 Mad 592 : 71 I C 242 : 24 Cr L J 114 : 46 Mad 257, Venkanna v. Emperor.
4. ('13) 17 CWN 948 : 20 I C 618 : 14 Cr L J 458, Basiruddi v. Khairat Ali.
5. ('14) 1 A I R 1914 Lah 561 : 26 I C 993 : 16 Cr L J 81 : 29 P R 1914 Cr : 210 PLR 1915 (FB), Hasta v. Emperor.

peared in support of the order of the Special Magistrate, Sukkur, and though he did not accept as correct the opinion of the learned Magistrate that an offence under S. 117, Penal Code, necessarily involves an offence under S. 143, Penal Code, in other respects he supported the order of the learned Special Magistrate. I think therefore that this revision application must be rejected. The trial of this case, the delay of which is now beyond all reason, must be continued by the Magistrate from day to day. I would dismiss this revision application accordingly.

Weston J. — I entirely agree and have nothing to add.

D.S./R.K. *Revision dismissed.*

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(28) A. I. R. 1941 Sind 190

DAVIS C. J. AND LOBO J.

Emperor

v.

Fazul Khush Muhammad.

Criminal Ref. No. 34 of 1940, Decided on 30th April 1940; reference by Dist. Magistrate, Larkana.

Criminal P. C. (1898), Ss. 397, 123, 120 and 118 — Magistrate directing sentence under Criminal Tribes Act to commence after expiry of two other sentences for theft and for default in giving security under S. 123—S. 397, Proviso 2 held did not apply since sentence under Criminal Tribes Act was not passed while sentence under S. 123 was being undergone — Accused could not be called upon to give security until expiry of sentence for theft since sentence under S. 123 was passed while accused was undergoing sentence for theft — Under substantive part of S. 397 sentence under Criminal Tribes Act held would commence after expiry of sentence for theft in absence of special order by Magistrate directing aforesaid sentences to be concurrent — Sentence under Criminal Tribes Act would run concurrently with sentence for default in giving security.

The Magistrate directed a sentence of six months rigorous imprisonment under S. 22 (2) (a), Criminal Tribes Act, to commence after the expiry of two other sentences of imprisonment, one of 12 months for an offence of theft and another a sentence of one year's rigorous imprisonment passed in default of giving security under an order made under S. 118, Criminal P. C.:

Held that (1) S. 397, second proviso, did not apply because the sentence for the offence under the Criminal Tribes Act was not passed while the sentence of imprisonment under S. 123, Criminal P. C., was being undergone ; [P 190 C 2]

(2) since the order under S. 123, Criminal P. C., was made while the accused was undergoing the sentence for the offence of theft, he could not under Ss. 120 and 123 read together be called upon to give security until the expiry of the substantive sentence for theft ; [P 190 C 2; P 191 C 1]

(3) under the substantive part of S. 397 the sentence of six months under the Criminal Tribes Act would commence after the expiry of the sentence of theft in the absence of a special order by the Magistrate directing the sentences to run concurrently ; [P 191 C 1]

(4) the sentence under the Criminal Tribes Act would run concurrently with the sentence passed in default of giving security under S. 123, Criminal P. C. [P 191 C 1]

Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is a reference by the District Magistrate, Larkana, who asked us to modify an order passed by the Resident Magistrate, Kambar, dated 9th November 1939, to bring it in conformity with the provisions of R. 384 of the Bombay Jail Manual, because under that order the learned Magistrate directed a sentence of six months rigorous imprisonment under S. 22 (2) (a), Criminal Tribes Act, to commence after the expiry of two other sentences of imprisonment, one of 12 months for an offence of theft and another a sentence of one year's rigorous imprisonment passed in default of giving security under an order made under S. 118, Criminal P. C. We are here concerned with the provisions of the Criminal Procedure Code which guides this Court and not with the provisions of the Bombay Jail Manual and we think the proper order to be made on the facts of this case is that the sentence of six months under the Criminal Tribes Act shall commence from the expiry of the sentence of 12 months for theft but shall run concurrently with the sentence of one year's rigorous imprisonment passed in default of giving security under the order made under S. 118, Criminal P. C., and if by any chance the accused person should give security before the expiry of the sentence of six months rigorous imprisonment for the offence under the Criminal Tribes Act, nevertheless, that sentence of six months rigorous imprisonment must be given its full effect, subject, of course, to any remissions the accused may earn by good conduct in jail.

It was at first urged before us that proviso 2 to S. 397, Criminal P. C., would apply; but it would not apply because the sentence for the offence under the Criminal Tribes Act was not passed while the sentence of imprisonment under S. 123, Criminal P. C., was being undergone, because according to the rulings of this Court, reading Ss. 120 and 123, Criminal P. C., together the accused person who is sentenced to undergo imprisonment in default of security and at the same time is undergoing a substantive sentence of imprisonment for another offence shall be called upon to give security only

after the expiry of the substantive sentence of imprisonment and the order committing the accused, if it may be so called, under S. 123, Criminal P. C., in default of giving security, should not be made until after the sentence of substantive imprisonment has been undergone. The first proviso to S. 397 also would not apply and so far as the substantive part of S. 397, Criminal P.C., is concerned the sentences for the offence of theft and under the Criminal Tribes Act would only run concurrently if a special order was made by the Magistrate. No special order was made and no special order appears to us to be necessary. Therefore this case really amounts to this: that the imprisonment for the offence of theft and that in default of giving security are governed by Ss. 118, 120 and 123, Criminal P.C., and the sentence for the offence under the Criminal Tribes Act must be considered quite apart from the special provisions of S. 120 or S. 123, Criminal P. C., and takes its course according to the ordinary rule of law laid down under S. 397, Criminal P. C., that is to say, that where an accused is convicted of an offence involving substantive sentences of imprisonment, these sentences are consecutive unless a special order is passed that they should be concurrent.

We therefore modify the order of the learned Magistrate by directing that the sentence of imprisonment for the offence under the Criminal Tribes Act shall commence on the expiry of the sentence of imprisonment for theft and that the order of imprisonment for failing to give security should be passed and the period of imprisonment for default should commence from the date of expiry of the sentence of imprisonment for the offence of theft. This coincides with the provisions of R. 384 of the Bombay Jail Manual.

G.N./R.K. *Order modified.*

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(28) A. I. R. 1941 Sind 191

WESTON J.

Mir Mahomed Haji Umar — Appellant

v.

Divisional Superintendent, N. W. Railway — Respondent.

Civil Appeal No. 5 of 1940, Decided on 3rd February 1941.

(a) Payment of Wages Act (1936), S. 17 (1) (b) —Right of appeal under S. 17 (1) (b) depends on monetary value of claim and not on any finding of trial Court.

Under S. 17 (1) (b) the right of appeal depends on the monetary value of the claim and not on any finding of the trial Court. [P 192 C 2]

(b) Payment of Wages Act (1936), S. 17 — Word "direction" in S. 17 includes refusal to make direction.

The word 'direction' in S. 17 should be taken to include a refusal to make a direction. [P 192 C 2]

(c) Payment of Wages Act (1936), Ss. 15, 7 and 8—Reduction of certain amount per month from delinquent employee's future salary ordered as penalty or punishment — Reduction amounts to deduction within meaning of S. 15 — Employee can claim refund of such deduction as it falls neither under S. 7 nor S. 8.

A reduction of a certain amount per month from the future salary of an employee as a penalty or punishment for the delinquencies committed by him amounts, in the absence of a fresh contract of service at a reduced rate of wages, to deduction within the meaning of S. 15 and since such a deduction is not covered by Ss. 7 or 8 the employee is entitled to a refund of the deductions. [P 193 C 1, 2]

(d) Payment of Wages Act (1936), S. 15 — Employer terminating existing contract with servant and re-employing him at lower rate of pay—No question of deduction arises.

There is nothing in the Payment of Wages Act to prevent an employer from terminating his existing contract with a servant and to re-employ him on a lower rate of pay. No question of deduction under the Act can arise in such a case. [P 193 C 2]

(e) Payment of Wages Act (1936), S. 26 — Railway rules or notes thereunder are not binding on authorities considering claims under Act.

The rules or notes under the Act have no statutory basis and no such rules or notes can bind the authorities considering claims under the Payment of Wages Act. [P 193 C 1]

Kishinchand J. Bijlani — for Appellant.

Choithram Dewandas — for Respondent.

Judgment. — This is an appeal under S. 17, Payment of Wages Act (Act 4 of 1936), against an order of the Judge, Karachi Small Cause Court, dismissing an application of the appellant under S. 15 (2) of the Act in respect of amounts totalling Rs. 51-11-0 alleged to have been deducted from his wages contrary to the provisions of the Act. Appellant, Mir Mahomed is an engine driver employed by the N. W. Railway, Karachi. In December 1937 he was receiving Rs. 68 a month as wages together with over-time allowances at a rate based upon his monthly rate of wages, and in that month he received a notice from the Divisional Personal Officer of the N. W. Railway, Karachi, which reads as follows :

N. W. R.

IMPOSITION OF A PENALTY.

(Under items (2) to (6) of Rule 2 of Agent's Circular No. 1 of 1936.)

No. 831F/2/RS. Date 31-12-37.

From

Divl. Personal Officer, Karachi.

To

Mir Mohd. s/o Haji Omer, Driver,
Through Loco Foreman, Karachi.

With reference to your reply to notice No. 331E/2/RS dated the 19th October 1937, you are hereby informed that the D. M. E. has passed the following orders :

Reduced one incremental step (R. T.) for three months from Rs. 68 to Rs. 61 from 8th January 1938 for unsatisfactory working resulting in the loss of all good conduct marks. The amount is to be recovered from his pay for the month commencing January 1938.

Signature (Sd.) (not legible,) 3/12
(Designation) Divl. Personal Officer,
Karachi.

An application under S. 15, Payment of Wages Act, was presented in the Karachi Small Cause Court, the authority appointed under S. 15 of the Act, in the month of August 1938 by the General Secretary of the Union to which Mir Mahomed belongs who was authorized to act on his behalf, and it complained that the following illegal deductions had been made from his wages :

Reduction in pay from 8-1-38 to 7-4-38.	Rs. 21- 0 -0
Reduction in overtime allowances from 8-1-38 to 7-4-38.	Rs. 22-10-0
Reduction on account of excessive time in running from 8-1-38 to 7-7-38.	Rs. 8 - 1-0
Total	Rs. 51-11-0

That the order of the Divisional Personnal Officer occasioned a loss to Mir Mahomed of the sums of Rs. 21 and Rs. 22-10-0 has not been disputed before me. But the deductions totalling Rs. 8 1-0 on account of excessive time in running were denied by the railway administration, and, in the absence of any evidence, the statement of the railway on this point has been quite rightly accepted by the learned Judge. The learned Judge with respect to the items totalling Rs. 43-10-0 has found that they are not deductions contemplated by the Act and that the application to him was therefore incompetent. A preliminary objection has been taken on behalf of the railway administration that the present appeal does not lie, and two grounds are taken for the objection. The first is that the total amount by which Mir Mahomed was 'reduced' does not exceed Rs. 50, and the second ground is that there has been no direction under sub-s. (3) of S. 15, as the trial Court has dismissed the application altogether. Section 17, Payment of Wages Act, which confers a right of appeal under the Act is as follows :

17. (1) An appeal against a direction made under sub-s. (3) or sub-s. (4) of S. 15 may be preferred, within 30 days of the date on which the direction was made, in a Presidency-town before the Court of Small Causes and elsewhere before the District Court—

(a) by the employer or other person responsible for the payment of wages under S. 3, if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees, or

(b) by an employed person, if the total amount of wages claimed to have been withheld from him or from the unpaid group to which he belonged exceeds fifty rupees, or

(c) by any person directed to pay a penalty under sub-s. (4) of S. 15.

(2) Save as provided in sub-s. (1) any direction made under sub-s. (3) or sub-s. (4) of S. 15 shall be final.

The present appeal is under cl. (b) of sub-s. (1), and under this clause the right of appeal depends on the monetary value of the claim and not on any finding of the trial Court. It may be that the section lends itself to exaggeration of claims for the purpose of making any orders passed thereon appealable, but the meaning of the clause is clear and the objection on the first ground must fail. As for the second ground, cl. (c) of sub-s. (1) of S. 17 provides for an appeal from an order under sub-s. (4) of S. 15. Clause (a) of the same sub-section deals with the right of appeal by the employer or other person responsible for the payment of wages, and it is cl. (b) which provides for a right of appeal by an employed person. Now any direction under sub-sec. (3) of S. 15 in the narrow sense must necessarily be a direction at least partly in favour of the employed person, and obviously an employed person will not desire to appeal against a direction or that part of a direction which is in his favour. Although the use of the word "direction" in S. 17 lends some support to the argument that no appeal will lie unless an order of the nature explicitly contemplated by S. 15 (3) has been made, it would be a remarkable result if an employed person were held to have a right of appeal only if he has obtained an order allowing a part of claim, and to have no right of appeal if his claim has been rejected in toto however large it may have been. I have no doubt whatever that the Legislature did not intend such a result, and that the word "direction" in S. 17 should be taken to include a refusal to make a direction. The preliminary objections to the appeal therefore fail.

The learned Small Cause Court Judge has come to the conclusion that the reduction of the appellant to lower scale of pay for three months is not a deduction within the meaning of the Act. So far as I understand his reasoning, he considers that a deduction must be a lopping off of part of the original whole, and this lopping off must be expressible in the form of an equation. A reduction in grade, he says, is not

capable of being expressed in the form of an equation and therefore such a reduction cannot amount to a deduction. With all respect to the learned Judge the use of algebraical expressions in this connexion only confuses the issue. It seems to me entirely irrelevant whether Rs. 61 is a grade of pay which at some earlier time this Mir Mahomed used to draw, or which some other engine drivers at the time of the order may happen to have been drawing. The plain facts of the action taken by the railway administration are that while up to December 1937 Mir Mahomed was drawing Rs. 68 as his monthly pay, for the three following months he was paid Rs. 61 only, and this was done as a penalty or punishment for delinquencies committed by him before December 1937. If this cutting of his pay is not a deduction within the meaning of the Act, I do not know how else it can be described. If the argument is to be accepted that the wages of an employed person are whatever he happens to receive, then obviously there can never be any deduction and the Payment of Wages Act will have no practical application to any circumstances. Using the word "fine" in its ordinary meaning of a monetary penalty it seems to me that the penalty imposed upon Mir Mahomed was nothing other than a fine. In my earlier order remanding this case for further consideration of the learned Small Cause Court Judge I drew his attention to a note to R. 5 in a publication of rules regulating the discipline and rights of appeal of non-gazetted railway servants styled "Agent's Circular No. 1 of 1936," and this note is as follows :

> For the purposes of this rule, the reduction of pay of such a railway servant or stoppage of his increment for a short period not exceeding a month, shall be considered to be a fine for the purposes of this rule.

The learned Judge considers that this note is against the appellant, and he seems to construe the note as a definition of fine which is binding upon the Courts. The learned advocate for the railway administration has not been able to satisfy me that the rules or this note have any statutory basis, and obviously no such rules or note could bind the authorities considering claims under the Payment of Wages Act. The note is of interest only because it contains an admission of the railway administration that a so-called reduction of pay for a short period is nothing more or less than a fine. The question suggests itself that if a reduction for a short period is held to be a deduction, then reductions for a number of short periods must also be deductions, and therefore that a permanent reduction in pay must also be a deduction and illegal under the Act. I am not aware of the actual conditions of engagement of railway employees such as Mir Mahomed, but ordinarily, employment is a matter of contract which is terminable under certain conditions of notice, and when terminated may be replaced by another contract. Should an employer terminate his existing contract with a servant, but offer to re-employ him on a lower rate of pay, there appears to be nothing in the Payment of Wages Act against it, and no question of deduction under the Act would arise. In the present case there is no suggestion that a fresh contract of service was offered to Mir Mahomed, or even that a fresh contract of service was intended to be imposed upon him. His wages continued to be Rs. 68 a month, but for the period of three months he was paid Rs. 61 only.

In my view the appeal must succeed. I hold that the action of the railway administration taken in pursuance of the notice of 3rd December 1937 amounted to a deduction within the meaning of S. 15 of the Act. It is admitted that on this finding the deduction is one which is not covered by S. 7 or S. 8 of the Act and that Mir Mahomed is entitled to an order directing the refund of the amounts deducted. I order therefore that refund of Rs. 21-0-0 plus Rs. 22-10-0 should be made to Mir Mahomed, son of Haji Omar. As I think the claim was artificially increased in order to make the order appealable, I decline to allow to Mir Mahomed his costs in this appeal, and the parties will bear their own costs throughout.

G.N./R.K. *Appeal allowed.*

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* (28) A. I. R. 1941 Sind 193

LOBO J.

In re Louis Thomas Pinto — Debtor

Ex parte Ghulamali M. Esmailji — Creditor.

Case No. 40 of 1939, Decided on 22nd April 1940.

• Presidency Towns Insolvency Act (1909), S. 9 (e) — Licensee depositing money with Government of India in connexion with his license for salt manufacture — Deposit is not attachable in execution of decree — Assuming deposit to be attachable on facts held there was no attachment within meaning of S. 9 (e).

The money deposited by the licensee with the Government of India in connexion with his license for the manufacture of salt cannot be attached in

execution of a decree against the licensee : ('39) 26 A I R 1939 Bom 90, *Rel. on* ; ('27) 14 A I R 1927 Bom 365 ; 9 Mad 203 and ('20) 7 A I R 1920 L B 46, *Dissent.*; ('29) 16 A I R 1929 Pat 97, *Disting.*
[P 196 C 1,2]

The Court on an application by the decree-holder under O. 21, R. 52, Civil P. C., purported to attach the above mentioned deposit of the licensee judgment-debtor by writing a letter to the Superintendent of Salt and Excise Department with a request to hold the sum equal to the decretal amount out of the deposit subject to further order of the Court. But the letter was returned by the Superintendent to the Court with an endorsement that the deposit could not be attached. No further action was taken by the Court. Simultaneously with the letter to the Superintendent the Court had issued a notice to the judgment-debtor to show cause why execution should not be granted :

Held that even assuming the deposit to be attachable, on the facts, it could not be said that there was an attachment within the meaning of section 9 (e). [P 196 C 2]

Walimahomed Vellani —
for Petitioning Creditor.

Kundanmal Dayaram — for Debtor.

Order. — This is a petition by one Ghulamali Mahomedali praying for an order of adjudication against one Louis Thomas Pinto. The act of insolvency on which the petition is based is set out in para. 3 of the petition which reads thus :

The said L. T. Pinto within three months before the date of the presentation of this petition has committed the following act of insolvency namely, on the 1st day of December 1939 his property, the sum of rupees 5000 deposited with the Salt and Excise Department at Mauripur, Karachi, had been attached for a period of twenty-one days in execution of a money decree passed by the Karachi Small Cause Court in Suit No. 1845 of 1939.

The alleged act of insolvency is one which falls under S. 9, cl. (e), Presidency Towns Insolvency Act which provides that if any property of the debtor has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money such act shall be deemed an act of insolvency. The petition is opposed by the debtor and the main contention put forward on his behalf is that there has been no act of insolvency, that there has been no attachment much less any attachment of his property, that there has been no attachment of property for a period of 21 days as alleged. The question before me therefore is whether there has been an act of insolvency on the part of the debtor falling under S. 9, cl. (e) such as would entitle the petitioning creditor to an order of adjudication. It appears that the petitioning creditor filed suit No. 1845 of 1939 against the debtor in the Karachi Small Cause Court for the recovery of a sum of rupees 600 costs and interest on 17th July 1939. On 30th October 1939 there was an ex parte decree passed against the debtor. On 3rd November 1939 the petitioning creditor applied for execution of the decree by attachment and sale of the moveable property of the debtor, namely car No. Ka.-7320, and also by attachment and sale of the household goods of the debtor to be pointed out by the judgment-creditor. On 8th November 1939 the judgment-creditor filed another application in execution in which he prayed for attachment of the sum of Rs. 5000 to the extent of the decretal amount deposited by the judgment-debtor with the Salt and Excise Department at Mauripur, Karachi under O. 21, R. 52, Civil P. C. In the affidavit filed along with this latter execution application the petitioning-creditor has stated :

The judgment-debtor has a sum Rs. 5000 in deposit with the Salt and Excise Department of the Central Government and unless this application is granted now I apprehend that this deposit too will be transferred together with the said business. I therefore pray that this Honourable Court will be pleased to order immediate attachment of the sum of Rs. 5000 in the hands of the Superintendent, Salt and Excise, Mauripur, Karachi.

It appears that on the same date a letter was addressed by the Registrar of the Karachi Small Cause Court to the Superintendent of Salt and Excise Department, Mauripur, which reads :

Sir,

The plaintiff having applied under R. 52, O. 21, Civil P. C., 1908, for an attachment of a sum of Rs. 675-3-6 out of defendant's deposit now alleged to be lying with you;

I request that you will hold the said sum of Rs. 675-3-6 subject to the further order of this Court.

This letter is Ex. 8 in the case. It appears further from the evidence of Naraindas Gulrajmal, a clerk of the Small Cause Court (Ex. 6), that on the same date a notice was issued to the judgment-debtor, L. T. Pinto which reads :

Whereas the plaintiff has made application to this Court for execution of decree in Suit No. 1845 of 1939, this is to give you notice that you are to appear before this Court at 11 A. M. on the 17th day of November 1939, to show cause why execution should not be granted.

This notice is Ex. 12 in the case. On 9th November 1939 the letter Ex. 8 addressed to the Superintendent, Salt Revenue of Sind, was returned to the Court by this officer with an endorsement, Ex. 9, which reads :

Returned with compliments.

The deposit taken by the Department is in pursuance of a condition precedent upon which Messrs. L. T. Pinto and Sons are granted the license to manufacture salt. Accordingly it is presumed that

it cannot be attached so long the firm holds the license.

No further action was taken by the Court of Small Causes in the matter of attachment and no further communication was sent to the Superintendent, Salt Revenue for Sind. On 8th December 1939 the following order was passed by the Judge of the Karachi Small Cause Court obviously at the instance of the present petitioning creditor and the present debtor :

By Court's order the balance of decretal amount to be paid by Rs. 30 per month on usual terms. Pro-order discharged. Execution struck off.

Now the adjudication of any person as an insolvent under the Presidency Towns Insolvency Act is at all times a very serious matter, and no Court would adjudicate a debtor insolvent unless it is satisfied that an act of insolvency specified under S. 9, Insolvency Act, was clearly established by the petitioning creditor. In the present case I should not adjudicate the debtor insolvent unless it is clear on the evidence before me that his property has remained under attachment for a period of not less than 21 days in execution of a decree against him for the payment of money. I am not satisfied in this case and on the facts set out by me above that there has been a definite act of insolvency falling under this sub-cl. (e) of S. 9. It is true that the letter Ex. 8 was issued by the Court of Small Causes and that the Court probably purported by such letter to effect an attachment of certain property alleged to belong to the debtor in the hands of the Superintendent, Salt and Excise, but it would appear from Ex. 9 that the letter Ex. 8 was returned to the Court and that the officer addressed refused to regard Ex. 8 as a valid attachment by the Court. No further action was taken by the Court of Small Causes on the letter Ex. 9. Again the letter (Ex. 8) was issued on 8th November 1939 and simultaneously there was issued to the judgment-debtor, the present debtor before me, the notice Ex. 12, wherein he was asked to show cause why execution should not be granted. It is argued by the learned advocate for the debtor that in these circumstances the order issued by the Court in Ex. 8 was at the most an interim attachment pending disposal of the notice Ex. 12. It has also been argued by the learned advocate for the debtor that Ex. 8 must be read along with Ex. 9 and that these two documents read together make it at the very least extremely doubtful whether any attachment such as is contemplated by cl. (e) of S. 9, Presidency Towns Insolvency Act, was ever effected. I am of opinion that there is considerable substance in these arguments and that on the facts before me it is not satisfactorily established that there has been on the part of the debtor an act of insolvency such as falls within the purview of S. 9, cl. (e), Presidency Towns Insolvency Act.

But even assuming that the Karachi Small Cause Court had effected a proper and valid attachment in execution of the decree in question I am of opinion that the sum of Rs. 5000 in the hands of Government was not such property of the debtor as could under law be attached in execution of the decree against him. The facts relating to this deposit of Rs. 5000 with Government need to be set out for a proper understanding of this part of my order. It appears from the evidence of the debtor Ex. 15 that he has obtained a license for the manufacture of salt at or near Landhi from the Government of India and in connexion with this license he has deposited with the Government of India a sum of Rs. 5000. Ex. 16 is the temporary license issued to him. The license is to be for 20 years and the debtor has produced a draft of the pucca license with the forwarding letter accompanying Ex. 17. In Ex. 17 the clause relating to the deposit of Rs. 5000 reads thus :

The lessees hereby further covenant and agree with the lessor :

. . . . .

(c) Keep always in deposit with the superintendent a minimum sum of rupees five thousand in cash or approved securities as security which deposit may be required by the Secretary, Revenue Department, to be increased as he decides having regard to the necessity for securing Government interests and for securing the due fulfilment and observance by the lessees of the covenants and agreements on their part herein contained. Any interest accruing on such deposit shall belong to the lessees.

A similar provision is to be found in cl. 13 of the temporary lease, Ex. 16 which reads thus :

The licensees shall keep always in deposit with the superintendent a minimum sum of Rs. 5000, five thousand in cash or approved securities which security may be required by the Revenue Commissioner for Sind to be increased as he decides having regard to the necessity for securing Government interests and for fulfilment of the conditions of the license. Any interest accruing on such deposit shall belong to the licensees.

Such being the nature of this deposit of Rupees 5000, I find it extremely difficult to differentiate this case from the case in 41 Bom L R 19.[1] In this case the deposit was

1. ('39) 26 A I R 1939 Bom 90 : 180 I C 360 : I L R (1939) Bom 109 : 41 Bom L R 19, Gajraj Sheokarandas v. Hukamchand Sarupchand.

made by a member of the East India Cotton Association with that Association under the Articles of the Association and it was held that it was not liable to attachment in execution of a decree against a member under O. 21, R. 46, Civil P. C. of 1908. Such a deposit could not be regarded as a debt within the meaning of sub-r. (1) (a) of Rule 46 of O. 21. In the judgment of Sir John Beaumont C. J. his Lordship states :

In my view there is also no substance in the contention that the interest of the judgment-debtor in this sum is a debt. The way in which the case is put by the learned Advocate-General is that this is a debt presently due, though payable in future, and liable in certain events to be lost altogether by forfeiture or to be diminished by the enforcement of a lien; but he says that that does not affect the character of the debt itself, which is a debt now due though not payable. In my opinion, that is not the correct position. I think the correct view is that this is money which is only repayable in certain contingencies. The case seems to me to fall within the principle of the case in (1887) 3 T L R 354[2] which came before the Court of appeal in England. In that case moneys had been deposited with a stock-broker as cover, and as soon as the transactions between the depositor and the broker were closed, the moneys not used as cover were repayable. The Court held that there was no debt at all until the transactions were closed. I think the same principle applies here, and that it is impossible to hold that there is any debt until the judgment-debtor has ceased to be a member of the association and his rights in the deposit can be ascertained. At the present moment, in my opinion, there is no debt, and I think, therefore, that the attachment must be raised.

This is a Bench ruling of the High Court of Bombay which reversed the decision of a single Judge, Engineer J., who had followed the judgment of a single Judge of the Bombay High Court in 29 Bom L R 416.[3] My attention has been invited by the learned advocate for the petitioning creditor to the case in 9 Mad 203[4] where a Bench of the Madras High Court held that:

Money deposited with a railway company by one of its servants as a guarantee for the due performance of his duties was attachable by a judgment-creditor of such servant under S. 268, Civil P. C. (of 1882).

With all respect for the learned Judges who decided this case I am not prepared to accept it as correct. The judgment is very brief and the matter does not appear to have been argued before the Bench except on behalf of the judgment creditor. The learned advocate has also invited my attention to a Bench ruling of the Patna High Court in 8 Pat 478[5] where the case in 9 Mad 203[4] has been cited with approval, and he also referred me to a ruling of the Lower Burma Chief Court in 56 I C 948,[6] where certain deposits of a railway contractor in the hands of the Public Works Department were held liable to attachment in execution of a decree for money against the said contractor. The case in 8 Pat 478[5] is clearly distinguishable and the Burma case is reported in an unauthorized report. But even if these cases have been correctly decided and there is a difference of opinion on this question between some of the High Courts in India, I would follow the practice consistently adopted by this Court when it was a Judicial Commissioner's Court, namely in such circumstances to accept and follow the decision of the Bombay High Court. Even from the point of view of the legal aspect of this question the petitioner creditor has not been able to satisfactorily establish an act of insolvency by the debtor falling under S. 9 (e), Presidency Towns Insolvency Act. I accordingly dismiss this petition of the petitioning creditor with costs. Costs to be taxed on scale I and to be allowed for two hearings.

G.N./R.K. *Petition dismissed.*

2. (1887) 3 T L R 354, Hutt v. Shaw.
3. ('27) 14 A I R 1927 Bom 365 : 102 I C 418 : 29 Bom L R 416, Jetha Devji & Co. v. Durgadutt.
4. ('86) 9 Mad 203, Karuthan v. Subramanya.
5. ('29) 16 A I R 1929 Pat 97 : 114 I C 465 : 8 Pat 478 : 9 P L T 969, Jagdish Narain Singh v. Mt. Ramsakal Kuer.
6. ('20) 7 A I R 1920 L B 46 : 56 I C 948, S. B. Das v. C. T. A. R. A. Muthia Chetti.

* (28) A. I. R. 1941 Sind 196

DAVIS C. J. AND WESTON J.

Shamsuddin Dostmahomed—Defendant — Applicant

v.

Shivji Premji, a firm — Plaintiffs — Opponents.

Civil Revn. Appln. No. 10 of 1939, Decided on 21st January 1941, to revise order of Judge, Small Cause Court, Karachi, D/- 17th October 1938.

* Civil P. C. (1908), S. 151—Decree—Default clause — Court can grant relief on equitable grounds against condition in nature of penalty but not against condition granting concession—Decree-holder agreeing to accept Rs. 255 instead of full decretal amount of Rs. 330 provided amount was paid in regular monthly instalments of Rs. 10 — Judgment-debtor paying Rs. 250 as per terms of agreement but defaulting in respect of remaining Rs. 5—Court held could not interfere as agreement embodied concession to debtor and not penal clause — Decree-holder held entitled to recover full decretal amount.

In the case of an agreement by the debtor to pay the decretal amount by a particular date a condition that if the money was not paid on that date,

a larger sum should be paid, being in the nature of a penalty the Court has power to relieve against that condition on equitable grounds. But in the case of an agreement to pay a particular sum followed by a condition granting the debtor a concession, such as the payment of a lesser sum, the party seeking to take advantage of the concession must carry out strictly the condition on which it was granted and the Court has no power to relieve from the obligation to abide strictly by a condition which is in the nature of a concession : ('34) 21 AIR 1934 Bom 370; ('29) 16 AIR 1929 Sind 98 and ('37) 24 AIR 1937 Sind 244, *Rel. on.* [P 197 C 2]

The decree-holder agreed to accept Rs. 255 in full satisfaction of the decretal amount of Rs. 330 provided the amount of Rs. 255 was paid regularly by monthly instalments of Rs. 10. On default the decree-holder was entitled to recover the full decretal amount of Rs. 330. The judgment-debtor paid Rs. 250 as per terms of the agreement but defaulted in respect of the remainder sum of Rs. 5 :

Held that the Court could not grant relief to the debtor as the default was of a condition granting concession and the decree-holder was entitled to recover the full decretal amount. The fact that the sum in the payment of which the default was made was small was immaterial : ('22) 9 AIR 1922 Bom 170 and ('24) 11 AIR 1924 Pat 387, *Disting.* [P 198 C 2]

Santdas Idanmal — for Applicant.

Madhowdas C. Bhagat — for Opponents.

Davis C. J. — This is an application in revision against an order of the Judge of the Small Cause Court at Karachi in which he dismissed an application purporting to have been made under Ss. 148 and 151, Civil P. C., by a judgment-debtor, who contended that he had not paid the small sum of Rs. 5 out of the sum of Rs. 255 payable by him under a compromise decree, and that he should be relieved of the penalty which he had incurred which would involve his paying a further sum of Rs. 175. The learned Judge, however, dismissed his application holding that S. 148, Civil P. C., had no application to a case of this sort, and that S. 151, Civil P. C., did not apply to the condonation of the breach of a conditional, as against a penal clause, in a decree. In support of this argument our attention was drawn to many cases some of which proceeded simply upon the basis that a Court is a Court of Equity and can do as seems to it just and equitable. For instance, in 46 Bom 463,[1] the case of a default in payment of instalments under a decree, when property over which a charge had been declared was ordered to be sold, Sir Norman Macleod C. J. said (p. 466) : "As a Court of Equity we have wide powers to do what seems to us just." In 2 Pat 906,[2] the case of a failure to pay instalments, the Court extended time so as to relieve the judgment-debtor from liability to pay the full claim at once, the Court acting on the general principle of equiry rather than under S. 148, Civil P. C. Many of the other cases to which we have been referred relate to some such serious matter as the forfeiture of an agriculturist's land.

But in the case before us, we do not think that we have a penal clause. We certainly have no case of a forfeiture of land. We merely have a case where the judgment-debtor was to pay a certain sum of money, but if certain instalments were paid promptly a certain concession would be made and a smaller sum would be accepted in satisfaction of the debt. This is a case very much on the lines of the case in 58 Bom 610,[3] where the learned Chief Justice distinguished between a class of cases where there was an agreement to pay a sum of money by a particular date with a condition that if the money was not paid on that date, a larger sum should be paid; where, in short, the condition was in the nature of a penalty and a class of cases where there is an agreement to pay a particular sum followed by a condition granting the debtor a concession, such as, for instance, the payment of a lesser sum. In the latter class of cases the party seeking to take advantage of the concession must carry out strictly the condition on which it was granted: in this class of case, there is no power in the Court to relieve from the obligation to abide strictly by a condition which is in the nature of a concession, while in the other class of cases there is power in the Court to relieve against a condition which is in the nature of a penalty. The learned Chief Justice, referring to the principle that the Court as a Court of Equity can do as appears to it just and equitable, said (p. 618) :

> Courts of Equity will, in cases which have become well defined, relieve against the rigours of the common law, and for the purpose of this case two heads of relief are relevant. A Court of Equity will relieve against a penalty, and will also refuse to enforce strictly stipulations as to time where it is satisfied that the parties themselves did not intend those stipulations to be acted upon strictly. Those two matters are dealt with in this country by Ss. 55 and 74, Contract Act, and unless the present

1. ('22) 9 AIR 1922 Bom 170 : 64 I C 570 : 46 Bom 463 : 23 Bom L R 1238, Narsinha Gopal v. Balvant Madhav.

2. ('24) 11 AIR 1924 Pat 387 : 82 I C 505 : 2 Pat 906 : 5 P L T 401, Mt. Nandrani Kuer v. Durgadass Narain.

3. ('34) 21 AIR 1934 Bom 370 : 152 I C 575 : 58 Bom 610 : 36 Bom L R 798, Barjorji Shapurji v. Madhavlal Jesingbhai.

case can be brought under one of those heads, in my judgment, the Court has no power to relieve the respondents from the consequences of their failure to carry cut strictly the terms of their agreement.

And, referring to this question of a condition which is a concession and a condition which is a penalty, the learned Chief Justice said (p. 617) :

The law on the subject is not, I think, open to any serious question. If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of Equity can grant relief and award to the party seeking payment only such damage as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum, followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing.

And the learned Chief Justice, referring to the large number of cases cited before him, said (p. 618) :

Some of them, and particularly the decision of this Court in 23 Bom L R 1238,[1] provoke this comment, that there is no general principle of equity that the Court can relieve a party in default in respect of money payments whenever the Court thinks it just so to do.

This view of the law is the view taken in 23 S L R 375[4] and 31 S L R 437.[5] Turning to the facts of this case, we find that the applicant defendant agreed to pay to the opponents-plaintiffs Rs. 300 and all the costs of the suit including the arbitration fee of Rs. 30 with interest at six per cent. per annum from the date of suit to payment, with the proviso that if the defendant paid Rs. 225 and Rs. 30 arbitration fee, in all Rs. 255, in regular monthly instalments of Rs. 10, the plaintiffs' claim would stand satisfied. The judgment-debtor paid Rs. 250 in all, leaving the balance of Rs. 5, and there the matter would have rested, but he foolishly provoked controversy by asking for refund of Rs. 25 and claiming or pretending to claim ignorance of the sum of Rs. 30 payable as arbitration fee. If he knew nothing of this payment of Rs. 30 as arbitration fee, he would not have paid Rs. 250 in the first instance. In reply to this demand for refund, the plaintiffs naturally demanded strict compliance with the terms of the compromise decree which the defendant himself had brought into question. The plaintiffs insisted that as the defendant had not strictly complied with the conditions of the decree, they were entitled to enforce the decree strictly. In short, they claimed that the defendant was entitled to pay a lesser sum as a concession and was not compelled to pay a greater sum as a penalty.

We think it is clear that this case falls within that class of cases where a sum of money was payable, but where a certain concession would be granted and a lesser sum be accepted if certain conditions be strictly complied with. We have not here a case of a penalty at all. The sum decreed was Rs. 300 plus the arbitration fee, and interest, and a certain concession was to be made, that is, that instead of the full sum a lesser sum was to be accepted if it were paid on certain dates and in certain instalments, but the lesser sum was not paid according to the decree; it fell short by Rs. 5. Though it may be said that this sum of Rs. 5 is a small sum in itself as compared with the whole, the application of the law is not dependent upon whether the sum involved is large or small. The principle is the same; and, in this case, we think there was a breach of the condition which was in itself a concession, and there was no breach of a penal clause. We think, therefore, that the defendant has no real ground for complaint, however small the margin by which he failed to fulfil the concession terms which were granted to him. We do not think anything rests upon the fact in this case that the decree is an award decree. We do not think, therefore, this is a case where upon the general principle of equity, we should interfere and grant relief against what is not a penalty but a concession. We therefore think that the revision application should be dismissed, but in the circumstances of this case we will not make any order as to costs. Order accordingly.

G.N./R.K. *Application dismissed.*

4. ('29) 16 A I R 1929 Sind 98 : 116 I C 577 : 23 S L R 375, Dayaram Gidumal v. Nabibux.
5. ('37) 24 A I R 1937 Sind 244 : 171 I C 841 : 31 S L R 437, Gunomal v. Lalomal.

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(28) A. I. R. 1941 Sind 198

DAVIS C. J.

Muhammad Ibrahim Haji Moula Baksh — Complainant—Applicant

v.

T. C. H. Naughton and others — Accused—Opponents.

Criminal Revn. Appln. No. 17 of 1940, Decided on 26th November 1940, against order of Addl. City Magistrate, Karachi, D/- 22nd August 1940.

(a) Penal Code (1860), S. 420—Essence of cheating consists in complainant being deceived —Managing director of business holding out high hopes to complainant—Complainant entering into partnership and investing money—Hopes not fulfilled by events — Complainant having access to business books and participating in management of business—No offence of cheating is committed.

The essence of the charge of cheating is that the complainant should have been deceived. [P 200 C 2]

The complainant, on high hopes being held out by the managing director of a business, entered into partnership with him and invested a large sum of money. The complainant had at all times access to the business books and also participated in the management of the business. The high hopes held out by the director were not fulfilled by events and the business ended in considerable loss. On a charge of cheating by the complainant against the accused :

Held that no offence of cheating was committed. [P 200 C 2]

(b) Criminal P. C. (1898), Ss. 253, 252 and 256—Ss. 253, 252 and 256 should be read together—S. 253 cannot be robbed of its purpose by reason of S. 252 or S. 256—Word "groundless" in S. 253 (2) means when there are no good grounds—Amount of evidence necessary for treating charge to be groundless depends on circumstances of case—Magistrate should arrive at his conclusion judicially and not capriciously—Magistrate from complaint and complainant's evidence concluding that even if complainant's witnesses said every thing in his favour defects in his case would not be made good and dismissing complaint as groundless without examining complainant's witnesses — S. 253 (2) held properly applied.

Sections 253, 252 and 256 must be read together. Section 253 cannot be robbed of its proper purpose by reason of S. 252 or S. 256. The word "groundless" in S. 253 (2) means when there are no good grounds for the charge. Although it is possible to say that the charge is not groundless when there are bad grounds in support of it: but that is not the meaning of the words used in the section: ('28) 15 A I R 1928 Mad 129, *Ref.* [P 201 C 1, 2 ; P 202 C 1]

The amount of evidence which would enable a Magistrate to conclude that a particular charge was groundless entirely depends on the circumstances of the case and all that the Magistrate is required to do is to arrive at his conclusion judicially and not capriciously : ('29) 16 A I R 1929 Mad 754, *Rel. on.* [P 201 C 2]

Where from the complaint and the complainant's evidence the Magistrate comes to the conclusion that the defects in the complainant's case could not be made good even if all his witnesses said everything in his favour and dismisses the complaint as being groundless without examining the complainant's witnesses, the provisions of S. 253 (2) are completely satisfied : ('26) 13 A I R 1926 Mad 989, *Ref.* [P 201 C 2 ; P 202 C 1]

Parmanand Kundanmal — for Applicant.

Order. — This is an application in revision against an order of the Additional City Magistrate, Karachi, discharging three accused persons, T. C. H. Naughton and Mrs. U. V. J. Naughton, his wife, and Captain Sultan Ahmed—upon a complaint by one Muhammad Ibrahim for an offence of criminal conspiracy to cheat. The complaint itself is a very long one, occupying from pp. 11 to 23 of the paper-book, and, reading the complaint through the impression left upon one's mind is that here is a case far more suited to a civil than to a criminal Court. But the application in revision was admitted largely upon the point taken—and it is an arguable point—by Mr. Parmanand for the complainant, that the Magistrate was wrong in discharging the accused before he had examined at least the witnesses named by the complainant in his complaint —two persons, Haji Allahdito of Karachi and Khuda Bakhsh of Karachi—who were either go-betweens or dupes in this transaction ; and that therefore quite apart from any view this Court might take as to the correctness or otherwise of the Magistrate's appreciation of the evidence, the order of discharge should be set aside merely on the ground that this was not a proper case for the application of sub-s. (2) to S. 253, Criminal P. C. But having heard the learned advocate Mr. Parmanand Kundanmal at very considerable length indeed, I have come to the conclusion that this is one of those cases where S. 253 (2), Criminal P. C., was properly applied by the Magistrate, and far from coming to the conclusion that the Magistrate has wrongly appreciated the evidence, he has, I think, correctly appreciated the evidence in the case and has as a result, come to a right conclusion, and that there is no reason at all why I should interfere with this order of discharge.

The learned advocate for the applicant contends that this case really is a matter of public importance, and that if I read between the lines of the complaint I should see that others besides the complainant have been cheated. But the complaint from pp. 11 to 23 of the paper-book is so full and detailed in itself that I see no necessity to read anything between the lines. Briefly, the complaint is that the complainant, a contractor, was induced by false representation to give to the accused as a result of their criminal conspiracy a sum of money, not in reality a sum of Rs. 7000, which appears so often in the complaint but a sum of Rs. 5400, to be used, to put it bluntly, to bribe military officers at Drigh Road, so that the complainant might get the canteen and dairy contracts from these authorities, and as if this was not enough, the accused

further deceived the complainant by making out that they had a prosperous business in which he could very profitably invest money and he invested Rs. 15,000. But the business in fact was not a real business at all but a bogus business. There was also a complaint about another Rs. 800 in which accused 3 Captain Sultan Ahmad was principally concerned, and the complainant paid him two sums of Rs. 500 and 300 by cheque so that he would get some contracts for cement. All these representations, the complainant says, were false, and he was deceived.

One would have thought from the manner in which the case was first put that the complainant was some simpleton with more money than sense, with no experience of the world, no experience of business; but, as it turns out, he is a canteen contractor, he has gone as far as Rangoon for the purpose of his business, and it appears to me that to suggest that the complainant here was a simple innocent man who was deceived by rogues or adventurers is to put a case which, regarding the complainant's age and his business, no reasonable man could accept. So far as the Rs. 7000 is concerned, it may be that this complainant himself entered into a conspiracy with accused 1 and 3 to bribe military officers and thus get a profitable contract by most improper means. But I see no necessity to attribute disgraceful conduct of this sort to the complainant, when there is a document Ex. 1/12 signed by him which is a deed dissolving the partnership between the complainant and the first two accused in which this Rs. 7000 is mentioned and which can be allotted to the item of goodwill which is referred to in that deed and for which, it is the case of the accused, this Rs. 7000 was paid. It is true that in Ex. 1/1 which was a deed not of dissolution of partnership but a deed whereby a partnership was formed, there is no reference to this Rs. 7000, the reference being to a sum of Rs. 15,000 then to be invested in this business of Holmes Naughton & Co. But when this partnership was constituted the parties had not in mind a dissolution or an account of all sums of money that had been advanced by the complainant to the accused, and I can see no significance in the omission of a sum of Rs. 7000 in this deed of partnership. So far as this business is concerned, the learned Magistrate points out quite rightly that the complainant himself took part in the management of the business, all the documents and all the books were open to him and he himself was responsible for the loss of one contract when he described bricks as sold not by the thousand but by the ton. So it appears to me quite unreasonable on the face of it to say that this complainant was a simple innocent man deceived by the accused and by deception induced to invest these Rs. 15,000 in the business which was a bogus business when he himself had in this manner access to the books and participated in its management.

After all the essence of the charge of cheating is that the complainant should have been deceived. I do not think the complainant is the sort of a person who would be deceived by the accused at all. It may be that the high hopes of profit from this business held out by accused 1, were falsified by events, but merely because a man holds out high hopes of a business of which he is a managing director, "puffs his wares," as the saying goes, and his high hopes are not fulfilled by events, it does not thereby follow that he had any criminal intent or that he was anything more than a mistaken optimist. Anyhow, in this case, the complainant who is a business man had every opportunity to find out all about the business and did in fact participate in it. I cannot see in what way it can be said that he was deceived. The learned Magistrate has written a very careful order. Indeed, its very length has been made the ground of argument against it. It has been said that if the Magistrate found it necessary to write this long order on the evidence of one witness, clearly other witnesses should have been called. But, as the learned Magistrate has said, if Khuda Bakhsh and Allahdito had been called and had supported the complainant in all his statements, he could not have come to any other conclusion but that this complaint should be dismissed. It appears to me merely a complaint of a disappointed business man, who, finding he has lost his money, wants to get back that money from those to whom he had advanced it, and thinks the criminal Courts are quicker and less expensive and also offer greater opportunities for vengeance than the civil Courts. Quite obviously however such complaints are not to be encouraged; nor can the argument that they are made in the public interest be accepted. The Magistrate has in his order shown how the complainant's case that he was advancing Rs. 7000 for the purpose of bribing in one way or the other the military officers of Drigh

Road is falsified by the dates of payment. As the Magistrate points out, if this Rs. 5400, or as has been so frequently mentioned in the complaint, Rs. 7000 which includes the Rs. 1600 said to have been paid by Allahdito, was for bribing officers, why was this payment so delayed? Why, for instance, was the payment of Rs. 3400 delayed till the agreement of partnership was drawn up and signed? It appears clear that the Rs. 7000 and Rs. 15,000 were all part of the same transaction and were in connexion with this business of Holmes Naughton & Co., with which the complainant subsequently became dissatisfied. And so far as the sum of Rs. 800 is concerned, the Magistrate says that there is only the complainant's word against the accused. The complainant's word is obviously not one on which any reliance can be placed. The evidence of Khuda Bakhsh and Allahdito can have nothing to do with this.

Now so far as the point taken that the Magistrate wrongly applied S. 253 (2), Criminal P. C., is concerned, as I have said, I think this was a case where this sub-section of this section was properly applied. I had to deal with the complainant's case on facts before I could deal with this point of law because, obviously, the application of sub-s. (2) to S. 253, Criminal P. C., depends upon the evidence already recorded when the Magistrate takes action under that section. The material word used in that sub-section is "groundless." It is not a word commonly used in the Criminal Procedure Code; in fact, the learned advocate said that he did not know of another section where that particular word was used, but he referred me to certain cases which have some relation to it. One is a case in 51 Mad 185[1] and the other is a case in 52 Mad 987.[2] But these two judgments really do not take the case much further, because it appears obvious that each case must be taken on its own facts and the sub-section as applied in relation to these facts. In 51 Mad 185,[1] it is pointed out that there is a difference between the phrase that "no case is made out" and "the charge is groundless". But I take it, the word "groundless" in sub-s. (2) of S. 253, Criminal P. C., means, when there are no good grounds for the charge. It is, of course, possible to say that the charge is not groundless when there are bad grounds in support of it: that is not the meaning of the words there used. The learned Judge in the case cited also goes on to point out that it is not always necessary to call all the witnesses; but the Magistrate should not come to a conclusion that the charge is groundless unless he has at least ascertained from the complainant what is the nature of the evidence which the other witnesses are going to give.

In this case, it is perfectly clear from the complaint and the evidence of the complainant what the evidence of Allahdito and Khuda Bakhsh was going to be, at least from his point of view, and the Magistrate was quite right, I think, in coming to the conclusion that assuming they said everything in favour of the complainant, that would not make good the obvious defects in his case, at least so far as the criminal case of criminal conspiracy and cheating is concerned. The case in 52 Mad 987[2] is authority to the effect that a Magistrate need not call all prosecution witnesses, even those named in the complaint, and that is, I think, plain, because otherwise sub-s. (2) to S. 253, Criminal P. C., would not lose much of its purpose and effect. But the learned Judge there said (p. 990):

> The amount of evidence which would enable a Magistrate to say that a particular charge was groundless is so entirely dependent on circumstances that no general rule or direction except that he is required to arrive at his conclusion judicially and not capriciously is likely to be of any use.

With all respect, I think, that puts the case as well as it can be put. The learned advocate also drew my attention to the case in 49 Mad 978,[3] in which, he points out, the learned Judge had said, that it was the duty of the Magistrate to assist the prosecution. I do not think, of course, that the learned Judge meant in that case that it was the duty of the Magistrate to assist the prosecution in the sense that he should take sides, for the Crown, and, even more, the Magistrate, it may be said, stands not for a conviction but for justice. But the provisions of S. 252, Criminal P. C., do impose upon the Magistrate in certain circumstances certain duties as regards ascertaining from the complainant or otherwise the names of persons likely to be acquainted with the facts of the case and he should

1. ('28) 15 A I R 1928 Mad 129 : 105 I C 819 : 28 Cr L J 995 : 51 Mad 185 : 53 M L J 757, Mohammed Sheriff v. Abdul Karim Sahib.
2. ('29) 16 A I R 1929 Mad 754 : 121 I C 619: 31 Cr L J 275 : 52 Mad 987 : 57 M L J 490, Kasinatha Pillai v. Shanmugam Pillai.
3. ('26) 13 A I R 1926 Mad 989 : 97 I C 643 : 27 Cr L J 1123 : 49 Mad 978 : 51 M L J 328, K. C. Menon v. Krishnan Nayar.

summon to give evidence before himself such of them as he thinks necessary. The learned advocate then referred to S. 256, Criminal P. C., and said that that section contemplates that witnesses may be cross-examined not only once but twice. Both Ss. 252 and 256, Criminal P. C., must be read with S. 253 of the Code, and S. 253 cannot be robbed of its proper purpose by reason of S. 252 or S. 256, Criminal P. C. All these sections must be read together; and, therefore, we come back to the point that was raised at so early a stage in argument, whether in this case the Magistrate has properly applied S. 253 (2), Criminal P. C. There is no doubt in my mind that if this sub-section can ever be applied properly, it has been applied properly in this case. I see no reason to interfere in any way with the order of the learned Magistrate, and I dismiss the revision application accordingly.

G.N./R.K. *Application dismissed.*

⁂ (28) A. I. R. 1941 Sind 202

LOBO J.

Sakhi Mahomed Hyder — Respondent 1

v.

Tharoomal B. Kirpalani — Respondent 2.

J. Misc. Appln. No. 169 of 1940, Decided on 4th February 1941.

* Arbitration — Arbitrator — Removal of — Architect arbitrator — Merely because he has expressed opinion or has money claim from one of parties does not disqualify him.

Where an agreement is made between the owner of certain premises and a building contractor, and an architect is appointed, and it is agreed that that architect should act as arbitrator in the event of disputes between the parties to the agreement, the parties know that in certain matters and to certain extent the arbitrator agreed upon may previous to his entering upon the arbitration, deal with the merits of the matter and possibly express opinions. And such an architect is not disqualified from acting as arbitrator merely by the fact that there is money due to him as architect from one of the parties or by the fact that he has expressed his opinions when he has made it clear that he is ready to adjudicate on the contentions of the parties with an open mind after hearing them.

[P 203 C 2 ; P 204 C 1]

Srikishindas H. Lulla — for Respondent 1.

Santdas Idanmal — for Respondent 2.

Order. — An award under the Arbitration Act has been filed in this Court by the arbitrator Mr. H. N. Jiandani. The parties to this arbitration were Mr. Tharoomal B. Kirpalani, a landlord, respondent 2, and Sakhi Mahomed son of Hyder, a building contractor, respondent 1. An application has been made by respondent 2 that the award filed by the arbitrator be removed from the file and the learned advocate who appears for respondent 2 has put forward the following grounds on which he urges that this award should be removed from the file: (1) That there was no submission clause; (2) that the arbitrator as architect had already bound himself irrevocably by the final certificate and by the expression of his views and thereafter he could not act as an arbitrator; (3) that the arbitrator had a dispute with respondent 2 and had threatened to file a suit against him. He could not thereafter act as an arbitrator between the parties, and (4) that the arbitrator gave no reasonable opportunity to respondent 2 to appear in the proceedings which resulted in the making of the award.

The arbitrator has been examined as a witness by respondent 2 and has put in all the correspondence that passed in connexion with this matter. I have heard arguments at great length by the advocates for respondents 1 and 2, and the conclusion I have come to is that there is no substance in the grounds put forward by the learned advocate for respondent 2 for removing this award from the file and that the award must stand filed and the application made by respondent 2 must be dismissed. In support of the first point raised by the learned advocate for respondent 2 he has relied on the case in 28 S L R 223,[1] a judgment of Rupchand, A. J. C. This decision, however, in my opinion, does not assist the learned advocate for respondent 2. It turned upon the peculiar wording of cls. 17 and 23 of the contract between the parties in that case. In the case before me cl. 13 of the contract Ex. 2 reads thus :

> In case of any dispute between the parties, the architect shall be sole arbitrator concerning the management of work, workmanship, measurements, rates, extra work, etc. And his decision shall be final and binding on both the parties and shall not be set aside on any pretence whatsoever.

The parties to this agreement were the building contractor and the owner of the property which was contracted to be built. It was known and well understood by the parties to this contract that the arbitrator was the architect named in the contract, for cl. 14 of the contract specifically states : "The term 'the architect' in the said conditions shall mean Mr. H. N. Jiandani." To my mind reading the contract as a whole

1. ('34) 21 A I R 1934 Sind 200 : 153 I C 911 : 28 S L R 223, Firm of Hormusji and Daruwalla v. Karachi District Local Board.

and cl. 13 thereof in particular, there was a clear submission to arbitration contained in the contract between the parties. The second ground put forward by the learned advocate for respondent 2 is based on the correspondence between the parties and the facts which led up to that correspondence. It appears from the evidence of the architect that on 11th November 1939 he gave a certificate of final measurements, Ex. 7. This certificate was based on detailed measurements taken by him in his measurement-book. This measurement book the architect produced and stated that on p. 45 respondent 2 had in writing accepted the measurements taken by him of work completed up to 2nd November 1939. He also stated that from pp. 45 to 48 of his measurement-book were measurements of work done after 2nd November 1939. After the architect had issued the final certificate Ex. 7, respondent 2 on 20th December 1939 wrote to the architect the letter Ex. 8 in which he set out detailed objections to the final measurements. The architect's reply to this letter is Ex. 9 dated 4th January 1940. Therein the architect states :

I have to inform you that your statement that the bill is incorrect is not true as before the bill was prepared and given to the contractor you verified, checked and consulted with me. It is a pity that now it should be said that the bill is incorrect.

Thereafter the architect states that he proceeds to touch upon the points raised by respondent 2 in his letter Ex. 8, and after doing so in detail the architect concludes his letter Ex. 9 thus :

I hope I have touched every point of yours so far the masonry work is concerned. I knew that you had certain difficulties in the money affairs and hence you try to delay making payment to the contractors. This is hardly fair and will not do for you.

In the end I would again request to be please fair and make early payments to the contractors in order to avoid unpleasantness.

The architect enclosed his bill for supervision. Further correspondence ensued, respondent 2 and the architect reiterating the opinions expressed by them in their letters, Exs. 8 and 9. On 8th April the architect wrote to respondent 2 the letter Ex. 13 in which it is stated :

I have to inform you that as per articles of agreement the sole arbitrator in case of disputes is the architect and therefore I hereby request you to attend this office on Monday the 15th instant for the settlement of your final bills.

Copy of this letter was forwarded by the architect to Sakhi Mahomed, son of Hyder, respondent 1. Respondent 2 through an advocate replied to Ex. 13 by his letter of 13th April, Ex. 14, wherein he contended that the architect had disqualified himself from acting as arbitrator on two grounds : (1) that he had already given a certificate to the contractor and "shown your mind in the matter," (2) that he had a dispute with respondent 2 regarding his fees and had threatened to file a suit. On 8th May the architect as arbitrator wrote to the advocate of respondent 2 the letter, Ex. 17 in which he said:

As per arbitration clause in the agreement I again request you to instruct your client to see me on Monday the 13th instant at 4 p. m., if he fails to come, the bills will be decided ex parte.

He also stated in this letter referring to Ex. 14 :

Issuing of a certificate does not indicate that I do not want to listen to both the parties on matters under dispute. My object in writing to your client and contractor to see me was to settle the bills finally after hearing both the parties.

The architect arbitrator held a sitting on 13th May and made his award thereafter. Respondent 2 failed to appear before him. In my opinion on the facts and the correspondence quoted above it cannot be said that the architect arbitrator had disqualified himself from acting as arbitrator. It must be remembered that in a case such as this where an agreement is made between the owner of certain premises and a building contractor, and an architect is appointed, and it is agreed that that architect should act as arbitrator in the event of disputes between the parties to the agreement, the parties know that in certain matters and to certain extent the arbitrator agreed upon may previous to his entering upon the arbitration deal with the merits of the matter and possibly express opinions. The law on this point is thus set out in Halsbury's Laws of England, Hailsham Edition, Vol. 3, page 327, para. 602 :

Although the general law as to the disqualification of arbitrators applies to building contracts, just as it does in other cases, this class of contracts often presents the peculiarity of the person designated as arbitrator being the agent of one of the parties. This peculiarity has given rise to much litigation. The effect of the decisions is that where an architect has two duties to perform, i. e., to superintend and control the work and to act as arbitrator, no honest exercise of his functions in the one capacity will disqualify him from acting in the other capacity. Nor will even extremely strong expression of opinion in his capacity of superintendent disqualify him from acting as arbitrator, except where such expressions show that he is not open to argument.

Thus, an architect is not disqualified from acting as arbitrator by the fact that there is money due to him as architect from the employer .... nor by subsequently expressing an opinion during the

progress of the works as to matters in dispute . . . nor by his measurements being impeached; nor by having revised the specifications or schedules for the works . . . . . nor on the ground that he is in substance made the Judge as to his own competence to advise his employers, unless there is sufficient reason to suppose that he will not act fairly . . . The parties have agreed on a tribunal, which they knew would not be absolutely impartial, and they must abide by their agreement. But if an arbitrator has misconducted himself, the Court may remove him.

In Hudson on Law of Building and Engineering Contracts at p. 262 it is stated :

It is impossible for an engineer or architect to perform the many duties devolving upon him during the progress of the works without expressing an opinion on matters as to which he may have to adjudicate, later, as arbitrator.

One of the illustrations given on that page reads thus :

The engineer of the L. Corporation wrote a letter in which he said that the claim of the contractor against the corporation was 'outrageous.' The contractor brought an action against the corporation, which the corporation applied to have stayed pending arbitration before the engineer, the named arbitrator. *Held*, that the arbitrator was not disqualified.

I think these principles are entirely applicable in the present case. No doubt in his letter Ex. 8, respondent 2 set up various objections to the final bill and the arbitrator as architect in his reply Ex. 9 attempted to refute all those objections and expressed the view that respondent 2 was merely gaining time because he had not money to pay; but it does not appear to me that these expressions of opinion on the part of the arbitrator as architect in the circumstances of this case disqualified him from acting as arbitrator. In his letter Ex. 17 the architect arbitrator states :

Issuing of a certificate does not indicate that I do not want to listen to both the parties on matters under dispute. My object in writing to your client and contractor to see me was to settle the bills finally after hearing both the parties.

To my mind this is a clear indication that the arbitrator in this case though he had expressed his view as to the correctness of his own measurements and as to the bona fides of the contention of respondent 2 was ready to adjudicate upon the contentions of the parties with an open mind after hearing what both the parties had to say. In my opinion, therefore, there is no substance in the second ground put forward by the learned advocate for respondent 2 for removing this award from the file. As to the third ground, it is covered by the passage from Halsbury's Laws of England which I have quoted above. The mere fact that the arbitrator before he acted as arbitrator had a claim against respondent 2 arising out of the contract Ex. 2 did not disqualify him from acting as arbitrator. Nor is there any substance in the last ground urged by the learned advocate for respondent 2. Though the arbitrator fixed a hearing for 15th April without naming any time, he has deposed that nothing was done by him at that hearing; it is not denied that he wrote the letter Ex. 17 on 8th May in which he fixed a hearing for 13th May at 4 P. M. Nor is it denied that respondent 2 failed to appear before the arbitrator on this date though he had notice thereof. I accordingly dismiss this application with costs and order that the award stand filed.

K.S./R.K. *Application dismissed.*

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(28) A. I. R. 1941 Sind 204

DAVIS C. J. AND WESTON J.

Emperor

v.

Mangharam Ghumanmal Thadhani.

Criminal Ref. No. 209 of 1940, Decided on 4th October 1940, made by District Magistrate, Karachi, D/- 15th July 1940.

(a) Government of India Act (1935), S. 270 — "Purporting to be done."

The words "purporting to be done" in S. 270 are important, and must be given their full meaning. Clearly used in their context they mean something more than "done" : ('37) 24 AIR 1937 Sind 129 (FB) and ('37) 24 AIR 1937 P C 306, *Rel. on*; ('39) 26 AIR 1939 F C 43, *Ref.* [P 205 C 1]

(b) Government of India Act (1935), S. 270 — Public servant entrusted with money misappropriating it and making false entries in cash book — Sanction is necessary for prosecution for offence under S. 477A, Penal Code, but not for offence under S. 409, Penal Code.

Where a public servant withdraws money from the cash in his keeping and misappropriates it and makes false entries in the cash book, sanction for the prosecution of an offence under S. 477A, Penal Code, is necessary but it is not necessary for the prosecution of an offence under S. 409, Penal Code: ('39) 26 AIR 1939 F C 43, *Foll.* [P 206 C 2; P 207 C 1]

(c) Criminal P. C. (1898), S. 235 — Offence under Ss. 477A and 409, Penal Code, can be tried together.

Where a person misappropriates certain money entrusted to him and makes false entries in the cash book, the two offences being part of the same transaction can be tried together. [P 207 C 1]

Partabrai D. Punwani Advocate-General — for the Crown.

Parmanand Kundanmal — for Opponent.

Davis C. J. — This is a reference by the District Magistrate, Karachi, recommending that we quash proceedings against one Mangharam G. Thadhani, head clerk to the

Conservator of Forests, Sind, for offences under Ss. 409 and 477A, Penal Code, on the ground that under S. 270, Government of India Act, 1935, the sanction of the Governor of the Province of Sind was necessary for the prosecution, and that sanction had now been given but could not have retrospective effect. Reliance was placed upon a judgment of the Federal Court of India in I L R (1939) Kar (FC) 132.[1] For the opponent it was argued that the reference was unusual and irregular, and the question of sanction should be left to be decided when these proceedings had terminated.

We can see no proper interest which would be served if the decision of this question upon which the validity of the trial itself depends were left undecided to the end of the trial, or if we sent back the case for the decision of the Magistrate on this important question of law which arises. On the merits it was argued on behalf of the opponent that so far as the offence under S. 409, Penal Code, was concerned, it did not fall within the purview of S. 270, Government of India Act, 1935. Section 270 (1), Government of India Act, with which we are concerned is as follows :

Indemnity for past acts.

270. (1) No proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India or Burma before the relevant date, except with the consent, in the case of a person who was employed in connexion with the affairs of the Government of India or the affairs of Burma, of the Governor-General in his discretion, and in the case of a person employed in connexion with the affairs of a Province, of the Governor of that Province in his discretion.

The words "purporting to be done" are important, and must be given their full meaning. Clearly used in their context they mean something more than "done" and the meaning and effect of these words were considered in a case the Sind Judicial Commissioner's Court, 32 S L R 567[2] at page 587, and by the Privy Council in 31 S L R 686,[3] where in construing S. 142, Calcutta Port Act, 3 of 1890, their Lordships described the words "purporting or professing to act in pursuance of the statute" as of pivotal importance. In the case before the Federal Court, I L R (1939) Kar (F C) 132,[1] Varadachariar J. said, when referring to the words "purporting to be done in execution of his duty" (page 139) :

> It only remains to deal with the arguments urged on the one side or the other as to the test to be applied in determining whether or not the act complained of is one "purporting to be done in execution of his duty" as a public servant. I would observe at the outset that the question is substantially one of fact, to be determined with reference to the act complained of and the attendant circumstances; it seems neither useful nor desirable to paraphrase the language of the section in attempting to lay down hard and fast tests. For instance, it was said in AIR 1935 Nag 52[4] that 'we are not concerned with the act itself so much as the capacity in which the act is performed.' An observation of that kind does not seem to be very helpful and may even prove misleading. Again, expressions like 'cloak of office' and 'professed exercise of office' may correctly fit in with certain cases, but they may not always be appropriate to describe or delimit the scope of the section. The question does not seem to have arisen for decision under S. 270 (1), Constitution Act; we were accordingly referred by way of analogy to a number of rulings under S. 197, Criminal P. C., and one or two decisions under S. 80, Civil P. C.

When dealing with cases falling under S. 197, Criminal P. C., the learned Judge says (page 140) :

> In one group of cases, it is insisted that there must be something in the nature of the act complained of that attaches it to the official character of the person doing it : *c. f.* 33 I C 648,[5] 50 Mad 754,[6] AIR 1929 Cal 724,[7] AIR 1935 Rang 263[8] and AIR 1939 Bom 63.[9] In another group, more stress has been laid on the circumstance that the official character or status of the accused gave him the opportunity to commit the offence. It seems to me that the first is the correct view. In the third group of cases, stress is laid almost exclusively on the fact that it was at a time when the accused was engaged in his official duty that the alleged offence was said to have been committed : *see* 52 Mad 602[10] at p. 605, quoting from Mitra's Commentary on the Criminal Procedure Code. The use of the

1. ('39) 26 AIR 1939 F C 43 : 181 I C 317 : 40 Cr L J 468 : ILR (1939) Kar FC 132 : 1939 FCR 159 : I L R (1940) Lah 400, Hori Ram Singh v. Emperor.
2. ('37) 24 AIR 1937 Sind 129 : 169 I C 274 : 38 Cr L J 723 : 32 S L R 567 (F B), Nuralhaqshah v. Emperor.
3. ('37) 24 AIR 1937 P C 306 : 170 I C 332 : 31 S L R 686 : 64 I A 363 : I L R (1938) 1 Cal 440 (P C), Commissioners for the Port of Calcutta v. Corporation of Calcutta.
4. ('35) 22 AIR 1935 Nag 52 : 157 I C 120 : 36 Cr L J 1092: 31 N L R 297, Abdul Hadi v. D. P. Mishra.
5. ('17) 4 AIR 1917 Mad 344 : 33 I C 648 : 17 Cr L J 168, In re Abdul Khadir Saheb.
6. ('27) 14 AIR 1927 Mad 566 : 102 I C 347 : 28 Cr L J 539 : 50 Mad 754 : 52 M L J 647, Raja Rao v. Ramaswamy.
7. ('29) 16 AIR 1929 Cal 724 : 122 I C 627 : 31 Cr L J 430 : 33 C W N 1058, Amanat Ali v. Emperor.
8. ('35) 22 AIR 1935 Rang 263 : 157 I C 1034 : 36 Cr L J 1272 : 13 Rang 540 (F B), Emperor v. Maung Bo Maung.
9. ('39) 26 AIR 1939 Bom 63 : 179 I C 686 : 40 Cr L J 269 : I L R (1939) Bom 119 : 40 Bom L R 1286, Gurushidayya Shantivirayya v. Emperor.
10. ('29) 16 A I R 1929 Mad 659 : 118 I C 102 : 30 Cr L J 864 : 52 Mad 602 : 57 M L J 31, Gangaraju v. Venki.

expression 'while acting,' etc., in S. 197, Criminal P. C., (particularly its introduction by way of amendment in 1923) has been held to lend some support to this view. While I do not wish to ignore the significance of the time factor, it does not seem to me right to make it the test.

In the case before the Federal Court the appellant, a Sub-assistant Surgeon in the Punjab Provincial Service, who had been convicted by a Magistrate under S. 409, Penal Code, for breach of trust in respect of certain medicines entrusted to him in his capacity as a public servant, and under S. 477A, Penal Code, for falsification of accounts by omitting to record entries in the stock book with intent to defraud, was acquitted by the Sessions Judge on appeal on the ground that S. 270 (1), Government of India Act, 1935, applied; but the acquittal was set aside by the Lahore High Court on the ground that S. 270 (1) of the Act did not apply. Varadachariar J. distinguished between the two charges that under S. 409 and that under S. 477A, Penal Code, and as we are bound by the judgment of the Federal Court on this question of the interpretation of S. 270 (1), it is as well if we quote at some length from that judgment. At p. 139 the learned Judge on this point said :

> The learned Judges have dealt with both the charges, i. e., the one under S. 409 and the other under S. 477A, as on the same footing; it, however, seems to me necessary to draw a distinction, for the present purpose, between the charge under S. 409 and the charge under S. 477A. Though a reference to the capacity of the accused as a public servant is involved both in the charge under S. 409 and in the charge under S. 477A, there is an important difference between the two cases, when one comes to deal with the act complained of. In the first, the official capacity is material only in connection with the "entrustment" and does not necessarily enter into the later act of misappropriation or conversion, which is the act complained of. In the charge under S. 477A, the official capacity is involved in the very act complained of as amounting to a crime, because the gravamen of the charge is that the accused acted fraudulently in the discharge of his official duty. The consent of the Governor would thus be prima facie necessary for the institution of proceedings against the appellant under S. 477A. The learned Advocate-General of the Punjab sought to found an argument on the fact that the appellant is in the present case charged not with an act, in the sense of making a fraudulent entry in the course of his official duty, but with an omission to make an entry which it was his duty to make. I do not think that anything can be made to turn on this distinction. Apart from the principle that, for the purposes of the criminal law, acts and illegal omissions stand very much on the same footing, the conduct of the appellant in maintaining the accounts, which it was his duty to keep, has to be dealt with as a whole and the particular omission cannot of itself be treated as an offence except as a step in the appellant's conduct in relation to the maintenance of the register which it was his duty correctly to maintain.

And it is argued that at least in this case we should distinguish between the offences under S. 477A and S. 409, Penal Code, and that there is an almost exact parallel between the case before the Federal Court where the first charge was that

> being a public servant and in such capacity entrusted with medicines of the hospital which were the property of the District Board, Dera Ghazi Khan, the accused committed criminal breach of trust in respect of certain medicines (specified in the charge) and thereby committed an offence punishable under S. 409, Penal Code.

We do not think that the fact that the accused in that case dishonestly removed or was alleged to have dishonestly removed, for the question of sanction must depend upon allegations in the complaint, certain medicines belonging to the hospital to his own quarters, makes any difference in view of the fact that the learned Judge held that the official capacity, in which capacity this accused was to be prosecuted, attached only to the entrustment and did not enter necessarily into the later act of misappropriation or conversion. In the charge under S. 477A, Penal Code, however, the Court held that the official capacity was involved in the very act complained of as amounting to a crime, because the gravamen of the charge was that the accused acted fraudulently in the discharge of his official duty when he omitted to make the proper entries in the stock book. So here it may be argued that in this case the official capacity of the opponent attached only to the entrustment of the money and did not enter into his misappropriation of it. The complaint is brief but is sufficiently clear. The allegations are that the opponent as head clerk to the Conservator of Forests, Sind, drew Rs. 206-12-0 from the cash in his keeping and misappropriated it and made false entries in the cash book showing sums totalling this amount as paid to certain forest guards. It is sufficiently alleged, we think, that it was the duty of the opponent to pay the forest guards and to enter the appropriate payments in the cash book, and following the ruling of the Federal Court, we think it is clear that sanction for the prosecution of an offence under S. 477A, Penal Code, was necessary for the parallel between the two cases appears complete.

But so far as the offence under S. 409, Penal Code, is concerned, it may be argued, following the decision in the case before the Federal Court, that the official capacity of

the opponent attached to him only so far as the entrustment is concerned. So far as the wrongful withholding of the pay of the forest guards was concerned, his official capacity did not attach to that as his official capacity did not attach to the Sub-assistant Surgeon in the Punjab when he misappropriated the medicines. It may be conceded that for the purpose of the criminal law acts and omissions stand on the same footing, and if the opponent was being prosecuted for withholding the pay of the forest guards or omitting to pay it, we could well hold, following the ruling in I L R (1939) Kar F C 132,[1] that sanction was necessary for this prosecution. But the opponent is not being prosecuted for withholding or omitting to pay their pay to the forest guards. That may be a departmental offence, we do not know. He is being prosecuted for the subsequent criminal misappropriation, and following the ruling in I L R (1939) Kar (F C) 132,[1] by which we are bound, we find that sanction is not necessary for the prosecution of an offence under Sec. 409, Penal Code. While, therefore, we quash the proceedings so far as the prosecution for an offence under S. 477A, Penal Code, is concerned, we do not quash the proceedings for the prosecution of an offence under S. 409, Penal Code, but there will be no incongruity or inconvenience in this because the two offences, one for which sanction is required, and one for which sanction is not required as being part of the same transaction, can be tried together and a fresh complaint for an offence under S. 477A, Penal Code, may be made. Order accordingly.

K.S./R.K. *Order accordingly.*

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* (28) A. I. R. 1941 Sind 207

DAVIS C. J.

Emperor

v.

Chuttal Imambaksh.

Criminal Ref. No. 45 of 1941, Decided on 26th March 1941, made by Sess. Judge, Larkana, D/- 27th February 1941.

* Penal Code (1860), S. 75 — S. 75 does not provide for enhanced punishment in case of convictions subsequent to offence — It applies only to convictions prior to offence — Accused committed to Sessions for theft committed on 28th October 1938—Accused having convictions dated 26th June 1939 and 20th July 1939 subsequent to offence for which he was committed — Convictions held could not be regarded as previous convictions within meaning of S. 75—Committal held should be quashed.

Section 75 applies in cases of convictions prior to the conviction of the offence for the enhanced punishment of which S. 75 is to be invoked. But it does not provide for enhanced punishment in the case of convictions subsequent to the offence. [P 207 C 2]

The theft for which the accused was committed to the Court of Session was committed on 28th October 1938. The accused had convictions subsequent to the commission of this offence, the dates of these convictions being 26th June 1939 and 20th July 1939 :

Held that the previous convictions being subsequent to the commission of the offence for which the accused was committed could not be deemed previous convictions within the meaning of S. 75. The accused was in fact committed for an offence which when committed was not a subsequent offence within the meaning of S. 75 and therefore the committal must be quashed : ('26) 13 A I R 1926 Bom 305, *Rel. on.* [P 208 C 1]

Kazi Khuda Baksh, Public Prosecutor — for the Crown.

Order.—This is a reference by the learned Sessions Judge of Larkana in which he recommends that the committal of one Chuttal, son of Imambaksh, to the Sessions Court to take his trial for an offence under S. 379 read with S. 75, Penal Code, be quashed on the ground that on the facts of this case S. 75, Penal Code, does not apply. It appears that the theft for which this Chuttal has been committed to the Court of Session was committed on 28th October 1938. It does appear that this Chuttal had convictions subsequent to the commission of this offence. The dates of these convictions are 26th June 1939 and 20th July 1939. But S. 75, Penal Code, does not provide for enhanced punishment in the case of convictions subsequent to the offence. Section 75, Penal Code, applies in cases of convictions prior to the conviction of the offence for the enhanced punishment of which S. 75, Penal Code, is to be invoked. Section 75 says :

> Whoever, having been convicted,—(a) by a Court in British India, of an offence punishable under Chap. 12 or Chap. 17 of this Code with imprisonment of either description for a term of three years or upwards, or (b) . . . . . shall be guilty of any offence punishable under either of those chapters with like imprisonment for the like term, shall be subject for every such subsequent offence to transportation for life, or to imprisonment of either description for a term which may extend to 10 years.

In this case, enhanced punishment is given because of previous convictions. The offence, for the enhanced punishment of which S. 75, Penal Code, was to be invoked, was committed on 28th October 1938. The two previous convictions were subsequent to the commission of this offence, and could not, therefore, be deemed previous convictions within the meaning of S. 75, Penal

Code. Reference may be made to the case in 28 Bom L R 484.[1] This Chuttal, in fact, has been committed to the Court of Session to take his trial for an offence which when committed, as alleged, was not a subsequent offence within the meaning of S. 75, Penal Code, at all. I think, therefore, that the committal of the accused should be quashed because a sentence of two years' rigorous imprisonment which the Resident Magistrate, Larkana, could himself impose, would in case of conviction, be an adequate punishment for this offence. The case, therefore, is returned to the Resident Magistrate at Larkana for the Resident Magistrate to try, and the reference is answered accordingly.

G.N./R.K. *Committal quashed.*

1. ('26) 13 A I R 1926 Bom 305 : 95 I C 54 : 27 Cr L J 726: 28 Bom L R 484, Emperor v. Sayad Abdul Sayad Imam.

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(28) A. I. R. 1941 Sind 208

DAVIS C. J.

Haroon Ahmed — Appellant

v.

Emperor.

Criminal Appeal No. 70 of 1940, Decided on 25th September 1940, against conviction and sentence passed by Third Addl. City Magistrate, Karachi, D/- 8th August 1940.

Bombay District Police Act (7 of 1867), Section 61D — Construction — S. 61D does not punish person for being found under suspicious circumstances — Reputed thief — He need not necessarily have convictions for theft — Evidence of witnesses that he was known to them as constantly stealing things is sufficient —Being found in company of other whose reputation as thief is proved by convictions cannot render person reputed thief.

There is nothing in S. 61D which punishes a man for being found under suspicious circumstances. Three conditions are required to satisfy S. 61D: (1) lying or loitering in any street or yard or other place, (2) being a reputed thief, and (3) without being able to give a satisfactory account of himself. [P 208 C 2]

A person to be a reputed thief need not necessarily have convictions for theft. Evidence of witnesses that the individual is known to them as constantly coming in and out of their houses or yards stealing property of little value is sufficient to prove that the man is a reputed thief. But a man cannot be said to be a reputed thief merely because he was found at night in the company of another whose reputation as a thief has been proved by previous convictions. [P 208 C 2]

Ajitsing Gobindram — for Appellant.

W. B. L. Vellani — for the Crown.

Judgment. — This is an appeal against the conviction of one Haroon son of Ahmed, aged 22 years, Baluch, described as a bidi-maker, who has been convicted by the Third Additional City Magistrate, Karachi, of an offence under S. 61D, Bombay District Police Act. The offence as described in these proceedings, which are summary proceedings, is that this appellant and another Pathia son of Punja were lying under a shade of a wall between sunset and sunrise, and the learned Magistrate in his judgment states that the offence is one of being found under suspicious circumstances. But there is nothing in S. 61D, Bombay District Police Act, which punishes a man for being found under suspicious circumstances. Section 61D of the Act, so far as it is relevant, says:

> Whoever is found between sunset and sunrise ..... (d) lying or loitering in any street, yard or other place, being a reputed thief and without being able to give a satisfactory account of himself .....

So three conditions are required to satisfy this clause, (1) lying or loitering in any street or yard or other place, (2) being a reputed thief, and (3) without being able to give a satisfactory account of himself. It appears from the record that two of these conditions are satisfied, first, that the appellant was lying in the street, yard or other place, and second, that he was not able to give a satisfactory account of himself.

The question then remains is, whether he is a reputed thief. I would not say that in order to prove that the appellant is a reputed thief, he must necessarily have convictions for theft. Witnesses may be prepared to say that an individual is known to them as constantly coming in and out of their houses or yards stealing property of little value and such evidence might be sufficient to prove that the man is a reputed thief. Presumably the words "reputed thief" are used deliberately and have the ordinary meaning that attaches grammatically to these words. But I do not think it can be said that a man is a reputed thief merely because he has been found at night in the company of another whose reputation as a thief has been proved by previous convictions. Therefore, though it is true the appellant was arrested under suspicious circumstances, and it may be he was up to no good, I do not think it can be said that all the three conditions of S. 61D, Bombay District Police Act, have been satisfied. I think therefore the conviction and sentence must be set aside and the appellant set at liberty. Order accordingly.

G.N./R.K. *Conviction set aside.*

* (28) A. I. R. 1941 Sind 209

DAVIS C. J. AND WESTON J.

Hundraj Tolomal

v.

Laxmi Insurance Co. Ltd.

Second Appeal No. 1 of 1939, Decided on 25th March 1941, against judgment and decree of Asst. Judge, Sukkur, D/- 24th September 1938.

* (a) Insurance—Life—Non-forfeiture clause —Policy acquiring surrender value—Premiums not paid — Policy kept alive by surrender value —Subsequent premiums paid after due date but before days of grace — Premiums held effective as if made before due date.

The policy dated 12th April 1927 recited that the annual premium was Rs. 41-10-0 and that the due dates of instalments of premiums were 6th January, 6th April, 6th July and 6th October of each year. Premiums payable up to and including those due in the year 1930 were paid on the policy, which therefore acquired a surrender value. The premium due on 6th January 1931 was not paid, nor were other payments made in that year, and the policy was kept alive by the surrender value, which sufficed to pay all premiums due in the year 1931. On 26th January 1932, appellant paid the amount of two quarterly premiums to carry on the policy until 6th July 1932 on which date a further payment was made covering the period in which the assured died :

Held that there was no provision of a fixed period for which the policy was to be kept alive by the surrender value, nor a provision for reinstatement only within that period. It was a reasonable interpretation of the 'non-forfeiture' clause that the surrender value was to be applied in payment of premiums with precisely the same effect, except for the charge created as ordinary payment of premiums by the insured. The position on 6th January 1932 was that the policy was as if the insured had paid the premiums due up to that day except that there was a charge on the policy for the premiums paid from the surrender value. The premium due on 6th January 1932 was subject to the same rules as any other payment of premium by the insured, and if made within the period of 30 days grace, its effect was as if it had been made on 6th January 1932. [P 210 C 2; P 211 C 1]

* (b) Insurance — Life — Person canvassing and receiving payments is agent of company — Provision that formal receipt of head office only would be recognised is not disclaimer of agent's authority — It is merely for benefit of company as check on agent's remittances.

A person who acts for the company to obtain business and to receive payments is an agent of the company. The term of the policy that the formal receipt of the head office of the company only would be recognized is not a disclaimer of the authority of agents, but is a provision for the benefit of the company in order that it may afford a check on the remittances of its agents. The payment to such an agent is a payment to the company. [P 210 C 1]

Kimatrai Bhojraj — for Appellant.

Dipchand Chandumal —
for Respondent 1 (Company).

Weston J. — The appellant in this second appeal is the son of one Tolomal who insured his life with the respondent Insurance Company in the sum of Rs. 1000 by policy No. 5218 dated 12th April 1927. Tolomal died on 30th July 1932 having assigned the policy to appellant before his death. Appellant sued to recover on the policy, and his suit was dismissed by the Subordinate Judge, Sukkur, and this dismissal has been affirmed in appeal by the Assistant Judge, Sukkur. Throughout the suit and appeals, one Hargunmal, a canvasser or agent of the respondent Insurance Company, has been joined as defendant or respondent. It is necessary to set out certain terms of the policy. They are contained under the heading 'Privileges and Conditions' and those materials are as follows :

Premium and Mode of Payment : The premiums are on a yearly basis but can be paid by half yearly and quarterly instalments.

Days of Grace : Thirty days grace is allowed for the payment of the yearly, half yearly and quarterly instalments of premiums, which must reach the office in full within the days of grace, the remittance charges being borne by the assured.

Cash Surrender Value : After being in force for three years, every policy acquires a Cash Surrender Value which can be ascertained on application to the company. Such value . . . will not be less than 40 per cent. of all premiums paid, (except that of the first year).

Non-forfeiture : If any premium due is not received in time, the policy does not lapse at once, but will be kept in force automatically for as long as the Cash Surrender Value is enough to cover the premiums to be paid. The premiums thus adjusted will carry interest at the rate of 6 per cent. per annum compound with half-yearly rests or such other rates as the Board may determine from time to time, and will be a first charge on the policy. The assured may, at any time, pay up the unpaid premiums with interest and have his policy free from the charge.

Receipts for Payments : The receipts issued by chief agent or agents are only interim receipts, and the formal receipt can be issued by the head office only signed by the Managing Director or Manager. If any policy-holder making payment to an agent of the company does not receive the formal receipt from head office within 30 days, he should immediately draw the attention of the head office to this fact for necessary action.

The policy recites that the annual premium was Rs. 41-10-0 and that the due dates of instalments of premiums were 6th January, 6th April, 6th July and 6th October of each year. The facts found by the lower Courts are as follows : Premiums payable up to and including those due in the year 1930 were paid on the policy, which therefore acquired a surrender value. The premium due on 6th January 1931 was not paid, nor were other payments made in that year, and the policy was kept alive by the surrender value, which sufficed to pay all

premiums due in the year 1931. On 26th January 1932, appellant paid the amount of two quarterly premiums to Hargunmal, a payment sufficient, if a payment to the company and made in time, to carry on the policy until 6th July 1932 on which date a further payment was made covering the period in which Tolomal died.

On these facts two questions arise in this appeal: (1) Whether payment to Hargunmal on 26th January 1932 was a payment to the company? (2) Whether this payment was in time under the terms of the policy? It has been contended by the company that Hargunmal was not their agent but was only a canvasser, and reliance has been placed on the term of the policy that the formal receipt of the head office of the company only would be recognized. We have no hesitation in holding that Hargunmal was an agent of the company and that receipt of premium by him was receipt by the company. It is clear that Hargunmal acted for the company to obtain business and to receive payments. The term of the policy relied upon is not a disclaimer of the authority of agents, but is a provision for the benefit of the company in order that it may be afforded a check on the remittances of its agents.

On the second point, the argument which has found favour with the lower Courts is that the surrender value of the policy only sufficed to keep the policy alive until 6th January 1932 when it automatically lapsed, and that there was no provision in the terms of the policy for 30 days grace to revive a lapsed policy. At first sight, it would appear that this argument is supported by authority. We have been referred to the case in (1920) 122 L T 30.[1] In this case premiums under a policy of life insurance were payable on or before the last day of January, April, July and October of each year, and it was provided in the policy that 30 days grace were allowed for the payment of each renewal premium. There was also a condition for keeping alive any policy which had acquired a surrender value, and this condition was that the policy would not immediately lapse if a renewal premium was not paid within the days of grace, but would be kept in force for twelve calendar months from the date upon which the last premium became due. The policy could be 'reinstated' at any time during the same twelve months on payment of the arrear premiums and interest. The policy in question had acquired a surrender value. The last payment of premium was made on 30th April 1915. On 7th August 1916, at which date more than a year had elapsed since the premium payable on 31st July 1915 had (excluding the days of grace) become due, an assignee of the policy offered to pay to the insurers the premiums in arrear, and contended that the year mentioned in the conditions of the policy ran from the expiration of the days of grace. The insurers refused to accept the premium. It was held by Scrutton L.J. following (1903) 1 K B 47[2] at page 55 that:

> The correct view as to the days of grace allowed by the terms of the policy is that if payment is made within the time mentioned it is to be taken to have been made on the day appointed for payment and is to have the same effect as if it had been made on that day,

and therefore that the period of twelve months was to be calculated from 31st July 1915, and the offer of reinstatement made on 7th August 1916 was not made within the period allowed by the terms of the policy. We think however the present case is distinguishable from (1920) 122 L T 30.[1] We have here no provision of a fixed period for which the policy is to be kept alive by the surrender value, nor a provision for reinstatement only within that period. The terms of the present policy which provides that it will be "kept in force automatically for as long as the cash surrender value is enough to cover the premiums to be paid" is contained under the heading 'non-forfeiture' and not under the heading 'forfeiture.' The amount of surrender value applied in payment of premiums is not required to be refunded, and if not refunded will remain a first charge on the policy. In our view, it is a reasonable interpretation of the "non-forfeiture" clause that the surrender value is to be applied in payment of premiums with precisely the same effect, except for the charge created as ordinary payment of premiums by the insured. It was open to the company to provide in the terms of the policy that, on expiry of the period covered by the surrender value, the policy would lapse forthwith, but this they did not do. We are not impressed by the argument that the days of grace exist for the benefit of the insured only when there is a surrender value to keep the policy alive after the due date of a premium, for if of less duration than three years the policy has no surrender value, but there is no suggestion that in

1. (1919) 2 K B 491 : 88 L J K B 1223 : 1919 W C & I Rep 308 : 122 L T 30, McKenna v. City Life Assurance Co.

2. (1903) 1 K B 47 : 72 L J K B 1 : 87 L T 516 : 51 W R 211 : 19 T L R 24, Stuart v. Freeman.

such circumstances the privilege of grace days does not exist.

In our view the position on 6th January 1932 was that the policy was as if the insured had paid the premiums due up to that day, except that there was a charge on the policy for the premiums paid from the surrender value. The premium due on 6th January 1932 was subject to the same rules as any other payment of premium by the insured, and if made within the period of 30 days grace, its effect was as if it had been made on 6th January 1932. We consider therefore that appellant is entitled to recover on the policy subject to the charge created on it by the payment from the surrender value of the premiums due in the year 1931, with interest as provided in the terms of the policy up to the date of suit. Appellant will be entitled to interest on the amount due from the date of suit until recovery at 6 per cent. and also to his costs throughout.

R.K. *Appeal allowed.*

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(28) A. I. R. 1941 Sind 211

DAVIS C. J. AND TYABJI J.

Haji Sir Abdullah Haroon

v.

Municipal Corporation of Karachi.

First Appeal No. 52 of 1938, Decided on 17th January 1941, against judgment and decree passed by Lobo J. *Reported in ('39) 26 AIR 1939 Sind 39.*

(a) Easements Act (1882), S. 33 — Easement of light and air — Interference with—Claim for injunction — Substantial damage amounting to nuisance must be shown to result from disturbance — What amounts to substantial damage explained — State of property at time of disturbance should be looked into.

In a suit for disturbance of an easement of light and air dominant owner must show that substantial damage amounting to a nuisance had been suffered by him. And, in order to establish substantial damage, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which could be ascribed to the interruption of the free passage of light and air. The state of the property at the time of the alleged disturbance of the easement has to be looked to, not as it was before or as it might be at a future date. [P 213 C 2]

The windows of the dominant tenement were regarded as wholly useless by the tenants in actual occupation of the premises. They preferred to have the windows bricked up rather than to take advantage of them as an amenity for the use of light and air. The light and air available to these premises such as they were, was regarded as amply sufficient for their purpose. Subsequently by the construction of a wall by the Municipality these windows were blocked :

Held that no substantial damage had been shown to result to the dominant owner as the result of the disturbance alleged as required under S. 33 of the Act : ('14) 1 A I R 1914 P C 45 and 30 Bom 319, *Rel. on.* [P 214 C 1]

(b) Easements Act (1882), S. 15 — Lessee of land, owner of building built upon land—Lessee acquires rights of easement with respect to use of light or air or support for his building as owner of building.

A lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming a title thereto and as of right, within the meaning of these words in cl. (3) of S. 15 for in such a case the tenant's occupation is in the sight of the law that of his landlord. But where a lessee of land, owns a building built upon land leased to him he may, so far as the use of light or air or support for his building are concerned, acquire rights of easement in respect of such light, air or support under cls. 1 and 2 of S. 15 and these rights cannot be objected to as being incapable of being acquired by him on behalf of his landlord as well as against his landlord, for these rights are acquired by him for himself and for none other than himself, as the owner of the building : ('38) 25 A I R 1938 All 293 (F B), *Rel. on.* [P 214 C 2]

Dingomal Narainsingh — for Appellant.

Dipchand Chandumal — for Municipal Corporation.

Tyabji J. — This is an appeal against the judgment and decree passed by a Judge of this Court (Hon'ble Lobo J.) dismissing the appellant's suit for a declaration that the appellant had acquired rights of easement, to receive light and air, in respect of 26 windows in his buildings on plot No. 1 Survey Sheet S. R. 5 in Serai Quarter, Karachi, and for a perpetual injunction restraining the respondents from interfering with his rights. The appellant purchased this property which is on South Napier Road, on the western side, on 9th November 1925. The northern boundary of this property was along a broad kutcha nullah (watercourse) which ran east to west. There was a two floored building about 40 to 50 feet deep along the entire frontage of the property on South Napier Road, and in this building there were 9 windows on the northern side overlooking the nullah. At the back of this building, there was a large quadrangle enclosed by rows of godowns along the northern, western and southern boundaries on the plot. There were 17 windows in the northern row of godowns which opened on to the nullah. There were thus 26 windows, 9 in the building in front, and 17 in the northern godowns which opened to the north overlooking the nullah. In 1928 or 1929 the old broad kutcha water-course was converted by the Karachi Municipality into a pucca cemented storm water drain, which was much narrower than the old nullah. As a result of this there became

available to the municipality a plot of land admeasuring above 738.86 square yards between the northern boundary of the appellant's property and the newly built storm water drain, with a frontage of about 40.2 feet on the South Napier Road, and a depth of about 180 feet, along the northern boundary of the appellant's plot. The municipality desired to sell this plot which had thus become available to them. It became apparent that if the appellant had as he claimed, acquired rights of easement in respect of the 26 windows on the northern side of the property overlooking this plot, this was a matter which must materially affect intending purchasers, and the price likely to be realized. Negotiations between the appellant and the municipality regarding the purchase of this plot by the appellant himself did not result in any agreement. Ultimately, in March 1934, the municipality decided to put the dispute to a test by inviting a legal decision and proceeded to construct a cement wall flush against the northern boundary of the appellant's property, blocking up the appellant's windows on that side completely. All the 17 godown windows out of the 26 (the remaining 9 being in the building fronting on Napier Road) were thus completely blocked up. After certain further efforts at an understanding which also proved fruitless, the appellant filed this suit on 12th December 1935. The learned Judge's conclusions briefly stated were, first with regard to the 9 windows in the building fronting on Napier Road, that these windows had not been in existence for the statutory period of 20 years before the suit, and secondly, with regard to the 17 windows in the northern godowns that the appellant had not proved that he had any actionable claim in respect of these windows though these windows were proved to have been in existence for the statutory period. The suit was accordingly dismissed.

It has been argued before us in this appeal that the learned Judge was in error with regard to both these findings. With regard to the nine windows in the building fronting on the road, the learned advocate who appeared before us for the appellant was not in a position to press his arguments in more than a very half-hearted manner and there is very little room indeed for any kind of argument in favour of the appellant so far as this part of his case was concerned. Admittedly the building in question had been built by Adamji Lukmanji, who owned the plot from 1907 to 1918. The appellant's case was that the building was built in 1912 or 1913, while the defendants contended that it was built in 1917 or 1918. The only evidence on the point which the appellant could produce was the oral testimony of Yusifally, a son of Adamji Lukmanji, and of one Nur Mahomed, a mistry who had constructed the building, who without having any documents to aid their memories or support their statements, stated that the building was constructed about 1912. As against this weak and meagre testimony, there was for the defendants, the evidence of the Head Surveyor of the Karachi Municipal Corporation, who had supervised and inspected the construction of the building, who stated that the building was constructed in 1917, and whose statement was supported by a resolution of the Karachi Municipality (Ex. 19) dated 27th March 1917; the evidence of the Land Clerk, Tikamdas who proved from the record of proceedings of meetings of the managing committee that between 1909 and 1933 constructions were only sanctioned by the municipality on this plot in 1917 and 1927, and not in 1912 or 1913; and most important of all, the assessment lists of municipal taxes (Exs. 26, 27, 28 and 29) for the years 1912 to 1921. The municipal taxes paid on this property for the year 1916-17 were assessed on a monthly rental of Rs. 375; for the year 1917-18 on a monthly rental of Rs. 545. In Ex. 28 there is a note :

> Portion worth Rs. 500 under construction : building assessed at Rs. 1045. Bill on Rs. 545 to be issued from 1st April 1917.

As the learned Judge observed, it is obvious from this that in 1917 building operations were in progress on the property. The taxes for the year 1918-19 were first assessed on a monthly rental of Rs. 1800, and were subsequently on appeal reduced and assessed on a monthly rental of Rs. 1600. We consider this evidence under the circumstances to be quite conclusive on the point and we can see no reason whatever why the learned Judge's finding on this point should be disturbed.

The position with regard to the 17 windows in the northern godowns was entirely different. It was not denied that these windows had been in existence for more than the statutory period and that the easement had existed in respect of these windows. The respondent's case with regard to these windows was two-fold. They contended first, that the appellant had by his own acts extinguished the easement and secondly, that the appellant had no actionable claim

against the respondents. Now these godowns were admittedly used for the storage of sugar, grains and other similar goods, and there was no evidence to show that they had at any time been used for any other purpose except for the storing and discharge of such goods. There are doors and windows and a covered verandah on the southern side of these godowns and then there is the open quadrangle. The 17 windows in question were each fitted with fixed wooden shutters closing inwards which could be closed from the inside. The respondents proved that at least since March 1934 when the photograph Ex. 21 had been taken every one of these 17 windows had been completely bricked up from the outside. This was done by the tenants who had rented these godowns in order to avoid thefts. The learned Judge who visited the premises himself found the godowns to be sufficiently lighted and ventilated in spite of the bricking up of these windows. The appellant contended that this bricking up had been done without the appellant's knowledge and consent. The respondents examined some witnesses to show that these windows had always been bricked up in this manner since 1917. The appellant admitted that these windows did remain bricked up for months together even before March 1934 but contended that this bricking up had not been continuous or intended to be permanent. There was no suggestion in the evidence that the accustomed business carried on in these godowns had ever needed more light and air than was available on the premises even after the windows had been bricked up, or that the bricking up had in fact in any way affected the utility of the godowns for the purposes to which they were being put, or in any way affected their value either to the tenants or to the appellant.

Under S. 38, Easements Act, an easement is extinguished when the dominant owner releases it even impliedly and as is stated in Expl. 1 to that section an easement is impliedly released where the dominant owner expressly authorizes an act of a permanent nature to be done on the subservient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and when such an act is done in pursuance of such authority. The learned Judge held that this had not happened and there had been no extinction of the easement. There was no evidence at all on the record to show that any express authority had at any time been given by the appellant to the bricking up of the windows, or that the bricking up was intended by the appellant to be a permanent arrangement. The learned Judge however held that the appellant had failed to prove substantial damage, and under S. 33, Easements Act, the appellant could not succeed in a suit for disturbance of an easement unless he proved such substantial damage.

As has been stated in 41 I A 180[1] the appellant must prove an invasion of his legal right to the easement, sufficient to amount to a nuisance. The easement has not to be measured by the amount of light and air that had been enjoyed. There is no infringement unless that which has been done amounts to a nuisance. Their Lordships cited with approval cases in which it was held that a finding that the place still remained a well lighted place would be fatal to a plaintiff's case, and that the quality of light to which a right could be acquired was what was required for the ordinary purposes of inhabitance or business of the tenement according to ordinary notions. In 30 Bom 319[2] Sir Lawrence Jenkins pointed out that under S. 33, in order to establish substantial damage, the plaintiff must prove material diminution in the value of his heritage or material interference with his physical comfort which could be ascribed to the interruption of the free passage of light and air. He also pointed out that the state of the property at the time of the alleged disturbance of the easement had to be looked to, not as it was before or as it might be at a future date, and that the plaintiff could not claim that sources of light and air alleged to be liable to construction at a later date, should be excluded from consideration. As these 17 windows were in premises which were godowns and which were not and had never been used as dwelling houses, there was no question here of any material interference with the appellant's physical comfort, and the only question here was whether the disturbance alleged had prevented the appellant or the occupants of the premises from carrying on their accustomed business in the premises as beneficially as had been done previously.

On the facts of this case we agree with the learned Judge that it is impossible to say that the appellant had shown that any

1. ('14) 1 A I R 1914 P C 45 : 24 I C 300 : 42 Cal 46 : 41 I A 180 (P C), Paul v. Robson.
2. ('06) 30 Bom 319 : 7 Bom L R 825, Framji Shapurji v. Framji Edulji.

such substantial damage amounting to a nuisance had been suffered by him. Taking the state of the property as it was, it is clear that the windows were regarded as wholly useless by the tenants in actual occupation of the godowns, that the tenants in fact preferred to have the windows bricked up rather than to take advantage of them as an amenity for the use of light and air, and that the light and air available to these godowns, such as they are, was regarded as amply sufficient for their purpose. It was argued before us that the learned Judge had wrongly relied upon the existence of certain sky-lights to which neither party had referred and which the learned Judge noted on his inspection of the premises: and that these sky-lights might at any time be obscured. We cannot see how as this building is situate, in the bright light of India necessary light could ever be cut off or materially interfered with by neighbouring buildings however high. Further, we are quite satisfied that if the appellant had wanted to lead evidence on the question of these sky-lights he would have been allowed to do so. Furthermore, even without the sky-lights the godowns opened fully, as they could be, when goods were to be brought in or taken out, on the southern side and looking on to the verandah and the courtyard, would be fully lighted for all necessary purposes. It is not possible for the appellant to contend that he is likely to obtain less rent for the godowns, or that the godowns are less likely to be taken by the prospective tenants and no suggestion was made at all that the accustomed business which has been carried on in the premises, has been prevented in any manner from being carried on as beneficially as was done before, either to the tenants or to the appellant. Under the circumstances, we agree with the learned Judge's conclusion that no substantial damage had been shown to result to the appellant as a result of the disturbance alleged as required under S. 33, Easements Act.

This really disposes of this appeal, which must accordingly be dismissed. But there is one other matter which was discussed before us to which we think we ought to refer, although, in view of our conclusions on the matters already dealt with, this can no longer affect the result of this appeal. It was argued on behalf of the respondents that as the appellant was a lessee of the respondents, the holder of a lease for 99 years from them, he could not acquire an easement over other land owned by his lessors. It is true that a lessee of land cannot acquire a right of way or any other easement over land owned by his lessor as having been peaceably and openly enjoyed by a person claiming a title thereto and as of right, within the meaning of these words in cl. 3 of S. 15, Easements Act, for in such a case the tenant's occupation is in the sight of the law that of his landlord. But where a lessee of land owns a building built upon land leased to him, he may, so far as the use of light or air or support for his building are concerned, acquire rights of easement in respect of such light, air or support under cls. 1 and 2 of S. 15, Easements Act, and these rights cannot be objected to as being incapable of being acquired by him on behalf of his landlord as well as against his landlord, for these rights are acquired by him for himself and for none other than himself, as the owner of the building: *cf* I L R (1938) ALL 538.[3] The respondents' contention that this suit against them was not maintainable on this ground could not therefore be upheld. For the reasons already given this appeal is dismissed with costs.

K.S./R.K. *Appeal dismissed.*

3. ('38) 25 A I R 1938 All 293 : 175 I C 227 : ILR (1938) All 538 : 1938 A L J 436 (F B), Abdul Rashid v. Brahman Saran.

(28) A. I. R. 1941 Sind 214

DAVIS C. J. AND WESTON J.

Tekchand Partabrai Bhavnani

v.

Sh. Kalavantibai Tekchand

Criminal Revn. Appln. No. 265 of 1940, Decided on 15th January 1941, to revise order of Third Addl. City Magistrate, Karachi, D/- 1st July 1940.

(a) Criminal P. C. (1898), S. 488 (4) — "Living separately by mutual consent" — Wife ill-treated by husband submitting to sum agreed by her panchayat is not living separately by mutual consent.

Where a woman who is helpless and has been ill-treated by her husband has to submit or thinks she has to submit to a sum agreed by her panchayat, it cannot be said that she is living separately by mutual consent within the meaning of sub-s.(4) of S. 488. [P 215 C 1]

(b) Criminal P. C. (1898), S. 488 — Child — Amount of maintenance — It should include simple and necessary education of child.

The purpose of S. 488 was to prevent vagrancy, and there cannot be anything more likely to make a child a vagrant than that it should be merely clothed and fed and lodged and its mind to be utterly untrained. If maintenance is to serve the purpose of the section, it must be something more than starvation maintenance, maintenance

sufficient only to keep body and soul together. It must include board and lodging, boarding and lodging on such a scale as to enable a frugal and thrifty mother to save sufficient for a simple and necessary education of her child: ('33) 20 AIR 1933 Mad 688, *Disting.*; ('33) 20 A I R 1933 Lah 1026, *Rel. on.* [P 215 C 2]

(c) Criminal P. C. (1898), S. 488 — Amount of maintenance—Net wages of husband and his other liabilities should be taken into account.

In fixing the amount of maintenance, the Court must take into account the net wages of the husband and his other liabilities. [P 216 C 1]

Fatehchand Assudomal — for Applicant.
Radheylal A. Aggarwal — for Opponent.
Partabrai D. Punwani, Advocate-General — for the Crown.

Davis C. J. — This is an application in revision against an order of the Third Additional City Magistrate, Karachi, who enhanced maintenance payable under S. 488, Criminal P. C., by the applicant, one Tekchand Partabrai Bhavnani, to his wife Shrimati Kalavantibai, for maintenance of herself and three children from Rs. 50 to Rs. 90 a month. A point was taken before us that the wife really was entitled to no order from the Court because she and her husband were living apart by mutual consent. But we do not think that where a woman who is helpless and has been ill-treated by her husband has to submit or thinks she has to submit to a sum agreed by her panchayat, that it can be said that she is living separately by mutual consent within the meaning of sub-s. (4) of S. 488, Criminal P. C. It appears that for some four years the husband paid Rs. 50 per month to the wife. One of the witnesses for the wife, a cousin and a senior advocate of standing in this Court said that the panchayat agreed to Rs. 50 on the understanding that a few months thereafter it should be increased; but it has not been increased, and the wife now claims that this sum of Rs. 50 should be increased because of the growing needs of her children. Apparently the learned Magistrate was impressed by the fact that the wife belonged to a community who greatly believed in advanced education and she must be awarded such sum as will enable her to educate her children as children of other members of her community are educated.

On the other hand it was urged before us on behalf of the husband that maintenance under S. 488, Criminal P. C., means only a bare maintenance and does not include the cost of any education of any sort or kind. The learned advocate said that the purpose of the section was to prevent vagrancy. We cannot think of anything more likely to make a child a vagrant than that it should be merely clothed and fed and lodged and its mind to be utterly untrained. The learned advocate referred us to a case in support of his argument that maintenance, so far as the children are concerned, within the meaning of S. 488, Criminal P. C., does not include any education of any sort or kind. The case he referred us to was 56 Mad 913,[1] which dealt with an entirely different set of circumstances. It related to the wife and not to the children. There is a judgment reported in A I R 1933 Lah 1026,[2] which is taken as an authority that maintenance should include education of some sort or kind, though not college education, and as under the section a father can be compelled to maintain his child, at least till the child attains the age of majority under the Indian law, and can presumably maintain himself, it is obvious in the father's interests that a sum paid for the maintenance of the child should cover at least the cost of education sufficient for the child, so soon as he is old enough to earn his living, to maintain himself, and thus relieve the father of the burden of his maintenance, possibly at 16 years of age and not at 18. I suppose the interpretation of this section may well alter from time to time as ideas of social justice and social needs alter, as ideas advance, or, as we hope, advance. But it appears to me that if maintenance is to serve the purpose of the section, it must be something more than, as has been suggested by the learned advocate, starvation maintenance, maintenance sufficient only to keep body and soul together. It must include board and lodging, but I should say myself, boarding and lodging on such a scale as to enable a frugal and thrifty mother to save sufficient for a simple and necessary education of her child. We do not think that in this case any question of college education arises, and we think that the learned Magistrate has quite unnecessarily anticipated events in this respect. The mother has three children, 9, 7 and 5 years of age, respectively. We do not think, therefore, that any question of college education needs to be considered at all.

We note that the learned Magistrate says that Rs. 90 will just cover the "bare necessities" of life for all four. It appears, how-

1. ('33) 20 AIR 1933 Mad 688 : 145 I C 378 : 34 Cr L J 950 : 56 Mad 913 : 65 M L J 386, Arunachala Asari v. Anandayamal.
2. ('33) 20 A I R 1933 Lah 1026 : 147 I C 719 : 35 Cr L J 473 : 35 P L R 320, Mt. Shanno Devi v. Daya Ram.

ever, by his reference in another part of his order to growing educational needs of the three children who belong to the community of the Amils of Hyderabad advanced in education, that Rs. 90 covers the cost of what one might call higher education. Looking at the evidence we cannot see, regarding all the circumstances of this case, that Rs. 90 can be regarded as the bare minimum, which the learned Magistrate finds. On the contrary, the general effect of the evidence is that while Rs. 50 is too little, Rs. 60-70 would be a proper sum, regarding the salary of the husband who is Superintendent in the office of the Inspector-General of Prisons, for the needs of his wife and children.

The husband appears to have been extremely unfortunate in his matrimonial affairs. From the evidence, one wife appears to have burnt herself, the circumstances under which she did so are not clear: while it is perfectly clear he cannot live in peace and amity with his second wife, the opponent. We cannot say from the evidence that we consider the wife is in any way to blame, for were that so, we cannot believe that the panchayat would ever have awarded her Rs. 50 as maintenance, living as she was to do away from her husband. The husband's salary is Rs. 220 in all: there are deductions of income-tax, provident fund and so on, which leaves him a net wage of Rs. 190 a month. I think we should agree with the learned Magistrate when he finds that the husband does keep a car, and that his statement that it really belongs to his brother and he pays Rs. 10 a month for petrol is not true. But even so, we think that is no reason for saying that the wife should get Rs. 75 if the husband does not keep a car and his brother does, and Rs. 100 if the husband keeps a car and the brother does not. We must take into account the net wage of the husband and his other liabilities, his duty, for instance, to maintain the children by his first marriage, two unmarried sisters and so on, but while we think that Rs. 90 is too much, we think Rs. 50 is too little, and that a fair sum under the circumstances is Rs. 65 a month. We do not think that if we order Rs. 65 a month to be paid from the date of this order we should call upon the wife to refund the balance at the enhanced rate that has been paid to her under the orders of the Magistrate or a sum of Rs. 25 ordered to be paid by the husband as expenses in these proceedings. To do so, would be, we think, to put the wife in so difficult a position that the benefit derived from this order of Rs. 65 per month would be, for some considerable time to come at least, frustrated by the detriment suffered by her if she were to be called upon to refund Rs. 315 which the Magistrate directed to be paid as arrears under the order and Rs. 25 for expenses. Further the difference between Rs. 65 and 90 must have been paid while these proceedings have been pending in this Court.

We, therefore, modify the order of the learned Magistrate accordingly, a sum of Rs. 65 shall be paid monthly to the wife for the maintenance of herself and her three children. We are told that maintenance is payable on the 12th of each month, and that maintenance for this month has already been paid. The first payment of this Rs. 65 will be on the 12th of next month. We do not think we should make any order as to costs. Order accordingly.

Weston J. — I concur.

K.S./R.K. *Order modified.*

*** (28) A. I. R. 1941 Sind 216**

DAVIS C. J. AND WESTON J.

Akan Sabzali — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 363 of 1940, Decided on 10th March 1941, to revise order of Additional Sessions Judge, Hyderabad, D/- 17th September 1940.

* Criminal P. C. (1898), S. 345 (5) — S. 345 (5) applies to all offences compoundable under S. 345 — Question of reduction of offence from one section to another taking effect only after pronouncement of judgment is immaterial — Accused convicted under S. 325, Penal Code — Application for compounding offence rejected — Appeal by accused against conviction accompanied with application for compounding offence—Appellate Court finding offence to be under S. 323 and not S. 325, Penal Code—Appellate Court can while writing judgment hold offence as one under S. 345 (1) and then consider application for compounding offence and pass order accordingly.

Section 345 (5) applies to all offences which may be compounded under S. 345 and, therefore, the question of the reduction of the offence from one section to another taking effect only on pronouncement of judgment is not material.

[P 217 C 1]

The accused was convicted under S. 325, Penal Code, and the application to compound the offence was rejected merely on the ground that the offence was one under S. 325, Penal Code. The accused appealed to the Sessions Court against his conviction and a further application by the parties asking that the case may be compounded was made. The appellate Court considered on the facts that the offence was one under S. 323, Penal Code, only which when in appeal under S. 345 (5) required the leave of the appellate Court for composition.

The appellate Court, however, found itself unable to grant such leave, because it was of opinion that the offence could not be held to be one under S. 323, Penal Code, until it had pronounced its judgment and as the offence could be compounded only before the judgment was pronounced, so no compounding of the offence was possible:

Held that the appellate Court, while writing its order or judgment could hold that the offence actually committed was one falling under S. 345 (1) and then consider the application for compounding the offence and pass an order allowing the offence to be compounded and the consequential order of acquittal. [P 217 C 1, 2]

Mohanlal Tekchand for K. H. Nagrani — for Applicant.

Advocate-General — for the Crown.

Weston J.—This is a revision application made by one Akan son of Sabzali who was convicted by the City and Sub-Divisional Magistrate, Hyderabad, under S. 325, Penal Code, and sentenced to imprisonment till the rising of the Court and a fine of Rs. 100. An application had been made to the Magistrate to compound the offence which we understand was rejected merely on the ground that the offence was one under S. 325, Penal Code. The applicant appealed to the Sessions Court against his conviction and a further application by the parties asking that the case may be compounded was made in the Sessions Court. The learned Additional Sessions Judge who heard the appeal considered on the facts that the offence was one under S. 323, Penal Code, only, an offence which in the original Magistrate's Court may be compounded without the permission of the Court, but which when in appeal under cl. (5) of S. 345, Criminal P. C., requires the leave of the appellate Court for such composition. The learned Additional Sessions Judge, however, found himself unable to grant such leave, because he felt that the offence could not be held to be one under S. 323, Penal Cede, until he had pronounced his judgment and as the offence could be compounded only before the judgment was pronounced, so no compounding of the offence was possible. The learned Judge does not seem to have considered whether Cl. (5) of S. 345 would apply not only to an offence under Cl. (1) but also to an offence falling under Cl. (2). For, if, as we think, Cl. (5) applies to all offences which may be compounded under the section, then the question of the reduction of the offence from one section to another taking effect only on pronouncement of judgment would not be material. On this last question also we think the learned Judge has taken an unduly technical view of the matter. We can see no difficulty in the appellate Court, while writing its order or judgment, in holding that the offence actually committed is one falling under Cl. (1) of S. 345 and then considering an application made for compounding the offence and in passing an order allowing the offence to be compounded and the consequential order of acquittal.

The matter has come before us now in revision and we have powers under Cl. (5A) to allow the compounding of any offence which may be compounded under S. 345, Criminal P. C. The present applicant does not appear to be the principal person concerned in the assault upon the complainant, and throughout the case the complainant has shown a desire to compound the offence, and we think that the accused person, the applicant, has been sufficiently punished by the various proceedings through which this case has passed. We therefore allow under Cl. (5A) of S. 345, Criminal P. C., this case to be compounded and accordingly we set aside the conviction and sentence which has been passed against the applicant. Under Cl. (6) of S. 345, Criminal P. C., this order will have the effect of acquittal of the applicant and the fine if paid by him should be refunded. We order accordingly.

G.N./R.K. *Revision allowed.*

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(28) A. I. R. 1941 Sind 217

DAVIS C. J. AND WESTON J.

Dr. Valiram Lilaram

v.

Govindram Jethanand Khatri.

Criminal Revn. Appln. No. 242 of 1940, Decided on 20th January 1941, to revise order of Sub-Judge, Shahdadpur, D/- 13th April 1940.

(a) Criminal P. C. (1898), S. 476—Complaint under S. 476 does not rest only upon private individuals—Court of its own motion can and should inquire under S. 476 — Conspiracy to commit offence under Ss. 206 and 207, Penal Code—Court must probe conspiracy to bottom and make complaint against those against whom prima facie case of complicity is made out.

A complaint to be made in the interests of justice on an inquiry under S. 476, does not rest only upon private individuals. The Court has its duty and can of its own motion inquire under S. 476. Consequently where a conspiracy to commit an offence under Ss. 206 and 207 Penal Code is discovered the Court should not place solely upon the complainant the responsibility as to the inquiry of persons responsible for the offence but should itself endeavour to probe the conspiracy to the bottom and make a complaint against those against whom he considers that a prima facie case of complicity has been made out, and if the sanction of Government under S. 197, Criminal P. C., is required for the prosecution of any person concerned, the Court should ask Government for that sanction. [P 218 C 2]

(b) Criminal P. C. (1898), Ss. 476, 476-B and 439—Complaint under S. 476 by Civil Court—Revision—S. 439 and not S. 115, Civil P. C., applies—Revisional powers are not limited by powers of appeal conferred by S. 476B.

Even in the case of a complaint by a civil Court under S. 476 the proceedings are subject to the revisional powers of the High Court under S. 439 Criminal P. C., and not under S. 115, Civil P. C. The High Court's powers of revision under S. 439 are not limited by the powers of appeal conferred by S. 476B which is not exhaustive : ('38) 25 A I R 1938 Bom 225 (FB) *Foll* ; ('33) 20 A I R 1933 Mad 767 and ('26) 13 A I R 1926 Sind 215, *Rel. on.* [P 220 C 2]

Dipchand Chandumal —for Applicant.

K. H. Nagrani, Suganlal Hassanand, and P. V. Pavar — for Opponents Nos. 1, 3, and 4 respectively.

Partabrai D. Punwani, Advocate-General — for the Crown and opponent No. 2.

Davis C. J.—This is an application by one Dr. Valiram who described himself as a physician and surgeon and eye specialist, against an order of the Subordinate Judge at Shahdadpur, in which he refused to make a complaint against the opponents, one Gobindram, a contractor, and one Mr. Idnani, Electrical Adviser to the Sind Government, under S. 476, Criminal P. C., for offences under Ss. 206 and 207, Penal Code. Under O. 39, Civil P. C., the Subordinate Judge, Shahdadpur, ordered Gobindram to be arrested and to be committed and detained in the civil prison for three months at the cost of the applicant, as the Subordinate Judge found that Gobindram had deliberately and intentionally committed breach of an injunction restraining him from receiving from the Electrical Adviser to Government certain monies payable to him.

So far as Mr. Idnani, the Electrical Adviser to Government was concerned, the Subordinate Judge discharged the notice, not having given the matter, it would appear to us, a sufficient and independent consideration, relying partly upon the fact that the applicant, he says, because he was ill-advised, withdrew his application. But in an inquiry under S. 476, Criminal P. C., the Subordinate Judge should have considered primarily the interests of justice, and where he found, as he did find, that a conspiracy existed in the office of the Electrical Adviser to Government to assist the opponent Gobindram to obtain, in defiance of the Court's injunction, money which the Court had ordered the Electrical Adviser should not pay, and the opponent should not receive, that injunctions issued by the Court had been destroyed and a false explanation as to their loss had been given, we do not think the Subordinate Judge should have rested content with remarks against the head clerk Gopal Vishnu or by the discharge of the notice against Mr. Idnani, the Electrical Adviser, without a proper consideration of the case against him or with ineffective action under O. 39, R. 2, Civil P. C., against the opponent Gobindram. He should, in our opinion, have endeavoured to have probed this business to the bottom and have made a complaint against those whom he considered a prima facie case of complicity in this conspiracy had been made out; and if the sanction of Government under S. 197, Criminal P. C., was required for the prosecution of any person concerned, then the Subordinate Judge should have asked Government for that sanction.

It is true that the applicant had asked for proceedings only against the opponent Gobindram, the contractor, and Mr. Idnani, the Electrical Adviser to Government, but he was not in a position to know before the inquiry who of those in the office were responsible, and the Subordinate Judge should not have placed the responsibility solely upon him. A complaint to be made in the interests of justice on an inquiry under S. 476, Criminal P. C., does not rest only upon private individuals. The Court has its duty and can of its own motion inquire under S. 476, Criminal P. C. Clearly, then, when the Subordinate Judge found, as he did find, that papers had been deliberately and intentionally destroyed at the instance of the opponent and with the help of the head clerk, he should have issued notice upon this head clerk as to why a complaint should not have been made against him by the Court for offences under S. 206 or S. 207, Penal Code. A Subordinate Judge does not do his duty in this matter when he writes : "I do not know if any action has been taken against the said head clerk, and, if not, some action should be taken against him." It was for the Subordinate Judge to take action against him and against any other persons whom he found there was reason to believe were involved in this offence. Take, for instance, the question of what are described as "the fresh injunctions" issued by the Shahdadpur Court on 1st March 1938 and which, it was alleged, were not received by the Electrical Adviser to Government or his office, the first or original injunction being issued on 13th January 1938, and received by the office of the Electrical Adviser to Government, having been destroyed, the Subordinate

Judge finds, at the instance of the opponent Gobindram, and with the help of the head clerk. Obviously, the offence, if any, committed under S. 206 or 207, Penal Code, would be aggravated if a second as well as the first injunction was destroyed, but the Subordinate Judge made no proper enquiry into this circumstance, accepting the word of Gopal who, he finds, was a party to the destruction of the first injunction, that the second injunction was never received by the Electrical Adviser.

We have before us now an application against four persons, Gobindram, the contractor, and Mr. Idnani, the Electrical Adviser to Government, who were opponents in the proceedings in the lower Court, and two others, who were not parties to that proceeding, the Assistant Engineer Saigal, and Gopal the head clerk. We have also the finding of the Subordinate Judge against Gopal which suffers from the defect that Gopal, though a witness, was not an opponent on whom notice had been issued. Clearly, notice should have been issued under S. 476, Criminal P. C., by the Subordinate Judge on the material before him against Gopal and against Saigal too. It may be, and the Subordinate Judge must consider this when we send, as we propose to do, the case back to him for proper enquiry, that notice should be served on others too, as for instance, Malawaram, the accountant, again one who appeared as a witness in the proceedings in the lower Court. We are quite satisfied that there has been no proper enquiry into this matter, and that so far as Gobindram is concerned, though there has been some enquiry, no proper action under S. 476, Criminal P. C., was taken, accepting for the purpose of this order the findings of the Subordinate Judge as to his part in this conspiracy. It should have been apparent, however, to the Subordinate Judge that one man cannot conspire with himself alone, and the Subordinate Judge should have been at pains to find out who were his fellow conspirators and into what criminal offence, if any, enquiry should be made and for what criminal offence, if any, the interests of justice required that he should make a complaint. Therefore, so far as proceedings under S. 476, Criminal P. C., are concerned, and so far as Mr. Idnani is concerned, discharged, we consider without proper enquiry, and Gobindram insufficiently punished, we think the order of the Subordinate Judge should be set aside and fresh proceedings under S. 476, Criminal P. C., should be taken against Mr. Idnani and Gobindram, and against Gopal and Saigal and any other person who, upon the evidence before him, the Subordinate Judge considers should be joined as opponent in these proceedings.

We do not wish to recount in detail the facts of this case and we desire in no way to prejudice the case against the opponents, and it must be remembered that when we refer to the findings of the Subordinate Judge and order a further enquiry, in the light of the findings of the Subordinate Judge and other matters upon the record, it is only for the purpose of ordering a fresh and proper enquiry under S. 476, Criminal P. C. It does not follow that after a proper enquiry and after a proper and more courageous consideration of the case than the Subordinate Judge has been able to give, the Subordinate Judge is not free to hold that no complaint should be made or no sanction should be obtained from Government for the prosecution of any person for any offence under S. 120-B or S. 206 or 207, Penal Code. These are questions on which the Subordinate Judge must come to his own careful and independent conclusions after a proper enquiry. Nevertheless, the alleged facts which clearly have a basis of truth are strange enough. This Dr. Valiram, the applicant, in addition to his medical practice was in partnership with Gobindram, a contractor, who had obtained a contract for electric installation at Sakrand and upon this contract this Gobindram has obtained payments amounting to some Rs. 4000 from the Electrical Adviser to Government.

In January 1938 the applicant filed two suits against Gobindram and obtained injunctions in both suits, Nos. 22 and 23 of 1938 on 13th January, against both Gobindram and Mr. Idnani, Electrical Adviser to Government; the injunctions were received by the office of the Electrical Adviser to Government, and then entered in the appropriate office registers but they were never obeyed. The explanation given by those concerned is that they were so illegibly written that the head clerk Gopal who in the absence of Mr. Idnani at Delhi opened the letters, and not being a Sindhi could not read them, could not also be read by any Sindhi member of the office staff and that they could not be read by any of the friends of the clerk Khatanmal who took them to his house for this purpose where they were stolen, the clerk says, between 12th and 21st January 1938, from the pocket of his coat. He made no complaint to the police of this

theft. The head clerk apparently thought that the loss of papers from a civil Court was a matter of such little importance as not worthy of report to his official superior Mr. Idnani, or so he says.

This explanation of the disappearance of these injunctions, the Subordinate Judge describes, not entirely inappropriately, if not entirely idiomatically, as "just like the cock and bull story." Fresh injunctions issued on 1st March 1938 appeared to have met a like mysterious fate so that as a result, on 31st March, Gobindram received payment from the Electrical Adviser to Government, despite the injunction of the Court against Gobindram that he should not receive payment, and against Mr. Idnani that he should not pay. Mr. Idnani appears to have thought that the fact that he was absent in Delhi on 14th January 1938, was a complete defence to any charge that he was a party to this defiance of the Court. But other matters have to be considered, the matter of the issue of the fresh injunctions, as they are called, on 1st March 1938, the conversations which admittedly took place at Nawabshah station on 9th March, the improbability that an injunction against Gobindram from the Small Cause Court in the suit of a party other than Valiram, should be so confused or identified with the injunctions issued by the subordinate Court of Shahdadpur in the suit of Valiram that Mr. Idnani, when he signed the order for payment, EX. 17, did not distinguish one from the other and did not correctly understand or did not have reason to rely on the letter of Valiram dated 28th March 1938, also EX. 17. Furthermore, the fact that Mr. Idnani was prepared to support his subordinates in this matter may be said to cast grave doubts upon his own integrity. But be this as it may, we think it clear that no proper enquiry has been made and no proper order passed under S. 476, Criminal P. C., and we must in the interests of justice order that proper enquiry be made and proper orders passed not only against the four opponents named but against any other persons who, on the evidence before him, the Subordinate Judge thinks should be joined as opponents in these proceedings.

We have considered all that Mr. Suganlal has urged on behalf of Saigal, the Assistant Engineer, but in view of the fact that he has been closely associated with this matter and that the matter is such a serious one, we think he must be joined as an opponent in this enquiry. Even more so must Mr. Idnani himself be joined. It was urged before us that we could not as a Court of revision ourselves make complaint against any of the opponents or record further evidence in this matter, but we do not ourselves propose to do that which we think should be done and more properly done by the Court directly concerned in the first instance. We do not accept, with the greatest respect, the view accepted by some of the High Courts, that proceedings under S. 476, Criminal P. C., when the Court enquiring is a civil Court, are not proceedings subject to our orders under S. 439, Criminal P. C. The power to enquire is given under the Criminal Procedure Code; the proceedings are in the nature of criminal proceedings, and it is difficult to hold that an order of the Court under this section of the Criminal Procedure Code, even when made by a civil Court is a "case decided" within the meaning of S. 115, Civil P. C., and that our powers of interference are limited by the provisions of that section. There is a decision of our own Court to the contrary effect, 20 S L R 90,[1] and the view that in such proceedings S. 439, Criminal P. C., applies and not S. 115, Civil P. C., is the view of the Bombay High Court in 40 Bom L R 297.[2] We do not accept the view that S. 476B, Criminal P. C., is exhaustive so that our powers in revision are limited by the powers of appeal conferred by that section: A I R 1933 Mad 767.[3] We think we have, reading S. 439 with S. 423 (1) (c) and (d), Criminal P. C., power to set aside the order of the Magistrate and, as an incidental order, direct proper enquiry to be made. The order we make affects only the order in Suit No. 22 of 1938. So far as Suit No. 23 of 1938 is concerned, the Subordinate Judge finds there had been no breach of the injunction, and we see no reason to differ from this finding. We therefore order further and proper enquiry under S. 476, Criminal P. C., to be made by the Subordinate Judge of Shahdadpur in relation to the proceedings in Suit No. 22 of 1938, and offences under S. 120B, and Ss. 206 and 207, Penal Code.

G.N./R.K. *Order accordingly.*

1. ('26) 13 A I R 1926 Sind 215 : 95 I C 316 : 27 Cr L J 780 : 20 S L R 90, Gerimal Manghirmal v. Shewaram Dasomal.
2. ('38) 25 A I R 1938 Bom 225 : 174 I C 780 : 39 Cr L J 495: I L R (1938) Bom 331 : 40 Bom L R 297 (F B), Emperor v. Bhatu Sadu Mall.
3. ('33) 20 A I R 1933 Mad 767 ; 147 I C 794 : 35 Cr L J 503 : 65 M L J 534, Krishnamachari v. Emperor.

(28) A. I. R. 1941 Sind 221

DAVIS C. J. AND WESTON J.

Emperor

v.

Dholaram Holaram — Accused Respondent.

Criminal Acquittal Appeal No. 27/1 of 1941, Decided on 20th March 1941, against judgment of acquittal passed by Sess. Judge, Sukkur, D/- 25th October 1940.

(a) Precedents — Sind Courts are not bound by Bombay decisions in absence of any Sind decision — Rule for Sind subordinate Courts, stated.

The subordinate Courts of the Province of Sind are not, in the absence of a decision of the Sind Court, bound by the judgments of the Bombay High Court. It would appear wise and prudent for subordinate Courts in Sind in the absence of a ruling of the Chief Court, to follow a duly reported ruling of the Bombay High Court, if there be such a ruling on the same point, or in the absence of such a ruling of the Bombay High Court, to follow the duly reported ruling of another High Court and where the rulings of other High Courts on the same question differ, to follow that ruling which in their own judgment appears the better ruling but it does not follow that they are bound to follow a ruling of the Bombay High Court, or of any other High Court, even if there be no ruling of Sind Court, if in the exercise of their own reason and judgment they come to a different conclusion. [P 221 C 2; P 224 C 1, 2]

(b) Interpretation of statutes — Words must be construed in relation to context.

The words of the statute must be considered in relation to their context. They cannot be taken out of the provisions of the statute in which they occur and made as it were the subject of an elementary exercise in grammar as children in school are required to parse words. [P 222 C 2]

(c) Bombay Abkari Act (5 of 1878), S. 14 (b) —"Any person" means specified person—Total prohibition is not within Preamble.

The words "by any person or class of persons" in S. 14B mean, by any specified person or specified class of persons : ('40) 27 A I R 1940 Bom 273 (S B), *Foll.* [P 222 C 2]

The purpose of the Legislature to permit the executive Government for the time being to abolish altogether the possession of intoxicants cannot be read into the Act. The power to control and regulate the trade in drinks and drugs is one thing, the power to abolish the trade altogether is quite another. [P 222 C 2; P 223 C 1]

(d) Interpretation of statutes — Preamble.

A Preamble does not override the plain provisions of a statute. It has been described as a key to an Act. [P 223 C 1]

Partabrai D. Punwani, Advocate General — for the Crown.

P. K. Vaswani — for Respondent (Accused).

Davis C. J. — This is an appeal against the acquittal by the Sessions Judge of Sukkur of one Dholaram who had been convicted by the City Magistrate of Shikarpur of an offence under S. 43 (a), Abkari Act, and sentenced to a fine of Rs. 100 or in default to rigorous imprisonment for six weeks. The learned Judge acquitted the accused primarily on the ground that the Government Notification totally prohibiting the possession of charas throughout the province of Sind is ultra vires. The Government of Sind has appealed against the acquittal contending inter alia that the notification concerned was not ultra vires, that the Sessions Judge erred when he based his own decision upon a decision of the Bombay High Court, holding that he was bound, in the absence of a decision on this question by this Court, by the decision of the Bombay High Court. Government also invited our attention to a judgment of the Second Additional Sessions Judge at Sukkur in Criminal Appeal No. 165 of 1940 of that Court, Abdul Khalik Atta Muhamad v. The Crown, decided on 12th August 1940, in which the Judge held that the notification of Government was intra vires. The facts of the case are simple and not in dispute. The accused's shop which is at Hathigate, in Shikarpur, was searched by the Excise Inspector Amanullah in the presence of two Mashirs Muhammad Panjal and Dr. Parsram, and there he found three or four charas pills, and from the folds of the accused's dhoti was also found about half a tola of charas. In the circumstances, the accused being also a liquor licensee, the punishment inflicted by the City Magistrate of Shikarpur for this offence would have been in no way excessive if the accused had committed the alleged offence. Apart however from the fact, that the learned Judge has considered himself and all the Subordinate Courts of this Province bound by the judgments of the Bombay High Court, for which statement he gives no authority, and which statement, in our opinion, is not correct, we think that on the merits the appeal must fail, and it must be held that the notification of the Government of Sind is ultra vires, the accused was rightly acquitted by the Sessions Judge and the appeal of Government must fail. The notification of the Government of Sind is as follows :

Sind Secretariat, Karachi, 21st September 1939. No. 563B. In exercise of the powers conferred by S. 11 and sub-s. (2) of S. 14B, Bombay Abkari Act, 1878, the Governor of Sind is pleased to prohibit with effect from 1st October 1939 :

(a) the import into, export from, and transport in, the Province of Sind,

(b) the possession by any person within the Province of Sind,

of charas or any preparation or admixture thereof.

This notification is purported to have been made under the powers conferred by S. 14-B, Bombay Abkari Act, 1878. The statement of the learned Judge that sub-s. (2) is not specifically mentioned in the Notification of Government is incorrect. It is so mentioned, but nothing turns upon this. Section 14B, Bombay Abkari Act, as amended by the Adaptation of Indian Laws, Order in Council is as follows:

14B.—(1) No person not being a licensed manufacturer or vendor of any intoxicant or hemp and no licensed vendor except as authorized by his license shall have in his possession any quantity of any intoxicant or hemp in excess of such limit as the Provincial Government under S. 17 may declare to be the limit of retail sale, except under a permit from the Collector.

Provided that nothing in sub-s. (1) shall extend to any foreign liquor, other than denatured spirit, in the possession of any common carrier or warehouseman as such, or purchased by any person for his bona fide private consumption and not for sale.

(2) Notwithstanding anything contained in sub-s. (1) the Provincial Government may by notification in the Bombay Government Gazette prohibit the possession by any person or class of persons, either throughout the whole Presidency or in any local area, of any intoxicant, either absolutely or subject to such conditions as it may prescribe.

The word "intoxicant" was substituted for the words "excisable article" by the order in Council referred to, but this makes no difference to the case. Charas is an intoxicant by the definitions in the Act itself. Under S. 3 (15) (a) "intoxicant" means any "intoxicant drug;" under S. 3 (9) (ii) "intoxicating drug" means "charas." "Charas" is defined as follows:

Charas, that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulation other than those necessary for packing and transport.

The question, therefore, to be decided is, whether Government has, by reason of the powers conferred by sub-s. (2) of S. 14B of the Act, the power to prohibit the possession of charas throughout the province by any person, meaning thereby all persons, that is to say, the total prohibition of the possession of charas throughout the province.

The Notification cannot be read alone. It must be read with the relevant words of the statute, and those words are "by any person or class of persons." If these words mean "by the public generally," which is the effect of the words used in the Notification, the Notification is intra vires; if these words do not mean "by the public generally," the Notification is ultra vires. It is clear to us that if the Legislature intended that sub-s. (2) of S. 14B of the Act should enable Government to prohibit the possession of an intoxicant by the public generally, the Legislature would have said so. The words of a statute must be considered in relation to their context. They cannot be taken out of the provisions of the statute in which they occur and made as it were the subject of an elementary exercise in grammar as children in school are required to parse words. And taking these words in the statute as they stand, we think it is clear that the words "by any person or class of persons" mean, by any specified person or specified class of persons.

A difficulty may indeed arise as to what is meant by "a class of persons." "A class of persons" has been defined as a number of persons associated together by common characteristics, but with this particular question we are not now concerned. I am supported in this view by a judgment of the Bombay High Court in I L R (1940) Bom 587;[1] in that judgment Beaumont, C. J. said (page 603):

The view which appealed to the learned Sessions Judge of Ahmedabad, and which has been strenuously pressed upon by the learned Advocate-General, is that the words "any person" are equivalent to the words "every person," in the section, as they clearly are in the notifications, and that, therefore, the whole public may be brought within the prohibition. On that construction it is difficult to see what effect can be given to the words which appear in the section but not in the notifications," or class of persons." In our opinion, the natural meaning of the expression "any person or class of persons" is a person designated by name or description or a class of persons designated. We are satisfied that if the Legislature had intended that the power of prohibition might be extended to the public generally, it would have so stated in clear language. Our attention was drawn to the fact that in the amendment of the Abkari Act, Bombay Act VI of 1939, the expression was used in three places "individuals, class of individuals, or public generally." We refer to this merely as an illustration of the phraseology which the Legislature might be expected to have used if it had intended sub-s. (2) of s. 14B to extend to the public generally.

With this statement of the case, I, with respect, agree. I cannot read into the Act the purpose of the Legislature to permit the Executive Government for the time being to abolish altogether the possession of intoxicants. The Preamble to the Act gives no hint or indication of this policy of total prohibition of intoxicants as a measure however desirable of social reform. The Preamble is as follows:

Whereas it is expedient to consolidate and amend the law relating to the import, export, transport, manufacture, sale and possession of

1. ('40) 27 AIR 1940 Bom 273: 190 I C 170: 41 Cr L J 834: 42 Bom L R 669: I L R (1940) Bom 587 (SB), Chinubhai Lalbhai v. Emperor.

liquor and of intoxicating drugs in the Presidency of Bombay; it is enacted as follows.

A Preamble, of course, does not override the plain provisions of a statute. It has been described as a key to an Act. The Act of 1878 replaced earlier legislation on the subject which commenced with Regn. 21 of 1827. It would be affectation to deny that the primary purpose of this legislation was fiscal. The primary purpose of the Act was to secure revenue combined, indeed, with the regulation and control of the trade in drinks and drugs, and such regulation and control might indeed be made to serve the cause of social betterment, but the power to control and regulate the trade in drinks and drugs is one thing, the power to abolish the trade altogether is quite another. One cannot regulate or control that which no longer exists. I think, therefore, that the learned Sessions Judge was right in his conclusions, and that the appeal of Government must be dismissed.

I would, however, before concluding, refer to the statement of the learned Sessions Judge that the decision of the Bombay High Court in I L R (1940) Bom 587,[1] is binding on his Court and every other Court of this Province except the Chief Court. The learned Judge gives no authority for this statement, and we can find none. It is true that it has been the practice of this Court, when a Judicial Commissioner's Court, to follow, as a rule, the rulings of the Bombay High Court in preference to the rulings of other High Courts, and clearly it was desirable that for the one province, for the Bombay Presidency then included Sind, the law on the same questions should be the same, and that in the absence of any ruling of its own the highest Court in Sind should follow the rulings of the Bombay High Court. This view had found expression in judgments of this Court from time to time; *see* 17 S L R 133,[2] at p. 140, 22 S L R 404[3] at p. 407 and 31 S L R 123[4] at p. 135, and this view has again found expression in the judgment of Lobo J. in I L R 1941 Kar 80,[5] given after this province has become a separate province and this Court had become a High Court under S. 219, Government of India Act, and a Chief Court. But we do not think it was ever the intention of the Judges of the Judicial Commissioner's Court to say that they would always and necessarily follow the rulings of the Bombay High Court; that when, for instance, a Full Bench of the Bombay High Court overruled the judgment of a Divisional Court, the Judicial Commissioner's Court, if it had followed the decision of the Divisional Court, must necessarily overrule its own previous decision, and follow the judgment of the Full Bench of the Bombay High Court. I do not think that the Judges of this Court ever intended to say they would not ever exercise their own individual judgment and discretion and only follow the decisions of the Bombay High Court, whether they thought them right or wrong. What the Judges of this Court meant to say, I think, was no more than this, that they, in the case of a difference of opinion between High Courts, always give to the decisions of the Bombay High Court a respectful preference. If I may use the term, and that they would, in considering their own decisions, give to the decisions of the Bombay High Court that great respect to which the status, traditions and judgments of that Court entitle it; but I do not think there is any authority for the statement by the learned Sessions Judge, that in the absence of a decision by this Chief Court, the subordinate Courts of the province are bound by the decisions of the Bombay High Court. There is a little known Act which in fact declares the judicial independence of this province from Bombay. The Act is as follows :

"ACT V OF 1872.

Received the G. G.'s assent on 28th March 1872.

An Act to remove doubts as to the jurisdiction of the High Court of Bombay over the Province of Sindh.

Whereas it is expedient to remove doubts which have arisen as to the jurisdiction of the High Court of Bombay over the Province of Sindh; it is hereby enacted as follows :

Preamble.

Bar of jurisdiction in Sindh of Bombay High Court.

1. The High Court of Bombay has not, and shall be deemed never to have had, jurisdiction over the Province of Sindh.

Saving of Act 24 of 1867.

2. Nothing herein contained shall be deemed to affect the Administrator General's Act, 1874.

Saving of probates and administrations.

3. Nothing herein contained shall be deemed to invalidate the grant of any probate or letters of administration heretofore or hereafter made by the High Court of Judicature at

2. ('24) 11 A I R 1924 Sind 75: 83 I C 353: 17 S L R 133 (F B), G. P. Gunnis & Co. Ltd. v. Amanmal Tulsidas.
3. ('29) 16 A I R 1929 Sind 30: 114 I C 99: 30 Cr L J 249: 22 S L R 404, Govindsing v. Emperor.
4. ('37) 24 A I R 1937 Sind 68: 168 I C 89: 38 Cr L J 512: 31 S L R 123 (F B), Tirathdas Dharamdas v. Jethanand.
5. ('41) 28 A I R 1941 Sind 193: I L R (1941) Kar 50, In re L. T. Pinto.

Bombay or to affect the rights, powers, or duties of any executor or administrator under, or by virtue of, any such probate or letters.

Saving of High Court's Criminal jurisdiction.

4. Nothing herein contained shall be deemed to affect the criminal jurisdiction of the said High Court so far as regards European British subjects of Her Majesty.

The limitations upon jurisdiction in matters within the provisions of the Administrator General's Act, 1874, have now been removed by suitable provisions in the Adaptation of Indian Laws Order in Council, and the original jurisdiction once exercised by the Bombay High Court over European British subjects of His Majesty in Sind ceased before that by the amendment of the Criminal Procedure Code in 1923 : *see* Civil Ref. No. 79 of 1924.[6] It cannot therefore be said that the subordinate Courts of this Province are subordinate to the Bombay High Court, or that the subordinate Courts of the Province, in the absence of a ruling of this Court, are bound by the rulings of the Bombay High Court. There is also nothing in the Indian Law Reports Act, 18 of 1875 to justify this statement. The Act which is a short Act is as follows :

THE INDIAN LAW REPORTS ACT (XVIII OF 1875).

An Act for the improvement of Law Reports.

Whereas it is expedient to diminish the multitude and expense of the Law Reports published in British India, and to improve their quality; and whereas, with a view to furthering these objects, it is proposed to authorize the publication of reports of cases decided by the High Courts of Judicature established under the twenty-fourth and twenty-fifth of Victoria, Ch. 104, and by the Chief Courts of Oudh and Sind; it is hereby enacted as follows :

Short title.

1. This Act may be called The Indian Law Reports Act, 1875.

Local extent.

It extends to the whole of British India;

and it shall come into force on such day as the

Commencement.

Governor-General in Council notifies in this behalf in the Gazette of India.

2. . . . .

Authority given only to authorized reports.

3. No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts or by the Chief Court of Oudh or the Chief Court of Sind on or after the said day, other than a report published under the authority of any Local Government.

Authority of judicial decisions.

4. Nothing herein contained shall be construed to give to any judicial decision any further or other authority than it would have had if this Act had not been passed.

We are informed that there is a practice in the Bombay Presidency for the subordinate Courts, in the absence of a ruling of the Bombay High Court, to follow the rulings of another High Court reported in the authorized law reports. We have been given no judicial pronouncement in support of this alleged practice, nor were we told what the subordinate Courts in the Bombay Presidency are to do if decisions of other High Courts reported in the authorized law reports differ on the same question. As a rule, it would appear wise and prudent for subordinate Courts in this Province, in the absence of a ruling of the Chief Court, to follow a duly reported ruling of the Bombay High Court, if there be such a ruling on the same point, or in the absence of such a ruling of the Bombay High Court, to follow the duly reported ruling of another High Court, and, where the rulings of other High Courts on the same question differ, to follow that ruling which in their own judgment appears the better ruling, but it does not follow that they are bound to follow a ruling of the Bombay High Court, or of any other High Court, even if there be no ruling of this Court, if in the exercise of their own reason and judgment they come to a different conclusion. Such cases would probably be rare, and it may be said that as a rule in the absence of a decision of this Court, it would be prudent and wise and in the interests of the uniformity of judicial decisions for the subordinate Courts of this province to follow the decisions of the Bombay High Court, but we know of no statutory provision whereby they are bound to do so. They are, as Courts, subordinate to this Court, bound by the decisions of this Court. They are not so bound by the decisions of another High Court. We see however no reason to interfere with the judgment of the Sessions Judge of Sukkur acquitting the accused, and we dismiss this appeal of Government accordingly.

Appeal dismissed.

R. K.

6. *Reported in* ('26) 13 AIR 1926 Sind 58 : 91 I C 99 : 25 S L R 345 (FB), Brooks v. Brooks.

ASSTT. REGR. 17729 ... ENTD. ... 21-11-30